



19 September 2008

Manager, MCE Secretariat
Department of Resources, Energy, and Tourism
GPO Box 1564
CANBERRA ACT 2601

Via email to MCE@ret.gov.au

Dear Sir/Madam

**Australian Energy Market Operator Establishment Legislative Framework:
Statement of Proposed Approach**

The Australian Pipeline Industry Association (APIA) welcomes the opportunity to respond to Statement of Proposed Approach Paper (the Paper) released by the Australian Energy Market Operator (AEMO) Implementation Steering Committee (ISC) on 7 August 2008.

APIA's comments are focussed on the proposed arrangements for governance and regulation of gas markets, particularly as they affect the gas transmission sector.

APIA supports the broad direction of the Paper in respect of accountability, cost-recovery, and immunity and indemnity issues.

However, APIA has real concerns about the proposed information-gathering powers and confidentiality arrangements. These powers confer an almost unlimited discretion on AEMO to seek information. There must be some balance to ensure that AEMO does not make costly and intrusive requests for information where that information provides little benefit to it in the exercise of its functions.

APIA's main concerns with the information gathering powers are:

- the Paper asserts that powers made available to the AER through the *Trade Practices Act 1974* set a precedent for the powers that should be available to AEMO. APIA contends that powers available to AEMO should not be as wide ranging or intrusive as those available to the AER as the AER and AEMO fulfil very different roles. There is not justification for this assertion. The AER regulates the wholesale electricity market and is responsible for the economic regulation of the electricity transmission and distribution networks in the national electricity market (NEM). The AER is also responsible for the economic regulation of gas transmission and distribution networks and enforcing the national gas law and national gas rules in all jurisdictions except Western Australia.

- There is a real issue regarding confidentiality as the use of these powers as proposed in the Paper, such as the ability of AEMO to use information gathered for any purpose it sees fit (para 110 i), is at odds with the National Gas Statement of Opportunities (GSOO) Industry Consultation Paper, which is also seeking industry comment. Page 21 of the GSOO Statement of Opportunities Industry Consultation Paper states:

"The introduction of obligations to provide information for the GSOO will also need to be accompanied by measures to protect the confidentiality of that information and to ensure it is only used for defined purposes."

This is incompatible with the views sets out in this Paper. The GSOO Paper was issued by the Gas Market Leaders Group, which also reports to MCE.

We look forward to your response to our submission.

Yours sincerely

A handwritten signature in black ink, appearing to read 'CHERYL CARTWRIGHT', with a long horizontal line extending to the right.

CHERYL CARTWRIGHT
Chief Executive

19 September 2008



APIA Response to AEMO Legislative Framework: Statement of Proposed Approach

Introduction

The *Australian Energy Market Operator Legislative Framework: Statement of Proposed Approach* (the Paper) proposes that the Australian Energy Market Operator (AEMO) will be responsible for a range of gas market functions.

APIA considers the Paper's position on the information gathering powers for AEMO to be of utmost concern, and will address that first, followed by other comments on issues that are addressed in the order that they appear in the Paper.

1. Information gathering powers

The two identified situations where a Market Information Order (MIO) or a Market Information Notice (MIN) can be issued are:

- the exercise of National Transmission Planner (NTP) functions and powers
- the exercise of Gas Statement of Opportunities (GSOO) functions and powers

The rules governing these two situations have not yet been established. It would be more appropriate for the relevant types of information that AEMO needs to be carefully identified before AEMO is given power to collect that information.

APIA's specific concerns related to information gathering are:

Powers to Gather Information

It is proposed that:

- “ A MIO or MIN may be issued in three situations:*
- when AEMO considers such ‘reasonably necessary’ for the exercise of NTP functions and powers;*
 - subject to and in accordance with the NGR, for the exercise of GSOO functions and powers ;*
 - otherwise, where the NER or NGR expressly provide for issue of a MIO or MIN, subject to and in accordance with the provisions of those rules.”*

This provides AEMO with very broad discretion as to what information it may collect and also enables AEMO to demand information where there may only be a secondary connection between the information and the exercise of these functions or powers by AEMO.

Relevance and Cost of the Information

The Paper proposes that the provisions for MIOs and MINs should be based on the provisions in the National Electricity Law (NEL) and National Gas Law (NGL) for RIOs and RINs.

APIA would like to highlight that s48 of the NGL, (2) b provides that the AER must have regard to the likely costs that may be incurred in complying with the notice or order.

The Paper only sets out a similar provision for AEMO in the case of an NTP MIO or MIN (ie an electricity industry related MIO or MIN) and leaves the issue of regard to cost for other MIOs or MINs dependant on the rules that govern MIOs and MINs.

APIA contends that all MIOs and MINs should be covered by the same provisions as NGL RIOs and RINs such that AEMO must have regard to the likely costs that may be incurred in complying with the notice or order.

The Paper also proposes that market participants should be required to provide the information in any format specified by AEMO. Thus AEMO can require businesses to bear the costs of performing data analysis by requiring information to be provided to meet a certain format. APIA strongly believes that AEMO should be required to consider the cost consequences of demanding information to be provided in a certain format.

s52 of the NGL sets out that AER should consult before serving a RIO or RIN on a company and APIA therefore believes that AEMO should be required to demonstrate the relevance of information being sought, and whether the value of the information outweighs its cost of collection before serving a MIO or MIN.

Clearly, communication with industry during the process will provide better outcomes than requesting information blindly. It is far more efficient to discuss the use of the information or the reason for the request, rather than seek unnecessary extra or inappropriate information.

Uses of Information

The Paper proposes that there should be no restrictions on how AEMO uses information provided by participants.

"There does not seem to be any basis for limiting the use to which AEMO may put the information. This is consistent with s44AAF of the Trade Practices Act (1974)" 110 i

APIA notes that s44AAF of the *Trade Practices Act (1974)* sets out powers in relation to information gathering for the Australian Energy Regulator. The AEMO Implementation Steering Committee (ISC) should note that AEMO is being established to operate and facilitate the market, not regulate it, and therefore powers that are appropriate to the regulator, such as those set out in s44AAF of the *Trade Practices Act (1974)* should not automatically be extended to AEMO.

APIA strongly recommends that AEMO should be required to use information only for the purpose for which it is obtained. This is an important accountability check on AEMO. It would enhance industry confidence and ensure that AEMO does not have

an opportunity to inappropriately use its information-gathering powers by obtaining information for one purpose and use that information for another purpose.

APIA raises the point that page 21 of the GSOO Statement of Opportunities Industry Consultation Paper clearly states:

"The introduction of obligations to provide information for the GSOO will also need to be accompanied by measures to protect the confidentiality of that information and to ensure it is only used for defined purposes."

This is substantially different from the position taken in this Paper.

It should also be noted that there are much tighter restrictions on how *market participants* can use confidential information than what is being proposed for AEMO. For example, section 137 of the NGR provides that pipeline companies may only use confidential information obtained from shippers for the purpose for which it was supplied. Similarly, the provisions in the NGL require parties accessing the emergency pages of the Bulletin Board to only use that information for the purposes of managing an emergency.

Powers to pass on information

The Paper proposes that AEMO should be entitled to pass on confidential information to other regulatory and governmental bodies, including the ACCC, the AER, ERA, AEMC, ESPIC, energy industry ombudsman, relevant jurisdictional regulators and any other person prescribed by regulation. The Paper sets out that this is appropriate due to the precedent set out in s44AAF of the *Trade Practices Act (1974)* for the AER.

As noted above, powers available to AER should not set a precedent for the powers available to AEMO. Indeed, it is inappropriate for AEMO to have powers as extensive as AER, given the difference in the roles of the two bodies.

Industry needs to be confident that AEMO will protect confidential information. Disclosure of confidential information may substantially affect the rights of market participants. Confidential information is often part of the competitive advantage of a company, and disclosure could reduce competition. In this regard it should be noted that, unlike electricity transmission, gas transmission is often competitive, with pipeline companies competing head-to-head. As such, disclosure standards which may apply in electricity transmission are likely to be inappropriate for the gas industry.

To address these concerns APIA believes the AEMO legislation should include:

- **checks on the ability of AEMO to issue MINs and MIOs. A possible approach would identify the specific types of information that AEMO may collect, while still providing flexibility;**
- **a requirement on AEMO to identify the purpose for which information is needed and provide reasons as to why the information is relevant. This is particularly important, as the provision of that information will impose a cost to industry;**

- a requirement on AEMO to seek to identify the most cost-efficient method for all parties for collection of the information which meets the identified purpose;
- a requirement on AEMO to use information only for the purpose for which it is obtained;
- a requirement where, if AEMO is to pass confidential information to a third party, this action be subject to a review; and
- an appeal right related to MINs and MIOs that seek information either unrelated to an AEMO function or inordinately costly to produce.

APIA's concern is the extent to which MINs and MIOs are open to being used inappropriately. For example, currently RINs and RIOs are used to obtain information on regulated pipelines. There is no equivalent instrument to seek information from unregulated pipelines. It would be inappropriate if MINs and MIOs were to be used to obtain information relating to unregulated pipelines that would be of little value to the market but which regulators or other market participants believe is of value in other processes. APIA is concerned that MINs and MIOs have enormous potential to introduce regulatory aspects into currently unregulated pipeline assets.

2. Accountability framework

The Paper proposes to retain the existing NGL compliance, enforcement and dispute resolution framework.

APIA is concerned about the section in the NGL that permits provisions to be classified as conduct and/or civil penalty provisions by regulation.¹

The consequences for breach of both civil penalty and conduct provisions are serious. Conduct provisions entitle parties to sue under the NGL, while civil penalty provisions permit the imposition of monetary penalties of up to \$20,000 plus \$2,000 per day for individuals, or \$100,000 plus \$10,000 per day for companies.

Recommendation 2 of Chapter 1 states:

"The Rules should specify the extent to which participants are obliged to comply with a particular procedure or part of a procedure. Particular Rules may be made a civil penalty or conduct provision by prescribing them in the Regulations."

Under the proposals in this paper, regulations can be made without any public consultation or comment, in contrast to the consultation processes which are central to the development of Rule (or procedure) changes. It would be inappropriate to create a civil penalty or conduct provision by regulation and bypass the safeguards built into the rule development processes for other types of rule changes. Given the impact of such provisions on the rights of companies and individuals, APIA

¹ Sections 3 and 4 of the NGL provide that the regulations may prescribe provisions of the Law and Rules as conduct provisions or civil penalty provision.

considers it is important that parties have the opportunity to provide comment through a rule change process on whether provisions should be classified as civil penalty or conduct provisions.

3. Cost recovery

The Paper proposes that AEMO operate on a cost recovery, not-for-profit basis, and that the budget take into account, and separately identify, projected revenue requirements for AEMO's lines of business.

APIA supports the principle that fees should be allocated on a functional basis, with the parties benefiting from a particular AEMO market service funding that service. As the proposed market generally benefits energy wholesalers and retailers, APIA believes that it is inappropriate for the gas transmission sector to contribute to proposed market funding, including funding of the gas bulletin board and the proposed gas short term trading market. Carrying forward the existing cost allocation formulae from the various market operators might be a pragmatic and practical starting point.

APIA supports the view that the total of the budgets of the bodies that will be rolled into AEMO provides a starting point for setting AEMO's initial budget. APIA supports a review of the efficiency of the AEMO budget after AEMO has been in operation for two years. Irrespective of the review, the Board and management of AEMO should be required to control costs on an ongoing basis.

Consistent with the philosophy of charging fees of a functional basis, APIA considers it is absolutely imperative that, where COAG, the MCE, or a jurisdiction directs AEMO to provide a report, the directing body or jurisdiction should pay for the costs of preparing the report.

Without this, it is possible that AEMO could be directed by governments to take on additional functions, without full consideration of whether the value of the functions outweighing their costs. Prior to accepting such functions, AEMO should be required to conduct an analysis of the costs of information collection, including the costs that would be imposed on industry. In such cases, governments should pay for the extra functions.

APIA is keen to preserve the arrangements under the Bulletin Board for gas companies to be recompensed for the provision of aggregation and information services (NGR Rules 197-198). APIA would support expanding these arrangements to other areas such as the proposed short term trading market and the proposed gas statement of opportunities.

4. Immunity and indemnity provisions

The Paper proposes that AEMO be subject to existing:

- NEL and NER immunity provisions applicable to NEMMCO. These relate to acts or omissions without bad faith or negligence
- NGL and NGR immunity provisions in relation to the Bulletin Board operator

The NGL provides the Bulletin Board operator with immunity from suit for any action unless it is undertaken in bad faith or through negligence, and provides a cap on liability for acts undertaken through negligence.

There is a parallel immunity for persons giving information to the Bulletin Board operator: section 226 of the NGL. The Paper is not clear in its recommendation regarding whether it intends to preserve the immunity provisions in section 226 of the NGL for entities giving information to the Bulletin Board operator. This immunity should be preserved.

5. Emergency management

The Paper proposes to establish a working group to assist it review current emergency arrangements and to consider the circumstances in which MCE might act.

APIA agrees with the Paper that energy markets are designed to work autonomously and should be able to respond to emergencies without government intervention.

APIA considers that government intervention in energy markets should be a last resort as it may involve suspending prevailing pricing and dispatch arrangements. An expectation of regular government intervention could change parties' behaviour. Investors would be more reluctant to make investments to reduce the risk of emergencies (e.g. to invest in some level of redundancy in the system) because government intervention might be perceived to undo the benefit of that investment, or because government intervention might be seen to protect them from the consequences of an emergency.

In determining the best path forward for emergency management, it is important to note that governments have already set up a process to managing gas-related emergencies. In 2005, governments set up the National Gas Emergency Response Advisory Committee (NGERAC) to manage gas emergencies. NGERAC has already undertaken considerable work on gas emergency arrangements, including analysing emergency scenarios, developing a communication protocol and developing a procedures manual to define the roles of various parties during an emergency.

Rather than setting up an additional working group, APIA recommends that the ISC consult NGERAC for views on management of gas emergencies.

NGERAC has a number of gas industry and gas user members, who can provide commercial input regarding the circumstances in a case when an emergency may require external intervention.

If the ISC sets up a working party to consider emergency arrangements, in order to function effectively, the body would need significant industry representation and participation. However, APIA believes such a body would essentially duplicate work currently undertaken by NGERAC.

APIA asks the ISC to note that in the event of an emergency, continuing safe operation of infrastructure should be the primary consideration.

6. Gas retail market operator functions

The Paper suggests that an appropriate balance will be struck if the existing retail market rules 'transfer' to the national framework but that the jurisdictional rules remain unchanged, except where necessary. Recognising that it may be transitional, APIA broadly supports the proposed minimal change approach.

The Paper identified two issues to be resolved during this consultation:

- the principles to be applied in determining whether an existing rule should be reflected in the NGR or procedures; and
- the proposed procedure change process.

APIA considers the Rule should reflect core or higher level responsibilities or areas where the AEMO can substantially affect the rights of parties, while the procedures should provide greater guidance and direction for how these responsibilities are exercised in practice. Nevertheless, the procedures are important and the process for changing procedures should not involve consultation with affected parties.

APIA supports the concept of developing a common process for changing procedures. In this regard, APIA supports the recommendation in the Paper to establish a committee of stakeholders that will provide recommendations regarding changes to procedures. APIA agrees with the sentiment in the Paper that stakeholder consultation is the key ingredient of a successful procedure-changing process.