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30 September 2008

Ms Kimberley Pattinson
Manager
MCE Secretariat
Department of Resources, Energy and Tourism
GPO Box 9839
Canberra ACT 2601
MCEMarketReform@industry.gov.au

Dear Ms Pattinson,

The Australian Energy Regulator (AER) welcomes the opportunity to comment on the MCE statement of approach on the establishment of the Australian Energy Market Operator.

The AER's comments are outlined below:

Proposal 47: application of current National Electricity Law and National Gas Law dispute resolution and compliance frameworks.

The AER agrees, in principle, with the proposal to align the dispute resolution and compliance frameworks for electricity and gas. The AER assumes the intention is to use the current electricity dispute resolution framework set out in Chapter 8 of the National Electricity Rules (NER) as the template for gas. The AER notes that there are some operational issues with Chapter 8 of the NER. The AER appreciates, however, that the MCE would prefer not to make wholesale changes to Chapter 8 at this time. Another option in the short- to medium- term might be to adopt Victoria's Market and System Operating Rules (MSOR), which are modelled on the NER dispute resolution framework, as the template for the national gas framework. Although similar, the latter is more recent and less problematic than the electricity model. Whilst this will result in slightly different dispute resolution frameworks for gas and electricity, this is preferable to perpetuating the problems in the electricity framework in the gas framework. That said, the AER does not consider this a long-term solution and therefore recommends that a comprehensive review of the dispute resolution frameworks be undertaken at a more convenient time with a view to aligning the gas and electricity frameworks and remedying any operational problems in the process.

The AER notes too that the NER and the NEL provide for slightly different (and potentially conflicting) approaches to the decision-making processes of the Dispute Resolution Panel (DRP). Whereas the NER provides the DRP with a broad base to determine its own processes and decisions, sections 69 and 71 of the NEL refer to an

arbitration panel both for its processes and in considering any appeals. It is unclear whether this may inadvertently limit the power of the DRP to an arbitral tribunal (currently it often sits as an expert body without the arbitration rules). Also, to the extent that the State Acts are different it also sets up forum shopping opportunities for market participants.

Care would need to be taken to not replicate the electricity provisions in the NGL and NGR if it is found that the NEL and NER provisions do in fact conflict. The electricity provisions would also need to be amended in this case.

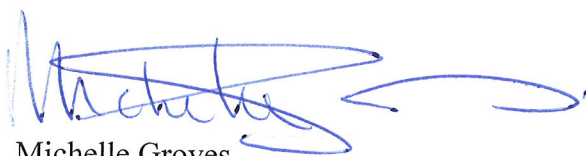
The AER is working with the Dispute Resolution Adviser, in conjunction with NEMMCO and VENcorp, to identify an appropriate way forward. .

Proposal 49: market participants to report to AEMO any non-compliance with the Procedures

The AER is concerned that the proposed arrangements do not fit with the enforcement framework that has been developed for the electricity market. Namely the NEL confers on the AER the responsibility for monitoring market participants' compliance with the NEL and NER. The NEL further empowers the AER to take appropriate enforcement action. The AER uses, or has the potential to use, a range of enforcement tools depending on such factors as the nature and extent of a breach, the likely impact of the breach, the participant's compliance culture, etc. Except for NEMMCO, provision is currently not made for participant reporting under the current arrangements – although this may change once non-pricing functions transfer to the AER. It would be preferable to have the flexibility to impose reporting obligations on participants rather than obliging them to do so at the first instance. Further, given that AEMO is not to have any enforcement responsibilities, the AER questions the rationale for requiring notification of instances of non-compliance to AEMO. If such an obligation is to be retained, notification should be made to the enforcement body – namely, the AER – rather than AEMO.

Otherwise the AER supports the general thrust of the paper and looks forward to ongoing involvement in the development of the legislative framework for AEMO. In particular the AER is keen to ensure that in the transition from the MSOR to the NGR those monitoring, compliance and enforcement powers currently shared between VENCorp and the ACCC are replaced with a suitable suite of powers in the AER to continue to monitor and enforce the MSOR including significant price events.

Yours sincerely



Michelle Groves

Chief Executive Officer