

# **AER-AEMC-ACCC Memorandum of Understanding (MoU) Framework**

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## ***Discussion Paper***

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**Ministerial Council on Energy Standing Committee of Officials**

March 2004

## **AER-AEMC-ACCC Memorandum of Understanding**

The Ministerial Council on Energy's Standing Committee of Officials (SCO) is seeking specific comments and/or views on the range of issues discussed in the paper to inform the development of policy actions by the MCE. SCO is interested in obtaining the views of all stakeholders.

The consultation process will comprise two similar consultation sessions on 23 and 24 March 2004, as advised in [Bulletin No. 3](#), and the opportunity to provide written comments to the SCO by Wednesday 7 April 2004.

Please include your name, address, organisation, and contact details, including your email address, if applicable, on your submission. Wherever possible submissions should be provided electronically.

To ensure the SCO is able to consider all views within the work program timeframe, it is requested that written submissions be limited to five pages. Any supporting documents should be clearly labelled as attachments.

It is intended to make electronic submissions publicly available on the Ministerial Council on Energy website at the end of the process. If you do not want all or part of your submission made publicly available, or you consider any part of your submission to be confidential or commercial-in-confidence, you should make this clear in your submission.

Submissions should be received by Wednesday 7 April and addressed to:

MoU Framework  
c/- MCE Market Reform  
Department of Industry, Tourism and Resources  
GPO Box 9839  
CANBERRA ACT 2601  
Facsimile: (02) 6213 7110  
Email: [MCETMarketReform@industry.gov.au](mailto:MCETMarketReform@industry.gov.au)

Please direct any enquiries regarding the consultation process to Neville Henderson, on (03) 8603 3765.

## **Energy Market Reform**

### *Framework for*

#### **Memorandum of Understanding between the AEMC, AER and ACCC**

##### ***Background***

The Report of the Ministerial Council on Energy (MCE) dated 11 December 2003 records that a Memorandum of Understanding (MoU) will be entered into between the AEMC, AER and ACCC. See para 4.2.3.

The MoU forms part of the “new regulatory arrangements [that] will provide for consultation and cooperation between the AEMC, AER and ACCC and will avoid the duplication of regulatory processes”. See *ibid*.

Para 4.2.3 goes on to say:

“the code change and authorisation process will be streamlined, with cooperative arrangements specified in the Memorandum of Understanding. In considering applications for authorisation or approval of code changes, the ACCC will have the discretion to use the AEMC’s analysis, assessment and consultation process”.

Appendix 2 to the Report provides as follows (see first bullet point, para 1):

“Memorandum of Understanding. A MoU will be established between the [AEMC, AER and the ACCC], to be endorsed by the MCE, addressing consultation, cooperation, code-change authorisation and staffing arrangements.”

Appendix 2 to the Report reinforces the above by noting (see last bullet point, para 2) that the ACCC will have the “discretion not to conduct full consultation” and that the Trade Practices Act will be amended to give the ACCC this discretion

“thereby allowing it to rely on submissions received and consultation undertaken by the AEMC, in addition to any further advice it might specifically seek from the AEMC, AER or other party. The Memorandum of Understanding between the ACCC, AER and AEMC will, amongst other things, address the circumstances in which full consultation may be undertaken by the ACCC”.

Para 4.2.1(c) of the Report is also relevant. It provides as follows:

“The MCE will establish a more structured and transparent code-change process to be followed by the AEMC, in which market participants, end-users, the [AER] ... and the [ACCC] will be involved.... The AEMC may, in consultation with the ACCC, seek ACCC authorisation under Part VII of the Trade Practices Act 1974, of code changes that raise competition issues.

Insofar as “staffing arrangements” are concerned, Appendix 2 to the Report provides (see 8<sup>th</sup> bullet point, para 1) that staff of the AER will be employed directly by the ACCC and then will be seconded to the AER. The bullet point goes on to provide:

“The secondment arrangements, including senior management of the AER will be by mutual agreement between the AER and the ACCC. The CEO of the AER will be chosen by the AER Members, following agreement with the ACCC.”

The AER will be a constituent part of the ACCC but will be a separate legal entity. This means that, while it will share staff with the ACCC, the members that constitute the AER will, with respect to the functions conferred upon the AER, make the final decisions.

***Policy context***

The MoU needs to be framed in the light of the following key policies, some of which were agreed by the MCE on 11 December and others which are proposed to be adopted, consistent with that agreement.

The role of AER members and staff<sup>1</sup> in ACCC decisions on energy matters under the *Trade Practices Act 1974* (TPA) requires a balance to be struck between efficiently using the energy market expertise of the AER to inform the enforcement and administration of the TPA on the one hand (while recognizing that the AEMC is responsible for rule making) and streamlining the changing of the energy codes, on the other.

In defining the role of the AER in TPA matters, distinctions need to be drawn between the roles of AER members and those of AER staff, and between ACCC decisions on the authorisation and approval of code changes (under Parts VII and IIIA respectively) and on potential breaches of Part IV by particular energy market participants, for example through mergers and acquisitions. The AER staff will assist the ACCC in relation to its functions in the energy sector. The AER will be sufficiently resourced to ensure that it has sufficient and appropriately qualified staff to be able to effectively perform its own functions while enabling AER staff to assist the ACCC in this manner. The roles of AER members and staff are set out in the table below.

	<b>Code change authorisation or approval</b>	<b>Other TPA energy market matters</b>
<b>AER members</b>	<p>Consultation between the ACCC and the AEMC will be necessary to ensure that industry-specific rule-making by the AEMC is directly influenced by the competition perspective of the ACCC.</p> <p>AER members may provide informal advice to the ACCC on matters relevant to code change decisions.</p>	<p>The ACCC may seek the formal advice of AER members on the administration and enforcement of the TPA in respect of particular energy market issues.</p> <p>The ACCC may also seek the advice of the AEMC on such matters, particularly those which have implications for or interact with the AEMC’s market development function.</p>

<sup>1</sup> The term ‘AER staff’ in this document is a shorthand reference to staff allocated to the AER, recognising that all such staff are employed by the ACCC.

<b>AER staff</b>	AER staff may/will participate in or undertake the drafting of advice to the ACCC on code change authorisations or approvals. The role of the AER staff in such matters will be by agreement between the ACCC and AER CEOs.	AER staff may participate in the drafting of advice to the ACCC on the administration and enforcement of the TPA in respect of particular energy market issues. The role of the staff in such matters will be by agreement between the ACCC and AER CEOs.  There is no policy principle preventing AER staff from leading such work. The principal issue is for the AER to ensure that its statutory functions are adequately resourced.
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The AEMC and AER will also routinely exchange information and confer in the course of fulfilling their respective functions. The AER is expected to inform the AEMC’s rule-making activities by providing relevant market information and its views on the enforceability of rules, while the AEMC is expected to inform the AER’s enforcement of market rules by advising of its interpretation of those rules.

It is clear that arrangements for staff appointments and secondments need to be specified between the ACCC and the AER given that AER staff will be employed by and seconded from the ACCC, and that AER staff will assist the ACCC in administering and enforcing the TPA in respect of the energy market.

Although the AEMC will be responsible for its own staffing, formal but voluntary secondment arrangements between the AEMC and the ACCC/AER could assist in the development of common perspectives and sound working relationships. Such secondment arrangements should be by agreement between the CEOs of the AEMC, AER and ACCC.

There is proposed to be no limitation on the sharing of information between the ACCC and AER, consistent with the policy decision that the AER is a constituent part of the ACCC, and noting that both bodies are or will be subject to appropriate limitations on disclosure to third parties (other than the AEMC) of commercially confidential information.

Because AER staff will be employed by the ACCC, there is no need to legislate their access to ACCC information. It will nevertheless be desirable to codify in the MoU arrangements for ensuring the timely and efficient transmission of information between ACCC and AER staff. Specific provision will need to be made to allow the ACCC to share information with AER members.

It is similarly proposed that there be no limitations on information sharing between the AEMC on the one hand and the ACCC/AER on the other, to assist each body to undertake its functions in respect of the energy markets, again subject to appropriate limitations on disclosure to third parties of commercially confidential information.

Indeed, information sharing between the AER and AEMC will be routinely required given that the two bodies are responsible for the same industries. There will be a high degree of commonality in each body’s information requirements, so a co-ordinated

information gathering system is likely to be desirable. Information sharing between the ACCC and AEMC will be critical to ensure that the code change process is streamlined.

### ***Legislative context***

A number of matters that bear on the content of the MoU will be prescribed in legislation. These are summarized below:

- The consultation and decision processes agreed by the MCE (Appendix 2 of the 11 December report) by which rule-making and regulation will occur.
- The consequential repeal of those parts of the National Electricity Code (and in due course those parts of the Gas Access Legislation) that presently govern rule-making (including the abolition of the Code Change Panel).
- The respective functions of the AEMC and AER.
- The information gathering powers of the AER.
- The information gathering powers of the AEMC.
- The capacity of the ACCC, AER and AEMC to share information.
- Appropriate limitations on the right of the AER and AEMC to disclose information to third parties (other than the ACCC).
- The ACCC to have discretion not to undertake separate consultations in respect of Part VII authorisation and Part IIIA approval decisions, but to rely on AEMC processes. The AEMC and AER to advise the ACCC at its request on such decisions.
- The staffing of the AER by secondment from the ACCC on a consultative basis between the AER and the ACCC.
- Amendment of sections 27 and 27A of the *Trade Practices Act 1974* so that they apply not only to staff and consultants appointed to assist or perform services for the ACCC but also when those staff and consultants assist or perform services for the AER.

### ***Key elements***

Based on the above, the following appear to be the key elements required of the MoU between the AEMC, AER and ACCC:

1. **Recitals:** Provisions that state the background to the MoU, in particular the agreement by the MCE to establish the AER and AEMC, and the decision to streamline the electricity and gas rule making, authorisation and approval processes.
2. **Purpose:** A clause stating the purpose of the MoU as “to provide for efficient and effective co-operation and coordination between the AEMC, AER and ACCC and the appointment to the AER of staff with appropriate skills and experience”.
3. **Amendment:** A clause recording that the MoU may be amended by agreement, and that amendments will be notified to the MCE.

4. **Sharing of information:** Each of the ACCC, AER and AEMC will promptly provide to the other bodies any information that is likely to have material relevance to, or has been sought by that other body for, the fulfillment of that other body's statutory functions.
5. **Joint information gathering:** The AEMC and AER will co-operate to minimise the duplication of information requests to market participants, in particular routine or ongoing information requests.
6. **Rule making:**
  - a. The AEMC will promptly provide to the ACCC and AER any proposal it receives or initiates, or any draft decision it makes, to modify any rule governing the electricity or gas industries.
  - b. The AEMC will promptly provide all submissions received on any proposal for or draft decision on a rule change to the ACCC and AER.
  - c. In consulting on a proposal for or draft decision on a rule change, the AEMC will seek stakeholders' views on whether the change:
    1. might result in a contravention of a provision of Part IV of the TPA;
    2. would be likely to result in any anti-competitive detriment that would be relevant to an application for authorisation under Part VII;
    3. would be likely to result in a benefit to the public that would outweigh any anti-competitive detriment described in paragraph 2 above; or
    4. would result in a variation to an access code accepted by the ACCC under s 44ZZAA of the TPA and, if so, whether the code change would satisfy the criteria in s 44ZZAA(3) of the TPA.
  - d. In considering a proposal for or draft decision on a rule change, the ACCC will promptly advise the AEMC whether it has identified, and if so the nature of, potential competition or access issues under the questions set out in (c) above, taking into account any submissions received by the AEMC.
  - e. The AEMC will confer with the ACCC and undertake any analysis required to resolve the competition and access issues it has raised.
  - f. In making a draft and final decision, the AEMC will explicitly seek submissions and gather information on competition or access issues raised by all stakeholders including the ACCC, with a view to ensuring that the ACCC may rely upon those submissions and information in any application for authorisation or approval that may be made.

- g. In considering a proposal for or draft decision on a rule change, the AER will promptly advise the AEMC of whether it has identified, and if so the nature of, potential regulatory issues arising from the change, taking into account any submissions received by the AEMC.
  - h. The AEMC will confer with the AER and undertake any analysis required to resolve the regulatory issues it has raised.
  - i. In making its draft and final decisions, the AEMC will address all competition and access issues notified by the ACCC and regulatory issues notified by the AER.
  - j. On making its final decision, the AEMC will confer with the ACCC on its decision whether to seek authorisation or approval.
  - k. If approval or authorisation is sought, the ACCC is able to rely on the submissions provided to the AEMC, and would seek further information if:
    - 1. the AEMC did not, during the rule change process, invite submissions on the issues that are relevant to the application before the ACCC;
    - 2. a submission made during the rule change process raises material competition and access issues that were not adequately addressed by the AEMC and require supplementary or further consultation;
    - 3. the proposed code change that is the subject of the application before the ACCC raises material competition or access issues that were not raised by the code change that was the subject of consultation by the AEMC; or
    - 4. a failure to undertake further consultation would result in reviewable error of law by the ACCC.
5. **Interpretation of regulatory rules:** The AER may seek the views of the AEMC on its interpretation of the regulatory rules administered and enforced by the AER. The AEMC will respond promptly to such a request.
6. **Recruitment, secondment and resource-sharing:**
- a. The ACCC will engage staff at the request of the AER. The MOU will set out the necessary provisions relating to procedures for engaging staff, position descriptions, etc.
  - b. Advertisements for AER staff will be placed in the names of both the AER and ACCC.
  - c. AER staff will assist the ACCC in relation to its functions in the energy sector. The ACCC and AER will work together to ensure that the AER has sufficient staff and consultants with appropriate skills and expertise to

enable the AER to effectively perform its own functions while enabling AER staff to assist the ACCC in this manner.

- d. The ACCC will respond promptly to requests by the AEMC to second or release staff to assist in establishing the AEMC. Staff transfers and secondments between the AEMC and ACCC/AER will be encouraged.
7. **Cost recovery:** The ACCC will be fully reimbursed for all AER costs. The full cost of ACCC staff and any other facilities provided to the AER by the ACCC will be separately identified and accounted for. The costs of any staff seconded to the AEMC from the ACCC or the AER will be met by the AEMC.

March 2004