

8 April 2004

Memorandum of Understanding
C/- MCE Market Reform
Department of Industry, Tourism and Resources
GPO box 9839
Canberra ACT 2601

By e-mail to MCMarketReform@industry.gov.au

**Ministerial Council on Energy Standing Committee of Officials
Discussion Papers on
AER-AEMC-ACCC Memorandum of Understanding and
Streamlining of the Code Change Process**

Dear Sir or Madam,

The Australian Gas Light Company (AGL) welcomes the opportunity to comment on the discussion papers on the AER-AEMC-ACCC Memorandum of Understanding (MOU) Framework and Streamlining of the Code Change Process.

AGL is concerned with the review process that is being undertaken for the MOU, industry levy and Code change process. Release of papers on the eve of the forum and then allowing merely a fortnight for participants and interested parties to respond to a variety of papers is not the full consultation that was promised to participants last December.

MOU FRAMEWORK

AGL supports the use of a MOU to define the boundaries between the AEMC, AER and the ACCC. We note that, while the recitals section of the MOU refers to gas, this MOU really focuses on the National Electricity Market processes and look forward to commenting on issues associated with gas.

We are concerned that;

- the MCE is prematurely seeking to settle the MOU before the organisations' respective roles and functions are fully defined;
- NEMMCO is not included in the MOU since many activities of NEMMCO interrelate to the market organisations;
- the MOU does not appear to ensure the independence of the AER, ensure the separation of rule making and regulation (in particular, in relation to information exchange and staffing matters) nor provide a transparent process for participants.

The use of a MOU to define the roles of the AEMC, AER and ACCC is supported by AGL since the lack of clarity between the ACCC, NECA and



NEMMCO was an area of concern with the old market development and Code change processes. AGL remains concerned, however, that the document does not appear to bind the ACCC to act in accordance with the new Code change process. The MOU appears focused on the AEMC and AER. AGL recommends that the ACCC be required to adhere to the timeframes in the new Code change process in the MOU.

The normal development process for organisations is to first define their roles and objectives and then to consider the relationships with related organisations. We note this MOU framework is being consulted upon without proper context and recommend that the MCE define the framework and objects of the new organisations, set out the changes to be made to the ACCC's legislation and then consult on the MOU to be established between the organisations. The consultation document supplied to participants only sets out the framework of the MOU rather than the MOU itself. It is vital that the complete MOU is made provided to industry and consulted upon.

NEMMCO is not explicitly included in the MOU despite having market development responsibilities which may overlap with the AEMC and surveillance tasks that may overlap with the AER. Additionally, NEMMCO is increasingly active in the retail markets in both gas and electricity. Some consideration should be given to bringing NEMMCO into this MOU or establishing a separate MOU between NEMMCO and relevant bodies.

AGL believes it is important that the separation of rule making and regulation be reinforced by the operational details set out in the MOU. This includes information sharing arrangements.

Moreover, the sharing of information and staff by the AER and ACCC proposed by the MOU creates significant concerns about the blurring of the regulatory functions of these bodies. There are real issues regarding the appropriate use of information. The general principle should be that information should only be used for the purpose for which it is provided.

Sharing of staff between the organisations, including the AER performing work for the ACCC in energy market area, also raises doubts whether the AER will operate independently of the ACCC. AGL believes that, as a minimum, AER information and staff must be quarantined from the ACCC's other functions to ensure appropriate separation of economic regulation and competition law enforcement.

STREAMLINING OF CODE CHANGE PROCESS

In broad terms, AGL supports the proposed new Code change process described because it:

- increases the opportunity for participants to comment on proposed changes
- has the potential to reduce the number of Code changes that require authorisation providing a "one step" process.

However, there are a number of issues that need to be resolved. The proposed process:

- is unlikely to be shorter than the current process for most Code changes;
- still relies on the ACCC deciding that authorisation is not required; and
- does not streamline the consultation required after major reviews;

AGL is aware that an alternative Code approach which would result in a streamlined change process has been put forward by the National Generators Forum (NGF). While we support the MCE proposal



as an improvement on the current process, AGL considers the NGF approach may be more effective in addressing participant concerns. We recommend that MCE should consider that approach.

AGL supports the increased consultation in the proposed Code change process. By issuing a draft report for comment the new Code change process will give participants a second look at the changes before they are finalised. We also support the consistency between the proposed Code change process and the existing Code consultation process used by NECA and NEMMCO.

The more integrated involvement of the ACCC in the Code Change Process from the beginning, in which it provides informal sign-off on changes that do not require authorisation, should in principle significantly streamline the consultation process. We remain concerned, however, that the process requires the ACCC to reduce its requirements for authorisation voluntarily. Under the existing process the ACCC already has the formal right to decide that a Code change does not require authorisation. The ACCC has, however, declined to do so when asked stating that the entire Code requires authorisation. It would be better for process, backed up by the MOU to require the ACCC to formally advise that it does not require authorisation.

Another key problem with the current authorisation process is that it allows the ACCC to engage in de-facto market development through conditional authorisations, clearly exceeding its statutory role as competition regulator. It is unclear how the proposed MCE process resolves this issue unless limitations on the ACCC actions will be included in the legislative changes. AGL recommends that the ACCC, when authorisation is required, be limited to reviewing the net benefits to customers for the anti-competitive behaviour being authorised.

AGL suggests that the MCE consider further streamlining of the Code change process after market reviews. During reviews the main issues are resolved as part of the review consultation process, leaving the Code change process to be an essentially administrative process. Under normal conditions the changes would not qualify for a shortened process since they may be significant, but the MCE process could be altered to allow the Code changes to be published immediately as a Code change draft report after the review process is complete.

The proposed Code change process is only related to the National Electricity Market. Currently gas code changes use a different, simpler process. AGL looks forward to commenting on any proposals for a gas code change process in due course.

Similarly, retail market codes and distribution codes are currently subject to jurisdictional change processes. AGL supports the harmonisation of the regulatory arrangements for distribution and retail but would be concerned if the MCE Code change process were to be applied to those areas without substantial further consultation.

If you have any questions in relation to this submission please contact Alex Cruickshank, Manager NEM Development, on (03) 9201 7694 or e-mail acruicks@agl.com.au.

Yours sincerely,

*Unsigned electronic copy
Original forwarded by post*

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