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Dr John Tamblyn  
Chairman  
Australian Energy Market Commission  
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By email to: [submissions@aemc.gov.au](mailto:submissions@aemc.gov.au)

Dear Dr Tamblyn

### **Draft National Electricity Amendment (Economic Regulation of Transmission Services) rule 2006**

AGL is pleased to provide a submission to the AEMC on its Draft Rule and Draft Determination.

While AGL is not a transmission network owner, we appreciate the policy intent to achieve consistency between the approach to rule making in the draft transmission Rule and aspects of economic regulation to be incorporated into national Rules for gas and electricity distribution being progressed by the MCE.

This submission has been developed with that possibility in mind. It focuses on the design of the regulatory framework and draws from AGL's experience with the framework established in 1997 for gas pipelines and the Victorian regime for electricity distribution.

There are two parts to this submission. The first part addresses the Draft Determination and Rule as a whole; the second addresses the role for guidelines, schemes and models in the light of the COAG/MCE policy decisions about governance under the market reforms, and in particular the clear decision to separate Rule making and Rule enforcement.

#### **Draft Determination and Rule as a whole**

AGL believes that the Commission's objectives of overcoming the very substantial problems of regulatory uncertainty associated with the current version of Chapter 6 of the NER are entirely appropriate and the Commission has made significant improvements in its Draft Rule. In particular, AGL supports the AEMC's use of 'propose-respond' as the framework for decision making and use of a 'fit for purpose' approach to determining processes, methods and the decision making standard. However, it appears to AGL that the Commission's approach tends to be toward the more prescriptive end of the regulatory spectrum in its response to the previous regime, and is concerned that the pendulum has been pushed too far.

The Commission's approach may in part be due to the nature of electricity transmission and its pivotal role of integrating the various transmission networks into a single grid essential to the operation of the NEM, with a consequent need for a high level of consistency of treatment. However, in AGL's view, the degree of prescription in the Draft Rule is not consistent with the NEL objective, and the inconsistency would be even greater if the same approach were to be applied to distribution networks and gas transmission. This is because of the very considerable

differences between individual distribution networks and between individual pipelines. AGL believes that there is a sound case for reduced prescription in the Draft Rule for electricity transmission, but that a substantially less constrained approach is essential in the Rules applying to electricity and gas distribution and gas transmission.

### **Guidelines**

AGL endorses the AEMC's objective of providing clarity and transparency of regulatory decision making. We believe, however, that one of the main means proposed to achieve this, namely through a requirement that the AER create numerous mandatory guidelines, schemes and models, offends against the policy direction to establish a clear separation between rule-making and the enforcement of the rules.

It is AGL's view that the power invoked by the AEMC to do this involves a particular reading of some very unclear provisions in the National Electricity Law.

Importantly, AGL believes that the AEMC's objectives of clarity and transparency can equally well be achieved by setting the key regulatory obligations directly in the Rules. It would then be open to the AER to develop genuine (ie non-mandatory) guidelines to assist in the interpretation of the Rules as and when necessary.

If you have any comments or queries with respect to this submission, please contact Chris Harvey, Manager Regulatory Development on (02) 9921 2601.

Yours sincerely,

Dr Robert Wiles  
General Manager Regulation and Policy

# Draft National Electricity Amendment (Economic Regulation of Transmission Services) Rule 2006

## AGL Submission - Part 1

### Draft Determination and Draft Rule as a whole

#### 1. Overview

AGL acknowledges the strong and sound objectives behind the Draft Rule. These include providing clarity of rules, and a stable and transparent regulatory framework. AGL appreciates that the Draft Rule aims to provide certainty and predictability for TNSPs, particularly given the uncertain regulatory environment which they faced in the past.

AGL also recognises the unique status of electricity transmission in the NEM which differentiates it to a significant extent from distribution and gas transmission. The electricity transmission grid is the key integrating factor in the NEM. It acts as a geographically spread pool which receives power from generators across the market, while distribution networks draw electricity from it to supply local customers. There is an imperative to devise a regulatory framework which provides similar signals for efficient transmission pricing across the network, perhaps leading to a more standardised approach to regulation than would be necessary or desirable for distribution or gas transmission.

AGL welcomes a number of specific aspects in the Draft Rule, including:

- the introduction of an effective (though limited) 'propose-respond' decision making framework. In the Draft Rule, the AEMC has recognised the appropriate distinction between (a) selecting a decision making framework, and (b) developing a 'fit for purpose' approach to the process, methodology and decision making standard;
- retention of the 'reasonable estimate' decision making standard for the AER to assess forecast capital and operating expenditures;
- clarification of the AER's information gathering powers in the context of the Draft Rule;
- recognition that regulatory powers to compel third party service providers to provide information to the AER could be counterproductive.

However, AGL questions some of the mechanisms used by the AEMC in the Draft Rule to achieve its intentions. There are significant conceptual issues with certain approaches used, in particular:

- the conferral of power on the AER to make an extensive series of "guidelines schemes and models" which may in effect delegate some of the AEMC's rule-making power to the AER;
- the very detailed level of prescription in the Draft Rule, to an extent which appears unnecessary for effective economic regulation; and
- a potentially inflexible approach to providing for cost of capital (WACC) in the Draft Rule, including the process for establishing the WACC and specification of its parameters.

Part 1 of this submission addresses the above matters. The issue of guidelines is fully addressed in Part 2.

## 2. Framework and architecture issues

### (a) Decision-making framework in Draft Rule

#### *'Propose-Respond' approach*

AGL's supports the AEMC's adoption of what it has called the 'propose-respond process' as the overall decision-making framework.<sup>1</sup> In AGL's view, the AEMC has adopted the essential features of what has become known as the 'propose-respond' model, but in its most limited form.

Together with the 'propose-respond' model, the AEMC has adopted an approach of tailoring the process, methodology and decision-making criteria (or standard) to that which is appropriate for each decision element of a price review. This has been termed the 'fit for purpose' approach to process, methodology and the decision making standard.<sup>2</sup>

AGL supports the above approach and the AEMC's rationale for it, but is concerned that incorrect conclusions may be drawn by participants and policy makers alike about the AEMC's application of its decision making framework and decision making standard in the Draft Rule. This possibility is due to considerable confusion in dealing with these matters in the final report of the Expert Panel.

The Expert Panel's final report, in evaluating the two decision making frameworks (ie 'propose-respond' and 'receive-determine' models), has confused the two issues of the decision making framework on the one hand and process, methodology and the decision making standard on the other. As a result, what the report has called 'fit for purpose' is really the application of a different decision making framework to each element in a price review requiring a decision. However, a requirement to apply a different framework to each decision element is cumbersome, confusing, and inefficient and (importantly) does not deal to the basic issue of appropriate process, methodology and decision making standard.

This confusion is largely due to the Panel's report:

- formulating an incorrect interpretation of 'propose-respond' as one requiring a presumption in favour of acceptance of a service provider's proposal;<sup>3</sup> and
- exhibiting an unwarranted preoccupation with the Productivity Commission's recommendation to apply a 'plausible ranges' decision-making standard.<sup>4</sup>

In contrast, the AEMC has appropriately distinguished these two issues in the Draft Rule. As a result, what the AEMC calls its 'fit for purpose' model is the application of a different process, methodology and decision making standard to each decision

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<sup>1</sup> Draft Determination (p.37): *"However references to 'propose-respond' model encompass both a reference to 'propose-respond' processes and a reference to a 'propose-respond' model as a complete approach to economic regulation"*.

<sup>2</sup> Draft Determination (p.45): *"The Commission agrees with the Expert Panel that the extent to which the Rules codify matters of process, methodology and decision making criteria should be determined through a Rule making process on the basis of a 'fit for purpose' approach"*.

<sup>3</sup> Expert Panel on Energy Access Pricing, *Report to the Ministerial Council on Energy* May 2006 (especially section 5.4.6). AGL considers that the Gas Code and the WA Electricity Access Code clearly demonstrate that there is no such presumption in favour of acceptance.

<sup>4</sup> In fact, this only related to two elements in a gas access arrangement: WACC and Total Revenue. It is important to understand that the 'propose-respond' model has no presumption of any sort, but simply requires that a proposal be assessed for compliance with the Rules. The risks of ambit claims by service providers (emphasised by the Expert Panel) are significantly overestimated. In fact, the nature of the 'propose-respond' model is to encourage service providers to submit values that are much more likely to be accepted rather than run the risk of the regulator substituting its own values.

element of a price review. The approach adopted by the AEMC is (in AGL's view) soundly based for the following additional reasons:

- it is simpler, less confusing and more efficient than the Expert Panel's proposal. While it may be possible to design Rules where the 'propose-respond' and 'receive-determine' models are selectively applied to each of the many elements of a price review or access arrangement, this would have a series of undesirable consequences because the resulting decisions would be confusing and prone to uncertainty and dispute;
- It is clearly preferable to decide which of the two decision-making frameworks is to apply to a regulatory process as a whole rather than to adopt a fragmented approach where the framework changes from element to element. In the context of the Draft Rule, both the price review decision as a whole and each of its elements will be subject to a common approach to decision-making;
- Once the overall decision-making framework has been decided ('propose-respond' or 'receive-determine') then the appropriate decision making standard (together with the level of prescription) can be tailored to each element of the decision according to the nature of each element (ie it is 'fit for purpose');
- As to whether the 'propose-respond' or 'receive-determine' decision making framework should be applied, it is AGL's clear view that there are very basic and powerful reasons to adopt 'propose-respond', and that the AEMC's rationale for that choice in its Draft Rule is based on a sound evaluation.

## **(b) Prescription and pre-emption**

The AEMC has determined the level of prescription and the decision-making standard for each element of a Revenue Proposal according to its judgement about what is appropriate. In particular, it has codified elements where they are:

- considered to be comparatively uncontroversial;
- unlikely to vary in application across different TNSPs; and
- necessary to be determined on an *ex ante* basis for efficient administration.<sup>5</sup>

AGL supports the codification of matters that are well accepted and where there is unlikely to be differences across businesses to the extent that businesses are not (a) forced to unnecessarily conform to practices which have no broader economic or particular business value; and (b) do not result in the stifling of innovative approaches.

However, AGL has concerns with other elements of prescription in the Draft Rule. One element is the *ex ante* determination of matters that are integral to a Revenue/Pricing Proposal or access arrangement. The most notable examples of this are:

- the pre-approval of TNSPs cost allocations;
- the pre-determination of elements of the efficiency benefit sharing incentive scheme and the service performance incentive scheme.

AGL submits that, as a matter of regulatory principle, it is inappropriate for the AER to exercise discretion in a way which pre-empts its role in reviewing a revenue/pricing proposal or an access arrangement as a whole.

The matters requiring AER pre-approval are essential elements of a revenue/pricing proposal or access arrangement and cannot properly be developed in isolation, as

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<sup>5</sup> Draft Determination p.45

they interrelate with many of the other elements of a proposal. If such an approach were applied to distribution and gas transmission, it would limit the businesses' ability to design a proposal which would reflect the individual characteristics of each business and would stifle innovative approaches to service delivery and business operations which are likely to lead to greater efficiency benefits, whether productive, dynamic or allocative.

Accordingly, AGL is of the strong view that even beyond the general regulatory principle of the AER not being required (or empowered) to pre-emptively exercise its regulatory discretion, there are substantive matters for distribution and gas transmission which should not be determined pre-emptively. Avoiding pre-emption will allow these businesses (which exhibit marked individual differences in terms of geography, market composition and commercial practice) sufficient scope to develop properly integrated proposals that reflect the individual characteristics of each business.

### **(c) The role of guidelines**

AGL has concerns about the appropriate role for guideline making powers under the NEL which are discussed in Part 2 of this submission. In particular, AGL is concerned that, for some of the guidelines, the manner in which the AEMC has applied the guideline making power in effect constitutes a delegation of Rule-making power. AGL's concerns about the appropriate role of guidelines and the separation of Rule making and Rule administration are fully covered in Part 2 of this submission.

## **3. Content and detail issues**

The following items address specific elements of the Draft Determination.

### **(a) The 'reasonable estimate' test**

AGL welcomes the retention of the 'reasonable estimate' decision making standard for the AER to assess forecast capital and operating expenditures, as initially proposed by the AEMC.

AGL agrees with the Draft Determination's reasons for specifying this test, including:

- The task of the regulator is to make a 'reasonable' decision, not the 'best' decision;
- Any attempt to identify the 'best' estimate is unachievable and involves the risk of regulatory error.<sup>6</sup>

As noted below, AGL considers that the estimation of WACC parameters would also benefit from a 'reasonableness' standard.

However, AGL may have some issues with the long list of matters in sections 6A.6.6(2) and 6A.6.7(3) of the Draft Rule that the AER will have to take into account in coming to a decision on whether a forecast of capital or operating expenditures is 'reasonable'.

The better approach may be to either omit the lists altogether or replace them with broad categories, using some of the listed items as examples of matters that would be relevant in this particular part of the regulatory process.

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<sup>6</sup> section 5.1.1.2

## **(b) Cost of capital**

In AGL's March 2006 submission on the Rule Proposal, it was said:

*AGL supports the AEMC's approach of locking in cost of capital parameters (or an agreed range for each parameter) for five years and believes this will lead to a more stable regulatory environment facilitating investment. However, AGL is concerned with the proposal for the AER to review values and methodologies for the subsequent five year period. Given the significance of the allowable WACC on investment decisions, AGL believes a panel of experts appointed by the AEMC is a preferable choice to set parameters initially and at reviews.*

While AGL believes that its proposal to convene a panel of experts was appropriate, it now it appears that there is a distinct unwillingness by policy makers to involve such a body in regulatory decision making. If this is the case, then AGL continues to believe that there are potential benefits in locking in certain less volatile WACC parameters for a 5 year period. However, for such an approach to be workable, there are a number of issues that need to be addressed. These issues are likely to be accentuated for distribution and gas transmission than for electricity transmission for reasons identified elsewhere in this submission.

The issues are:

- Under the AEMC's proposed approach, the AER will be making decisions every 5 years about significant elements of a Revenue Proposal which, because they will not be component parts of a Revenue and Pricing review, will not be open to merits review (which would otherwise be the case). AGL strongly holds the view that these matters are far too significant not to have in place some form of merits review of the AER's decision to mitigate against the possibility of regulatory error, especially as the decision will affect a significant number of businesses with their associated asset values. AGL believes that for a 5 year lock-in to be viable, it must be accompanied by a form of merits review.
- While the locked-in parameters are substantially those in the Statement of Regulatory Principles, there is scope for the Beta and credit rating parameters to vary between individual businesses to reflect their particular market and geographical characteristics and associated variations in both systematic and non-systematic risk. Again, this is less likely to be so for electricity transmission, but is very likely in respect of electricity and gas distribution and gas transmission. Locking in a single set of parameters will not allow the resulting WACC for businesses to adequately reflect their variations in risk. The Rule should allow variation from the benchmark values to properly reflect the individual risk positions of the businesses.
- The imprecision in determining specific parameters used in the CAPM should be acknowledged, and the AER should be directed, as part of each revenue review, to consider a reasonable range within which the true WACC is likely to fall.
  - AGL continues to be concerned that the Draft Rule has failed to acknowledge the imprecision in determining WACC based on point estimates of certain parameters. In the light of the significant statistical uncertainty associated with WACC estimation, AGL still considers it necessary to determine a point estimation of WACC that acknowledges the adverse impact that underestimating the cost of capital has on levels of investment.
  - The Draft Rule has failed to recognise the uncertainty of determining some key parameters of the WACC. The result is a point estimate of WACC that risks underestimating the cost of capital. AGL has previously proposed the Monte Carlo simulation approach as a method of acknowledging each

parameter's degree of uncertainty and ensuring that the final result is within a reasonable range and has an acceptable level of risk that costs to the business are underestimated. AGL urges the AEMC to consider the imprecision in determining the cost of capital, the adverse impacts on investment of underestimation and adopt an approach to determining the cost of capital that acknowledges the inherent uncertainty.

There is a minor issue with the AEMC straying into the role of the Rule administrator by deciding parameters which are the province of the AER. However, AGL recognises that this is a transitional process until the AER takes over responsibility for deciding parameters under the Draft Rule.

### **(c) AER's information gathering powers**

AGL agrees with the reservations expressed in the Draft Determination concerning information gathering by regulators:

*The Commission recognises that 'regulatory creep' can be a particular concern when considering the issue of information gathering, as regulator requirements progressively increase and information is sought for purposes other than the original purpose. This was a concern also raised by the PC in its review of the Gas Access Regime<sup>7</sup>.*

As the Draft Determination observes, the AER has very wide powers of information collection under the National Electricity Rules – namely “any other information that the AER reasonably requires” to perform its functions under the Rules.

AGL supports the Commission's recognition of the need to clarify in the Rules the scope of information gathering powers of the AER so that it is clear that those powers apply only to the particular regulatory roles required under the Draft Rule. This will benefit the AER and Service Providers by avoiding areas of uncertainty and potential dispute.

### **(d) Third party service providers**

AGL notes that the AEMC has not opted for specific AER regulatory powers over information held by third parties (although even under current Rules the AER can seek such information).

AGL agrees with the reasons in the Draft Determination that a power for a regulator to compel compliance by third parties with specific information requirements would be too intrusive (notwithstanding that the Productivity Commission and the Expert Panel recommended such an approach).

AGL recognises, as the Draft Determination puts it, that there is a perception that dealings between service providers and third parties could be struck on non-competitive terms, particularly where there is some relationship to that provider.

However, AGL supports the AEMC's reasoning that *'a blanket rule that a regulator can compel third parties to retain and provide information.....may have a detrimental effect on the ability of regulated businesses to get the best value from outsourcing arrangements'*.<sup>8</sup> Such outsourcing will be a major efficiency driver for regulated industries in the future.

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<sup>7</sup> p.116

<sup>8</sup> Draft Determination p.118



AGL supports the AEMC view in favour of competitive testing to determine if costs have been set on the basis of competitive tendering or arm's length negotiation. If the costs pass these tests, then they should be presumed efficient without any recourse to third party information.

### (e) Income tax

The Draft Determination puts the view that "a pre-tax approach has the potential to overcompensate for tax to the extent that accelerated depreciation continues to apply to some TNSP assets."<sup>9</sup> AGL submits that supporting a post-tax approach on this basis is flawed on both policy and economic grounds.

Successive governments have implemented or removed accelerated tax depreciation provisions with the intent to vary the strength of incentives to invest in capital intensive industries. In the 2006 Federal Budget speech, the Treasurer stated that the most recent tax depreciation incentives were introduced to induce investors to "undertake investment in new plant and equipment and to keep pace with new technology". The detailed budget papers support the tax measures under the heading "Improving Incentives to Invest."<sup>10</sup>

There was no suggestion in either the speech or the detailed papers that the measures were introduced to reduce prices to consumers with no net impact on investors. This is the ultimate outcome of the approach proposed in the Draft Rule.

Even from a purely economic viewpoint, the regulatory capture of the entire benefit of accelerated depreciation cannot be justified. In a perfectly competitive market some, but not all, of the benefit of accelerated depreciation will be passed on to consumers through lower prices. The less perfect the competition, the greater the proportion of benefit that would be retained by the asset owner. In no market however, other than in an industry regulated under a PTRM, will *all of the benefit* be passed on to consumers.

While it may be true that a pretax approach *has the potential* to overcompensate for tax, it is equally true that a PTRM using actual tax depreciation rates *will* under-compensate for tax in comparison to even a perfectly competitive market situation.

AGL submits that the proposed rule will not only negate the policy intent of Federal Government initiatives, but will also effectively under-compensate service providers for the cost of taxation.

### (f) Gamma

The Draft Determination has responded to AGL's view that there is a persuasive body of expert research demonstrating that ascribing a value of 0.5 to gamma is unsustainable. AGL submitted that a value of gamma cannot be obtained to any great level of confidence and that a statistical approach would be more appropriate. AGL cited significant evidence that a gamma of 0.5 would underestimate the cost of capital to a business and that a more appropriate value would lie between 0.0 and 0.35 including the following:

- Imputation credits are effectively worthless to the marginal investor of large Australian companies with significant foreign ownership;

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<sup>9</sup> p.95

<sup>10</sup> <http://www.budget.gov.au/2006-07/ministerial/html/treasury-05.htm>

- A gamma of 0.5 together with a Market Risk Premium of 6% is inconsistent with the level of historically paid dividend yields. A gamma of 0 resolves this inconsistency;
- An update to research by Hathaway and Officer demonstrated that calculations historically used by regulators to derive a gamma of 0.5 would currently produce a gamma of 0.355; and
- KPMG<sup>11</sup> had determined that the standard practice of financial practitioners is to not adjust for the value of imputation credits. Similarly, analysis by Lonergan<sup>12</sup> demonstrated that of the 6 reports making an adjustment to reflect dividend imputation, 5 attributed little or zero net effect on the value of the company being assessed.

The Draft Rule has maintained a gamma value of 0.5, noting that the evidence cited by AGL was examined by the Victorian ESC during the recent electricity distribution price review, but that the regulator declined to change the value of gamma from 0.5. AGL considers that the ESC's conclusions on the value of gamma did not involve a thorough examination of evidence put to it, partly because of time pressures during the review. The ESC's conclusions are clearly contrary to a significant body of expert advice. AGL submits that in the light of this evidence it is appropriate for the AEMC to consider this advice directly and not simply to rely on the ESC's views. Furthermore, as the AEMC is locking in parameters for the next five years which will impact a number of businesses nationally, the AEMC should form its own considered view as to an appropriate value for gamma.

AGL considers a gamma of 0.5 risks underestimating the cost of capital for the service provider, thereby undermining an objective of the NEL in that it does not contribute to the long term benefit of consumers.

Moreover, AGL notes the considerable uncertainty surrounding estimates of a value for gamma. In the light of the evidence available, and the uncertainty of estimating a value for gamma, AGL maintains its position that an appropriate gamma value lies between 0.0 and 0.35.

### **(g) Post Tax Revenue Model (PTRM)**

The Draft Determination has responded to some of AGL's reservations with codifying a generic Post Tax Revenue Model (PTRM) for the calculation of maximum allowed revenue.

AGL queried the need for a mandatory guideline to establish a PTRM. The issue was not so much that the AER was to determine the modeling technique to be applied, but that:

- (i) *Given the detailed specification of the model in the Rule, a guideline was unnecessary*

The elements of the PTRM set out in the Draft Rule are quite specific. Given the level of detail, AGL submits that it should only be necessary for a service provider to submit a model with its revenue proposal which conforms to the Rule.

- (ii) *The practical difficulties of mandating a 'one-size-fits-all' PTRM*

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<sup>11</sup> KPMG (2005) Cost of Capital – Market Practice in Relation to Imputation Credits – A Report for the Victorian Electricity Distribution Price Review 2006-10

[http://www.esc.vic.gov.au/apps/page/user/pdf/AppendixL\\_AGLE\\_Response\\_to\\_EDPR\\_Draft\\_Decision.pdf](http://www.esc.vic.gov.au/apps/page/user/pdf/AppendixL_AGLE_Response_to_EDPR_Draft_Decision.pdf)

<sup>12</sup> Lonergan, W. (2001) "The Disappearing Returns", JASSA Issue 1 Autumn 2001

While the Draft Determination puts the view that “a PTRM must be published prior to a TNSP preparing its proposal”,<sup>13</sup> AGL considers that if a model were to be specified in advance, the *application* of that model would need to be flexible, particularly if it were to be adopted for distribution as well as transmission.

AGL acknowledges that the proposed PTRM will not at this stage cover distribution; but nonetheless wishes to expand on some of its concerns, which potentially apply to electricity transmission as well as distribution and gas transmission.

One example of the practical difficulties that can arise is the complexity of the AGL Gas Networks (AGLGN) asset base, which requires the following detailed record keeping:

- the maintenance of separate bases for the NSW distribution system, two separate trunk pipelines and sundry metering equipment;
- thirty separate asset classes with different economic lives; and
- assets within each asset class that were acquired over several decades.

In its 2005 access arrangement review, the regulatory financial model for AGLGN was developed jointly by AGLGN, IPART and external consultants, based on a generic 'shell' consistent with the NSW electricity distribution model, with modification to suit AGLGN's characteristics. As all other regulated businesses can be expected to have their own unique features, AGL remains concerned with the practicality of mandating a standard PTRM.

AGL submits that the use of a generic PTRM could only be workable if there is practical approach to its use, with the flexibility for service providers to add extra modules and/or to accept the input from business specific calculations carried out independently from the PTRM.

## **(h) Pre-emptively determined matters**

### *Cost Allocation Methodology Approval*

The Draft Rule has maintained a requirement for the AER to make guidelines on the cost allocation methodologies to be developed by TNSPs. Both the guidelines and the methodologies are required to be consistent with the Draft Rule's cost allocation principles. Each TNSP will then be required to submit its detailed methodology to the AER for approval. The AER will be able to change its guidelines at any time (and hence the TNSP methodologies).<sup>14</sup>

AGL's earlier submission expressed a view that it was inappropriate to require a service provider's detailed cost allocations to be approved in advance by the AER under a guideline. Rather, the basic cost allocation principles should be set out in the Rule. AGL agreed with establishing basic cost allocation criteria, such as costs being within the range of stand alone and long-run avoidable costs and not allowing costs to be recovered more than once. But since a large proportion of costs in energy transmission and distribution can not be directly traced to an asset and/or a service, a range of equally valid methodologies could apply. The proposed Rule did not reflect well accepted economic theory on cost allocation, in that it effectively

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<sup>13</sup> p. 47

<sup>14</sup> There is provision for a TNSP to amend its methodology “from time to time” and to submit this to the AER for approval, but clearly the amendment would have to be within the scope of the cost allocation principles.

decided that there would be only one valid cost allocation method to set revenues/prices.

For the above reasons, AGL maintains the view that TNSPs should only be required to submit cost allocations which are consistent with the Rule as part of a complete Revenue Proposal. A non-mandatory guideline developed by the AER, setting out relevant issues for its consideration of cost allocation and the associated methodologies, may be beneficial to that process.

### *Incentive schemes*

The Draft Rule has maintained a requirement for the AER to design an efficiency benefit sharing scheme and a service performance incentive scheme (in line with the Draft Rule) by means of guidelines. The AER will be required to approve the TNSPs' proposed parameter values for each scheme if they comply with the AER's requirements in the guidelines.

In line with its general position on guidelines, AGL does not see why mandatory guidelines are required to develop and implement incentive schemes. The AEMC should specify the essential elements the schemes in the Rule, which could then be supplemented by non-mandatory guidelines from the AER if necessary. The TNSPs should then submit the schemes appropriate to their respective businesses for approval as part of their revenue proposals.

### **(i) Regulated Asset Base (RAB)**

In its earlier submission, AGL supported the codification of the initial asset base for each TNSP and the proposed roll-forward methodology in determining the asset base for the start of each regulatory period, although some improvements to the methodology were suggested.

On review, AGL does not see it necessary or appropriate for the initial RAB values to be specified in the Rule; rather the Rule should state the principle that the asset bases determined in the most recent revenue regulatory determinations should apply, with appropriate roll forward of capital expenditure since that time. This approach avoids the AEMC straying into the Role of Rule administrator, which in AGL's view it would be doing by specifying a particular regulatory value normally determined by the AER.

### **(j) Cost pass-through / re-openers**

AGL largely supported the cost pass-through mechanisms and re-opener provisions in the proposed Rule. However, the Draft Rule will now permit the re-opening of a revenue cap in only the most extreme circumstances, as the result of the introduction of 'contingent project' provisions into the capital expenditure regime.

AGL supports this general approach; but in line with its earlier submission, considers that should be some provision for the AER to pass through specified categories of unforeseen costs additional to those specified in the Draft Rule.

# Draft National Electricity Amendment (Economic Regulation of Transmission Services) Rule 2006

## AGL submission - Part 2

### AER guidelines to be made under the Draft Rule

#### 1. Overview of this submission

This submission highlights a number of issues arising from the AEMC's application of the National Electricity Law (NEL) provisions which enable it to confer a guideline-making power on the AER:

- AGL endorses the AEMC's objective of providing clarity and transparency of regulatory decision making, but proposes that the application of guidelines in the Draft Rule is not the most effective means of achieving this objective;
- a major concern is the extent to which the guidelines to be made by the AER would incorporate elements of Rule-making, thus creating fundamental inconsistency with the 'separation of powers' principle enshrined in the new national energy framework;
- in addition to the particular issues raised in respect of the specific guidelines detailed in this Draft Rule, AGL is concerned that it sets a benchmark for the scope, form and construction of future Rule-making under the new national regulatory framework; and
- AGL aims to set out those aspects of the Draft Rule that in AGL's view potentially and/or actually infringe on the principle of the separation of rule-making and rule-enforcement as embodied in the NEL and the policy intent of CoAG and the MCE.

#### 2. AEMC's use of s 34(3)(e) power

The NEL provides that Rules made by the Australian Energy Market Commission may:

*confer a function on the AER, the AEMC, NEMMCO, or a jurisdictional regulator, to make or issue guidelines, tests, standards, procedures or any other document (however described) in accordance with the Rules<sup>1</sup>*

The AEMC Draft Rule has apparently used this provision to require the AER to develop a number of "guidelines, schemes and models"<sup>2</sup>, namely:

- submission guidelines
- information guidelines;
- cost allocation guidelines;
- service performance target incentive scheme;
- efficiency benefit sharing scheme;
- post tax revenue model; and
- roll-forward of the Regulatory Asset Base Model.

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<sup>1</sup> Section 34(3)(e)

<sup>2</sup> This phrase was used in the AEMC Transmission Rule Proposal in February 2006 (Appendix 3), but does not seem to be used in the Draft Determination. Nevertheless, essentially the same instruments are being referred to in both documents. For simplicity, this submission refers to all these instruments as 'guidelines'.

These proposed guidelines are about substantive matters of economic regulation. It is therefore imperative that their content and application should be in accordance with (a) the provisions of the NEL; and (b) the wider regulatory framework being implemented by the MCE. This submission addresses these key issues.

### 3. Intent of guidelines

AGL appreciates the objective behind the AEMC's use of the section 34(3)(e) power; namely, to provide clarity and transparency in the AER's use of its discretion in administering the transmission Rule. In the words of the Draft Determination:

*the Draft Rule provides guidance on how certain discretions are to be exercised and requires the AER to publish models or guidelines (to be developed using the consultation process in the Rules) to clarify how these discretions would be exercised<sup>3</sup>*

However, AGL's firm view is that, in attempting to guide the AER's discretion, the AEMC has evolved a potential role for guidelines which is potentially not consistent with the (a) the scope of the AEMC's powers under the NEL and (b) the design of the regulatory governance framework determined by CoAG (and implemented by the MCE).

### 4. The compulsory nature of guidelines in the Draft Rule

It appears from the Draft Determination that the AEMC has confirmed that service providers will be required to comply with actions specified by the AER in a guideline.<sup>4</sup> The method used to secure this compliance is notable in the context of the NEL. While there are formal provisions in the NEL under which the AEMC can allow the AER to make its guidelines mandatory<sup>5</sup>, the AEMC has not used them. Instead, the Draft Rule itself establishes an obligation to comply. Using the example of the submission guidelines, this is achieved by:

- specifying in the Draft Rule what the guidelines will contain (s 6A.10.1);
- stipulating that a TNSP's Revenue Proposal must comply with chapter 6A in general, and in particular the requirements of the submission guidelines (s 6A.4.1).

This technique (or a variation of it) is used for the other guidelines. It is also important to note that the content of guidelines is specified in two significantly different ways in the Draft Rule, and this has the potential to produce different outcomes:

- in some cases, the prescription of the content of a guideline is very "tight" so that the AER would in practice be able to add few (or no) substantive matters to it. In these cases, the outcome of the guideline would be basically procedural;
- in other cases, the prescription is at a high level of principle, so that the content of the guideline will be largely determined by the AER, and thus the content can deal with substantive matters of regulation.

Sections 9 and 10 of this submission deal further with this very important distinction. Here, the point is simply being made that the guidelines will be mandatory, and that the Draft Rule itself has established this requirement. Therefore, the Draft Rule

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<sup>3</sup> Draft Determination p.48

<sup>4</sup> The discussion in section 8.5.2 refers to the mandatory nature of the guidelines.

<sup>5</sup> Section 34(3)(h) confers a power of direction on the AER, the AEMC, NEMMCO or a jurisdictional regulator to require a person on whom an obligation is imposed under the Rules to comply with a guideline, test, standard (etc).

apparently reflects a view that guidelines made under the s 34(3)(e) power can be mandatory.

This appears to be confirmed by the following comment in the Draft Determination:

*There are already a number of AER guidelines in place which market participants are required to adhere to, such as for ring-fencing, rebidding and service standards. These guidelines place obligations on market participants in terms of behaviour and information requirements. In that regard the standing of the guidelines proposed in the Rules is no different to current arrangements.<sup>6</sup>*

AGL does not agree that the existing mandatory guidelines in the National Electricity Rules (NER) offer any definitive guidance for the AEMC. First, there have been non-mandatory guidelines made in the past as well as mandatory guidelines. Second, the cited guidelines derive from an earlier period in the history of the National Electricity Code, when it was considered that regulatory obligations could be imposed by guidelines to facilitate the efficient operation of the NEM. This is reflected in the subject matter that these guidelines address, namely market structure (ring fencing separates the competitive and non-competitive sections of the market) and market operation (rebidding and service standards).

Third, the earlier approach to guidelines operated before CoAG had announced energy market reforms to establish a clear distinction between rule making and rule enforcement in the new national regulatory framework, including the NEL. In AGL's view, rather than the NER carrying forward a model which may have been relevant in the prior framework, but which is now clearly superseded, it would be more consistent with the current policy framework to replace the existing guidelines by equivalent Rules.

From the beginning of the energy reform process in 2003, it was understood that the new national energy market governance framework being developed by the MCE would adhere to the separation of powers principle such that:

- the AEMC's role would be rule making, subject to policy direction from the MCE;
- the AER's role would be rule enforcement consistent with the new regulatory framework (the Law and the Rules), and its enforcement decisions would be transparent and appealable.<sup>7</sup>

Any obligation (set out in an instrument) which requires market participants to comply with a substantive matter is in fact a Rule, no matter what it is called. The essential issue then is whether the NEL can be interpreted to allow the conferring of a power on the AER to make a compulsory guideline on a matter which, under the 'separation of powers' principle, should properly be the subject of a Rule.

To provide greater clarity on the intended role of guidelines in the NEL, AGL has sought legal advice from Gilbert + Tobin on the meaning and effect of the s 34(3)(e) and (h) provisions.<sup>8</sup> The following sections consider that advice in depth.

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<sup>6</sup> Draft Determination p.120 (emphasis added).

<sup>7</sup> See Appendix 2 of legal advice noted below

<sup>8</sup> Gilbert + Tobin Lawyers memorandum of advice: *National Electricity Law: separation of rule-making and rule-enforcement powers as between the Australian Energy Market Commission and the Australian Energy Regulator*, 11 September 2006. This advice is provided to the AEMC on a confidential basis.

## 5. Legal advice re sections 34(3)(e) and (h) - Summary

The advice is a careful analysis of the section 34(3)(e) and (h) provisions based on the legal principles of statutory interpretation. As part of the analysis, the advice examines the purposes and objectives of the MCE legislative reform package (including the NEL) since identifying the purpose of legislation is of direct significance when a court is required to interpret its meaning.

In summary, Gilbert + Tobin's considered view is that:

- a) There is some ambiguity in sections 34(3)(e) and (h), and a breadth of interpretation (or construction) is possible. On one view, a broad power could be conferred on the AER; alternatively, the power may only be a limited one;
- b) Despite the possible breadth of interpretation, the best and most likely interpretation is:
  - *In respect of section 34(3)(e)*, the Rules may allow the AER or NEMMCO to make only documents compliance with which is *not mandatory*. The documents that could be made can only properly provide guidance or direction, and not (in the absence of a valid exercise of a power granted pursuant to 34(3)(h)), require compulsion;
  - *In respect of section 34(3)(h)*, the Rules can confer a power of direction to comply with documents created pursuant to subsection 34(3)(e) only where the AER or NEMMCO directs a particular person to comply with a particular (identified) right or obligation. That direction must be consistent with the functions of the AER or NEMMCO.
- c) The proposition that the rules could provide for the AER or NEMMCO to make instruments that are, in substance indistinguishable from rules, would be inconsistent with the key policy intent of the reforms of which the NEL is a part; and
- d) The inconsistency between the possibility of the AER making a Rule and the MCE policy intent should be a reason for the courts to reject any alternative view if they were called upon to determine the validity of AEMC Rules or relevant AER documents. Further, the mere fact that the drafting of section 34 could inspire such a view suggests that the drafting of the section should be reformed.

## 6. Legal advice – reasons for NEL reform

As part of its analysis, the legal advice includes an assessment of the 2003 MCE reform package<sup>9</sup> since, as noted, this is an important part of interpreting the meaning of sections 34(3)(e) and (h). In summary, the advice concluded:

- The introduction of the reform package was a policy response to the failings of the existing electricity industry regulatory structures. These failings can be inferred from the language of the statute itself and are also likely to be supported by a further review of relevant secondary materials to which a court would have regard;
- These failings included duplicative and inefficient governance and rule-making regimes;
- As well as concerns about inefficiency and duplication, significant concerns existed in relation to the blurred roles played by the ACCC as both (a) the body which approved (and in many circumstances in practice re-wrote) the rules and (b) the transmission network regulator. Similar concerns were raised in relation

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<sup>9</sup> MCE Communique and MCE report to CoAG, 11 December 2003



- to NECA's role as a writer and enforcer of the Rules. This blurring of roles created potential conflicts of interest and market uncertainty; and
- Finally, there was a perception that that the rule change process as it operated was opaque and rule makers lacked accountability.

In response to these concerns, the NEL reform package sought to explicitly:

- separate the rule making and rule enforcement roles;
- improve the process by which Rules are made;
- introduce a generally more transparent and accountable rule making process; and
- overall, to reduce the regulatory risk faced by market participants.

The advice points out that if the AEMC could, in substance, empower the AER to make rules, this would be inconsistent with the policy aims of the reform package in that:

- there would be no, or at least incomplete, separation of rule making and rule enforcement /administration;
- the process by which the AER could make rule like instruments could be opaque; and
- as a result, businesses would face additional risk and uncertainty.

It is therefore AGL's firm view that the conferring of a power on the AER to make a compulsory guideline on a substantive matter of economic regulation would be:

- incorrect from a policy and legal perspective, as discussed by Gilbert + Tobin;
- a retrograde step for TNSPs, since it would reintroduce the blurring of roles which characterised the old electricity transmission regulatory regime;
- a poor signal for all businesses subject to future regulation by the AER, since they would lack assurance that the Rule making process had been reformed as they had been led to expect; and
- a contributor to increased regulatory risk.

## **7. Legal advice - the proper role for guidelines**

As part of its analysis and interpretation of the section 34(3)(e) and (h) provisions, the legal advice develops a picture of what a guideline *should* do under those provisions as well as what it should *not* do (ie be a rule). Some elements of the advice's reasoning are as follows:

- Any conferral of a function to make or issue a document under section 34(3)(e) must be conferred and exercised consistently with the functions and powers of the body upon whom the function is conferred;
- With reference to the AER's powers, the exercise of the function should be limited to its role of monitoring compliance, investigating breaches or possible breaches of provisions of the NEL or the Rules, and performance of economic regulatory functions or powers; and
- The use of the words 'guidelines', 'tests', 'standards' and 'procedures' suggests that the characteristics of the types of documents made or issued under subsection 34(3)(e) or (f) are that they direct a process or procedure to be followed as opposed to mandating a substantive outcome. Things that determine substantive outcomes could be expected to properly be the subject of Rules.

AGL's clear view (supported by the legal advice) is that guidelines may have value in telling market participants how the regulator will exercise the powers given to it under the framework or rules, but that guidelines should never mandate substantive outcomes (by placing regulatory obligations on participants). A guideline may either provide guidance on the AER's approach to the use of its discretion or address processes and procedures.

This leads to the question of whether guidelines should ever be mandatory, and if so, under what circumstances. AGL notes that if a 'guideline' was interpreted under the plain English meaning of the term, then it would simply be a 'guide' to particular actions and there would never be a risk of guidelines becoming de facto rules.

The legal advice addresses the issue of compulsion from several viewpoints. First, as noted above, the correct construction of section 34(3)(e) is that the Rules may allow the AER or NEMMCO to make only documents compliance with which is not mandatory. The documents that could be made can only properly provide guidance or direction.

The advice then considers the nature of the 'power of direction' to comply with a guideline that can be conferred under section 34(3)(h). Broadly stated, the power is to be used specifically and not generally. Rather than directing all market participants or a sub-group to comply with a guideline, the power should be aimed at correcting particular instances of failure related to rights or obligations under the Rules. The advice develops the position that whatever gives rise to a direction to comply must also be of some significance (ie a threshold test). Thus, any direction to comply with guidelines, tests, standards or procedures is most relevant when it aims to secure ultimate compliance with the Rules.

In AGL's view, the foregoing strongly suggests that the power to direct compliance with a guideline is particularly relevant to the AER's functions of monitoring and enforcing compliance. These functions are most evident in the *market operation provisions of the NEL*, since failure to comply may have major physical and financial consequences for the market as a whole.<sup>10</sup> The circumstances in which the AER, in fulfilling its economic regulatory function, might use the power to direct a person to comply with a guideline or other section 34(3)(e) document are (as the advice notes) less obvious, although perhaps not inconceivable. Even so, AGL can envisage very few circumstances that would require use of the section 34(3)(h) power of direction in the course of the AEMC making Rules covering economic regulation.

As noted in section 4, the AEMC does not appear to have applied the section 34(3)(h) power of direction in the Draft Rule and has sought compliance by other means.

## **8. Ambiguity in the NEL**

AGL acknowledges that, while its legal advice provides a clear view of the interpretation of the NEL, it also points to some ambiguity. There is a range of interpretations (or constructions) applicable to sections 34(3)(e) and (h). The advice acknowledges that matters of judgment and degree are involved in any assessment of whether the conferral, and ultimately the exercise, of the function in section 34(3)(e) (or power in section 34(3)(h)) is legitimate, or within power.

However, the alternative interpretation to that of the advice – that is, the NEL *can* be interpreted to allow the conferring of a power on the AER to make a compulsory guideline on a matter which, under the 'separation of powers' principle, should properly be the subject of a Rule - has been shown above to be contrary to the CoAG/MCE policy intent.

In order to avoid what AGL perceives in the Draft Rule as a potential conflict with the policy intent in the use of guidelines, an assessment is needed as to what function

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<sup>10</sup> This issue is highlighted in the AEMC's recent final decision on the review of the enforcement and compliance regime for the NEM's technical standards (contained in the National Electricity Rules). The decision canvasses substantially higher penalties for breaches of technical standards.

they fulfil. The following section investigates what the AEMC appears to have done in the Draft Rule and its implications for future consistency with the MCE policy.

## 9. Nature of the proposed AER guidelines in Draft Rule

As noted in section 4, the Draft Rule provides a high level of prescription to guide the AER in making or developing many of its guidelines, schemes and models. Examples include:

- specification of the contents of the post-tax revenue model<sup>11</sup> ;
- specification of key inputs which will feed into the post-tax revenue model, such as the details of the building blocks<sup>12</sup>, and the methodology and parameters of the return on capital<sup>13</sup>;
- specification of the contents of the submission guidelines which in turn govern the content of TNSP Revenue Proposals<sup>14</sup>;
- specification of the content the cost allocation guidelines which give effect to the cost allocation principles<sup>15</sup>; and
- establishment of the opening values of regulatory asset bases and the methodology for rolling them forward<sup>16</sup>.

On the other hand, only high level guidance (by way of general principles) is provided for the AER in developing and implementing the incentive schemes for efficiency benefit sharing<sup>17</sup> and service target performance<sup>18</sup>. In practice, the substantive content of these (mandatory) guidelines will be determined by the AER.

The Draft Determination provides a rationale for the frequently high degree of guidance provided for the AER:

*The Commission considers it appropriate that the AER is provided with sufficient guidance in the Rules on the formulation of the guidelines, in order to focus their scope. This ensures that the guidelines are developed in line with the intention of the Rules.*<sup>19</sup>

Given that the subject matter on which the AER will be required to make guidelines, schemes and models deals with central features of economic regulation, it is perhaps understandable why such a high degree of specification and direction has been seen as necessary. However, this only serves to heighten AGL's concern with potential application of the section 34(3)(e) and (h) provisions to mandate substantive outcomes.

If the AER were given the power to produce a mandatory guideline on a substantive matter of economic regulation - with a much lower degree of direction than that provided in the Draft Rule for the majority of guidelines - then the AER would be free to adopt a construction of the section 34(3)(e) and (h) provisions which would allow it to make *de facto* Rules.

However, it would appear that the relatively high level of prescription in the Draft Rule has in effect confined the AER to making guidelines which (for the most part) do

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<sup>11</sup> Draft Rule 6A.5.3

<sup>12</sup> Draft Rule 6A.5.4 and other clauses

<sup>13</sup> Draft Rule 6A.6.2

<sup>14</sup> Draft Rule 6A.10.2

<sup>15</sup> Draft Rule 6A.19.3 and 6A.19.2

<sup>16</sup> Draft Rule Schedule 6A.2

<sup>17</sup> Draft Rule 6A.6.5

<sup>18</sup> DR 6A.7.4

<sup>19</sup> Draft Determination section 8.5 (p.120)

not intrude into Rule-making. There are some discretionary elements available to the AER in making or developing its guidelines, schemes and models but these are greatly outweighed by the number of elements that have been prescribed by the Draft Rule (with the exceptions of the incentive guidelines). Although the subject matter of the proposed guidelines is clearly substantive, they are not *mandating substantive outcomes*, since the outcomes have already been specified in the Rule. Essentially, in the majority of cases, the AER is formalising a number of specific procedural mechanisms through which the economic regulatory framework set out in the Draft Rule can be implemented, and is therefore likely to be doing something (in the words of the legal advice) *limited to processes or procedures*.

The above assessment illustrates the principle that whenever guidelines deal with substantive matters and there is an obligation to comply, the result will be delegation of a *de facto* rule-making function to the AER. The AEMC's Draft Rule has attempted to avoid this danger by tightly prescribing the content of the guidelines, but this is not a correct or even necessarily effective response to the problem.

As noted, there are some proposed guidelines which will intrude into rule making given the greater discretion available to the regulator; namely, the service target performance and efficiency benefit sharing incentive schemes. For both, the Draft Rule is relatively light in prescription, with only broad principles given to guide the AER in devising the schemes. They will therefore allow the AER to determine substantive matters (which under the Draft Rule will be mandatory for TNSPs).

## **10. Implications of the AEMC use of guidelines**

The AEMC's prescriptive approach (apart from the two incentive guidelines) begs the question of whether the AER should be required to make the guidelines proposed in the Draft Rule at all. Most of the essential elements of the economic regulatory framework are specified in such detail in the Draft Rule that there would seem to be no impediment to the TNSPs formulating their Revenue Proposals in accordance with the Rule and the AER assessing the proposals for compliance with the Rule. Experience with the Gas Code over the last eight years demonstrates that if the rules are defined at a sufficient (but not excessive) level of detail, then businesses are well able to assemble their price/revenue proposals without any need for regulatory intervention in the form of detailed guidelines<sup>20</sup>.

In AGL's view, the Draft Rule could work equally well if all the regulatory elements (including the two incentive schemes) were appropriately specified in the Rule, with provision for some non-mandatory guidelines to be made by the AER indicating how it will exercise discretion given to it by the AEMC.<sup>21</sup> As discussed in section 11, AGL recommends that the NEL be amended to adopt this approach.

### *In summary of above*

AGL considers that the AEMC's approach to the use of guidelines in the Draft Rule could have been applied in a manner which better reflected the NEL and the MCE policy intent. Nevertheless, the Draft Rule has in effect largely avoided the potential for the regulator to act as rule maker. But this outcome cannot be guaranteed as a permanent feature of future Rules if the conferring of a guideline-making function is understood to carry with it an obligation to comply. There is always scope for a new Rule proposal or amendment to emerge which could adopt a construction of the

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<sup>20</sup> Some jurisdictional regimes did make use of mandatory guidelines, but equally those regimes had no commitment to the "separation of powers" principle.

<sup>21</sup> AGL notes that the AER can make non-mandatory guidelines at any time, so no specific provision in the Rule for guidelines may be needed.

section 34(3)(e) (and possibly 34(3)(h)) provisions which gave the regulator rule making power. The AEMC's views may change over time and there is no guarantee that its current overall prescriptive approach to the making of guidelines will continue. For these and other reasons, it is important to establish that only a construction of the section 34(3)(e) and (h) provisions which meets the policy intent is possible. This may well require the MCE to provide the appropriate clarity in the NEL.

## 11. What the MCE should do

In the light of the AEMC's current interpretation and application of the Rules with respect to guidelines, AGL considers that there would significant value for all parties if the MCE were to confirm its policy intent with respect to the use of guidelines. Even more importantly, steps need to be taken to ensure that any future Rule making for both electricity and gas includes an appropriate role for guidelines in economic regulation. To this end, AGL proposes that the MCE should amend the NEL appropriately<sup>22</sup> to remove the ambiguity identified earlier in this submission.

This can be done in the following ways:

- a) The role for guidelines needs to be established by appropriate amendments to the NEL, and equivalent provisions subsequently enshrined in the new National Gas Law. The amendments should provide that:
  - Rules made by the AEMC should specify all the substantive obligations of a service provider (TNSP or DNSP), and with a sufficient level of detail such that the service provider can assemble a complete price/revenue proposal for submission to the AER;
  - Where a Rule has given the AER a degree of discretion in its decision-making, the AER can also be conferred with a guideline making function, the purpose of which would be to explain (but not mandate) its intended approach in applying discretion.
- b) Alternatively, and as a minimal approach, the NEL could be amended to clarify the existing section 34(3)(e) and (h) provisions to the extent that they are unclear. The legal advice examined earlier provides an approach to removing the current ambiguity to ensure that the section 34(3)(e) and (h) powers are consistent with the MCE policy intent:

*To resolve the ambiguity and make the principles more readily accessible to all readers, in subsection 34(3)(e) after the words "any other document (however described)" there should be inserted the words "but not rules". For the purposes of subsection 34(3)(e), "rules" should be defined to mean a document which requires persons to do something, or prohibits persons from doing something.*

*It should explicitly be stated in subsection 34(3)(h) that the power is to be used as a remedial instrument and not as an instrument used as a means to govern general electricity market conduct.<sup>23</sup>*

For consistency with both of these proposed amendments, the existing mandatory guidelines issued under the current Rules (including those cited in section 4 above) should be converted to Rules.

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<sup>22</sup> Or issue an equivalent Statement of Policy Principles

<sup>23</sup> Section 6.3(b)

While the above recommendations do require various changes to laws and rules, AGL submits that in light of the changes required to chapter 6 of the Rules for transmission, and the forthcoming legislative package for gas and amendments to the NEL, this is the very time that such changes can best be made.

# Memorandum of advice



L A W Y E R S

11 September 2006

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**To** Chris Harvey; Paul Johnston  
**From** Nick Taylor; Catherine Dermody; Charlie Beasley  
**Matter No** 260945  
**CC** Paul Jeffares  
**Subject** **National Electricity Law: separation of rule-making and rule-enforcement powers as between the Australian Energy Market Commission and the Australian Energy Regulator**

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## 1 Introduction and background

We have been asked to advise on the meaning and effect of subsections 34(3)(e) and (h) of the National Electricity Law.

In particular the issues upon which we are asked to advise are whether the AEMC may make Rules that empower the AER and NEMMCO to undertake a role that, in substance, is akin to Rule making.

We have been asked these questions in the context that Governments are currently drafting a National Gas Law and changes to the National Electricity Law to enable distribution regulation to be undertaken on a national basis by the AER.

This memorandum is structured as follows:

- Section 2 sets out key legal concepts of statutory interpretation;
- Section 3 undertakes an analysis of the purpose of the legislative reform package that introduced the current National Electricity Law which is a key necessary element to the application of the most significant of the principles identified in Section 2;
- in Section 4 we focus on the application of the principles of statutory interpretation to the regulatory structure generally and in particular to the function in that regulatory structure of subsection 34(3)(e);

- in Section 5 we focus on the application of the principles of statutory interpretation to the regulatory structure generally and in particular to the function in that regulatory structure of subsection 34(3)(h);
- in our view the exercise of applying the principles of construction of each of subsections 34(3)(e) and (h) cannot be undertaken in isolation and Sections 4 and 5 also consider the function that, in our view, they play as an integrated whole with certain other subsections in the overall regulatory structure of the National Electricity Law; and
- in Section 6 we summarise those elements of our analysis above that answer the specific questions that you have posed.

In summary, we consider that:

- Subsections 34(3)(e) and (h) are, in their own terms, ambiguous. On one view, the subsections could be read as enabling the AEMC to confer a power upon the AER which is so broad it is very similar, or even indistinguishable in substance from rule making. Alternatively, the subsections could be more limited and enable the AEMC to confer upon the AER a power to make only guidance instruments that are non-mandatory and, in specific circumstances require particular persons only to comply with those guidance instruments.
- In respect of subsection 34(3)(e), it is our view that the correct construction is that the Rules may allow the AER and NEMMCO to make only documents compliance with which is not mandatory. Rather the documents that could be made pursuant to that subsection can only properly provide guidance or direction and not (in the absence of a valid exercise of a power granted pursuant to subsection 34(3)(h)) provide compulsion. Although this mechanism could be used for the AER's rule compliance function or the AER's economic regulatory function, the mechanism would seem to us to have a much greater role to play in respect of the former.
- It is our view that the correct construction of subsection 34(3)(h), is that the Rules can only require compliance with documents created pursuant to subsection 34(3)(e) where the AER or NEMMCO as the case may be directs a particular person with an identified right or obligation to comply. That direction must be consistent with the functions of the AER or NEMMCO.
- In our view the proposition that the rules could provide for the AER or NEMMCO to make instruments that are, in substance indistinguishable from rules, would be inconsistent with the key policy intent of the reforms of which the Law is a part. Indeed it may be that the AEMC's Draft Rule of February 2006 is grounded on that view.
- The inconsistency referred to in paragraph (d) should both be a reason that this alternative view should be rejected by the courts if called upon to determine the validity of AEMC Rules or relevant AER documents. Further, the mere fact that the drafting of subsection 34 could inspire such a view suggests that the drafting of the section should be reformed.

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## 2 Principles of Statutory Interpretation

The new National Electricity Law<sup>1</sup> (NEL) is part of a reform package that also includes amendments to the *Trade Practices Act 1974* (Cth) to establish the Australian Energy Market Commission (AEMC), establish the Australian Energy Regulator (AER) and allocate powers to them.

There is a substantial body of law that applies when courts interpret legislation. In respect of the reform package that is the subject of this advice, the same core concepts apply which are found in:

- Schedule 2 to the NEL which contains a specific set of principles to be applied by courts in the construction of the Law and the National Electricity Rules; and

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<sup>1</sup> The National Electricity Law is contained in the Schedule to Part 2 of the *National Electricity (South Australia) (New National Electricity Law) Amendment Act 2005*.



- the Common Law.

Appendix 1 to this advice sets out in further detail the following key concepts:

- the starting point for statutory interpretation is the plain or ordinary meaning of the words of the statute;
- wherever the words are ambiguous or the ordinary meaning is manifestly absurd or unreasonable, the courts seek to give the words the meaning that best accords with the statutory intent of the legislation. In particular, the courts consider the “evil” that legislative reform packages seek to address;
- where statutes use lists of specific items followed by general words, the general words are given a meaning consistent with the characteristics of the list; and
- there is a presumption that each of the words and phrases in a statute are intended to have meaning – that is, there is a presumption that none of the words are redundant.

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### **3 What is the purpose of the statutory package?**

Establishing the purposes and objectives of the reform package is relevant in two distinct respects to this discussion;

- first, the identification of the purpose or objective of the legislative scheme is of direct legal significance when a court is required to interpret the meaning of legislation. Section 2 above, contains a discussion of the principles involved in construction of statutory language; and
- secondly, an understanding of the purpose or objective of the reform package informs discussions as to the manner in which the law should be drafted or re-drafted.

This memorandum is primarily concerned with the first of these. While we have set out our views as to the correct meaning of subsections 34(3)(e) and (h), we recognise that the meaning of those sections is susceptible to argument. The scope for such argument is a weakness in the drafting of the legislation and provides a cogent reason why the legislation should be reformed and also provides a strong direction of the direction of that reform.

A summary of the secondary materials to which a court would have regard, and the consistent themes of the legislative reform package to which a court would, in our view, have regard in interpreting the provisions are set out in Appendix 2. In particular the policy behind the legislation is to the effect that:

- there should be a separation on the one hand of rule making and on the other of rule enforcement and administration;
- there should be a more rigorous, transparent and streamlined rule making process; and
- regulatory risks for electricity market participants should be reduced.

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### **4 Section 34(3)(e)**

Section 34(3)(e) of the Rules provide that Rules made by the AEMC in accordance with the NEL and the Regulations may:

- (e) confer a function on the AER, the AEMC, NEMMCO, or a jurisdictional regulator, to make or issue guidelines, tests, standards, procedures or any other documents (however described) in accordance with the Rules;...

As noted above, the starting point for statutory interpretation is the ordinary meaning of the words used.

The dictionary definition of a 'guideline' is that it is 'a statement which offers advice on the implementation of a policy and/or (general instructions)'. The dictionary definition of 'test' is 'the trial of the quality of something'. The dictionary definition of 'standard' is 'a level of quality which is regarded as normal, adequate or acceptable'. The dictionary definition of 'procedure' is 'the act or manner of proceeding in any action or process; conduct; or a particular course or mode of action'. A key common characteristic to each of these words is that none of these definitions include the concept of compulsion.

It is illustrative to contrast the common characteristic of those words with the directory definition of the word 'rule' which is quite different. It is a 'principle or regulation governing conduct, action, procedure, arrangement, etc'. Additionally, as a verb 'rule' means 'to control or direct; exercise dominating power or influence over; to exercise authority or dominion over; govern; to decide or declare judicially or authoritatively; decree; to make a formal decision or ruling, as on a point at law'.

Notwithstanding the dictionary meaning for those terms, we note that on occasion some of the terms used in section 34(3)(e) have been used, and indeed are still used, in electricity regulation inconsistently with that ordinary meaning. In particular, the term "guideline" has been used to describe documents that have, in fact, been mandatory.<sup>2</sup> Also, subsection 34(3)(e) states that the Rules can empower the AER and NEMMCO to make "any other document (however described)".

Section 34(3)(e) is therefore capable of two constructions:

- the Rules could empower the AER or NEMMCO to make instruments that themselves directly govern or control the behaviour of market participants or alter their substantive rights or obligations. At its extreme, this power in substance would be indistinguishable from the power of the AEMC to make Rules (**Construction 1**); and
- alternatively the Rules can only empower the AER or NEMMCO to make or issue documents that provide guidance and are non-mandatory in one of two senses:
  - in one sense the documents could be non-mandatory by guiding industry as to how the AER or NEMMCO intends to use its powers (analogous to the ACCC's merger guidelines) or similarly guide industry as to best practice conduct; and
  - in another sense they could be directory rather than mandatory meaning that they are processes, procedures and deadlines or dates that the law expects a party to follow but which, if they are not followed, result in limited, if any, remedies. Usually the only remedy available would be an order to comply. Significantly, substantial rather than strict, compliance will disentitle a party from seeking any remedy and substantive rights and obligations are not affected. For example, a procedure might require a network service provider to lodge an application for a revenue cap decision by a particular date in triplicate at the AER's head office. If a network service provider lodged only two copies a day late at a branch office of the AER, it would not affect at all its rights and obligations concerning charging customers. (**Construction 2**).

*Note: Unless stated otherwise, where this advice uses the term "non-mandatory" it includes both the above senses.*

While we have distinguished between Construction 1 and Construction 2, it should be noted that there is no 'bright line' between the broad and narrow interpretations and matters of judgment and degree are involved in any assessment of whether the conferral, and ultimately the exercise, of the function in section 34(3)(e) (or power in section 34(3)(h) that is discussed below) is legitimate, or within power. For example, although for the reasons set out below we consider all elements of Construction 2 to be

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<sup>2</sup> For instance, there are gas and electricity ring fencing guidelines in many jurisdictions, compliance with which is mandatory.

correct, it is possible that a court may agree with us on most but not all of the elements that we have set out for Construction 2.

#### 4.1 Our view as to the correct meaning of section 34(3)(e)

As noted in section 2 of this advice, the courts gain their comprehension of legislation by reading the instrument as a whole rather than each provision in isolation. In that respect the following important initial observation can be made concerning section 34 as a whole. Section 34 is comprised of:

- subsection 34(1) which is the principal provision that empowers the AEMC to make Rules;
- subsection 34(2) which identifies “without limitation” the subject matter of those Rules; and
- subsection 34(3) which provides some further detail as to the nature of the Rules that the AEMC may make. Importantly, this subsection is not expressed to be “without limitation”.

The difference between subsection 34(2) and subsection 34(3) in this respect positively invites the court to use the words of subsection 34(3) to identify the breadth and bounds of the AEMC’s Rule making powers.

In our view there is a strong case that it is Construction 2 that should be favoured by any court seeking to construe the breadth of the power in section 34(3)(e). Such a construction:

- (a) maintains the distinction between what is a Rule (that is, a mandatory obligation applying broadly to a class of market participants) and documents made or issued under section 34(3)(e);
- (b) better accords with the purpose of the NEL and the principles of the reform package that rule-making and rule-enforcement be separate but requiring a connection between the body exercising the function and the powers and functions ascribed to that body; and
- (c) maintains and gives meaning to the role in the regulatory scheme of documents made or issued under subsections 34(3)(e) or (f) (that, in combination with subsection 34(3)(h), may subsequently be of binding effect on a person).

Each of these points is examined further below.

##### (a) Distinction between Rules and documents made or issued under section 34(3)(e)

It should be clear that any guidelines, tests, standards, procedures or any other documents made and/or issued under section 34(3)(e) are not Rules because they are not required to follow the procedure for the making of a Rule by the AEMC in Division 3 of Part 7. That is, all the checks and balances provided in Division 3 of Part 7 to make a Rule, in particular the public consultation processes, which from section 3 of this memorandum are clearly central elements of the reform, are not required to be met for the AER or NEMMCO to make or issue a guideline, test, standard or procedure.

If Construction 1 of section 34(3)(e) were adopted, these checks and balances would be circumvented and their purpose frustrated.

The different processes for making a Rule and making or issuing a document under section 34(3)(e) also suggests that such documents should set out a process or procedure to be followed, as opposed to mandating a substantive outcome. The principle of proportionality would imply that those things that determine substantive outcomes and have a significant impact on persons participating in the national electricity market are properly the subject of Rules. The converse of this is that those things that are ancillary or secondary to substantive outcomes may properly be the subject of documents made in the absence of broader participation or consultation.

##### (b) Consistent with the separation of the roles of Rule-making and Rule-enforcement

There is also a strong argument that the any conferral of a function to make or issue a document under section 34(3)(e) must be conferred and exercised consistently with the functions and powers of the body upon whom the function is conferred.

If the function to make or issue documents is interpreted by reference to the AER's powers, this would suggest that the exercise of the function should be limited to its role of monitoring compliance, investigating breaches or possible breaches of provisions of the NEL or the Rules, and performance of economic regulatory functions or powers.

If the function is interpreted by reference to NEMMCO's powers, the exercise of the function should be limited to the operation and administration of the market.

(c) Gives meaning to the different list in subsection 34(3)(g)

For the purposes of this advice, we note that the list of documents in subsection 34(3)(g) differs from the list in subsection 34(e) in a key respect: subsection 34(3)(g) includes the term "rules" in the list which is notably absent from the list in subsection 34(3)(e).

That difference is consistent with the concept of separation of rule making and rule enforcement which underpins the reform package of which the Law is a part.

(d) Maintains and gives meaning to the role in the regulatory scheme of documents issued under subsection 34(3)(e), and directions to comply with such documents under subsection 34(3)(h)

As explained in section 2, subsection 34(3)(e) would not be interpreted in isolation. The language of subsections 34(3)(e), 34(3)(f), 34(3)(g) and 34(3)(h) clearly inter-link. Together, and in contrast to the Rule-making power of the AEMC in subsection 34(1), it is clear that the instruments that the AER or NEMMCO would produce and the effect of them under subsections 34(3)(e), 34(f) and 34(3)(h) are intended to perform a different role in the regulatory scheme to that of the Rules. Also, if subsection 34(3)(e) was intended to provide for the Rules to empower the AER or NEMMCO to make mandatory instruments, there would be no need for subsection 34(h) to be included in the Law. That would be contrary to the principle set out in section 2 that it is to be presumed that all the words included in a law are intended to "do work". This clearly suggests that the powers in subsections 34(3)(e), (f) and 34(3)(h) should not, in combination, be conferred or exercised in such a way that the documents issued under subsection 34(3)(e) or (f) effectively become Rules.

Such a position is also consistent with the principle of statutory interpretation in relation to the operation of specific and general powers within a statute. This principle is broadly that where a statute confers both a general power not subject to limitations, and a special power that is not subject to limitations, the general power cannot be exercised to do that which is properly the subject of the special power.<sup>3</sup> Therefore, the power to issue documents under subsection 34(3)(e) or (f) and to direct compliance with such documents under subsection 34(3)(h) should not be used to circumvent or avoid the Rule making process.

It is clear in our view that any documents issued under subsection 34(3)(e) or (f) are not binding in the absence of:

- first, a Rule conferring a power to direct compliance made under subsection 34(3)(h); and
- second, a direction to comply made by the relevant body made under subsection 34(3)(h).

If compliance with documents issued under subsection 34(3)(e) or (f) was mandatory following their being made or issued without any further regulatory action (eg a direction pursuant to a Rule contemplated by subsection 34(3)(h)), subsection 34(3)(h)(i) would be nugatory.

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<sup>3</sup> See for example: *Mason J in Leon Fink Holdings Pty Ltd v Australian Film Commission* (1979) 141 CLR 672, at 678.

- (e) Use of the words 'or any other document (however described)'

The use of the words 'guidelines', 'tests', 'standards' and 'procedures' suggests that the characteristics of the types of documents made or issued under subsection 34(3)(e) or (f) are that they direct a process or procedure to be followed as opposed to mandating a substantive outcome. Things that determine substantive outcomes could be expected to properly be the subject of Rules.

At first blush the words "or any other document (however described)" appear to be very broad words indeed. For instance, contracts, deeds, cheques, affidavits, wills, court orders, written legal advices, regulations and Acts of Parliament are all documents. It would be quite peculiar if "any other document" in the context of this Law were to include any of those documents.

As noted in section 2, such general words should be interpreted with their accompanying words and may be limited by the characteristics of the other words in the list of which they are a part. We consider that a key characteristic that should properly be inferred from the list is that it is not intended to include mandatory documents.

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## 5 Subsection 34(3)(h)

Subsection 34(3)(h) of the Rules provides that Rules made by the AEMC in accordance with the NEL and the Regulations may:

- (h) confer a power of direction on the AER, the AEMC, NEMMCO or a jurisdictional regulator to require a person conferred a right or on whom an obligation is imposed under the Rules (including a Registered participant) to comply with –
- (i) a guideline, test, standard, procedure or other document (however described) referred to in paragraph (e) or (f); or
  - (ii) a standard, rule, specification, method or document (however described) referred to in paragraph (g);...

### 5.1 Minimum requirements for the exercise of the subsection 34(3)(h) power on its plain meaning regardless of the two possible constructions of subsections 34(3)(e) and 34(3)(h)

It should be noted that before mandatory compliance with a guideline, test, standard, procedure or other document is required by a person under subsection 34(3)(h), the following would be necessary:

- first, that a guideline, test, standard, procedure or other document has been made or issued under either subsection 34(3)(e) by virtue of a Rule made by the AEMC that confers a function to make such a document (or, for completeness, a Rule has applied, adopted or incorporated the provisions of a document under subsection 34(3)(g));
- secondly, that a Rule has been made by the AEMC that confers a power of direction; and
- thirdly, that a direction to comply has been issued.

### 5.2 Scope of possible interpretations

Similarly to subsection 34(3)(e), subsection 34(3)(h) is capable of two constructions:

- a broad construction (**Construction 1**) that may extend to a requirement for all participants upon whom a right is conferred or an obligation is imposed to generally comply with the relevant guideline, test, standard, procedure or other document;

- a broad construction may suggest that a direction to comply could be issued such that it applied to the entire class of persons or participants (for example, all generators, or all distribution network operators or even all market participants); and
- a broad construction may also suggest that the ‘right or obligation’ could be any right or obligation in the National Electricity Law or Rules at all and need not be specifically contemplated – that is the mere characteristic that market participants are subject to the National Electricity Rules may be regarded as sufficient to support a Rule applying to all of those participants, and
- a more narrow construction (**Construction 2**) that requires:
  - a particular person to be identified;
  - a particular threshold to be met before compliance is directed,
    - o for example, a recidivist, or a person with a particular proposal; and
  - a specific right or obligation to be identified.

### 5.3 Our view as to the correct meaning of subsection 34(3)(h)

In our view there is a strong case that it is Construction 2 that should be favoured by any court seeking to construe the breadth of the power in subsection 34(3)(h). Such a construction:

- (a) is consistent with the use of the phrase ‘a person’, which appears to implicitly contemplate a level of particularity as to whom the requirement to comply is directed, and related to this;
- (b) further gives meaning to the phrase ‘a person’ which also suggests that a nexus is required between the person directed to comply and right or obligation that is imposed on them under the Rules;
- (c) respects the principle of proportionality – given the consequences that may flow from non-compliance, this suggests that the power to direct compliance should only be exercised in specific circumstances where failure to comply with documents issued under subsection 34(3)(e) (or adopted by the Rules under subsection 34(3)(g)) gives rise to not insignificant consequences; and
- (d) as discussed in part in relation to subsection 34(3)(e) above, maintains and gives meaning to the separate role in the regulatory scheme given to Rules and that given to documents made or issued under subsection 34(3)(e), which, in combination with subsection 34(3)(h), may subsequently be of binding effect on a person.

Each of these is examined further below.

- (a) Use of the phrase ‘a person’: particularity as to whom the requirement to comply is directed

The language used in subsection 34(3)(h), which permits a direction to comply to require ‘a person conferred a right or on whom an obligation is imposed’ to comply with a document issued under subsection 34(3)(e) or referred to in subsection 34(3)(g), suggests that the person who is the subject of the direction to comply must be specifically identified.

If the legislature intended that persons generally, or a class of persons could be directed to comply, it could be expected that the language would have explicitly stated that ‘a person, or class of persons’ could be directed to comply.

Indeed the legislature did contemplate that certain mandatory requirements would apply generally to market participants or general classes of market participants and the Rules (with its checks and balances) is the vehicle for the development and application of such requirements. At one level it

would make a mockery of that Rule making structure if the use of a combination of subsection 34(3)(e), (h) or (g) could be used to the same effect.

- (b) Use of the phrase 'a person': nexus between person directed to comply and the relevant document

Subsection 34(3)(h) provides that a direction to comply may only be made in respect of a person 'conferred a right or on whom an obligation is imposed under the Rules'. The separate role of subsections 34(3)(e) and 34(3)(h) in the regulatory scheme from that of the Rules suggests that a particular right or obligation under the Rules must be identified prior to any direction to comply being made.

- (c) Respects the principle of proportionality: threshold to be met before a direction to comply is made

A direction to comply with a document issued under subsection 34(3)(e) or a document referred to in subsection (g) is, given that such documents are not Rules, significant. The principle of proportionality suggests that whatever gives rise to a direction to comply must also be of some significance. Further, the phrase 'a person conferred a right or on whom an obligation is imposed under the Rules' suggests that a connection is required between the direction to comply and the right or obligation. In combination therefore, it could be argued that the direction must be aimed at correcting some kind of failure that is ultimately affecting that person's rights or obligations under the Rules.

While a document made or issued by virtue of a power conferred under subsection 34(3)(e) may give guidance or suggest best practice for achieving compliance with the Rules, the framework established through the combination of subsections 34(3)(e) and (f) suggests that it should ultimately be left to the market participant concerned to determine how to run its business in accordance with the Rules. However, the sanction for non-compliance with the Rules may be for a relevant body to direct a particular person to comply with a document made or issued under subsection 34(3)(e) as an aid to ensuring compliance with the Rules in the future.

If the power of the AER to direct compliance in subsection 34(3)(h) is interpreted by reference to the AER's powers, this would suggest that the power should be connected in some way to the AER's role of enforcement and compliance with the Rules or its economic regulatory functions. In the event that a particular market participant failed to comply with any particular Rule in respect of which matters that are ancillary to that Rule are covered by a document made or issued under subsection 34(3)(e), the AER (in the event that a power to direct had been conferred under subsection 34(3)(h)) could direct that particular market participant to comply with the document made or issued under subsection 34(3)(e).

The circumstances in which the AER in fulfilling its economic regulatory function might use the power to direct a person to comply with a guideline or other subsection 34(3)(e) document are less obvious but, perhaps, not inconceivable. For instance, it might issue a guideline concerning the outsourcing policies of networks. This guideline might specify that the AER will usually accept as evidence of the costs of performing operations and maintenance that an outsourcing contract was the result of a public tender. Some participants might instead choose a different means of outsourcing and use different evidence to substantiate that the costs were efficient costs (eg detailed information as to the service provider's costs). However, if a particular network business were to refuse to provide any evidence as to the efficient costs of outsourced service provision, the AER could direct that network to comply with the guideline requiring any outsourcing contract to be tendered.

If the power of NEMMCO to direct compliance in subsection 34(3)(h) is interpreted by reference to NEMMCO's powers similar considerations apply. Insofar as possible it should be left to market participants to organise their activities as they see fit to ensure compliance with their obligations relating to the day-to-day operation of the national electricity market. For example, say NEMMCO issued a guideline as to the information that participants should provide in churning NMIs and one particularly aggressive retailer did not choose to comply with the guideline and was found to repeatedly need NMI transfers to be reversed or corrected. In these circumstances the exercise of the power to direct *that person* to comply may be appropriate. As a further example, NEMMCO may have

a communications equipment guideline in place concerning what communications infrastructure is appropriate to use to connect back to the SPD. NEMMCO may find that a particular generator's communications system does not conform to the guideline and repeatedly fails. NEMMCO might direct *that person* to comply with the communications equipment guideline.

Guidelines and similar documents offer the benefit (as opposed to Rules) that, as a general matter of course, compliance with such documents is not mandatory (by either the body that issued or made the guidance or the person to whom the guidance relates). However, where compliance with guidance, tests, standards or procedures ensures ultimate compliance with the Rules, there may be some benefit in directing compliance with such documents in respect of specific market participants that may have been found to be in breach of a particular Rule on more than one occasion.

In the event of systemic non-compliance by market participants, whether any or all of the documents should be made into a Rule, and therefore, for compliance to be mandatory by all relevant persons, would always be available for consideration.

- (d) Maintains and gives meaning to the role in the regulatory scheme of documents issued under subsection 34(3)(e), and directions to comply with such documents under subsection 34(3)(h)

As discussed above in relation to subsection 34(3)(e), the existence of subsections 34(3)(e) and 34(3)(h) in the NEL as well as the Rule-making power of the AEMC in section 34(1) indicates that subsections 34(3)(e) and 34(3)(h) are intended to perform a different role in the regulatory scheme to that of the Rules.

Further, the type of regulatory arrangement evoked by subsections 34(3)(e), 34(3)(f), 34(3)(g) and 34(3)(h) is similar to:

- the mechanism in section 65E of the Trade Practices Act. Although Standards Australia standards are not of themselves mandatory, section 65E enables the relevant Commonwealth Minister to declare that a Standards Australia standard is mandatory for corporations and certain other persons those other parties to whom that part of the Act applies;
- in telecommunications, the mechanism by which industry codes can be developed by industry bodies and associations that represent sections of the telecommunications industry, on any matter which relates to a telecommunications activity. A code is initially only binding on those parties who are signatories to the code. However, if a code is registered by the Australian Communications and Media Authority (**ACMA**), the ACMA is then able to direct any participant in a section of the telecommunications industry which is breaching the code to comply with it, whether they are a voluntary code signatory or not.

In summary therefore, subsections 34(3)(e), 34(3)(f), 34(3)(g) and 34(3)(h), taken together, suggest that:

- the types of documents issued under subsection 34(3)(e) should properly deal with matters such as processes or procedures to be followed and matters ancillary to the more substantive Rules, as opposed to mandating particular outcomes; and
- directions to comply under subsection 34(3)(h) with documents issued under subsection 34(3)(e) (or subsection 34(3)(g)) should be made to:
  - a particular person;
  - in relation to a specific right or obligation that relates to them under the Rules; and
  - only in circumstances where it has been demonstrated that there is a need for compliance with that document to give effect to the right, or adherence to the obligation so identified in the Rules.



## 5.4 Applying the Statutory Principles Concerning the Grant by the AEMC of Powers

We note further that whichever of the possible constructions of subsections 34(3)(e) and (h) discussed above apply, these subsections provide a statutory framework under which the AEMC is provided with the power to grant powers to make regulatory instruments and to make compliance with them mandatory. In this circumstance, we consider that the application of the maxim of statutory construction discussed in section 2 of this memorandum may provide a strong basis to argue that the AEMC cannot use other means to empower the AER or NEMMCO to make regulatory instruments and make them mandatory.

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## 6 Specific questions

### 6.1 What is the scope of the AER's power under subsections 34(3)(e) and 34(3)(h)? In particular, can the AEMC effectively delegate its rule making powers to the AER? If so, does this contravene any established legal principle?

As discussed above, were subsections 34(3)(e) and 34(3)(h) to be broadly construed, the scope of the AER's powers would be very broad.

First, a broad construction of subsection 34(3)(e) (Construction 1 in the discussion above) would suggest that a Rule could confer a function on the AER to make or issue guidelines, tests, standards, procedures or any other document on a range of matters that could encompass the subject matter for the Rules as set out in subsection 34(1), and the matters or things specified in Schedule 1 to the NEL.

Secondly, a broad construction of subsection 34(3)(h) would suggest that the Rules could confer a power of direction on the AER to generally require compliance by any person conferred any right or on whom any obligation is imposed under the Rules with any document issued under subsection 34(3)(e) or referred to in subsection 34(3)(g).

However, in our view, such a broad construction of the relevant provisions would not be correct.

Applying the principles of statutory construction, in our view, the scope of subsections 34(3)(e) and (h) is more likely to be limited in the following respects:

- the instruments which can be made under subsection 34(3)(e) would of themselves necessarily be non-mandatory: either they would be mere guidance as to the exercise of the AER's powers or guidance on other matters, or, at their highest, their procedural elements could be directory in the sense that the law expects adherence to them but imposes limited consequences indeed for non-compliance;
- the making mandatory under subsection 34(3)(h) of one of these documents is only validly done in connection with an AER or NEMMCO power and is only within power in respect of particularly identified persons who are subject to an identified right or obligation;
- for the documents to be made and to be made mandatory, the Rules must also specifically provide for two distinct powers – one to make the instrument and separately another to require adherence and, of course, each of the powers must actually be exercised by the AER or NEMMCO as the case may be.

Further, the Rules that confer the function and/or power may themselves place restrictions on the AER's exercise of the relevant function or power.

### 6.2 Are there any provisions in the NEL dealing with the AEMC's Rule-making powers (for example, item 17 in Schedule 1) which signal an intent by legislators to limit the scope of guidelines that could be made by the AER?

Subsection 34(2) provides:

- (2) Without limiting subsection (1), the AEMC in accordance with this Law and the Regulations, may make Rules for or with respect to any matter or thing specified in Schedule 1 of this Law.

Schedule 1 is entitled 'Subject matter for the National Electricity Rules' and lists a number of subject areas including: registration; participant fees; wholesale exchange; operation of generation, transmission and distribution systems; transmission system revenue and pricing; distribution system revenue and pricing; metering; and disputes in relation to the Rules.

However, subsection (2) is expressly stated not to limit subsection (1). Nor does subsection (2) require the AEMC to make Rules covering the subject matter listed in Schedule 1. Therefore, it would appear that Schedule 1 merely provides an indication of the types of matters that it may be expected would be dealt with by the National Electricity Rules. That said, subsection 34(1) does limit (although in a very broad way) the Rules that may be made by the AEMC. In effect subsection 34(1) provides that the AEMC is limited to making Rules for or with respect to regulating the matters listed in subclauses (a) to (c).

Some limit to the scope of any exercise of a function conferred under subsection 34(3)(e) may be derived from section 15, which sets out the functions and powers of the AER. These functions and powers include: to monitor compliance by Registered participants and other persons with the NEL, the Regulations and the Rules; investigate breaches or possible breaches of provisions of this Law, the Regulations or the Rules that are not offence provisions; AER economic regulatory functions or powers; and any other functions and powers conferred on it under the NEL and the Rules.

However, in our view as discussed in Sections 4 and 5 of this memorandum, the much more significant limitations are found both in the entirety of the legislative reform package and the language of subsections 34(3)(e) and (h) themselves.

### **6.3 Given the policy intent of the reform package:**

#### **(a) Are the subsection 34(3)(e) and 34(3)(h) powers likely to be consistent with this policy intent under Construction 1 or Construction 2?**

In our view only Construction 2 of each of subsection 34(3)(e) and (h) (as set out in sections 4 and 5 of this memorandum) are consistent with the policy intent of the reform package.

If Construction 1 were to be correct, the AEMC could, in substance, empower the AER to make rules. That would be inconsistent with the following policy aims of the reform package:

- there would be no, or at least incomplete, separation of rule making and rule enforcement / administration;
- the process by which the AER could make rule like instruments could be opaque; and
- as a result, businesses would face additional risk.

#### **(b) Assuming Construction 2 applies, what (if any) are the deficiencies in the subsection 34(e) and (h) provisions in respect of the policy intent that would need to be addressed?**

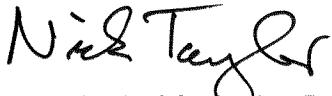
As noted in our advice, the words of subsections 34(3)(e) and (h) themselves are ambiguous. It is only by construing the words in the context of the statute as a whole that their meaning, in our view, becomes clear. That situation is, in our view, poor because a reader who does not engage in the detailed consideration that we have undertaken could conclude that the subsections could be used much more broadly. Indeed some aspects of the current draft AEMC rules would appear to be based on such a broader reading.

To resolve the ambiguity and make the principles more readily accessible to all readers, in subsection 34(3)(e) after the words "any other document (however described)" there should be

inserted the words "but not rules". For the purposes of subsection 34(3)(e), "rules" should be defined to mean a document which requires persons to do something, or prohibits persons from doing something.

It should explicitly be stated in subsection 34(3)(h) that the power is to be used as a remedial instrument and not as an instrument used as a means to govern general electricity market conduct.

Yours sincerely

A handwritten signature in black ink that reads "Nick Taylor". The signature is written in a cursive style with a large, prominent "N" and "T".

**Nick Taylor/ Catherine Dermody/ Charlie Beasley**  
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## Appendix 1: Legal principles of statutory interpretation

### 1 The Starting Point – meaning to be given to words and the ordinary meaning of words

In interpreting the words of a statute, it is an accepted principle that words are to be given their literal meaning if there is only one literal meaning open on the face of the words used.

However, if the language used in a provision gives rise to some ambiguity this is to be resolved by a purposive interpretation such that the meaning adopted is one that best meets the objectives of the legislation.

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### 2 The principal focus – evidence of the purpose of the legislation

A purposive interpretation is required by:

- subsection 7(1) of Schedule 2 of the NEL which requires that “[i]n the interpretation of a provision of this Law, the interpretation that will best achieve the purpose or object of this Law is to be preferred to any other interpretation”; and
- at Common law.

A purposive construction is to be preferred to a construction that would not promote the purpose or object of the relevant Act.<sup>4</sup> Where the various instruments of the reform package are subject to Commonwealth and State law, each of the above sources is relevant, however the same general principles of interpretation flow from each.

Where legislation constitutes the implementation of a package of reforms, the courts commonly consider what were the previous failings of the law that the reform package was designed to correct and this may be regarded as an important (or perhaps even the most important) element of the purpose of the legislation.

To establish the purpose or object underlying the NEL, regard may be had to extrinsic material in accordance with section 8 of Schedule 2 of the NEL. Subsection 8(2) of Schedule 2 provides that consideration may be given to extrinsic material capable of assisting in the interpretation of a provision of the NEL:

- (a) if the provision is ambiguous or obscure, to provide an interpretation of it; or
- (b) if the ordinary meaning of the provision leads to a result that is manifestly absurd or unreasonable, to provide an interpretation that avoids such a result; or
- (c) in any other case, to confirm the interpretation conveyed by the ordinary meaning of the provision.

“Ordinary meaning” in this section is the “ordinary meaning conveyed by a provision having regard to its context in this Law and to the purpose of this Law”. Subsection 8(3) of Schedule 2 does however qualify the potential use of extrinsic material as it provides that in determining whether consideration should be given to extrinsic material and determining the weight to be given to the extrinsic material, regard is to be had to:

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<sup>4</sup> See for example: *Mills v Meeking* (1990) 91 ALR 16, per Dawson J at 30-31; *Saraswati v R* (1991) 100 ALR 193 at 207-208 per McHugh J, with whose judgment Toohy J agreed; *Corporate Affairs Commission (NSW) v Yuill* (1991) 100 ALR 609 at 628-9 per McHugh J; *R v Bunder* (1994) 70 A Crim R 577 at 991.

- (a) the desirability of a provision being interpreted as having its ordinary meaning; and
- (b) the undesirability of prolonging proceedings without compensating advantage; and
- (c) other relevant matters.

“Extrinsic material” for the purpose of Section 8 of Schedule 2 is defined in subsection 8(1) as relevant material not forming part of the NEL, which includes, for example, parliamentary materials of South Australia or documents declared by the regulations to be a relevant document for purposes of subsection 8(1).

Common law principles governing statutory interpretation<sup>5</sup> and section 8 of Schedule 2 of the NEL also provide that regard may be had to extrinsic material. As stated by McHugh J in *Newcastle City Council v GIO General Ltd* (1997) 191 CLR at 112:

“In construing a provision [ ... ] a court is permitted to have regard to the words used by the legislature in their legal and historical context and, in appropriate cases, to give them a meaning that will give effect to any purpose of the legislation that can be deduced from that context.”

McHugh J went on to cite Toohey and Gummow JJ in *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408:

“It is well settled that at common law, apart from any reliance upon s 15AB of the Acts Interpretation Act 1901 (Cth), the court may have regard to reports of law reform bodies to ascertain the mischief which a statute is intended to cure. Moreover, the modern approach to statutory interpretation (a) insists that the contexts be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses “context” in its widest sense to include such things as the existing state of the law and the mischief which, by legitimate means such as those just mentioned, one may discern the statute was intended to remedy.”

Section 3 of this memorandum analyses the relevant extrinsic materials to discern the relevant purposes of the legislation which is the subject of this advice.

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### **3 Interpreting the meaning of lists of concepts in legislation**

Note that section 34(3)(e) of the NEL sets out a list of instruments.

Several related further principles of statutory construction provide additional assistance to courts in interpreting such lists.

First, the context of the provision itself is considered.<sup>6</sup> The implications following from this principle are, among others, that:

- words should be interpreted with reference to accompanying words;
- words should be interpreted with reference to other parts of the legislation in which they appear;
- consistent use of words is assumed;

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<sup>5</sup> See for example: *Newcastle City Council v GIO General Ltd* (1997) 191 CLR at 112 per Toohey, Gaudron and Gummow JJ at 99

<sup>6</sup> See for example, *Project Blue Sky Inc v Australian Broadcasting Authority* (1988) 194 CLR 355 at 381 per McHugh, Gummow, Kirby and Hayne.

- the express meaning of something may draw attention to the absence of something else; and
- provisions may be interpreted with reference to other legislation and provisions may be interpreted with reference to prior or other existing law.

Two maxims or principles of statutory interpretation flow specifically from the requirement that words should be interpreted with reference to accompanying words:

- *noscitur a sociis* which provides that the meaning of a word is known from the words that accompany it; and
- *ejusdem generis* which provides that if words of a particular meaning are followed by general words, the general words may be construed as being limited to the to the same kind as the particular words.

For the maxim *ejusdem generis* to apply, the specific words must have a genus, or a basic core of meaning by reference to which the general words should be interpreted. The significance of the maxim has diminished as the courts have placed greater emphasis on the purpose of the Act being construed and on much broader means of context.<sup>7</sup> The operation of these maxims of interpretation is to some extent also circumscribed by legislation. For example, section 15AD(a) of the *Acts Interpretation Act 1901* (Cth) provides that an example given in a statute is not to be taken as exhaustive.

The courts will be further guided by the principle that the express mention of something may draw attention to the absence of something else or, in other words, the express mention of one thing is done at the express exclusion of another. This principle is encapsulated in the maxim *expressio unius est exclusio alterius*. The operation of this maxim provides that where an instrument expressly mentions matters or items within a category, such that the failure to include other matters or items of that category is significant or obvious, that an inference can be drawn that those items or other members of that category were not intended to be included in the instrument. The courts have however counselled that this maxim should be treated with caution, such that in applying the maxim the question must still be asked whether the construction is in accordance with the underlying purpose of object of the legislation.<sup>8</sup>

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## 4 Interpreting legislation that grants a power to one body to grant powers to other bodies

Note that subsection 34(3)(e) and (h) of the NEL provide the AEMC with the powers to make Rules that grant powers to other bodies.

The courts are guided in this context by the maxim that a person invested with a statutory power must exercise it personally, rather than delegate its exercise to others (referred to in the law as *delegatus non potest delegare*).

This principle of construction gives way in the face of an implied or express contrary legislative intention. Where there is an express power in the statute to delegate:

- the prohibition against delegation does not apply, but
- the ability to delegate is limited to the terms of the express delegation power – that is, where there is a specific provision under which a body can grant powers to other bodies, it is a basis upon which courts presume that there is no other or more general power to delegate.

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<sup>7</sup> See for example, Speigleman CJ in *Deputy Commissioner of Taxation v Clark* (2003) 57 NSWLR 113 at 143: "Whether or not general words ought to be read down is to be determined by the whole of the relevant context, including other provisions of the statute and scope and purpose of the statute".

<sup>8</sup> See for example: *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at 349-9 per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ.

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## 5 All words should be given a meaning

One particular principle that is relevant to the combined interpretation of subsections 34(3)(e) and (h) is as that courts will prefer a construction that gives every word in that instrument a role. That is, it will be assumed that every word is intended to have meaning, and will attempt to give meaning to every word of the provision being interpreted.<sup>9</sup>

The above principle suggests that for subsection 34(3)(h) to add something to the regulatory structure it must provide for something additional to subsection 34(3)(e).

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<sup>9</sup> See for example, *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 382 per McHugh, Gummow, Kirby and Hayne JJ.

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## Appendix 2 Policy behind the legislative reform package of which the National Electricity Law is a part

### 1 Reasons for Reform

As a constituent element of a broader objective to improve the effective operation of open and competitive national energy markets, a stated purpose of NEL reform package (**reform package**), according to the Ministerial Council of Energy (**MCE**) in its Communiqué of 11 December 2003 (**MCE Communiqué**) was to:

“...improve accountability, streamline decision-making and remove unnecessary duplication of regulatory processes. It is designed to provide an appropriate balance between the development and implementation of energy market rules; industry regulation and general competition regulation.”

The MCE further noted in a report entitled *Report to Council of Australian Governments: Reform of Energy Markets* of 11 December 2003 (**MCE COAG Report**) that the:

“...processes must be made more efficient and streamlined, responsive to market developments, and occur within a clear framework of government policy.”<sup>10</sup>

We understand that the introduction of the reform package was a policy response to the failings of the existing electricity industry regulatory structures. We consider that these failings can be inferred from the language of the statute itself and are also likely to be supported by a further review of relevant secondary materials to which a court would have regard.

These failings included duplicative and inefficient governance and rule-making regimes. There existed a large degree of overlap in responsibility between the National Electricity Code Administrator (**NECA**) and the Australian Competition and Consumer Commission (**ACCC**) in respect of rule changes to the National Electricity Code (**Code**). In effect, to bring about a Code change, both the ACCC and NECA's Code Change Panel had to undertake an assessment of the Rule change. Compounding this duplication and inefficiency was the fact that the Statement of Regulatory Principles, which formed a type of quasi-regulation above and beyond the Code regulations, imposed another layer of regulatory complexity for market participants.

As well as the concerns about inefficiency and duplication, significant concerns existed in relation to the blurred roles played by the ACCC as both the body which approved and in many circumstances in practice re-wrote, the rules and network regulator. Similar concerns were raised in relation to NECA's role as a writer and enforcer of the Rules. This blurring of roles created potential conflicts of interest increasing investment uncertainty.

Finally, under the existing regime, there was a perception that that the rule change process as it operated was opaque and rule makers lacked accountability.

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### 2 The reform package

In response to these concerns, the NEL reform package sought to explicitly:

- separate the rule making and rule enforcement roles;
- improve the process by which Rules are made;
- introduce a generally more transparent and accountable rule making process; and

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<sup>10</sup> Ministerial Council on Energy, *Report to Council of Australian Governments: Reform of Energy Markets* (11 December 2003), p 8.



- overall, to reduce the regulatory risk faced by market participants.

These aims of the NEL reform package are discussed further below.

(a) Separation of the rule-making and rule-enforcement / administration

With reference to the separation of the rule-making and rule-enforcement roles, the MCE in the MCE COAG Report proposed the establishment of two new statutory bodies where “[o]ne body will focus on rule-making and market development, the other on network access regulation and market rule enforcement.”<sup>11</sup> The reform package gave effect to this through the creation of the AEMC which was given responsibility for “Rule making and market development”<sup>12</sup> and the AER which was given “enforcement, compliance monitoring and economic regulatory functions.”<sup>13</sup>

The functions and powers of the AEMC were elucidated in the Australian Energy Market Commission Establishment Bill Second Reading Speech 2004 (SA):

“The Australian Energy Market Commission will be accountable to and subject to the power of policy direction from the MCE. The object of the Australian Energy Market Commission is to make code changes, undertake reviews and carry out other Australian energy market development functions as conferred on it under relevant Commonwealth, State and Territory Legislation. The electricity code change role of the existing National Electricity Code Administrator will be transferred to the Australian Energy Market Commission.”

In the MCE COAG Report, the MCE Communiqué also notes that the AEMC “will have no regulatory enforcement responsibilities and will not itself be able to initiate code changes other than of a minor administrative nature”<sup>14</sup> The inability of the AEMC to initiate its own substantive rule change is set out in section 91(2) of the NEL.

More specifically, the AEMC’s functions and powers are detailed in section 29 of the NEL as follows:

- (1) The AEMC has the following functions and powers—
  - (a) the Rule making functions and powers conferred on it under this Law and the Regulations; and
  - (b) the market development functions conferred on it under this Law and the Rules; and
  - (c) any other functions and powers conferred on it under this Law and the Rules.
- (2) The AEMC has power to do all things necessary or convenient to be done for or in connection with the performance of its functions.

The functions and powers of the AER were discussed in the Second Reading Speech of the Trade Practices Amendment (Australian Energy Market) Bill 2004 (Cth) which sets out the following:

“Initially the AER will have responsibility for the economic regulation of wholesale electricity and transmission networks and key rule enforcement functions. It will undertake the regulatory and enforcement functions previously exercised by the Australian Competition and Consumer Commission and the National Electricity Code Administrator.”

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<sup>11</sup> Ibid.

<sup>12</sup> Second Reading Speech National Electricity (South Australia) (New National Electricity Law ) Amendment Bill (SA) , p 3.

<sup>13</sup> Ministerial Council on Energy, above n 8, p 8.

<sup>14</sup> Ministerial Council on Energy, above n 8, p 8.

More specifically, the AER's functions and powers are specified in section 15 of the NEL, as follows:

The AER has the following functions and powers—

- (a) to monitor compliance by Registered participants and other persons with this Law, the Regulations and the Rules; and
- (b) to investigate breaches or possible breaches of provisions of this Law, the Regulations or the Rules that are not offence provisions; and
- (c) to institute and conduct proceedings—
  - (i) against relevant participants under section 61 of this Law or section 44AAG of the Trade Practices Act 1974 of the Commonwealth; or
  - (ii) in respect of Registered participants under section 63 of this Law; or
  - (iii) against persons under section 68 of this Law; and
- (d) to institute and conduct appeals from decisions in proceedings referred to in paragraph (c); and
- (e) to exempt persons proposing to engage, or engaged, in the activity of owning, controlling or operating a transmission system or distribution system forming part of the interconnected transmission and distribution system from being registered as Registered participants; and
- (f) AER economic regulatory functions or powers; and
- (g) any other functions and powers conferred on it under this Law and the Rules.

(b) Improvement in rule-making process

Following on from the separation of the rule-making and rule enforcement process, the reform package seeks to improve the process by which rules are made through removing duplication and providing for an explicit and predictable rule making process.

The reform package has sought to achieve this policy objective through creating a single rule making process in Part 7 of the NEL which specifically provides for consultation processes and requires that Rule changes be made with reference to the single clear National Electricity Market Objective.

This reform package was also intended to increase the transparency of the rule-making process and remove perceptions of conflict of interest. This concern can be seen in relation to the decision to prevent the AEMC from initiating substantive rule changes. As noted in the Second Reading Speech to the National Electricity (South Australia) (New National Electricity Law) Amendment Bill (SA) 2004 at page 5:

“This [position] is in accordance with the policy position, stated by the Ministerial Council on Energy in its December 2003 Report, that the initiator of a rule change should not also decide whether the rule change should be made.”

The focus on accountability of the governance bodies is also evident in the MCE COAG Report discussion relating to the accountability of the AER under the reform package. The Communiqué notes:

“The AER will operate within an enhanced framework of accountability to governments and market participants through clear consultation, reporting and transparency obligations and accessible avenues of appeal against regulatory decisions.”<sup>15</sup>

(c) Reduction of regulatory risks

Flowing from the separation of roles and more transparent and accountable rule making process, the overall key objective of the reform package was to generally reduce regulatory risks for market participants so as to increase the efficiency of investment. The intention of the package is made clear in the Second Reading Speech to the National Electricity (South Australia) (New National Electricity Law) Amendment Bill (SA) 2004:

“In short, this Bill will strengthen and improve the quality, timelines and national character of the governance and economic regulation of the national electricity market. In turn, this should lower the cost and complexity facing investors, enhance regulatory certainty and lower barriers to competition.”

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<sup>15</sup> Ministerial Council on Energy, above n 8, p 9.