Energy Action Group

Comments on the Framework for the Memorandum of Understanding between the AEMC, AER and ACCC and the various associated papers.

The Energy Action Group (EAG) a 26 year old not for profit incorporated association representing the interests of residential energy consumers. EAG has had over 10 years experience with regulatory processes and determinations in the gas and electricity markets. This submission is based on that experience!

Most of the consumers who have been directly involved in issues around the National Electricity Market have been frustrated by systemic problems around the relationships between NECA, NEMMCo and the ACCC. The decision to use of light hand incentive regulation has in turn strongly favoured the transmission and distribution network service providers. The use of Vesting Contracts then generous retail Standing Offers and inherent transmission network constraints has acted to protect both generators and retailers. (The major problem relating to Victorian and South Australian generators and several pipeline owners was in the main caused by the new owners over paying for the assets they bought or by factors external to the Australian electricity and gas markets.)

It is important for the MCE and the SCO to recognise that the entire process has been underwritten by electricity and gas consumers and they have been excluded from almost all processes and decision making. The MOU between the various regulatory bodies needs to provide for greater consumer involvement particularly at the oversight and decision making levels of the AEMC, AER .and ACCC.

The current regulatory process was claimed by its proponents at the time that the gas and electricity reforms would deliver benefits and efficiencies to consumers. The latest reforms based on the establishment of the AER (re-badging part of ACCC functions in a separate organisation) and the AEMC (re-badging NECA) and changing the role of the ACCC in the regulatory process to look after competition issues under the Trade Practices Act can be seen as an attempt to redress some of the deficiencies in the current arrangements. However the on ground implementation of the MOUs' will actually determine the performance of the 3 bodies and the benefits that consumers will gain from the changes in the MCE reform package.

EAG has had extensive experience of systemic deficiencies associated with the implementation of both the Gas and the NEM Codes by the jurisdictions and the various regulators. It is worth noting EAG is one of the very few consumer organisations to have been involved in several NEM and gas market decision making processes and has been trying to test the legal redresses available.

EAG believes that the AEC and the AEMC need to be more proactive in addressing the current deficiencies in the market and the Code. The gas and electricity industries and their associated lobby groups have been using the concept of "regulatory uncertainty" over the head of the various governments as deterrent to changing there current light handed regulatory approach. EAG experience with > 160 MWh in Victoria for example show that there are significant jurisdictional and regulatory issues on enforcement that do not get addressed by the current institutional arrangements. EAG experience is that the "devil comes from the detail" and not the well meaning rhetoric of a MOU. One simple example -is the failure by government, ombudsman and regulator parties (all covered by MOU's) to address systemic problems associated with electricity FRC in Victoria.

EAG is of the opinion that many of the problems in the reform process arose because most participants (particularly the very few consumers involved) did not/could not envisage how the outcomes from the reforms would evolve from the processes that they put in train.

These brief comments highlights a number of issues that EAG believe need to be addresses either in the body of the MOU's or in the legislative/regulative framework stemming from the MOU's.

EAG believes that there are several indicators that highlight systemic deficiencies in the NEM and gas industry regulatory arrangements-

1) The number of derogations in the NEM Code.

2) The length of time it is taking to get effective implementation of Full Retail Competition Information Technology Business to Business arrangements in both the gas and electricity industries. This has been a live issue across gas and electricity since 2001. The problem has been compounded by the lack of scrutiny of the costs of revising IT systems in the light of changing market conditions.

3) The failure to investigate and address unexplained NEM pool price increases. The weekly NECA market investigation excludes 30% of the high priced transactions due to the sampling technique that is employed. This has been an issue since market start.

4) The continuing deteriorating Annual Load Duration Curves for regulated assets best demonstrated by the distribution businesses highlighting the issue of limited load management. There are minimal pricing signals getting through to consumers, the main source of the problem, many market participants are rewarded by volatility!

5) Several issues particularly some relating to transmission have been complicated by one the participants taking the issue to the National Electricity Tribunal (SNI) or the Australian Competition Tribunal (GasNet, APT, Epic etc.) This process has involved both the relevant regulator (ESC Victoria and ACCC) and in the case of electricity interconnector issues NEMMCo has incurred considerable legal expenses trying to protect the process.

6) Historically there has been minimal consumer involvement in the Code change processes. There are 3 Issues that consumers have devoted what little resources they have on For instance -the two consumers involved in the development of the National Gas Code were virtually ignored on most issues. One of many consequences is a deficient definition of "consumers" in the Gas Code this lead to the subsequent revocation of standing of EUAA and EAG in the ACT appeal process.

7) The failure on a number of occasions to stop an absurd process. This is best highlighted by the implementation of FRC in gas in South Australia where the costs appear to be far higher than the projected savings.
8) Decision making with little to no information. This point is illustrated by the Federal Ministers decision to uncover 2/3 of the Moomba to Sydney pipeline based on little understanding of the relationship between the various east coast gas pipelines. This problem is now being further exacerbated by the Productivity Commission report into gas access arrangements. The disjointed transmission arrangements is still not public knowledge 4 months after the Santos Moomba explosion on new years day.

One objectives of the MOU should be for the AER and the AEMC to try and reduce the number of jurisdictional derogations. These regulatory bodies need to resolve whether most of the clauses in the largest chapter, Chapter 9, in the Code are there to protect consumers or jurisdictional self interest, when clauses need to be sunset early, stay the for the period stated in the derogation or whether there need to be on going derogations for some specific issues. Streamlining the NEM Code should be a major objective of the reform process and the MOU's

The MOU needs to have a set of specific objectives for the AER, AEMC and the ACCC to ensure that convergence occurs as soon as practicable between the gas and electricity industries.

The MOU needs to have clear accountabilities and legal responsibilities. The consumer appeal to the ACT (8/2003) against the Federal Ministers decision to uncover part of the Moomba to Sydney pipeline and the SNI appeal to the National Electricity Tribunal highlight the number of parties that can become involved in market issues and the costs to the parties. The MOU needs to ensue that the legal liability/responsibility are allocated in a clear transparent manner and that costs to all parties are minimised!

The MOU needs to effective allocate oversight and responsibility to the AER or the AEMC. The following two examples highlight what can go wrong with process. In the case **a)** no party is accountable and in case **b)** it's a jurisdiction just going through process with out thinking.

a) The industry delays in implementing a common framework for IT systems is slowing the introduction of competitive pressures in both gas and electricity markets.

b) Different gas Market System Operating Rules (and each state currently has different rules) can influence the outcomes in both the gas and electricity markets. (Victoria, the worst example has 4 different gas MSOR's)

One of the objectives under the MOU between the various parties should be the removal of as many impediments to national markets in gas and electricity as possible as a specific focus. The Australian Regulators Forum has started to address this issue but the MOU needs to drive the process. For instance timetables need to be established in relation to the transfer of jurisdictional regulatory responsibilities to the

AER, AEMC and ACCC. Currently jurisdictional differences appear to allow some parties to claim the same expenditure across several jurisdictions.

The MOU needs to take account that a number of Code changes come from NEMMCo processes. The current arrangement consists of NEMMCo consulting with the market (usually with a fortnight turn around time) then assessing the NEMMCo position which was then sent to NECA who in turn consult then the issue went through to ACCC processes. The revised process only changes the involvement of the ACCC. So the consultation process would still consist of a NEMMCo consultation followed by AER, whose charter looking at the economic issues and some of the minor technical issues and the ACCC looking at the effects on competition. There needs to be a far greater emphasis on the technical nature of the gas and electricity industries in the regulatory process.

The MOU should outline that the ACCC, AEC and AEMC need to formally involve customers in the regulatory process or ensure that there is some redress from poor regulatory practices/performances. Simply funding consumer doesn't empower them. EAG has had the experience in two recent regulatory determinations (IPART's NSW Distribution Pricing Review and ACCC Transgrid/Energy Australia's Access Arrangements) where the regulator commissioned consultants, whose work was vital to making these 2 determinations, was not available until well after the consumers submission dates to the process had closed. How can one effectively participate in a process under these circumstances!

The role of energy market oversight and accountability needs to be strengthened in the MOU. The current NECA energy market analysis (for what can be argued as valid reasons) has not been able to provide consumers with a sufficient explanation as why there price disturbances at times when one would not expect a disturbance to happen like a Sunday night at 6 pm. The public explanations by NEMMCo and NECA on the price spikes in NSW and Qld on March the 9th fail to inspire consumers with confidence in the current market oversight arrangements.

It is clear that certain processes take time to move the NEM forward (eg the debates around retail boundaries and constraint equations) while other processes don't work well at all (eg. inter regional transmission augmentation). Some transmission augmentations, for instance are being justified on reliability grounds, because they do not pass the appropriate Regulatory Test. The MOU needs to incorporate some objectives and drivers to ensure that the Annual Transmission Planning Review and the regulatory approval process address the deficiencies seen in current processes around the Inter Regional Planning Council (IRPC) arrangements. EAG will be in a far better position to comment on this issue after the ACCC delivers its final determination on TransGrids' Access Arrangement.

If the current batch of reforms are, to have any credibility, then more consumers need to be involved in making the decisions around the current processes as well as evaluating how effective this round of reforms have been over time. This clearly means more significant consumer involvement and better resourcing. The Ministerial decision from Friday's meeting doesn't help the process of better resourcing. Having an open door doesn't constitute consultation or resourcing.

It is important for the SCO recognise that consumers need to be involved in the decision making processes as well as making submissions to the various steps outlined in the reformed Code change process in the discussion document.

Some Brief Comments on Streamlining the Energy Code Change Process

There are at least three sub processes that have not been included in the analysis provided in the SCO paper.

1) NEMMCo is probably the largest user of the NEM Code change process. NEMMCo go through a web based consultation process with a fortnight turn around time for submissions, they then make a decision on the required code change based the submissions they receive and their own experience.

2) Another important source of code changes is the NECA Reliability Panel, who also use a web based submissions process and consultants to form their recommendations for code changes. The turn around times of the Reliability Panel consultations can take well over 12 months to make recommendations for code changes.

3) The NECA Code Change Panel has in the past consulted on Code change proposals.

It is important to comment that very few consumer groups understand or have been involved in the NEM or Gas Code, Code change process. So a start to simplify the Code change process can be seen as an improvement!

The in the case of NEMMCo consultations it would have difficulties getting funding from the NEM Advocacy Panel for NEM Code issues given some of the proposed short consultation time frames at the start of the process. It is also clear that for consumers to have an effect on the Code change process they have to be involved from the start and have the stamina/persistence to follow through over a long period of time. Part of this problem can be simply rectified by changes in the NEM Advocacy Panel's processes. However it doesn't help for Gas Code changes!

In many cases consumer awareness of a Code changes proposal has come from consumer representatives on the initating body.

EAG believes that the issue of standing is not well understood by the Code writes or the MCE SCO nor has it been effectively addressed to date in the current reform process. What do consumers need to do to change the electricity or gas code for instance!

EAG suggests that the SCO include the definition of persons "or organisation" after any other person in the proposed legal definition given in the paper. This is particularly pertinent given EAG /EUAA experience on standing based on the Gas Code interpretation given by the Australian Competition Tribunal in February 2004.

EAG was ignored after requesting legal aid in the 2003 GasNet v's ACCC appeal before the Australian Competition Tribunal. EAG was able to intervene in this case with limited resources but when the applicant withdrew their requests review WACC one of the important elements of the case collapsed. It is worth mentioning that generous regulatory WACC determinations are costing Australian gas and electricity consumers around $ 500 m /a.

One further improvement in the Code change process- is for the proponent/s of a Code change to set out a regulatory impact statement, based on issues like - who in the market will the change effect! What are the costs to implement and what the change will cost the industry and consumers? How are the costs to be allocated? What are the costs to various levels of consumers based on their levels of consumption when they became market contestable?

Comments on the Application of the Industry Levy to Fund the AER and AEMC

EAG has made comments over the past 10 years on a number of funding and institutional structure proposals associate with the electricity and gas markets. This proposal is one of the most outrageous our organisation has seen!

This MCE SCO paper proposes the complete transfer of costs from a predominantly tax payer funded regulatory activity costing over $ 40 m/a to a direct industry levy paid for by gas and electricity consumers. Consumers might well believe that this funding objective will be imposed on them by jurisdictional treasuries with a strong vested interest in cutting costs.

It is important to recognise that the Australian Regulators Forum has already begun the process of rationalising consultancies and work activities slightly reducing the cost of regulators. This arrangement is currently providing some savings due to unnecessary duplication of work activities by regulators. (The MCE SCO appears to have adopted the same approach in progressing this reform process.) Some revenue will be derived the industry if the existing state based regulatory activities from fees and charges arrangements are maintained by the AER.

What is clear for our experience over this period is that consumers will be thrown to the wolves if the AEC and AEMC are funded by direct consumer levy without any effective oversight. Most of the funding provided to the industry regulators comes from the relevant Treasury. It's not difficult to understand why all the jurisdictions would want to finance the proposed changes in the new regulatory regime by an industry levy.

EAG notes that the MCR S.C.O. paper suggests that ACCC will be provided with full cost recovery by the AEC in the Code change process (*p. 9 Streamlining the Code Change Process*).What happens if there is a repeat of an issue like the AGL v's ACCC case heard before the Federal Court early this year that cost the Commission around $ 2 m. Who pays!

Currently the majority of ACCC activities are funded in the main by the Commonwealth (Treasury) with some licence fees and charges. The various jurisdictional regulators are again in the main funded by the jurisdictional Treasury and industry fees and charges and the shortfalls are then funded by state treasuries. While NECA is funded by a levy on electricity consumers collected by NEMMCo.

The current arrangement minimises direct cost to consumers and ensures that the various jurisdictions have an interest in cost control

The proposal to move to a single national regulator for the NEM and transmission followed distribution and retail for both the electricity and gas industries will further increase regulatory costs and extra costs will be incurred by the AER.

EAG notes that the overall costs of the regulatory regime needs to be assessed as there are considerable costs incurred by relatively un-regulated generation and retail businesses in complying with the various Licence conditions Rules and Codes. The cost to non regulated businesses needs to be coupled with the cost associated in meeting regulatory requirements for the regulated businesses. The direct costs to regulated businesses are allowed for in regulatory determinations. All the regulation and associated costs at the end of the day are paid for by consumers. The Victorian ORG now ESC for instance, allowed a sum of $ 67 m (real) for the 5 year regulatory cycle 2001-5 for the 5 Victorian distribution businesses.

The proposal for consumers to fund al of the AER and ARMC just adds to the consumers costs.

It is important recognise that a decision by the MCE that adds a (substantial) jurisdictional taxpayer contribution to the AER and AEMC running costs will in turn help consumers by keeping some jurisdictional oversight of the AER and AEMC performance and cost control!

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