

# **Memorandum of Understanding**

**between**

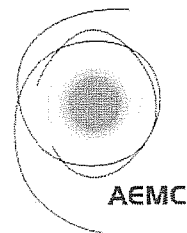
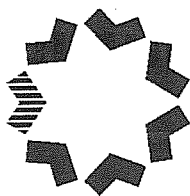
**National Competition Council**

**and**

**Australian Energy Market  
Commission**

**1 June 2007**

**National  
Competition  
Council**



## Parties

1. The Parties to this Memorandum of Understanding ("MOU") are:  
  
the **Australian Energy Market Commission** ("the AEMC") established by section 5 of the *Australian Energy Market Commission Establishment Act 2004* (SA);  
  
and  
  
the **National Competition Council** ("NCC") a statutory body established under Part IIA of the Trade Practices Act 1974 (Cwlth) ("TPA").

## Purpose and principles

2. The *Australian Energy Market Agreement* contemplates that the NCC and the AEMC enter into a Memorandum of Understanding (clause 15.3, *Australian Energy Market Agreement*) and that this MOU will be provided to the Ministerial Council of Energy ("MCE") for consideration and endorsement.
3. This MOU is a public document that sets out the arrangements agreed between the NCC and the AEMC to promote effective communication, cooperation and co-ordination between the agencies in the performance of their respective roles in the Australian energy markets.
4. The agencies agree that in addition to the general principles governing their relationship, in respect of the certification of any State or Territory access regime the agencies will, in advance of any application being made to the NCC, discuss the timing of such an application(s) and other procedural, content and specific matters as required.
5. The agencies will use their best endeavours to maximise regulatory certainty and transparency by identifying the circumstances where amendments (proposed or actual) to the regulatory regime(s) for electricity and in the future gas, might be considered a substantial modification affecting the on-going certification of a State or Territory access regime

## Background – energy markets and certification

6. In 2003 Commonwealth, State and Territory Governments (the Council of Australian Governments – COAG) agreed to establish a new regulatory

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framework for the energy sector. The new framework includes a suite of energy market reforms, concerning governance and institutions, economic regulation, electricity transmission, user participation and gas market development. As part of the new framework, COAG agreed on a national approach to energy access, promoting consistency within the gas and electricity regimes. The COAG members also undertook to take all reasonable measures to have their respective gas and electricity access regimes certified and to ensure the regimes remain certified.

7. Under Part IIIA of the TPA a State or Territory access regime may be certified by the Australian Government Treasurer as effective. The consequence of the certification of an effective access regime is that the declaration provisions of Part IIIA of the TPA will no longer apply to the services covered by that certified access regime. The certified State or Territory access regime then exclusively governs access to the particular services.
8. Applications for certification are made to the NCC by a State or Territory's Premier or Chief Minister. Section 44NC of the TPA prescribes that the NCC must use its best endeavours to make its recommendation within 6 months of receipt of the application.<sup>1</sup> The NCC then recommends to the Australian Government Treasurer whether a state/territory access regime should be certified. In making its recommendation, the Council must consider whether the proposed access regime satisfies the criteria set out in the *Competition Principles Agreement* (commonly known as the clause 6 principles and primarily contained in clause 6(4)) – section 44M(4) TPA. In brief, these criteria provide that:
  - a. the primary aim is for access to be achieved via agreement between the access seeker and the facility owner. In the event that agreement is not possible, the access regime must provide for negotiation, dispute resolution and an enforcement process;
  - b. the results of any dispute resolution will be binding on the parties. Any dispute resolution must consider:
    - (i) the owner's legitimate business interests and investment in the facility; the interests of all persons with contractual rights to use the facility; and the existing contractual rights and obligations of the owner and all existing users of the facility; and
    - (ii) the costs to the facility owner of providing access;
  - c. the economic value to the owner of any additional investment that the access seeker or the owner has agreed to undertake; and

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<sup>1</sup> The standard period is capable of being extended (s44NC, TPA).

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- d. health and safety requirements, along with what it is in the public interest and consideration of what would be the economically efficient operation of the facility.
9. The Australian Government Treasurer must, within 60 days<sup>2</sup> of receiving the Council's recommendation, decide whether to certify the regime as effective and if so for what period of time.
10. A certification remains in force for the duration specified in the Australian Government Treasurer's decision, unless a substantial modification occurs such that the regime no longer satisfies the clause 6 principles (section 44G(4) TPA). If there is a substantial modification services may then be exposed to the declaration regime contained in Part IIIA of the TPA.

## Co-operation

11. The NCC and AEMC recognise that overall outcomes for the energy markets and stakeholders, including consistency, transparency, competition, investment, development and the long term interests of consumers, will be improved if the agencies work co-operatively and maintain a close working relationship in fostering a national approach to energy market access issues.
12. The agencies acknowledge and agree that:
- a. regulatory certainty must be maximised in the energy markets. Where appropriate, the agencies will consult with each other on the performance of their responsibilities (including formal decisions and public statements that may be of interest to or have an effect on another agency) and on issues relevant to the further development of and fostering of competition, access and regulatory certainty in energy markets; and
  - b. wherever possible early consultation and liaison is preferred.

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<sup>2</sup> The period is capable of being extended (s44ND, TPA).

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# The NCC and AEMC's roles in energy markets

## AEMC

13. The AEMC is responsible for rule making and market development for the National Electricity Market ("NEM") under the National Electricity Law ("NEL") and the National Electricity Rules (Rules) including:
  - a. reviews of the operation of the NEM and of the Rules and advising the MCE on the development of energy markets; and
  - b. managing Rule change proposals and processes in accordance with the NEL.
14. It is also foreshadowed in the *Australian Energy Market Agreement* that the AEMC will assume responsibility for rule making and market development for:
  - a. natural gas transmission and distribution networks; and
  - b. electricity distribution networks and electricity and natural gas retail markets (excluding retail pricing).

## NCC

15. The NCC's responsibilities include:
  - a. providing advice on the design and coverage of access rules under the national access regime, including under Part IIIA of the TPA and the current national gas code; and
  - b. certification of State and Territory access regimes, notably in respect of gas and electricity.

## Operational provisions

### Cooperation with third parties

16. The parties agree that they will cooperate in dealing with relevant third parties in order to facilitate consideration of applications for certification

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of State or Territory access regimes and other activities of joint interest or involvement.

## **Information sharing and commitment to keep informed**

17. The agencies recognise that in the course of performing and exercising their respective roles, functions and powers they may each come into possession of information which could assist the other agency to fulfil its responsibilities. Each agency will use reasonable endeavours to notify the other agency in a timely manner of the existence of such information, even if it has not received a request from that agency to do so.
18. The agencies will use their best endeavours to provide to each other, in a timely manner, relevant information that has been requested by another agency, subject to any relevant legal, confidentiality or operational considerations.

## **Confidential information**

19. In exercising the agencies obligations under this MOU the agencies acknowledge that they are bound by and must recognise their obligations and duties with respect to the disclosure of confidential information. Where information has been provided to the agency on a confidential basis, the agency concerned will not, unless otherwise required by law or by order of a judicial body, release that information to the other agency without obtaining the consent of the original provider.
20. Where any confidential information is provided from one agency to the other, the agencies agree that:
  - a. the agency providing the confidential information will identify what is confidential in any information it provides to the requesting agency; and
  - b. the recipient agency will treat the information that is so identified as confidential.

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# Management of the MOU

## Meetings between the agencies

21. The Chairperson of the AEMC and the President of the NCC, or their nominees, will meet at least annually to assess the operation of the MOU.
22. The agencies will also meet at executive or senior officer level at least six monthly to discuss the implementation of this MOU and matters pertaining to the certification of State and Territory access regimes. Other contact between staff of the agencies will take place as required.

## Liaison officers

23. The Chief Executive Officer of the AEMC and the Executive Director of the NCC will each act as the liaison officer to serve as a point of contact in relation to matters arising under this MOU and to be responsible for general liaison under this MOU and all initial co-operation between the agencies.

## Disagreements

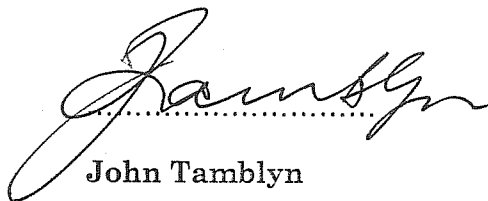
24. In the event of any disagreement between the parties as to the implementation of this MOU or the performance of their respective functions, powers and duties, the liaison officers of the relevant agencies (or their delegates) will seek to resolve the matter in accordance with the principles of this MOU.

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## Review

25. The agencies will review this MOU within 18 months of its commencement and at further intervals of no more than 3 years.

DATED: 1 June 2007



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**John Tamblyn**

Chairperson  
Australian Energy  
Market Commission



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**David Crawford**

President  
National Competition Council