

Intergovernmental Agreement and Legislative Framework

Information Paper

Ministerial Council on Energy Standing Committee of Officials

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The Ministerial Council on Energy's Standing Committee of Officials has developed this information paper on the new governance and institutional arrangements for Australia's gas and electricity markets.

The information paper outlines the role of the Ministerial Council on Energy under a new intergovernmental agreement and the legislative framework for establishment of the Australian Energy Regulator and Australian Energy Market Commission by the States and Territories and the Commonwealth.

The paper includes sections on:

- the proposed intergovernmental agreement underpinning the energy market reforms, the Australian Energy Market Agreement;
- establishment legislation for the Australian Energy Regulator;
- establishment legislation for the Australian Energy Market Commission;
- amendments to the National Electricity Law and the Gas Pipelines Access Law; and
- jurisdictional National Electricity Law and Gas Pipelines Access Law application Acts.

There is no discussion of the new National Electricity Code change process, nor approvals and authorisations of Code changes as these matters are the subject of ongoing consultation.

If you require further information on any matters raised in this information paper, please email: MCETMarketReform@industry.gov.au.

1. Introduction

The Ministerial Council on Energy (MCE), established by the Council of Australian Governments (CoAG) in June 2001, is overseeing substantial reform of the governance and institutional structure of Australia's energy sector. This Information Paper describes the implementation tasks of:

- establishment of an intergovernmental agreement and enactment of cooperative legislation; and
- establishment of the Australian Energy Regulator (AER) and the Australian Energy Market Commission (AEMC).

MCE report to CoAG Broader discussion of the policy initiatives of the reform program is contained in the MCE Report to the CoAG, Reform of Energy Markets, dated 11 December 2003, available from the MCE website at www.mce.gov.au.

NECA The National Electricity Code Administrator (NECA) will continue to perform core functions until these two new organisations are fully operational, and will be wound up once all its existing functions are transferred either to the AEMC or AER.

2. Australian Energy Market Agreement

The IGA Once executed through CoAG, an intergovernmental agreement, to be referred to as the Australian Energy Market Agreement (AEMA), will commit the Commonwealth, State and Territory Governments to establish and maintain the new national energy market regulatory framework.

The AEMA will set out the governance and institutional framework within which the Australian energy market will operate. This will include the commitment of all parties to enact complementary legislation to develop and implement a national legislative framework. The document will be publicly available once finalised by the Heads of all Australian Governments.

Role of MCE Under the AEMA, the MCE is to assume a national policy oversight role for the Australian energy market, including for electricity and gas, superseding the National Electricity Market Ministers Forum. The MCE will oversee the policy framework under which the AER and AEMC will operate but will not be engaged directly in the day-to-day operation of the market or conduct of the regulators.

Timing of transfers to AER/AEMC The transfer of responsibilities to the AER and AEMC is to be in accordance with the following timetable:

- rule-making for, and regulation of, electricity wholesale and transmission in the National Electricity Market (NEM) jurisdictions, from the second half of 2004;
- rule-making for gas pipelines access, from July 2005;
- regulation of gas transmission for all other than Western Australia, from July 2005;
- provision will be made for the Northern Territory and Western Australia to join for electricity regulation, and Western Australia for gas pipeline access regulation under the AER, by agreement; and

- the AER will assume responsibility for national regulation of distribution and retailing (other than retail pricing) by 2006, following development of an agreed national framework.

3. AER establishment legislation

Role of AER The role of the AER is to regulate the operation of the Australian energy market and to perform functions and carry out responsibilities conferred on it under relevant Commonwealth, State and Territory legislation.

AER and ACCC The MCE has agreed that the AER will be a constituent part of the Australian Competition and Consumer Commission (ACCC), established under the *Trade Practices Act 1974* as a separate legal entity. Initially, the AER will be responsible for electricity transmission regulation currently undertaken by the ACCC, and the electricity code enforcement functions currently undertaken by NECA. The head office will be located in Melbourne separately from the ACCC, with code enforcement and market monitoring functions in Adelaide.

AER electricity functions and powers The AER will have functions and powers conferred by both the Commonwealth, pursuant to its legislation, and States and Territories by way of NEL Application Acts. The AER will take its electricity functions from the National Electricity Law (NEL), the National Electricity Regulations (NEL Regulations) and the National Electricity Code (the Code).

Each NEM jurisdiction will amend its existing NEL Application Act to confer functions and powers on the AER in such a way as to manage any constitutional issues. South Australia will continue to be the lead legislator for, and will make changes to, the NEL itself. Existing State and Territory NEL Application Acts will be amended using ‘template’ legislation agreed by the MCE, to confer functions on the AER. The Commonwealth will also pass its own Application provisions. There will be provision for judicial review of AER decisions.

The AER will take its gas functions from the Gas Pipelines Access Law (GPAL), the Gas Pipelines Access Regulations, and the National Third Party Access Code for Natural Gas Pipeline Systems (the Gas Access Code). A similar approach to electricity will be used to confer gas pipelines access functions and powers on the AER.

In general terms the AER will have powers and functions to:

- implement and enforce the operation of the NEL, GPAL, the above Codes and Regulations;
- obtain information and statistics, publish reports and disseminate information relating to the regulatory performance of the Australian energy market;
- liaise with other bodies including National Electricity Market Management Company (NEMMCO), the ACCC and the AEMC;
- undertake public consultation processes for all revenue determinations;
- undertake market surveillance to maintain the integrity of the national energy market; and
- perform any other functions conferred on the AER by the above Codes.

The AER will have legal enforcement powers under the NEL, such as:

- the power to obtain information (currently clause 8.5.1 of the Code);
- the power to obtain and exercise search warrants (currently s.71 of the NEL); and
- the power to seek and obtain pecuniary penalties and related orders, from the Federal Court and State and Territory Supreme Courts (currently ss.10-15, 44 of the NEL, and the NEL Regulations).

4. AEMC establishment legislation

Role of AEMC The role of the AEMC in the Australian energy market is to make Code changes, undertake reviews and carry out other market development functions as conferred on it under relevant Commonwealth, State and Territory legislation.

Separate statutory commission The AEMC is to be established in South Australian legislation as a separate statutory commission. The electricity Code change role of NECA will be transferred to the AEMC. The Commission will ultimately have responsibility for rule making and market development for both gas and electricity markets. The AEMC will be located in Sydney.

A South Australian entity The AEMC, as a South Australian body, will be subject to South Australian laws in relation to financial management and accountability, and annual reporting. There will be a specific provision in the NEL for judicial review of AEMC decisions. The AEMC will take powers and functions under South Australian energy laws which will be applied by each jurisdiction. The South Australian energy laws comprise:

- the NEL, including the Code;
- the NEL Regulations;
- the GPAL, including the Gas Access Code; and
- the Gas Pipelines Access Regulations.

Conferring functions and powers Each of the participating jurisdictions of the NEM will amend its NEL Application Act to confer functions and duties on the AEMC. Subsequently each party to the CoAG Gas Pipelines Access Agreement (excluding Western Australia) will make amendments to its GPAL Application Laws to confer gas functions and duties on the AEMC. Western Australia will make amendments to its own GPAL to confer gas functions and powers on the AEMC.

The MCE will have the power to issue policy directions to the AEMC with respect to rule-making or electricity or gas market reviews. This power of direction will be exercised by the MCE in relation to its national energy policy role rather than the day to day operational functions of the AEMC.

5. NEL and GPAL amendments

NEL amendments With establishment of the AER and the AEMC by the Commonwealth and South Australia respectively, amendments to the NEL will be enacted. These amendments will implement specific reforms to the institutions of the NEM to:

- confer functions on the AER as a Commonwealth body and enable the AER to perform functions in the participating jurisdictions under the NEL;

- confer functions on the AEMC as a South Australian body and thereby enable the AEMC to carry out functions in the participating jurisdictions under the NEL, (including the NEL Regulations and the Code);
- streamline the existing Code change process;
- implement the MCE decision to abolish the National Electricity Tribunal, including ensuring there is judicial review for decisions of the AEMC and AER and an appropriate review regime for decisions of NEMMCO; and
- make all necessary consequential amendments to the NEL, the NEL Regulations and the Code, to implement the NEM Reforms as agreed by the MCE in its Report dated 11 December 2003.

GPAL amendments

As outlined above, changes consistent with the MCE Report on *Reform of Energy Markets* will be made to the GPAL and the Gas Access Code to confer gas-related functions on the AER and AEMC. These changes will follow MCE consideration of the outcomes of the Productivity Commission Review of the Gas Access Regime and can take account of the particular requirements of the gas sector in contributing to this national approach.

6. Jurisdictional Application Acts

NEL template legislation

Each NEM State and Territory, in conjunction with the NEL amendments, will enact amendments to its own NEL Application Acts using ‘template’ legislation agreed by the MCE. The Commonwealth will also pass its own application provisions for offshore areas.

The template for the NEL Application Amendment Bills will implement specific reforms agreed by the MCE to the institutions of the NEM, and to this end, will:

- define and recognise the AER, a Commonwealth body, in each participating jurisdiction;
- authorise the AER to perform functions that are conferred by the NEL, the NEL Regulations and described in the Code in each of the participating jurisdictions of the NEM;
- define and recognise the AEMC, a South Australian body, in each jurisdiction;
- authorise the AEMC to carry out functions that are conferred by the NEL, the NEL Regulations and described in the Code, in each of the participating jurisdictions of the NEL (in addition to being able to do so in South Australia); and
- make any other necessary consequential changes to relevant legislation within each jurisdiction, to implement the NEM reforms as agreed by the MCE in its report dated 11 December 2003.

NEL amended legislation

The following NEL Application Acts are to be amended in the respective jurisdictions:

- the *National Electricity (New South Wales) Act 1997*;
- the *National Electricity (Victoria) Act 1997*;
- the *Electricity – National Scheme (Queensland) Act 1997*;

- the *National Electricity (South Australia) Act 1996*;
- the *Electricity (National Scheme) Act 1997 (ACT)*; and
- the *Electricity – National Scheme (Tasmania) Act 1999*.

GPAL Changes of a similar nature will be also be made to the GPAL Application Acts and to
template Western Australia's GPAL.
legislation