



Overview of APIA's Response to MCE's Proposal for 23 November 2005 Consultation on the Review of the National Gas Pipelines Access Regime

Context of current review

- Gas access regime commenced in 1997 with the purpose of improving economic efficiency through the development of competitive gas markets. The industry is still evolving, and becoming increasingly competitive.
- The PC undertook an extensive review. The current MCE review processes should be seen in this context.

General Observations

- APIA supports introduction of PC recommendations, the PC is a comprehensive reform package and the introduction of this package would not be a difficult process.
- PC review a very thorough process based on extensive consultation and analysis. APIA did not support all recommendations, but supported implementation of the package as a whole to prevent 'cherry picking' and delays. APIA strongly believes PC recommendations should be implemented now;
- 'Clean slate' approach is not warranted - APIA concerned that MCE is diverging from the PC's recommendations and is proposing further review of matters already exhaustively dealt with. Given this, APIA questions the breadth of matters referred to Expert Panel;
- Good regulatory outcomes for gas should not be sacrificed for the sake of standardisation - MCE's goal of consistency across gas and electricity regimes does not adequately acknowledge that differences may be justified by specific industry circumstances;
- Merits review is a critical element of robust regulatory regime and should be retained or expanded – as recommended by PC.

Comments on specific proposals

Objects clause

- APIA disagrees with the MCE's proposed objects clause and believes the PC's proposed clause is more appropriate and we urge consultation before any decision is made.

Coverage test

- Support revised coverage threshold, but NCC should be retained as decision making advisory body;

Light handed regulation

- Support introduction of option of 'light-handed' form of regulation, but that light-handed regulation should be restricted to covered pipelines and not extended to uncovered pipelines;
- APIA does not support separation of decision on coverage from decision on form of regulation;
- Guidelines should not be left to future discretion of AEMC, but belong in National Gas Law;

Regulatory certainty for greenfields

- APIA supports MCE's proposed options of a binding no coverage ruling and price regulation holiday.
- Criteria for 'greenfields' need to be modified in order to be workable. Issues of concern are the definition of a market, materiality, ownership restrictions and capacity expansions.



APIA's Response to MCE's Proposal for Consultation on the Review of the National Gas Pipelines Access Regime

Forum discussion - Sydney 23 November 2005

Context of current review

- Gas access regime commenced in 1997 with the purpose of improving economic efficiency through the development of competitive gas markets. The industry is still evolving, and becoming increasingly competitive.
- Against this background, the primary aims of the PC's review of the gas access regime were to:
 - examine extent to which current gas access arrangements balance the interests of relevant parties;
 - provide a framework that enables efficient investment in new pipeline and network infrastructure; and
 - assist in facilitating a competitive market for natural gas.
- The MCE's current review processes, and its response to the PC gas review, are undertaken in the context of the new national energy access regulation reforms. However, APIA would like to reiterate that the original objectives of the regime and the subsequent PC review should be pre-eminent in the current MCE processes.

Some General Observations

- APIA supports introduction of PC recommendations, the PC report is a comprehensive reform package and the introduction of this package would not be a difficult process.
- PC review was a very thorough process which gave careful consideration to a wide range of issues. APIA did not support all of the PC's recommendations, but decided

to support the package as a whole to avoid cherry-picking and to prevent delays in implementation.

- APIA is therefore concerned that the current MCE process diverges from the PC recommendations and is proposing further review of key issues. This ‘clean slate’ approach is not warranted and will lead to delays and uncertainty.
- MCE’s goal of consistency across gas and electricity regulation does not adequately take into account cases where differences are justified due to the different nature of the assets. Clearly, there will be aspects where consistent approaches are relevant and beneficial and, therefore, consistency is an appropriate policy goal. However, there is a risk that an overriding goal of consistency may not allow the best regulatory decisions to be made, as accuracy and optimal outcomes may be sacrificed for the sake of standardisation.
- APIA considers that there has been insufficient discussion regarding possible consistencies between the gas and electricity regimes and such a significant new area of investigation requires further debate. APIA notes the mooted role of the Expert Panel in this regard, but questions whether the time allowed for the Expert Panel process is adequate to properly consider this matter [more on the Expert Panel later].
- APIA would also like to reiterate the importance of retaining a merits review process as part of the access regime. You would be well aware that the merit review framework is an integral part of the gas access regime and we have argued this position in the MCE’s separate process on this issue.

I will now turn to the MCE’s specific proposals on four key issues: the objects clause; the coverage test; light-handed regulation; and measures to improve regulatory certainty for greenfields pipelines.

MCE’s proposal – Objects clause

- The PC recommended a clear and simple change to the objects clause.
- The MCE has proposed the adoption of an objects clause for the gas access regime which mirrors that in the electricity regime on the grounds of promoting a seamless approach to access across the energy sector.
- APIA does not support the MCE’s proposed objects clause. In our view, it suffers from critical failings. These are that:
 - it has lost the connection with the objectives of third-party access. Instead, it places emphasis on consumers, rather than achieving efficiency along the whole supply chain through enhancing competition. Clearly an efficient and thriving transmission industry will benefit consumers while an industry hindered by lack of investment would not benefit consumers;

- it contains competing objectives – despite recognition of the need to consider the ‘long-term’ interests of consumers, its focus on the interests of consumers introduces a potential conflict between objectives of the regime. APIA submits that this will serve to undermine the goal of the new objects clause, which is to provide certainty to all stakeholders.
- This view is supported in the recent court case in WA (between Dr Ken Michael and EPIC Energy, with respect to the Dampier to Bunbury natural gas pipeline, DBNGP) in which it was found that the current formulation of matters the regulator must take into account (including, among other things, the service provider’s legitimate business interests, the interests of users and the public interest) involves potentially conflicting objectives. APIA believes that this potential for confused objectives being carried forward to the new regime should be avoided.
- There is no clear reason to diverge from the Trade Practices Act and National Access Regime. In fact, rather than bringing the gas regime in line with the NEL, there should perhaps be scope for the NEL objective to be reviewed.
- APIA remains of the view that the objects clause proposed by the PC should be adopted for the gas access regime. Importantly, it contains a single objective of economic efficiency, thereby promoting effective competition. It is through this means that the interests of consumers and the economy as a whole are promoted.
- This is an aspect of the MCE’s response where APIA is concerned that the goal of consistency across the energy sector has been applied to the detriment of effective regulatory outcomes.

MCE’s proposal – Coverage test and administration

- APIA welcomes the adoption of a coverage test for gas transmission and distribution pipelines that is aligned with the coverage test in Part IIIA. This change is in line with APIA’s view that regulation should be limited to pipelines where intervention is justified on economic grounds – namely, where it would generate a *material* increase in competition. This should be a fundamental underlying principle of economic regulation.
- However, APIA is concerned about the proposal for the AEMC to replace the NCC as the coverage recommendation body.
- The separation of “rule making” and policy setting function from rule application and enforcement is another fundamental underpinning of good regulatory policy. While recognising that the MCE proposes to achieve this separation by transferring the criteria and procedure for coverage assessments to the new National Gas Law, APIA does not believe this is sufficient. Given the AEMC’s role as ‘rule maker’ in the new arrangements, it should not then also have a role that involves being a part of

regulatory decision making. APIA considers that these responsibilities should remain separate.

- Moreover, expertise regarding coverage assessment and decisions currently lies with the NCC. No compelling case has yet been made to justify this change and it is clearly not recommended by the PC.

MCE's proposal – Light-handed form of regulation

- The introduction of the option of a 'light-handed' form of regulation is also welcomed by APIA. As an industry, we supported this aspect of the PC's report and it is therefore pleasing to see this taken up in general by the MCE.
- We also note that MCE has rejected the notion of any form of monitoring for uncovered pipelines. As introduction of a monitoring regime to uncovered pipelines would be, in effect, a broadening or extension of regulation, we urge that it not be reconsidered in the current negotiations.
- Generally speaking, including a new option of monitoring, with recourse to dispute resolution, is likely to help ensure that where regulatory intervention does occur, it is imposed in a manner that is justified in terms of the net economic benefits of that regulation, including not posing undue costs on industry. The key issue from APIA's perspective is to ensure that regulation in any form will only apply to pipelines meeting the new coverage test. In terms of which form of regulation should apply, the current, 'heavy-handed' option should only apply where it is justified in terms of an assessment of the costs and benefits.
- That said, there are aspects of the MCE's model that are of some concern:
 - firstly, APIA does not support the proposed separation of the decision on coverage from the decision on the form of regulation – there is the potential for the AER to face a conflict in deciding on the form of regulation to apply in terms of preserving its scope of influence. APIA supports the adoption of the PC's approach on this issue, which is to have the type of coverage decided by the Minister and the NCC;
 - secondly, I note that the AEMC is to develop guidelines governing what form of regulation should apply. APIA believes that this is a high-level policy issue which should be in the National Gas Law, and not be left to the AEMC to determine.

MCE's proposal – Regulatory certainty for greenfields

- APIA strongly supports the need for reforms that improve the incentives for investment in greenfields capacity. In light of this, we support the additional measure proposed by the MCE in regard to greenfields in terms of the options for new pipeline proponents to seek a binding no-coverage ruling or a price regulation holiday.

However we remind SCO that industry sought a regulation holiday of 20 years rather than 15 and our acceptance of the PC recommendations is a compromise.

- Nevertheless, there are some important matters that still need to be worked through in order for the price-regulation holiday option to be workable. Specifically, the criteria for determining whether a pipeline is a greenfields pipeline need to be:
 - clear and indisputable, with minimum judgement required; and
 - as practical and workable as possible.
- In this regard, the criteria for determining a greenfields pipeline present some issues and may need to be clarified:
 - the definition of the market should be based on “load centre” or geographical location of consumers;
 - there should also be some recognition of materiality in the definition;
 - the restriction on ownership may be considered unreasonable in a number of circumstances (for example, the new pipeline is being built as fields supplying the old pipeline are depleting; the new pipeline is being built to supply major new loads that are expected to develop; and some projects that would, on the face of it, appear to be greenfields projects, could be excluded as they join existing pipeline networks at sizeable markets). It may be that the concerns which have led to this proposed restriction on ownership may be better addressed by other means, such as through ringfencing of the relevant entities (for example, along the lines of the DBNGP, involving ringfencing of the relevant entity from the other pipeline operations). APIA considers that this is an area that requires more thought, and should not simply rely on Corporations Law approach;
 - it is unclear whether connections between two basins would be included;
 - APIA also has some concerns about the exclusion of capacity expansions – this has the potential to provide perverse incentives.

Expert Panel

- APIA disagrees with the breadth of the Terms of Reference provided for the Expert Panel. Proper consideration of such an extensive range of issues, which have already been considered in full by the PC, could see the process extended even further.
- APIA does not believe that the expert panel should develop model legislative provisions for the national energy regulation regime. The PC’s recommendations should be implemented, avoiding the confusion caused by waiting for the common rules for the energy market to be developed. In view of the extensive nature of the PC’s review, the ‘clean slate’ approach is clearly unwarranted.
- The Expert Panel process as proposed by the MCE could lose the benefit of the PC’s review of key provisions of the gas access regime.
- Nevertheless, APIA would like to offer the following comments:
 - the key issue is to ensure the integrity of the PC recommendations is retained;
 - given the broad scope of matters referred to the expert panel and the timeframes suggested, APIA questions whether the terms of reference for the

expert panel need to be reworked to simply identify which of the PC's recommendations may not be applicable to electricity transmission and distribution; and that

- stakeholders have an opportunity to comment on any proposals.

Concluding Remarks

- In concluding, APIA would like to reiterate its view that the best outcome would be for the full set of PC recommendations to be implemented immediately. This would represent a balanced outcome for all stakeholders. Further reviews will only result in unnecessary delays and uncertainty.