



**Submission to the Ministerial Council on Energy
Standing Committee of Officials**

**AER-AEMC-ACCC Memorandum of
Understanding (MoU) Framework**

Response to Discussion Paper

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Overview

This submission responds to the Ministerial Council on Energy Standing Committee of Officials Discussion Paper on the *AER-AEMC-ACCC Memorandum of Understanding (MoU) Framework* (the Discussion Paper). The Energy Networks Association (ENA) raises the following issues in the submission:

- Information sharing between the AEMC and the AER should be more circumscribed, and relate more closely to the differing functions of these bodies;
- Information gathering powers of the AEMC and the AER/ACCC should vary reflecting the different roles of these bodies in market development and enforcement respectively;
- AER/ACCC Members and staff should remain aware of the different objectives of market, access and competition regulation and apply these objectives appropriately;
- Recognising the different legislative basis of the National Gas Code, it is important that gas arrangements do not become overly complicated by the needs of the electricity sector; and
- Another stage of industry consultation on the MoU is required that involves more detailed information on the provisions contained in the Inter Governmental Agreement, and in particular with regard to the details of the proposed energy legislation.

This paper should be read in conjunction with the ENA submission on the *Streamlining the Code Change Process* Discussion Paper, which mainly relates to the role of the AEMC and ACCC in Code changes.

Background

The Energy Networks Association is the newly-established national representative body for gas and electricity distribution network businesses. Energy network businesses deliver electricity and gas to over 12 million customer connections across Australia through approximately 800 000 kilometres of electricity lines and 75 000 kilometres of gas distribution pipelines. These distribution networks are valued at more than \$28 billion, and each year energy network businesses undertake capital investment of more than \$2 billion in network reinforcement, expansions and greenfield extensions.

Policy context for MOU

The Ministerial Council on Energy 2003 report identifies the need to clearly and transparently separate the rule making, rule enforcement and competition regulation functions in the energy market, assigning these to an Australian Energy Market Commission (AEMC), an Australian Energy Regulator (AER), and the Australian Competition and Consumer Commission (ACCC) respectively. This intention is demonstrated in the 11 December 2003 Ministerial Council on Energy Communiqué, which states:

This new framework will improve accountability, streamline decision-making and remove unnecessary duplication of regulatory process. It is designed to provide an appropriate balance between development and implementation of energy market rules, industry regulation and general competition regulation.¹

Information sharing

The ENA understands that the AEMC will have primary responsibility for market development (Code change development and approval). This role involves conducting consultation processes on proposed Code changes and bringing the experience of the market to bear on the appropriate development of the Code. The ENA recognises that the AER and the ACCC have specific expertise, in the enforceability and competition affects of proposed Code changes respectively, that are necessary inputs to the Electricity Code change process.

Unlike in electricity, ACCC involvement is not required for Gas Code changes and would be inappropriate. ACCC involvement in the Gas Code change process would complicate the process and would lengthen the time involved in approving Code changes.

In attempting to address these issues, the ENA is concerned that the proposed information sharing arrangements between the AEMC, AER and the ACCC set out in the Discussion Paper undermine the decision to separate market development and regulation. The ENA considers that in particular, the proposal that there be no limitations on information sharing between the AEMC and the AER/ACCC is

¹ Ministerial Council on Energy *Communiqué*, Perth, 11 December 2003

inappropriate given the different functions of a market developer as opposed to a regulator.

Information sharing between the AEMC and the AER/ACCC

The Discussion Paper anticipates that the AEMC and the AER will “routinely exchange information and confer in the course of fulfilling their respective functions”.² Further, the Discussion paper states;

It is similarly proposed that there be no limitations on information sharing between the AEMC on one hand that the ACCC/AER on the other, to assist each body to undertake its functions in respect of the energy markets...³

These arrangements appear to go beyond information sharing for the purposes of developing Code changes, into the interpretation and enforcement of Code provisions. In this regard the Discussion Paper states:

Each of the ACCC, AER and the AEMC will promptly provide to the other bodies any information that is likely to have material relevance to, or has been sought by that other body for, the fulfillment of that other body’s statutory functions.⁴

The ENA considers that information sharing between the AEMC and the AER/ACCC beyond Code change issues would be inappropriate and contravene important general regulatory principles such as only using information for the purpose for which it was collected. Further, as outlined in the next section, the rights to acquire information are likely to be different for each party, in line with their separate functions.

The ENA seeks clarification on whether information sharing between the AEMC and the regulatory bodies will be limited to Code change issues or be applied across all AEMC functions (yet to be specified).

Information requirements of the AEMC and AER/ACCC

The Discussion Paper envisages that ‘there will be a high degree of commonality in each body’s information requirements, so a coordinated information system is likely to be desirable’.⁵ The ENA disputes this claim, and considers that there is likely to be considerable difference between the information required by the AEMC for market development and that collected by the AER/ACCC for regulation and enforcement. Indeed, the rights to access information for regulatory bodies must be different from those of the AEMC given the privileged rights of regulatory bodies like the ACCC to access information for enforcement purposes.

The ENA considers that it would be inappropriate and unnecessary for all of the information gathered by the AER/ACCC to be available to the AEMC and that this

² Ministerial Council on Energy Standing Committee of Officials *AER-AEMC-ACCC Memorandum of Understanding (MoU) Framework – Discussion Paper*, March 2004, p.5

³ Ministerial Council on Energy Standing Committee of Officials (March 2004), p.5

⁴ Ministerial Council on Energy Standing Committee of Officials (March 2004), p.7

⁵ Ministerial Council on Energy Standing Committee of Officials (March 2004), p 5-6

approach would be contrary to regulatory principles on the use of information outlined above.

Market participants will be acutely focused on monitoring the developing relationship between these two new bodies and would be highly critical of them “converging” given their very different functions.

Information sharing between the AER and ACCC

As the AER is to be a constituent part of the ACCC, the ENA considers it appropriate that the AER and the ACCC share information which facilitates the respective functions of these regulators with respect to Code changes. The ENA is concerned, however, that this information sharing will extend beyond Code change issues to AER specific functions such as market regulation, access and pricing regulation. These concerns are highlighted by the statement in the Discussion Paper that:

There is proposed to be no limitation on the sharing of information between the ACCC and the AER, consistent with the policy decision that the AER is a constituent part of the ACCC...⁶

It is important to ensure that information sharing provisions in the MoU are not so broad as to negate the decision to separate the energy specific regulatory functions from general competition regulation. The ENA considers that this separation is critical to ensure that market regulation is carried out within market objectives and is not confused with the wider consumer focus of the existing competition regulator.

Legislative context for MOU

To ensure accountability and streamlined processes, it is important to clearly define the respective roles of the AER, AEMC and the ACCC in legislation as well as the proposed MoU. This will ensure that these bodies operate within the appropriate boundaries of their functions, with recourse to judicial appeal for industry participants should these functional separations fail to eventuate.

The ENA has not had opportunity to consider the proposed legislative arrangements for the energy market. The form of the energy market legislation will be critical to ensure the proper functioning of the market, and the ENA considers it essential that this legislation be subject to a full industry consultation before it is introduced in Parliament.

Legislated consultation and decision processes

The ENA supports including in legislation the consultation and decision making processes by which market development and regulation will occur.

⁶ Ministerial Council on Energy Standing Committee of Officials (March 2004), p.5

Information gathering powers

The ENA is concerned that the Discussion Paper does not differentiate between information gathering powers, i.e. the power to require information from parties, and consultation arrangements. For example, while it is clear that the AER would require information gathering powers for the purposes of code enforcement, it is not at all clear that the AEMC will require information gathering powers for any purpose other than perhaps in relation to its proposed planner of last resort responsibilities.

These planning functions are different from conducting consultations, which do not require any information gathering powers at all.

Where specific information gathering powers are granted to the AER and/or the AEMC, these powers should be limited to explicit legislative functions for these bodies. Information gathered through these powers should also not be shared between these bodies, as to do so would mean that the information is used for purposes other than which it was gathered.

Other issues

The ENA has some general concerns over the complexity of arrangements, particularly for the staff of the AER/ACCC, well as the application of these arrangements to gas when it is rolled into these market institutions.

Staffing

The Discussion Paper outlines the varying roles of AER/ACCC staff depending on whether they are working on energy market regulatory issues, access or competition issues. The ENA considers that this separation of functions is critical to the efficient regulation of the market, particularly as the objectives of market regulation differ from the access regulation and competition regulation objectives set out in the *Trade Practices Act*.

In implementing this separation, the role of the AER Members will be critical to ensure that AER staff are aware of the different regulatory objectives of the various functions they will be asked to carry out.

Arrangements for gas

The procedures set out in the Discussion Paper appear to have been developed to accommodate the arrangements in the electricity market with regard to Code changes, authorisations and the approval of changes to the electricity industry access undertaking. Not all of these procedures, however, are required for changes to the National Gas Code. The National Gas Code is a set of jurisdictional regimes certified under s44N of the *Trade Practices Act* with no requirement for Part VII authorisation. In the proposed arrangements for transfer of gas access regulation to the AER, the ACCC will not have a regulatory role in Gas Code changes or enforcement. Information sharing with the ACCC is therefore unnecessary and inappropriate.

The ENA understands that the Ministerial Council on Energy has agreed in-principle to the development of a national approach to energy access, under which the arrangements for the electricity and gas access regimes may change. At this stage, however, it is important that gas arrangements do not become overly complicated by the needs of the electricity sector, or the assumption made that current gas market arrangements will be amended to align with current electricity market arrangements.

Further consultation

Given this importance of the MoU in shaping energy market legislation and industry consultation arrangements, the ENA considers it essential that further consultation be carried out on the specific text of the MoU prior to its finalisation. This consultation should occur at the earliest possible stage and include an appropriate period for industry to provide comments.

The Energy Networks Association
7 April 2004