



25 October 2004

Manager – Energy Market Reform Team  
National Energy Market Branch  
Department of Industry, Tourism and Resources  
GPO Box 9839  
CANBERRA ACT 2601

Dear Sir,

**RE: Development of a National Framework for Distribution and Retail Regulation**

Thank you for the opportunity to comment on the Consultation Paper on the Development of a National Framework for Distribution and Retail Regulation issued by the Ministerial Council on Energy's Standing Committee of Officials.

Gas Market Company Limited and Retail Energy Market Company Limited, the market operators in NSW and the ACT, and SA and WA respectively, have prepared a joint submission on the Consultation Paper which is attached for consideration.

Should you require any further information or clarification of any of the issues raised, please contact Patricia McKenzie on (02) 9418 2660 or Steve Thomson on (03) 9607 8351.

Yours sincerely,

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# **Submission on the Consultation Paper on the Development of a National Framework for Distribution and Retail by the Ministerial Council on Energy Standing Committee of Officials**

## ***Overview***

The Consultation Paper on the Development of a National Framework for Distribution and Retail states that:

“The separate jurisdictional systems for regulating distribution and retailing for electricity and natural gas create inefficiencies and increased costs for industry participants and consumers. Differences in the rights and obligations imposed on industry participants impede the development of a truly national energy market.”

The gas industry has taken significant steps toward the development of uniform arrangements across the jurisdictional gas markets which operate in NSW, the ACT, Victoria, SA and WA, particularly in the areas of implementation of full retail contestability (FRC) and management of B2B transactions. It is our belief that, despite the jurisdictional nature of the gas markets in Australia, the industry participants in NSW, the ACT, Victoria, SA and WA have worked cohesively and cooperatively to develop gas markets with a strong degree of consistency and that industry should continue to be given the opportunity to progress the development and enhancement of these arrangements in a manner that is driven by commercial imperatives in response to consistent public policy.

## ***Regulatory Model***

The NSW, ACT, SA and WA governments and market participants have chosen to implement a co-regulatory model to deliver FRC.<sup>1</sup> For these jurisdictions, industry participants have ensured that FRC has been delivered in an efficient and cost effective manner to meet the policy outcomes determined by Government. The joint submission to the MCE by Gas Market Company Limited (GMC) and the Retail Market Company Limited (REMCo) on the Consultation Paper titled “Draft Gas Market Principles” outlined this model, and discussed the high level of satisfaction of market participants with the outcomes delivered.

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<sup>1</sup> A co-regulatory model is one whereby an industry owned retail market administrator establishes and administers the rules for interactions between the market participants and between the market participants and the retail market administrator. These rules are consistent with any relevant jurisdictional policy and regulatory constraints applicable to market participants, and are sanctioned by a jurisdictional authority

### *Convergence Measures*

In addition to consistency in the model, GMC, which administers the gas markets in NSW and the ACT, and REMCo, which administers the gas markets in SA and WA, have similar rules for customer transfer. Both entities have entered into agreements with the same IT service provider, to ensure a level of consistency in the underlying IT platforms for our rules, and with the same financial and administration management service provider, to facilitate consistency of administration of those rules.

GMC and REMCo have entered into a Deed of Co-operation which establishes:

- a process for co-operation between the companies and exchange of information;
- a joint approach to the development of rule changes with a view to maximising convergence where possible; and
- an agreement on a sharing of costs where IT system enhancements which enact common rules changes can be developed and implemented concurrently by our common IT services provider.

This cooperation will ensure a continued merging of rules and administration at a time which provides the most efficient transition for industry and its customers, recognising the significant funds invested in the systems. It also recognises that there are real jurisdictional differences in the gas delivery models between jurisdictions which must be reflected in the applicable rules, particularly in areas such as gas balancing and reconciliation.

REMCo has also entered into a Memorandum of Understanding with VENCORP, the market administrator in Victoria. This MOU recognises that the Victorian, SA and WA gas markets have adopted the same communications protocol and delivery method for the majority of transactions between participants and between participants and the market administrator and that there is, therefore, benefit in seeking to converge the business processes and technical standards that govern these transactions.

Under the MOU REMCo and VENCORP will cooperate in order to coordinate the development of the rules and technical standards documentation related to these transactions, including sharing information on changes under consideration and coordination of the implementation of system changes.

GMC, REMCo and VENCORP are in the process of establishing an Australian Retail Gas Market Consultation Procedure, which will provide for joint consideration of future rule development between NSW, ACT, Victoria, SA and WA allowing identification and pursuit of opportunities for convergence.

### *Effective Change Mechanisms*

Unlike the electricity industry where change has been a complex and difficult process, change of the rules for FRC and B2B Processes in the gas industry has been effective and efficient.

Although the rule change process differs in each jurisdiction, the facts are that rule changes have been made consistently since the introduction of FRC and implemented at a time when industry considers the investment justified. For example, in NSW 29 material rule changes have been made since commencement of FRC, instigated by industry, consulted within industry and stakeholder groups, decided by the Board of GMC, and promulgated without exercise of the right to object held by the Minister.

In the SA and WA jurisdictions, approval of rule changes by either regulators or government is required, which extends the timeframe for change but still remains a relatively efficient process. REMCo is currently finalising the first post go-live rule changes for submission to the jurisdictions for approval. REMCo expects that these rule changes will be reviewed and approved by the relevant jurisdictions quickly and efficiently because of the prior broad and detailed consultation operated during the development of the rule change submissions and the broad industry support for these changes.

REMCo has previously submitted that it would be inappropriate to adopt the proposed National Electricity Code Change Consultation process for consideration and consultation on gas market rule changes. REMCo believes that adoption of a process like the NE Code Change process for approval of gas market rules would unnecessarily duplicate consultation already completed by a market administrator during the initial consultation on the rule change proposal.

### *Leadership in B2B*

The gas industry has well developed standards for B2B transactions, and REMCo and VENCORP share standards management and an underlying IT support platform for use in Victoria, SA and WA. The market administrators have recommended to the electricity B2B committees that they consider convergence to the maximum extent possible with the gas industry standards in this area.

Due to the particular circumstances in the jurisdictions, B2B transactions in NSW and the ACT are handled by the distributors.

### *Conclusion*

As demonstrated, the gas industry has made significant progress in instituting convergent rules and systems for FRC and B2B processes across the five jurisdictions with gas market full retail contestability. Given the complex task facing the MCE in addressing consistency of regulation of distribution and retail entities, it is submitted that the gas industry should be allowed to continue down its path of industry managed,

sensible, cost efficient convergence without the need for further Government intervention.

REMC0 and GMC note that establishing consistency in the governance and regulation of the retail market administrator function is highly desirable and this will be proactively pursued by management of both companies.

[In this submission, responses are joint responses of GMC and REMCo unless specifically noted as an individual response.]

## ***Responses to Issues***

### **Issue 5 – Impact for Existing Electricity Distribution Price Determinations**

In making a future electricity distribution price determination, should the Australian Energy Regulator be required to conform with the statements of intention made by a jurisdictional economic regulator in the context of an existing price determination, or should the Australian Economic Regulator merely be required to consider whether to apply them?

If the Australian Energy Regulator is to be bound by statements of intention by a jurisdictional regulator in an existing price determination:

- What is the nature of these statements of intention; and
- Should these statements of intention be incorporated in any national set of electricity distribution pricing principles, either as a nationally applicable pricing principle or as a specific jurisdictional deviation?

#### **REMC0 ONLY RESPONSE**

Whilst REMCo is not party to electricity price determinations, there is a matter of principle in relation to the ongoing application of price determination outcomes (regardless of the type of market or role associated with the determination) that is at question.

As a regulated business that is subject to a price determination in SA, REMCo is very concerned about the transition of Price Determination powers to a new entity and the impact that this may have on our ongoing business viability.

REMC0 believes that where a statement of intention has been made by a regulatory authority in relation to a Price Determination, the business that is the subject of that Price Determination will take direction from the statement of intention and base future investment decisions on the expected behaviour of the regulatory authority. Where such statements are providing guidance on a businesses future investment, consistency of the application of these statements is crucial to the ongoing confidence and equity of the regulated activity. Failure to abide by such statements

of intention by a regulatory authority will lead to businesses being disadvantaged by either missing out on the benefits of opportunities that could otherwise have been leveraged (where such opportunities were previously expected to be excluded), or being unable to gain expected benefits from investments made in good faith based on reasonably expected future behaviour.

REMCo does not wish to constrain opportunities for entrepreneurial activity and leverage within regulated environments by locking all the activities and outcomes down in perpetuity, however we believe that it is reasonable to expect that certain fundamental issues related to the outcomes sought by a regulator and the means by which these will be captured in a Price Determination should be set through binding statements of intention that require consistent regulatory treatment of businesses activities throughout consecutive regulatory periods, the duration of which should be aligned to the type of asset that underpins such outcomes and the expected useful/economic life of such assets.

In REMCo's case it is particularly important for consistent application of the outcomes of the Price Determination in SA beyond the end of the current Price Determination period because only a part of our revenue is recovered under the Price Determination. The remainder of our revenue is recovered in the unregulated environment in WA where, due to similar commercial constraints, a consistent outcome is achieved: that being the avoidance of interstate cross subsidies for jurisdictionally specific costs. Fortunately for REMCo and the SA and WA markets, the underlying principles, which are the basis of the REMCo charging arrangements, have been captured in the Retail Market Rules, thereby locking in consistency of application unless altered through a consultative process that is not linked to regulatory periods.

## **Issue 10 – Activities to be licensed**

What activities should be licensed under a national licensing scheme for the electricity and gas industries?

REMCo notes that the SA jurisdiction is the only jurisdiction that has established a licensing arrangement for a market administrator in any of the gas or electricity markets. It is REMCo's view that consistency of the legislative and regulatory approaches to all aspect of the operation of gas markets throughout Australia would be beneficial and, therefore, that this anomaly of a SA Retail Market Administrator licence should be resolved.

Obviously two options exist for such an arrangement: either introduce retail gas market administrator licences in all jurisdictions, or remove the SA retail market administrator licence.

In the interests of convergence of regulation between the jurisdictions, REMCo and GMC support the uniform adoption of the arrangements in the NSW, ACT, Vic and WA gas markets, and hence the removal of the SA based retail market administrator licence.

In particular REMCo considers that the nature of the retail market administrator functions and commercial arrangements demonstrate that the licence is unnecessary.

With respect to the establishment and ongoing control of the market arrangements conducted and overseen by the retail market administrators, each market has a rule change process which provides for a final sanction of rule changes to be made by a jurisdictional authority. REMCo does not believe that there is any additional benefit gained in SA by licensing this activity.

With respect to compliance with the market arrangements, each market has a compliance process embedded in the rules which is at least complementary to jurisdictional compliance processes operated by either regulators or governments or both. The licensing of REMCo does not provide for a significant benefit in this area.

With respect to cost recovery, each market currently has different arrangements as to where the retail market administrator gets the authority to charge for their services and the receivers of these services get the obligation to pay. In REMCo's case, REMCo operates in both a regulated environment (in SA) and an unregulated environment (in WA). REMCo's cost recovery arrangements for both markets are the same and have been embedded in the Retail Market Rules (RMR) which ensures consistency in application. This arrangement has resulted in a known duplication between the Price Determination document issued by ESCOSA and the RMR, which is technically a breach of the REMCo RMA licence but accepted due to the requirement to achieve consistency across the jurisdictions.

## **Issue 11 – Suggested Licence Conditions**

Is the allocation and coverage of existing licence provisions between the various regulatory instruments, as suggested in Appendix 1 to this Issue Paper, satisfactory?

## **Issue 12 - Mandatory Licence Conditions**

Are there any existing or suggested licence conditions which, as a matter of Government policy, should be included in electricity or gas retail licences or electricity or gas distribution licences and therefore should be specified in legislation as mandatory licence conditions?

GMC and REMCo agree with the allocation of the requirement to participate in a gas retail market scheme to licence conditions. We consider that this must be a mandatory provision under the licence conditions. It is crucial for the existence of the co-regulatory model that all relevant industry participants are required to participate in the gas market scheme.

We note that in each of NSW, the ACT, SA and WA the requirement to participate in a gas market scheme is drafted to allow the Government or

regulator to approve more than one scheme to operate in the jurisdiction. This provision has ensured that there is no general anti-competitive effect of the rules adopted by a market administrator and there is no requirement for the retail market administrator arrangements to be authorised under the Trade Practices Act or changes subject to ACCC approval. This has contributed to the efficiency of the rule change process. Any mandatory licence condition should retain this position.<sup>2</sup>

In relation to changes to the Rules of the market administrators, we have in our introduction to this submission established the efficacy of the existing change management procedures, and the efforts being made to ensure maximum convergence moving forward.

GMC and REMCo consider that in any efficient rule management scheme for FRC or B2B:

- Industry should be entitled to establish the rules since they relate to conduct between industry members
- Any oversight of those rules should be limited to compliance with transparent, previously established government policy

GMC wishes to preserve its current process, whereby the Minister may revoke approval of the scheme if changes are made to the Rules with which the Minister does not agree.

REMCO would prefer an identical process. Alternatively, REMCo would suggest that the oversight role for its rules should lie with the AEMC, and should be limited to a consideration of the consistency of the rules with the established policy outcomes.<sup>3</sup>

### **Issue 13 – Form and Variation of Licence Conditions**

Should the Australian Energy Regulator be required to issue licences in an agreed form containing specified conditions?

Under what circumstances (if any) should the Australian Energy Regulator be able to vary a licence condition that is included in any agreed form of

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<sup>2</sup> REMCo has sought authorisations to certain sections of its Retail Market Rules because of other considerations contained within the rules and their operation in relation to the Trade Practices Act.

<sup>3</sup> REMCO notes that the report does not deal with the allocation of the retail market administrator licence that applies in SA and considers that this matter requires attention as discussed in our response to Issue 10 above.

REMCO also notes that the WA gas licences that were the subject of the review detailed in Appendix 1 to the Issues Paper appears to be out of date and lacking in detail as related to FRC obligations.

licence, eg. Only with the approval of the Government of the relevant jurisdiction(s) or of all of the Governments?

Under what circumstances (if any) should the Australian Energy Regulator be able to include licence conditions that are in addition to those included in any agreed form of licence?

The requirement to participate in the gas market scheme cannot be subject to variation by the AER

### **Ability of Governments to Vary Licence Conditions**

Under what circumstances (if any) should the Governments be able to require that issued licences be varied to include additional specified conditions?

The Government should not have an ability to change the requirement to participate in the gas market scheme. Should Governments change public policy relating to FRC, then this would presumably be the subject of overriding legislation.

### **Issue 16 – Suggested Licence Administration and Enforcement Arrangements**

Is the suggested licence administration and enforcement regime described above suitable for application as a national regime? If not, in what respects should it be modified?

What role (if any) should the Governments play in the administration or enforcement of the licensing regime?

What role should the Australian Energy Market Commission (in its rule making and market development capacity) have in any licensing arrangements?

#### **REMCO ONLY RESPONSE**

REMCo believes that the licensing regime described on pages 56 to 58 of the Issue Paper is generally acceptable, subject to the following comments:

- REMCo is not convinced that public consultation is necessary in respect to the transfer of a licence.
- REMCo draws the MCE's attention to our response to Issue 15 in respect to the conditions related to variation of an issued licence.
- REMCo does not accept that a participant in either of the gas or electricity markets should be required to maintain a licence if the AER believes that surrender of the licence would have detrimental impacts on customers. The operation of a company in accordance with the Corporations Law must be paramount. It is inconceivable

that a company could recklessly abandon assets associated with a regulated entity without being in breach of the Corporations Law.

- Should the AER be able to vary a licence condition and the licence holder believe that they have been aggrieved by the impact of this variation as it relates to the reconsideration of price determination impacts, REMCo believes that a merits review of this variation decision may be appropriate.

REMCo believes that the appropriate roles for Governments, the AEMC and the AER are as follows:

- Governments set policy and establishes conditions.
- AEMC develops licences consistent with policy.
- AER administers and enforces.

## **Issue 17 – Suggested National Exemption Regime**

Is there benefit in adopting a national system of exemptions from licensing requirements? Is the suggested national exemption regime described above acceptable? In particular, should only the Governments be able to grant or authorise the granting of such exemptions?

Self Contracting Users (that is, large users which contract directly for purchase and transportation of gas rather than purchase gas from a retailer) exist in all jurisdictions, and accordingly it is necessary for them to participate in the market rules. However, as they are not licensed, this participation needs to be individually negotiated.

GMC and REMCo support a mechanism by which the participation of Self Contracting Users in the market can be enforced.

## **Issue 18 – Process for Introducing New Licences and Exemptions**

Should the replacement of existing licences and exemptions with the new agreed form of licences and exemptions (if any) be effected through legislation or by way of a voluntary surrender and replacement, in either case with a transitional period?

The response to Issue 10 outlines the current licencing requirement for REMCo in SA, and establishes that licencing is not a necessary means of regulation for market administrators. Therefore the establishment of nationally consistent arrangements should see amendments to the legislation in each of SA, WA, NSW and the ACT to align the arrangements for RMAs based on the principles reflected in the current WA or NSW/ACT arrangements.

Should licencing of REMCo in SA continue, REMCo considers that this should remain a jurisdictional matter for SA only.

## **Issue 19 – Alternatives to Licensing**

Is there an alternative form of regulation (eg. Registration) that it would be preferable to adopt instead of the licensing of electricity and gas retailers and distributors?

The response to Issue 10 outlines the current licencing requirement for REMCo in SA, and establishes that licencing is not a necessary means of regulation for market administrators.

GMC and REMCo support the adoption in SA of the alternative regulation methods for market administrators adopted in NSW, ACT and WA, and supports convergence of these alternative regulation methods to a nationally consistent model.

## **Issue 20 – Single Customer Protection Code**

Is there a benefit in adopting a single consumer protection code that applies in respect of electricity and gas retail and distribution in each jurisdiction? If so, are all the relevant matters for inclusion in such a code listed in Table 9 above? What are the areas in respect of which justifiable jurisdictional differences are likely to arise?

A single approach would be beneficial as it would help minimise differences that need to be accounted for by market administrators in their market systems. In particular the effect of varying cooling off periods before transfers can be considered 'committed' can complicate the transfer process that a market administrator is required to automate.

REMCo has already seen a number of areas where certain rules in the RMR are jurisdictionally specific (i.e. SA Only or WA Only) because of differences in areas such as customer consent. This has also been required because there is no alternative documentation structure in WA to accommodate certain obligations on retailers and network operators, whereas these regulatory documents do exist in SA and the regulatory documents have been aligned/merged with the SA (ESCOSA) electricity documents.

In relation to complaints and dispute resolution, REMCo assumes that the Paper proposes to relate only to the interface between the Retailers/Network Operators and the Customer and not to complaints and dispute resolution between market participants and the market administrators.

GMC and REMCo note the reference to the transfer between retailers in this Customer Protection Code, and wish to ensure that it is only in respect to the consumer protection aspects of the transfer that it would be included in the Code. Obviously, the processes for such transfer are covered by the gas market rules in each jurisdiction.

## **Issue 21 – Responsibility for Making Industry Codes and Rules**

Should industry codes or rules (such as consumer protection code) be developed by, or be subject to approval of, the Australian Energy Regulator or the Governments, or should the Australian Energy Market Commission be responsible for making such industry codes and rules?

GMC and REMCo believe that development of the gas market rules, should continue to be governed by the Rule Change processes detailed in the current gas market rules. In respect of any oversight of the Rules, our views are expressed in our response to Issues 11 and 12.

## **Issue 22 – Variation of and Exemption from Industry Codes**

If the Australian Energy Regulator is to have responsibility for making an industry code (such as a consumer protection code), under what circumstances (if any) should it be able to vary or add terms of that code, eg. only after a process of public consultation? Are there any consumer protection measure, that could be included in a consumer protection code, which should not be able to be varied without the approval of governments (eg. Because they implement a particular policy or are of particular significance to one or more jurisdictions) and so should be enshrined in legislation?

Under what circumstances (if any) should the Australian Energy Regulator be able to exempt an electricity or gas retailer or distributor from complying with a provision of a consumer protection code?

There should be no exemptions from compliance with gas market rules under a gas market scheme.

## **Issue 24 – Uniformity or Consistency in Associated Electricity or Gas Schemes**

Should there be a single uniform national approach to or consistency in terms of:

- the dispute resolution scheme;
- the retailer of last resort scheme;
- the customer transfer scheme; and/or
- the business to business information exchange schemes,

that apply in each of the States and Territories?

What impediments are there to achieving such a national approach or such consistency in respect of any of these kinds of schemes?

## *Retailer of Last Resort - GMC ONLY RESPONSE*

The NSW Government has instituted a retailer of last resort scheme, and GMC has adopted a detailed scheme to implement that regulatory requirement. One element of the scheme which is crucial is the ability to take quick action to limit the exposure of consumers and other market participants to a failing retailer. Any national retailer of last resort scheme would need to be able to replicate the time frames for action, which would seem a more difficult task at a national rather than jurisdictional level. We note that any change to the existing scheme could also incur significant costs to the central system.

### *Customer Transfer Scheme*

The Overview to this submission sets out the substantial level of consistency between the jurisdictions for gas FRC rules and systems, and the current moves to adopt convergent systems in a cost effective manner. We submit that this process should be allowed to continue, and that the adoption of a national Customer Transfer Scheme would impose unnecessary and inefficient costs on gas industry participants and ultimately consumers.

In meeting the government's requirement in NSW, ACT, Vic, SA and WA for the introduction of FRC, gas industry participants have incurred considerable expenditure on central systems and participant systems. There is little benefit in the adoption of a national Customer Transfer Scheme Code which would require significant change to rules and systems with attendant cost, for little benefit.

The gas industry participants have demonstrated through their control of GMC and REMCo a willingness to consider convergence, while recognising the jurisdictional differences which distinguish gas from electricity. The gas industry and governments have to date accepted that the role of government has been to establish required policy outcomes and overview expenditure pass through, while the expertise of industry is to implement rules and systems to deliver those policy outcomes in the most economically efficient manner. GMC and REMCo submit that this co-regulatory process has been successful to date, and should continue. Accordingly, we do not support the establishment of a national Customer Transfer Scheme.

### *Business to Business Information Exchange Scheme*

The Overview also sets out the current position in B2B, where there is already convergence of rules and systems in Vic, SA and WA. In NSW and the ACT, the existing distributor operated B2B systems have worked well without occasioning retailer complaint. While market participants in NSW and the ACT support the concept of convergence, they have rejected convergence for its own sake, but rather have sought to establish cost benefit in moving to convergent rules and systems. In relation to B2B, they have concluded that the costs outweigh any benefits at this time. Accordingly, GMC can see no justification for the adoption of a national

B2B Exchange Scheme which will inevitably incur additional costs for no benefit other than convergence for its own sake.