

Ministerial Council on Energy
Standing Committee of Officials

**Responses to key issues raised in Submissions to the
Statement of Approach**

A New Legislative Framework for Gas

December 2005

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A New Legislative Framework for Gas

The Statement of Approach, released in September 2005 was prepared by the Standing Committee of Officials (SCO), to outline its approach to the development of the new National Gas Law and National Gas Rules. This work, which involves the restructuring of the existing Gas Law and Code, is to give effect to the requirements set out in the *Australian Energy Market Agreement* as agreed to by the Council of Australian Governments.

Submissions were received on the proposed approach to the development of the new National Gas Law and Rules as well as the preliminary positions taken in developing the legislative package.

The response to key issues raised in the submissions to the Statement of Approach have been provided by SCO, and are attached.

MCE Standing Committee of Officials

22 December 2005

**Issues raised and responses to submissions
Ministerial Council on Energy Standing Committee of Officials - Statement of Approach**

Issue raised in submission on the Statement of Approach (SoA)	SCO Response
Principles for creating National Gas Law and National Gas Rules	
<p>It is problematic to align the gas regime with the electricity regime.</p>	<p>The MCE remains committed to a common approach to energy access, which it identified in its December 2003 report to CoAG. The purpose of this approach is that, to the extent feasible and where effective regulation is not impeded, there should be consistency and harmonisation between electricity and gas access regimes such that investment in, and use of, energy is not distorted by differing regulatory regimes.</p> <p>It is recognised, however, that convergence of gas and electricity regimes should not occur for its own sake and, where, good policy or operational reasons exist, differences in regulatory arrangements should be maintained.</p> <p>The area of enforcement demonstrates where harmonisation and consistent application of laws across sectors by a national regulator can provide benefits. The Statement of Approach also acknowledges that, in other aspects, there may be legitimate policy reasons for the application of the gas regime to be applied in electricity, for example for dispute resolution.</p>

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<p>The changes should not change rights and obligations on parties as was done with the NEL.</p>	<p>Changes to the current regimes are required to reflect the CoAG Australian Energy Market Agreement and the transfer of functions to the AER and AEMC.</p> <p>The changes will have some consequential effects upon the rights and obligations of parties. For example, as in the NEL, the NGL will include provisions to give clear guidance to the regulator, appropriate enforcement powers and mandatory consultation processes. The changes are necessary to give effect to the COAG Australian Energy Market Agreement (AEMA) and give effect to the transfer of functions to the Australian Energy Market Commission (AEMC) and Australian Energy Regulator (AER).</p>
<p>Process and consultation</p>	
<p>Consultation on the NGL and NGR should take place at the same time because they need to be assessed as a complete package. The period of consultation should be sufficient.</p>	<p>Agreed. The Exposure Draft will comprise both the National Gas Law and National Gas Rules. Consultation will be for a minimum period of 6 weeks.</p>
<p>Why is merits review being dealt with by a different work stream and why are existing review mechanisms not being kept until a final decision has been made.</p>	<p>Merits review is an area in common with electricity and under consideration at the same time. Also, it is an area where convergence would be desirable. The MCE therefore decided in May that merits review for both the electricity and gas sectors needed to be the subject of a separate comprehensive work program (for more information on merits review see <i>Review of</i></p>

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	<p><i>Decision-making in the Gas and Electricity Regulatory Frameworks, Discussion Paper, 10 October 2005).</i></p> <p>For gas, the existing review mechanisms contained in the <i>National Third Party Access Code</i> will remain in force until the new National Gas Law is enacted.</p> <p>On the basis of a timely resolution to this work stream and a MCE decision, recommendations with respect to review and appeal rights will be incorporated into the drafting of the NGL.</p>
<p>The policy issues associated with Productivity Commission Review of the Gas Access Regime (PC Review) should not be dealt with by the Statement of Approach.</p>	<p>The SoA does not presuppose MCE decisions with respect to responses to recommendations of the Productivity Commission (PC) Review. It does, however, make some assumptions about the form of the MCE's response, for example, that the NGL will include an objects clause which, consistent with the application of the MCE's governance model in electricity, will guide both the Regulator and AEMC's decision making.</p> <p>The MCE's response to the PC Review will remain the subject of separate consultation and, when the MCE's response is finalised, this will be reflected in the drafting of the NGL and NGR.</p>
<p>The drafting of the National Gas Law should wait until all outstanding policy issues in gas and electricity are resolved.</p>	<p>At its May 2005 meeting, the MCE resolved that to the extent that policy issues could be resolved by its November 2005</p>

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	<p>meeting, these would be incorporated into the drafting of the NGL. The deferral of a decision on some issues until early December 2005 places pressure on the achievement of the timetable, however continuous deferral of the legislation until all policy issues are resolved is not practical, particularly with respect to achieving the timetable for transfer of functions to the AER and AEMC by 1 January 2007.</p> <p>In the absence of a timely resolution to policy matters, the NGL and NGR will continue to reflect, at the minimum, the change in governance arrangements and transfer of functions to the AER and AEMC.</p>
<p>Will the NGL change in future without consultation?</p>	<p>Any change to the NGL would need to be unanimously agreed by MCE Ministers in accordance with the Australian Energy Market Agreement and would involve public consultation.</p> <p>Future changes to the NGL (and therefore jurisdictions' application acts) will be subject to the normal consultation processes undertaken when legislation is being amended.</p>
<p>Implementation of specific changes</p>	
<p>Implementation of associate contracts provisions needs clarification.</p>	<p>The drafting of the associate contracts provisions will need to give effect to the MCE response to the PC Review, currently released in draft form.</p>

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	<p>The MCE's draft response proposes that service providers will be required to report all associate contracts to the AER. The AER will be empowered to void associate contracts that undermine the integrity of the ring fencing provisions.</p> <p>Implementing the recommendation in this way means that there is no need to exclude asset management contracts from the provisions. This accommodates the issue of how to determine what is, and what is not, an asset management contract. The drafting of these provisions will be made clear by the exposure draft of the NGL and NGR.</p>
<p>The suggested approach on competitive tender provisions being broadly modelled on Part IIIA of the <i>Trade Practices Act 1974</i> does not solve problems with the current provisions.</p>	<p>The current Code provisions on competitive tendering are considered problematic, in their present form, to be transferred directly into the NGL.</p> <p>In light of the useful changes proposed for Part IIIA of the <i>Trade Practices Act 1974</i>, an interim policy position was taken by SCO (pending final decision by the MCE) to resolve drafting ambiguities in the current provisions by drawing on the model proposed for the <i>Trade Practices Act 1974</i>.</p> <p>The existing purpose and scheme contained in the Gas Code will not be changed. It is recognised that the Code currently applies to more than just government competitive tenders and extends to private entities tendering for services. Changes in this area will</p>

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	<p>be procedural in nature and were not considered significant enough to warrant consultation, other than that which would occur on the Exposure Draft.</p>
<p>The proposed information gathering and sharing powers of the AER should be restricted as per the current gas regime and not modelled on the NEL. Also concern that information provided in confidence can only be used for the purpose in which it was provided.</p>	<p>The MCE has committed to an effective enforcement regime with appropriate information gathering and sharing powers for the national institutions.</p> <p>Information sharing under the <i>Trade Practices Act 1974</i> ensures that information is not gamed between bodies. This regime provides protection from unauthorised disclosure outside of those arrangements. If any national institution intends to use the information it has acquired against the interests of a particular party, natural justice obligations and the arrangements currently within the legislative framework, provide opportunity for the aggrieved party to correct any misconceptions arising from information taken out of context.</p> <p>With regard to the scope of AER information gathering, the NEL provisions provide a robust framework for the regulator to obtain information necessary to carry out its functions and powers applicable to the National Electricity Market Access Regime.</p> <p>The powers will be consistent with other regulatory information gathering powers for Commonwealth regulators and are not intended to create a significant burden on industry.</p>

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<p>Concern over penalty levels and use of infringement notice system. <i>(Note some submissions considered penalty levels to be too high, while some suggested they were too low).</i></p>	<p>The MCE is committed to effective deterrents for the breach of access obligations in the energy sector. Consistent penalty regimes across gas and electricity ensure that similar offences in each sector will be dealt with in the same way. It is important to note that the penalties are a maximum penalty, and the actual gravity of the conduct will be considered by the Federal Court in coming to a view on the penalty to be imposed.</p> <p>The addition of the infringement notice system is intended to assist the smooth operation of the enforcement system. A company alleged to be in breach of the gas access regime will still have the right to take that matter before the court in the usual way.</p>
Application of the regime to Western Australia	
<p>Question whether WA would continue to keep their mirror law consistent with changes to the NGL.</p>	<p>WA is committed to applying the national gas pipeline access regime embodied in the new National Gas Law. WA will enact complementary legislation which substantially corresponds to the access module of the National Gas Law. WA's complementary gas legislation and any subsequent changes will be consistent with the National Gas Law, and differ only in respect to having its own institutions, the regulator being the Economic Regulation Authority.</p>

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<p>Question why WA does not adopt all of the national gas and electricity regimes.</p>	<p>WA is committed to applying the national gas pipeline access regime embodied in the National Gas Law. The only difference in regards to the arrangements for WA will be in respect of the institutional arrangements (ie the regulator will be the Economic Regulation Authority). The National Gas Rules (as they relate to access) as initially made by the South Australian Minister, and subsequently amended through the AEMC, will apply in Western Australia.</p> <p>WA is currently pursuing substantial electricity reform in the State which is the subject of significant public consultation and developed for the specific WA environment with the aim of ensuring the WA energy market continues to move towards a competitive outcome.</p>
<p>Clarification of detailed provisions (contained in Statement of Approach Appendix 1)</p>	
<p>Divided comments on ring fencing provisions being placed in the NGL.</p>	<p>The SoA detailed that the fundamental aspects of ring fencing will be placed in the NGL with procedural and technical details to be placed in the NGR. This approach is consistent with SCO's principle of enshrining the policy and structural matters of the regime in the NGL, with the detailed application of provisions to be contained in the NGR.</p> <p>As the gas regime is solely concerned with access, and the</p>

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<p>For example, APIA has direct representation on NGPAC, however will not have the same representation on the AEMC; and what ability will the MCE have to guide AEMC in the discharge of its functions?</p>	<p>COAG and given effect in the <i>CoAG Australian Energy Market Agreement 2004</i>.</p> <p>Industry bodies will have the opportunity to submit their views as part of the consultation processes enshrined in the NGL and included in the NGR. This may include as part of advisory panels or working groups (equivalent to NEL s 39).</p> <p>The MCE will be able to direct the AEMC through the release of statements of policy principles, consistent with s 8 of the NEL. The MCE will also be able to initiate the AEMC undertaking MCE-directed reviews.</p>
<p>Are transitional arrangements to be retained in the NGL.</p>	<p>The NGL will involve adequate savings and transitional provisions to ensure a smooth transition to the new governance arrangements.</p>
<p>Seek clarification of transfer of gas regulation to AER at the same time as transfer of gas transmission regulation. Clarify non-access related regulatory functions and their transfer.</p>	<p>The transfer of access-related regulatory functions (i.e. all powers under the existing Code) will occur at the same time for both distribution and transmission pipelines. South Australia, as lead legislator, is not expected to proclaim its legislation until all other jurisdictions have passed their application acts. Accordingly, all regulatory functions are expected to be conferred upon the AER and AEMC on the same date.</p> <p>It is not proposed to transfer those regulatory functions that are</p>

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	not related to access, such as technical regulation, licensing, and issues related to performance standards and monitoring.
Miscellaneous	
Existing transitional derogations, particularly with respect to the Queensland Gas Access Regime, should continue.	<p>Derogations by jurisdictions will be minimal and, for many states, have been spent as part of the transition to full retail competition. Derogations should be consistent with the objective of the National Gas Law while taking into account the need for variations similar to those set out in s. 89 of the National Electricity Law.</p> <p>It is anticipated that the MCE will make a final decision about the retention of derogations in 2006 (although the MCE has not made a final decision on exercising this function at the time of writing).</p>
Concerned with Victorian Appeals Tribunals decision and ESC Victoria's access to related party transactions.	<p>The recent appeal to the Victorian Essential Services Commission Appeals Panel by United Energy in relation to information sought from UED and other parties on its electricity distribution price review, is not directly relevant to the NGL legislative program, as it is not proposed that provisions equivalent to section 37 the <i>Essential Services Commission Act 2001 (Vic)</i> be adopted.</p> <p>The MCE is currently considering the issue of appropriate</p>

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	<p>information gathering and sharing powers for the gas and electricity regimes.</p> <p>As outlined above, the MCE’s draft decision on its response to the PC Review of the national gas access regime proposes that an Expert Panel on common pricing provisions across electricity and gas regimes, may further examine appropriate information gathering and sharing powers.</p>
<p>Need to enshrine in the NGL a Gas Quality Standards and Specification body to reflect technical developments in gas, including coal seam methane and new basins.</p>	<p>The current MCE legislative program for gas is focused initially on access issues. The quality standards issue is not being considered by MCE at this time, and has not in the past been dealt with as part of the national access regulatory regime. This matter may be further considered, however, as part of the development of a national framework for distribution and retail regulation.</p>
<p>How will access, wholesale market development, and merits review fit into new gas legislation.</p>	<p>The legislative package and exposure draft will relate solely to access provisions. To the extent possible, the NGL will be drafted so that discrete modules, such that may relate to gas market development or retail issues, can be incorporated into the NGL at a later date.</p> <p>With respect to merits review, the policy decisions arising from this work stream will be incorporated into the NGL, pending its timely resolution and an MCE decision occurring prior to mid-</p>

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