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MCE Response to the Productivity Commission Review of the National Gas Access Regime

The Ministerial Council on Energy (MCE) draft response to the Productivity Commission (PC) review of the National Gas Access Regime is an important aspect of the Energy Market Reform program and the Energy Supply Association of Australia (esaa) appreciates the additional opportunity to provide comment.

The MCE draft response seeks comment on several elements that were outlined in the Standing Committee of Officials' (SCO) August consultation paper, including two elements that have been significantly refined since that time – notably, light-handed regulation and greenfields provisions. esaa notes that the MCE announced the establishment of an Expert Panel in its 4 November Meeting Communiqué and the draft response also includes a Terms of Reference for this Panel.

Objects Clause

The esaa supports the inclusion of an overarching objects clause, as recommended in the PC Review, in preference to the alternative option put forward in the MCE draft response. The esaa considers that the objects clause recommended by the PC enables the regulator to appropriately balance the interests of consumers as well as service providers and is consistent with the National Access Regime.

The MCE's proposed objects clause attempts to provide consistency with the National Electricity Law but does not enhance its meaning and, potentially, could give undue emphasis to the interests of consumers. The MCE's proposed objects clause includes specific reference to "the long-term interests of consumers...with respect to price, quality, reliability, safety and security of supply...." In our view this is unnecessarily prescriptive. As noted in our earlier submission, these aspects create ambiguity as the "long-term interests of consumers of natural gas with respect to price and quality" is already captured in the objects clause through the use of the terms "economically efficient" and "promotion of effective competition". The additional elements of safe and reliable supply are appropriately addressed through the PC's recommendation to retain these factors within s2.24 and s6.15 of the Gas Code.

Coverage Test

The esaa supports the MCE's proposal to endorse the PC Review's amended coverage test. The amended coverage test seeks to ensure that where access (or increased access) to services provided by the pipeline would promote a material increase in competition in at least one market, other than the market for the services provided via the pipeline, the pipeline is covered.

Aligning the coverage criteria to that contained within Part IIIA of the *Trade Practices Act 1974* (TPA) will ensure consistency with the National Access Regime.

However, the esaa does not support the MCE proposal that the coverage test be applied by the Australian Energy Market Commission (AEMC) rather than the National Competition Council (NCC). As stated in our previous submission, esaa considers that administrative management of the coverage test should remain with the NCC. The current role of the NCC in relation to coverage – under which the NCC responds to a request for assessment of coverage, makes that assessment, and then provides a recommendation to the responsible Minister – is firmly established.

Extending all or part of this process to the newly established AEMC is, in esaa's view, not appropriate. While the AEMC will – in time – take on responsibilities in relation to the gas market, the assessment of coverage as provided for in the Gas Access Regime should remain with the NCC given its specific resources, experience, expertise and focus on national competition policy. This will also ensure on-going consistency with the National Access Regime. Passing this responsibility to the AEMC would confuse its role. The AEMC effectively determines the rules for all participants whereas, any role that required the AEMC to determine conditions for one particular participant or asset (that is, determine its regulatory coverage) would fundamentally alter the AEMC's *raison d'être* and may compromise its core activities.

In order to provide certainty and stability for investors in the application of coverage assessments, the new National Gas Law must include a clear framework that specifies the criteria and procedural requirements of the coverage test.

Light-Handed Regulatory Option

As noted in our earlier submission, the esaa supports the establishment of a light-handed regulatory regime. The current reference tariff setting system is unnecessarily cumbersome and potentially hinders efficient operational and investment outcomes and may not be well suited to situations where there is emerging competition.

We support the PC's recommended approach for a light-handed regulatory model. Under the Commission's proposal the NCC would undertake a net-benefits test to determine the form of regulation with the presumption of price monitoring, unless the benefits of price regulation can be demonstrated to exceed the costs.

The MCE's draft response moves away from this approach. The MCE proposes that the form of regulation should be determined by the regulator itself – that is, the Australian Energy Regulator (AER). This would represent a significant conflict of interest given the AER's role in applying the regulatory regime. In fact, the proposal is

at odds with the key PC recommendations (see below) to ensure the agency recommending coverage or form of regulation is separate and independent to that responsible for regulating the asset.

12.1: “The agency that recommends coverage of a pipeline should also be responsible for recommending the form of regulation to apply to the pipeline”.

12.2: “The agency responsible for making recommendations on pipeline coverage and the form of regulation decisions (currently the [NCC]) should be separate from the regulator actually responsible for administering the regulation (either monitoring or access arrangements with a reference tariff).”

However, if the MCE commits to this proposal then it would be essential that the AER’s decision on the form of regulation is subject to both merits and judicial review. This would assist in providing the independence that is required in making a decision that could significantly impact the scope and viability of a business.

In addition, under this less independent approach, it would be essential to ensure that the AEMC develops a clear set of rules for a net benefits test that presumes price monitoring unless the benefits of price regulation can be demonstrated to exceed the costs.

Greenfields Projects

As noted in our earlier submission, the esaa supports the PC recommendation to provide upfront binding rulings for new pipelines to deliver the necessary confidence for new pipeline investment.

esaa therefore supports the proposal in the MCE draft response to enable service providers (or investors) to seek an upfront (15 year) binding no coverage ruling. However, the MCE also recognises that the coverage assessment process, followed by a Ministerial decision on a binding ruling, may not be timely enough to provide sufficient regulatory certainty for new investment projects.

In order to address this concern, the MCE has proposed that there be an option to seek Ministerial consent to a 15 year price regulation holiday. In proposing the option, the MCE has suggested that there needs to be specific criteria for determining whether a pipeline would qualify for the holiday and a process under which such an application would be assessed.

The esaa supports the proposal for a price regulation holiday as a way of providing a more timely response and certainty to new investors. However, esaa considers that the criteria for qualifying pipelines needs to be sufficiently clear and simple that a Ministerial assessment can be made in a timely manner and at an early stage of project development. As such, we are concerned that the level of detail required under the proposed criteria in the Regulatory Impact Statement may be too onerous for new investors seeking regulatory assurance and may undermine the MCE’s objective for a more timely assessment mechanism.

The Review Panel Proposal

In its 4 November 2005 Communiqué, the MCE announced that it would establish an Expert Panel for the review of the energy access regime. esaa recognised in its earlier submission the need for a review of what constitutes best practice regulation and to consider what changes, if any, are required to the national energy access regime to deliver this.

However, the MCE's draft response outlines terms of reference for the Expert Panel that are extremely broad, the objectives unclear and the expectations for good policy debate constrained given the time line proposed.

The Expert Panel has the potential to be an important component of developing a best practice energy access regime and should not be constrained by the timeframe for the development of gas legislation. Given that the PC has already reviewed the Gas Access Regime and made recommendations they consider to be best practice, the recommendations should be implemented in full to enable passage of the gas legislation.

The Expert Panel should then be adequately resourced, in terms of both time and expertise, to consider the energy access regime as a whole – for gas and electricity – keeping in mind that another “expert panel” – namely the Productivity Commission – has already considered and recommended best practice regulation for the gas market.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Brad Page', with a stylized flourish at the end.

Brad Page
Chief Executive Officer