

Our Ref: 05/12048  
Your Ref:

Manager – MCE Secretariat  
Department of Industry, Tourism and Resources  
GPO Box 9839  
Canberra ACT 2601

Attn: John Polack

Dear Mr Polack,

### **National Framework for Energy Distribution and Retail Regulation**

The Ministerial Council on Energy (**MCE**) Energy Market Reform program includes the development of a National Framework for Energy Distribution and Retail Regulation. In October 2005 the MCE Standing Committee of Officials (**SCO**) released a paper prepared by NERA Economic Consulting and Gilbert + Tobin (**Consultants**).

The paper sets out the Consultants' proposal for a nationally legislated framework for distribution and retail regulation rules to be made and administered by the Australian Energy Market Commission (**AEMC**) and enforced by the Australian Energy Regulator (**AER**).

The MCE sought submissions on the detail and content of the Consultants' paper by Friday 13 January 2006. The Commission welcomes the opportunity to participate in this consultation and makes this submission accordingly. However, the Commission understands that various elements of the proposed national framework for energy distribution and retail regulation, including the timeframe in which certain responsibilities are to be transferred to the AER, have been superseded by developments agreed by the MCE since the Consultants' paper was prepared and released. These changes are likely to be reflected in amendments to the Australian Energy Market Agreement (**AEMA**).



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As such, in this submission the Commission has restricted its comments to those high-level principles it considers most relevant to the successful transfer and implementation of the national energy framework.

Experience to date suggests that having different jurisdictional regulators interpreting the national energy regulatory framework does not necessarily achieve uniformity and consistency across jurisdictions, identified in the Consultants' paper as important objectives to facilitating market entry and more effective competition. Jurisdictions have agreed, therefore, that these objectives are more likely to be secured through one national regulator being responsible for regulating the national energy regulatory framework.

The Commission agrees with this approach but notes that jurisdictions will continue to have an ongoing role in some areas of energy regulation. As such it is important the national energy regulatory framework that is ultimately agreed by the MCE allocates responsibility between jurisdictions and the national regulator appropriately, effectively and transparently.

## **1. Price regulation of distribution**

The Commission broadly agrees that the administration and regulation of the functions listed under this heading should fall under the responsibility of the new national governance arrangements. Many of the functions listed are those the jurisdictional regulators administer and regulate pursuant to the National Electricity Rules, particularly Parts D and E of Chapter 6 and the National Gas Access Code.

The Consultants' proposals relevant to the price regulation of distribution broadly reflect what the Ministers agreed under the AEMA, dated 30 June 2004. As such, the Commission's comments are limited to its discussion on service performance targets.

### *1.1 Service performance targets*

The Consultants' paper seeks to make a distinction between minimal service performance targets that can be categorised as technical and safety requirements and service performance targets that are in addition to those, which are categorised as falling in the domain of economic regulation. The regulation of minimal service performance targets would remain with the jurisdiction while the regulation of any additional service performance targets would transfer to the AER.

The Commission considers that identifying service performance functions as being subject to either technical or economic regulation in a way that is clear and unambiguous is potentially problematic. This is because what constitutes minimum service performance targets tends to go beyond bare technical and safety standards to what the Consultants' paper describes as 'higher service performance'.

It is the Commission's view that the technical and 'higher' functions are inextricably intertwined such that allocating regulatory responsibility for each to separate jurisdictions is likely to experience considerable difficulties in the implementation.

Assuming this proposal proceeds, however, the Commission believes it is vital to structure the arrangements such that there is a clear nexus between the role of the AER as economic regulator and the jurisdictions' technical regulators to ensure no service standard obligation falls into any jurisdictional gap.

Thus, to ensure that any gaps or problems that may become apparent only once the allocation of regulatory responsibility is complete are identified and quickly addressed, the Commission considers it would be prudent for a review of those regulatory functions to be undertaken no later than one year from implementation. The Commission considers the AEMC would be the best placed to conduct such reviews.

## **2. Consumer protection**

The Commission agrees with the Consultants' paper's guiding principle for consumer protection being that the scope of regulation should be sufficient to ensure 'vulnerable customers' are treated fairly but not so wide or prescriptive as to impose regulatory costs that exceed benefits. The Commission also agrees that it is preferable that consumer protection be governed by generic regulation, with energy specific regulation only being imposed where the consumer protection concerns are particular to the energy market. Fair trading legislation provisions relevant to market contracts and marketing generally will stay with jurisdictions. However, where there is a need for consumer protection regulations specific to energy, they will be developed under the national arrangements.

In the ACT the Commission notes that the energy specific consumer protection obligations imposed on distributors and retailers were imposed because of concerns the fair trade legislation did not adequately cover all the circumstances a customer was likely to encounter in acquiring energy services. It is likely other jurisdictions with energy specific consumer protection regulations introduced those regulations for similar reasons. As such, if existing jurisdictional protections are removed but no or only minimal national energy specific consumer protection regulations are introduced the level of consumer protection is likely to vary between jurisdictions depending on the comprehensiveness of each jurisdiction's general consumer protection legislation. It is critical, therefore, that each jurisdiction's fair trading authority participate in the development of consumer protection in the energy sector.

This is a salutary reminder that consequences associated with the introduction of the national energy framework will extend beyond the energy industry and market. In the Commission's view it would be prudent for the regulatory framework to provide for ongoing communication between the AEMC/AER and jurisdictions, notwithstanding the role of the MCE, to ensure the incidental consequences accompanying the introduction of the national energy framework are identified and adequately monitored and/or addressed.

The Commission also considers that a mechanism should be agreed between the AER and jurisdictions pursuant to which the AER should provide a regular report to each jurisdiction of systemic issues apparent from complaints made against distributors/retailers or breaches by them that occur within the respective jurisdiction.

## 2.1 'vulnerable customers'

The Consultants' paper refers to 'vulnerable customers' as being those who consume, as an example, less than 160 MWh p.a. or 10 TJ p.a.. While the Commission appreciates that these figures are referred to by way of example, it believes this is the appropriate place to emphasise the importance of not defining 'vulnerable customer' too broadly.

With full retail contestability (**FRC**) still being rolled out at different rates in different jurisdictions, 'vulnerable customers' are included in the broader category of 'franchise customers. In the ACT 'franchise customers' are those who consume 100 MWh p.a. or less and who are on the 'standard customer contract' in accordance with the *Utilities Act 2000* (ACT). There are no 'franchise customers' relevant to gas retail in the ACT.

The definition of franchise customers has particular relevance to retail pricing and FRC, the responsibility for which is not being transferred to the AER. However, it also is closely linked to the obligation on retailers to supply customers and is potentially relevant to any national dispute resolution scheme that may be introduced.

While ultimately any decision to declare customers to be franchise customers is one of Government, the Commission would be reluctant to see a definition of 'vulnerable customers' incorporated into the national energy framework such that, at least in the ACT context, almost all small customers are relegated to marginal participation in the national market.

If 'vulnerable customers' is defined so broadly as to encompass most small customers, including potentially small businesses, it has the potential to discourage competition from developing in the areas of, among others, the supply of energy to small customers. Surely one of the purposes of developing a national energy framework is to encourage the development of competitive gas and electricity markets.

It is the Commission's view that what constitutes a 'vulnerable customer' should be prescriptive, targeted and limited to those who are unable, for reasons outside of their control, to participate in a competitive market. This would ensure that customers who are unable to participate in a competitive market are not denied supply to gas or electricity as a consequence.

The Commission would be concerned, however, if access to any national dispute resolution scheme that was subsequently developed was limited to 'vulnerable customers' so defined. This is discussed in more detail below.

## 2.2 *Distributor obligation to provide connection services*

The Commission endorses the Consultants' proposal that an obligation to connect be incorporated into the national energy framework. The Commission considers that a transitional phase from jurisdictional to national regulation is necessary to ensure no 'hiccups' arise during, or as a consequence of, the transfer, preferably in the form of ongoing communication between jurisdictions and the AEMC/AER.

To ensure that any gaps or problems that may become apparent only once the transfer of responsibility is complete are identified and quickly addressed, the Commission considers it would be prudent for regular reviews of the operation of the obligation to connect be undertaken, perhaps every five years but with the first being no later than one to two years from completion of transfer. The Commission considers the AEMC would be the best placed to conduct such reviews.

## 2.3 *Distributor connection and reconnection of small end-customers*

The Commission agrees with the Consultants' proposal that the disconnection and reconnection of small end-customers be regulated, subject to the national framework ensuring those customers who are unable to participate in the competitive market remain protected and that there are adequate and accessible appeal and review channels available to all customers.

Again, to ensure the any gaps or problems that may become apparent only once the transfer of responsibility is complete are identified and quickly addressed, the Commission considers it would be prudent for regular reviews of the disconnection and reconnection regulatory framework be undertaken, perhaps every five years but with the first being no later than one year from completion of transfer.

## 2.4 *Small end-customers dispute resolution*

The Commission agrees with the Consultants' view that customers should have access to informal, fair and efficient dispute resolution arrangements. The Commission also agrees that alternative dispute resolution schemes are important to the most vulnerable of small end-customers.

While the Commission understands that responsibility for dispute resolution will remain with the jurisdictions, at least in the interim, it is also aware that dispute resolution schemes are likely to operate under nationally agreed principles in future. These comments are made in anticipation of that eventuality. It is the Commission's view that the development of a national dispute resolution scheme should not result in its application being unduly restrictive.

The body responsible for handling electricity and gas customer complaints and disputes in the ACT is the Essential Services Consumer Commission (**ESCC**). The ESCC currently enjoys a reasonably extensive jurisdiction and has considerable powers to, among other things, direct a utility to restore a service (section 192) and discharge debts\* (section 207). Although a large number of the ESCC's complaints relate to hardship, the ESCC also deals with a range of non-hardship matters.

If the jurisdiction of a dispute resolution system was limited to, say, only those customers who were unable to participate in a competitive market, this would exclude most small end-customers from what is generally regarded as a valuable alternative dispute resolution forum. It is the Commission's view that any dispute resolution scheme developed must be made available to all customers subject to perhaps a monetary limit.

The Commission is also concerned that the national energy framework be structured such that the network of distribution/retailer relations with small-end customers, any dispute resolution scheme, be it national or jurisdictional, and the penalties and enforcement available to the dispute resolution body operates effectively and seamlessly otherwise any dispute resolution process can easily become discredited. It is vital not only that the dispute resolution process works, but that it be seen to work with all customers feeling their complaints are being addressed appropriately and adequately.

The Commission considers the jurisdictions and the AER should reach some formal and transparent arrangement through which jurisdictions can inform the AER of consistent findings by dispute resolution bodies of poor performance or breaches of obligations against a distributor or retailer with that information then factored into the AER's ongoing assessment of that distributor's/retailer's service performance targets. Where the AER declines to take any action, a jurisdiction should be entitled to seek a review of that decision.

Again, to ensure that any gaps or problems that may become apparent only once the transfer of responsibility is complete are identified and quickly addressed, the Commission considers it would be prudent for regular reviews of the efficacy of the dispute resolution processes and outcomes to be undertaken, with the first being no later than one year from completion of transfer.

Finally, in the ACT the Commission, the ESCC and the technical regulator are funded through licensing fees. As licensing would be limited to technical regulation it is unclear how funding to finance the ESCC and its obligations would be sourced. Adequate funding of dispute resolution schemes and the authorities that administer them is a critical issue for ensuring the efficacy, effectiveness, durability and long-term legitimacy of such schemes and authorities. The Commission anticipates this issue will be appropriately recognised and addressed as the national energy market continues to develop.

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\* to a maximum of \$10,000

## 2.5 *Retailer obligation to supply to small end-customer*

The Consultants' paper anticipates that under the national framework local retailers will be obliged to make standing offers to specified classes of customers with the jurisdictions designating local retailers, their regions of responsibility and specified classes of consumers. Local retailers would have to make the standard terms and conditions of supply in accordance with AEMC rules. Those jurisdictions with FRC would require regulation only for those circumstances where a customer occupies premises and consumes energy without having entered into an agreement with the retailer ('move-in' customers). In those circumstances a default supply agreement would arise between the 'move-in' customer and the retailer who had a supply contract with the previous occupant of those premises. The Commission agrees with this proposal.

The national energy regulatory framework proposed does not consider whether there should be a default supply obligation should a customer not choose to enter into a negotiated retail contract.\* This issue does need to be addressed, as the ACT and other jurisdictions are only too well aware, and an appropriate framework agreed with clear parameters established as to the circumstances in which a default supply obligation arises. Indeed there seems to be no reason why any default supply arrangement developed for 'move-in' customers cannot also be used for customers who decline to enter into a negotiated customer contract. Whether or not prices for default supply agreements should be set would be decided by each jurisdiction.

Another issue the Consultants' paper does not address, but on which a clear policy needs to be established (in conjunction with what constitutes a 'vulnerable customer'), is whether a general obligation to supply to any customer regardless of their credit history should be imposed on specified service providers. As energy supply is an essential service the Commission considers the national framework should oblige designated local retailers to supply such customers with those service providers being compensated for that role.

## 2.6 *Small end-customers market contracts (retail) /marketing (retail)*

The Commission refers to its comments in relation to consumer protection generally under section 2 above and notes its applicability in relation to retail market contracts and retail marketing.

The Commission also emphasises the importance of ensuring the alternative dispute resolution scheme is available to all customers who have agreed market contracts with their retailer with the jurisdiction limited by a maximum amount only.

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\* The Consultants' paper does not address this noting that this issue is beyond the scope of the Consultants' project.

### **3. Other distribution and non-price retail regulation**

#### *3.1 Business authorisation*

The Commission notes that licensing is to stay with the jurisdictions but that licences are to be limited to technical regulation. The Commission notes, as a consequence, that a significant source of revenue collected by the Commission through licence fees and made available to the Commission, the ACT Technical Regulator and the ESCC will no longer be available. The Commission considers the responsible policy decision-makers are best placed to address these funding requirements.

#### *3.2 Distributor interface with retailers*

The Commission notes that the distributor interface with retailers proposed in the Consultants' paper reflects the approach adopted by the ACT. The Commission agrees with this approach.

#### *3.3 Balancing regime and settlements, effecting customer transfer in balance and settlements system*

The Commission notes that under the national energy framework these functions will stay with the jurisdictions at least for the foreseeable future. The Commission notes, however, that these functions are slowly shifting toward a national scheme, which in the longer term the Commission considers to be the preferable option.

#### *3.4 Metering*

The Commission considers it is important that regardless of who has responsibility for what aspect of metrology there should be a concerted effort by all jurisdictions to ensure that the development of metrology is consistent across electricity and gas and the different jurisdictions to the extent possible.

#### *3.5 Load shedding and curtailment*

The Commission notes that under the national energy framework load shedding (that is not technical) and curtailment will stay with the jurisdictions at least for the foreseeable future.

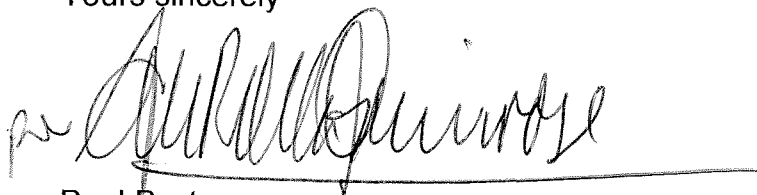
#### *3.6 Retailer of last resort*

The Consultants' paper notes that there is a need for a regulatory scheme that preserves the integrity of the wholesale settlements system and ensures continuity of supply to customers of a failed retailer. The step-in arrangements would be developed in accordance with AEMC Rules within a national regulatory framework and would apply for a time sufficient to allow customers to choose a new retailer.

The Commission agrees with this approach. Note, however, that while the ACT has a retailer of last resort for electricity it has no retailer of last resort for gas.

Please do not hesitate to contact Ian Primrose, Chief Executive Officer, on 02 6205 0779 should you have any queries.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Paul Baxter', written over a horizontal line.

Paul Baxter  
Senior Commissioner  
13 January 2006