



AusCID

<http://www.auscid.org.au>

**Australian Council for
Infrastructure
Development
Limited** ACN 061 241 638

88 Whitehall Street
FOOTSCRAY VIC 3011

Telephone: (03) 9689 4448

Mobile: 0409 911 554

E-mail: regulation@auscid.org.au

Streamlining of Code Changes Process

Submission in response to Discussion Paper issued
by the Ministerial Council on Energy Standing
Committee of Officials

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AusCID is the principal industry association representing the interests of companies and organisations owning, operating, building, financing, designing and otherwise providing advisory services to private investment in Australian public infrastructure.

The Council formed in 1993 and currently has 88 members, drawn comprehensively from all economic infrastructure sectors including electricity generation, transmission and distribution, gas transmission and distribution, roads, rail, telecommunications, water, airports and ports. As a result of our membership base, AusCID is in a unique position to consider the views of infrastructure owners, equity investors and debt financiers and combine them with the views of infrastructure operators.

As a representative of investors in energy infrastructure assets, AusCID is concerned with many of the issues that need to be addressed in the current energy market reform process. The Council considers that the strategic direction set by a national energy policy will have wide consequences for the development of the energy market, as well as the broader economy.

AusCID welcomes and supports any well founded proposals that are directed at improving the efficiency and transparency of energy market operations. As such, AusCID welcomes the discussion paper as a concrete contribution towards improving the efficiency and transparency of the rule making activities of AEMC. In this spirit, AusCID has set out below its responses to the discussion paper. However, AusCID's lack of specific responses should not be taken as an endorsement of any particular recommendations in the discussion paper, as this endorsement (or otherwise) is better left to other industry organisations and individual market participants.

Prescribed Criteria for Assessing Code Change Proposals

Senior Officials will be aware that in responding to the Productivity Commission's Review of the National Access Regime, the Commonwealth Government has indicated that the following should be the objects clause for Part IIIA of the *Trade Practices Act 1974*

'The object of this Part is to:

(a) promote the economically efficient operation and use of, and investment in, essential infrastructure services, thereby promoting effective competition in upstream and downstream markets; and

(b) provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry.'

Following on from, and consistent with this, the Productivity Commission has recommended that the objects clause of the Gas Code should be amended to

To promote the economically efficient use of, and investment in, the services of transmission pipelines and distribution networks, thereby promoting competition in upstream and downstream markets.

The Productivity Commission goes on to recommend that a range of other objectives currently in the Gas Code (a number of which are similar to those set out in the market objectives listed in the discussion paper) should be deleted. The Productivity Commission cites three reasons for this:

- The economic efficiency based approach to defining the objectives of these regimes properly captures the over-arching objective of maximising social welfare
- Deletion of the relevant objectives moves the Gas Code away from the notion of “competition for competition’s sake”
- Deletion of the relevant objectives reduces regulatory risk by removing the discretion provided to regulators in interpreting and weighing what can at times be competing objectives.

It is clearly important that there be a consistent approach taken to the objectives of both the Gas Code and the Electricity Code and that in turn they be consistent with the more general access regime provided under Part IIIA. Therefore, it would seem that the following is an appropriate objective for the Electricity Code:

To promote the economically efficient use of, and investment in, the services of electricity transmission and distribution networks, and efficient operation of electricity markets, thereby promoting competition in upstream and downstream markets.

Ultimately, if the Codes were to be merged an appropriate objective would be

To promote the economically efficient use of, and investment in, the services of electricity and gas transmission and distribution networks, and the efficient operation of associated markets, thereby promoting competition in upstream and downstream markets.

Appeals

Whilst this discussion paper is largely directed at the code change process, it does canvass briefly the more general issue of appeal mechanisms within the new market structure. In particular, the discussion paper states

When regulatory functions for the Electricity and Gas Codes are transferred from the ACCC to the AER, the rights of review are not affected by this process

AusCID strongly believes that as part of this process, the opportunity should be taken to correct the lack of merit review in the Electricity Code and the restrictions on merit appeals in the Gas Code.

The need for a full merits based appeal right under the Gas Code has been borne out by recent decisions of the Australian Competition Tribunal which held that the ACCC acted unreasonably in its assessment of access arrangements for gas pipelines.

The National Electricity Code pricing and access requirements are not consistent with best regulatory practice. This Code does not have a merit review of ACCC regulatory pricing and access decisions although some state regimes for regulating distribution assets provide for merit review of a full or limited nature.

Given that service providers are consistently having to resort to appeals on matters of law to correct relatively simple but egregious regulatory errors, and to deliver regulatory best practice, full merit appeals to the Australian Competition Tribunal must be available in both the Electricity and Gas Codes.

The Productivity Commission in their Draft Report on the Review of the Gas Access Regime has recommended that full merit reviews should be extended to the National Gas Code to replace the current more limited review on the “facts”. This position has recently been supported by the ACCC in its response to that Draft Report. The ACCC says:

As access arrangements allow regulators to alter the property and contractual rights of service providers, the Draft Report recommended that the limitations on the grounds of appeal under s39 be removed to allow a full merits review (Draft Recommendation 11.5). The Draft Report recognised that such a broad appeal may take considerable time and expend considerable resources. However, it felt the potential costs were outweighed by

the benefit of protecting the property and contractual rights of covered service providers.

The ACCC recognises that access to natural justice is important and may justify an extension of s39 to a full merits review.

Providing full merit review under the Gas and Electricity Codes would place operators of these facilities in the same position as operators of infrastructure subject to the more general access regime provided in Part IIIA of the *Trade Practices Act 1974* where full merit appeals to the Australian Competition Tribunal on decisions of the Minister (on declaration matters) and ACCC (on arbitration matters) are provided for by sections 44K and 44ZP respectively.

In reviewing the National Access Regime, the Productivity Commission recommended that the current appeal mechanisms within Part IIIA should be retained and the Commonwealth's final response show no intention of removing full merit review from either aspect of Part IIIA of the *Trade Practices Act 1974*.

The Productivity Commission, in relation to the Gas Code, has also recommended (and this is also supported by the ACCC) that any merits review process be limited to the material that was before the original decision maker. The primary reason for this is to place the onus on service providers to ensure that decision makers do have access to all relevant information and to speed up any appeal process. Whilst this does limit appeals relative to those provided for in Part IIIA of the *Trade Practices Act 1974*, AusCID does not see this as unreasonable providing service providers may bring forward material that reasonably was not available at the time the original decision was made and that material generated by the decision maker (such as consultants reports) can be fully challenged and examined.

If Senior Officials wish to discuss these issues further, please contact Dr Warren Mundy on 0409 911 554 or by email regulation@auscid.org.au.