

Response to the Draft National Gas Law

Submission to the Ministerial Council on Energy
Standing Committee of Officials

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1. Introduction

ActewAGL is a multi-utility company combining energy distribution and retail operations with interests in water services management and telecommunications. The ActewAGL Distribution partnership operates as a unique public–private joint venture between Alinta Limited and the ACT Government owned ACTEW Corporation. The ActewAGL Distribution partnership owns and operates the gas distribution networks in the ACT, Queanbeyan and Nowra and the electricity distribution network in the ACT.

ActewAGL welcomes the opportunity to respond to the exposure draft of the National Gas Law (draft Law). ActewAGL fully supports the MCE intention to streamline and improve the quality of economic regulation across energy markets, to lower the cost and complexity of regulation and enhance regulatory certainty¹.

We are concerned however that in several critical ways the draft Law is out of line with these broad intentions. The proposed allocation of roles and functions (for the MCE, AEMC and AER) and the excessive detail in the draft Law result in greater complexity and regulatory uncertainty for businesses. Compared with the current gas regime, the proposed regime involves more discretion for the regulator, yet more limited checks on regulatory accountability.

2. Governance framework

The governance framework for the national energy market is set out in the Australian Energy Market Agreement (AEMA). The MCE's role is to provide the policy framework and strategic directions for the national market. The AEMC will be responsible for Rule-making and market development, while the AER will be responsible for economic regulation and enforcement.

The MCE's objective in creating this split between Rule-making and Rule-enforcement was to provide 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' and to establish a 'more structured and transparent code-change [or rule-change] process'².

ActewAGL fully supports the general governance framework and the intention to improve transparency and accountability. However, we believe that the draft Law is inconsistent with these intentions in a number of ways.

Overwhelming reliance on Laws rather than Rules

In contrast to both the current gas regime and the new regime for electricity transmission, the proposed gas regime involves an overwhelming reliance on Laws over Rules.

¹ MCE Standing Committee of Officials, *Statement of Scope: A National Legislative Framework for Electricity and Gas*. July 2006. p. 6

The proposed reliance on Laws over Rules has serious implications for accountability and transparency. The draft Law sets out a detailed Rule-making consultation process whereby the AEMC is required to consult with industry, consumers and the public on proposed Rule changes. Industry has the opportunity to initiate Rule changes. However, because most of the proposed gas regime is contained in Laws, rather than Rules, the scope for this transparent consultative process is severely limited.

While it is clearly appropriate, and in line with MCE intentions, for the Law to set out the high-level policy framework, more detailed technical and procedural matters are better suited to Rules. ActewAGL notes that many technical and procedural matters from the Gas Code have been moved into the draft Law, particularly into chapter 4, and would be locked-in and not subject to possible review and refinement through the Rule-change process.

The role of regulations

The proposed role for regulations in the new gas regime raises further serious concerns about transparency and regulatory accountability and streamlining regulation.

The draft Law allows for extensive use of regulations. Regulations are not subject to requirements for consultation, as Rules are. They are set directly by governments, and disallowance provisions are confined to the lead jurisdiction. Regulations can potentially create a further set of obligations or requirements, in addition to those contained in the Law and Rules. Furthermore, while the Law requires that rules must promote the National Gas Law objective, there is no such requirement on regulations. The proposed use of regulations to cover matters such as the scope of merits review and the definition of associates increases uncertainty for businesses.

3. The role of the AER

ActewAGL is concerned about the degree of regulatory discretion that the draft Law confers on the AER. The current gas regime embodies a 'propose-respond' model for the role of the regulator. As the MCE notes, the nature of the regulator's decision-making power under the propose-respond model is to assess a service provider's proposal and accept it (in whole or in part) unless it fails to meet specified criteria and, only in those circumstances, to determine an outcome that best meets the criteria. That is, there is a presumption of acceptance of the proposal under the propose-respond model³. ActewAGL believes that this model has worked well in the past reviews of gas access arrangements. We also note that a limited propose-respond model has been adopted by the AEMC for the electricity transmission sector.

In contrast, the draft Gas Law does not require acceptance by the AER of any element or part of an access arrangement in the form it is submitted to the AER. Sections 170 and 178 empower the AER to make 'reasonable assumptions' on any aspect of the proposed access arrangement. ActewAGL is concerned that this will allow the AER to replace the businesses'

³ MCE Standing Committee of Officials. *2006 Comprehensive Legislative Package: Overview and*

estimates with its own 'reasonable assumptions', without a requirement on the AER to show how or why the businesses' proposals were inadequate. This is clearly at odds with the MCE's own view that the outcomes of regulatory reviews should be predictable⁴.

The scope for the AER to set regulatory guidelines under the draft Law raises further serious concerns about regulatory discretion. The powers of the AER to set guidelines also create regulatory uncertainty for businesses, and an additional layer of obligations which are not necessarily determined through a consultative process.

4. Merits review

Compared with the current gas regime, the draft Law gives the AER greater discretion, but at the same time provides more limited scope for review and accountability. Under the draft Law, merits review is to be on limited grounds, with restrictions placed on the evidence that may be brought to establish any ground of review.

ActewAGL has several concerns about the proposed limited review arrangements. As the MCE explains, the decisions subject to merits review will not be listed in the draft Law, but will instead be prescribed by the Regulations⁵. This creates unreasonable uncertainty for businesses, as rights to merits review can potentially be removed by the passing of a Regulation.

The unreasonable scope for refusal of an appeal application further undermines the effectiveness of the review arrangements. The draft Law allows the Tribunal to refuse leave to appeal where the business may have failed, even in a minor way, to comply with an information request from the AER, even if the matter was unrelated to the appeal.

While the regulated businesses face tight limits on their rights to review, the AER has scope during the review to raise new matters unrelated to the grounds of appeal. This could potentially result in matters thought to have been settled in the final decision being re-visited at the discretion of the regulator. This power for the AER clearly creates uncertainty and unpredictability for the regulated businesses.

5. Information requirements

ActewAGL is concerned that the draft Law significantly expands the regulator's information gathering powers, without providing adequate checks that the additional compliance costs imposed on businesses are necessary or reasonable. The draft Law creates two new concepts, a 'general regulatory information order' and a 'regulatory information notice', and outlines the processes by which these instruments may be used by the AER.

⁴ MCE Standing Committee of Officials, *2006 Comprehensive Legislative Package: Overview and Response to Expert Panel on Energy Access Pricing*, November 2006, p. 16

⁵ MCE Standing Committee of Officials, *Explanation of the Gas Legislative Framework*, November 2006, p. 29

The AER may serve a regulatory information notice or make a general regulatory information order if it considers it 'reasonably necessary for the performance or exercise of its functions'. It is not required to demonstrate that the compliance costs of the request are more than offset by benefits of acquiring the additional information. It is only required to 'take into account comments received'⁶.

The MCE's own intention is that the Law should contain 'a framework for the AER to have regard to the relevance of the information it requires to be reported, and to the costs incurred by the information provider, and the efficiency and effectiveness of the regulatory process and its objectives'⁷. ActewAGL believes that the requirement to 'take into account comments received' is not an adequate framework. As a result, the new information gathering powers are likely to result in more costly and cumbersome requirements for regulated businesses, for no clear benefit.

6. Associate contracts

The provisions in the draft Law relating to associate contracts are a further serious concern. Compared with the current gas regime and the new electricity transmission regime, the proposed gas arrangements give the AER far more wide reaching powers to require associates to provide information. The AER will have discretion to require the associate to provide prescribed information, including information that is not directly related to the service provided to the regulated business. These requirements will impose additional costs and compliance burdens on the regulated businesses and their associates, yet the AER is not required to demonstrate that these additional costs will be more than offset by any benefits. Uncertainty about the possible definition of associates exacerbates the cost and regulatory risk associated with the proposed Law.

7. Further concerns

ActewAGL is also concerned about a range of other elements of the draft Law that potentially add to regulatory uncertainty and have no clear policy basis. For example, the proposed pricing principles refer to a requirement for the regulator to consider asset under or over utilisation. The basis for the requirement is unclear, and the result could be unpredictable and inconsistent pricing decisions. The use of vague terms, such as 'allowance should be made for the value of the pipeline', in the draft pricing principles adds to the regulatory uncertainty.

Concerns about a range of further matters are set out in detail in the Energy Network Association response to the draft Law.

⁶ MCE Standing Committee of Officials, *Explanation of the Gas Legislative Framework*, November 2006, p. 12

⁷ MCE Standing Committee of Officials. *2006 Comprehensive Legislative Package: Overview and Response to Expert Panel on Energy Access Pricing*, November 2006, p. 22