

**Submission on the Productivity Commission's
Review of the Gas Access Regime Draft Report
From the Chairman, National Gas Pipeline Advisory Committee (NGPAC)
March 2004**

Preface

As with my original submission, the views expressed in this paper are my own and should not be taken to represent the views of NGPAC as a whole or those of any other member. Again, I will not attempt to canvass all the issues identified in the Draft Report ("the report"), but focus on those involving underlying principles of the gas access regime ("the regime"), on the one hand, and some specific institutional arrangements on the other.

Observations

In my view, the report identifies and comments on all the major factors which have led to dissatisfaction with the regime so far. As noted, some of the dissatisfaction is objective and based on experience, some is hypothetical and based on anticipated difficulties which have not yet been tested, and some is blatant special pleading. At the end of the day, the gas pipeline access regime must be, in the context of regulation, about ensuring that the available margin from well head to end consumer is not allocated to service providers as a result of abuse of market power. But the policy basis for the regime was always about more than that. To the extent that the report appears to lean towards investors in gas pipeline and distribution infrastructure, it acknowledges doing so in terms of the underlying policies which led to the establishment of the regime in the first place (e.g. as set out in the Hilmer report). I would support this approach on the basis that it is far more important to facilitate expansion of the infrastructure and later have to regulate it than to try, almost inevitably in vain, to anticipate all the pitfalls and regulate for them in advance.

This approach seems sensible also on the basis that this quite specific regime applies to an industry in which the stakeholders are neither small nor unsophisticated. The report correctly notes that the non government participants in the regime are all substantial entities. Producers, pipeline and distribution system operators, marketers and large end users all have or have access to the resources necessary to achieve practical commercial outcomes through regime mechanisms other than regulatory intervention. In the lead up to the introduction of the regime, all such participants said they wanted light handed regulation. They must accept some responsibility for taking up existing and any new opportunities arising from e.g. the reports recommendations, if the gas regime is to operate, as I believe it can, with far less formal intervention by the regulators. As noted in the report the electricity regime adopted a far more detailed structure and approach than gas. Perhaps the convergence of various sectors of the gas and electricity industries and preoccupation with issues arising in the latter explains, at least in part, the less than robust pursuit of available non regulatory outcomes by non-government stakeholders under the gas regime.

Perhaps a less intrusive and complex regulatory outcome could still have occurred under the present gas regime, had the regulators been given much clearer policy riding instructions at the outset. In this context, I also support the direction taken in the report recommendations. Consistent with my earlier submission, I support the thrust of the report draft findings in refocussing the **objectives** of the regime on promoting competition and market driven outcomes. Also, I support the objectives being appropriate to the specific stakeholder group for the gas regime rather than attempting to anticipate all the issues which could (but should not, if the regime works) arise in the wider community.

Again, it remains my view that such objectives should clearly differentiate between competition principles and consumer protection. The former are about ensuring a level playing field based on economic policies (inter alia: energy, industry and infrastructure development). The latter

acknowledges that one or more categories of consumer stakeholder are in need of specific intervention based on social policy.

Indeed I would go further than the report in specifically linking such objectives to the remit of existing and any new agencies involved (respectively) in policy settings for and changes to the regime (eg the Code), on the one hand, and administering it, on the other. In other words, the objectives for regulators should clearly indicate under what circumstances they should intervene, rather than requiring regulators to assume regulatory intervention is inevitable in administering their remits under the gas regime. In this context for example, while retention of the public interest test is appropriate (finding 6.6), I share the Commission's view that regulators should not be required to take account of "any other matters" as currently provide in Clause 2.24(g) of the Code. It should be clear from the objectives that regulators can properly be discharged their remits by NOT intervening where no "material" or "substantial" threat to a competitive environment (as defined now or as in recommendation 5.1) is shown to exist. The corollary of this is that the regime, or some overarching legislation (such as the Trade Practices Act), must afford an aggrieved stakeholder adequate opportunity to call foul play. This seems to be covered although I could not find a specific statement to this effect in the report.

Some regulators (notably ACCC) will also have consumer protection remits under quite separate regimes and it should be possible for them to ringfence their gas regime activity in the same way service providers are required under the Code to ringfence their different functions.

While the expertise and experience of regulators should remain available to any new body with a remit to advise ministers on establishing and amending policy and its documentation relating to the gas regime, the report notes the "widely held views about the desirability of separating the rule making and administration functions." The report seems to support this broad principle, but its specific findings (12.4) and recommendations (12.1) refer to narrower aspects of applying the principle. The report notes the COAG Energy Market Review recommendation on Code change process and comments that it could be "perceived as an undesirable step away from the separation of regulation policy making and administration" (report p.382). The report goes on to note that the "Commission considers (institutional separation) to be the preferred approach" (also p 382). In my view the broad principle is worthy of a specific finding, and perhaps a recommendation.

The report finds that NGPAC is not working effectively and that changes are essential. I note that changes to improve the NGPAC process have been identified some time ago, but as submitted by South Australia (p.372 of the report) NGPAC members have been reluctant to take initiatives on these and other matters since a review of the gas access regime was officially foreshadowed in October 2000. Unless the Commission believes that new institutional arrangements and amendments to the Code can be made by the Ministerial Council on Energy within a short time frame, it would not be inappropriate to have its findings on what NGPAC could do in the meantime.

The report contains many findings and recommendations on which I have not commented. To some extent this reflects the constraints of my remit as independent Chair of NGPAC. It also reflects a constraint on my resources to analyse the effects of some recommendations. In any event, I remain of the view that achieving a clarification, amendment and, where necessary, re-statement of the **objectives** of the gas regime should be the primary aim and priority at the policy level. The detailed and technical documentation of the gas regime could then be confidently and effectively redrawn to conform with the objectives. While action should be taken on both fronts in parallel, perhaps it would be helpful to policy makers if the report offered some ranking of the Commission's recommendations and topics and their priority for action at the political level.