



**APIA Submission to Ministerial Council for
Energy – Senior Officials**

**Discussion Papers: AER-AEMC-ACCC
Memorandum of Understanding Framework and
Streamlining the Code Change Process**

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Introduction

APIA is deeply concerned that the Standing Committee of Officials apparently intends to introduce common processes for administering the Gas Access Code and the National Electricity Code. This concern is exacerbated by the SCO's preoccupation with the considerable issues affecting the Electricity Code at the expense of due regard to, or analysis of, the very different nature of the Gas Access Code.

Consultation papers are not reflective of the Gas Code Arrangements

In particular, the papers do not indicate any consideration of the fundamental differences between the Electricity Code (which consists of a set of rules for trading energy which are authorised under Part VII of the *Trade Practices Act 1974* and an access arrangement applying to all electricity transmission businesses made under Part IIIA of that Act)) and the Gas Access Code (which provides a framework for a different range of issues including the framework for, but not the content of, access arrangements which differ from pipeline to pipeline and are subject to formal approval processes involving the ACCC or the WA Economic Regulatory Authority.)

The rationale for the high degree of information transparency between the three regulatory bodies appears to reflect the unique circumstances of the electricity arrangements. In particular, the Ministerial statement of 11 December (section 4.2.3) states:

“The new regulatory arrangements will provide for consultation and cooperation between the AEMC, AER and ACCC, and will avoid the duplication of regulator roles. The code change and authorisation process will be streamlined, with the cooperative arrangements specified in the Memorandum of Understanding. In considering applications for authorisation or approval of code changes, the ACCC will have the discretion to use the AEMC's analysis, assessment and consultation processes.”

Given this objective, which is relevant to electricity and not gas, the Discussion Paper concludes that a high level of information transparency between all three bodies is essential.

Unlike electricity, the Gas Access Code is certified by the NCC, not authorised by the ACCC. Hence any “transparency” requirement as outlined in the Discussion Paper is not relevant to the gas arrangements. APIA also notes that there is a lack of mention of the interrelationship between the NCC and other institutions (see below).

Proposed information sharing arrangements undermine effective separation of Code Change (AEMC) and regulatory (AER) functions

More importantly, APIA believes that it is essential that the AEMC Code change process, including information sharing arrangements, should give explicit recognition to the need to progress consideration outside any direct influence by the AER/ACCC. This direct

influence would inevitably arise under the information sharing arrangements outlined in the Discussion Paper. The most important objective must be to ensure effective separation of the Gas Code change [AEMC] function, the regulatory implementation [AER] functions, and the coverage/revocation and certification functions [currently undertaken by the NCC and the relevant Minister]. It is very important that the role of the regulators be established to implement the Code, not have a role in developing policy, and this requires a very clear and transparent “separation of powers” between the regulatory and Code change functions. The proposed information sharing arrangements will undermine that separation.

This lack of clarity and conflict represents one of APIA’s criticisms of the NGPAC process (where regulators have consistently used their involvement to pursue policy objectives, eg in relation to information provision). When viewed from a Gas Access Regime perspective, the proposed arrangements of high information transparency between the three bodies is neither necessary nor desirable and is inconsistent with the need to ensure institutional separation of policy making from administration of the Code.

Information sharing needs effective controls to ensure no improper use

Another fundamental issue appears to have been overlooked in the information sharing proposal. An institution should not have access to information acquired by another institution if the first institution could not acquire that information using its own information gathering powers. Further, even where the information gathering powers of institutions are equivalent, information acquired from industry participants by one institution for a particular purpose should not be shared with other institutions to use it for different purposes. The MoU at the very least needs to expressly describe and forbid such behaviour. If it does not, the proposal will give rise to significant disputes, including litigation, with industry if the institutions test the extent to which they can share information.

Arrangements for gas must address the role of the NCC

As a final matter, it is noted that the Productivity Commission, in its draft report for the review of the Gas Access Regime, has recommended that the NCC be afforded the ability to develop certain guidelines to assist in coverage/revocation applications. APIA is concerned to ensure that this function – essentially a policy function – is not vested with the NCC or the AER to ensure the appropriate “separation of powers” regime is maintained.

Conclusion

It is difficult to provide more detailed commentary on the proposal until the arrangements for gas are fully considered by the MCE Standing Committee of Officials. APIA notes, however, that effective separation of the policy and regulatory functions for electricity would be achieved by giving the AEMC full responsibility and accountability for Code changes, without recourse to any ACCC authorisation process. Given our experience

with regulatory bodies through the NGPAC process, this would appear to be a more desirable approach than the arrangements envisaged in the Discussion Paper.