



Final Submission

Ministerial Council on Energy (MCE)
Standing Committee of Officials (SCO)

National Electricity Law (NEL)

January 2005

CONTENTS

1	EXECUTIVE SUMMARY	1
1.1	RECOMMENDATIONS	1
1.2	ISSUES FOR CONFIRMATION.....	2
2	INTRODUCTION.....	3
3	DISCUSSION	4
3.1	THE CONSULTATION PROCESS	4
3.2	THE SINGLE MARKET OBJECTIVE.....	4
3.2.1	<i>The formulation of the objective</i>	<i>4</i>
3.2.2	<i>The interaction between the market objective and section 15.....</i>	<i>6</i>
3.2.3	<i>The interaction between the market objective and section 91</i>	<i>6</i>
3.2.4	<i>Entrenching the market objective</i>	<i>6</i>
3.3	STANDING OF END-USERS	7
3.3.1	<i>Applications for judicial review.....</i>	<i>7</i>
3.3.2	<i>"Any person"</i>	<i>8</i>
3.4	CHECKS AND BALANCES FOR THE AER, AEMC AND NEMMCO	8
3.4.1	<i>Rule making process – greater transparency for decisions.....</i>	<i>10</i>
3.4.2	<i>Enforcement procedures</i>	<i>10</i>
3.4.3	<i>Checks and balances.....</i>	<i>10</i>
3.5	FUNDING FOR END-USERS.....	11
3.6	OTHER ISSUES.....	13
3.6.1	<i>Reliability Panel.....</i>	<i>13</i>
3.6.2	<i>Rule making process</i>	<i>13</i>
3.6.3	<i>Dealing with market power.....</i>	<i>14</i>
4	CONCLUSION.....	15

1 EXECUTIVE SUMMARY

1.1 RECOMMENDATIONS

In summary, the EUAA recommends:

- The explanatory material for the NEL bill make clear that the legislative intent is for the market objective and the factors listed in section 15(2) to be interpreted in accordance with economic principles. It should further be made clear that the market objective is not focussed upon investment alone, but rather the effective operation of the NEM overall.
- Immediate steps be taken to consider the need for the NEM to include an appropriate process for merits review of decisions of the AER, AEMC and NEMMCO:
 - the onus in this should be for the MCE to show why merits review should not be included; and
 - the process must also include adequate opportunity for stakeholder input.
- The Reliability Panel be granted a greater degree of autonomy than it currently enjoys and that end-users have three representatives on the Panel. In order to ensure that the market objective is given effect to, there should also be provision for a "super vote" by end-user representatives (commensurate with promoting the long term interests of end-users/ consumers).
- Funding for the Advocacy Panel be entrenched in the NEL.
- the following amendments to the NEL be implemented (suggested drafting is set out in Appendix 1):
 - clarification of the market objective (section 6);
 - entrenchment and consistent implementation of the market objective (sections 7(2), 15, 33, NEW 37(2a), 87, 91, 99 and 102);
 - express confirmation of standing for organisations representing end-users, including the EUAA (section 68) and funding to ensure these processes are effective, balanced and fair to all interested parties;
 - insertion of checks and balances for the AER and AEMC (sections 83, 94 and 96); and
 - clarification of the rule making process (sections 87, 90, 91, 94 and 96).
- The errors identified in Appendix 2 be corrected.

- The SCO provide a firm and detailed commitment to a process for addressing outstanding issues in relation to the NEM which have not been able to be addressed during this consultation process, including in relation to the mitigation of market power.

1.2 ISSUES FOR CONFIRMATION

The EUAA seeks confirmation that:

- There will be no material distinction in the application of the market objective in the National Electricity Market, notwithstanding that the Rules regulates a power pool and are not confined to addressing access issues.
- There is no limitation on who may make requests for a Rule pursuant to section 90 or who may seek an investigation pursuant to section 83.
- The new legal structure of the NEL/ NER provides appropriate legal support for the funding arrangements of the Advocacy Panel.
- Section 46 of the *Trade Practices Act* will continue to apply to market participants in respect of their conduct in the NEM.

2 INTRODUCTION

Further to our “initial written comments” (ie initial submission) of 24 December 2004, the Energy Users Association of Australia (EUAA) takes this opportunity to make “final written comments” (ie final submission) in relation to the draft National Electricity Law (NEL). In preparing these comments, the EUAA has sought objective legal and economic advice from Phillips Fox on selected issues, and has received National Consumers Electricity Advocacy Panel funding for this purpose.

The EUAA is a non-profit organisation focused entirely on energy issues. Members determine EUAA policy and direction. The EUAA represents a wide spectrum of end-users in all Australian states. The EUAA currently has over 75 members (and growing), predominantly business users with activities across all states and many sectors of the economy. This includes many of Australia’s largest gas and electricity users. EUAA activities cover both national and sub-national issues. [See <http://www.euaa.com.au/> for more information on the EUAA.]

A summary of the EUAA's recommendations and the points for which it seeks clarification is set out above. Meanwhile, Appendix 1 contains EUAA's proposed amendments while Appendix 2 identifies some apparent errors in the draft NEL.

3 DISCUSSION

3.1 THE CONSULTATION PROCESS

The EUAA reiterates its concerns about the process by which national energy reform is being implemented.

In particular, the EUAA notes that no justification has been given for the very time limited consultation process currently being undertaken, other than that the Ministers have directed this timeframe. This does not constitute a valid reason to deny both end-users and market participants a voice in the most important reforms in these most important legislative and regulatory reforms to the National Electricity Market (NEM).

Accordingly, the EUAA seeks:

- specific responses from the SCO in relation to recommendations which are not adopted (as identified in the Executive Summary);
- responses to a number of issues for which the EUAA seeks confirmation (also identified in the Executive Summary); and
- a commitment from the SCO to an ongoing review of the NEL, whereby a process is developed for addressing various issues which - for whatever reason - cannot be addressed at the implementation stage (for example, the mitigation of market power within the NEM, an extremely important issue for end-users and in terms of the proposed Market Objective).

3.2 THE SINGLE MARKET OBJECTIVE

3.2.1 The formulation of the objective

The EUAA agrees in principle with the concept of a single market objective and, by and large, agrees with the objective proposed.

Nonetheless, the EUAA considers there is scope to further clarify the market objective to remove any potential ambiguity as to its interpretation.

Accordingly, the EUAA considers that:

- the objective should be stated in terms of "end-users", not "consumers".¹ This would remove any doubt as to whether the "consumers" in question must have a

¹ This change is also relevant to certain aspects of the Rules, for example, in relation to the composition of the Reliability Panel.

direct contractual relationship with a Registered participant, as well as ensuring that the interests of large purchasers of electricity (and, in turn, the consumers of their goods or services) are taken into account.² This would have the added benefit of allowing all participants in the market greater certainty as to the application of the test, as there is established jurisprudence which considers the meaning of the "long term interests of end-users".³ (Similarly, section 15(1)(a) should be amended in like fashion);

- it should be made clear that the market objective is to be interpreted in accordance with economic principles and not simply the plain and ordinary meaning of the words⁴ (in accordance with the stated intention of the MCE as set out in its recent paper, *National electricity market objective: an explanation*). Accordingly, the explanatory material for the bill should make it clear that the legislative intent is for the market objective to be interpreted in accordance with economic principles. In addition, it would be helpful to insert the word "economically" before "efficient" in section 6; and
- it needs to be clear that the market objective is not merely investment-focussed but considers the overall efficient functioning of the market. As a minimum, this points needs to be stated clearly in the explanatory material. Better still, the market objective should refer to the "efficient operation of the national electricity market" rather than "efficient investment in, and use of, electricity services". This broader approach would continue to encompass concepts such as efficient investment, but would also incorporate issues such as demand-side management, the efficient dispatch of generators and the use of embedded generation⁵ as well as the efficient operation of NEMMCO itself. All these matters are important to the future of the NEM. Indeed, most if not all, are part of the MCE agenda for reform.

The EUAA also notes that tests such as the "long term interests of end-users" have previously only been implemented in relation to bottleneck monopolies (for example, in respect of the access regime established for telecommunications pursuant to Part XIC of the Trade Practices Act). The EUAA seeks confirmation that there will be no material distinction in the application of this test in the NEM, notwithstanding that the NEL/ NERs regulate a power pool as well as addressing access issues.

² See further, ACCC, *Telecommunications services - declaration provisions* (1999), page 32.

³ See, for example, *Seven Networks Limited (No 4)* [2004] ACompT 11.

⁴ We note the apparent tension between the approach of the Full Federal Court in *Telstra Corporation Ltd v Seven Cable Television Pty Ltd* (2000) 178 ALR 707 (at 737-38) and the Australian Competition Tribunal in *Seven Networks Limited (No 4)* [2004] ACompT 11 (at [120]-[122]). The suggestions contained in this submission would clearly indicate which way the NEL was intended to be interpreted.

⁵ The existing Code already requires TNSPs to take account of competing options such as demand-side management and generation alternatives when developing network augmentations, and the market objective should continue to reflect this requirement. The EUAA notes, however, that the mere requirement for TNSPs to do so has had very little (if any) impact on the opportunities in the NEM for such alternatives. As such, it is even more important that it be made clear that efficient operation of the market requires much more than investment which - on paper - looks "efficient".

3.2.2 The interaction between the market objective and section 15

In the EUAA's view, proposed section 15 unnecessarily dilutes the market objective. Accordingly, the EUAA considers that the AER, in exercising its economic regulatory functions or powers, should be subject to the market objective, with the additional factors listed in section 15(2) being clearly subsidiary to this objective.

At the very least, the EUAA considers that section 15(1)(a) should follow more closely the language of section 6 to avoid potential uncertainty as to the interpretation of either section which may be created by the exclusion of the words "price, quality, reliability, safety and security" from section 15. The potential for such uncertainty also highlights the need for specific confirmation that the market objective and section 15(2) are to be interpreted in accordance with economic principles.

Section 15 should also be carefully drafted to avoid the *generalia specialibus non derogant* principle of statutory interpretation, whereby the subsidiary factors identified in section 15(2) may be considered to be more "specific" and thereby held to override (to the extent of any inconsistency) the "general" statement of principle in section 15(1).⁶

The EUAA notes that the AER is not bound by the national electricity market objective (or other similar objectives) in the performance of its non-economic regulatory functions or powers, and does not consider it necessary for the AER to be so bound.

3.2.3 The interaction between the market objective and section 91

The EUAA is also concerned that the market objective is diluted by section 91.

Again, as currently drafted, there appears to be a risk that the *generalia specialibus* principle will apply, with the factors listed in section 91(3) considered to have precedence over the Rule making test as stated in section 87 to the extent of any inconsistency.

Accordingly, we consider it appropriate for section 91 to be amended slightly to ensure it is clear that the section 91(3) factors are guides to implementing the Rule making test in section 87 and do not override it. This approach would be in accordance with the suggested amendments to section 15.

3.2.4 Entrenching the market objective

In summary, the EUAA considers it vital that the market objective be stated in a consistent manner throughout the NEL, to ensure it is applied consistently and does not give rise to uncertainty.

⁶ See further *Perpetual Executors and Trustees Assoc of Australia Ltd v FCT* (1948) 77 CLR 1 at 29.

Furthermore, the EUAA considers that the draft NEL should be amended to ensure that the market objective is more firmly entrenched. In particular, the EUAA considers amendments should be made to sections 7(2), 33 and 94(1) (as set out in Appendix 1).

3.3 STANDING OF END-USERS

3.3.1 Applications for judicial review

The EUAA considers that the NEL should *expressly* provide that organisations clearly representing end-users, such as the EUAA, have standing pursuant to proposed section 68 of the draft NEL. This would be entirely consistent with the spirit of the NEL and the stated desire of the MCE to include end-users/ consumers⁷ in energy reform debates and issues.

In light of the market objective, only end-users or consumers - whether acting individually or collectively - are in a position to advocate the interests of end-users/ consumers. The interests of end-users/ consumers may not, and in some cases almost certainly will not, coincide with the interests of the registered participants.

Furthermore, in accordance with the *Hardiman Principle*,⁸ it may be considered inappropriate for the AEMC or the AER to advocate for these interests in any review process. As noted by the High Court in that case: "If a tribunal [or, in this case, the AER or AEMC] becomes a protagonist in this Court there is the risk that by so doing it endangers the impartiality which it is expected to maintain in subsequent proceedings..." (at pages 35-36). We note that this could threaten the very nature of the performance and the credibility of the regulators and their standing in the NEM. This would not be in the interests of either end-users or market participants.

Accordingly, it is essential that the NEL be drafted to avoid a potential repeat of the decision in *Application by Orica IC Assets Ltd & Ors re Moomba to Sydney Gas Pipeline System*,⁹ in which both the EUAA and the Energy Action Group Inc were refused standing as neither was considered to be "adversely affected" by a decision of the Minister pursuant to the *Gas Pipelines Access (South Australia) Act 1997* (noting that the term "adversely affected" is the same as used in section 68 of the draft NEL). This view, if applied to the NEL, would be inimical to the market objective with its clear focus on end-users/ consumers and contrary to the stated desire of the MCE of including end-users/ consumers in the reform process.

⁷ Noting the EUAA's firm view that the term "end-user" is more appropriate (see above).

⁸ *R v The Australian Broadcasting Tribunal & Ors; ex parte Hardiman & Ors* (1980) 144 CLR 13.

⁹ [2004] ACompT 2.

Accordingly, proposed section 68(2) must be amended to ensure that organisations which represent the interests of end-users/ consumers (whether in general, or particular groups of end-users/ consumers) have standing.¹⁰

As well as supporting the market objective, allowing organisations to represent the interests of end-users/ consumers collectively will assist in reducing the time and expense associated with the appeal process. If the draft NEL were to remain as is, the authority of the *Orica MSP* case (and other such cases) would likely result in the EUAA recommending that members concerned by specific decisions pursue such decisions individually. This approach has the potential to greatly increase the time and public resources required to resolve such matters, as well as adding to the expense of all parties involved.

Accordingly, we consider that companies or associations whose objects or purposes are affected by a given decision should have their standing expressly recognised. In addition, it should be possible for particular organisations to be prescribed by regulation. If such an approach were adopted, the EUAA submits that it is an appropriate organisation to be so prescribed.

3.3.2 "Any person"

The EUAA seeks confirmation that there is no limitation on who may make requests for a Rule pursuant to section 90 or who may seek an investigation pursuant to section 83.

3.4 CHECKS AND BALANCES FOR THE AER, AEMC AND NEMMCO

As per its initial submission, the EUAA considers that the principals underpinning merits review are normally a critical check and balance on the respective operations of the AER, AEMC and NEMMCO. While the EUAA notes that the SCO intends to address this issue later, it is simply too important an issue to be ignored at this time. As indicated earlier (see above), no valid justification has been given for the haste with which the reform process is proposed to be implemented. Accordingly, the EUAA sees no reasonable cause why merits review cannot be addressed at the same time that the new regulatory arrangements are introduced.

The Administrative Review Council (a body set up under the Administrative Appeals Tribunal Act 1975, to advise the Attorney-General about merits review, including the types of decisions for which merits review should be available) identifies two basic reasons for merits review:

¹⁰ Note, for example, the difficulties faced by the Australian Competition Tribunal in *Seven Networks Limited (No 4)* [2004] ACompT 11, at [352]: "[W]e should not fall into the trap of approaching these reviews as though they were adversarial proceedings with Seven Network's concerns taken to reflect exhaustively the interests of end-users".

- to ensure persons whose interests are adversely affected by a decision have an opportunity to have that decision reviewed; and
- to improve the overall quality of government decision-making.

In its report, *Review of the Gas Access Regime* (2004), the Productivity Commission stated:

There is a need for merits review under the Gas Access Regime. In the Commission's view, appropriate protection for property rights and natural justice are key considerations. While the appeal process might take considerable time and expend considerable resources, the regulatory bodies and Ministers have powers to make decisions that have an impact on fundamental rights of service providers. The prospect of exposure to imperfect regulatory instruments means there is a strong case for a merits review (page 498).

These comments are equally applicable to decisions made under the NEL or the NERs.

While the Administrative Review Council has identified certain factors which may justify the exclusion of merits review (including policy decisions of a high political content or financial decisions with a significant public interest element), these factors¹¹ do not justify the complete exclusion of merits review under the NEL/ NERs. Both the factors cited for the exclusion of merits review are very tightly confined - for instance, the examples given for decisions of 'high political content' include decisions relating to interest rates or the floating of the dollar.

The Administrative Review Council also notes that the fact that:

- the (original) decision-maker is an expert or requires specialised expertise;
- large numbers of people may take advantage of review (resulting in increased cost and delay); or
- there is potential for the original decision to be subject to judicial review,

are **not** grounds for excluding merits review.¹²

Finally, the recent Moomba to Sydney Pipeline decision by the Australian Competition Tribunal¹³ - in which the Tribunal stated the ACCC approach was "idiosyncratic", demonstrating "fundamental errors in principle" - further highlights why parties affected by decisions under the NEL or the NERs must have the right to seek merits review. Without the merits review process involving the ACT, these flaws would not have been unearthed.

¹¹ In its booklet, *What decisions should be subject to merit review?* See particularly at Chapter 4.

¹² *What decisions should be subject to merit review?*, at ¶¶5.16 and 5.24.

¹³ *Application by East Australian Pipeline Limited* [2004] ACompT 8 (8 July 2004).

The EUAA recognises that there may be concerns raised as to the length of time and expense involved in any merits review process. Nonetheless, there are legislative means by which such concerns may be addressed. As clearly indicated by the Administrative Review Council, however, the *prima facie* position is that merits review should be permitted. As such, it is for the SCO to identify any difficulties which it considers merits review may raise; the industry and users, together with the SCO, can then consider how best to resolve these difficulties.

Finally, the EUAA notes that it is vital that any review process ensure *all* affected persons, including consumers and consumer bodies, have a fair opportunity to participate on equal terms. This requires appropriate funding arrangements, including for the review process (whether judicial or merits), as discussed below.

3.4.1 Rule making process – greater transparency for decisions

There are a number of instances where there needs to be a more transparent decision-making process in relation to the Rule making process. These include:

- a decision by the AEMC not to take any action in respect of a request for making a Rule (proposed section 94);
- the reasons why the AEMC considers a Rule to be urgent or non-controversial pursuant to section 96(1). We note in particular that the consequence of the AEMC concluding that a rule is urgent or non-controversial is an expedited rule-making process, with limited opportunity for stake-holder participation. Accordingly, it is essential that any decision which results in the curtailment of stake-holder consultation be transparent and robust; and
- the justification for why the AEMC considers that reasons given by a person or body in a written request for it not to make the non-controversial Rule or urgent Rule are misconceived or lacking in substance pursuant to proposed section 96(4).

In each case, the AEMC should publish its reasons including on its website.

3.4.2 Enforcement procedures

In addition, the EUAA considers that there needs to be a transparent process when the AER elects not to prosecute following an investigation (see further proposed section 83). Again, detailed reasons should be published.

3.4.3 Checks and balances

In summary, effective checks and balances require:

- appropriate review processes, starting from the premise that merits review should be available unless it can be soundly demonstrated by SCO why this should not be so;
- provisions which ensure all affected parties and their representative bodies (including the EUAA) have standing to seek review; and
- funding provisions in place to ensure end-users/consumers (or their representative bodies) are not placed at a disadvantage when compared with industry participants in any review process.

3.5 FUNDING FOR END-USERS

Particularly having regard to the objective of promoting the long term interests of end-users/ consumers, it is essential to ensure that these interests can be appropriately advocated.

In accordance with the *Hardiman Principle* (discussed above), it would be inappropriate for the AEMC or the AER to pursue certain matters on review.

In addition to ensuring that parties such as the EUAA have an undisputed right of standing in relation to review processes, it is necessary to ensure that there is appropriate funding for parties representing end-users/ consumers. This will also be necessary if - as suggested above - the market objective is to be interpreted in accordance with economic principles, as this will require the engagement of technical, economic and legal experts.

If appropriate funding mechanisms are not in place, an uneven and unfair process will result, whereby large corporate market participants have access to vastly superior resources than end-users/consumers. This, in turn, will mean that it is not possible for the market objective - i.e. the long term interests of end-users/ consumers - to be effectively promoted.

The need for funding of end-users has been recognised in the Code in relation to arrangement for the Advocacy Panel (see clause 8.10).

The Advocacy Panel grants funds for advocacy by representations of business and domestic electricity customers affected by the Code or the NEM.

The Panel's funds come from end-users via a component of market participant fees of retailers and generators – currently set to raise around \$1m p.a.. The funds are granted in response to applications, although the panel also has the power to commission advocacy or research.

In relation to the Advocacy Panel, the EUAA seeks confirmation that the new legal structure of the NEL/ NER provides appropriate legal support for its funding

arrangements. In the absence of certainty that its funding arrangements (as currently drafted) are not open to legal challenge, the EUAA considers that funding for the Advocacy Panel should be addressed in the NEL itself.

An appropriately structured end-user advocacy model should aim to satisfy the following principles:

- funds should be allocated for energy reform matters that includes both gas and electricity and covers policy issues in energy that is wider than the National Electricity Code and the development of the NEM;
- funds should be allocated to advocacy functions that cover:
 - responding to the Federal and State Governments' energy policy proposals as well as electricity & gas member issues;
 - undertaking research and proactively developing and promoting energy policy reform;
 - representing and presenting energy users views at public forums (including public hearings, conferences, governmental consultative groups) and to relevant policy-makers;
 - informing and educating end-users about the NEM that seeks to increase their involvement;
 - challenging detrimental decisions of the AEMC, AER and NEMMCO in terms of judicial and/or merits review;
- funds should be allocated by an independent person(s)/panel that is not directly affiliated with energy end-user advocacy groups but one knowledgeable in energy matters and end-user impacts;
- funds should only be allocated to member-based organisations whose members are direct end-users of energy;
- provide end-user advocates with flexibility in undertaking advocacy by distributing funds on an annual tied basis whereby member-based energy end-user advocates can outline a forward work program (eg 12 months) and then provide a report on how the funds were spent; and
- an appropriate level of funding that will allow for an active and robust participation in energy policy development.
- Representatives of energy supplies should not be involved in allocating funds

3.6 OTHER ISSUES

3.6.1 Reliability Panel

The EUAA considers that the Reliability Panel should be bound by the market objective in performing its functions and exercising its powers.

In addition, the EUAA notes that the current Reliability Panel is heavily dependent on NECA for all its resources, including the secretarial functions and more importantly, the selection, engagement and payment of consultants to provide the Panel with advice. The EUAA recommends that the Reliability Panel be provided with a greater degree of autonomy, particularly in relation to funding, and the selection and engagement of consultants.

In addition, the EUAA has concerns about the balance of membership of the Reliability Panel under the proposed NERs, as market participants each have a representative (totalling four representatives) while end-users only have a single representatives (see proposed clause 8.10.2). This clearly creates a bias in favour of the industry against consumers and, again, is inimical to the market objective.

In the EUAA's view, there needs to be at least two representatives for end-users, and it would seem to be necessary for decisions of the Reliability Panel to require a "super vote" where, for example, the agreement of at least one end-user representative is required before a decision can be made.

3.6.2 Rule making process

The interaction between proposed section 87, subsections (1) and (3) is unnecessarily confused, and creates considerable scope for future uncertainty. In our view, section 87(1) should create a "threshold" test, setting out the minimum standard which a proposed Rule must meet, while section 87(3) should effectively mandate a rule change in certain circumstances. Accordingly, section 87(1) should require only that the AEMC be satisfied that a proposed Rule is consistent with the national electricity market objective. This would permit rule changes of a purely technical nature which, while consistent with the market objective, are difficult to demonstrate as "promot[ing] the long term interests of end-users". This would also assist in a scenario where, as a condition of authorisation, the ACCC requires a Rule change which - whilst not inconsistent with the Rule making test - could not be said to contribute to its achievement.

Accordingly, Appendix 1 puts forward some suggested amendments to section 87.

The AEMC's powers to initiate a Rule change are unclear, as the relationship between section 90 and section 96 is unduly complicated. Furthermore, the EUAA considers

that the AEMC should be able to initiate an urgent Rule. Appendix 1 sets out proposed amendments to reflect these recommendations.

3.6.3 Dealing with market power

58 The EUAA also notes that all reformed electricity markets are very susceptible to the exercise of extreme market power. This issue needs to be directly addressed by the MCE. In terms of the NEL/NER, we believe it is important to ensure that the market power of participants is held in check by appropriate rules and measures to limit the scope for an punish any abuse. Hence, there is a need for additional measures to address market power in the NEM and EUAA strongly recommends that the AEMC be required to conduct a review into this issue within the first 12 months of its operation.

We also wish to advise the MCE that we are shortly to commence our own investigation into market power in the NEM and will be making the results available to the MCE and publicly. One key objective for this study will be to recommend ways to limit the exercise of market power in the NEM.

4 CONCLUSION

As noted in the EUAA's initial submission, it is essential that the market objective lie within an appropriate framework. The recommendations which accompany this submission work as a package to support the market objective.

In the absence of adequate support for and our suggested amendments to the market objective, it will be necessary to ensure that end-users'/ consumers' interests are protected by way of significant amendments to the market objective with additional safeguards - in the form of consumer impact statements - also necessary.

In the EUAA's view, however, this is a second-best approach. Accordingly, the EUAA considers that the market objective can best be supported by:

- careful consideration of the wording/framing of the objective to give better effect to its intent (especially its focus on end users/consumers) and entrenchment of the objective in the NEL;
- appropriate standing provisions for representatives of end-users and consumers;
- adequate checks and balances on the exercise by the AER, AEMC and NEMMCO of their respective powers and functions;
- fair and equitable funding arrangements for parties representing the interests of end-users/ consumers, preferably entrenched in the NEL; and
- greater autonomy for the Reliability Panel and an increase in representation for end-users from one to two:

in accordance with the recommendations set out in this submission.

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