

Our Ref: 05/12048
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Dear Manager

Proposed Framework Schedule for Transfer of Distribution and Retail Functions

The Ministerial Council on Energy (**MCE**) Energy Market Reform program includes the development of a National Framework for Energy Distribution and Retail Regulation. The MCE Standing Committee of Officials (**SCO**) has released a paper prepared by NERA Economic Consulting and Gilbert + Tobin (**Consultants**) on which it seeks comments by 13 January 2006.

Simultaneously participating jurisdictions are considering amending the Australian Energy Market Agreement to provide binding commitments to transfer specified distribution and retail functions to the national framework. *The Proposed Framework Schedule for Transfer of Distribution and Retail Functions* (**Proposed Framework**) is a high-level listing of functions drawn from the Consultants' paper that highlights the decisions that need to be made including:

- which transfers should be transferred to the new governance arrangements;
- whether the functions should be uniform or jurisdiction specific;
- whether any functions should remain with jurisdictional regulators (apart from general safety, environmental and similar functions not part of standard economic regulation);
- whether any existing economic regulation functions would be redundant under a national framework; and
- the appropriate timing of any transfers.



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The MCE sought submissions on the specification of high level functions by Friday 11 November 2005. The Commission requested an extension to the morning of Tuesday 15 November 2005. The Commission welcomes the opportunity to participate in this consultation and makes this submission accordingly.

The Proposed Framework lists the functions that are likely to be the responsibility of the new national governance arrangements, those that are likely to remain with the jurisdictions and those that are likely to be abolished. The Commission addresses those areas that it considers requires close attention by the SCO and MCE.

Consumer protection

The Commission broadly agrees that the new national governance arrangements should be responsible for administering and regulating the functions listed under this heading. 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 ongoing development of the energy market means a consistent regulatory framework alone is not sufficient to ensure uniform and consistent market development. Instead, there is a need for uniform and consistent regulation across the jurisdictions.

The Commission, however, is concerned that the protection of the small-end consumer, in particular those who are most marginal, does not end up falling into any 'jurisdictional gaps'. The Commission agrees that functions such as 'distributor obligation to provide connection services', 'distributor disconnections and reconnections of small-end customers', 'retailer obligation to supply to small-end customers', 'retailer: small-end customer market contracts' and 'retailer: small-end customer marketing' most sensibly belong within the national governance arrangements. However, it also considers that to do so increase the likelihood of small-end customers, particularly marginalised ones, becoming unheard and having the potential to lose their existing levels of protection.

As such, it is the Commission's view that there needs to be a clear nexus between the functions that relate to the interaction and contractual arrangements between distributors and small-end customers, and between retailers and small-end customers, a jurisdiction's dispute resolution scheme and the penalties and enforcements available to customers under the national arrangements. Further, the Commission considers the jurisdictions and the Australian Energy Regulator (**AER**) should reach some formal and transparent arrangement through which jurisdictions can inform the AER of consistent findings 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.

The Proposed Framework also anticipates that while generic fair trading legislation provisions relevant to market contracts and marketing will stay with jurisdictions, energy specific consumer protection regulations, if any, will be developed under the national arrangements. The Commission notes that the energy specific consumer protection obligations it has imposed on distributors and retailers within the Australian

Capital Territory (**ACT**)¹ were imposed because of concerns the fair trade legislation in the ACT did not adequately cover all the circumstances a customer was likely to encounter in acquiring energy services. It is likely energy specific consumer protection regulations were introduced in other jurisdictions for comparable reasons. As such, if no or only minimal energy specific consumer protection regulations are introduced under the national arrangements it is likely that the level of consumer protection will differ between jurisdictions with some consumers better protected than others. As such, it is critical that each jurisdiction's fair trading authority participate in the development of consumer protection in the energy sector.

Service performance targets

In order for service performance targets to be meaningful the 'two tier' delineation made by the Consultants' paper as to what constitutes minimum technical levels and those in excess of the minimum levels needs to be unambiguous. The Consultants' paper proposes that minimum technical levels, such as voltage fluctuations and gas composition remain with the jurisdiction while those in excess of minimum technical levels, such as service reliability, constitute economic regulation and thus belong within the national governance arrangements.

This submission does not propose to address the details of the Consultants' paper. That is the purpose of the submission due on 13 January 2006. The Commission notes that with service reliability constituting the main component of service performance targets, the responsibility remaining with the jurisdictions is likely to be minimal. However, the Commission notes that any uncertainty as to which jurisdiction is responsible for what tier, and the kind of conduct that falls within each tier, again can result in small-end customers, and particularly marginalised customers, finding themselves in a jurisdictional gap. As the national framework continues to be developed, this issue needs to be maintained as a high priority.

Dispute resolution

The Commission agrees that small-end customer dispute resolution, albeit one that is established pursuant to the national governance arrangements, should remain the responsibility of each jurisdiction. The Commission understands the dispute resolution process conducted by the Essential Services Consumer Council (**ESCC**) in the ACT is well received and has a good record for resolving disputes to the satisfaction of all parties concerned.

Again, however, the Commission is concerned that unless there is a clear nexus between the distribution/retailer relations with small-end customers, a jurisdiction's dispute resolution scheme and the penalties and enforcement available to the dispute resolution body, the 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 small-end customers feeling their complaints are being addressed appropriately and adequately.

¹ Through the Consumer Protection Code and licence conditions

Another issue of considerable concern to the Commission is that the Proposed Framework (and the Consultants' paper from which the Proposed Framework derives) does not indicate how the dispute resolution schemes developed under the national arrangements are to be funded. The funding of the ESCC is currently sourced from licence fees paid by licence holders. However, under the proposed national framework jurisdictions will no longer have the power to grant general business authorisations or licences to distributors and retailers and thus no power to require the payment of fees. This means a vital source of funding is no longer available to energy related agencies of jurisdictions.

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.

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.

Merits and judicial review

The Commission has made a submission to the MCE on the SCO's proposed merits and judicial review framework. See the 'what's new' page at: www.icrc.act.gov.au.

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

Yours sincerely



Paul Baxter
Senior Commissioner
15 November 2005