

THE NATIONAL ELECTRICITY LAW AMENDMENT PACKAGE

An initiative of the environment, community and consumer groups of Australia



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TO ALL PREMIERS AND ENERGY MINISTERS

Amendments to the National Electricity Law, in accordance with the Australian Energy Market Agreement, are currently being drafted for sign-off by all NEM Governments in the next few months. Before finalising those important changes, we urge Ministers to consider this package of amendments.

This Amendment Package is designed to deliver urgently needed improvements to the National Electricity Market (NEM). If accepted, the amendments will deliver far greater efficiency, equity and sustainability to the market and to consumers.

Developed by a broad-ranging coalition of environment, community and consumer advocacy groups, this package targets demand management, ecologically sustainable development, protections for low-income consumers and improved consultative process within the NEM.

The Council of Australian Governments (COAG) has recognised the necessity for the NEM to deliver these goals for many years. To date, however, they have largely failed to materialise in the National Electricity Law (NEL), the National Electricity Code (Code), the NEM regulatory bodies and the electricity supply industry as a whole.

The broad symptoms are massive supply-dominance, spiralling demand and the lock out of sustainable energy solutions such as demand management and renewables. The promised efficiency has failed to materialise as the energy supply industry encourages wasteful and excessive consumption. At the same time there has been a failure to recognise the need for a basic level of essential energy supply for all consumers and a safety net to protect vulnerable consumers.

These amendments seek to address these problems at their source. Coinciding with the ongoing energy market reform process, they are both timely and relevant.

We urge you to adopt these amendments and incorporate them in the set of amendments currently being developed by the Ministerial Council on Energy (MCE).

ACT Council of Social Service

NSW Council of Social Service

Alternative Technology Association

Public Interest Advisory Centre

Australian Conservation Foundation

QLD Consumers Association

Climate Action Network Australia

SA Council of Social Service

Conservation Council of SA

Tasmanian Environment Centre

Environment Victoria

Tasmanian Council of Social Service

Environmental Defenders Office

Total Environment Centre

Moreland Energy Foundation

WWF

Introduction

The *National Electricity (South Australia) Act 1996* contains the NEL as a Schedule. This Act is due to be amended to give effect to proposed Australian energy market reforms. Reciprocal legislation will be implemented in other participating states and territories.

The coalition of advocacy groups that has developed this Amendment Package has identified eight key issues that should be addressed in the NEL to adequately provide for environmental and social considerations in the NEM. The Amendment Package identifies where amendments need to be made to existing sections and where new clauses or Parts are required to be inserted into the NEL to address the eight issues.

1 Ecologically Sustainable Development (ESD)

The NEM should have regard for the need to maintain an environmentally sustainable electricity market.¹

Currently, the NEM does not include consideration of any long-run environmental costs such as mining, land use, thermal pollution or climate change. In addition, the market does not provide adequate, long term price signals to foster research, development and commercialisation of renewable energy, energy efficiency or demand management. Policy instruments, such as emissions trading, that aim to introduce environmental externalities, and industry development policies like the Mandatory Renewable Energy Target, will not properly integrate into the energy market unless the market is designed to work with them.

Additionally, the NEM does not include consideration of the impacts of the market on consumers generally, in particular, low-income consumers. The principles of ESD include the requirement to take into account social considerations. The impact of the NEM on low-income consumers is discussed in point 4 below.

Amendments

- Insert into Part 1 and Objects clause as follows:

The objectives of the National Electricity Market are:

- a) to ensure that decisions will be made in accordance with the principles of ecologically sustainable development.²
- A definition of ESD would need to be inserted into section 3 of the NEL. This definition could be taken from section 3a of the Commonwealth *Environment Protection and Biodiversity Conservation Act* and read as follows:

The following principles are principles of ecologically sustainable development:

- (a) decision-making processes should effectively integrate both long-term and short-term economic, environmental, social and equitable considerations;

¹ Within the meaning of the principles of ESD as set out in Section 3a of the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999*.

² It is common to incorporate principles of ESD into legislation. For example see section 3 objects of the Native Vegetation Act 2003 which lists 5 objects bound by ESD. In NSW alone there are over 50 legislative instruments incorporating ESD principles.

- (b) if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation;
- (c) the principle of inter-generational equity—that the present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations;
- (d) the conservation of biological diversity and ecological integrity should be a fundamental consideration in decision-making;
- (e) improved valuation, pricing and incentive mechanisms should be promoted.

2 Demand Management (DM)

The NEM should facilitate demand-side participation by consumers to enable a balance between supply and demand in the market.

It is broadly accepted that the NEM is a supply-side dominated market at the expense of consumers, the environment and efficiency. Inefficiency by consumers increases consumption and therefore the income of energy providers. While the regulated networks are in a position to implement and benefit from DM, many barriers exist under the Code that prevent or fail to encourage DM initiatives. The NEL should make the development of DM an objective. Likewise, the immaturity of the DM provider market should be addressed.

Amendment

- Part 2 of the NEL should contain a new clause requiring that the Code include provisions for the development of DM.

3 Greenhouse Emissions

The NEM should recognise the impact of greenhouse gas emissions produced by the electricity sector.

At present, the NEM and the Code do not recognise the contribution that DM, embedded generation or renewable energy generation make to the reduction of greenhouse emissions. While strategies to address emissions may be implemented through policies outside the market, it is essential the NEM works with, rather than against these policies.

Amendment

- As noted in 1 above, an Objects clause needs to be inserted into Part 1 of the NEL. The Objects clause should continue:
 - b) ...to recognise the long-term environmental and economic cost of greenhouse emissions of the electricity market; and
 - c) to encourage the reduction of greenhouse gas emissions associated with the production and use of electricity.

- A new clause should be inserted into Part 2 requiring that the Code address the issue of greenhouse gas emissions associated with the production and use of electricity.

4 Impact of the NEM on Low-Income Consumers

NEM decision makers should have regard to impacts of the market on low-income consumers.

Vulnerable households are not always able to fully meet their needs in the NEM. They are often housed in below-standard accommodation with inadequate insulation and energy inefficient appliances. They are also more likely to be at home for a longer proportion of the day, missing out on the hidden subsidies that people in full time employment receive from energy provided at the work place. They often experience low-income or constrained cash flow that marginalises them from participating in the NEM.

Electricity is an essential service, i.e., a service (whether provided by a public or private undertaking) without which the safety, health or welfare of a community or a section of the community would be endangered or seriously prejudiced.³ Governments should recognise this fact by subsidising electricity through community service obligations imposed on corporations, concessions and a safety-net including supply and price obligations.

Amendment

- The new Objects clause should continue:
 - d) ...to ensure consumers have continuous access to the affordable, reliable and safe supply of electricity under the NEM, in recognition that electricity is an essential service in the community.
- Part 2 of the NEL should contain a new clause requiring regulators and market participants to consider the impact of their activities on low-income consumers.

5 Community Consultation

The key NEM regulatory bodies should include representation that reflects the NEM goals of equity and access, with particular emphasis on the inclusion of environment, community and consumer advocacy groups. Further, these representatives should be resourced to ensure participation equal to that of industry participants.

The exclusion of environment, community and consumer sector stakeholders on critical decision-making bodies and committees has been chronic, with the make-up of these bodies routinely restricted to more powerful electricity industry stakeholders.⁴ Without effective representation from the community sector on the NEM's key institutions, it can be expected that social and environmental objectives will continue to remain unmet.

³ *Essential Services Act 1981 (SA)*

⁴ For example, see Alan Pears, 'Energy Reform and the Environment', in *Power Progress : An Audit Of Australia's Electricity Reform Experiment*, Graeme Hodge, Valarie Sands, David Hayward, David Scott (eds.), Australian Scholarly Publishing, Monash University, 2004, p. 176; and Gavan McDonnell, 'NSW Government Ownership and Risk Management in a Mandatory Pool: 'Neither Fish nor Fowl nor ...' in Hodge et al., p. 96.

The legislation establishing the new regulatory bodies in the NEM, the Australian Energy Market Commission (AEMC) and the Australian Energy Regulator (AER)⁵ do not provide for community sector representatives. It is recognised that the content of the representation on these bodies cannot be altered through the NEL. Accordingly, it is essential to ensure that adequate, compulsory consultation processes are included in the NEL.

An advisory panel (Advisory Panel) should be established, consisting of environmental experts and representatives from consumer, community and environmental advocacy groups. The Advisory Panel should have both an environmental protection and consumer protection mandate, especially regarding low-income consumers. The Advisory Panel should be independent and provide advice to the AER, AEMC and any other relevant decision making body. Before decisions are made to amend the NEL or the Code, the decision maker must seek the views of the Advisory Panel.

Amendments

- Into Part 2 add:

- a) Clause X 'Consultation During Code Change'

- Extensive public consultation must be carried out during the Code change process. A reasonable length of time for submissions must be provided. Advertisement for submissions should not take place over the December-January period. The decision maker must take into account submissions received during the Code change process.

- b) Clause XX 'Code Changes to be Consistent with this law'

- Any Code changes are consistent with the Objects set out in the Objects clause of this law.

- c) Clause XXX 'Community Representatives on Code Change Panel'

- The Code Change Panel should contain at least two community representatives.

- A new Part Z 'Advisory Panel':

- a) Clause Z 'Establishment of Advisory Panel'

- An independent Advisory Panel must be established and should consist of environmental experts and representatives from consumer or environmental advocacy groups. The Advisory Panel should have both an environmental protection and consumer protection mandate, especially regarding low-income consumers.

- b) Clause ZZ 'Role of Advisory Panel'

- The role of the Advisory Panel is to provide advice to the AER, AEMC, the Code Change Panel and any other relevant decision making body. In making any decision to amend the NEL or the Code, the decision maker must seek the views of the Advisory Panel, and is required to take into account the views of the Advisory Panel in making its decision.

⁵ The AEMC was set up by the *Australian Energy Market Commission Establishment Act 2004*, and the AER was set up under the *Trade Practices Amendment (Australian Energy Market) Bill 2004*.

6 Transparency and Access to Information

Individuals and environment, community and consumer advocacy groups should have appropriate access to key documents relevant to the NEM.

Current NEM regulatory bodies are not subject to FOI legislation in the various NEM jurisdictions. This prevents the community accessing key documents relevant to decisions relating to the development of the NEM and limits the community's ability to participate in the development of the NEM.

Amendment

- A new Part Y – Information and Standing should be added with the following clauses:

- a) Clause Y 'Freedom of Information'

- All bodies administering the legislative instruments underpinning the NEM should be subject to FOI legislation, where appropriate.

- b) Clause YY 'Public Register'

- There must be a public register of key decisions made under the NEL and the Code, as well as public submissions, reports and other documents. This register should be publicly available on a website.

7 Right of Review and Appeal of Decisions

It is essential that affected parties, or groups that represent affected parties such as environment, community and consumer interest groups, be afforded standing to challenge decisions under the NEL and the Code.

Environment and consumer advocacy groups are currently prohibited from seeking judicial review of decisions as they are excluded from the definition of an aggrieved person. The Standing Committee of Officials of the MCE has signalled that the National Electricity Tribunal will be abolished, eliminating the right to merits review of decisions. These barriers to judicial or merits-based redress constitute inappropriate exclusion of the community from critical decisions.

Amendment

- The following clauses should be added to the new Part Y:

- a) Clause YYY 'Standing' Option 1

- Any person shall have standing to seek changes to the Code.

- b) Alternatively Clause YYY 'Standing' Option 2

- For any decision made by any body under the NEL an aggrieved person is as defined.⁶

⁶ The definition should be similar to section 487 of the *Environment Protection and Biodiversity Conservation Act 1999*⁶ with an expansion to provide for groups working on consumer protection issues

c) Clause YYY 'Merits Review'

Merits review is available for decisions of the AEMC and the AER.

- Alternatively, the NEL should be amended to state that “for any decision made by any body under the NEL an aggrieved person is as defined”. The definition should be similar to section 487 of the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999*.⁷
- Additionally, an expansion of the meaning of ‘aggrieved person’ would need to provide for groups working on consumer protection issues to be included in the definition in a similar way to environmental groups.
- The new legislation should explicitly provide that merits review is available for decisions of the AEMC and the AER.

8 Content of the Code/Rules⁸

While amendments to the Code can be made by way of the proposed Code Change Process it is preferable to include key objectives of the Code in the NEL to ensure that essential issues are not sidelined. In assessing changes to the Code, bodies under the NEL should determine whether changes would be likely to result in any public detriment or benefit.

The lack of recognition in the Code of ESD, DM, the impact of greenhouse emissions, the difficulties faced by low-income consumers and the fact that electricity is an essential service, is reflected in the electricity market as a whole. The result is an ongoing failure to consider environmental and social considerations throughout the NEM.

The ‘net benefits test’ currently proposed to assess Code changes is limited to a narrow set of Market Objectives.⁹ By excluding public benefits, the test conflicts with the broader interpretation of public benefit taken by the ACCC and supported by jurisprudence, which includes social and environmental considerations.

Amendment

- A new clause should be added to Part 2 of the NEL providing the following specific list of matters that must be covered by the Code:
 - a) Demand management
 - b) Greenhouse gas emissions reduction
 - c) Low-income consumers, including guarantee of supply
 - d) Recognition of electricity as an essential service
- A new clause should be added to Part 2 of the NEL requiring Code change determinations to consider whether the proposed Code change would be likely to result in any public detriment or benefit.

⁷ See Appendix B for section 487 of the Commonwealth *Environment Protection and Biodiversity Conservation Act*.

⁸ It is anticipated that the Code will become the National Electricity Rules under the amended National Electricity Law.

⁹ Ministerial Council on Energy, Standing Committee of Officials, *Proposed National Electricity Rule Change Process: Consultation Paper*, August 2004, p.12.

Summary of Amendments

1. In Part 1 add clause X 'Objectives':

The objectives of the National Electricity Market are:

- a) to ensure that decisions will be made in accordance with the principles of ecologically sustainable development.
- b) 'to recognise the long-term environmental and economic cost of greenhouse emissions of the electricity market; and
- c) to encourage the reduction of greenhouse gas emissions associated with the production and use of electricity.
- d) to ensure consumers have continuous access to the affordable, reliable and safe supply of electricity under the NEM, in recognition that electricity is an essential service in the community.

2. In Section 3 add 'ecologically sustainable development' means:

The following principles are principles of ecologically sustainable development:

- (a) decision-making processes should effectively integrate both long-term and short-term economic, environmental, social and equitable considerations;
- (b) if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation;
- (c) the principle of inter-generational equity—that the present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations;
- (d) the conservation of biological diversity and ecological integrity should be a fundamental consideration in decision-making;
- (e) improved valuation, pricing and incentive mechanisms should be promoted.

3. In Part 2 add:

- a) Clause X '*Development of DM*'

The Code must address the development of Demand Management.

- b) Clause XX '*Greenhouse Gas*'

The Code must recognise the issue of greenhouse gas emissions associated in the production and use of electricity.

- c) Clause XXX '*Low-Income Consumers*'

Regulators and market participants must consider the impact of their activities on low-income consumers.

d) Clause XXX '*Matters to be listed in the Code*'

The following matters must be covered by the Code:

- demand management;
- greenhouse gas emissions reduction;
- low-income consumers, including guarantee of supply; and
- recognition of electricity as an essential service.

e) Clause XXX '*Public Benefit*'

Code change determinations must consider whether proposed Code changes would be likely to result in any benefit of detriment to the public.

4. Add new Part Y – Information and Standing

a) Clause Y '*Freedom of Information*'

All bodies administering the legislative instruments underpinning the NEM should be subject to FOI legislation, where appropriate.

b) Clause YY '*Public Register*'

There must be a public register of key decisions made under the NEL and the Code, as well as public submissions, reports and other documents. This register should be publicly available on a website.

c) Clause YYY '*Standing*' Option 1

Any person shall have standing to seek changes to the Code.

d) Alternatively Clause YYY '*Standing*' Option 2

For any decision made by any body under the NEL an aggrieved person is as defined. (The definition should be similar to section 487 of the *Environment Protection and Biodiversity Conservation Act 1999*¹⁰ with an expansion to provide for groups working on consumer protection issues).

e) Clause YYY '*Merits Review*'

Merits review is available for decisions of the AEMC and the AER.

¹⁰ See Appendix B for the definition of an aggrieved person in section 487 of the Environment Protection and Biodiversity Conservation Act.

5. Into a new Part Z 'Advisory Panel' add:

a) Clause Z 'Establishment of Advisory Panel'

An independent Advisory Panel must be established and should consist of environmental experts and representatives from consumer or environmental advocacy groups. The Advisory Panel should have both an environmental protection and consumer protection mandate, especially regarding low-income consumers.

b) Clause ZZ 'Role of Advisory Panel'

The role of the Advisory Panel is to provide advice to the AER, AEMC, the Code Change Panel and any other relevant decision making body. In making any decision to amend the NEL or the Code, the decision maker must seek the views of the Advisory Panel, and is required to take into account the views of the Advisory Panel in making its decision.

Appendix A

Extended Standing for Judicial Review

From section 487 of the Environment Protection and Biodiversity Conservation Act 1999):

- (1) This section extends (and does not limit) the meaning of the term person aggrieved in the Administrative Decisions (Judicial Review) Act 1977 for the purposes of the application of that Act in relation to:
 - (a) a decision made under this Act or the regulations; or
 - (b) a failure to make a decision under this Act or the regulations; or
 - (c) conduct engaged in for the purpose of making a decision under this Act or the regulations.
- (2) An individual is taken to be a person aggrieved by the decision, failure or conduct if:
 - (a) the individual is an Australian citizen or ordinarily resident in Australia or an external Territory; and
 - (b) at any time in the 2 years immediately before the decision, failure or conduct, the individual has engaged in a series of activities in Australia or an external Territory for protection or conservation of, or research into, the environment.
- (3) An organisation or association (whether incorporated or not) is taken to be a person aggrieved by the decision, failure or conduct if:
 - (a) the organisation or association is incorporated, or was otherwise established, in Australia or an external Territory; and
 - (b) at any time in the 2 years immediately before the decision, failure or conduct, the organisation or association has engaged in a series of activities in Australia or an external Territory for protection or conservation of, or research into, the environment; and
 - (c) at the time of the decision, failure or conduct, the objects or purposes of the organisation or association included protection or conservation of, or research into, the environment.
- (4) A term (except person aggrieved) used in this section and in the Administrative Decisions (Judicial Review) Act 1977 has the same meaning in this section as it has in that Act.