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**Submission to the Standing Committee of
Officials of the Ministerial Council on Energy**
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**APIA Response to the SCO Consultation
Paper on the Statement of Approach – A New
Legislative Framework for Gas**

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APIA Submission to the SCO Consultation Paper on the SCO Statement of Approach – A New Legislative Framework for Gas

Introduction

The Australian Pipeline Industry Association (APIA) welcomes this opportunity to respond to the Standing Committee of Officials' (SCO) invitation to make submissions on the proposed approach to the development of the proposed National Gas Law (NGL) and Rules as well as the preliminary positions taken in developing the legislative package as set out in the SCO Consultation Paper released on 13 September 2005.

APIA submits that in the development of the new legislative framework:

- a clear and reasoned final policy position must be put forward prior to the drafting of legislation. APIA has concerns that the current process may result in legislation being drafted prior to policy finalisation, with the risk that policy will not be reflected in legislation.
- the SCO needs to provide further details so that industry can understand the preliminary positions it has taken;
- the new framework must be consistent with the recommendations from the Productivity Commission's review of the Gas Access Regime;
- transitional arrangements and derogations under the existing Gas Access Regime must be retained where they remain on foot. This is particularly the case in respect of the derogations under the Queensland Gas Access Regime;
- The MCE and SCO must release the proposed Rules and NGL for public comment at the same time;
- It is inappropriate to defer the implementation of the proposed Rules and NGL for reasons of consistency between gas and electricity
- The proposed Rules and NGL must be a single total package of reforms – issues such as appeal rights can not be delayed or separated from the package of reforms.

Overarching Issues

There are a number of overarching issues that are relevant to the development of a new legislative framework.

Insufficient detail in SCO Consultation Paper to explain split between Rules and NGL

There is very little detail on how many aspects of the existing Code will be incorporated in the proposed framework. Accordingly, APIA calls on the SCO to provide more detail to understand precisely what aspects of the existing Gas Access Regime are proposed to be in the NGL and what aspects are proposed to be in the Rules. For example:

- It is not clear what is meant by the use of the phrase "procedural and technical detail". Matters in the Code that are of a procedural nature and technical detail are proposed to be included in the Rules. Given the relative ease by which the Rules will be able to be amended, APIA submits that the matters that are of a "procedural and technical detail" must be defined now.
- there is a lack of detail concerning the proposed reshaping of the information collection provisions in the Gas Pipelines Access Law other than it is to be based on the National Electricity Law. This is particularly relevant where no analysis has been undertaken to assess whether it is appropriate to apply aspects of the electricity framework to gas.

APIA to have representation in any reviews of the Rules

The current roles and functions of the National Gas Pipelines Advisory Committee (NGPAC) are proposed to be assumed by the AEMC.

Under the current framework, APIA has direct representation in NGPAC. While not a voting member, its status (along with other key stakeholders such as the APPEA and regulators) in reviewing proposed changes to the Gas Access Regime was justified having regard to the potential impact that the Code has on the business interests of pipeline owners and operators.

This justification still applies today. Accordingly, APIA requires a guarantee from the MCE that it will have a "seat at the table" in the AEMC's consideration of any changes to the Rules of the same standing as it currently has in NGPAC. Being invited to make submissions does not provide that guarantee to the APIA, unless there is a requirement that the AEMC release for public comment, any proposed change to the Rules of the NGL.

Consistency with PC Recommendations is required

A clear and reasoned final policy position must be put forward prior to the drafting of legislation. APIA believes that the current policy position is unlikely meet the MCE's reform objectives of strengthening investment, improving regulation, reducing regulatory complexity or increasing regulatory certainty. These objectives will be met by implementing the recommendations of the Productivity Commission's review of the Gas Access Regime ("PC Review") and maintaining appeal rights.

APIA recently provided a submission ("APIA PC Submission") to the SCO in response to its consultation paper prepared to assist in developing the MCE's response to the PC Review. The APIA PC Submission called on the MCE to implement the recommendations from the PC Review in full and to do so now.

Consistent with the APIA PC Submission, APIA submits that the proposed legislative framework must be consistent with the recommendations from the PC Review.

Convergence of gas and electricity

The MCE's push for the convergence between gas and electricity should not be seen as a justification for a delay in implementing changes to the Gas Access Regime. It should also not be seen as a justification for ignoring the PC recommendations.

The rationale for aligning gas and electricity is not outlined in the Statement of Approach. Problems that may be created by alignment are not discussed - this lack of discussion creates some concerns as to the level of understanding of the differences between the gas and electricity industry, particularly in relation to gas pipelines. The fact that the treatment of gas and electricity in Western Australia will continue to be different is evidence that there is no overwhelming policy reason to align the industries.

In the Statement of Approach there is an implicit assumption that if alignment is to occur then the gas industry must follow electricity structure and rules and not vice versa. APIA believes that the gas structure and rules have been more thoroughly tested than the electricity system via processes such as certification, multiple appeals and reviews, notably the PC Review. APIA notes that the electricity system is not certified and has only been tested in limited appeals. Given this the more robust gas system should be used as a template if alignment is considered necessary.

Jurisdictional Specific Issues

Jurisdictional specific issues will still need to be addressed as part of the development of the new legislative framework.

Queensland Derogations

- APIA submits that transitional arrangements and derogations that are included in each Jurisdiction's implementation of the Gas Access Regime and which still have work to do should be retained in the proposed NGL. In particular, this includes the derogations under section 58 of Queensland's Gas Pipelines Access Act 1998.

The retention of these requirements is imperative given that they formed the basis of Queensland becoming a party to the gas reforms of the 1990s.

Western Australia's proposed Regime

It is noted that, as is currently the case, Western Australia intends to adopt its own legislation, although it is likely to mirror the proposed NGL and Rules.

APIA submits that subject to:

- the role of the relevant regulator being the ERA instead of the AER; and
- any derogations under the Gas Access Regime that still have work to do

as part of any intergovernmental agreement that is signed by the MCE or COAG, Western Australia be required to implement:

- legislation that mirrors the national NGL and Rules that are implemented by other jurisdictions; and
- any subsequent changes to the NGL and Rules within a reasonable period following their amendment by other jurisdictions

Transfer of all of the NGPAC functions to the AEMC.

The SCO Consultation Paper proposes that all of the existing functions of NGPAC are to be transferred to the AEMC.

NGPAC's existing functions are wide ranging and include¹:

- (a) to administer the Code;
- (b) to monitor, review and report on the operation of the Gas Pipelines Access Law (including the Code);
- (c) to provide advice to the Ministers on interpretation and administration of the Gas Pipelines Access Law (including the Code);
- (d) to prepare information on the Gas Pipelines Access Law (including the Code) for general publication;
- (e) to make recommendations on amendments to the Gas Pipelines Access Law (including the Code) to Ministers; and
- (f) any other functions the parties to the intergovernmental agreement agree to bestow on the NGPAC.

APIA submits that:

- given the wide ranging functions that are to be conferred to the AEMC; and
- as it is unclear what aspects of the Code will be contained in the NGL and what will be contained in the Rules,

then without proper controls and clear procedures in place, there is a risk that substantial changes to the NGL could be made without the knowledge or proper consideration by industry.

Not only would this be a significant change to the current position but it could give the AEMC significant ability to manipulate government policy. This is reinforced by the proposal to have a very limited ability for the MCE to guide the AEMC in carrying out its functions - it is proposed that the MCE have the ability to only issue Statements of Policy Principle. It is not clear what could be the subject matter of these statements or how binding they will be on the AEMC. This needs clarification.

¹ Council of Australian Governments, National Gas Pipelines Access Agreement, 7 November 1997, clauses 9.1 and 9.4

The proposed legislative scheme – adopting the principles

What goes in the Rules and what goes in the NGL

It is noted that the proposed Rules will be easier to modify than the proposed NGL. It is also noted that some aspects of the existing Gas Access Regime form the cornerstone of the 3rd party access framework for gas, both in terms of the administrative approvals processes to be undertaken by Regulators and in terms of the protection of Service Providers' legitimate business interests.

Given the above, it is important to ensure that these form part of the proposed NGL. They include:

- the tests for coverage and revocation of coverage
- the guidelines for deciding what form of regulation should apply for a covered pipeline
- the information collection powers of regulators.
- certain procedural issues associated with the regulatory approvals process. This includes:
 - the need for a draft and final decision
 - the requirement for the regulator to consider submissions made during a prescribed public consultation period
 - the requirement for a minimum amount of public consultation before the regulator can proceed with the next step in the regulatory approvals process
 - the retention of such provisions as section 2.47 of the Code.
- the right to appeals of certain decisions of regulators
- the ring fencing requirements of section 4 of the Code.

Appeal Rights

It is noted that the SCO proposes to initially limit review rights to judicial review only. Such limitation would remove a fundamental right under the Gas Access Regime, and an important element in the acceptance of the Code as an “effective access regime” under the Trade Practices Act. . Any regulatory regime under which a decision-maker is given considerable discretion requires an appeals system to ensure that such significant decisions are subject to proper scrutiny, thus ensuring accountability of decision-makers and transparency in the process. It is for this reason that the majority of significant statutory decisions are subject to administrative review, including most decisions of the Australian Tax Office and the ACCC. There is nothing peculiar to gas infrastructure, or in the structure and expertise of the AER, which would justify the removal of the currently existing rights. Given the extent of powers and discretion granted to the regulators under the Gas Code, and that regulators' decisions can substantially affect the rights of the regulated business and its customers, APIA believes that the existing review rights should be either maintained, or, at most, modified as recommended by the PC.