



7 April 2004

Streamlining the Code Change Process
C/- MCE Market Reform
Department of Industry, Tourism and Resources
GPO Box 9839
CANBERRA ACT 2601

Via E-mail: MCEMarketReform@industry.gov.au

Dear Sir,

Streamlining of the Code Change Process

I refer to the discussion paper on the above matter released by the Ministerial Council on Energy Standing Committee of Officials (**SCO**), dated March 2004 (**Discussion Paper**) and the invitation extended to interested parties to provide specific comments and/or views on the range of issues discussed in that paper. The SCO has also released another Discussion Paper on the proposed "AER-AEMC-ACCC Memorandum of Understanding Framework" (**MoU**). The subject matters of the two papers are related. Although this submission is the National Generator Forum's (**NGF's**) response to the matters detailed in the Discussion Paper, it also discusses some common matters raised in the proposed MoU.

The NGF is an organisation that represents 21 of the largest electricity generating companies that operate in the in the National Electricity Market (**NEM**) and the NGF would like to thank the Ministerial Council on Energy (**MCE**) and the SCO for the opportunity to provide comments on the Discussion Paper. The NGF considers that it is critical to the long term success of the NEM that an appropriate institutional, governance and regulatory framework be established.

As a general principle, the NGF is of the view that the NEM institutions should operate in an efficient, transparent and consistent manner, with clearly defined authorities, responsibilities, and accountabilities, with limited or no overlapping of functions and with robust consultation requirements and review mechanisms. The NGF is of the view that it is against these objectives that the proposals in the Discussion Paper should be measured.



1. Support for the reform process

The NGF commends the MCE for establishing the reform process for NEM governance and recognises the need for a basic legislative and institutional framework to be in place by the middle of this year. Nonetheless, the NGF is concerned that consultation with industry participants, and opportunities for exploring the practical implications of the proposed changes, is truncated and as a direct consequence that this may lead to less than ideal outcomes for the industry.

The NGF appreciates the tight timetable that the SCO has been directed by the MCE to adhere to and the resultant impact on both the range of governance options provided for consideration and the time provided for industry consultations. While the NGF does not wish to delay the overall schedule that the MCE has agreed for the reform process, it is concerned that the current timetable is preventing the SCO from giving full consideration to the views of generators and other industry participants on some major issues. In particular, the NGF is concerned that significant changes proposed for the Code change process, such as the issue of the indivisibility of the Code which is discussed in detail within this paper, have not been subject to sufficient consultation.

2. Threshold Issues and Summary

The relationship between the Code and the *Trade Practices Act (TPA)* in respect of authorisation under Part VII is central to the design of the Code change process. It appears to the NGF that SCO has erroneously assumed that only certain provisions of the Code are authorised, that authorisation of a proposed Code change is discretionary, and that the ACCC will assess each proposed Code change that is the subject of an application for authorisation in isolation, without reference to the Code as a whole. The NGF believes that the basis of the original authorisation of the Code is such a fundamental element for the design of the Code change process that this issue should have been the first point of intensive consultation with industry, which actually bears the risk under Part IV of the TPA, to settle a common understanding of that relationship. Only then should the Code change process be re-designed.

The NGF is concerned that if the SCO proposals for the Code change process are adopted, the new governance regime for the NEM will not protect Market Participants unless every proposed Code change is authorised by the ACCC and will be open to the risk of legal challenge for contravention of provisions of Part IV of the *Trade Practices Act*. Consequently, it is unlikely that market participants will be confident they can rely upon the new regime to provide them with the regulatory certainty needed to operate effectively in the NEM. This uncertainty will ultimately translate to increased costs for end use customers. Section 5 elaborates on this issue and Section 8 presents the NGF's proposal for structuring the market rules to achieve the outcomes sought by all interested parties.



The NGF also is concerned about certain detailed facets of the proposed Code change process and the MoU which it believes need to be resolved. These relate most importantly to the roles and interactions of the institutions, the sharing of information among them, and the initiation and management of Code changes. It appears that these issues require significant further consideration, and are discussed below with a view to that.

3.Roles of the institutions in the Code change process

It is generally accepted within the industry that the current NEM governance arrangements suffer from the lack of clearly defined accountabilities for the Code development function by the NEM institutions. The MCE clearly appreciated that this was and continues to be a problem, and its proposed resolution is one of the key objectives of the MCE reform process. Unfortunately, the roles it is proposed to give to the various NEM governance institutions for the Code change process have not fully addressed this matter.

Leaving to one side the threshold issues discussed in Section 2, and the issues discussed in Section 5, the Code change process will depend, in part, on a number of assumptions:

- That the AEMC will not take a 'prudent' attitude to Code changes and, as a result, will not submit all proposed changes to the ACCC for authorisation (this is covered in more detail in Section 5 in this submission on the ACCC authorisation process);
- That the ACCC will use the output of the AEMC consultations and not seek to undertake its own consultation processes as it has the discretion and quite probably an overriding obligation to do;
- That the ACCC will not insert its own conditions of authorisation on proposed Code changes thereby influencing NEM policy direction;
- That the process of Code change will not be delayed by judicial appeals or appeals under the *Administrative Decisions (Judicial Review) Act 1977* regarding the AEMC not following the laws of administrative fairness, especially since standing will now be given to 'any other person' as they will be freer under the new arrangements to lodge proposals for Code changes;
- That the AEMC will be best placed to develop Code changes involving complex market and system issues for the MCE as opposed to NEMMCO as was envisaged by the Parer review; and



- That the ACCC will assess and evaluate a proposed Code change according to a pragmatic and likely alternative if the Code (as amended by that change) is not authorised. As the Australian Competition Tribunal has recognised, the ACCC is constrained by its statutory duty; namely, that it is not the role of the ACCC “to design for others business arrangements that can be authorised, nor to insist on optimum arrangements before granting authorisation, but rather to assess formally whether some proposed conduct that might breach the provisions of the Act yields a net public benefit, and therefore can be authorised”¹.

The proposal for a MoU to manage the roles and relationships between the institutions is unusual and in our view impractical. MoUs have been established between regulatory and administrative institutions overseas but the NGF understands that this is to clarify cooperative arrangements, not to delineate boundaries and set roles. A MoU cannot override a statute such as the TPA, and it would be much sounder practice to delineate between the institutions through appropriate provisions in their founding legislation.

4. Management of the Code change process

4.1 Who can initiate a Code Change Proposal

is the NGF considers that the MCE proposal widen the classes of persons who can initiate a Code change may lead to additional lengthy delays in the Code change process. This will happen through the conjunction of abolishing the discretion exercised by the Code Change Panel, expanding the classes of person who have the right to initiate a Code change to include ‘any other person’, and the right to have decisions of the AEMC judicially reviewed. This proposal gives rise to the following observations:

- The reference to “any other person” will include a person who has neither a direct nor special interest in the subject matter. This means that a Code change proposal may be one that is aligned to the particular interests of that person, regardless of what those interests may be or whether they have any significant relevance to the Code, its operation or Market Participants;
- It is one thing to give to a person a right to make submissions in relation to a Code change proposal, but it is quite a different thing for any person to have the right to propose a Code change.

Even if the AEMC were to reject the Code change proposal as part of its preliminary assessment, that decision would be subject to judicial review; and

¹ *Re 7-11 Stores Pty. Ltd.* (1988) ATPR ¶ 41-666 at 41, 481.

- By conferring upon “any other person” standing to propose a Code change, such a person would have standing under the *Administrative Decisions (Judicial Review) Act*, being a position that such a person would not be likely to enjoy if that person did not have standing to propose a Code change in the first place. This conclusion would also flow through to the proposed right of judicial review in respect of a final determination of the AEMC, by any person merely making a submission to the AEMC (regardless of that person having no other special interest), a “sufficient interest” to make an application for a judicial review would be created.

The Discussion Paper indicates that the AEMC (in its market development role) can propose Code changes through the MCE and it is also responsible for evaluating Code changes. This dual role for the AEMC is potentially conflicting.

The NGF is of the view that the body who will have responsibility for the review and approval or rejection of Code change proposals should not also be one which can initiate, design or recommend proposals in the first place. This was an issue with NECA initiated Code changes and it may also possibly be an issue yet again if the AEMC is to undertake both these roles. Ring fencing within the AEMC will be ineffective as there will always be a decision-making point in the organisation at which the functions meet.

The MCE have apparently accepted the regulatory model in which there has been a separation of powers to provide checks and balances in the Code change process. Under this governance model for the NEM the rule developer (AEMC) is a separate body to the rule enforcer (AER). To be consistent with this underlying principle it also is necessary for the rule development and rule approval functions to be undertaken by different bodies.

Having the restriction on the AEMC that their proposed Code changes must be submitted by the MCE is only a partial safeguard against potential conflict of interest inherent to this proposed dual role of the AEMC. It is entirely possible for the MCE to request the AEMC look at an issue of interest to governments, the AEMC to then recommend to the MCE a way to address those concerns and for the MCE to then submit to the AEMC for assessment a Code change proposal based on the AEMC’s recommendation. The very possibility of this happening will reduce participants’ faith in the arrangements.

If governments insist on an institutional capacity to initiate Code changes, it will be preferable for NEMMCO, which has the expertise, to initiate market development Code changes on behalf of the MCE. This will best preserve AEMC’s impartiality which will be critical to market participants’ long term confidence in the integrity of that office.

That said, the NGF greatly prefers a model in which only parties facing risk under the Code should be able to initiate Code changes. Ideally, NEMMCO ought to be required to obtain market sponsors for any changes it may propose to ensure that at least some parties taking risk in the market are supportive. This would be a much better solution than the creation of a ring fenced function within the AEMC similar to the Code Change Panel in the current arrangements.



4.2 What Must a Code Change Proposal Contain?

The Discussion Paper details what is required to be included in a Code change proposal. One of those requirements is for a “statement of the problem with the existing Code provisions” (s3.2(1)). Although this is required to be provided, there is no equivalent specific criteria for rejecting the Code change proposal if the AEMC believes that this problem has not been able to be established or has been grossly overstated. It was considered by many participants that the Code changes relating to Rebidding developed by NECA were a solution looking for a problem rather than a problem looking for a solution, that is, it is considered that NECA had failed to prove there was a real problem that needed to be addressed or indeed that the issue was best addressed by a Code change. The AEMC should be satisfied that a real, not potential, problem exists before it progresses a Code change proposal. It also should be convinced on reasonable grounds that the best or preferred solution to that problem is by a change to the Code as opposed to some other remedy.

Another requirement is for the Code change proposal to include a “prima facie demonstration that the Code change proposal will result in a net benefit” (s3.2(4)). The footnote on page 7 to this matter, states that “AEMC is required to apply a net benefit test based on the achievement of the market objectives, including the long term interests of consumers, in deciding whether to approve a rule change”. Given the difficulty the ACCC has in developing a net public benefits test, it is considered that this test should be enunciated as soon as possible and in any case before the new arrangements are introduced. In that regard, the NGF suggests that the SCO should consider the following criteria for inclusion in the test to be applied by the AEMC to proposed Code changes:

- NEM customer impacts;
- Information discovery;
- Simplicity of the solution;
- Regional impacts;
- Net present value (before the introduction of a Code change it must be demonstrated that it will deliver a material net market benefit over the long term);
- Forward market efficiency and liquidity; and
- Impacts on systemic creditworthiness / credit risk.

4.3 Initial Involvement of the ACCC and AER

Step 1 as proposed in the Discussion Paper, provides that the AEMC will make a preliminary assessment of a Code change proposal and amend or reject it without inviting submissions. It is provided that the AEMC must publish its decision to amend or reject and provide a statement of reasons for its decision.



It can be assumed that this preliminary step (or decision) will be subject to administrative review under the *Administrative Decisions (Judicial Review) Act 1977*.

Step 1 also contemplates the AEMC amending a Code change proposal to overcome potential anti-competitive or trade restrictive matters. This proposal raises the question of how will the AEMC determine whether a Code change proposal gives rise to potential anti-competitive matters and, if so, how the AEMC will determine that its amendment will overcome those issues.

The specific criteria for rejecting a Code change proposal include that "it is clear that there would be no possible benefit to the public that would outweigh any anti-competitive or trade restrictive matters in its application". Again, this raises the question of how the AEMC will make such a decision.

If the AEMC were to amend a Code change proposal, the question also is whether Code participants, and other persons who may be affected by a Code change as amended by the AEMC, will be protected by reason of the decision made the AEMC.

The very issues upon which the AEMC would be making a decision in determining whether to reject or amend a Code change proposal by reason of potential anti-competitive matters, would appear to within the sole province and domain of the ACCC. Even then, the only statutory protection is an authorisation granted under the *Trade Practices Act*.

A further specific criterion for rejecting a Code change proposal is that it "fails to demonstrate a prima facie net benefit". First, a decision made by the AEMC in relation to this specific criterion could be easily the subject of administrative challenge (one basic reason being that no person, including the applicant, has been given a fair opportunity to be heard).

Paragraph 5.2 of the Discussion Paper provides that it will be only if the AEMC has not rejected a Code change proposal that it will then provide a copy of the proposal to the ACCC. This appears to confirm that the initial assessment by the AEMC, including in relation to competition related issues, will not involve the ACCC. Even so, the AEMC will have the power to amend or reject a Code change proposal. It is also provided that if the AEMC has not received advice from the ACCC on competition or access issues within a period of two weeks, the AEMC will proceed to the next step of the Code change process. However, the fact the ACCC may not have responded does not limit or affect in any way the powers, duties and functions of the ACCC under the *Trade Practices Act*. Even if the ACCC does give "advice" as requested by the AEMC, neither the ACCC nor any other person would be bound by that "advice".

The proposed Code change process envisages that the ACCC will be able to promptly consider whether the proposed Code change, which has been submitted to it by the AEMC, has competition implications under Part IV of the TPA or potential access issues under Part IIIA, and to advise the AEMC accordingly. Although the NGF believes this is a laudable recommendation, it may not be quite so easy to achieve in practice. Under current arrangements the ACCC has taken considerable amounts of time to deliberate and authorise Code changes notwithstanding it has had the benefit of written submissions from all parties on the merits of the Code change. Although some of this delay is unavoidable due to the statutory process that the ACCC must adhere to, this alone cannot justify the



extended delay by the ACCC in providing authorisation determinations. The statutory process for providing interim authorisations, although partially mitigating this effect, may well not be applied by the ACCC, does not finalise the matter or lead to a quicker final determination, can be revoked at any time and should not be seen as a satisfactory solution to this problem.

In addition to the issues identified above, the NGF believes it is highly optimistic to expect the ACCC will be able to provide the AEMC anything more than a highly qualified response to such an enquiry before it has reviewed submissions by other market participants and interested parties. It is also possible the ACCC may not wish to make such a preliminary assessment on the competition issues involved in the proposal so as not to prejudice its position or weaken its final response to the proposed change. Alternatively, the ACCC simply may not be able to respond within the 2 weeks deadline.

In any case, as the ACCC will not be legally bound by such a preliminary advice, this step may be of little value to those parties requiring more certainty regarding compliance with the TPA. Indeed, the provision of a preliminary but non-binding advice from the ACCC to the effect that they did not consider the proposed Code change had competition issues may embolden the AEMC to not submit the final Code change proposal to the ACCC for authorisation notwithstanding a submission considered that it did raise such issues. As discussed below enforcement of the TPA is the role of the courts and it is open for private individuals to take action for TPA breaches. Any party who submitted that a proposed Code change had competition issues and the AEMC did not seek authorisation for that change would have standing to challenge that change. Further, that change (or the Code as amended by that change), would continue to be exposed to challenge under Part IV.

With regard to the proposal that the ACCC and AER see the Code change proposal before it is made public, it is considered that it would be an enhancement if the initial Code change proposal was made available for public view at the same time as it was provided to those bodies. This would be consistent with objective of increased transparency for the Code change process and would permit participants to understand the proposal prior to any changes by AEMC/ACCC which might occur in Steps 1 and 2.

4.4 Categorisation of the Code change proposal

Under step 2 as proposed in the Discussion Paper, it is stated that after the AEMC has categorised the Code change proposal into one of the four identified categories, "any party, including the ACCC or the AER, can notify the AEMC that they dispute the categorisation".

This appears to introduce a further layer of challenge. Indeed, it is suggested that if the AEMC receives such a notification, it is *obliged* to re-categorise the Code change proposal. Surely, the question of whether a Code change proposal is to be re-categorised must involve a right of discretion on the part of the AEMC.

In any event, the categorisation of a Code change proposal, and final determination made by the AEMC in relation to that Code change proposal (as categorised), will not limit or affect the powers, duties and functions of the ACCC under the Trade Practices Act, regardless of the input given by the ACCC to that process.



4.5 Call for Submissions

It would seem that the AEMC when seeking stakeholder's views on whether the proposed Code change might have TPA consequences (s7.1 (1) – (5)) that it is 'standing in the shoes' of the ACCC for this role. Even though the Discussion Paper indicates the TPA will be amended to give the ACCC discretion to use the submissions provided to the AEMC, it is problematic as to whether the ACCC will consider these to be adequate for it to properly discharge its statutory duties.

Each of the issues listed appears to be either:

- A question of law which could be only determined by a court of competent jurisdiction; or
- In relation to the question of whether there would be any any-competitive detriment or whether public benefit outweighs anti-competitive detriment, a complex question of mixed law and fact.

4.6 Referral of Proposed Code Changes to the ACCC

The Discussion Paper indicates that for competition-related Code changes, it is proposed that the AEMC would have the discretion to apply to the ACCC for authorisation. This power vested in the AEMC significantly amplifies the risk that the AEMC will approve of Code changes which may actually have TPA concerns (all be it perhaps not fully identified or appreciated at that time by the AEMC). If this is the case then the risks to Code participants is magnified. The alternative would be for the AEMC to adopt a more prudent approach and to submit all Code change proposals to the ACCC for authorisation. This approach will be contrary to the intention of the MCE to reduce duplication and increase accountability in the NEM institutions that these proposals have been developed to address.

This proposal also leads to the following observations:

- Notwithstanding the fact that various steps that lead to the final determination, including the final determination itself, must address competition issues, it is clear that the final determination is not determinative of the question of whether the Code change proposal involves competition concerns.
- Given the fact that the ACCC has powers, duties and functions under the TPA, and its statutory duties cannot be fettered, it does not appear correct to suggest that a *decision* by the AEMC not to refer the Code change proposal to the ACCC for authorisation, is a decision that can be relied upon by Market Participants. If the AEMC decides not to refer the Code change proposal to the ACCC, that decision will not fetter the ACCC (or any other person who may consider a challenge under Part IV of the TPA). Such a decision could not be binding on the ACCC and would not have the same legal effect as an authorisation.



- The proposal that the AEMC would refer “competition-related proposed Code changes” to the ACCC after the AEMC has made its final determination, together with the proposal the AEMC will decide whether to refer the Code change proposal to the ACCC for authorisation, indicate an understanding that each proposed Code change is assessed in isolation and that it is not the whole of the Code (as amended from time to time) that is authorised. This proposal appears to assume that the Code comprises, or will comprise, some provisions that are authorised and other provisions that are not authorised. This is not the case.

When a change to the Code is proposed, as the whole of the Code (as amended from time to time) is authorised, the subject matter of the application for authorisation is the whole of the Code as amended by that proposed change.

It is not a matter of the AEMC deciding whether to refer a Code change proposal to the ACCC for authorisation; as the whole of the Code is authorised, each Code change requires the whole of the Code as amended by that change, to be authorised.

- If the AEMC refers a proposed Code change to the ACCC, it is proposed that the ACCC will have the discretion to rely on the submissions provided to the AEMC. The four areas of qualification set out in section 12 of the Discussion Paper are sufficient to demonstrate that the ACCC is likely to exercise that discretion on very few occasions.

In this regard, it is necessary to take into account the fact that the test or tests that the AEMC will apply through its process of making a final determination upon whether a proposed Code change should be made, will be different from the test that is applied by the ACCC in relation to an application for authorisation under Part VII of the *Trade Practices Act*. There may be areas of overlap, but it would be difficult for the ACCC to be satisfied that its statutory functions and obligations as an administrative body, would be satisfied by reference to the submissions given to the AEMC.

- It is proposed that if the ACCC declines to authorise a Code change, the AEMC will make a minor amendment to the Code change proposal and proceed to gazette the amended Code change, amend the Code change proposal or withdraw the Code change proposal. This proposal gives rise to the following comments:
 - If the AEMC makes a “minor amendment”, in what manner will Code participants be able to rely upon that “minor amendment”? How can they be satisfied that the “minor amendment” resolves the issues raised by the ACCC? How will they be satisfied that the Code change (after the “minor amendment”) will not be capable of challenge under the *Trade Practices Act*? How will a “minor amendment” be defined in any event?



It appears inconsistent with the fact that a proposed Code change has proceeded to an application for authorisation, and has been rejected by the ACCC, for the whole issue to be resolved by the AEMC then making a “minor amendment” without further reference to the ACCC or without the change being authorised.

- The appropriate approach would be for the Code as amended by the proposed change (together with the minor amendment) to be authorised by the ACCC, not for the AEMC merely to make a “minor amendment” then proceed to gazette the amended Code change. In that event, there would be no authorisation in relation to the change at all.
- If the AEMC amends the Code change proposal, the consultation process would appear to indicate a repetition of both the AEMC’s public consultation process and the ACCC’s public consultation process when the amended Code change is the subject of a further application for authorisation to the ACCC. In practice, issues and concerns relating to the proposed Code change, should be dealt with as part of the authorisation process (perhaps as conditions of authorisation) prior to the ACCC making its determination.
- Given all would have occurred prior to that time, it would appear remarkable that a Code change proposal would be simply withdrawn if the ACCC declines to authorise the Code change proposal (or the Code as amended by that Code change proposal).

4.7 Working Groups

The Discussion Paper indicates that the AEMC will establish working groups where necessary to achieve maximum stakeholder agreement on contentious aspects of Code changes. No detail has been provided on the scope of such working groups including who will be entitled to attend, how many members will they have, voting rights etc. NECA had at one stage used a Code Change Focus Group to consider Code drafting changes but this group was discontinued early on after the start of the market. It is not known why NECA discontinued with such meetings. The NGF considers that unless such representative groups are given some formal status and the outworkings of the groups are required to be duly considered by the AEMC they may soon be considered as a token gesture by the AEMC to consult and build consensus.



4.8 AEMC analysis

Section 7.4 of the Discussion Paper details the types of analysis the AEMC will undertake and the bodies with whom it will confer. It is noteworthy that the institution which has been given a statutory charter for the operation of the market and system, i.e. NEMMCO, has not been included as an organisation that the AEMC must consult with. NEMMCO has the specialist staff and organisational knowledge required to understand the potential impacts of Code changes on these functions. NEMMCO is ideally placed to provide the AEMC with such specialist advice which may be of significant importance to ongoing market development initiatives. Accordingly, it is considered that the AEMC should also consult with NEMMCO on proposed Code changes at this early stage.

Many of the issues involved in the continuing development of the NEM are complex. Due to this complexity and the potential impact of poorly formulated changes it is imperative that the regulators and the jurisdictions have access to high level advice and specialist assistance to support them in the discharge of their functions and continuing development of the NEM. The SCO is urged to consider incorporating a relevant role for both NEMMCO and participant representative groups in the proposed new governance arrangements.

4.9 Information Sharing Arrangements

The information sharing proposal in the MoU raises significant issues that must be addressed. A market institution should not be able to obtain information from another institution if the first institution could not obtain that information by using its own powers. Moreover, even where institutions enjoy the same information gathering powers, information obtained from businesses by one institution for a particular purpose in carrying out its functions should not be provided to other institutions to use for different purposes. The MoU at the very least needs to expressly describe and forbid such behaviour. If it does not, the proposal will give rise to significant disputes, including litigation, with industry when the institutions explore the extent to which they can share information.

5. The Authorisation Process

The NGF believes that the new Code change process and MoU, are based on a flawed assumption that Code changes need not require a specific ACCC authorisation process if there has been an *a priori* authorisation of the intent and overall structure under which the Code operates.

In this regard, several fundamental issues must be taken into account in relation to the proposals for a Code change process as set out in the SCO Discussion Paper:



- The Code (as amended) has been at all times, and continues to be, authorised as a whole. The applications for authorisation of the original or initial Code sought authorisation of the whole of the Code as the contract, arrangement or understanding between NECA, NEMMCO and present and future Code Participants. The ACCC granted conditional authorisation to those applications until 31 December 2010.

The structure of the authorisation has never been that certain provisions of the Code are authorised while others are not.

- When assessing an application for authorisation of a Code (such as an “industry Code of practice” as defined in section 87D(1) of the *Trade Practices Act*), including an application for reauthorisation of that Code as amended by proposed changes, the assessment “can only be made in the overall context of the function performed by the applicants, of the industry in which they operate, and of the market or markets which would be affected by such conduct”².

In applying the “future with-and-without” test, the Australian Competition Tribunal has recognised that in relation to a Code or series of rules, it is inappropriate to balance benefit and detriment in relation to individual rules. Rather, such a Code and its component rules “exist as a corpus and derive force and effect according”³. A similar approach is taken in relation to contracts, as the Tribunal recognised in *Re AGL Cooper Basin Natural Gas Supply Arrangements*⁴:

“This consideration warns against assessment of particular clauses in isolation from each other. It is important that benefit or detriment is determined by considering the Letter of Agreement as a whole. It is the sum of its parts, some of which in their effect are anti-competitive; but others have positive benefit.”

This leads to the following conclusions:

- When the ACCC exercises its powers under section 88(1) of the *Trade Practices Act*, it must have regard to the provisions of the contract, arrangement or understanding as a whole, weighing the benefits to be derived from it against the detriment it may cause. The Code is a complete, inseverable and entire contract, arrangement or understanding (including an industry Code of practice) and is not a series or collection of separate and severable contracts, arrangements or understandings. Basically, when the Code is amended, it is the Code (as amended) that replaces its predecessor in its entirety.

Accordingly, if the ACCC considers separately, a particular provision or a particular proposed change, in isolation, it would not be considering the contract, arrangement or understanding in relation to which the authorisation operates (and is to operate).

² *Re Concrete Carters Association (Victoria)* (1977) 31 FLR 193 at 202.

³ *Re Media Council of Australia (No. 2)* (1987) ATPR ¶ 40-774 at 48, 443.

⁴ (1997) ATPR ¶ 41-594 at 44, 220.



- Even if a particular proposed change to the Code were to be the subject of an application for authorisation in its own right (without the other continuing provisions of the Code being included in the application), it is clear that the ACCC must, and will, apply the “future with-and-without” test in the context of the Code as a whole. That is, the public benefits and public detriments of the particular proposed change cannot be assessed in isolation; they must be assessed in the context of the public benefits and public detriments of the Code as a whole as amended by the proposed change.

However, even though the “future with-and-without” test would be applied to the same extent and in the same manner as if the application for authorisation were for the whole of Code (as amended by the proposed change), in such a case, it would be only the proposed change that would be authorised, not the whole of the Code as amended by that proposed change.

- It is *only* if a contract, arrangement or understanding is authorised by the ACCC that it is immune from challenge by the ACCC or any other person under the relevant provision or provisions of Part IV of the *Trade Practices Act*. It is the *only* statutory procedure that will achieve that result and it is the *only* power that the ACCC has to achieve that result. This comes about by reason of, for example, section 88(1)(c)(d) and (e). These provisions provide that if the authorisation is granted, and for so long as it remains in force, section 45(2) does not prevent the corporation from making or giving effect to the contract or arrangement or arriving at the understanding in accordance with the authorisation and, in the case of a contract, that contract is not unenforceable by reason of section 45(1).

Accordingly, the following observations are of critical importance in relation to the proposals set out in the SCO Discussion Paper:

- The ACCC does not have any power under the existing provisions of the *Trade Practices Act* to make any binding assessment or evaluation upon whether any proposed change to the Code will or may contravene a provision or provisions of Part IV of the *Trade Practices Act*.
- The ACCC does not have the power to grant an authorisation retrospectively.
- The question of whether a proposed change to the Code contravenes a provision or provisions of Part IV of the *Trade Practices Act*, is a question of law to be determined by a court of competent jurisdiction, not the ACCC.
- Even if the ACCC were to decide, in the exercise of its discretion, not to challenge a change to the Code, this would not prevent or limit any such challenge being made by any other person.



- Even if the ACCC were to consider, at least initially, that a proposed change to the Code would not be likely to contravene a provision or provisions of Part IV of the *Trade Practices Act*, such an assessment could not fetter its statutory duty to challenge that change, or conduct engaged in by reason of that change, if at some later time, the ACCC forms the view that it does, or is likely to, contravene a provision or provisions of the *Trade Practices Act*.

Accordingly, any process short of authorisation by the ACCC, places any person who is, or proposes to be, a party to the Code as amended by a change that has not been authorised, at risk in relation to a challenge, whether in relation to that change or in relation to the Code as amended by that change, by any person, including the ACCC.

It follows that under the present structure of one market rule instrument, that is, the whole of the Code is authorised, the AEMC will be required to adopt (as NECA before it did), a prudent practice to submit all changes to the Code to the ACCC for authorisation of the Code as a whole (as amended by the proposed change) in order to protect participants from actions for breach of the TPA. Even "minor variations" must be submitted to the ACCC under section 91A otherwise, the Code (as amended from time to time) and approved by the AEMC will cease to be authorised under the TPA.

Given the prospects of uncertainty, duplication and complexity in the proposals set out in the Discussion Paper, the NGF believes Ministers should direct officials to expand the allocated consultation arrangements to allow greater discussion of the complex legal issues implicit in arguments to this effect.

Handled properly, consultation arrangements can be improved and expanded while still allowing the MCE to meet its reform timetable and without precluding the additional reform the NGF is seeking.

The NGF believes Ministers should consider and ultimately commit to such a program of work. For its part, the NGF is prepared to commit resources to a longer-term program of work beyond mid-2004 to restructure the market rules to address what it regards as a fundamental flaw in the scheme.

6. Discretion

Another concern of the NGF relates to the degree of discretion proposed to be exercised by these institutions that permits arbitrary decision-making. The NGF consider that where a regulatory institution such as the AEMC has wide ranging duties, then these powers should be tightly confined and not open textured, permitting a wide use of discretion.

For example, as discussed above, the use of discretion by the ACCC in adopting the AEMC's consultation for the purposes of its approval and authorisation processes may mean that the policy intent to reduce or eliminate the duplicated consultation processes will be lost or severely compromised. Additionally, the AEMC has discretion to submit Code changes to the ACCC for authorisation. As discussed above, this will be a real dilemma for the AEMC and will prove to be quite problematic given that this is based on a flawed premise.

7. Review and appeals

The Discussion Paper provides for decisions of the AEMC to be able to be judicially reviewed. There does not appear to be any provision for appeal on merit. This is considered to be a deficiency. The existing National Electricity Tribunal allows for de novo merits based reviews of reviewable decisions under the Code. It is suggested that the removal of this merits based review mechanism would be a retrograde step insofar as the principle of accountability of the NEM institutions. The establishment of the rights to a robust review and appeals process should be incorporated into the new arrangements as this represents a final protection for aggrieved parties in the NEM against bad decision making by the regulator.

8. The NGF Proposal – Structuring the Market Rules to Deliver Good Governance

This paper has outlined the NGF's considerable concerns with the SCO's proposed approach to authorising the Code.

The NGF has an alternative proposal for managing the development of the NEM's rules that clearly minimises the exposure of market participants to regulatory risk under the TPA. This proposal has been developed by Mallesons Stephen Jaques in response to concepts and issues presented to it by the NGF. Mallesons' full report on this matter forms Attachment 1 to this submission, and the NGF would be pleased for these documents to be published in conjunction.

The proposal clearly maintains the ACCC as the nation's single competition regulator. It involves no expectation that the ACCC will in some uncertain way delegate its authority to the AEMC, as effectively proposed in the SCO paper, to avoid the duplication of effort by all parties. At the same time, the proposal minimises the role of the ACCC in the making of the NEM's rules, as intended by the SCO proposal. The consideration and approval or rejection of the vast majority of proposed Code changes will fall solely within the province of the AEMC, as is also intended by the SCO proposal.

The NGF's proposes two market rule instruments, the first to be TPA authorised market arrangements broader and more flexible than the second instrument forming the actual provisions of the Code itself and administered solely by the AEMC. In effect, the authorised market arrangements would be a defined framework within which the NEM operates while contemplating and allowing for procedural flexibility within that framework. It is that defined framework that would be authorised under Division 1 of Part VII of the Trade Practices Act. The Code (as amended from time to time) would represent a manifestation of that authorised framework, but would not be the only precise method by which the framework could be implemented and operated.

The authorised market arrangements would be a framework or form of "umbrella" under which various methods of operating within that framework could be introduced or an existing method (such as the Code) could be varied, without any authorisation being required.



The primary objects of the Proposed Code Change Process would be as follows:

- a) To identify and describe the arrangements and market framework that would be sufficiently certain to be authorised and to identify the Code as one manifestation of the market procedures under which that market framework can be implemented.
- b) As a result, rather than:
 - (i) applying the authorisation process (and the exercise by the ACCC of its statutory powers and functions under that process) to particular provisions of the Code that may have the potential to contravene Part IV of the Trade Practices Act; or
 - (ii) proposing amendments (or substantive amendments) to the statutory processes and tests under Division 1 of Part VII of the Trade Practices Act (or the ACCC's powers and functions in respect of those functions and tests), the authorisation process would be eliminated altogether in relation to most proposed amendments to the Code.

This would be achieved by reason of the fact that the market arrangements and market framework would comprise the subject matter of the authorisation and for so long as any amendment to the Code falls within that authorised market framework, the authorisation would not be affected at all.

The identification and description of market arrangements and a market framework as the authorised instrument is consistent with the certain degree of flexibility and generality that is inherent in Part IV of the Trade Practices Act and the subject matter that is capable of authorisation under Division 1 of Part VII.

By way of practical example, the current clause 3.18 of the Code (Settlement Residue Auctions) adopts a similar approach. The Code provisions set out the principles identifying settlement residue auctions at a high level, (including the anti-competitive features of the auction process), but provide for NEMMCO to develop and amend the particular actual auction rules. Neither the development nor the amendment of the auction rules requires any authorisation; it is the auction framework as described in clause 3.18 that is authorised.

Of course, there may be a proposed amendment to the Code that is sufficiently material as to raise the question of whether it falls outside the parameters of the authorised market arrangements and framework. It may be that this element of risk could be removed if a procedure similar in concept to that applied in relation to the notification of exclusive dealing under Division 2 of Part VII of the Trade Practices Act is introduced. In this context, the "notification" concept could be applied so as to:



- Give the AEMC the power to “certify” that the proposed amendment to the Code falls within the authorised market framework; and
- Provide that any certification by the AEMC has effect unless and until the ACCC withdraws it (after following a prescribed procedure) on the ground that the ACCC considers that:
 - the certified amendment expands or modifies or is inconsistent with the market framework as authorised; or
 - the net public benefit attaching to the market framework as authorised has been, or is likely to be, materially diminished (i.e., the certified amendment amounts to a material change of circumstances); and
- If the ACCC withdraws the certification and an application for authorisation of the market framework as amended by the proposed amendment is to be made, the ACCC would be required to grant an interim authorisation under section 91(2) of the Trade Practices Act until it gives due consideration to the application and makes a determination in respect of it.

As a potential alternative to the “notification” concept, in the context of the Proposed Code Change Process, the “interim authorisation” procedure as provided for in section 91(2) of the Trade Practices Act could be applied so as to:

- Give the AEMC the power to “certify” that the proposed amendment to the Code falls within the authorised market framework; and
- Provide that if the AEMC gives that certification in circumstances that raise the question of whether the Code change, or conduct that would be engaged in under it, may fall outside the parameters of the authorised market framework, the ACCC would be required to grant an interim authorisation for the market framework as amended by the change certified by the AEMC, until the ACCC gives due consideration to it and makes a determination upon any application for authorisation in respect of it that may follow.

Annexure B to Mallesons’ report is an example set of market arrangements to demonstrate what would be authorised to provide TPA cover of those matters now dealt with in Chapter 3 of the Code. The NGF considers that this draft set of arrangements shows this proposal is practicable given the will to implement it.

9. Conclusion

The NGF is committed to the development of a robust set of reforms to the National Electricity Market. This submission has been prepared consistently with that commitment and in the belief that governments similarly want to deliver a solid footing for the future governance of the NEM. The NGF therefore agrees with the MCE's intention to have a basic legislative and institutional framework in place in mid 2004 on the basis that a considered program of further reforms such as this submission advocates can be pursued and implemented under that new framework.

It is clear that there must be a Code change process established under the new legislative and institutional framework. The NGF firmly believes that the concept of restructuring the market rules as described in this submission offers the best long-term solution to the fundamental problems of NEM governance yet proposed. The proposed structure ensures more than any other proposal that the ACCC is contained to its responsibilities under the TPA and that the AEMC operates as maker of rules for the operation of the NEM and not as an adjunct competition regulator. Under this structure NEM rule changes involving the ACCC will be indisputably rare and market participants will be confident they are not exposed to the risk of litigation under the TPA

Attachment B summarises the NGF's proposal and I commend it and the rest of this submission to the SCO for consideration. The NGF looks forward to significant further discussions with officials on these very important questions.

Yours sincerely



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