

# The challenge of institutional governance in the National Electricity Market: A consumer perspective

Penelope Crossley  
Sydney Law School



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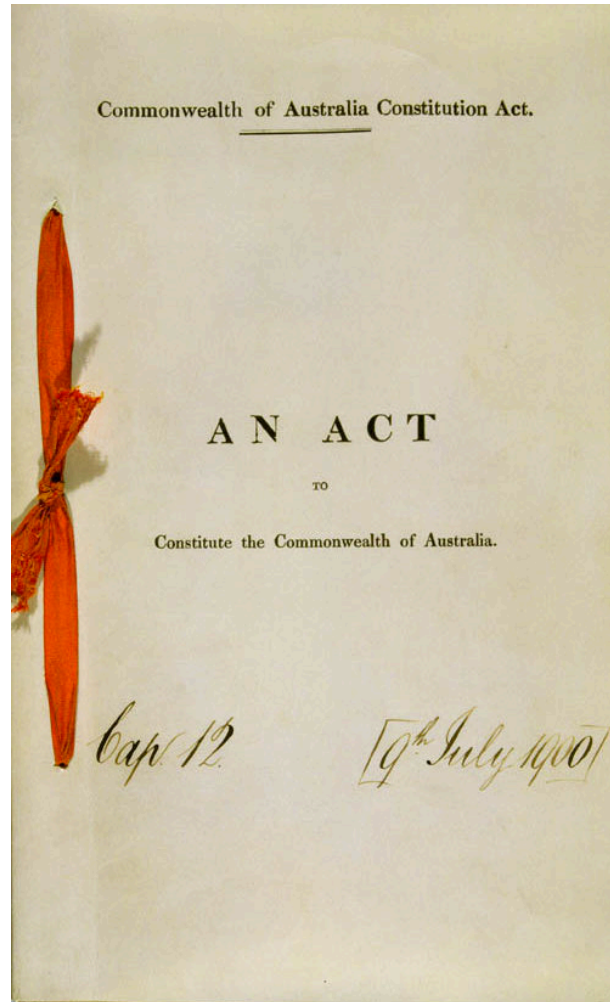
# My research

- Adopts a commercial perspective to energy and resources law
- Particular focus on renewable energy and energy storage law and policy
- Interested in interdisciplinary collaborations with engineering, economics, public policy, etc.

# Outline of presentation

- Why is the legal, governance and institutional framework of the NEM so complicated?
- The institutional governance structure of the NEM
- Key issues for consumers
- Legal issues

# The ultimate source of the problem: The Commonwealth of Australia Constitution Act (1900)



# s.51 of the Commonwealth Constitution

## Part V - Powers of the Parliament

**51.**The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to: -

**(i.)** Trade and commerce [...] among the States;

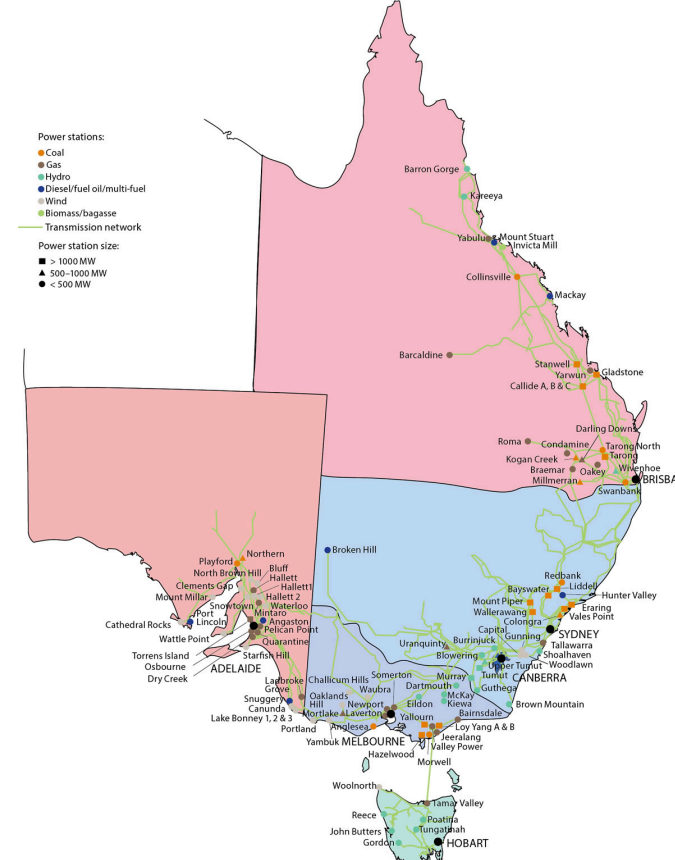
**(xx.)** Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth;

**(xxxvii.)** Matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law;

# The rationale for the NEM

- The NEM was designed to:
  - facilitate interstate trade;
  - to lower barriers to competition;
  - to increase regulatory certainty; and
  - to improve productivity,

within the electricity sector as it transitioned from being dominated by large unbundled state owned monopolies to privatised corporations.



# The transformation of the energy sector

- Increasing concern among both large-scale and residential consumers about **rapidly rising energy prices**.
- Changes in the fuel sources used to generate electricity, with a **shift from carbon intensive fossil fuel sources** to less carbon intensive sources, such as natural gas and renewable energy sources.
- The **growth in distributed generation**, particularly in the form of photovoltaic (PV) solar cells on residential and commercial rooftops.
- The ongoing development and commercialisation of grid-scale and residential **energy storage**.

# Key governance documents

- **Australian Energy Markets Agreement (AEMA)** (2004, last amended 2013)
- **National Electricity Law (NEL)** (a schedule to the *National Electricity (South Australia) Act 1996*) establishes obligations in the National Electricity Market and for electricity networks.
- **National Energy Retail Law (NERL)** (a schedule to the *National Energy Retail Law (South Australia) Act 2011*) regulates the supply and sale of energy to retail customers.
- **NER, NERR, NECF, AEMC Act, COAG EC Terms of Reference** etc.
- The role of the Energy White Paper?



# Institutional governance structure of the NEM

## National Energy Market Institutions

Australian Energy Market Commission  
(Rule Maker and Market Developer)

Australian Energy Market Operator  
(System Operator)

Australian Energy Regulator  
(Economic Regulator and Rule Enforcer)

## Policymaker

New South Wales

Commonwealth

Victoria

Queensland

COAG Energy Council  
(Policymaking)

Western Australia

South Australia

Tasmania

Australian Capital Territory

Northern Territory

## Other Institutions

Energy Consumers Australia

Senior Committee of Officials

Energy Efficiency Working Group

Energy Market Reform Working Group



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## Governance

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# The COAG Energy Council

- The national policy and governance body for the national energy market for electricity and gas.
- COAG EC did not have Terms of Reference for 18 months!
- Most decisions are made by consensus. Where votes are taken, the votes of each participating jurisdiction are not public.
- Arguably, some states currently have a conflict of interest in respect of their public ownership of assets.
- The identity and mandate of the SCO is unclear.

# Transparency measures of the COAG Councils (May 2015)

COAG Council	Terms of reference	Governance structure	Names, titles and contact details of SCO	Guidance or delegation issued to SCO	Advance meeting dates
<b>Transport and Infrastructure Council (TIC)</b>	No	Yes	Yes	No	Yes
<b>Health Council (CHC)</b>	No	Yes	Yes	Yes	No
<b>Federal Financial Relations</b>	No	No	No	No	No
<b>Energy Council</b>	No	No	No	No	No
<b>Education</b>	Yes	Partial	Yes	Yes	Yes
<b>Law, Crime and Community Safety Council</b>	Partial	No	No	Yes	No
<b>Industry and Skills Council</b>	No	No	No	No	No
<b>Disability Reform Council</b>	Yes	No	No	No	No

# The bifurcated structure: a uniquely Australian design

- A unique feature of these arrangements is the concern that there should be ‘the bifurcation of economic regulation between a rule-making [Australian Energy Market Commission (AEMC)] and a rule implementing [AER] institution.’
- We do not see this structure reflected in comparable markets around the world.

Jurisdiction	Regulator and compliance	Rule maker and market development	Market operator	Consumer advocate
NEM (Australia)	Australian Energy Regulator (AER)	Australian Energy Markets Commission (AEMC)	Australian Energy Market Operator (AEMO)	Energy Consumers Australia (Ltd) (ECA)
California	Federal Energy Regulatory Commission (FERC) and California Public Utilities Commission (CPUC)	FERC and CPUC	California Independent System Operator (CAISO)	CPUC
United Kingdom	Gas and Electricity Markets Authority (GEMA) and Ofgem (Office of Gas and Electricity Markets)	GEMA and Ofgem	National Grid Electricity Transmission (NGET)	Ofgem

Jurisdiction	Regulator and compliance	Rule maker and market development	Market operator	Consumer advocate
New Zealand	Electricity Authority	Electricity Authority	Transpower	Consumer Affairs (part of the Ministry for Business, Innovation and Enterprise)
Ontario	Ontario Energy Board	Ontario Energy Board	Independent Electricity System Operator (as merged with the Ontario Power Authority from 1 Jan 2015)	Ontario Energy Board
Alberta	Alberta Utilities Commission (AUC), Market Surveillance Administrator (MSA)	Alberta Utilities Commission (AUC), Market Surveillance Administrator (MSA)	Alberta Electric System Operator (AESO)	Utilities Consumer Advocate (UCA)

## The Draft Report's Response (July 2015)

[It is] 'curious to note that some stakeholders have suggested possible synergies from combining the rule maker (AEMC) and the rule enforcer (AER).'



# The Australian Energy Markets Commission (AEMC)

- Responsible for the rule making and market development of the electricity and natural gas markets.
- The Rule-change process:



- Once the AEMC has made the final rule determination, the rule will be incorporated into the National Electricity Rules.
- There is also the capacity for expedited and ‘fast track’ rule changes in prescribed circumstances.

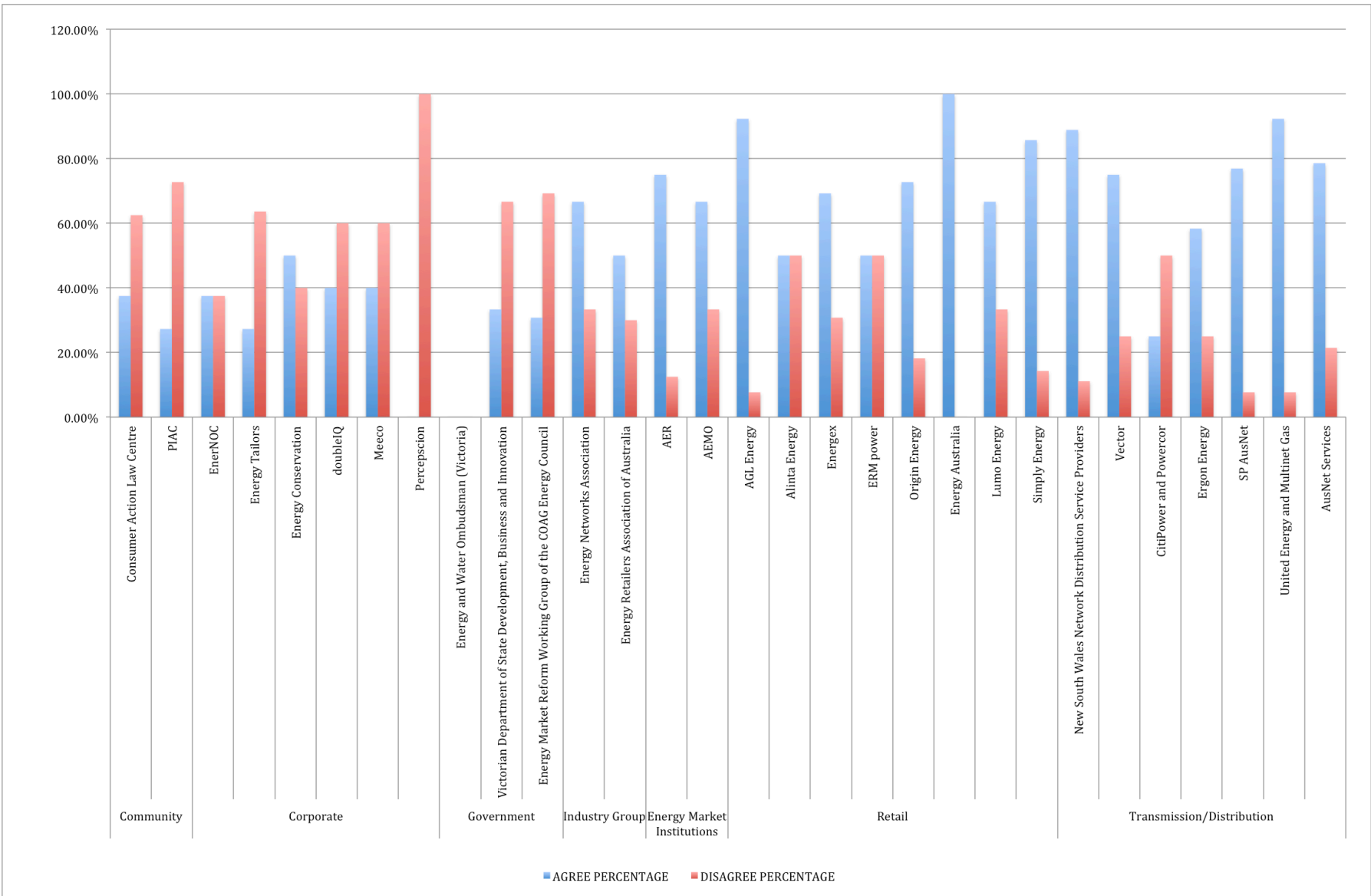
## In the past 2 years, the entities that most frequently participated in the AEMC rule change process were:

ENTITY	COUNT
AGL Energy	35
Australian Energy Regulator	25
Origin Energy	24
Alinta Energy	22
Energy Retailers Association of Australia	20
Lumo Energy	20
Energy Australia	19
GDF SUEZ Australian Energy	18
Australian Energy Market Operator	18
Energy Networks Association	17

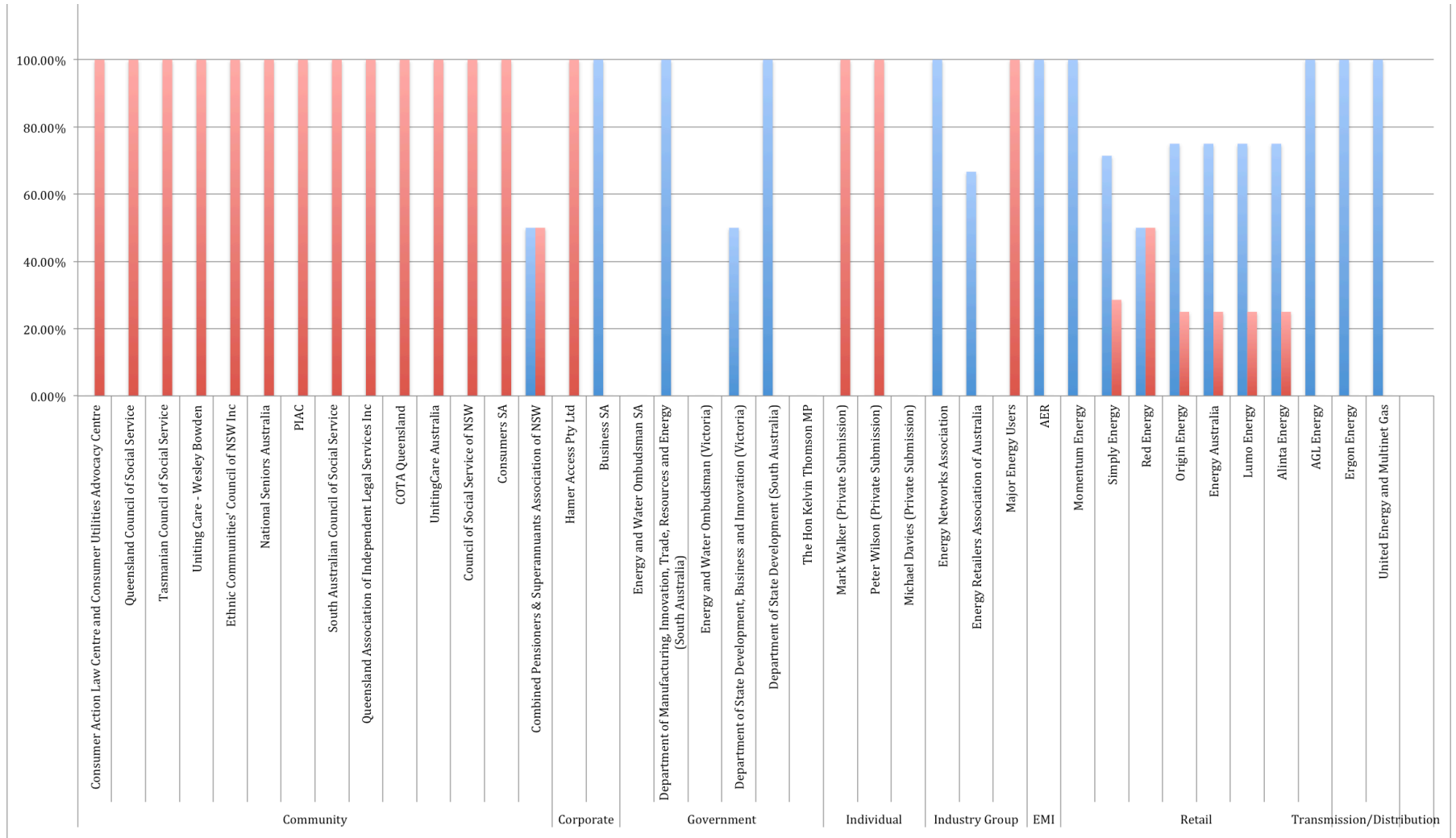
## Breakdown of submissions received by entity type:

TYPE	NUMBER	PERCENTAGE*
Retail	164	29%
Transmission/Distribution	101	18%
Industry Group	75	13 %
Network Entity	57	10%
Community	56	10%
Generation	49	9%
Corporate	35	6%
Government	27	5%
Individual	7	1%

# Customer access to information about their energy consumption



# Retailer price variations in market retail contracts



## Challenges for consumers

- Participation in the Rule-change process requires a significant degree of industry knowledge and information.
- Consumers may lack access to sufficient resources to be able to make credible submissions to the AEMC. E.g., Quantitative economic data is seen as much more credible by the AEMC than anecdotal data or surveys.
- The impact of delays

# The use of delegated legislation with no checks or balances

- Rules do not require subsequent endorsement by COAG, the Minister, the government or parliament in order to become effective.
- This is unlike other comparable regulatory bodies such as Food Standards Australia and New Zealand and the National Transport Commission.
- A person aggrieved by a decision or determination of the AEMC may apply to the Court for a judicial review of the decision or determination. There are very limited grounds for review.

# The Australian Energy Regulator (AER)

- Responsible for enforcing the rules for the NEM and for economic regulation of electricity and gas transmission distribution networks and retail markets.
- Enforcement issues
- Should the AER be split from the ACCC? Should there be a functional separation with the network regulation, market regulation and pricing regulation functions going to different institutions?
- Consumer Reference Group and Consumer Challenge Panel



# The Australian Energy Market Operator (AEMO)

- Operates the wholesale national electricity and gas markets and undertakes market development functions to maintain system security and safety.
- Ownership of AEMO is split 60:40 between government and industry
- AEMO Governance Review 2013

# The consumer perspective



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# The National Energy Objective (NEO)

The objective of this Law is to promote efficient investment in, and efficient operation and use of, electricity services **for the long term interests of consumers of energy** with respect to –

- a) price, quality, safety, reliability and security of supply of electricity; and
- b) the reliability, safety and security of the national electricity system.

– *National Electricity (South Australia) Act 1996*, sch 1 s 7.

# Who are consumers?



# What do consumers want?

- A seat at the table
- Less consultation in the form of reviews but to be heard when they do make submissions
- A review of the NEO (or at least its current interpretation)
- Greater transparency and accountability
- A reduction in unnecessary complexity
- An effective check and balance on the use of delegated legislation

# Energy Consumers Australia (ECA)

- Established 30 January 2015
- Purpose identified as ‘increasing consumer advocacy on national energy market matters of strategic importance and material consequence for energy consumers, in particular household and small business consumers’

# Limited merits reviews

**Date: Monday, 21 September 2015 – Friday, 2 October 2015**

**Location:** Federal Court of Australia

**Time:** 10:15 am

**Hearing:** ACT 1 - 8 of 2015

Public Interest Advocacy Centre Ltd (ACT 1-3 of 2015)

Ausgrid (ACT 4 of 2015)

ActewAGL Distribution (ACT 5 of 2015)

Endeavour Energy (ACT 6 of 2015)

Essential Energy (ACT 7 of 2015)

Jemena Gas Networks (NSW) Limited (ACT 8 of 2015)



# The legal perspective



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# Managing the challenge of Federalism

- Australian governments currently own about 75% of electricity network assets in the NEM.
- In many senses, the States have recognised the importance of common market regulation and conceded significant portions of their regulatory competency to Federal regulators.
- However, a number of aspects of the market continue to be regulated by State and Territory governments.
- In practice, this has led to widely divergent market conditions in various States and Territories, with differing implications across generation, networks and retail for energy consumers.

# Ownership structures in the NEM

	Generation	Transmission	Distribution	Retail
<b>SA</b>	Private	Private	Private	Private
<b>Vic</b>	Private	Private	Private	Private
<b>Qld</b>	Public/Private	Public	Public	Public/Private
<b>NSW</b>	Private/Private	Public	Public	Private
<b>Tas</b>	Public/Private	Public	Public	Public
<b>ACT</b>	Public/Private	Public/Private	Public/Private	Public/Private

# State and Territory regulatory competence and derogations

- The introduction of the NEM reflected a regulatory shift to empower a consistent national regulation. However, a number of significant areas of concern for retail consumers within the NEM remain with the State and Territory governments, including:
  - feed-in tariffs;
  - the application of National Energy Customer Framework;
  - consumer protections;
  - retail price regulation;
  - energy efficiency standards; and
  - environmental regulation.
- Annexure 2 to the AEMA indicates that the following components of distribution and retail functions remain allocated to the State and Territory governments notwithstanding their referral of power to the Commonwealth in other areas:
  - distributor technical/safety business authorisation – licensing and authorisation schemes that require demonstration of technical capability;
  - small customer dispute resolution – obligation for distributors and retailers to have internal dispute resolution schemes and participate in independent dispute resolution (Ombudsman) schemes;
  - load shedding and curtailment – customer supply reduction sequence to maintain system security;
  - service reliability standards – standards to ensure network security and reliability;
  - metering – policies on the type of meters required for specific customer classes, accredited service provider arrangements, and load profile arrangements; and
  - distribution and retail service areas – specification of geographical areas in which responsibilities/obligations apply.

# Contact Information



**PENELOPE CROSSLEY**

Lecturer | Faculty of Law

**THE UNIVERSITY OF SYDNEY**

Room 427, New Law Building

The University of Sydney | NSW | 2006

T +61 2 9351 0388 | F +61 2 9351 0200

E [penelope.crossley@sydney.edu.au](mailto:penelope.crossley@sydney.edu.au)

W <http://sydney.edu.au>