

**Submission to Productivity Commission
Review of the Gas Access Regime**

by

**The Secretariat to
The National Gas Pipelines Advisory
Committee**

August 2003

NGPAC Secretariat Submission to PC Review of Gas Code

Table of Contents

1.	Introduction	3
2.	Background on NGPAC	5
2.1	Introduction	5
2.2	Role and functions	5
2.3	Membership	6
2.4	Funding	7
2.5	Operation	7
3.	Activity by NGPAC in relation to its functions	8
3.1	Introduction	8
3.2	Monitor, review and report on the operation of the Law/Code	8
3.3	Advise on interpretation and administration of Law/Code	8
3.4	Prepare public information on the Law/Code	8
3.5	Make recommendations on amendments to the Law/Code	9
4.	The Code change process	11
4.1	Introduction	11
4.2	Overview of the Code change process	11
4.3	Overview of Code changes that have been made	12
4.4	NGPAC's experience with the Code change process	13
5.	Historical information from NGPAC on the Code	21
5.1	Introduction	21
5.2	Background on the development of the Code and the Law	21
6.	Proposed Code/Law changes that did not proceed	33
6.1	Introduction	33
6.2	Overlap between the Code and Part IIIA of the TPA	33
6.3	New investment issues	34
6.4	Information collection between reviews	35
6.5	Other issues of relevance to the PC review	37
Appendix 1		39
	Overview of the Code and the laws that give it legal effect	39
Appendix 2		52
	Amendments to the Code and the Law	52
Appendix 3		55
	NGPAC report to Ministers February 1999 to 31 December 1999	55
Appendix 3		89
	NGPAC report to Ministers January 2000 to June 2001	89
Appendix 4		114
	Summary of Code/Law Change Activity by NGPAC	114
Appendix 5		120
	Public Information Memorandum on the overlap of the Code and Part IIIA of the TPA	120

1. Introduction

This submission is provided by the Secretariat to the National Gas Pipelines Advisory Committee (**NGPAC**).

The Chairman of NGPAC has made a separate submission containing his personal interpretation of and perspective on the Code and the NGPAC experience.

To separate his personal views from the institutional records, the Chairman has asked the Program Manager of NGPAC, Ms Catherine Cooper, to co-ordinate and edit this "NGPAC Secretariat" submission.

It is emphasised that, because the position of "Program Manager" was not established until August 2000, this submission has been compiled with the assistance of members of NGPAC's panel of independent consultants who have been involved since the inception of NGPAC and even during the period on consultation and negotiations leading to the adoption of the Code.

It is acknowledged that any account of past events will involve a degree of interpretation. Considerable effort has been made to ensure this submission presents an independent view of the events recorded. However:

- (a) if any stakeholder feels that any aspects of this account is misleading, they are, of course, entitled to express their views directly to the Productivity Commission Inquiry. The submission has been circulated to NGPAC members.
- (b) Nothing in this submission purports or should be taken to represent the views of NGPAC as an entity (except where documents of record are quoted or reproduced herein), or of any individual or group of members of NGPAC (including the Chairman).
- (c) It is the view of the Chairman that the material put together in this submission should be available to the Inquiry as an open document, upon which any stakeholder may further comment.

NGPAC was established by the Commonwealth, State and the Territory Governments as provided for under the Natural Gas Pipelines Access Agreement of 7 November 1997 (the **Agreement**). NGPAC is responsible for the administration of the National Third Party Access Code for Natural Gas Pipelines (the **Code**).

The purpose of this submission is to provide the Productivity Commission with:

- information about NGPAC, in particular NGPAC's practical experience in relation to the Code change process;
- information about the history and philosophy of the Code; and
- information about a number of Code change proposals that have been made to NGPAC but did not proceed, in particular those that NGPAC had deferred for consideration at a major review

This submission is structured as follows:

-
- **section 2** provides background information on NGPAC;
 - **section 3** provides an account of NGPAC's performance of its functions since its formation;
 - **section 4** provides information in relation to NGPAC's principal function, Code change, including an overview of the Code change process, a summary of the Code changes that have been made to date and some comments on NGPAC's practical experience in relation to the Code change process;
 - **section 5** provides information about the history and philosophy of the Code.
 - **section 6** provides information in relation to a number of Code changes that have been proposed to NGPAC but which did not proceed in particular those that NGPAC had deferred for consideration at a major review.

2. Background on NGPAC

2.1 Introduction

The origin of NGPAC is closely related to the origin of the Code, which is outlined in section 5.1 of this submission. The bodies which were responsible for the development and implementation of the Code under the auspices of the Council of Australian Governments (**CoAG**) were initially the Gas Reform Taskforce (**GRTF**) and then the Gas Reform Implementation Group (**GRIG**). Once the Code was in place, NGPAC was established and the initial membership of NGPAC was almost identical to the membership of GRIG, hence providing an effective link between the debates on the design of the Code with the on-going administration of the Code.

NGPAC was formally established by the Parties to the Agreement (the Governments of the Commonwealth, New South Wales, Victorian, Queensland, Western Australian, South Australian, Tasmanian, the Australian Capital Territory and the Northern Territory) in late 1998 as provided for under the Agreement and first met in October 1998.

A summary of the role and functions, membership, funding and operation of NGPAC is provided below.

2.2 Role and functions

NGPAC is responsible for "...the administration of the Code..." (clause 9.1 of the Agreement), but more specifically, its functions (clause 9.4 of the Agreement) are to:

- (a) monitor, review and report on the operation of the Gas Pipelines Access Law (including the Code);
- (b) provide advice to the Ministers on interpretation and administration of the Gas Pipelines Access Law (including the Code);
- (c) prepare information on the Gas Pipelines Access Law (including the Code) for general publication; and
- (d) make recommendations on amendments to the Gas Pipelines Access Law (including the Code) to Ministers.

The Parties may agree to give the NGPAC other functions. NGPAC may determine its own procedures subject to the requirements as set out in the Gas Pipelines Access Law (including the Code).

It should be noted that the Parties may agree on other mechanisms for Code administration (clause 9.6 of the Agreement):

- 9.6 The Parties may from time to time unanimously agree on other appropriate mechanisms for administration of the Code.

However, to date, the Parties have not done so.

2.3 Membership

The membership of NGPAC (clause 9.2 of the Agreement) is as follows:

- 9.2 The NGPAC will be composed as follows:
- (a) an independent Chair to be appointed collectively by the Parties;
 - (b) the Code Registrar;
 - (c) one person nominated by each Party;
 - (d) one person nominated by each of the following industry groups:
 - Australian Gas Association (AGA),
 - Australian Petroleum Production and Exploration Association (APPEA),
 - Australian Pipeline Industry Association (APIA), and
 - Business Council of Australia Energy Working Group (BCA);
 - (e) two representatives of State and Territory Relevant Regulators appointed by the Parties on a rotation basis, with Victoria and New South Wales to provide the first two such representatives; and
 - (f) one representative nominated by the Australian Competition and Consumer Commission. The National Competition Council will be invited to participate as an observer and adviser.

Collectively, the members of NGPAC represent nearly all major stakeholders affected by the Code, other than small consumers, who are indirectly affected by the Code.

Only the representatives of the Parties (ie the Governments) are entitled to a vote at NGPAC meetings (clause 9.3 of the Agreement).

Since the establishment of NGPAC, the role of Independent Chair has been undertaken by Mr Greg Harvey. Mr Harvey was previously Managing Director of Gascor and Chairman of the AGA and in this role played made an important contribution to the development of the Code as AGA representative on the Gas Reform Implementation Group (GRIG), the body which designed the Code. Prior to this Mr Harvey came from a background in the petroleum industry, including a period as Managing Director of BP Singapore.

The rotation on NGPAC of the representatives of State and Territory Relevant Regulators has been as follows:

- the initial representatives were provided by The Independent Pricing and Regulatory Tribunal of NSW (**IPART**) and The Office of the Regulator-General, Victoria (**ORG**); now the Essential Services Commission of Victoria, (**ESC**);
- after one year, ORG was then replaced by the Office of Gas Access Regulation, of Western Australia (**OffGAR**);
- at the expiry of its term, IPART was replaced by ESC;
- at the expiry of its term, OffGAR was replaced by the Essential Services Commission of South Australia (**ESCOSA**);

On 15 August 2001, NGPAC agreed to a request, sponsored by BCA, that a representative of major gas users attend NGPAC meetings and take a part in discussions. A BCA representative has not attended NGPAC meetings since that date.

2.4 Funding

NGPAC is funded by the Parties according to a formula provided in clause 9.5 of the Agreement:

- 9.5 The Commonwealth will pay one third of the costs of funding the NGPAC (including its Chair) and the Code Registrar (including any damages or legal costs arising out of the Code Registrar performing its functions under the Code). The balance of those costs will be shared by the Parties (other than the Commonwealth) on the basis of population.

NGPAC's total expenditure in each financial year has been:

2002/2003:	\$396,880 (budget)
2001/2002:	\$344,366
2000/2001:	\$300,198
1999/2000:	\$399,733
1998/1999:	\$90,114

2.5 Operation

NGPAC is an advisory committee and as such has limited powers to conduct its day-to-day operations by itself. As such, the Parties agreed that the South Australian Government would assist by providing support including holding monies, providing access to accounting services, providing accommodation and office services, hiring employees and entering into contracts. The South Australian Government recovers the cost of these support activities from NGPAC.

NGPAC is supported by a Secretariat that comprises:

- a part time Program Manager, an independent contractor who performs the role of secretary to NGPAC and provides support and advice to the Independent Chair; and
- a part time Executive Officer, an employee (through the South Australian government) who provides administrative support to the Program Manager.

NGPAC also established a panel of advisers, the Project Team, which it draws upon for advice, especially in relation to Code change issues. The main advisers have been:

- The Allen Consulting Group Pty Ltd, in relation to economic and regulatory advice; and
- Allens Arthur Robinson, in relation to legal advice.

3. Activity by NGPAC in relation to its functions

3.1 Introduction

This section provides a summary of the activities of NGPAC in terms of the four functions of NGPAC identified in clause 9.4 of the Agreement (see section 2.2 above).

More detail on NGPAC's activity is provided in its Reports to Ministers, copies of which are attached in Appendix 3.

3.2 Monitor, review and report on the operation of the Law/Code

NGPAC has undertaken relatively little activity in relation to this function.

In the early years, the emphasis was on leaving some time for implementation of the first round of access arrangements to see what issues might arise. As time went on and experience from implementation accumulated, NGPAC members have discussed a range of issues concerning the operation of the Code at meetings. However, Code change proposals aside, NGPAC has undertaken little in the way of formal studies or research on the operation of the Code.

Once the first round of access arrangement began to be approved, NGPAC began to focus on the need for a review. NGPAC prepared a paper on issues and options for the review, which was provided to the CoAG Energy Markets Group at their Dec 2000 meeting.

3.3 Advise on interpretation and administration of Law/Code

No requests have been received by NGPAC from the Relevant Ministers regarding advice on the interpretation and administration of the Code. Aside from recommendations for amendments to the Law including the Code, NGPAC has not provided any advice direct to Relevant Ministers on interpretation and administration of the Law including the Code.

The primary sources of advice to Ministers on interpretation and administration of the Code have been through their public service advisers, from the regulators and from stakeholders directly. However, many of these public service advisers, regulators and industry stakeholders are also members of NGPAC and have had access to the debate within, and to the advice generated by, NGPAC. It seems likely that members have drawn on this information to advise Ministers.

3.4 Prepare public information on the Law/Code

Aside from the numerous public consultation processes undertaken in relation to possible amendments to the Law including the Code, NGPAC has undertaken a number of other initiatives to prepare and disseminate information on the Law including the Code and the role of NGPAC:

- NGPAC has provided a range of information, through a website shared with the Code Registrar.
- an information booklet outlining the background to the Law and the Code and the role of NGPAC has been prepared and distributed directly and through members.

-
- the Secretariat has responded to a number of public enquiries.
 - the Chairman has made a number of presentations at industry conferences.
 - the Chairman has also undertaken consultations with key stakeholders over the period including meetings with most of the relevant Ministers and senior officials, CEOs or senior executives of most major companies operating in the gas industry either as Service Providers or users and the heads and senior staff of most regulatory agencies.

A more prominent role in public education about the Law including the Code was not considered appropriate by NGPAC given the extensive information that is made available by regulators through their regulatory processes, the extensive information provided by the Code Registrar, the perceived limited demand from small consumers for additional information on the Law and the Code and NGPAC's limited budgetary resources.

3.5 Make recommendations on amendments to the Law/Code

This has been, by far, the principal activity of NGPAC since its establishment.

In relation to amendments to the Law and the Code, 32 separate issues in relation to possible changes have been raised with NGPAC by a range of stakeholders. Some of these issues themselves cover multiple issues and possible Code changes. The issues are outlined in Appendix 4, including an outline of their history at NGPAC and their final or current status. Of the 32 issues:

- 7 were considered by NGPAC and no further action was taken as either a change was not required, the issue was withdrawn or the issue was seen as beyond NGPAC's remit to progress by itself and so referred to governments to be addressed
- 9 were considered by NGPAC and put on hold pending a major review and/or changes in priority or the availability of resources to consider them. These issues are discussed in more detail in section 6 of this submission.
- 16 were progressed as Code/Law change recommendations, of which 15 were approved by Ministers and one was withdrawn by NGPAC.

Of the 16 issues which were progressed as Code/Law change recommendations:¹

- 7 were not considered significant changes and so were progressed directly as recommendations to Ministers without public consultation. All of these recommendations were approved by Ministers and are now in operation.

¹ One issue (end user information) involved some aspects that required public consultation and some that did not, and so this was split into two separate recommendations, so the total of issues following adds up to more than 16.

-
- 9 were subject to public consultation through the release of information memoranda. All of these recommendations were approved by Ministers (with one exception) and are now in operation. One recommendation was withdrawn by NGPAC before being approved by all Ministers following the outcome of the Australian Competition Tribunal's decision on the appeal in relation to the coverage decision in relation to the Eastern Gas Pipeline. This issue is discussed in more detail in section 6 of this submission.
 - One issue involved changes to legislation only (required as a result of the High Court decision on Wakim) and no changes to the Code. Legislation was passed and this change is now in operation.

The Code change process is discussed further in the following section 4.

4. The Code change process

4.1 Introduction

This section:

- provides an overview of current Code change process;
- briefly summarises the Code changes that have been made to date;
- provides comments on NGPAC's practical experience with the Code change process.

4.2 Overview of the Code change process

As outlined in more detail in Appendix 1, the Code takes effect as a law in each Australian State and Territory. Ordinarily, such a law could be amended only by the Parliaments of the States and Territories. As a result of provisions of the various State and Territory *Gas Pipelines Access (name of State/Territory) Acts*, however, the Code can be amended by agreement between the Ministers of the Commonwealth, States and Territories as described below.

Section 9.1 of the Code and section 6(1) of Schedule 1 of the *Gas Pipelines Access (South Australia) Act (Schedule 1)* provide that the Code can be amended by agreement between the relevant Ministers of each participating jurisdiction, provided that the Ministers have first received a report from NGPAC making a recommendation in relation to an amendment of the Code. Section 9.2 of the Code provides that the report from NGPAC must state whether NGPAC considers the amendment recommended to be significant or not significant. If the amendment is considered to be significant, the report must confirm that NGPAC had undertaken a public consultation process under which NGPAC has:

- prepared an information memorandum setting out the amendment being considered and a statement of why such amendment may be desirable;
- published a notice in a national daily newspaper calling for submissions by a specified date, being a date not less than 21 days after the date of the notice; and
- considered any submissions received within the time period specified in the notice.

Ordinarily, the agreement of all Ministers is required for an agreement amending the Code to be effective. An agreement amending the Code may, however, be made by two thirds of relevant Ministers provided the amendment does not amend a "core provision" within the meaning of the Code, extend the application of section 38 of Schedule 1 (dealing with administrative appeals) and does not insert a provision dealing with a matter not previously dealt with in the Code. An agreement between Ministers to amend the Code is ineffective if it purports to amend the criteria for coverage (see section 6(2), (3) and (4) of Schedule 1).

Unlike the Electricity Code there is no legal requirement that the Code changes be authorised by the Australian Competition and Consumer Commission (or be approved by the National Competition Council). As explained in more detail in Appendix 1 the Gas

Code and the laws that implement it have been certified as an effective access regime for the purpose of Part IIIA of the *Trade Practices Act* (except in Queensland). The effect of such certification is that a person seeking access to a pipeline could not seek to have a pipeline that is covered by the Code "declared" for the purposes of the "declaration/arbitration" provisions of Part IIIA of the *Trade Practices Act*. Declaration will not be precluded in this way, however, if since the certification decision was published the Commonwealth Minister considers "there have been substantial modifications of the access regime". None of the changes to the Code made to date are considered by NGPAC to amount to "substantial modifications" to the access regime. In the case of some changes, confirmation has been obtained that the National Competition Council shares this view.

4.3 Overview of Code changes that have been made

In total, fifteen amendments have been made to the Code. These amendments are contained in seven Amending Agreements. The amendments that have been made to the Code and to the laws that give it legal effect are summarised in Appendix 2 to this submission. The seven Amending Agreements, and a consolidated version of the Code incorporating all amendments made, can be found on the Code Registrar website (www.coderegistrar.sa.gov.au).

Most of the changes made to date have been of technical nature or clarify the originally intended operation of the Code. No fundamental changes have been made to the Code that overturn the basic design of the Code. For example, changes have been made to the reference tariff principles contained in section 8 of the Code:

- to clarify that reference tariffs may be set in real as well as nominal terms;
- to permit the use of cross period incentive mechanisms;
- to clarify that the reference tariffs may be amended during an access arrangement period to provide for an administrative role for the Regulator in approving such variations (eg pursuant to a CPI minus X or tariff re-balancing formula); and
- to clarify that marketing costs may be recovered through reference tariffs.

Other changes have been made to facilitate the development of retail competition including:

- imposing obligations on Service Providers to make information about a final customer available to a retailer upon request by the final customer; and
- to clarify that costs such as incurred in relation to the introduction of full retail contestability can be recovered through reference tariffs.

A number of amendments have also been made to the relevant legislation as a result of the Wakim decision and as a result of changes made to the Code to permit variations to reference tariffs during an access arrangement period.

4.4 NGPAC's experience with the Code change process

(a) NGPAC's approach to managing the Code change process

NGPAC's approach to the assessment of amendments to the Code/Law has developed and evolved over time in response to experience. The basic approach NGPAC has taken has been as follows:

- **Proposing issues** – any person can raise a Code/Law amendment by writing to the Chair. In virtually all cases, proposed amendments have been sponsored by a member of NGPAC.
- **Placing an item on the agenda** – the Chair acts as a filter to ensure an issue is of sufficient priority and sufficiently well developed to be considered. A paper is circulated in advance, and Members then decide whether to further consider the issue or not and if so, in what manner it should be progressed.
- **Scoping the issue** – the next stage is typically to scope out the basic issues and the broad options so that NGPAC has the necessary information and analysis to decide on whether to progress an amendment to the stage of detailed drafting, and if so, including what options and recommendations. The purpose of this stage is to avoid unnecessary work being undertaken by the Secretariat before receiving guidance from NGPAC.
- **Making a decision** – detailed drafting of possible amendments along with the necessary supporting information is prepared, to allow NGPAC to make a decision on the specifics of a possible Code/Law amendment.
- **Consulting with the public** – this is required if an amendment to the Code is judged to be significant. Feedback received is considered by NGPAC and may be incorporated into a recommendation to Ministers.
- **Recommending to ministers** – a package to Ministers recommending a change is prepared for final sign-off by NGPAC.
- **Following up** – the Code Registrar collates responses from Ministers and, if approved, gazettes the Code change and/or liaises with the relevant jurisdictions regarding any legislative changes. If not approved, the Chair would take the issue back to NGPAC for reconsideration (however, this has not occurred to date).

Some important features of this approach are as follows:

- **Flexibility** - a feature of the NGPAC approach is its flexibility. The processes outlined above are only a guide. Depending on the nature of the issue, the level of development of the proposal and the urgency, these steps may be compressed or not considered further. Issues can be considered by members at any of the stages out of session. Further steps can be added or tailored approaches to specific issues can be developed to match the needs of the issue. For those procedural issues that need to

be clear in terms of NGPAC's statutory role, NGPAC has established a concise set of formal procedures.

- **Contributions by members** – members and their representatives are encouraged to make contributions to the debate outside of meetings by sponsoring proposals, developing or commenting on papers and participating in working groups. This provides a tangible indication to NGPAC of the importance members attach to specific amendments and it also acts to keep NGPAC's costs down. The great majority of time spent on consideration of NGPAC issues is spent by members and their representatives and advisers (preparing for or attending meetings, working groups, developing or commenting on papers, etc) rather than by the Secretariat or NGPAC's panel of advisers (see below).
- **Use of working groups** – working groups can be formed to discuss and refine Code/Law amendments (but there is no standing working group). These can include members and/or their nominees. The role and composition of working groups is flexible depending on the specific remit they receive from NGPAC. They are coordinated by the Secretariat. They have been quite a useful mechanism on occasions to explore issues, to develop options, to reach a consensus, or to refine proposals. On other occasions, they have been less useful, in particular on highly contentious issues where members have held strong opposing views. These matters are best considered at the highest member level.
- **Independent Chair and Independent Secretariat** – an independent Chair is responsible for chairing the meetings. A small Secretariat, overseen by the Chair, is dedicated to managing the process and the panel of advisers (see below). This Secretariat is independent of any individual member. This provides an important mechanism in progressing contentious issues in a transparent and professional way given that the individual interests of members frequently do not align (whether they are government, industry or regulator members). This approach was adopted based on the success of a similar approach used in the original development and implementation of the Code by GRIG.
- **Independent expert advice** – a panel of advisers (the Project Team) with specific expertise in economic, regulatory, legal and technical aspects of Code/Law amendments is in place to provide advice to NGPAC as required. These advisers are independent of any individual member and are managed through the Secretariat. The panel is periodically opened up to competitive tender.

(b) Comments on NGPAC process and governance

Rather than provide a self-assessment of its own performance, the focus of this section is to expose internal and external criticisms of NGPAC that have been made, and to attempt to respond to these in an objective and positive way. Criticism of institutions such as NGPAC is inherent in their roles and should be

both welcomed and also considered carefully as a means of testing the design and performance of such institutions.

There have been a number of public criticisms of NGPAC, principally by industry at industry forums. Most prominently, some of these have been reported in the final report of the CoAG Energy Market Review. The Chairman of NGPAC has also recently consulted key stakeholders on a range of issues, including NGPAC's structure and performance. Some stakeholders raised concerns regarding NGPAC's performance, others were positive on a number of aspects of NGPAC's performance.

Generally, criticisms of NGPAC have focussed on issues of either process or governance as follows.

Process issues:

- Lack of progress on major problems with the Code;
- Low number of Code changes;
- Slow and cumbersome Code change process; and
- Domination of Code changes by regulators.

Governance issues:

- Lack of industry voting rights on NGPAC;
- Regulator representation on NGPAC;
- Lack of representation of major consumers on NGPAC; and
- Seniority of representation.
- Reliance on members to propose Code changes.

Each of these issues is considered individually below.

- (i) Lack of progress on major problems with the Code

The criticism here is that there are major deficiencies in the Code which NGPAC has not sought to address. It is important when considering this issue to distinguish between the situation where stakeholders are unhappy with regulatory outcomes as opposed to clear deficiencies in the Code that have not been acted upon. In addition, stakeholders often have disagreements on whether regulatory outcomes have erred and, if so, in which direction and also on whether Code changes would have made any difference or not.

NGPAC's activities in relation to potential Code changes that have not resulted in an amendment is provided in some detail in section 6. In short, the conclusion of this section is that NGPAC has put on hold a range of issues in recent years to be considered as part of a major review of the Code. However, at no point has NGPAC been unwilling to proceed with consideration of any major issue raised by a stakeholder, where the

stakeholder was willing to invest the time to properly articulate the issue and the proposed amendment.

(ii) A low number of Code changes

The criticism is that too few Code changes have been made.

Sections 4.3 and Appendix 2 show that there has been a significant amount of Code change activity. However, the number of changes is not necessarily a measure of how good or bad a Code change process may be. A Code that was well designed in the first place would require less amendment. Also the scope and design philosophy are relevant. For example, the scope of the Gas Code is less than the Electricity Code, and in addition the design philosophy is different given the focus of the gas Code on establishing some high level roles, powers and principles, rather than a large and prescriptive set of rules.

(iii) A slow and cumbersome process

The issue here is that the Code change process is slow and cumbersome, in particular given the involvement of all the Relevant Ministers in making any Code change.

As a general rule, NGPAC believes that it has responded in an effective and timely fashion to issues that were raised with it regarding potential changes to the Law and the Code. However, there are a number of constraints under which NGPAC operates that restrict its scope and its ability to react quickly.

Some of these constraints are legislative in nature and are as follows:

- Firstly, any Code change requires the Approval of Relevant Ministers (or a two-thirds majority in the case of a change to a "non-core" provision). There are nine Relevant Ministers and so the process of coordinating and gaining the necessary documentation can sometimes take time, especially given the competing priorities of Ministers. After this, the change must also be gazetted in the South Australian Government Gazette before it can take effect.
- Second, if the change is a significant change, then NGPAC must undertake public consultation, which adds a minimum of 21 days to the process (see clause 9.2 of the Code). The great majority of Code changes proposed have been judged by NGPAC to warrant public consultation.
- Third, any change that involves an amendment to an Act of Parliament requires significant lead time as well as the ability to secure a place in the often crowded parliamentary agenda.

NGPAC accepts that the above constraints reflect the checks and balances that formed the basis for the negotiated intergovernmental agreement that

lead to the Law and the Code. Delegation by Ministers of approval of Code changes (effectively the making of legislation) was not considered appropriate at the time given that the Code has the potential to significantly affect and define property rights in relation to the gas pipeline industry and can have major financial implications for stakeholders.

Some of the constraints are more inherent in the nature of the Code/Law and of NGPAC and are as follows:

- Code changes often raise complex and technical issues so the process of members forming a considered view on Law/Code changes can take time and relies to some extent on advice and analysis from interested stakeholders and from the secretariat and the Project Team. This is especially so where the issue is contentious as well as complex and technical;
- there are a large number of members (nine government, four industry association and three regulators in addition to the Chair and the Code Registrar plus NCC as an observer) which provides significant scope for a diversity of views and strong debate. This can be time consuming, especially for contentious issues. This can be seen as both a strength and a weakness. On the one hand, it can slow and complicate the process. On the other hand, once a proposition goes through this process, it is either agreed or at least any differences are very well defined in a policy and technical sense. This is reflected in the observation that relatively little change in NGPAC recommendations have resulted from public consultation on possible Code amendments, and that all recommendations considered by Ministers have been approved (with the exception of one recommendation which was withdrawn before it was approved by all Ministers.);
- NGPAC, to date, has not generally sought to proactively consult directly with industry and regulators or to initiate research on issues concerning development of the Law/Code. Rather, it has typically relied on issues being raised by stakeholders. Initially, NGPAC was keen to wait some time for experience to emerge on implementation. In later times, a number of issues have been deferred in order to be considered in a planned major review of the Law/Code. This said, virtually every major stakeholder has some avenue of representation on NGPAC (some have multiple representatives) and so the members in themselves also provide a significant consultative mechanism;
- NGPAC's budget has been constructed on the basis of the establishment costs of an independent Chair and a small Secretariat plus funding for advice from consultants on a relatively modest number of Code change issues (around 5 or 6 per year)

plus a range of smaller issues. The preference has been to rely on contributions from members to sponsor Code changes and to support the process as much possible.

(iv) Domination of Code changes by Regulators

The issue here is the perception that NGPAC's agenda is dominated by issues raised by Regulators.

Both regulators and industry are well positioned to observe the practical affect of the Code and would be expected to generate ideas for improving the Code. Of the total 16 recommendations to Ministers for amendments, Regulators have sponsored four. Service Provider representatives have sponsored five and governments have sponsored seven. This does not appear to support the contention of dominance of Code changes by Regulators. In any case, at no point has NGPAC been unwilling to proceed with consideration of any major issue raised by an industry stakeholder.

(v) The lack of industry voting rights on NGPAC

The issue here is that the lack of voting rights leads to a lack of ownership of the Code change process by industry.

The Code has the effect of legislation and the only way the Code can be changed under the current framework is following a recommendation from NGPAC. As such, the designers of the governance arrangements deemed it appropriate that only the jurisdictional representatives have voting rights (and not industry or regulator representatives). However, non-voting members are free to have their views documented in any recommendation to Ministers. Industry representatives contribute freely and have been influential in NGPAC debates.

As a matter of contrast, it should be noted that there are no voting rights for industry nominees on NECA, the electricity equivalent of NGPAC. In fact, there are no industry nominees. NECA comprises one nominee from each NEM government and a Chairman that is unanimously agreed.

(vi) Regulator representation on NGPAC

The criticism here is that Regulators have a potential conflict of interest between their role in implementing the Code and the role in changing the Code, leading to the danger of "regulatory creep".

Along with industry, Regulators have the most experience in the practical implementation of the Code. As such, the original designers of the Code thought it appropriate that they be present on NGPAC as a source of advice and information on the Regulator perspective. However, the original designers of the Code did recognise the potential for conflict of interest for both regulator and industry representatives and so limited their role to that of non-voting members.

In comparison, the ACCC approves changes to the Electricity Code. However, this is partly the result of the choice by the governments and electricity industry to take a Part IIIA industry undertaking route rather than a certified regime route. Also, ACCC authorisation was thought to be required to avoid the arrangement being characterised as a price fixing mechanism under Part IV of the TPA.

(vii) Lack of representation of major consumers on NGPAC

The issue here is that there is no representation of major consumers on NGPAC.

When the membership of NGPAC was devised there were no national representative bodies for major downstream consumers of gas. During the Code development process, the role of representing the interests of this group was undertaken by a Working Group operating under the auspices of the Business Council of Australia (BCA) and as such the BCA was identified as a member of NGPAC. However, the BCA has since indicated that it has no long-term interest in such a role, in particular as some significant bodies representing major downstream consumers have been formed.

A representative nominated by the Energy Users Association of Australia and the Energy Markets Reform Group was invited by NGPAC to attend meetings as an active observer under the sponsorship of the BCA. Since that time the BCA has not attended NGPAC meetings. The formalisation of membership for a major consumer representative is clearly a matter that would need to be considered in any recommendations on future governance arrangements for a gas Code change body.

There is no representation of smaller users on NGPAC. However, to the knowledge of the Secretariat, this has not been raised with NGPAC as an issue. This reflects the wholesale level nature of the Code.

Representatives of smaller consumers are active at the Regulator level, in particular through customer consultative committees.

(viii) Seniority of representation

The criticism here is that the level of seniority of members attending NGPAC meetings has eroded over time to the point where it is seen by some as a technical level forum.

Initial attendance of members at NGPAC was very senior, including senior bureaucrats, senior regulators and senior company and industry association executives. However, given the generally agreed strategy of initially not pursuing major Code changes but only necessary technical amendments, and then the approach of deferring major changes to a review, the level of seniority of attendance by members understandably shifted to accommodate this.

The Secretariat has considered this issue and notes that it is entirely within the flexibility of NGPAC's current arrangements for it to be structured as a senior forum (which might meet less frequently to discuss and vote on major issues), which could be serviced by a technical committee or working group (which might meet more frequently and be focussed on the technical detail and process issues), and that this structure is well suited to the post-review period when any changes to the Code flowing from the Review's recommendations would be of interest to major stakeholders, but would also have major technical dimensions that would need to be worked through.

Alternatively, if NGPAC remains in the Code change role following the review, it is likely that that the seniority of attendance will increase in line with the expected batch of major changes to the Code/Law.

(ix) Reliance on members to present Code change proposals

NGPAC has been criticised for relying on members to propose Code changes.

Nothing in the Code prevents NGPAC considering Code change proposals from non-members. NGPAC welcomes Code change proposals from any person. In practice, however, Code change proposals have generally been sponsored by members. Given that NGPAC's membership includes industry bodies representing upstream producers, transmission pipeline owners, distribution pipeline owners and major users, along with regulators and all governments, this is not surprising. There have been a number of instances in which Code change proposals have been brought to NGPAC by industry bodies to address issues which specifically concerned one or more of their members.

5. Historical information from NGPAC on the Code

5.1 Introduction

- In addition to providing information on the NGPAC Secretariat's practical experiences with the Code change process (discussed above), the Secretariat also wishes to provide to the Productivity Commission historical information in its possession on the development of the Code and the laws giving it effect and the philosophy underlying the Code and those laws.

5.2 Background on the development of the Code and the Law

The national gas access regime, like most major reforms, has had a long gestation period.

(a) Microeconomic reform and competition policy

Following the opening up of the Australian economy in the 1980's, including the float of the Australian dollar and major tariff reforms, significant pressure had built up for attention to be turned to micro-economic reforms to ensure that Australian exporting and manufacturing industries that faced international competition, were serviced by an efficient and competitive domestic service sector. This included crucial infrastructure services such as energy, communications and transport.

An important early landmark was the report of the National Competition Policy Review, chaired by Professor Hilmer, in August 1993. This report, among other things, recommended that something more than the misuse of market power provisions in the Trade Practices Act was required in the case of access to essential infrastructure, and that a new legal regime should be established. Recommendations were also made in a range of other areas including the removal of regulatory restrictions on competition, structural reform of public monopolies, monopoly pricing and competitive neutrality.²

(b) Free and fair trade in gas

In the early 1990's, the structure of the Australian gas industry was fundamentally different to the structure in place today. The gas supply for each State/Territory was sourced from a single basin by a single joint venture selling jointly. The provision of gas pipeline services and the sale of gas were generally undertaken by State/Territory based monopolies. Interstate pipeline linkages and gas flows were weak or non-existent, NSW aside. The majority of the gas pipeline industry was under government ownership.

The specific origins of the current national gas regime can be traced back to debates in the early 1990s, conducted in parallel to the Hilmer Review, that led to a CoAG commitment by the Commonwealth, State and Territory Governments in

² National competition Policy Review Independent Committee of Inquiry, *National competition Policy*, Australian Government Publishing Service, Canberra, August 1993.

February 1994 to achieve "free and fair trade in natural gas". There were three underlying objectives for this commitment:

- To remove policy and regulatory impediments to retail competition in the natural gas sector;
- To remove a number of restrictions on interstate trade; and
- To encourage the development of a nationally integrated and competitive natural gas market by establishing a national regulatory framework for third party access to natural gas pipelines and facilitating the interconnection of pipeline systems.³

CoAG considered that a national gas access regime that is characterised by free and fair trade in gas would have the following features:

- no legislative or regulatory barriers to both inter- and intra-jurisdictional trade in gas;
- third party access rights to both inter- and intra-jurisdiction supply networks;
- uniform national pipeline construction standards;
- increased commercialisation of the operations of publicly owned gas utilities;
- no restrictions on the uses of natural gas (for example, for electricity generation);
- franchise agreements consistent with free and fair competition.

This agreement in many ways served as a model for later competition policy agreements.

(c) Competition Principles Agreement

CoAG responded to the Hilmer Review by developing a comprehensive package of competition policy reforms. The Commonwealth, State and Territory Governments signed the Competition Principles Agreement on 11 April 1995, which led to the development of the *Competition Policy Reform Act 1995*. This Act provides the legislative base for achieving competition reform across the economy. This Act establishes Part IIIA of the *Trade Practices Act 1974*, which provides a right for third party access to essential facilities, including natural monopoly infrastructure such as gas pipelines. The Act became operative on 6 November 1995.

(d) Natural Gas Pipelines Access Agreement

The Natural Gas Pipelines Access Agreement of 7 November 1997 was the culmination of over three years work to implement the CoAG commitments of

³ Gas Reform Implementation Group, *Policy Information Paper. National Access Regime for the Natural Gas Industry*, July 1997.

February 1994 consistent with the Competition Principles Agreement of 11 April 1995.

This work included a range of reforms and legislative changes by individual jurisdictions along with the development of nationally consistent set of arrangements.

The need for a mechanism for national coordination was recognised and the Gas Reform Task Force (GTRF) was established by CoAG in mid 1995 to undertake this role. GTRF undertook a scoping study of gas reform and then, among other things, developed a comprehensive set of principles to be reflected in an access Code. CoAG endorsed these principles and established the Gas Reform Implementation Group (GRIG) in 1997 to take over the work of GTRF.

Working from the principles agreed by CoAG, GRIG coordinated the development of a national regulatory framework for an integrated and competitive national gas market. GRIG included representation from the Commonwealth, State and Territory Governments, the Australian Gas Association, the Australian Pipeline Industry Association, the Australian Petroleum Production and Exploration Association, the Business Council of Australia, the NCC and the ACCC. GRIG worked intensively over 1997 to develop a comprehensive package and also conducted a series of consultations throughout Australia on the package. The final package was endorsed by the Commonwealth and all State and Territory Governments on 7 November 1997 and included:

- The Gas Access Agreement;
- The Gas Pipelines Access law including the Third Party Access Code for Natural Gas Pipeline Systems (the Code); and
- Application legislation in South Australia and the Commonwealth. .

The legislation was subsequently brought into effect in all jurisdictions, triggering the development of access arrangement for a range of major gas pipeline systems in Australia as well as consideration of a range of coverage issues. In addition, there was also a series of major industry restructures, privatisations and major new pipeline projects.

(e) Subsequent developments

National gas reform also included consideration of issues other than third party access. Some of these issues were addressed as part of the package of reform. Other issues were the subject of further work.

GRIG continued to coordinate the final implementation of the package and also considered the remaining competition issues in the gas retail industry. NGPAC was established in late 1998 and first met on 27 October 1998. Initial membership of NGPAC was almost identical to that of GRIG. GRIG continued on with residual issues and was eventually was wound up in 1999.

Upstream competition issues were addressed by the Upstream Issues Working Group (UIWG) under the auspices of both CoAG and the Australian and New

Zealand Minerals and Energy Council (ANZMEC). UIWG had a similar membership to GRIG and delivered a report in December 1998 that included recommendations on acreage management systems, access to upstream facilities and marketing arrangements.

In June 2001, CoAG agreed to establish a new Ministerial Council on Energy (**MCE**) to provide a forum for national leadership on energy issues (including gas). MCE comprises Ministers with responsibility for energy from Commonwealth, State and Territory governments. MCE held its inaugural meeting on 7 December 2001. The Energy Market Development Committee of MCE has carriage for issues relating to the gas Code and NGPAC.

The final report of the Productivity Commission's review of the National Access Regime was released in 2002. This included a number of references with relevance to gas access. The Commonwealth government proposed to consider the reviews recommendations in relation to gas in the context of the planned review of the Gas Access Regime.

The CoAG Energy Markets Review (the "Parer" review) delivered its final report in 2002. The report included a range of findings with relevance to the Gas Code and the Law and also to NGPAC. MCE has responded to the recommendations of this review, including the decision to establish a national energy regulator.

The Productivity Commission was commissioned to review the National Gas Access regime on 13 June 2003, with a final report to be submitted within twelve months. MCE has indicated that it will respond to the recommendations of this review in 2004.

(f) Code and Law design philosophy

GRTF and GRIG went through a three-year process of intense debate on the design of the Gas Access Regime. The ability to resolve a series of major policy questions and technical issues and to reach agreement on a recommended package for CoAG was a major achievement. This achievement was made possible by a number of factors:

- **The strong commitment of the Governments to gas reform** – this was a highly contentious reform with significant impacts on a range of stakeholders and on the governments themselves and government businesses and a strong commitment was required by all governments to reach an agreement to meet national objectives;
- **The cooperation of the gas industry and major gas consumers;** the gas pipeline industry had the option of not cooperating with the reforms or of challenging the legal and constitutional basis for the reforms but, along with major consumers, chose to cooperate and enhanced the debate and improve the outcome.
- **The structure and approach of GRTF and GRIG** – Both GRTF and GRIG included representation from governments, industry and regulators, had an

independent Chair and was supported by an expert independent Project Team. GRTF and GRIG's activities were consultative and transparent.

The structure and design of the Code and the Law reflects to some degree the three-year process of negotiation between the members of GRTF and GRIG around a series of key issues. Some of the key issues raised and debated during this period included the following:

- What framework would best harness services providers and users in helping to develop fair and reasonable access and pricing outcomes?
- What kind of regulatory intervention is justifiable?
- What broad model for access should be adopted, eg negotiate-arbitrate model, reference tariffs, rate of return regulation, etc?
- What pipelines should be covered? Should they be covered for all time or should there be some mechanism to apply or revoke coverage? Who should decide on coverage?
- What differences in approach are required for transmission and distribution systems?
- What issues will need to be included in the Code, and how detailed should the Code be?
- How should we best take account of historical complexities in setting fair and reasonable access terms and pricing going forward?
- What form of controls over pricing should be used? What incentives for productivity improvements should be given? What incentives for investment should be given, especially in the States/Territories with less developed infrastructure?
- What kinds of powers will the Regulator require? Who should undertake the role of Regulator? Should the Regulator be national, state or a mixture of both?
- What kind of information needs to be disclosed by Service Providers, and to whom should this information be available?
- What should be done to make the Code practical from a commercial perspective? How will the administrative and compliance costs be kept down?
- What kind of dispute resolution mechanisms are needed? How should the Code and the Law be enforced?
- Should there be appeals mechanisms to regulatory decisions and if so, on what basis and by whom?
- How does access regulation fit together with technical regulation and operational and safety issues?
- What process is required for changes to the Code over time?

-
- What should be the legal form and structure of the Code and the Law?
 - How is the regime to be rolled out, what transitional issues need to be tackled and in what timeframe?
 - How can we ensure that the objectives of third party access are not undermined by inconsistencies with licensing or franchising regimes?

As the Productivity Commission's review of the gas access regime will reveal, most of these issues remain current today.

In response to these issues GRTF and GRIG evolved, over time and through extensive debate and negotiation, a basic philosophy to guide the design of the regime. Some perspectives on this are summarised below. The necessary caveat must be made that this is an attempt at a historical description of perspectives on the Code's development and is not intended to be definitive in nature nor an interpretation of the legal meaning of the Code/Law (which is a matter, ultimately, for the courts). Other participants in the regime development process may have different perspectives.

(i) Basic access model

The Code was intended to be a high level document that would establish some basic rights, powers, processes and principles that would be consistent nationally. A key objective was to empower the commercial parties to negotiate and to leave a significant level of discretion with the Regulator as umpire. The aim was also to avoid a high level of prescription and to avoid the problems associated with the worst aspects of US style rate of return regulation.

However, the negotiate-arbitrate model was seen to be impractical from both commercial and administrative perspectives, given the costs, delays and uncertainties involved in negotiation and arbitration of a string of precedents, the likely disparities between larger and smaller players and the general scope for standardisation of services.

As such, an approach which established up-front regulatory approval of reference tariffs for a suite of standard services, which could be accessed directly by users or used as a "stake in the ground" around which to negotiate non-standards services, was seen to be preferable.

(ii) Coverage

Rather than to "set in stone" what infrastructure should be subject to this intrusive form of regulation, the aim was to establish an objective test. Any pipeline could be subject to coverage or revocation of coverage in line with this test. The test used was similar to that in Part IIIA of the TPA (for consistency and also because no better formulation of words was developed). The purpose of this is to allow for those pipelines that may not have strong monopoly characteristics (particularly in transmission as the

grid matures) or that are so small that the benefits of regulation outweigh the costs to be excluded (eg very small systems).⁴

Decisions on coverage would be undertaken by a separate institution from that making decisions about access and pricing, to minimise the risk of "regulatory creep". Coverage decisions would be made by Ministers after taking a recommendation from the NCC.

To provide greater flexibility, in particular for proposed pipelines, there is also scope for Service Providers to voluntarily seek coverage via the access arrangement process or to be covered as part of an approved competitive tender.

For convenience in the transition to the new regime, a list of pipelines deemed to be covered would be identified at the outset (Schedule A).

(iii) Access arrangements

The idea here was to have a concentrated up-front process to set access terms and reference prices, which would apply for a significant period during which the Regulator would not generally have a major role until the review for the next round.

The aim was to provide a high degree of flexibility to Service Providers to propose arrangements that suited their businesses while still fulfilling the basic regulatory objectives. The high level elements thought necessary to be included in an access arrangement that were arrived at are identified in section 3 of the Code.

The Regulator would have extensive information gathering powers. Information would also be made publicly available, in particular through the access arrangement information, to facilitate informed input from stakeholders, subject to a confidentiality test.

Regulators would respond to proposals by Service Providers and would only step in to put in place an access arrangement if Service Providers did not modify access arrangements in line with the Regulator's draft and final decisions.

The initial terms of access arrangements were expected to be around 5 years for established pipelines systems, in order to minimise the significant review costs to all parties and to give room for incentives to work while retaining some scope for review after time. However, significant flexibility on the term was provided at the discretion of the Regulator to allow for longer terms which were thought to be needed for new pipelines (perhaps 10 to 15 or more years) and possibly also for mature pipeline systems as the regime became more settled.

⁴ The exact meaning of the coverage test is still being revealed through decision and appeals in relation to a range of coverage and revocation decisions, some still current.

In guiding the Regulator, a very broad range of factors reflecting stakeholder and public interests were identified for the Regulator to consider in making a decision about an access arrangement. However, significant discretion was left with the Regulator regarding how these might be weighed up in reaching a decision. In particular, the aim was to reflect the complex case-by-case issues involved in each specific pipeline in the transition to a new regulatory system.

Given the high level nature of the Code and the common principles involved, after significant debate the view was reached that the differences between transmission and distribution were not so great that they could not be dealt with under a common framework.

(iv) Pricing principles

Access arrangements must include reference tariffs which could be used by users directly for standard services or could be used as a stake in the ground around which to negotiate for non-standard services. As such, the pricing principles to be applied in developing reference tariffs was always going to be one of the most sensitive and contentious issues. These are set out in section 8 of the Code.

The basic objectives were:

- for the capital base at the start of each period to represent the capital costs that the Service Provider should be given a reasonable opportunity to recover (in net present value terms) over the economic life of the assets;
- for the reference tariffs for a period to be developed to produce a stream of revenue over the period that could be expected to recover the efficient cost of delivering the service over the period including a return on capital;
- to provide scope through incentive mechanisms for Service Providers to earn greater profits (or less profits) than anticipated between reviews if they out-perform (or under-perform) the benchmarks on which the reference tariffs are based.

The pricing principles were intended to leave significant flexibility for Service Providers and the Regulator in line with the general tenor of the Code, however:

- the principles do contain a number of important constraints; and
- overarching objectives are listed in section 8.1.

The objectives in section 8.1 are largely economic in nature, reflecting their importance of economics in pricing issues. However, the approval of an access arrangement as a whole including reference tariffs was still subject to consideration of the broader factors in section 2.24. This somewhat unclear arrangement is a good example of the kind of compromises

inherent in the negotiation process involved in the development of the Code.⁵

The main constraints relate to the definition and interaction of:

- the variables in the pricing equation during the period such as total revenue, rate of return, capital base, non-capital costs, etc.;
- the variables surrounding how the capital base changes between reviews such as new facilities investment, depreciation, redundant capital, etc;
- incentive mechanisms; and
- the allocation of costs/revenues between services and between users.

These constraints are generally expressed in terms of one methodology (Cost of Service) but there is the flexibility for Service Providers to propose other equivalent methodologies or combinations of methodologies (NPV or IRR). This basic approach is similar in many respects to incentive regulation approaches that have been used in the US and the UK.

One important constraint was the attempt to isolate the more complex factors to be considered in the transition of existing pipelines to a new regime from the less complex on-going pricing issues, a key decision was to separately identify and "lock in" (ie not revalue in the future) an initial asset base at the first review. Again, a wide discretion was provided to the Regulator in setting the initial capital base given the lack of useful guidance from economics in relation recovery of sunk costs (other than the fairly broad constraints of above scrap value and below replacement cost). A special list of factors for consideration in setting the initial asset base for existing pipelines in section 8.10 for consideration by the Regulator emerged from negotiations.

An important feature of the Code is that it is possible to avoid the pricing principles set out in section 8 by having reference tariffs set by an approved tender process. The idea here is to provide scope for the market to be harnessed to achieve the same objectives as in section 8.1.

The pricing principles and competitive tender provisions provide examples of where the Code is arguably fairly prescriptive (some argue unnecessarily so). While it was recognised by many that simpler principles were possible, the involved nature of the negotiation process on these critical issues limited the scope for refinement in the timeframe available for an agreement. In terms of detailed rules for cost allocation, however, the Code does remain high level.

⁵ Note that the interaction of sections 8.1, 8.10 and 2.24 has been since been explored in an appeal in the WA Supreme court in relation to the regulators draft decision on the Dampier to Bunbury Natural Gas Pipeline.

(v) Enforcement

In line with the basic model adopted, enforcement of the access arrangement and reference tariffs would be primarily through the mechanism of binding arbitration on the terms and conditions of the access arrangement. However, a high incidence of disputes was not envisaged given the scope of access arrangements, the costs and time involved and the expected demand for fairly standard services, other than perhaps in the case of major users seeking non-standard services.

The legislation giving effect to the Code also contains mechanisms for penalties to be imposed for certain breaches of the Code. It is also possible to seek damages, injunctions and declarations in relation to breaches of certain provisions of the Code. This is discussed in more detail in paragraph 2.6 of Appendix 1 to this Submission.

(vi) Independence

Given the high level nature of the Code and the wide discretion in relation to key regulatory roles under the Code, there was a concern that these institutions should be independent from Service Providers and Users but also at arm's length from government (many governments owned gas businesses or were seen to potentially have economic or policy interests in the development of the gas industry or upstream or downstream industries).

The regime attempted to provide a significant degree of independence in the administration of the regime by:

- limiting decisions by individual ministers to coverage (and collectively to Code change);
- using independent bodies such as NCC and Regulators (which did not exist in a number of jurisdictions and had to be established) and Arbitrators as required by clause 11 of the Gas Access Agreement;
- requiring that reasons be given for major decisions and establishing appeals rights for major decisions (to appeals panels on limited grounds in some cases and to the courts) provide the incentive for regulators and arbitrators to provide independent, consistent and legally sound decisions;
- a range of measures to ensure transparency of regulatory process and public availability of information;
- providing for an independent Chair of NGPAC.

(vii) Information and transparency

It was recognised that there was an information asymmetry between the Service Provider, who generally had access to good information, and Users and the Regulator, who has limited information.

If the Code is to provide the framework for Services Providers to establish access terms and prices, and Users to have the opportunity to provide their views, with the Regulator as umpire, then key issues are:

- the availability of information both to the Regulator and to users. There is a wide range of provisions in the Code and the law relating to the collection and dissemination of information and related process issues such as the regulators ability to collect information, Access Arrangement Information, information and timelines for negotiation, etc;
- a high degree of transparency in relation to regulatory processes and decisions to facilitate participation in the process and to "keep the Regulator honest".

(viii) Ring fencing

The ring fencing provisions are an attempt to segregate the business of providing services of a covered pipeline in recognition of the issues surrounding market power and vertical integration.

The provisions are the product of a long debate and are expressed as minimum requirements in terms of the separation of related businesses, costs, information and staff, with some flexibility for additional measures or for waiver of the minimum requirements under certain circumstances.

(ix) Code change

The approach to Code change in many ways was designed to reflect the process that was successful in developing the original Code through GRTF and GRIG for agreement by the governments.

(x) The split between Code and Law

The regime was initially developed as a single draft Code. A process was undertaken to separate out those elements which belong in legislation rather than in the Code. A key difference was that elements in legislation could be amended only by Parliament whereas the Code could be amended by agreement between Ministers: *see Appendix 1*.

Given the generally high level nature of the Code, it was argued by some that it properly belonged in legislation that could be amended by Parliaments rather than in a Code that could be changed by Ministers on the recommendation of NGPAC.

While this is a valid view in many respects, the practical benefits of making (often minor or technical) amendments without the need to go through the legislative process, were seen to outweigh this, especially given the checks and balances in the Code change process.

On a related issue, this was also the reason why a body other than Ministers was not considered to approve Code changes (such as NGPAC or the Regulator as applies under the electricity model), as it was not

thought appropriate to delegate changes to such high level legislation beyond Ministers.

- (xi) Transitional arrangements and derogations, and licensing and franchising principles

The provision in the Gas Access Agreement for governments to identify transitional arrangements derogations to the Code/Law is a reflection of important transitional issues and reflects negotiation process inherent in the design of the gas access regime.

The identification of franchising and licensing principles in the Gas Access Agreement reflects a commitment not to undermine the regime through other regulatory mechanisms.

(g) Concluding remarks

The design of the Code and the unique process through which it was developed, while not perfect, made a significant contribution to the success of gas reform process over the last decade. The NCC recognised the gas reform process as one of the success stories of the competition policy and microeconomic reform.

An understanding of the context and design principles of the Code provides a useful background in understanding the check and balances and compromises inherent in its design, and provides a clearer basis for recognition of improvements that can be made to the Code.

A brief summary of the structure and operation of the Law and the Code is provided in Appendix 1.

6. Proposed Code/Law changes that did not proceed

6.1 Introduction

The purpose of this section is to outline those Code/Law change issues that have not resulted in a change and to highlight those that may be relevant to the Productivity Commission's review of the Gas Access Regime.

Appendix 4 includes a summary of all Code change issues considered by NGPAC including their history and their final or current status. Of the 32 issues:

- 15 of them resulted in recommendations for changes to the Code/Law that have been approved by Ministers (and/or passed by Parliament) and are now in operation.
- One recommendation to Ministers was withdrawn by NGPAC before it could be approved by all Ministers. This issue involved the overlap between the Code and Part IIIA of the TPA, is covered in more detail in section 6.2.
- 7 were considered by NGPAC and no further action was taken as either a change was not required, the issue was withdrawn or the issue was seen as beyond NGPAC's remit to progress by itself and so referred to governments to be addressed. These issues are probably of little relevance to the PC review.
- 9 were considered by NGPAC and put on hold pending a major review and/or changes in priority or the availability of resources to consider them. Some of these issues are highly relevant to the PC review and are discussed in more detail in sections 6.3 to 6.5 of this submission. Others are of a minor or technical nature and are not discussed.

6.2 Overlap between the Code and Part IIIA of the TPA

At its meeting of 28 Nov 2000, NGPAC considered a proposal by EPIC Energy with the sponsorship of the AGA to amend Code to avoid overlap between an undertaking under Part IIIA of the TPA and the Code.

Epic Energy at the time was proposing the potential construction of a transmission pipeline from Darwin to Moomba. Epic Energy had a strong preference for making an undertaking under Part IIIA of the TPA rather than under the Code. Epic Energy and AGA outlined that an amendment was urgent to remove regulatory uncertainty, if Part IIIA undertaking was accepted by the ACCC, whether it would be subsequently covered under the Code. A change was urgent as EPIC Energy outlined that there was only a short window of opportunity available in which to progress the project.

NGPAC agreed at that meeting to progress consideration of a possible Code change as a matter of urgency. Significant work was undertaken to progress the Code change out of session and a draft information memorandum was prepared for consideration at the 2 March 2001 meeting of NGPAC. At this meeting NGPAC agreed to release an information memorandum, which recommended amendment of the Code to avoid the possibility of coverage for the duration of any Part IIIA undertaking, for public consultation.

An information memorandum was released for Public consultation. A copy of this paper is provided in Appendix 5, and provided a good outline of the key issues. Following consideration of public submissions, NGPAC made a recommendation to Ministers for a Code Change.

Before the recommendation was approved by all Ministers, the Australian Competition Tribunal (ACT) made a decision on an appeal in relation to a coverage decision for the Eastern Gas Pipeline (EGP). Following consideration of this decision, combined with consideration of advice from the NCC that a pipeline with a Part IIIA undertaking that was accepted by ACCC was unlikely to meet the criteria for coverage, Epic withdrew its proposal. This led to a re-assessment of whether there was a need for a change.

On 2 March 2001, NGPAC agreed to withdraw the recommendation until the outcome of the EGP decision could be clarified. On 15 August, NGPAC confirmed the withdrawal of recommendation, and noted that there was no priority in further addressing the issue.

6.3 New investment issues

Since the advent of the Code, concerns have been raised about how attractive a regime it was for new investment in pipelines. In assessing the previous issue, Epic Energy and APIA highlighted a series of concerns about the incentives for new investment under the Code to NGPAC at its meeting of 28 Nov 2000. The key issues were subsequently outlined in the public information memorandum on this issue released by NGPAC as follows (see Appendix 5 for more detail):

- clarifying key terms
- actual capital cost not known in advance
- access request before pipeline in service
- information requirement for prospective pipelines
- limits on duration of an access arrangement
- certainty on tariffs across periods
- scope for market based tariffs
- delays
- prescription, flexibility and regulatory discretion

In addition to the above, there have been a range of other issues raised with NGPAC over time concerning incentives for new investment under the Code, including issues surrounding extension of distribution systems.

NGPAC asked the Project Team to prepare a paper on these issues. This paper was considered at the 23 May 2001 meeting, and NGPAC:

- agreed, in principle, to Code change on issue of "clarifying key terms" (this Code change is minor and technical in nature and has been held back until it can be bundled with more substantive new investment issues);
- referred the other issues to a Working Group.

A Working Group assessment of the issues was tabled at the 15 August 2001 meeting. NGPAC noted the paper and asked for a further paper on the priority issue of market based tariffs for competitive pipelines.

The Project Team paper on market-based tariffs was discussed at the 21 November 2001 meeting. NGPAC agreed to defer further consideration of new investment issues until after Productivity Commission report on the national access regime was available.

Meanwhile, the issue of the regulatory environment for greenfields pipelines had begun to be addressed by the ACCC, in relation to both the Code and the Part IIIA undertaking routes, which was discussed at NGPAC on 21 November 2001. The ACCC provided draft greenfields guidelines to NGPAC on 14 August 2002. These guidelines provide the ACCC perspective on the many issues that may arise in relation to new investment under the Code or a Part IIIA undertaking.

There was a long delay from the completion of the PC review and the public release of its findings. Once the report was released, the Project Team provided a paper for the 4 April 2003 meeting of NGPAC summarising the reviews finding in relation to gas and suggesting an approach to tackling new investment issues. NGPAC decided to reconsider these issues when terms of reference for PC review of Gas Access Regime are available.

The Secretariat would be happy to provide further papers from NGPAC on these issues (with the permission of NGPAC) if this is considered useful by the PC for its review.

6.4 Information collection between reviews

The issue was raised by the Regulators in relation to the inadequacy of information collection powers outside of those powers available in a review. Regulators claim that the ability to specify the information that a Service Provider should collect and maintain is crucial to having the right information in existence for the review. The risk was that in the absence of specification, this information will not be collected or will be collected in a less relevant form. They claim that the existing power for Regulators to specify guidelines for the collection of financial information under the ring fencing provisions is inadequate as this does not cover non-financial information.

This is a complex issue as it requires a good understanding of the interaction of:

- the various information gathering powers of the Regulator and their strengths and limitations;
- the kind of information that is required in a review;
- the kind of information that is typically collected and maintained by a Service Provider, and the costs they may incur in responding the information requests.

This is an issue that was raised relatively early in NGPAC's life and on which NGPAC has expended considerable energy but which remains unresolved. It is important to outline the sequence of events as it is on this issue in particular that NGPAC appears to have been criticised in terms of slow progress. The Regulators were seeking a general (largely unbounded) power to require Service Providers to collect and maintain information outside of a review.

NGPAC asked the Project Team to prepare a paper scoping out the issues. This paper was considered at the 25 August 1999 meeting along with an IPART paper. Service Providers were concerned about any extension of powers, especially unbounded powers, given the broad powers already available, the possibility of "fishing trips" by the Regulator, the cost of responding to requests and the inability of the Regulators to specify exactly what kind of information was required. The Regulators had difficulty specifying exactly what kind of information they required. NGPAC asked the regulators to define what information they required and consult with Service Providers before returning to NGPAC. Service Providers were also of the view that the definition of information powers was debated at length in the Code/Law development process and the final powers were a key part of the negotiated outcomes that led to the Code/Law. As such they should not be changed.

At the 30 November 1999 meeting, NGPAC agreed that user representatives should also be included in discussions, and if the parties were unable to develop a joint position any of the three parties may call on the Project Team as a facilitator. Later upstream representative were also added to those to be consulted. User and upstream representatives were concerned that information issues has been important in access arrangement delays and outcomes and were supportive of extended powers.

IPART provided a paper to NGPAC on 15 August 2001, nearly two years after the original request. However, the regulators had not clearly defined what information they required and why, and they had not consulted with industry. Nevertheless, NGPAC discussed the issue and agreed to convene a Working Group in an attempt to make some progress.

The Working Group met and the Program Manager reported the outcomes to the 21 November 2001 meeting. NGPAC agreed that the Project Team should progress a more detailed paper in consultation with Working Group. This paper was provided to the 20 March 2002 meeting of NGPAC. NGPAC discussed the issue and agreed to the preparation of draft information memorandum as the basis for a final decision by NGPAC at its planned May meeting on whether or not to progress the issue and, if so, in what form.

The May meeting was cancelled so an out-of-session vote was taken, with the result that there was not unanimous support among jurisdictions regarding whether the Regulators had made the case for additional powers.

At the next meeting on 14 August 2002, the issue was again discussed and NGPAC agreed that it would not support a new unbounded information gathering power for Regulators and that the Project Team should prepare a paper that explored the alternatives. This paper was considered by the jurisdictions, and agreed to the preparation of a draft information memorandum for a more bounded Code change.

Finally, at the meeting of 4 April 2003, NGPAC considered the draft but, given the proximity of a major review of the Code/Law, agreed not to progress the issue at this point but to refer the issue to the major review.

The secretariat of NGPAC has collected a substantial file on this issue including a series of papers from the Project Team and from a range of interested members. These papers provide an analysis of the issue as well as information on broader information collections powers and issues. If the Productivity Commission is interested, the Secretariat would be

happy to provide copies of relevant documents (with the permission of NGPAC and relevant members).

6.5 Other issues of relevance to the PC review

(a) Scope of the Code

This is a significant issue that was raised early in NGPAC's life. The issue concerns how the Code/Law, which was a completely new regime, interacted with other legislation in relation to licensing, technical, safety, environmental or other regulation. Whether there were inconsistencies, overlaps, or gaps that led to serious problems which required clarification or amendment.

While it was a significant issue, it was not one which NGPAC could easily deal with by itself given the spread of legislation and jurisdictions involved. NGPAC has no remit to advise on issues other than those related to the Code/Law unless directed to by Ministers, which it was not. In any case, these matters were thought to be best dealt with by individual jurisdictions or jointly by jurisdictions through, initially, the Gas Policy Forum (and its successor the Energy Market Development Committee of MCE).

This remains an area where NGPAC could make a contribution if requested by jurisdictions or Ministers.

(b) Competing pipelines

During the construction of the EGP, the pipeline connected with the existing AGL system in a number of locations and also duplicated some lengths of pipeline in the AGL network. The operator and major users of EGP were concerned that tariff restructuring by the incumbent was leading to cost being shifted away from competitive parts of the systems to be recovered in non-competitive parts of the network. The NSW government was also concerned and raised the issue at NGPAC on 29 February 2000.

The Project Team prepared a number of paper on the issues and identified a range of issues concerning "competing" pipelines including the above cost shifting issue, duplication issues, competition at the fringes of networks, market based tariff for competitive pipelines and related coverage issues.

NGPAC deferred consideration of these issues pending the outcome of the EGP coverage decision and appeal. Subsequently, the issue were not assessed of sufficient priority to progress. It may be that such issues are of relevance to the review. If so, the Secretariat will be happy to provide any materials prepared on this (with the permission of NGPAC).

(c) Regulation of service standards

The Code/Law is largely silent on the issue of regulation of service standards. However, a natural corollary of the regulation of prices is the definition of the standard of service that is inherent in that regulated price. This is, in effect, a form of service standard regulation.

Regulators have pursued a number of approaches to service standards regulation in gas and electricity, including at the more innovative end some incentive mechanisms for reflecting service standards in price regulation.

This issue was raised at NGPAC by IPART on 26 May 1999, with the regulators invited to provide a further paper to progress the issues. The regulators did not provide another paper and the issue has remained on hold.

NGPAC has not prepared any material on this issue, but, it is pointed out as it may be of interest to the PC review.

Appendix 1

Overview of the Code and the laws that give it legal effect

This Appendix provides a brief description and commentary of the structure and operation of the Law and the Code. In broad terms there are three instruments that give legal effect to the Code:

- each State and Territory has passed a "Gas Pipelines Access (name of State/Territory) Act" (the **Application Acts**). These Acts apply, as a law in each State and Territory, Schedules 1 and 2 to the South Australian Act;
- Schedule 1 to the South Australian Act, which contains various provisions necessary to give the Code legal effect. Schedule 1 is often referred to as the "Law", although in this Appendix it is referred to more precisely as "Schedule 1";
- Schedule 2 to the South Australia Act, which is the Code.

1. Overview of legal structure

1.1 How the Code is given legal effect.

The Code, and the Commonwealth, State and Territory Acts that give it legal effect, are intended to create a uniform national regime regulating third party access to natural gas pipelines. In broad terms this is achieved through an application of laws scheme, like Corporations Law scheme that applied prior to 2001.

South Australia acted as the scheme's lead legislator. In 1997 South Australia passed the *Gas Pipelines Access (South Australia) Act* (the **South Australian Application Act**). That Act applies the "Gas Pipelines Access Law" as a law in South Australia⁶. The Gas Pipelines Access Law is set out in Schedules 1 and 2 of the South Australian Application Act. Schedule 1 consists of provisions necessary to give the Code legal effect (for example, it deals with how the Code may be amended, the procedures to apply in the arbitration of access disputes, the consequences of a breach of the Code and administrative appeals from decisions of various bodies made under the Code). Schedule 2 consists of the Code. The contents of Schedule 1 are summarised in section 2 below. The contents of the Code are summarised in section 3.2(d) below. The South Australian Application Act also deals with various South Australian specific matters including the conferral of functions on local Code bodies, the Code Registrar and transitional arrangements.

Each other State and Territory (other than Western Australia) has passed its own *Gas Pipelines Access (name of State/Territory) Act*, which applies the Gas Pipelines Access Law as set out in Schedules 1 and 2 to the South Australian Act, as amended from time to time, as a law of that State or Territory. The Application Acts of each other State and

⁶ Section 7.

Territory also deal with other local matters such as the conferral of functions on local Code bodies and transitional arrangements.

Western Australia has enacted its own *Gas Pipelines (Western Australia) Act 1998*, which has essentially identical effect to the *Gas Pipelines Access (South Australia) Act 1997*. That Act applies the Gas Pipelines Access Law (as set out in Schedules 1 and 2 to the Western Australian Act) as a law of Western Australia. The critical difference between Western Australia and the other States and Territories is that when Schedule 1 to the South Australia Application Act is amended that Schedule as amended is automatically adopted as a law in each other State and Territory. In the case of Western Australia, Western Australia needs to pass its own law to amend Schedule 1. The Code change provisions are, however, the same in Western Australia and the other States and Territories (see section 1.4 below).

The *Gas Pipelines Access (Commonwealth) Act 1998* completed the coverage of the access regime by ensuring, amongst other things, that the Gas Pipelines Access Law applies in offshore waters. The Commonwealth Act also permits the use of certain Commonwealth bodies as decision makers under the Code.

1.2 Code Bodies

The various Application Acts, in combination with Schedule 1 to the South Australian (and Western Australian) Application Acts and the Code, appoint various Commonwealth, State and Territory bodies as decision makers under the Code. The following table summarises the institutions appointed to make various decisions under the Code.

	Transmission	Distribution
1. Coverage Decisions		
(a) Recommendations	National Competition Council (NCC).	NCC.
(b) Decisions	If the pipeline is located in one jurisdiction: the Commonwealth Minister, except in SA, WA and NT where it is the local minister.	If the pipeline is located in one jurisdiction, the local minister.
	If the pipeline is located in 2 or more jurisdictions: the Commonwealth Minister.	If the pipeline is located in 2 or more jurisdictions: the local minister of the jurisdiction "most closely connected".

	Transmission	Distribution
(c) Administrative Appeals	For appeals from the Commonwealth Minister: Australian Competition Tribunal (ACT). For appeals from the local minister: the ACT, except in SA and WA where it is the local appeals body.	For appeals from the local minister: ACT, except in SA and WA where it is the local appeals body.
2. Regulatory decisions including in relation to access arrangements		
(a) Decision	Australian Competition and Consumer Commission, except in WA where local Regulator.	Local Regulator. ⁷
(b) Administrative appeals	From decisions of the ACCC: ACT.	From decisions of the local Regulator: local appeals body. ⁸

⁷ The local regulators are:

- New South Wales: Independent Pricing and Regulatory Tribunal;
- Victoria: Essential Services Commission;
- Queensland: Queensland Competition Authority;
- South Australia: Essential Services Commission of South Australian;
- Western Australia: Western Australian Office of Gas Access Regulation;
- Tasmania: Tasmanian Energy Regulator;
- Australian Capital Territory: Independent Competition and Regulatory Commission;
- Northern Territory: Australian Competition and Consumer Commission.

⁸ The local appeals bodies are:

- New South Wales: Australian Competition Tribunal;
- Victoria: Essential Services Commission Appeals Panel;
- Queensland: Queensland Gas Appeals Tribunal;
- South Australia: The District Court;
- Western Australia: Western Australian Gas Review Board;
- Tasmania: Australian Competition Tribunal;
- Australian Capital Territory: Australian Competition Tribunal;
- Northern Territory: Australian Competition Tribunal.

The above allocation of responsibilities is, as a legal matter, achieved through the interaction of the Code and certain definitions contained in Schedule 1 to the South Australia Application Act (and Schedule 1 of the Western Australian Application Act) and the Application Acts of the individual States and Territories and the Commonwealth.⁹

9

In relation to coverage decisions section 1 of the Code confers responsibility for making recommendations on the NCC and responsibility for decisions on the "Relevant Minister". The Relevant Minister is defined in Schedule 1 of the South Australia Application Act (and Western Australia Application Act) relevantly as follows:

- in relation to a coverage decision about a transmission pipeline situated in one jurisdiction the "Relevant Minister" is the "designated minister". The term "designated minister" is in turn defined in each State and Territory's Application Act to mean in each case the Commonwealth Minister, except in South Australia and the Northern Territory where the designated minister is defined as the local minister. In Western Australia the equivalent of Schedule 1 of the South Australian Act provides that the local minister will make coverage decisions about all transmission pipelines;
- in relation to a coverage decision about a transmission pipeline situated in 2 or more jurisdictions the relevant minister is the Commonwealth Minister (except in Western Australia whose Act is silent on this situation);
- in relation to a coverage decision about a distribution pipeline the "Relevant Minister" is the local minister of the jurisdiction in which the distribution pipeline is situated (or if it is situated in 2 or more jurisdictions the local minister of the jurisdiction "most closely connected" to the pipeline).

In relation to appeals from coverage decisions Part 6 of Schedule 1 provides for the "relevant appeals body" to hear administrative appeals from coverage decisions (amongst other decisions). The relevant appeals body is defined in Schedule 1 to mean:

- in relation to a decision of the Commonwealth Minister, the Australian Competition Tribunal;
- in relation to a decision of a local minister, the "designated appeals body". The "designated appeals body" is defined in the various State and Territory Application Acts to be the Australian Competition Tribunal, except in South Australia and Western Australia where the local appeals body is the designated appeals body.

In relation to the regulatory decisions taken under the Code (for example whether or not to accept an access arrangement, waive ring fencing requirements or approve an associate contract) the Code confers responsibility on the "Relevant Regulator". The term "Relevant Regulator" is also defined in Schedule 1 to the South Australian (and Western Australia) Application Acts as follows:

- in relation to transmission pipelines the relevant Regulator is the Australian Competition and Consumer Commission (**ACCC**), except in Western Australia where Schedule 1 of the West Australian Act provides that the relevant Regulator is the local Regulator;
- in relation to distribution pipelines the relevant Regulator is the local Regulator of the jurisdiction where the distribution pipeline is located (or where the distribution pipeline is in 2 or more jurisdictions, the local Regulator of the jurisdiction determined to be most closely connected with the pipeline).

In relation to appeals from regulatory decisions where those appeals are allowed under Part 6 of Schedule 1 the appeal is to the "relevant appeals body". In relation to a decision of the ACCC, the appeal is to the Australian Competition Tribunal. In relation to a decision of the local Regulator, the appeal is to the local appeals body.

For the purposes of the application of the above rules, Schedule 1 contains provisions to allow pipelines to be classified as transmission or distribution pipelines and to allow for the determination of the jurisdiction most closely connected to a distribution pipeline that spans 2 or more jurisdictions: *sections 10, 11 and 12 of Schedule 1.*

1.3 The jurisdiction of the courts and judicial review

The Application Acts of South Australia and each other State and Territory initially purported to give both the Federal Court and the relevant State or Territory Supreme Court jurisdiction in relation to the general enforcement of the gas pipelines access regime (other than Western Australia which conferred jurisdiction only on the Western Australian Supreme Court). The intention was that proceedings seeking civil penalties, damages, injunctions or declarations in relation to alleged breaches of the Code could be brought in either the Federal Court or the State and Territory Supreme Courts. The Commonwealth legislation consented to this conferral of jurisdiction on the Federal Court.¹⁰ This arrangement was similar to the scheme that applied under the Corporations Law at the time.

On 17 June 1999 the High Court handed down a decision in relation to the Corporations Law in which it held that the Constitution prevented State legislation conferring jurisdiction on the Federal Court, even where Commonwealth legislation had purportedly consented to such conferral of jurisdiction (*Re: Wakim; ex parte McNally* [1999] HCA 27) (*Wakim*). The effect of the decision in *Wakim* was that the conferral by the States of jurisdiction on the Federal Court with respect to general enforcement was invalid. The States' Application Acts have since been amended to delete the previous references to the Federal Court. As a consequence, the Supreme Courts of the States are now solely responsible for hearing enforcement actions under the Code as applied in the relevant States. In the ACT and the Northern Territory both the Federal Court and the State Supreme Courts still have jurisdiction.

In relation to judicial review, the Application Acts of the States and Territories initially purported to apply the *Commonwealth Administrative Decisions Judicial Review Act 1977* (the *ADJR Act*) as a law of the State or Territory to decisions taken by Code bodies. (In Queensland this applied only to Commonwealth Code bodies, with Queensland judicial review laws applying to Queensland Code bodies.) By virtue of the provisions of the ADJR Act any judicial review would be carried out by the Federal Court. Again, the Commonwealth legislation purportedly consented to the conferral of ADJR Act jurisdiction by the States and Territories on the Federal Court. The Commonwealth legislation also directly applied the ADJR Act to Commonwealth Code bodies.¹¹

The effect of the decision in *Wakim* was that the conferral by the States of jurisdiction on the Federal Court with respect to judicial review was invalid.

Subsequently, the relevant legislation has been amended to remove from the State's (and the ACT's) Application Acts the sections purportedly applying the ADJR Act. As a consequence, each State's own judicial review laws now apply to decisions made under

¹⁰ See the definition of "court" in section 9 and sections 18(a) and 19 of the Gas Pipelines Access (South Australia) Act 1997 as enacted and the equivalent provisions in each other State and Territory's Application Act (except Western Australia) and sections 31-37 of the Gas Pipelines Access Law as enacted. See also section 16(2)(a) and 17 of the Gas Pipelines Access (Commonwealth) Act 1998 as enacted.

¹¹ See sections 18(b), 20 and 21 of the *Gas Pipelines (South Australia) Act* as enacted and equivalent provisions in each other State and Territory's Application Act and section 16(2)(b), 18 and 19 of the Commonwealth Act as enacted.

that State's Application Act, including Schedule 1 and the Code. The decision of the Western Australian Supreme Court in re: *Dr Ken Michael; ex parte Epic Energy (WA) Nominees Pty Ltd* [2002] WASCA 231 is an example of a judicial review conducted by a State Supreme Court of a decision under the Code.

The Commonwealth and Northern Territory Application Acts still apply the ADJR Act.

1.4 How Schedule 1 and the Code are changed

Schedule 1 of the South Australian Application Act can be amended only by the South Australian parliament. If Schedule 1 is amended by the South Australian parliament, Schedule 1, as amended, is automatically applied as a law of the Commonwealth and in each other State and Territory, except Western Australia. In Western Australia, only the Western Australian parliament can amend Schedule 1 to the Western Australian Application Act.

The Intergovernmental Agreement requires each jurisdiction not to amend its Application Act unless the amendment has been approved in writing by all Ministers. It also obliges South Australia to submit to its parliament a bill amending Schedule 1 if and when a bill has been approved in writing by all Ministers. Similarly, Western Australia is obliged to submit to its parliament a bill amending Schedule 1 of the Western Australian Act if that bill has been approved in writing by all Ministers. Western Australia must also take all reasonable measures to ensure that at all times Schedule 1 as enacted in Western Australia has essentially identical effect to Schedule 1 to the *South Australian Act* (see section 6 of the IGA).

The Code can be amended by agreement between the relevant Ministers of each participating jurisdiction, provided that the Ministers have first received a report from NGPAC: see the section 9.1 of the Code and section 6(1) of Schedule 1. Before issuing such a report, NGPAC must, if it considers the amendment is significant, follow a prescribed public consultation process in relation to the proposed Code change: see Code section 9.2. An amendment of the Code does not require the approval of any Parliament despite the Code taking effect as a law in each state and Territory (subject to one exception noted below).

Ordinarily, the agreement of all Ministers is required for an agreement amending the Code to be effective. An agreement amending the Code may, however, be made by two-thirds of relevant Ministers provided the amendment does not amend a "core provision" within the meaning of the Code, extend the application of section 38 of Schedule 1 (dealing with administrative appeals) and does not insert a provision dealing with a matter not previously dealt with in the Code. An agreement between Ministers to amend the Codes is ineffective if it purports to amend the criteria for coverage: see section 6(2), (3) and (4) of Schedule 1.

Seven Amending Agreements have to date been made. These are discussed in more detail in section 4 below.

1.5 Inter-relationship between the access regime and Part IIIA of the Trade Practices Act

The Gas Pipelines Access Regime as applying in each of the States and Territories (other than Queensland) has been certified by the Commonwealth Minister to be an "effective

access regime for the purposes of Part IIIA of the *Trade Practices Act* (see section 44N of the *Trade Practices Act*).

The effect of certification is that the NCC cannot recommend, and the Commonwealth Minister cannot decide, to “declare” under Part IIIA a service provided by means of a “covered” pipeline unless the NCC or the Commonwealth Minister believes that since the certification decision was published there have been substantial modifications of the access regime (see sections 44G(4) and 44H(6)). Importantly, certification of the gas access regime as an effective access regime does not preclude a Service Provider offering or the ACCC accepting an access undertaking under section 44ZZA of the *Trade Practices Act*. The existence of the gas access regime is of course likely to be a relevant consideration for the ACCC in deciding whether or not to accept an “access undertaking” (one of the criteria the ACCC must have regard to is whether access to the service is already the subject of an access regime).

2. Short commentary on Schedule 1

2.1 Introduction

Schedule 1 to the South Australian Application Act (and Schedule 1 to the Western Australian Application Act) contain provisions necessary to give the Code legal effect, as described below.

One of the issues that was discussed early in the process of development was the possibility of combining Schedule 1 and the Code. As both Schedule 1 and the Code are given effect as a law of the Commonwealth and each State and Territory, it would be possible to combine Schedule 1 and the Code without altering their legal effect. The most important difference between Schedule 1 and the Code is that Schedule 1 can be altered only by the South Australian (and Western Australian) parliament, whereas the Code can be altered by agreement between Ministers.

It may well assist stakeholders to understand the national access regime if Schedule 1 and the Code were combined. If such a step was taken, however, then difficult issues may arise in relation to the amendment of that combined document. In particular, should the combined document be capable of amendment only by Parliament or should the whole document be subject to change by Ministerial agreement (or by some alternative method not involving parliament). The latter approach would provide more flexibility but may not be something Parliaments will agree to given that the Code operates as a law and should therefore be subject to Parliamentary control.

2.2 The Code and amendment of the Code

Part 2 of Schedule 1 of the Code deals principally with the mechanism for amending the Code discussed in section 1.4 above. It also places obligations on the Code Registrar to make copies of the Code available.

2.3 Determining relevant institutions

As noted in section 1.2 above, part 3 of Schedule 1 contains a mechanism for classifying a pipeline as either a distribution or transmission pipeline and also for determining in relation to a distribution pipeline situated in the jurisdictional area of two or more scheme participants, the scheme participant with which the pipeline is most closely connected. These classifications are relevant for determining which the relevant institutions are in relation to various decisions to be made under the Code.

2.4 Hindering access

Section 13 of Schedule 1 prohibits certain persons, including a Service Provider, an associate of a Service Provider or a person who is a party to an agreement with a Service Provider, from engaging in conduct for the purpose of preventing or hindering the access of another person to a service provided by means of a Code pipeline.

2.5 Arbitration of access disputes

Part 4 of Schedule 1 contains provisions that apply in relation to any arbitration of an access dispute. Part 4 needs to be read in conjunction with section 6 of the Code, which also deals with arbitration of access disputes. In broad terms, Part 4 of Schedule 1 deals with the rules and procedures in relation to the conduct of the arbitration whereas section 6 of the Code deals more with the factors to be considered by the arbitrator in making a decision and the parameters for the arbitrator's decision. For example, Part 4:

- allows the relevant Regulator to conduct the arbitration or appoint another person to do so: section 16;
- provides that the arbitration hearing is to be held in private, unless otherwise agreed: section 18;
- allows a party to appear in person or be represented: section 19;
- provides for procedures in relation to the conduct of the arbitration: sections 20, 21 and 22;
- makes provision for the compulsory disclosure of information and the power to compel a person to appear as a witness: sections 23 to 29;
- deals with the costs of the arbitration: section 30;
- provides for an appeal on a question of law to the Court: section 31.

2.6 Proceedings for breach of law

Part 5 of Schedule 1 makes provision for proceedings to be brought in relation to certain breaches of the Gas Pipelines Access Law, including the Code.

In broad terms, provisions of the Gas Pipelines Access Law are classified as "civil penalty provisions", "regulatory provisions" and "conduct provisions".

If a person has breached a civil penalty provision (or attempted to do so or aided and abetted, etc such a breach) the Court may, on the application of the relevant Regulator, impose a pecuniary penalty. The civil penalty provisions are sections 13 and 40 of

Schedule 1 (dealing with hindering access and unbundling gas supply and transportation) and provisions of the Code prescribed in regulations.¹² The maximum penalties are set out in regulations.

In relation to regulatory provisions, the court may, on the application of the relevant Regulator only, grant an injunction to restrain a breach of that section or make a declaration. The regulatory provisions are set out in section 10.7 of the Code.

In relation to conduct provisions, any party, including **but not limited to** the relevant Regulator, may bring proceedings seeking an injunction, damages for contravention or declaratory relief. The conduct provisions are also defined in section 10.7 of the Code.

The key differences between a regulatory provision and a conduct provision are that only the Regulator may bring proceedings based on a breach of a regulatory provision, whereas any party can bring proceedings based on a breach of a conduct provision. Also, damages are available for a breach of a conduct provision, but not for a breach of a regulatory provision.

2.7 Administrative appeals

Part 6 establishes a right for certain persons adversely affected by certain decisions made under the Code to apply to the relevant appeals body for a review of the decision.

Under section 38 of Schedule 1, a person adversely affected by the following decisions may apply to the relevant appeals body for a review of the decision:

- a decision in relation to coverage, including revocation of coverage;
- a decision to add to or waive ring fencing requirements;
- a decision not to approve an associate contract.

In a review under section 38, the relevant appeals body effectively remakes the decision.

¹² Gas Pipelines Access (South Australia) Regulations currently prescribes the following sections of the Code as civil penalty provisions and provide for the maximum civil penalties set out below.

Section 2.2 [Submission of Access Arrangement and Access Arrangement Information] \$100,000

Section 2.4 [Submission of separate access arrangements] \$100,000

Section 2.9 [Changes to access arrangement information] \$50,000

Section 2.28 [Submission of access arrangement revision and access arrangement information] \$100,000

Section 2.30 [Submission of separate access arrangement revisions] \$50,000

Section 3.15 [Compliance with queuing policy] \$100,000

Section 4.1 [Minimum ring fencing obligations] \$100,000

Section 4.3 [Additional ring fencing obligations] \$100,000

Section 4.14 [Reporting breach of ring fencing obligations] \$50,000

Section 5.1 [Maintenance and information package] \$100,000

Section 5.3 [Provision of information package to prospective users] \$50,000

Section 5.4 [Provision of specific information to prospective users] \$50,000

Section 5.5 [Investigations on behalf of a prospective user] \$50,000

Section 5.6 [Provision of an explanation if capacity does not exist] \$50,000

Section 5.7 [Confidential information] \$100,000

Section 5.8 [User to provide information about unutilised capacity to the market] \$20,000

Section 5.9 [Public register of capacity] \$100,000

Section 6.16 [Compliance with decision of an arbitrator] \$100,000

Section 7.1 [Associate contracts] \$100,000

Section 7.20 [Disclosure of information to end users] \$20,000

Section 7.21 [Non-disclosure of the fact of an end user request] \$20,000.

In addition, under section 39, a Service Provider or a person who made a submission to the relevant Regulator in relation to an access arrangement and whose interests are adversely affected by the decision, may apply to the relevant appeals body for a review of a decision by the relevant Regulator to approve the Regulator's own access arrangement or the Regulator's own revisions to an access arrangement. A Service Provider may also apply to the relevant appeals body for a review of a decision by the relevant Regulator to disallow a variation proposed by a Service Provider of a reference tariff within an access arrangement period or to make the Regulator's own variation of a reference tariff within an access arrangement period.

Importantly, section 39 of Schedule 1 does not allow for an application for review to be brought in relation to a decision by a relevant Regulator to **accept** a Service Provider's access arrangement or variations to reference tariffs. Furthermore, a review can only be brought on certain limited grounds specified in section 39(2). The material the relevant appeals body may consider in relation to a section 39 appeal is limited to the material set out in section 39(5).

The rights of appeal under section 39 were considered by the Australian Competition Tribunal in an application by Epic Energy South Australia Pty Ltd [2002] A CompT4 (27 November 2002). The ACCC had drafted and approved its own access arrangement in relation to the Moomba to Adelaide pipeline. Epic applied to the ACT for a review of that decision. In a decision dealing with some preliminary issues the ACT made the following findings:

3. Epic's only right of review was under section 39. It did not have a right to have the ACCC's decision reviewed under section 38.
4. Epic Energy could not, as part of its submissions in support of its application, seek to incorporate new matter, including expert opinion evidence or material of a rebuttal nature, which was not before the ACCC before the decision under the review was made.
5. The ground of want of procedural fairness was not an available ground for the purposes of seeking a review under section 39.

In considering the limited and, in one sense, one sided right of appeal under section 39, it should be born in mind that it was initially proposed that there be no rights of administrative appeal from such a decision by the Regulator. No appeal was provided for because it was thought that the relevant Regulator was best equipped to make a decision in relation to an access arrangement and to avoid unnecessary delays in establishing a final access arrangement. Service providers strenuously objected to the absence an administrative appeal right. As a consequence section 39 was inserted to seek to balance the interests of Service Providers in having a right of recourse if an access arrangement was imposed by the relevant Regulator, without, however, allowing unlimited appeal rights.

2.8 Unbundling of gas supply and transportation

Section 40 of Schedule 1 contains a provision that requires a producer of natural gas who offers to supply natural gas through a covered pipeline other than at the exit flange at the producer's processing plant to also, upon request, state the terms and conditions upon which the producer will supply natural gas at the exit flange. The producer must provide a statement of reasons for the difference between the delivered and undelivered prices.

2.9 Information collection

Sections 41 and 43 of Schedule 1 contain provisions relating to Regulator's information gathering powers. These provisions are discussed further in section 6.3 in the body of this submission.

3. Short commentary on elements of the Code

3.1 Coverage

The Code applies to pipelines used for transporting natural gas (*Pipelines*). The Code applies to both transmission pipelines and distribution networks but does not apply to upstream facilities.

The operative provisions of the Code apply only to Pipelines that are "covered" by the Code. A Pipeline may become covered in a number of ways.

- Certain Pipelines, which are listed in a Schedule to the Code, are covered automatically. The Schedule lists all major Australian Pipelines in existence at the time the Code came into effect.
- A Pipeline may be declared to be "covered", on a case-by-case basis, by a relevant Minister (after having received a recommendation from the National Competition Council) if the Pipeline satisfies certain criteria for coverage.
- The owner or operator of a Pipeline may volunteer to have the Pipeline covered.
- A Pipeline will also become covered if a competitive tender process conducted under section 3 of the Code is used to select the Service Provider for a new Pipeline.

The coverage of a Pipeline may be revoked by a relevant Minister (after having received a recommendation from the National Competition Council) if the Minister is satisfied that the criteria for coverage are not satisfied. An extension is also covered, if a pipeline that is already covered and the extension/expansions policy contained in the access arrangement provides for extensions and expansions to be part of the covered pipeline.

3.2 Access arrangements

The owner or operator of a covered Pipeline (a Service Provider) must establish an "Access Arrangement" to the satisfaction of the relevant Regulator for that covered Pipeline. An Access Arrangement is a statement of the policies and the basic terms and conditions that will apply to third party access to a covered Pipeline. The relevant Regulator is the ACCC in the case of transmission Pipelines (except in Western Australia

where there is an independent State Regulator) and there will be an independent State or Territory Regulator in the case of distribution Pipelines (except in the Northern Territory where the ACCC is the Regulator).

As a minimum, an Access Arrangement must include:

- a description of the services provided by means of the covered Pipeline (a **Services Policy**);
- a statement of the “Reference Tariffs” that a Service Provider will charge for certain defined services provided by the covered Pipeline (**Reference Services**) and a statement of the principles that were used to determine the Reference Tariff (a **Reference Tariff Policy**);
- the Terms and Conditions on which the Service Provider will supply each Reference Service;
- a Capacity Management Policy;
- a policy on the trading of Pipeline capacity (a **Trading Policy**);
- a Queuing Policy (in the case of a transmission pipeline, and at the discretion of the Regulator in the case of distribution pipelines), which defines the priority that Prospective Users will have to negotiate for spare capacity;
- an Extensions/Expansions Policy; and
- a Review Date.

A Service Provider and a person seeking access are free to agree to terms and conditions that differ from those contained in the Access Arrangement (except where it affects the interests of other users or potential users under the Queuing Policy). If a dispute about access arises and is referred to the relevant Regulator for arbitration (see below), the Regulator must, amongst other things, apply the provisions of the Access Arrangement in resolving the dispute.

3.3 Reference Tariff Principles

The Code sets out principles with which Reference Tariffs and the Reference Tariff Policy contained in an Access Arrangement must comply. The Reference Tariff Principles are designed to provide a high degree of flexibility so that the Reference Tariffs and Reference Tariff Policy can be designed to meet the specific needs of each Pipeline.

3.4 Negotiation

The Code includes a number of provisions designed to facilitate negotiation between a Service Provider and a person seeking access. In particular, Service Providers for covered Pipelines are required to:

- establish, and provide to bona fide access seekers, an information package containing general information on the terms and conditions of access and explaining how to make a specific access request;
- respond within 30 days of a specific request for access; and

-
- in the case of a transmission pipeline (and at the discretion of the Regulator in the case of distribution pipelines) establish and maintain a public register of spare and developable capacity.

3.5 Dispute resolution

The Code establishes a mechanism whereby disputes between a Service Provider and access seekers in respect of covered Pipelines can be submitted to the relevant Regulator for binding arbitration (or, in Western Australia, to a separate statutory body, the Gas Disputes Arbitrator). The Regulator's decision may deal with any matter relating to access. For example, the decision may require the Service Provider to offer to enter into a contract to provide a service to the access seeker at a specified tariff and on specified terms and conditions.

In resolving an access dispute the Regulator must, amongst other things, apply the provisions of the Access Arrangement. If the sole subject of a dispute is what tariff should apply to a Reference Service, the Regulator must make a determination requiring the Reference Service to be provided at the Reference Tariff.

3.6 Ring fencing

The Code includes a number of provisions designed to ensure the separation of activities in non-contestable markets (the ownership and operation of a covered Pipeline) from activities in contestable upstream and downstream gas markets (for example, retailing of gas) (a **Related Business**). In particular:

- a Service Provider must not conduct a Related Business (as a consequence a vertically integrated Service Provider will need to transfer its upstream or downstream activities to another company, for example, a subsidiary);
- any contract between a Service Provider and an "associate" for a service may be entered into only if approved by the relevant Regulator;
- Service Providers must maintain separate accounts for activities that are the subject of an Access Arrangement;
- confidential information provided to a Service Provider by a user of a covered Pipeline, or obtained by a Service Provider which might reasonably be expected to affect materially the commercial interests of a user, must be kept confidential and not disclosed, for example, to an associate of the Service Provider who competes with the user; and
- marketing staff of a Service Provider must not work for an associate that takes part in a Related Business and marketing staff of an associate that takes part in a Related Business must not work for the Service Provider.

Appendix 2

Amendments to the Code and the Law

Amendments made to the Code

In all, changes in relation to fifteen issues through seven Amending Agreements have been made by relevant Ministers to the Code. The following table summarises the various changes made.

Short description of amendment	Amending Agreement
Ability to release end user information: to clarify that a Service Provider may release certain information to end users (ie customers) on request without requiring the approval of the pipeline user (eg a retailer) (insertion of new clause 4.1(a) and new definitions of "end user" and "end user information" in section 10.8).	First Amending Agreement
Real versus historical cost: to clarify that reference tariffs may be set in real as well as nominal terms (insertion of a new clause 8.5A and amendment of clauses 8.9 and 8.33).	First Amending Agreement
Associate contracts: to clarify that a person should not be considered as an associate solely because that person has, or proposes to enter into, a contract with a Service Provider to acquire a service (amended definition of "associate").	First Amending Agreement
Process for approving access arrangements: to amend the process for approving access arrangements and revisions to access arrangements to provide the Regulator with a discretion to approve a final access arrangement that only substantially complies with the Regulator's final decision (extensive revisions to section 2).	Second Amending Agreement
Who can be a Service Provider: to amend section 4.1 of the Code to permit a foreign company to be a Service Provider provided that the foreign company has appointed a local agent (revision to section 4.1(a)).	Second Amending Agreement
Ring fencing tax costs: to clarify that in determining whether or not to waive ring fencing obligations the relevant Regulator may take into account tax costs of ring fencing (revisions to section 4.15).	Second Amending Agreement

Short description of amendment	Amending Agreement
<p>Obligation to release end user information: to place an obligation on Service Providers to release certain end user information on the request of the end user to facilitate to introduction of retail competition (new sections 7.20, 7.21 and 7.22 and amendments to sections 10.7 and 10.8 of the Code).</p>	Second Amending Agreement
<p>Cross period incentive mechanisms: to amend the reference tariff principles in section 8 of the Code to allow cross period incentive mechanisms, that is a mechanism that would allow a Service Provider to retain some or all of the benefits arising from efficiency gains during a reference tariff period, after the expiry of the reference tariff period (amendments to section 8.4 and 8.44).</p>	Third Amending Agreement
<p>Proposed pipelines: to clarify application of the coverage tests to proposed pipelines (amendments to section 1.20, 1.21, 1.22 and 2.3)</p>	Third Amending Agreement
<p>Queuing policy for distribution pipelines: to provide that a queuing policy are not required for distribution pipelines, unless the relevant Regulator so requires (amendment to section 3.12).</p>	Third Amending Agreement
<p>Capacity register for distribution pipelines: to provide that a capacity register is not required for distribution pipelines, unless the relevant Regulator so requires (amendment to section 5.9).</p>	Third Amending Agreement
<p>Variation of reference tariffs during an access arrangement period: to clarify that reference tariffs may be varied in accordance with an approved reference tariff variation method during an access arrangement period and to provide for an administrative role for the Regulator in approving such variations during an access arrangement period (new sections 8.3, 8.3A, 8.3B, 8.3C, 8.3D, 8.3E, 8.3F, 8.3G and 8.3H and consequential amendments including insertion of numerous new definitions in section 10.8 of the Code).</p>	Fourth Amending Agreement
<p>Marketing costs: to clarify that costs incurred in generic market development activities may be recovered as non-capital costs under the reference tariff principles (amendment to section 8.36).</p>	Fifth Amending Agreement

Short description of amendment	Amending Agreement
Merging of covered pipelines: amendments to allow for a single access arrangement to be proposed in relation to more than one covered pipeline (new sections 2.4A, 2.28, 2.28A, 2.28B).	Sixth Amending Agreement
New facilities investment: amending the provisions relating new facilities investment to clarify, first, that capital expenditure incurred in providing services, including the cost of non-pipeline assets such as IT systems, could be rolled into the capital base of the covered pipeline subject to applicable efficiency and other criteria and, secondly, to clarify that the Regulator can agree before an access arrangement review that forecast expenditure will meet the relevant criteria for inclusion in the capital base at the forthcoming review.	Seventh Amending Agreement

Amendments to legislation

The South Australia Application Act and Schedule 1 to that Act have been amended on three occasions.

The *Statutes Amendment (Federal Courts – State Jurisdiction) Act 2000* and the *Statutes Amendment (Corporations) Act 2001* amended the South Australian Application Act and Schedule 1 to remove references to the Federal Court and the *Administrative Decisions (Judicial Review) Act* following the Wakim Decision (discussed above). Similar amendments have been made by the Commonwealth and the other States.

The *Gas Pipelines Access (South Australia) (Reviews) Amendment Act 2002* amended section 39 of Schedule 1 to allow for appeals from a decision of the relevant Regulator in relation to variations to a reference tariff within an access arrangement period. This amendment was made in conjunction with the Fourth Amending Agreement discussed above. A similar amendment has also been made in Western Australia to Schedule 1 to the Western Australia Act: *Gas Pipelines Access (Western Australia) (Reviews) Amendment Act*.

Appendix 3

NGPAC report to Ministers February 1999 to 31 December 1999

1. Background

The domestic natural gas industry makes a significant contribution to Australia's economy. It provides an economic and environmentally efficient fuel source for industry, electricity generation, transport, commerce, and households. As a result of Australia's geography and previous government policies, the gas market developed in such a way that most major markets in Australia were served by a single transmission pipeline connecting the market to a single basin. Within a particular market, commercial end-users were generally supplied by a single, state-based retailer. The supply basin itself was also typically dominated by a single joint venture producer. The Australian gas industry was therefore characterised by a monopoly structure in the gas production, transmission, distribution and retail sectors as well as varying degrees of vertical integration. The resultant lack of diversity of supply, and hence supply security, was exposed during the Longford disaster in 1998.

Negotiations to provide for third party access to natural gas pipelines took place through a Council of Australian Governments' (CoAG) forum, at which all stakeholders were represented. The negotiations were held in the context of the national competition reform agenda to facilitate access to 'essential' facilities in order to promote competition, investment and economic growth.

Governments, representatives of the gas industry and gas users, regulators and national competition bodies worked cooperatively through a series of complex and sensitive issues to develop a regime to facilitate third party access to natural gas pipelines. Users and marketers of gas have now been empowered to seek access to previously monopoly run facilities on reasonable terms and conditions.

The rules and principles governing access conditions and price faced by third party users of downstream delivery infrastructure are enshrined in the National Third Party Access Code for Natural Gas Pipeline Systems (the Code). This document derives its national standing from the gas access legislation and Gas Pipelines Access Law which is uniform legislation passed by the Parliaments of all jurisdictions which entered into the CoAG Natural Gas Pipelines Access Agreement of November 1997 (the "IGA").

Users and marketers of gas may now seek access to previously monopoly run facilities on reasonable terms and conditions through the new regulatory regime.

The parties to the IGA recognised the importance of involving stakeholders in the administration and evolution of the third party access regime. Accordingly, the IGA provided for the establishment of the National Gas Pipelines Advisory Committee (NGPAC) which involves the direct participation of non-voting industry representatives.

The implementation of the Code has the potential to expand downstream investment activities, as well as increase gas consumption and production. Accordingly, it is in the interests of gas producers, pipeline owners and gas consumers to work towards pro-competitive and efficient outcomes, which could also drive sustainable investments across the gas industry chain.

2. Function and Remit

The role of NGPAC is established in clause 9 of the IGA and is elaborated in section 6 of the Pipeline Access Law and part 9 of the Code. The IGA set up NGPAC with responsibility for “administration of the Code”. Its functions are defined as being to:

- (a) monitor, review and report on the operation of the Gas Pipelines Access Law (including the Code);
- (b) provide advice to Ministers on interpretation and administration of the Gas Pipelines Access Law (including the Code);
- (c) prepare information on Gas Pipelines Access Law (including the Code) for general publication; and
- (d) make recommendation on amendments to the Gas Pipelines Access Law (including the Code) to Ministers.

The members of NGPAC include an independent Chair and representatives of the Commonwealth and each of the States and Territories, together with industry and regulator representatives. Membership and their contact details are set out in [Appendix 1](#).

3. NGPAC Modus Operandi

NGPAC is the formally constituted vehicle for administering the rules now governing access to extensive natural gas infrastructure assets worth billions of dollars. NGPAC is the only entity which can make recommendations to Ministers on proposed changes to the Code designed to improve its operation.

NGPAC recognises that any recommendation by it to amend the Code must conform to a transparent set of procedures. At the same time members are concerned to avoid unnecessary complexity and have preferred to develop procedures only as a need is clearly perceived. A copy of the present set of procedures is attached as [Appendix 2](#).

As a general approach, NGPAC concluded that, during its first year of operation, its most important function should be to correct any perceived anomalies and ambiguities in the Code which were identified through the experience of pipeline operators, users and regulators in assessing the inaugural batch of Access Arrangements. NGPAC further determined that any proposals for Code change should be categorised as:

- uncontroversial corrections clarifications of minor inconsistencies or anomalies in the Code where all members agree on the true intention of the provision;
- addressing “significant” or otherwise important omissions or inconsistencies where practical experience, implementation or administration of the Code has revealed that an amendment is necessary to promote the clear intention of the regime, and where the matter cannot wait until finalisation of the first round of Access Arrangements; and
- issues identified as needing to be addressed in the Code, but which are not currently inhibiting the operation of the Code, and whose consideration could be deferred until a broad substantive review of the operation of the Code.

In assessing proposals to amend the Code, NGPAC must determine the level of significance of the change. In the case of significant changes an open and transparent public consultation process is incorporated into the assessment of the proposed Code change.

The first two categories are taken up by NGPAC for analysis (and public consultation where necessary) before recommendation of a Code change to Ministers. The third category is retained in a watching brief for review of priority for action in the light of experience and availability of resources.

NGPAC is staffed by a Secretariat located within the South Australian Office of Energy, Adelaide where the Code Registrar is also located. The Chair is provided with the use of an office within the Commonwealth Department of Industry, Sciences and Resources in Melbourne.

NGPAC has selected a panel of consultants in the fields of project management, policy and economic analysis, legal and technical expertise which can be called upon to provide arms length, third party expert advice and analysis. The consultants contracted to date are listed in [Appendix 3](#). A Project Manager, currently Mr James van Smeerdijk, of The Allen Consulting Group, manages the consultancy effort, undertakes preparation of agenda papers and assists the Chair.

4. Financial Arrangements and Budget

Clause 9.5 of the IGA stipulates that: "The Commonwealth will pay one third of the costs of funding the NGPAC (including its Chair) and the Code Registrar (including any damages or legal costs arising out of the Code Registrar performing its functions under the Code). The balance of those costs will be shared by the Parties (other than the Commonwealth) on the basis of population".

Largely because NGPAC dealt with procedural issues in late 1998 and did not commence dealing with substantive Code changes until 1999, the 1998/99 NGPAC budget agreed by GRIG was significantly underspent in that financial year and was carried forward into 1999-2000. The Financial and Operating Statement for 1998-1999 is at [Appendix 4](#). The budget for 1999-2000, and expenditure to 31 December 1999 is attached as [Appendix 5](#). The proposed Budget for 2000–2001 is attached as [Appendix 6](#).

Concerns about the ability of the NGPAC to fulfil all of its functions and to provide timely and credible advice to Ministers on Code change proposals and other matters, have generated some robust debates at NGPAC meetings. This has led to a re-examination of how the NGPAC manages its work. Nevertheless, there is ongoing concern about budget constraints.

5. Summary of Code Change Proposals

The Code changes agreed by Ministers and the status of other Code change proposals submitted to the NGPAC over the period are set out in [Appendix 7](#).

By the end of 1999, the NGPAC had considered 21 Code change proposals, of which 14 had been proposed by regulators. NGPAC has agreed to recommend 7 Code change proposals to Ministers for approval. Three of these, which were not considered significant, related to:

- clarifying that historical cost may be used in the Code
- clarifying the definition of associate
- the ability for a Service Provider to provide end user information to another retailer at the request of the end user.

Ministers approved these three changes and the changes were gazetted in the South Australia gazette on 23 December 1999.

The other four Code changes were considered significant. As required under section 9.2 of the Code, NGPAC prepared an information memorandum and undertook public consultation on these proposed Code changes. The NGPAC then considered the submissions received before making recommendations to Ministers.

The four significant Code change proposals which NGPAC has agreed to recommend to Ministers comprise:

- the inclusion of taxes within “administrative costs” where a Regulator is required to balance the private administrative costs against the public benefit when considering a waiver of ring fencing arrangements (proposed by Western Australia);
- expanding the definition of “legal entity of a Service Provider” to include a foreign company (proposed by Victoria);
- providing regulators with discretion to approve a Service Provider’s revised access arrangement where the Service Provider has substantially incorporated the amendments specified by the Regulator or satisfactorily addressed the matters identified by the Regulator;
- a requirement for a Service Provider to disclose end user information to a retailer, if requested to do so by the end user (important to facilitate end users changing to a different gas retailer).

6. Review of Operation of Gas Pipelines Access Law

This section provides a summary of the status of implementation of the gas pipeline access regime in each jurisdiction. Information is provided under the following headings:

- legislation;
- Code implementation;
- derogations;
- NCC certification; and
- other comments.

It should be noted that the contributions in section 6 of this report have been provided directly by jurisdictions and other members of NGPAC. In these contributions views of the particular member may not reflect the views of NGPAC as a whole.

6.1. Commonwealth

Legislation

The *Gas Pipelines Access (Commonwealth) Bill 1998* was passed by the Federal Parliament on 9 July 1998. The Act received Royal Assent on 30 July 1998.

On 17 June 1999 the High Court handed down a decision in the *Wakim* case that the Constitution prevented State legislation conferring jurisdiction on the Federal Court, even where Commonwealth legislation had consented to such conferral of jurisdiction. The decision has implications for the

general enforcement and judicial review provisions under the Gas Pipelines Access Law (the Law) and the Code.

The effect of the High Court's decision is that conferral by the States of jurisdiction on the Federal Court to deal with general enforcement matters, for example, proceedings seeking civil penalties, damages, injunctions or declarations in relation to alleged breaches of the Law or the Code, is invalid. These matters will in future need to be dealt with by the Supreme Court in each State.

The gas pipelines access legislation of each State and Territory also purports to apply the Commonwealth *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act) as a law of the State and Territory to decisions taken by State and Territory "Code bodies". The High Court's decision means that the conferral by the States of jurisdiction on the Federal Court to deal with judicial review of the State Code bodies, through the application of the ADJR Act, is also invalid.

As a result of the High Court's decision, the Commonwealth and the States will need to amend their *Gas Pipelines Access (Name of State) Acts*. The proposed amendments to the *Gas Pipelines Access (Commonwealth) Act 1998* are contained in a Commonwealth omnibus Bill, the *Jurisdiction of Courts Legislation Amendment Bill*. The Bill proposes to remove from Commonwealth legislation provisions which purport to consent to the conferral of State jurisdiction on Federal Courts.

The omnibus Commonwealth Bill also proposes to amend the ADJR Act to permit review under the Act of decisions made by Commonwealth officers and bodies under specified State laws. For example, decisions by officers of the Australian Competition and Consumer Commission in respect of access arrangements for a gas pipeline under a State or Territory law would be reviewable under the ADJR Act.

The Commonwealth consulted the States and Territories on the proposed changes to the Commonwealth's legislation, which was anticipated to be placed before the Autumn 2000 session of Parliament. Complementary amendments will be required to State legislation.

Code Implementation

The *Gas Pipelines Access (Commonwealth) Act 1998* includes amendments to the *Trade Practices Act 1974* to allow, amongst other things, the national competition bodies to exercise powers and functions under the Code. It also includes amendments to other legislation to ensure that the Code can be applied by the States and Territories, to the Moomba–Sydney Pipeline, and to pipelines beyond the territorial sea. The national competition bodies include:

- the ACCC as the national Regulator of transmission pipelines (except in Western Australia);
- the National Competition Council (NCC) which certifies jurisdiction regimes as effective and is the adviser on coverage (ie to which pipeline the regime should apply); and
- the Australian Competition Tribunal (ACT) which reviews certain decisions of the ACCC and the NCC.

Derogations

Nil.

NCC Certification

The NCC has given in-principle approval that the national gas pipelines access regime is an “effective” access regime for the purposes of Part IIIA of the Trade Practices Act. Each State and territory regime is required to be certified by the NCC.

Other Comments

Australia wide implementation of the third party access Code for natural gas pipelines is a major step in establishing “free and fair trade” in natural gas. The regime is contributing to lower gas haulage rates, increasing the competitiveness of gas-consuming industries, stimulating investment and generating jobs.

Stability in the regulatory regime will be an important factor in providing certainty for continued investment in gas pipeline infrastructure. It will be important to ensure that any Code change proposals are consistent with the maintenance of a broad national regulatory framework which encourages commercial negotiations and also enables independent regulators to exercise a significant degree of flexibility in determining the terms and conditions of third party access to gas pipelines.

6.2. New South Wales

Legislation

The enabling legislation, the *Gas Pipelines Access (NSW) Act 1998* to implement the National Access Code passed through the NSW Parliament in June 1998. The Act commenced operation on 14 August 1999. It has not been amended.

Consideration is being given to amend the *Gas Pipelines Access (NSW) Act* to address the difficulties arising from the High Court decision on *Wakim*.

A Savings and Transitional Regulation under the *Gas Pipelines Access (NSW) Act* was introduced in June 1999. The purpose of the Regulation is to extend the expiry date of AGL Gas Networks' Access Undertaking from 30 June 1999 until it is replaced by a revised one approved by the Independent Pricing and Regulatory Tribunal. This is expected to occur in early 2000. Jurisdictions were advised of the Regulation.

Code Implementation

The National Access Code has been in operation in NSW since August 1998. The local Code bodies are fully in operation. No application for coverage or revocation has been received since the operation of the Code.

Three separate access arrangements have been assessed under the National Access Code. They are: AGL Gas Networks' (AGLGN) revised deemed Access Arrangement; Albury Gas Company's Access Arrangement; and Great Southern Energy Gas Networks Pty Ltd's (GSEGN) Access Arrangement. The deemed AGLGN's Access Arrangement and GSEGN's Access Arrangement are currently in operation.

In April 1999, GSEGN filed with the Australian Competition Tribunal (ACT) an application for the review of the decision by the Independent Pricing and Regulatory Tribunal not to accept GSEGN's revised access arrangement but to issue its own access arrangement. At the hearing on 20 May 1999, however, GSEGN withdrew its application for review of the Tribunal's decision.

Derogations

Derogations as per the Gas Pipelines Access (NSW) Act are enforced.

NCC Certification

NSW submitted the *Gas Pipelines Access (NSW) Act 1998*, to implement the National Access Regime, to the NCC on 27 October 1998 for certification under the Trade Practices Act. The Commonwealth Minister for Financial Services and Administration, the Hon Joe Hockey, MP advised NSW in August 1999 of his decision to delay certification of the NSW Access Regime until the difficulties arising from the High Court decision on cross-vesting are rectified. As indicated, options to amend the Gas Pipelines Access (NSW) Act are being considered.

Other Comments

Mandating third party access to services provided by monopoly pipelines has led to increased interests in pipeline construction. The Interconnect pipeline linking the Victorian pipeline systems to the NSW pipeline systems commence operation in August 1998. This pipeline has the initial capacity to transport 20 petajoules per year between Victoria and NSW.

Construction has begun on a 740 km pipeline from Longford in Victoria to Horsley Park in NSW. This pipeline has the capacity to transport 90 petajoules of gas per annum and is expected to be in operation in September 2000. In addition, a number of lower pressure pipelines have either been constructed or in the process of being constructed, in NSW.

The number of authorised suppliers in NSW has increased significantly from 3 in 1997 to 21 in 1999.

A result of the recent competition reforms is that there is now more gas competition in NSW. In addition, NSW no longer has to depend on the Cooper Basin for almost all its natural gas requirements.

6.3. Victoria

Legislation

The *Gas Pipelines Access (Victoria) Act 1998* came into operation from 1 July 1999. As from 1 July 1999, the National Third Party Access Code for Gas Pipeline Systems as applied in Victoria regulates the operation of the Victorian gas transmission and distribution systems. An interim access regime modelled on the national regime operated in Victoria from December 1997.

Code Implementation

Access arrangements for the Victorian distributors and the owner and operator of the transmission system were approved by the Office of the Regulator-General and the Australian Competition and Consumer Commission in November and December 1998 respectively.

Derogations

The Victorian Code is the same as the National Code with some minor exceptions. The exceptions relate principally either to points of transition between the interim Victorian regime and the national regime or to provisions specific to the interim regime.

NCC Certification

An application for certification of the Victorian regime is being considered by the NCC at the time of writing (November 1999).

Other Comments

It is noted that Victoria has suspended the proclamation of Division 2 of Part 3 of the *Gas Pipelines Access (Victoria) Act 1998*. This is because the High Court in the recent case of *Re Wakim* held that cross-vesting of the powers of State Courts in Federal Courts is unconstitutional. This means any judicial review would have to be heard by the Supreme Court of Victoria.

6.4. South Australia

Legislation

The Gas Pipelines Access (South Australia) Act 1997 came into operation on 30 July 1998.

The regulations under the *Gas Pipelines Access (SA) Act 1997* were published in the South Australian Government Gazette on 16 December 1999 and came into operation on that date.

A plan to coordinate state responses to the High Court's decision re: *Wakim* was sent to all NGPAC members on 29/10/99, and a discussion draft prepared by South Australia Parliamentary Counsel, was presented to NGPAC for consideration at its meeting of 30 November 1999.

Code Implementation

The Code commenced operation at the same time as the Act on 30 July 1998.

The South Australian Independent Pricing and Access Regulator (SAIPAR), Mr Graham Scott commenced in the Regulator's position on 2 April 1998.

The South Australian Gas Review Board, which hears appeals, is chosen from two panels. These panels were established on 19 February 1998. The legal practitioners panel currently has 2 members, and the experts panel currently has 6 members.

The Code Registrar, a statutory officer under the Act was gazetted as the Executive Director of the Office of Energy Policy on 19 February 1998. Dr Cliff Fong is the current Code Registrar. The Code Registrar's Annual Report for 1998/99 was tabled in the South Australian Parliament on 27 October 1999.

An application was made by Epic Energy, to the National Competition Council, for revocation of coverage of the South East Pipeline System, under sections 1.24 and 1.25 of the Code.

The access arrangement for the SA distribution pipelines was submitted to SAIPAR by Envestra Ltd on 22 February 1999.

The access arrangement for the Moomba to Adelaide transmission pipeline was submitted to the ACCC by Epic Energy on 1 April 1999.

Derogations

All derogations as listed in Annex I of the CoAG Natural Gas Pipelines Access Agreement are still current. Customers with annual loads greater or equal to 10 Tj became contestable on 1 July 1999.

NCC Certification

The South Australian regime for access to natural gas pipeline services was certified as "effective" by the Commonwealth Minister for Financial Services and Regulation, the Hon Joe Hockey, MP on 8 December 1998.

Other Comments

South Australia has put forward to NGPAC in the past year a non-controversial Code change proposal which clarifies the responsibility of various parties to provide information for the Code's Public Register. This particular proposal will be progressed in 1999/2000.

South Australia has provided the Secretariat for NGPAC, which is funded by all jurisdictions.

6.5. Western Australia

Legislation

The legislation implementing the Gas Pipelines Access Law in Western Australia – the *Gas Pipelines Access (Western Australian) Act 1999* (the Act) was passed by the Western Australian Parliament on 23 December 1998 and commenced operation on 9 February 1999.

Consequent to the proposed sale of the State owned utility – AlintaGas, a set of consequential amendments to the Act have been approved by all jurisdictions as required under the National Gas Pipelines Access Agreement (the Agreement). The amendments are mechanical and do not affect the operation of the Act or, where they may be perceived to do so, have the potential to accelerate/limit the scope of Western Australia's transitional arrangements agreed under the Agreement. The legislation enabling the sale of AlintaGas and containing those consequential amendments – the *Gas Corporation (Business Disposal) Act 1999*, commenced operation on 24 December 1999.

Regulations under section 87 of the Act - the *Gas Pipelines Access (Western Australia) (Funding) Regulations 1999* were made on 14 January 2000 to provide for fees and charges in connection with the performance of the functions of the Western Australian Independent Gas Pipelines Access Regulator. Regulations under Section 12 of *Gas Pipelines Access (Western Australia) Act 1998* to provide, amongst other things, for penalties for breaches of the Gas Pipelines Access Law and the Code were gazetted on 2 May 2000.

Code Implementation

The *Gas Pipelines Access (Western Australian) Act 1998* established the Offices of the Western Australian Independent Gas Pipelines Access Regulator (the Regulator), the Western Australian Gas Disputes Arbitrator (the Arbitrator) and the Gas Review Board (the Board).

Dr Ken Michael was appointed as the Regulator and the Chief Executive Officer of the Office of Gas Access Regulation (OffGAR) on 2 June 1999. Dr Michael had acted in this position since 23 February 1999.

Access disputes in Western Australia are referred to the Arbitrator for resolution. Mr Laurie James was appointed as the Gas Disputes Arbitrator on 9 September 1999.

In Western Australia, appeal of determinations of the Regulator or the Relevant Minister would be to the Board. The Board is assembled on an ad-hoc basis drawing upon panels of legal practitioners and of other relevant experts. The Governor appointed specific persons to the panels in April 2000. OffGAR provides administrative services to the Regulator, the Arbitrator and the Board, as required.

Following the commencement of the Western Australian Act, applications for revocation of Code coverage were submitted to the NCC in respect of seven pipelines located in Western Australia and listed in Schedule A to the National Access Code at its commencement. The NCC

recommended, and the Western Australian Relevant Minister subsequently made decisions to revoke the Code coverage in respect of five of those pipelines, namely:

- Karratha to Cape Lambert Pipeline – Pipeline Licence WA:PL8;
- Beharra Springs to CMS Pipeline - Pipeline Licence WA:PL18;
- Goldfields Gas Transmission Pipeline (GGT) to Mt Keith Power Station Lateral - Pipeline Licence WA:PL25;
- GGT to Leinster Power Station Lateral - Pipeline Licence WA:PL26;
- GGT to Kalgoorlie Power Station Lateral - Pipeline Licence WA:PL28.

However, the NCC recommended, and the Western Australian relevant Minister subsequently made decisions, to not revoke the Code coverage in respect of two of the pipelines subject to the above mentioned applications, namely:

- Tubridgi to DBNGP Compressor Station No.2 – Pipeline Licence WA:PL16;
- Kalgoorlie to Kambalda Lateral - Pipeline Licence WA:PL27.

CMS Gas Transmission Australia lodged with the Regulator its proposed Access Arrangement for the Parmelia Pipeline (PLs 1, 3, 5 & 23) on 7 May 1999. On 27 October 1999 the Regulator issued a Draft Decision in relation to that proposed Access Arrangement. The Regulator is expected to release his Final Decision shortly.

AlintaGas lodged its proposed Access Arrangement for the Mid West and the South West Distribution System on 30 June 1999. The first phase of the public consultation process in relation to this proposed Access Arrangement has been completed and the Regulator released his Draft Decision on 14 March 2000.

Origin Energy Resources has lodged its proposed Access Arrangement for its Tubridgi Pipeline System (PL16 & PL19) and the first round of public consultation in relation to that Access Arrangement has been completed. The Regulator is expected to release his Draft Decision shortly.

Epic Energy lodged its proposed Access Arrangement for the Dampier to Bunbury Natural Gas Pipeline (DBNGP, PL40) on 15 December 1999. On the same date, the Goldfields Gas Transmission Pty Ltd lodged its proposed Access Arrangement for the Goldfields Gas Pipeline system (PL24).

So far no appeals or disputes have been lodged in accordance with the provisions of the Gas Pipelines Access Law in Western Australia.

Derogations

Following is the current status of derogations in Western Australia:

- The Western Australian Independent Gas Pipelines Access Regulator regulates under the National Access Code all covered intrastate gas transmission and distribution pipelines in Western Australia. The Relevant Minister in relation to the application of the Code to all intrastate pipelines is the State Minister (Minister for Energy).

- The Western Australian Gas Review Board will deal with all administrative appeals under the Code in respect of State bodies, including the Regulator and the Relevant Minister.
- The Supreme Court of Western Australia has exclusive jurisdiction in respect of all matters of law relating to the decisions made by the Regulator in relation to intrastate gas transmission and distribution pipelines. However, this derogation has been superseded by the High Court decision in *Wakim*.
- The Dampier to Bunbury Natural Gas Pipeline was deemed to be covered under the National Access Code until 1 January 2000 by access arrangements in place under the *Dampier to Bunbury Pipeline Act 1997*. As previously mentioned, the owner of the pipeline submitted a proposed Access Arrangement in respect of that pipeline on 15 December 1999.
- The Goldfields Gas Pipeline was deemed to be covered under the National Access Code until 1 January 2000 by the access arrangement in place under the *Goldfields Gas Pipeline Agreement Act 1994*. As previously mentioned, the owner of the pipeline submitted a proposed Access Arrangement in respect of that pipeline on 15 December 1999.
- The AlintaGas Mid West and South West gas distribution systems are deemed to be covered under the National Access Code until 1 January 2000 by arrangements under the *Gas Corporation Act 1994*. However, AlintaGas lodged its proposed Access Arrangement with the Regulator on 30 June 1999.
- Ring fencing of the gas distribution and trading activities of AlintaGas was to be made consistent with the provisions of the Code by 1 July 2002. However, the above mentioned consequential amendments to the *Gas Pipelines Access (Western Australia) Act 1998* under the *Gas Corporation (Business Disposal) Act 1999* accelerate the application of the ring fencing provisions of the National Access Code to AlintaGas to the date of its sale, which is expected to be completed by mid-2000. The State proposes to institute ring fencing by establishing a wholly owned subsidiary of AlintaGas to own and operate AlintaGas' distribution systems.
- A 10 year gas distribution franchise has been granted to AlintaGas for the Kalgoorlie/Boulder distribution system for customers below 100 TJ/annum until 9 February 2009. A Distribution Licence is to be issued to that effect under the *Energy Coordination Act 1994*.
- Under the deregulation timetable, the open access level for the AlintaGas' Mid and South West distribution systems is reduced to 100 TJ/annum on 1 January 2000 and to 1 TJ/annum on 1 January 2002. Access to those systems becomes fully opened on 1 July 2002.

NCC Certification

The Western Australian application for certification of the regime as effective was submitted to the NCC in March 1999. The NCC has submitted its recommendation in regarding the Western Australian application to the Commonwealth Minister for Financial Services and Regulation, the Hon Joe Hockey, MP.

Other Comments

NGPAC has recommended to the Ministers a number of significant proposed changes to the Code. The proposed changes include a change to sections 4.15 of the Code proposed by Western Australia. This proposed change relates to factors to be considered by the Regulator in determining whether to waive ring fencing obligations and involves including in the Code a

provision identical to section 23 (3) of the *Gas Pipelines Access (Western Australia) Act 1999*, which reads:

In making a decision under section 4.15 of the Code, the relevant Regulator may treat any tax liability arising from an exempt matter as an administrative cost referred to in section 4.15 (a) (ii) or (b) of the Code.

An equivalent to subsection 23(3), which was included in the *Gas Pipelines Access (Western Australia) Act* by the Western Australian Parliament, has not been included in the other States and Territories Acts. This amendment is intended to clarify that the Regulator may consider potential tax liabilities as an administrative cost when assessing whether the public benefit of complying with the ring fencing obligations exceeds the cost of those ring fencing obligations.

6.6. Queensland

Legislation

The *Gas Pipelines Access (Queensland) Act 1998* received Assent in May 1998, but a decision was taken not to proclaim the Act at that time, pending the outcome of consideration by the National Competition Council of Queensland's gas access regime. In order to address the introduction of contestability into the retail gas market in Queensland, the approval of other jurisdictions was sought in October 1999 for an amendment to the Act to defer the introduction of the first tranche of contestability (for customers of 100 terajoules or more) to December 2000. The amendment was approved in December 1999. This action was taken to allow sufficient time for Access Arrangements to be considered by the Queensland Competition Authority following the expected imminent commencement of the Act. Amendments to the legislation to provide for the recent High Court decision on conferral of powers to the Federal Court have awaited the outcome of the Commonwealth decision in this respect. Complementary amendments to the Queensland gas access legislation are currently under consideration.

Code Implementation

As the gas access legislation in Queensland has not commenced, the requirement to comply with Code provisions has not yet arisen. In February 1999 steps were taken to finalise membership of the Queensland Gas Appeals Tribunal which, in accordance with legislative provisions, will conduct reviews of decisions under the access legislation.

Derogations

Queensland is awaiting the outcome of a review of derogations under the gas access legislation, which is being conducted by the Australian Competition and Consumer Commission, as consultants to the National Competition Council, as part of the certification process for Queensland's gas access regime.

NCC Certification

Queensland's application for certification of its gas access regime was lodged with the National Competition Council in September 1998. The National Competition Council has engaged the services of the Australian Competition and Consumer Commission to review Queensland's derogations under the legislation and the outcome of that review is expected in the near future.

6.7. Australian Capital Territory

Legislation

The Gas Pipelines Access Act was passed in 1998, which gave effect to the National Pipeline Law including the application of the National Third Party Access Code for Natural Gas Pipeline Systems. The Gas Supply Act, that provides for the supply of natural gas within the ACT, was also passed in the same year. This Act, among other things, covers the licensing of natural gas pipeline infrastructure.

Code Implementation

There are two access arrangements being reviewed by Independent Regulators that affect pipelines in the ACT. EAPL has lodged an access arrangement with the ACCC for the Moomba – Sydney Pipeline System that includes the section of the Dalton – Canberra Lateral Pipeline located in the ACT. The AGL Gas Company (ACT) Limited has lodged an access arrangement with the ACT Independent Pricing Regulatory Commission for the Canberra – Queanbeyan – Yarrowlunla Network. The NSW section of the network has been cross-vested to the ACT.

Derogations

There are no ACT derogations.

NCC Certification

An application for the certification of the ACT Gas Access Regime has been submitted to the NCC. The Commission wishes to clarify the issue of the separation of the ACT IPART's roles of regulation and arbitration. Legislation is being prepared to address this issue.

Other Comments

The ACT is reviewing the implications of the Wakim decision.

6.8 Northern Territory

Legislation

The *Gas Pipelines Access (Northern Territory) Act (No 35 of 1998)* was debated and passed by the Legislative Assembly during the April 1998 sittings. The Act was assented to by the Administrator on 27 May 1998, with an assent notice published in the Northern Territory Gazette of 10 June 1998.

The Act commenced in the Northern Territory on 2 September 1998, following the publication of a notice in Northern Territory Gazette.

The decision in the Wakim case dealing with cross vesting has the same impact on the Northern Territory, as in the States. Therefore section 15 of the *Gas Pipelines (Northern Territory) Act 1998* is invalid and fails in the same way as the States cross vesting provisions that were struck down in the Wakim's case. The issue is currently being considered by the Northern Territory Attorney-General's Department.

Code Implementation

NT Gas, the operator of the 1600 km long Amadeus to Darwin gas transmission pipeline, submitted its access arrangements to the ACCC for approval in July 1999. This followed a 6-month postponement, granted by the ACCC, to NT Gas in which to submit its access arrangements. The NT gas access arrangements are currently being considered by the ACCC.

Derogations

Not applicable

NCC Certification

The Northern Territory has not submitted its application to the NCC for certification of its access regime as “effective”. While the application documentation has been prepared by the Northern Territory no formal submission has been made to date.

Other Comments

The Northern Territory is continuing to encourage the development of several new initiatives with the potential to expand the natural gas market. These include proposals to bring gas on shore to Darwin by pipeline from the Timor Sea, and the construction of branch line off the existing Amadeus to Darwin transmission pipeline to supply gas to the Gove peninsula. Gove is a major site of bauxite mining and the processing of the ore to produce alumina.

6.9. Tasmania

Although a gas supply industry has not yet been established in Tasmania, the Tasmanian Government participated in the development of the Code and signed the IGA along with all other jurisdictions on 7 November 1997. Because there is no gas supply industry in Tasmania, however, Tasmania was not required under the IGA to develop legislation in the same timeframe as the other parties, but was instead required to introduce its legislation ‘significantly before’ the first gas pipeline in the State was approved or before any competitive tendering process for a new natural gas pipeline in the State commenced.

The Tasmanian Government elected to introduce its legislation ahead of any obligations under the IGA. The *Gas Pipelines Access (Tasmania) Bill 1999* was passed by the House of Assembly on 3 June 1999. Before the Bill could be introduced to the Legislative Council, however, the High Court (Wakim) decision of 17 June 1999 effectively rendered some sections of the Bill invalid. The Bill was therefore withheld. The Bill has now been amended in line with the draft amendments to the South Australian Act and is awaiting the approval of relevant Ministers.

Duke Energy International is currently assessing the feasibility of constructing a gas pipeline from Longford in Victoria to northern Tasmania to bring natural gas to the State. Legislation to govern the gas supply industry will be developed as part of the process of facilitating the project.

7. Issues

Industry and Consumer Feedback

The Australian Pipeline Industry Association (APIA) believes that the NGPAC should take a more strategic approach to Code change issues. While the Code gives Regulators a wide discretion on many issues, APIA is concerned that Code changes are currently being brought forward on an “ad hoc” basis, mainly by Regulators. APIA believes that NGPAC runs the risk of focussing on the process of effecting changes to the Code at the expense of strategic issues like operation of the market, efficiency and regulatory costs and benefits. In APIA’s view, changes to the Code should not be considered until the first round of Access Arrangements has been finalised and, at this early stage of Code operation, NGPAC must resist the desire by Regulators to increase their powers under the Code.

In APIA’s view, NGPAC should, in future, place a much stronger emphasis on reporting the outcomes that result from the Code arrangements. Once the first round of Access Arrangements is

in place, NGPAC should undertake a comprehensive review of the Code, including an assessment of regulatory costs and the overall costs and benefits of the current approach.

The Business Council of Australia Energy Reform Task Force (BCAERTF), which represents consumer interests, notes that a number of third party access arrangements are in operation following regulatory reviews. BCAERTF also notes that the review processes and the regulatory outcomes have generally worked well and have met the overall objectives of the Code.

In the BCA's view, NGPAC has worked effectively to-date. It has the important task of continuing to iron out anomalies or unintended consequences arising from implementation of the Code, consistent with the guiding principles of NGPAC, such as transparency, open consultations, pro-competition, prioritisation and efficiency.

A key issue that NGPAC needs to keep constantly in mind is the need to minimise transaction costs and regulatory intrusion in the regulatory processes and reviews, when promulgating Code changes. 'Light-handed' regulation should remain the on-going philosophy behind the Code.

Consistency of Regulatory Decisions

Experience by regulators and industry in applying the third party access regime suggests that the uniform approach seems practicable and sensible, and hence easy to implement for a mature distribution system, but may not always be as well suited to a greenfields, entrepreneurial transmission pipeline. While NGPAC members generally adhere to the principles of uniformity, the exigencies of regional implementation have presented a constant challenge. So far, NGPAC has managed to maintain the uniform approach, sometimes under fairly severe pressures. These pressures seem unlikely to abate in the near term, although NGPAC retains confidence that as the new commercial and policy concepts associated with third party access become more commonplace, a *modus vivendi* will emerge offering an equitable and (importantly) predictable business climate.

In the meantime, maintaining the flexibility and uniform national consistency of the Code will be an issue for NGPAC. Pretty well all stakeholders, certainly jurisdictions and industry, embraced the regime on the basis of its minimalist or "light handed" approach. NGPAC is already making some difficult judgements about what changes to the Code are necessary, and what matters should properly be left to a later review of the regime. An appropriate time for such a review would be after the first round of Access Arrangements have been dealt with but before the first round of scheduled reviews of Access Arrangements.

Resources

Another issue for NGPAC is the challenge of preserving its credibility as a genuinely responsive vehicle for Code change. As the IGA and supporting legislation now stands, Ministers may only agree to amend the Code on the recommendation of NGPAC. Since all members of NGPAC (except the Chair) represent stakeholders, which in turn represent a diversity of interests and gas markets of widely differing characteristics, NGPAC has recognised in principle, the need for objective, arms length advice on the full impact and implications of Code change proposals as they come forward.

Hence the selection of a panel of independent expert consultants. Even a decision by NGPAC not to take up a proposal needs to be made on the basis of transparent, objective analysis. The availability of expertise to undertake this objective analysis is not the problem, but its cost has

emerged as an issue. NGPAC has not had sufficient financial resources to undertake the appropriate analysis and evaluation of all the proposals, which have been submitted to it. This has necessitated NGPAC prioritising Code change proposals so those justified as essential are dealt with as the first priority, while others may be held over until a broad review of the operation of the Code. While the financial aspect presents an immediate problem, the longer term challenge is one of credibility of the process by which the third party access regime is kept relevant to developments within this important infrastructure industry.

8. Conclusions

While implementation of third party access to gas pipeline systems has not been without some delays, the landmark restructuring of the gas industry to accommodate third party access to pipelines and distribution systems is well under way. As anticipated during the drafting of the Code, implementation of the Third Party Access Regime so far has brought to light some situations where the Code requires amendment. Some of these amendments are clearly “significant” within the meaning of section 9.2 of the Code.

Private enterprise and public sector Service Provider entities have participated constructively in the dismantling of their hitherto monopoly positions, with attendant revolutionary changes to their traditional property rights. This achievement in so short a time and in a cooperative manner underlines the value that industry, consumers, regulators and jurisdictions have derived from the comprehensive consultative process during the drafting of the Code. This consultative process is now enshrined in the administration of the Code through NGPAC.

There is, of course scope for disagreement about the fitness of the regime in terms of attracting the massive investment still required to give Australia a truly national market in pipeline based natural gas energy. On the one hand, the cooperative attitude of the asset owners in this massive change process so far should not be forgotten nor taken for granted in the future. On the other hand, it is also important to remember that the underlying purpose of third party access is to provide long term benefits to end users and to the community. The Code has struck that balance and NGPAC's role is to continue to consider the development of the Code in that light.

At this stage, as the regime is bedded down, all stakeholders represented on NGPAC are inevitably feeling their way. However, NGPAC feels confident that the third party regime is proving to be fundamentally sound in its approach and fulfilling its essential task of providing the infrastructure for a competitive national market for gas.

APPENDIX 1 — NATIONAL GAS PIPELINES ACCESS COMMITTEE MEMBERSHIP (May 2000)

NAME & POSITION	ADDRESS	TELEPHONE	FAX
NGPAC Chairman Mr Greg Harvey	C/- Dept of Industry Science and Resources 9 th Floor 161 Collins Street Melbourne Vic 3000 greg.harvey@isr.gov.au	03 9268 7590	03 9268 7599
Commonwealth Mr John Hartwell Head of Petroleum and Electricity Division	Department of Industry Science and Resources GPO Box 9839 Canberra ACT 2601 john.hartwell@isr.gov.au	02 6213 7946	02 6213 7970
Commonwealth (Alternate) Ms Chrysanthi Papadopolous General Manager Gas Reform and Taxation Branch, Petroleum and Electricity Division	Department of Industry Science and Resources GPO Box 9839 Canberra ACT 2601 chrys.papadopoulos@isr.gov.au	02 6213 7924	02 6213 7945
New South Wales Mr Bob Neil Acting Director	Ministry of Energy and Utilities PO Box 536 St Leonards NSW 1590 neilr@doe.nsw.gov.au	02 9901 8815	02 9901 8402
New South Wales (Alternate) Mr Phillip Lee Assistant Director Energy Programs and Planning	Ministry of Energy and Utilities PO Box 536 St Leonards NSW 1590 leep@doe.nsw.gov.au	02 9901 8866	02 9901 8402
Victoria Mr John Robinson Director of Energy Policy	Department of Treasury and Finance Level 3 35 Spring Street Melbourne Vic 3000 John.Robinson.@dtf.vic.gov.au	03 9651 3240	03 9651 3192

NAME & POSITION	ADDRESS	TELEPHONE	FAX
Victoria (Alternate) Mr Peter Naughton Manager Energy Market Development	Department of Treasury and Finance Level 3, 35 Spring Street Melbourne Vic 3001 Peter.Naughton@dtf.vic.gov.au	03 9651 3633	03 9651 3192
Queensland Mr Bryan Coulter Executive Director of Energy Division	Department of Mines and Energy GPO Box 194 Brisbane QLD 4001 bcoulter@dme.qld.gov.au	07 3224 8623	07 3237 1227
Queensland (Alternate) Mr Tom Hassed Special Project Manager	Department of Mines and Energy GPO Box 194 Brisbane QLD 4001 thassed@dme.qld.gov.au	07 3224 8611	07 3237 1227
South Australia Dr Cliff Fong Executive Director	Office of Energy Policy Level 19 , 30 Wakefield Street Adelaide 5000 Fong.Cliff@saugov.sa.gov.au	08 8226 5544	08 8226 5541
Western Australia Dr Les Farrant Coordinator of Energy	WA Office of Energy The Governor Stirling Building Level 9, 197 St Georges Terrace Perth WA 6000 lfarrant@energy.wa.gov.au	08 9420 5601	08 9420 5700
Western Australia (Alternate) Ms Dora Guzeleva Manager Planning, Industry Development Division	Office of Energy The Governor Stirling Building Level 9, 197 St Georges Terrace Perth WA 6000 dguzeleva@energy.wa.gov.au	08 9420 5617	08 9420 5700
Tasmania Dr David Harries Assistant Director	Office of Energy Planning and Conservation 2 nd Floor, 144 -148 Macquarie Street Hobart TAS 7000 dn-harries@dot.tas.gov.au	03 6233 3785	03 6224 3476

NAME & POSITION	ADDRESS	TELEPHONE	FAX
Australian Capital Territory Mr Brad Page Director, Industry Policy and Regulation	Department of Urban Services GPO Box 158 Canberra ACT 2601 brad.page@act.gov.au	02 6207 6150	02 6207 6775
Australian Capital Territory (Alternate) Dr Stephen Paterson Manager, Energy and Water	Department of Urban Services GPO Box 158 Canberra ACT 2601 stephen.paterson@act.gov.au	02 6207 6250	02 6207 6255
Northern Territory Mr Donald Hudson Senior Policy Officer	Department of Mines and Energy GPO Box 2901 Darwin NT 0801 donald.hudson@dme.nt.gov.au	08 8999 5363	08 8981 4806
Australian Gas Association (AGA) Mr Ollie Clark Managing Director	Envestra Ltd Level 10, 81 Flinders Street Adelaide SA 5000 ollie.clark@envestra.com.au	08 8227 1500	08 8227 1511
Australian Gas Association (AGA) (Alternate) Mr Greg Evans Policy Manager	Australian Gas Association Level 3 40 Blackall Street BARTON ACT 2600 gevans@canberra.gas.asn.au	02 6272 1530	02 6272 1566
Australian Pipeline Industry Association (APIA) Dr Allen Beasley Executive Director	Australian Pipeline Industry Association 1st Floor, 7 National Circuit BARTON ACT 2604 abeasley@apia.asn.au	02 6273 0577	02 6273 0588
Australian Petroleum Producers and Explorers Association (APPEA) (Alternate) Ms Tracey McMinn Director Energy Markets	Australian Petroleum Producers and Explorers Association GPO Box 2201 CANBERRA ACT 2601 tmcminn@appea.com.au	02 6247 0902	02 6247 0548

NAME & POSITION	ADDRESS	TELEPHONE	FAX
<p>Australian Pipeline Industry Association (APIA)</p> <p>Mr Bruce Connery General Manager</p>	<p>AGL Regulatory Affairs PO Box 944 North Sydney NSW 2059 bconnery@agl.com.au</p>	<p>02 9922 8585</p>	<p>02 9957 3871</p>
<p>Business Council of Australia Energy Reform Task Force (BCAERTF)</p> <p>Mr Bob Lim Adviser</p>	<p>Bob Lim & Co Pty Ltd C/- Management Frontiers PO Box 494 North Sydney NSW 2059 boblimco@ozemail.com.au</p>	<p>02 9957 3552</p>	<p>02 9959 3461</p>
<p>Australian Competition and Consumer Commission (ACCC)</p> <p>Ms Kanwalijt Kaur General Manager - Gas Group Division Microeconomic Reform Division</p>	<p>Australian Competition and Consumer Commission PO Box 1199 Dickson ACT 2602 Kanwalijt.kaur@acc.gov.au</p>	<p>02 6243 1259</p>	<p>02 6243 1205</p>
<p>Australian Competition and Consumer Commission (ACCC) (Alternate)</p> <p>Ms Suzie Copley</p>	<p>Australian Competition and Consumer Commission Level 5, Skygarden 77 Castlereagh Street SYDNEY NSW 2000 suzie.copley@acc.gov.au</p>	<p>02 9230 9112</p>	<p>02 9223 1092</p>
<p>Independent Pricing and Regulatory Tribunal (IPART)</p> <p>Mr Eric Groom Chief Manager of Energy and Other Industries</p>	<p>Independent Pricing and Regulatory Tribunal Level 2, 44 Market Street Sydney NSW 2000 eric_groom@ipart.nsw.gov.au</p>	<p>02 9290 8400</p>	<p>02 9290 2061</p>

NAME & POSITION	ADDRESS	TELEPHONE	FAX
<p>Independent Pricing and Regulatory Tribunal (IPART) <i>(Alternate)</i></p> <p>Mr Gary Drysdale Program Manager, Access</p>	<p>Independent Pricing and Regulatory Tribunal Level 2, 44 Market Street Sydney NSW 2000 gary_drysdale@ipart.nsw.gov.au</p>	02 9290 8477	02 9290 2061
<p>Office of the Regulator General (ORG)</p> <p>Mr Andrew Chow Director, Gas, Water and Ports</p>	<p>1st Floor 35 Spring Street Melbourne VIC 3000 achow@reggen.vic.gov.au</p>	03 9651 0229	03 9651 3688
<p>National Competition Council (NCC)</p> <p>Ms Michelle Groves Director</p>	<p>GPO Box 250B Melbourne Vic 3001 michelle.groves@ncc.gov.au</p>	03 9285 7476	03 9285 7477
<p>Code Registrar (Delegate)</p> <p>Mr Kym Jervois General Manager Energy Reform Policy</p>	<p>Office of Energy Policy Primary Industries and Resources South Australia Level 19 30 Wakefield Street ADELAIDE SA 5000 Jervois.Kym@saugov.sa.gov.au</p>	08 8226 5546	08 8226 5523
<p>NGPAC Executive Officer</p> <p>Ms Julie King</p>	<p>Level 13 30 Wakefield Street ADELAIDE SA 5000 King.Julie@saugov.sa.gov.au</p>	08 8226 5783	08 8226 5866

APPENDIX 2 — NGPAC PROCEDURES

April 2000

1. Introduction

Preamble

The National Gas Pipelines Advisory Committee (NGPAC) is established under clause 9 of the National Gas Pipelines Access Agreement (the Inter-Governmental Agreement or, IGA). NGPAC's functions are set out in clause 9.4 of the IGA. One of NGPAC's functions is to make recommendations to Ministers on amendments to the Gas Pipelines Access Law including the National Third Party Access Code for Natural Gas Pipeline Systems (the Code). Section 9 of the Code sets out certain steps, which NGPAC must follow before making a recommendation to Ministers. Section 6 of the Law then sets out how Ministers, having received advice from NGPAC, may amend the Code. The IGA contains only limited guidance on the procedures NGPAC should follow. Instead, clause 9.4 of the IGA provides that NGPAC may determine its own procedures subject to the requirements as set out in the Gas Pipelines Access Law (including the Code).

The purpose of this document is to outline procedures for the administration of NGPAC.

Role of the Chair

- 1.1 The independent Chair of NGPAC (the Chair) appointed under clause 9.2(a) of the IGA shall chair NGPAC meetings and assist NGPAC to effectively perform its functions through:
- becoming conversant with issues raised in agenda papers prior to meetings and ensuring that meetings reflect NGPAC priorities;
 - chairing meetings to guide development of a consensus, where possible, on issues and summing up outcomes and future actions required.
 - consultation with members to ensure minutes of the meetings accurately reflect the attendance, the views expressed by members and the agreed outcomes;
 - ensuring that actions arising from meetings are progressed;
 - advising Ministers of Code changes recommended by NGPAC and on the operation of the Code and the Gas Pipelines Access Law including through an Annual Report to the Ministers
 - any other activity that NGPAC considers appropriate.

Role of the Secretariat

- 1.2 NGPAC shall appoint a Secretariat to NGPAC (the Secretariat).
- 1.3 The Secretariat shall manage the day to day administration of NGPAC, in consultation with the Chair and in accordance with the directions of NGPAC, including:
- assist in the preparation of correspondence as directed by the Chair;

- managing the budget;
- maintaining membership records;
- organising meetings including advising members of the venue and draft agenda and ensuring agenda papers are prepared and distributed before the meeting;
- making and maintaining a record of the proceedings of meetings;
- processing Code amendment proposals on behalf of NGPAC, including
 - receiving and distributing copies of the proposals (where appropriate) to members and determining members views on the significance of the proposals;
 - receiving public submissions sought by NGPAC on Code change proposals and distributing copies of the submissions (where appropriate) to members;
 - referring Code amendment proposals and related matters to the appropriate persons (consultants, members or member's nominees) for analysis and advice; and
 - making public notifications in relation to public consultation processes and Code amendments agreed by Ministers.
- any other activity that NGPAC considers appropriate.

2. Membership

- 2.1 An entity specified in clause 9.2 of the IGA may nominate its representative and any alternative representative on NGPAC (a Member) at any time by notice in writing to the Chair and shall provide a copy of the notice to the Secretariat.

3. Meetings

- 3.1 There shall be not less than four meetings each calendar year with at least one meeting within or close to the months of February, May, August, November.
- 3.2 A meeting may be convened by the Chair with the agreement of at least two Members.
- 3.3 Where the Chair is unwilling or unable to convene a meeting then a meeting may be convened with the agreement of at least four Members.
- 3.4 In convening a meeting all Members shall be given not less than ten working days notice in writing of the meeting, such notice to include the agenda and copies of all papers relevant to items foreshadowed in the minutes of the previous meeting plus any relevant supplementary papers, to an address nominated by the Member.
- 3.5 NGPAC may waive the requirement for notice in clause 3.4 of these procedures by agreement.
- 3.6 A quorum for a meeting shall be a simple majority of members.

- 3.7 In the absence of the Chair, the representative of the National Competition Council may chair the meeting.
- 3.8 The Chair shall ensure that a true and accurate record of the proceedings of a meeting, including those members present, is taken and that a record of such is signed by the Chair.

4. Voting

- 4.1 Clause 9.3 of the IGA provides that only those persons nominated by a jurisdiction are entitled to vote at NGPAC meetings.
- 4.2 The manner of voting will be by voices including meetings by telephone or video conference. A Member unable to attend a meeting may lodge with the Chair a vote by proxy in writing.
- 4.3 In such matters as are submitted to a vote, a two-thirds majority of voting Members shall prevail.
- 4.4 In the case of a vote being taken on an issue, the votes of individual members shall be recorded in the minutes and, at the request of a Member, the views of non-voting Members on the issue shall also be recorded in the minutes.

5. Significant Amendments

- 5.1 If a Member requests that a proposed amendment be considered "significant" in terms of the preparation of a report in accordance with section 9.1 of the Code, then it shall be considered "significant" unless a two-thirds majority of voting Members determines otherwise.

6. Information Memorandum

- 6.1 In relation to action in compliance with section 9.2 of the Code, the Chair shall initiate the preparation of a draft information memorandum in consultation with Members and the Secretariat.
- 6.2 In the case of an information memorandum relating to a significant amendment, NGPAC must agree on a statement for inclusion in the memorandum "of why such amendment may be desirable". Note by Chair: quotation marks indicate wording taken directly from the Code.
- 6.3 No information memorandum shall be released to the public without the approval of NGPAC, which includes out-of-session approval.

7. Budget and Expenditure

- 7.1 NGPAC shall adopt a budget prior to the commencement of each financial year based on expenditure estimates for the forthcoming financial year discussed and approved in principle by a consensus of NGPAC members at its November meeting.

- 7.2 The Secretariat shall record and report progressively on NGPAC expenditure against budget.
- 7.3 Expenditure within budget items may be initiated by the Chair in consultation with the designated South Australian Government Authorised Officer whose authorisation is required for payment.
- 7.4 The Chair shall report to NGPAC at its May meeting on the administration of the budget for the preceding financial year and present for the consideration of NGPAC, final estimates of expenditure for the forthcoming financial year. Expenditure estimates as adopted by NGPAC will become the budget for the forthcoming year.

8. Transparency Operations

- 8.1 NGPAC shall adopt a transparency procedure informing the public of its operations. This will involve publishing material on the NGPAC web site (www.coderegistrar.sa.gov.au) such as summary of activities, information booklet, annual report, information memoranda's, submissions to such memoranda's, agendas, meeting schedules and NGPAC procedures.

Notes by the Chair:

- (i) In relation to the meeting procedures, it is noted that the value of NGPAC's recommendations depends on the input of all Members (voting and otherwise) and that this will be borne in mind when meetings are convened.
- (ii) Similarly, in relation to the voting procedures, it is acknowledged that:
- (a) the value of any recommendation or decision by NGPAC depends on it reflecting the views of all members. NGPAC specifically acknowledges that the views of non-voting members shall be taken into account by voting members; and
- (b) on the amendments of core provisions the decision of Ministers must be unanimous. However, a recommendation by NGPAC on such matters need not also be unanimous, ie. it is not appropriate that a single jurisdiction should be able to veto even the consideration of a proposal by Ministers.

APPENDIX 3— PANEL OF ADVISERS

NAME	ADDRESS	TELEPHONE	FAX
The Allen Consulting Group Mr James van Smeerdijk Project Manager	Level 4, 128 Exhibition Street Melbourne VIC 3000 jvansmeerdijk@allenconsult.com.au	03 9654 3800	03 9654 6363
Pricewaterhouse Coopers Mr Robert Southern Mr Paul Liggins	215 Spring Street Melbourne VIC 3000 robert.southern@au.pwcglobal.com paul.liggins@au.pwcglobal.com	03 8603 6037 03 8603 4172	03 8603 6046 03 8603 3046
Arthur Robinson & Hedderwicks Mr Ted Hill	Stock Exchange Centre 530 Collins Street Melbourne VIC 3000 ted.hill@arh.com.au	03 9613 8588	03 9614 4661

APPENDIX 4 — FINANCIAL & OPERATING STATEMENT 1998/1999

Financial Statement

The National Gas Pipelines Advisory Committee is financed in accordance with section 9.5 of the CoAG Natural Gas Pipelines Access Agreement:

The Commonwealth will pay one third of the costs of funding the NGPAC (including its Chair) and the Code Registrar (including any damages or legal costs arising out of the Code Registrar performing its functions under the Code). The balance of those costs will be shared by the Parties (other than the Commonwealth) on the basis of population.

The proportionate contributions of each State and Territory for 1998/99 was based on the Australian Bureau of Statistics population estimates for each jurisdiction at December 1997 and published in *Australian Demographic Statistics (June 1998)*.

These 1998/99 contributions are listed below:

Jurisdiction	Contribution (%)
Commonwealth	33.3333
New South Wales	22.5694
Victoria	16.5604
Queensland	12.2768
Western Australia	6.4817
South Australia	5.3070
Tasmania	1.6885
Australian Capital Territory	1.1058
Northern Territory	0.6771

The operating Surplus at 30 June 1999 was \$292,357 as indicated in the Operating Statement below.

NATIONAL GAS PIPELINES ADVISORY COMMITTEE (NGPAC) OPERATING STATEMENT

for the year ended 30 June 1999

\$

Operating Revenues

Commonwealth/State Contributions 382,471

TOTAL OPERATING REVENUES 382,471

Operating Expenses

Salaries and Wages 12,201

Goods and Services 77,913

TOTAL OPERATING EXPENSES 90,114

OPERATING SURPLUS 292,357

CONSULTANCIES

In 1998-99, three consultancies were engaged by the NGPAC for a total expenditure of \$34,871.

CONSULTANT	PURPOSE	VALUE
Consultancy fees below \$10,000		
One consultant was engaged		Subtotal <u>\$8 000</u>
Consultancy fees between \$10,000 and \$50,000		
The Allen Consulting Group	To provide Economic and Policy advisory services and Project Manage for Code change proposals	\$12 205
Arthur Robinson & Hedderwicks	To provide Legal advisory services for Code change proposals	\$14 666
		Subtotal <u>\$26 871</u>
		Total \$34 871

APPENDIX 5 — BUDGET 1999/2000

EXPENDITURE ITEMS	EXPLANATION	1998/99	1999/00
Labour Costs			
Secretariat (0.7FTE)	1 ASO-3 Executive Officer @ \$37,500 per annum plus 27% on-costs: maintaining office systems, fielding inquiries and organising meetings. 10% of 1 ASO-8 @ \$67,000 plus 27 % on-costs for the role of contract administration.	22,000	33,300
			8,500
Chair		20,000	20,000
Independent Web Consultancy (s)	Based on advice from Primary Industries & Resources re establishing a Web site home page for NGPAC.	5,000	5,000
Total		\$47,000	\$66,800
Goods and Services			
Chair's expenses	This is mainly in conjunction with interstate travel to NGPAC meetings, including that of secretariat, and the Chair's conference speaking engagements.	17,000	12,000
Chair's office rent	Office rent for the Chairman.		5,000
Meeting expenses	4 meetings: room rental, catering and sound systems.	30,000	10,000
Stationery etc	Including printing letterheads, on going requirement for photocopying of documents and posting.	3,000	4,000
Telecommunications	Phones, fax and other equipment.	4,000	4,000
Web site maintenance	Hosting the site, and support services to incorporate changes.	4,000	4,000
Publications	Discussion papers re. Recommended Code changes. Publications such as the NGPAC Information Booklet.	6,000	6,000
Contingencies	Eg Public Forums regarding Code changes. (In 1998/99 used to pay consultants)	137,000	14,500
Consultancies	Project Management & Consultancies in terms of Legal & Economic advice on Code changes.		279,367
Total		\$ 201,000	\$ 338,867
Once-Off Set-Up Costs	Assumes \$1,000 to set up the NGPAC site in conjunction with the Public Register Web Site.	1,000	1,000
TOTAL EXPENSES		\$ 249,000	\$ 377,300
Previous years carry-forward (accruals basis)		0	139,725
Stakeholders contributions		249,000	266,942

NGPAC EXPENDITURE 1999/2000

Expenditure Items	Notes	Expenditure Budget			Year To Date (YTD)			Forward Estimates		Annual Budget
		Actual	Budget	Variance	Actual ³	Budget	Variance	Commit	YTD + commit	
Labour Costs										
(A) Secretariat (0.7FTE)	1	2,937	2,892	-45	13,731	12,550	-1,181	861	14,592	33,300
(B) Contract Admin (0.1FTE)	2	-174	708	882	3,072	4,250	1,178	394	3,466	8,500
(C) Chair		0	1,667	1,667	9,000	10,002	1,002	0	9,000	20,000
(D) Indep Web Consultancy		0	417	417	2,550	2,502	-48	0	2,550	5,000
Sub total		2,763	5,684	2,921	28,353	29,304	951	1,255	29,608	66,800
Goods and Services										
(E) Chair's expenses		1,771	1,000	-771	6,195	6,000	-195	137	6,332	12,000
(F) Chair's office rent		0	417	417	0	2,502	2,502	6,000	6,000	5,000
(G) Meeting expenses		0	833	833	2,253	4,998	2,745	30	2,283	10,000
(H) Stationery		639	333	-306	903	1,998	1,095	25	928	4,000
(I) Telecommunications		0	333	333	0	1,998	1,998	1,998	1,998	4,000
(J) Web site maintenance		0	333	333	0	1,998	1,998	0	0	4,000
(K) Publications		4	500	496	1,029	1,500	471	0	1,029	6,000
(L) Contingencies		0	1,208	1,208	-414	3,963	4,377	2,982	2,568	14,500
(M) Consultancies	5	0	3,715	3,715	80,091	83,880	3,789	102,235	182,326	279,367
Sub total		2,414	8,672	6,258	90,057	108,837	18,780	113,407	203,464	338,867
(N) Once-off set-up costs		0	83	83	0	498	498	0	0	1,000
1999/2000 Expenditure		5,177	14,439	9,262	118,410	138,639	20,229	114,662	233,072	406,667
1998/99 Commitments paid	6	0	19,161	19,161	19,161	19,161	0	0	19,161	19,161
Total		5,177	33,600	28,423	137,571	157,800	20,229	114,662	252,233	425,828

NGPAC Finance Position Report December 1999

IMMEDIATE FUNDS AVAILABLE

Carryover available as at 1/7/99 (operating carry-over \$158,886; Prepayment of contributions for 1999/2000 \$133,471)	292,357
Add revenue received year to date	0
	292,357
Less expenditure to date (including commitments)	252,233
Immediate funds available 17/1/2000	40,124

BUDGET REMAINING

Carryover available as at 1/7/99 (operating carry-over \$158,886; Prepayment of contributions for 1999/2000 \$133,471)	292,357
Add remaining contributions from jurisdictions 1999/2000 (invoiced in December 1999)	133,471
	425,828
Less expenditure to date (including commitments)	252,233
Budget remaining 17/1/2000	173,595

NGPAC Expenditure Report December 1999

Note to the Accounts

- 1 Figure included for Secretariat costs are on actual wages paid plus oncosts as reported in the Dept of Primary Industries General Ledger.
2. Previous reports have overestimated expenditure on the Contract Administrator. This has been adjusted in this report.
3. Year To Date Actuals are for actual payments made to the end of the month.
4. Commitments outstanding are as at 17 January 2000.
5. The 1998/99 surplus was \$29,367 greater than estimated when the budget was approved in May, and has been added to the consultants line.
The total budget has been increased accordingly, as per consultation with members on 8/11/99.
6. Actual payments in respect to 1998/1999 commitments have now been identified and applied against the operating reserve (a portion of the Carry-over which is to be applied to expenses that had not been processed before the PIRSA accounts cut off date) held for that purpose.

APPENDIX 6 — BUDGET 2000/2001

EXPENDITURE ITEMS	EXPLANATION	2000/01
Labour Costs		
Secretariat (0.7FTE)	1 ASO-3 Executive Officer @ \$36,855 average per annum plus 27% on-costs: maintaining office systems, fielding inquiries and organising meetings	32,764
NGPAC Part-time Contractor	10% of 1 ASO-8 replaced with part time contract project manager 2000/1	55,000
Chair	Preparation time plus 4 one day meetings annually	22,000
Independent Web Consultancy (s)	Based on advice from Primary Industries & Resources re establishing a Web site home page for NGPAC.	0
Total		\$109,764
Goods and Services		
Chair's expenses	This is mainly in conjunction with interstate travel to NGPAC meetings, including that of secretariat, and the Chair's conference speaking engagements.	14,400
Chair's office rent	Office rent for the Chairman.	6,600
Meeting expenses	4 meetings: room rental, catering and sound systems.	11,000
Stationery etc	Including printing letterheads, on going requirement for photocopying of documents and posting.	4,400
Telecommunications	Phones, fax and other equipment.	4,400
Web site	Hosting the site, and support services to incorporate changes.	2,200
Publications	Discussion papers re. Recommended Code changes. Publications such as the NGPAC Information Booklet.	4,400
Advertisements	Costs for 2 public consultation advertisements in the Australian and the Financial Review.	6,600
Contingencies	Eg Public Forums regarding Code changes. (In 1998/99 used to pay consultants)	11,000
Consultancies	Consultancies for Legal & Economic advice on Code changes (including lead consultancy costs).	185,424
Total		\$250,424
TOTAL BUDGET		360,188
Budget funded from carry-over		0
Stakeholder Contributions		360,188
		360,188
TOTAL		360,188

APPENDIX 7 — CODE CHANGES

Code Change and Related Issues Considered by NGPAC (to 31 Dec 1999)

Short description of proposed amendment	Information memorandum prepared for public consultation	Recommendation provided to Ministers	Status as at 31 Dec 1999
1. UNCONTOVERSIAL AND MINOR OMISSIONS, CORRECTIONS OR CLARIFICATIONS:			
Real vs. historical cost — to clarify that Reference Tariffs may be set in real as well as nominal terms.	NA	✓	Code change implemented 23 Dec 1999
Associate contracts — to clarify that a person should not be considered an Associate solely because that person has, or proposes to enter into, a contract with a Service Provider.	NA	✓	Code change implemented 23 Dec 1999
Ability to release end user information— to clarify that a Service Provider may release certain user information to end users on request without requiring the approval of the User.	NA	✓	Code change implemented 23 Dec 1999
2. SIGNIFICANT OMISSIONS, CORRECTIONS OR CLARIFICATIONS:			
Ring fencing tax costs — to clarify, when the Regulator is assessing the administrative costs of ring fencing, that administrative costs include taxation costs.	✓		Agreed to progress changes to Ministers
Who can be a Service Provider? — to widen the definition of Service Provider to include foreign companies, among others.	✓		Agreed to progress changes to Ministers
Substantial compliance — to provide the Regulator with the discretion to approve a final access arrangement that substantially complies with the Regulator's final decision.	✓		Agreed to progress changes to Ministers
Obligation to Release of end user information— to oblige the Service Provider to release certain end user information on request of the end user.	✓		Agreed to progress changes to Ministers
Tariff formula — clarifying that a Regulator may approve a reference tariff formula which defines or sets limits on how Reference Tariffs are to be calculated between Access Arrangement reviews.			Agenda paper to Feb 2000 meeting
Administration of AA during period — what powers are required for regulators to undertake roles during the Access Arrangement Period			Agenda paper to Feb 2000 meeting
Appeals — to clarify a number of issues concerning appeals, in particular when an appeal can be initiated.			Agenda paper to be prepared
Across period incentive mechanisms- to clarify that cross period incentive mechanisms, such as glide paths, can be used.			Agenda paper to Feb 2000 meeting
High court decision in Wakim - changes to jurisdictions legislation to preserve elements of the Code following the decision by the High Court concerning ability of the States to confer jurisdiction on the Commonwealth			Legislative (not Code) change; being progressed by jurisdictions

3. NEW AND OTHER ISSUES:			
Scope of the Code, to clarify the extent to which the Code should overlap with legislation in certain other areas.			On work program low priority
Derivation of the elements — to clarify what level of information should be required to be provided by the Service Provider to explain the basis for the proposed Reference Tariffs.			On hold pending precedents
Administration of surcharges — to clarify the scope of the method that applies for the administration of surcharges, including in relation to new connections.			On work program medium priority
Collection and maintenance of financial data — to clarify what information a Service Provider may be required to collect and maintain during the Access Arrangement period.			Regulator to consult with industry
Clearer ring fencing obligations — to create more clearly identifiable ring fencing obligations to aid enforcement.			On work program awaiting review
Changes proposed by the Code Registrar—			On work program awaiting review
Competitive pipelines— to clarify what pricing and other rules should apply in the case of competing pipelines.			On work program awaiting prioritisation
Asset valuation— to change the asset valuation approach to better reflect uncertainty about future load and to provide for consistency in the treatment of new and existing capital.			QCA asked to clarify proposal
Apportionment issues— issues concerning methods of nomination, apportionment, balancing and settlement.			Issue transferred to Gas Policy Forum
Smoothing of tariffs— to allow flexibility in certain circumstances for the smoothing of tariffs beyond an Access Arrangement period.			Withdrawn by IPART
Procedures for managing access and retail contestability (no ref) issues at the interface of the pipeline and the retail industries			Issue transferred to Gas Policy Forum
Regulation of service standards— clarifying the role of the Code in regulation of service standards.			Regulators to provide a further paper

Appendix 3

NGPAC report to Ministers January 2000 to June 2001

A message from the Chairman

Once again I have the honour to prepare a Report on the activities of the National Gas Pipelines Advisory Committee (NGPAC) established by the Council of Australian Governments (CoAG) on 7 November 1997. The Report covers the eighteen-month period from January 2000 to June 2001.

Whilst, the size and diversity of NGPAC membership has its disadvantages, it is also the source of its potential strength and benefit to the policy making process in gas industry regulation and reform. It has been largely the same stakeholders now represented on NGPAC who managed to agree the Third Party Access Code, without the cost, complexity and delay which would have been involved had a *modus vivendi* not been reached in the years leading up to 1997.

The broad stakeholder representation on NGPAC provides a filter to ensure unintended consequences of policy initiatives are identified and addressed early on, or as practical issues arise (an example is given under the heading "Greenfield Development" in the Report). It is capable of doing and indeed its remit in the National Gas Pipeline Access Agreement suggests it should do more than that.

As independent Chair of NGPAC, I express the hope that the foreshadowed Review of the Gas Access Framework will take these potential strengths into account in addressing any need to change to the role of NGPAC or in the way in which NGPAC should exercise it.

In the meantime, NGPAC is conscious of its responsibility to operate at optimum effectiveness within its present role and resources. Over the coming months we will further streamline our procedures and look to issues of governance, conscious as we are of the need for transparency and accountability in the way we operate.

Greg Harvey

NGPAC Chairman

NGPAC Report to Ministers

For the period 1/1/00 – 30/6/01

1. Background to the establishment of NGPAC

The Council of Australian Governments (CoAG) established the National Gas Pipelines Advisory Committee (NGPAC) on 7 November 1997, through the Natural Gas Pipeline Access Agreement (the Agreement). NGPAC was created to administer the National Third Party Access Code for Natural Gas Pipeline Systems (the Code).

The major objective of the Code was to establish a uniform national framework for third party access to national gas transmission pipeline and distribution systems. The Code aims to provide flexibility for the negotiation of third party access to natural gas pipeline systems, whilst also providing sufficient prescription to reduce the need for arbitration.

The implementation of the Code has the potential to facilitate downstream investment activities, as well as increase competition in markets for gas consumption and production. Accordingly, it is in the interests of gas producers, pipeline owners and gas consumers to work towards pro competitive and efficient outcomes, which could also drive sustainable investments across the gas industry chain.

Users and marketers of gas now seek access to previously monopoly run and vertically integrated facilities on reasonable terms and conditions through the regulatory regime of the Code. The Code provides a uniform national regulatory framework within which owners and operators of existing and proposed pipelines can make investment decisions and market their gas transportation and distribution services.

In recognition of the importance of involving stakeholders in the administration and evolution of the third party access regime, direct participation of non-voting industry representatives is provided for through membership of NGPAC.

2. Role of NGPAC

The role of NGPAC is established in Clause 9 of the Agreement and is elaborated in Section 6 of the Gas Pipelines Access Law ¹ and Part 9 of the Code. In essence, NGPAC is the formally constituted vehicle for monitoring the effectiveness of and recommending changes to the rules now governing access to and hence investment in extensive natural gas infrastructure assets estimated to be worth some \$20 billion dollars. NGPAC is the only entity which can make recommendations to Ministers on proposed changes to the Code designed to improve its operation.

The Agreement set up NGPAC with responsibility for “administration of the Code”. Its functions are to:

- a) monitor, review and report on the operation of the Gas Pipelines Access Law (including the Code);

- b) provide advice to Ministers on interpretation and administration of the Gas Pipelines Access Law (including the Code);
- c) prepare information on Gas Pipelines Access Law (including the Code) for general publication; and
- d) make recommendations on amendments to the Gas Pipelines Access Law (including the Code) to Ministers.

Subsequent to the reporting period, NGPAC has discussed whether its role has evolved in accordance with this remit. Certainly in the first years after the adoption of the Code, NGPAC took a positive decision to concentrate on necessary technical and procedural Code change recommendations to facilitate the establishment of the regime. Opinions varied on whether this approach was still appropriate, but there were broadly two opposing views. On one hand there were members who opposed NGPAC involving itself in any policy issues. Others held the view that NGPAC, in discharging the functions listed in and intended by the Agreement, would necessarily need to make recommendations having policy implications. Clarification of NGPAC's role should be included in any review of the gas access framework.

Membership of NGPAC includes an independent Chair, a Code Registrar and representatives of the Commonwealth and each State and Territory, together with industry and regulator representatives. Further details of members are set out in [Appendix 1](#).

3. Major Issues during the Reporting Period

Review of the Gas Access Framework

During the reporting period, NGPAC undertook a detailed consideration of the issues related to the need for a review of the gas access framework.

The outcomes of that consideration were that there was a need for a review and such a review should focus on the gas pipeline access and investment frameworks. However, the review should also take into account, where relevant, developments in the electricity access framework and the general access (Trade Practices Act, 1974, Part IIIA) framework together with upstream and downstream gas industry issues.

The original objectives set by CoAG, which are replicated in the preamble to the lead legislation the *Gas Pipelines Access (South Australia) Act 1997* were to:

- facilitate the development and operation of a national market for natural gas;
- prevent abuse of monopoly power; and
- promote a competitive market for natural gas in which customers may choose suppliers (including procedures) (including producers), retailers and traders; and
- provide rules of access to national gas pipelines on conditions that are fair and reasonable for both Service Providers and users; and

- provide for resolution of disputes.

It was also envisaged that the Code would:

- provide regulatory certainty for investment decision making and promote free and fair interstate trade in gas;
- improve the international competitiveness of Australian industry;
- encourage upstream and downstream investment and competition in the Australian gas industry;

As well as ensuring that the Code is achieving the original objectives outlined above, NGPAC also considered that any review should address a number of specific issues involving the Code, its provisions and administration namely:

- treatment of new investment;
- regulatory bodies;
- coverage of pipelines;
- interaction and overlap with Part IIIA of the Trade Practices Act, 1974(TPA) (taking into account the findings of Productivity Commission's review of Part IIIA of the TPA);
- recognition of differences between transmission and distribution systems;
- information provision requirements;
- timely process and administration;
- openness and transparency issues;
- the appeals process;
- competing pipeline issues;
- revenue and tariff design issues;
- Code changes and the role of NGPAC; and
- a number of specific Code changes.

NGPAC prepared and sent a paper on the proposed Code review to the 13 December 2000 meeting of the Energy Markets Group (EMG), relating to possible terms of reference and budgetary implications.

Apart from the preliminary discussion about its role, mentioned in the previous section, NGPAC is awaiting the outcome of the reviews referred to above before determining a process for handling some of the wider issues raised.

NGPAC is nevertheless obliged to deal with urgent operational and policy issues as they come forward in the form of specific Code change proposals.

Greenfields Development

There is general agreement that one such issue relates to whether the Code adequately deals with the special requirements of major pipeline investments, both at the level of major augmentation of existing pipelines as well as stand alone greenfields pipeline developments.

The most significant example of this issue came forward as a Code change proposal by the Australian Pipelines Industry Association (APIA) and initiated by Epic Energy in the context of its proposed new gas transmission pipeline between Darwin and Moomba. The APIA proposal sought to amend the Code in order to remove – on an interim basis pending the outcome of forthcoming reviews – the possibility of duplicated or overlapping regulation of a new pipeline under the Code and Part IIIA of the TPA.

APIA submitted that there were a number of problems with the Code, both as to its application to prospective pipelines, and its ability to accommodate particular terms of access that new pipeline developers may want to put forward. APIA submitted that these problems lead to a lack of “regulatory certainty” for greenfields projects, which is likely to discourage investment in new pipeline infrastructure that could become covered by the Code.

After undertaking an extensive public consultation process and considering the submissions received, NGPAC agreed to recommend to Ministers on 2 April 2001 the effect of which was that the owner or operator of a new pipeline not be required to submit an Access Arrangement under the Code where there is in force an access undertaking for that pipeline accepted by the ACCC under Part IIIA of the TPA.

NGPAC subsequently withdrew the earlier Recommendation to Ministers pending clarification of the implications of the Eastern Gas Pipeline (EGP) decision.

Eastern Gas Pipelines Decision

The Australian Competition Tribunal handed down its decision on an application under Section 38 (1) of the Gas Pipelines Access Law for review of the decision by the Minister for Industry, Science and Resources to cover EGP pursuant to the Code (the EGP decision).²

The Tribunal decided that the pipeline should not be covered. The EGP decision illustrates the importance of the coverage test, and in particular the requirements in the Code that coverage is only available:

- in relation to the services provided by infrastructure having the characteristics of a natural monopoly; and
- where regulation of that infrastructure would promote competition in a market for services or in another (upstream or downstream) market to a level greater than would occur without regulation.

The EGP decision also suggests that in some circumstances providing regulated access to a transmission pipeline will not promote competition in upstream or downstream markets even

though it may be the only pipeline covering a particular route. As a consequence, the concerns and consequent Code change proposals raised by APIA relating to regulatory certainty and overlap appear to have become less urgent, as it cannot be assumed with any degree of certainty that an application for coverage of pipelines such as the Epic Darwin to Moomba Pipeline under the Code would necessarily be successful.

In any event the Australian Competition Tribunal decision appears to have placed a renewed focus on an underlying competition principle that Code regulation should apply only where markets fail to deliver the benefits of competition.

4. Summary of Code Change Proposals

The Code changes agreed by Ministers and the status of other Code change proposals submitted to the NGPAC from its establishment, including changes which have been approved by Ministers in the First or Second Amending Agreements of 23/12/99 and 9/11/00 respectively, are set out in Appendix 6.

The Code change proposals being dealt with currently by NGPAC are listed in Appendix 6 and may be summarised by category as follows:

- 1) Specific Code change proposals for which NGPAC undertook public consultation before making recommendations to Ministers. These Code change proposals include:
 - a) APIA proposal initiated by Epic Energy regarding “regulatory overlap”;
 - b) Reg 1 and 2 – to clarify that reference tariffs may be varied in accordance with an approved Reference Tariff Variation Method during the Access Arrangement Period and to provide for an administrative role of the Regulator in approving such variations;
 - c) Reg 8 - to clarify that across period incentive mechanisms, such as glide paths, can be used;
 - d) whilst not technically a Code change, the action necessary to restore the appeal process under the Code following disallowance of delegation from State jurisdictions to the Federal Courts, flowing from the Wakim³ decision.
- 2) A number of issues, which are currently being prioritised and put into a work program. Some of these issues, particularly those that relate to greenfields development, are of a high priority; and
- 3) Less significant changes which are currently being progressed, analysed, or have been accorded a lower priority pending the availability of resources.

5 NGPAC Resources

In discharging its remit to monitor, review and report on the operation of the access regime, as well as advising Ministers on the interpretation of the Gas Pipelines Access Law and the Code, NGPAC has an obvious, if limited, need for resources. While considerable expertise would be available

through NGPAC members, the Committee acknowledges the existing and potential conflict of interests among such members and has identified the need for access to entirely independent expert advice.

NGPAC therefore undertook a process to select a panel of consultants in the fields of project management, policy and economic analysis, legal and technical expertise which can be called upon to provide arms length, third party expert advice and analysis. The consultants contracted to date are listed in [Appendix 2](#).

This panel is currently subject to a review process to ensure the correct balance of expertise and expenditure is maintained.

NGPAC was set up with an independent non-executive Chair, currently located in Melbourne, who is provided with the use of an office within the Commonwealth Department of Industry Science and Resources. For its first two years of operation, NGPAC's only dedicated staff resource was a part time Executive Officer (0.7 FTE Executive Officer grade ASO3 in South Australia).

In the light of experience of the resources required to brief expert advisers and coordinate a number of Code change processes, the Committee agreed in September 2000 to engage, again on a part time basis, a suitably qualified Program Manager who now performs these functions. Indications are that this appointment is already budget neutral and likely to be positive in the coming year. More importantly, the Program Manager coordinates and chairs task specific working groups, drawn from NGPAC members, which discuss and progress detailed analysis of Code related issues between NGPAC meetings. This significantly extends the effective consultative capacity of NGPAC as the principal industry forum on third party gas pipeline access matters.

With the engagement of the Program Manager, the Secretariat is also pursuing initiatives to improve the effectiveness and focus of NGPAC processes and administration. A move towards electronic distribution methods and development of the website, particularly for a public and industry perspective, are ways in which these initiatives will be further enhanced.

6. Financial Arrangements and Budget

The funding arrangements for NGPAC are structured in a manner whereby the Commonwealth pays one third of the costs of NGPAC and the balance of the costs are shared by the other jurisdictions on the basis of population.

During the period of this Report, NGPAC has produced two financial and operating statements. The Financial and Operating Statement for F2000 is attached as [Appendix 3](#) and the Financial and Operating Statement for the period F2001 is attached as [Appendix 4](#). The proposed Budget for F2002 is attached as [Appendix 5](#).

Members' concerns about the ability of NGPAC to fulfil all of its functions, to provide timely and credible advice to Ministers on Code change proposals and other matters, have generated some robust debates at NGPAC meetings. This has led to a re-examination of how NGPAC manages its work and a review of priorities is currently underway. Nevertheless, there is ongoing concern

among a number of members about budget constraints and any Code Review would need to address this issue.

Notes

1. The rules and conditions governing access by third party users to downstream delivery infrastructure are enshrined in the Code. This document derives its national standing from the gas access legislation and the Gas Pipelines Access Law which is uniform legislation passed by the Parliaments of all jurisdictions which entered into the CoAG Natural Gas Pipeline Access Agreement of November 1997.
2. Duke Eastern Gas Pipeline Pty Ltd (2001) ACOMPT 2
3. Wakim Ex parte McNally [1999] HCA 27 17 June 1999

APPENDIX 1 - NATIONAL GAS PIPELINES ADVISORY COMMITTEE (NGPAC) MEMBERSHIP

NAME & POSITION	ADDRESS
<p>NGPAC Chairman Mr Greg Harvey</p>	<p>C/- Dept of Industry Science and Resources 9th Floor, 161 Collins Street Melbourne VIC 3000 greg.harvey@industry.gov.au</p>
<p>Code Registrar Mr George Scherer Principal Regulation and Access Officer</p>	<p>Energy SA Primary Industries and Resources South Australia Level 19, 30 Wakefield Street ADELAIDE SA 5000 scherer.george@saugov.sa.gov.au</p>
<p>Secretariat Ms Catherine Cooper Program Manager</p>	<p>Energy SA Primary Industries and Resources South Australia Level 13, 30 Wakefield Street ADELAIDE SA 5000 cooper.catherine@saugov.sa.gov.au</p>
<p>Commonwealth Mr Kevin O'Brien General Manager Electricity and Gas Reform</p>	<p>Department of Industry Science and Resources GPO Box 9839 Canberra ACT 2601 kevin.obrien@industry.gov.au</p>
<p>Commonwealth (Alternate) Mr Bill Crawshaw Manager Gas Reform</p>	<p>Department of Industry Science and Resources GPO Box 9839 Canberra ACT 2601 bill.crawshaw@industry.gov.au</p>
<p>New South Wales Mr Brian Steffen Acting Director General</p>	<p>Ministry of Energy and Utilities PO Box 536 St Leonards NSW 1590 steffenb@energy.nsw.gov</p>
<p>New South Wales (Alternate) Ms Elsie Choy Executive Director</p>	<p>Ministry of Energy and Utilities PO Box 536 St Leonards NSW 1590 choye@energy.nsw.gov.au</p>

NAME & POSITION	ADDRESS
Victoria Mr Peter Naughton Manger Market Development Energy Policy	Department of Natural Resources and Environment Victoria Level 13, 8 Nicholson Street Melbourne Vic 3000 peter.naughton@nre.vic.gov.au
Victoria (Alternate) Mr John Krbaleski Senior Policy Advisor	Department of Natural Resources and Environment Victoria Level 13, 8 Nicholson Street Melbourne Vic 3000 john.krbaleski@nre.vic.gov.au
Queensland Mr Scott Flavell Acting Executive Director	Office of Energy, Queensland Treasury GPO Box 611 Brisbane QLD 4001 Scott.Flavell@treasury.qld.gov.au
Queensland (Alternate) Mr Dean Harvey Manager	Office of Energy, Queensland Treasury GPO Box 611 Brisbane QLD 4001 Dean.Harvey@treasury.qld.gov.au
Queensland (Alternate) Mr Tom Hassed Team Leader Energy Planning	Office of Energy, Queensland Treasury GPO Box 611 Brisbane QLD 4001 Tom.Hassed@treasury.qld.gov.au
South Australia Dr Cliff Fong Executive Director	Energy SA Level 19, 30 Wakefield Street Adelaide SA 5000 fong.cliff@saugov.sa.gov.au
South Australia (Alternate) Kym Jervois General Manager Energy Reform Policy	Energy SA Level 19, 30 Wakefield Street Adelaide SA 5000 jervois.kym@saugov.sa.gov.au

NAME & POSITION	ADDRESS
<p>Western Australia</p> <p>Dr Les Farrant Coordinator of Energy</p>	<p>WA Office of Energy The Governor Stirling Building Level 9,197 St Georges Terrace Perth WA 6000 les.farrant@energy.wa.gov.au</p>
<p>Western Australia (Alternate)</p> <p>Mr Rolando Custodio Senior Manager Strategic Issues</p>	<p>WA Office of Energy The Governor Stirling Building Level 9, 197 St Georges Terrace Perth WA 6000 rolando.custodio@energy.wa.gov.au</p>
<p>Tasmania</p> <p>Dr David Harries Assistant Director</p>	<p>Office of Energy Planning and Conservation GPO Box 396 Hobart TAS 7001 david.harries@dier.tas.gov.au</p>
<p>Australian Capital Territory</p> <p>Mr John Robertson Director, Economic Management Department Treasury</p>	<p>Department of Urban Services GPO Box 158 Canberra ACT 2601 john.robertson@act.gov.au</p>
<p>Australian Capital Territory (Alternate)</p> <p>Mr Martin d'Este Manager, Energy and Water</p>	<p>Department of Urban Services GPO Box 158 Canberra ACT 2601 martin.deste@act.gov.au</p>
<p>Northern Territory</p> <p>Mr Donald Hudson Senior Policy Officer</p>	<p>Department of Business, Industry & Resource Development GPO Box 2901 Darwin NT 0801 donald.hudson@nt.gov.au</p>
<p>Australian Gas Association (AGA)</p> <p>Mr Ollie Clark Managing Director</p>	<p>Envestra Ltd Level 10, 81 Flinders Street Adelaide SA 5000 ollie.clark@envestra.com.au</p>

NAME & POSITION	ADDRESS
<p>Australian Gas Association (AGA) <i>(Alternate)</i></p> <p>Mr Bill Nagle Chief Executive</p>	<p>GPO Box 323 Canberra ACT 2601 bnagle@canberra.gas.asn.au</p>
<p>Australian Petroleum Producers and Explorers Association (APPEA)</p> <p>Mr Bill Henson</p>	<p>BHP Level 43, 152-158 St Georges Terrace Perth WA 6000 bill.henson@bhpbilliton.com</p>
<p>Australian Petroleum Producers and Explorers Association (APPEA) (Alt)</p> <p>Ms Tony Haydock Director, Energy Markets and Resource Access</p>	<p>GPO Box 2201 Canberra ACT 2601 Thaydock@appea.com.au</p>
<p>Australian Pipeline Industry Association (APIA)</p> <p>Dr Allen Beasley Executive Director</p>	<p>PO Box 5416 Kingston ACT 2604 abeasley@apia.asn.au</p>
<p>Australian Competition and Consumer Commission (ACCC)</p> <p>Ms Kanwaljit Kaur General Manager Gas Division</p>	<p>PO Box 1199 Dickson ACT 2602 kanwaljit.kaur@accc.gov.au</p>
<p>Business Council of Australia Energy Reform Task Force (BCAERTF)</p> <p>Ms Karen Grady General Manager</p>	<p>Box 1472N GPO Melbourne VIC 3001 kareng@bca.com.au</p>
<p>Essential Services Commission (ESC)</p> <p>Mr Nick Rizos</p>	<p>1/35 Spring Street Melbourne VIC 3000 nick.rizos@esc.vic.gov.au</p>
<p>National Competition Council (NCC)</p> <p>Ms Michelle Groves Director</p>	<p>GPO Box 250B Melbourne VIC 3001 michelle.groves@ncc.gov.au</p>

NAME & POSITION	ADDRESS
<p>Office of Gas Access Regulation (OFFGAR)</p> <p>Mr Peter Kolf Executive Director</p>	<p>L6 Governor Stirling Tower 197 St Georges Terrace Perth WA 6000 peter_kolf@offgar.wa.gov.au</p>
<p>Energy Users Association of Australia and the Energy Markets Reform Group EUAA/EMRF</p> <p>Mr Bob Lim Advisor</p>	<p>PO Box 305 Milsons Point NSW 1565 boblenco@ozemail.com.au</p>
<p>NGPAC Executive Officer</p> <p>Ms Anna Witty</p>	<p>Level 13, 30 Wakefield Street ADELAIDE SA 5000 witty.Ann@saugov.sa.gov.au</p>

APPENDIX 2 - PANEL OF ADVISERS

NAME	ADDRESS
<u>The Allen Consulting Group</u> Mr James van Smeerdijk Executive Director	Level 4, 128 Exhibition Street Melbourne VIC 3000 jvansmeerdijk@allenconsult.com.au
<u>Allens Arthur Robinson</u> Mr Ted Hill Partner	Stock Exchange Centre 530 Collins Street Melbourne VIC 3000 ted.hill@aar.com.au
<u>PriceWaterhouse Coopers</u> Mr Robert Southern	GPO Box 2650 Sydney NSW 1171

APPENDIX 3 - FINANCIAL & OPERATING STATEMENT 1999/2000

Financial Statement

The National Gas Pipelines Advisory Committee is financed in accordance with section 9.5 of the CoAG Natural Gas Pipelines Access Agreement:

The Commonwealth will pay one third of the costs of funding the NGPAC (including its Chair) and the Code Registrar (including any damages or legal costs arising out of the Code Registrar performing its functions under the Code). The balance of those costs will be shared by the Parties (other than the Commonwealth) on the basis of population.

The proportionate contributions of each State and Territory for 1999/2000 was based on the Australian Bureau of Statistics population estimates for each jurisdiction at 30 September 1998 and published in *Australian Demographic Statistics (23/3/99)*.

These 1999/2000 contributions are listed below:

Jurisdiction	Contribution (%)
Commonwealth	33.33
New South Wales	22.55
Victoria	16.57
Queensland	12.30
Western Australia	6.52
South Australia	5.28
Tasmania	1.67
Australian Capital Territory	1.09
Northern Territory	0.68

The Operating Surplus at 30 June 2000 was \$13,139 as indicated in the Operating Statement below.

National Gas Pipelines Advisory Committee (NGPAC) Operating Statement

for the year ended 30 June 2000

Operating Revenues

Commonwealth/State Contributions	412,872
TOTAL OPERATING REVENUES	412,872

Operating Expenses

Salaries and Wages	39,630
Goods and Services	360,103
TOTAL OPERATING EXPENSES	399,733
OPERATING SURPLUS	13,139

RECONCILIATION OF CARRYOVER FUNDS

Carryover funds 1 July 1999	292,357
Operating Surplus 30 June 2000	13,139
Carryover funds 30 June 2000	305,496

CONSULTANCIES

In 1999-2000, three consultancies were engaged by NGPAC for a total expenditure of \$300,968.

CONSULTANT	PURPOSE	VALUE
Consultancy fees below \$10,000		
There were no consultants engaged for less than \$10,000		
Consultancy fees between \$10,000 and \$50,000		
Pricewaterhouse Coopers	To provide economic and commercial advisory services for Code change proposals	\$28,639
		Total <u>\$28,639</u>

Consultancy fees above \$50,000

The Allen Consulting Group	To provide economic and policy advisory services and Project Manager for Code change proposals	\$171,797
Arthur Robinson & Hedderwicks	To provide Legal advisory services for Code change proposals	\$100,532
		Subtotal <u>\$272,329</u>
		Total <u>\$300,968</u>

APPENDIX 4 - FINANCIAL & OPERATING STATEMENT 2000/2001

Financial Statement

The National Gas Pipelines Advisory Committee is financed in accordance with section 9.5 of the CoAG Natural Gas Pipelines Access Agreement:

The Commonwealth will pay one third of the costs of funding the NGPAC (including its Chair) and the Code Registrar (including any damages or legal costs arising out of the Code Registrar performing its functions under the Code). The balance of those costs will be shared by the Parties (other than the Commonwealth) on the basis of population.

The proportionate contributions of each State and Territory for 2000/2001 was based on the Australian Bureau of Statistics population estimates for each jurisdiction at 30 September 1998 and published in *Australian Demographic Statistics (29/3/99)*.

These 2000/2001 contributions are listed below:

Jurisdiction	Contribution (%)
Commonwealth	33.33
New South Wales	22.54
Victoria	16.57
Queensland	12.36
Western Australia	6.55
South Australia	5.24
Tasmania	1.65
Australian Capital Territory	1.09
Northern Territory	0.68

The Operating Surplus at 30 June 2001 was \$68,526 as indicated in the Operating Statement below.

FINANCIAL & OPERATING STATEMENT 2000/2001

National Gas Pipelines Advisory Committee (NGPAC) Operating Statement for the year ended 30 June 2001

	\$
Operating Revenues	
Commonwealth/State Contributions	368,724
<u>TOTAL OPERATING REVENUES</u>	<u>368,724</u>
Operating Expenses	
Salaries and Wages	16,618
Goods and Services	283,580
<u>TOTAL OPERATING EXPENSES</u>	<u>300,198</u>
<u>OPERATING SURPLUS</u>	<u>68,526</u>

Notes to and Forming Part of the Operating Statement

1	Reconciliation of Cash Reserve Account	
	Opening Cash Reserve Balance 1 July 2000	305,496
	Add: Operating Surplus 30 June 2001	68,526
	Closing Cash Reserve Balance 30 June 2001	374,022
2	Commitments:	
	<u>Commitments outstanding as at 30 June 2001</u>	<u>39,396</u>

CONSULTANCIES

In 2000-2001, three consultancies were engaged by NGPAC for a total expenditure of \$181,129

CONSULTANT	PURPOSE	VALUE
Consultancy fees below \$10,000		
	There was 1 consultant engaged for less than \$10,000	1,500
Consultancy fees between \$10,000 and \$50,000		
Arthur Robinson & Hedderwicks	To provide Legal advisory services for Code change proposals	48,892
	Total	48,892
Consultancy fees above \$50,000		
The Allen Consulting Group	To provide economic and policy advisory services and Project Manager for Code change proposals	130,737
	Total	181,129

APPENDIX 5 NGPAC BUDGET F2001-2002

G/L Account	G/L Code	Notes - Expenditure	Dollars
Labour Costs			
Salaries	-	Secretariat - 1 ASO3 Executive Officer 0.7 FTE @ \$38000 pa plus 25% on cost	34,000
Contractors	717	NGPAC Program Manager - P/T 2.5 days per week	63,000
Contract Payments	714	Greg Harvey, Chair - Preparation time and 4 one day meetings annually plus a maximum of 16 days consulting between meetings @ \$550/day (incl GST)	22,000
Goods and Services			119,000
Advertising and Publicity	682	Public Consultation Notices in National Media and any general advertisements	13,200
Travel			9,600
- Airfares	842	Air travel for attendance at all NGPAC and Working Group meetings by Chair, Program Manager and Secretariat	
-Cabcharge	844	In respect to Chair, Program Manager and Secretariat	780
-Travel General	851	Accommodation and associated costs with respect to Chair, Program Manager and Secretariat attending NGPAC and Working Group meetings. (Includes reimbursements for Chair out-of-pocket expenses.)	3,600
Building Rental	648	Office rent for Chair's office in Melbourne	6,600
Building Rental	648	Office rent for NGPAC in Adelaide	6,000
Accounting Fees		Costs for SA Govt Accounting System & support	7,000
Consultancy Fees	715	Costs re The Allen Consulting Group, Allens Arthur Robinson and any other consultant engaged	196,600
Meeting Expenses	Code TBA	Room hire costs, equipment hire (eg PA System) and catering	15,000
Minor Equipment/Furniture	766	Small office equipment	2,000
Office Supplies	770	Including printing letterheads/envelopes, general stationery and photocopying	4,000
Postage/Mail Services	807	All postage and courier costs	1,000
Telephone Charges - Dept	670	Phone and fax services	5,500
Software Supplies and Maintenance	801	Support services to incorporate changes, design of updates etc to web site	5,000
Printing and Artwork	778	External production of brochures, information bulletins and other publications	2,000
		SUB TOTAL:	277,880
		GRAND TOTAL:	396,880

APPENDIX 6

CODE CHANGES

(1) CHANGES WHICH HAVE BEEN AS APPROVED BY MINISTERS AND INCLUDED IN THE FIRST OR SECOND AMENDING AGREEMENT OF 23/12/99 AND 9/11/00 RESPECTIVELY.	
Short description of proposed amendment	Status as at 30 June 2001
Real vs. historical cost — to clarify that Reference Tariffs may be set in real as well as nominal terms.	Completed 1 st Amending Agreement 23/12/99.
Associate contracts — to clarify that a person should not be considered an Associate solely because that person has, or proposes to enter into, a contract with a Service Provider.	Completed 1 st Amending Agreement 23/12/99.
Ability to release end user information— to clarify that a Service Provider may release certain user information to end users on request without requiring the approval of the User.	Completed 1 st Amending Agreement 23/12/99.
Ring fencing tax costs - to clarify, when the Regulator is assessing the administrative costs of ring fencing, that administrative costs include taxation costs.	Completed 2 nd Amending Agreement 9/11/00.
Who can be a Service Provider? - to widen the definition of Service Provider to include foreign companies, among others.	Completed 2 nd Amending Agreement 9/11/00.
Substantial compliance - to provide the Regulator with the discretion to approve a final access arrangement that substantially complies with the Regulator's final decision.	Completed 2 nd Amending Agreement 9/11/00.
Obligation to release end user information - to oblige the Service Provider to release certain end user information on request of the end user.	Completed 2 nd Amending Agreement 9/11/00.

(2) SPECIFIC CODE CHANGE PROPOSALS FOR WHICH NGPAC UNDERTOOK PUBLIC CONSULTATION BEFORE MAKING RECOMMENDATIONS TO MINISTERS.

Short description of proposed amendment	Status as at 30 June 2001
<p>Reg 1 & 2</p> <ul style="list-style-type: none"> • to clarify that reference tariffs may be varied in accordance with an approved Reference Tariff Variation Method during the Access Arrangement Period; and • to provide for an administrative role of the Regulator in approving such variations. <p>Issues arising were:</p> <ul style="list-style-type: none"> • the extent of information gathering powers of the Regulators; • the Regulators' ability to specify their own tariff variation (obligation or discretion), and • default notice period for tariff variations. 	<p>Change to Section 39 and the Code – Proposed in conjunction with Fourth Amending Agreement Ongoing.</p> <p>Proceeding with amendment to GPAL to provide that the approval of a tariff variation is a “prescribed duty” and is therefore covered by the Regulators powers to require information under Section 41 (1) GPAL.</p> <p>To be progressed as a Recommendation to Ministers pursuant to Option B in the Information Memorandum.</p> <p>To proceed with Option (c) as contained in the paper with a period of 25 working days and to clarify that the Regulator may “stop the clock” eg words similar to those used in Section 7.4 (b) – Associate Contracts.</p>
<p>Appeals - to clarify a number of issues concerning appeals, in particular when an appeal can be initiated.</p>	<p>Amendments to Change Schedule 1 and Section 39 - Proposed in conjunction with Fourth Amending Agreement Ongoing.</p>
<p>Reg 8 - Across period incentive mechanisms - to clarify that across period incentive mechanisms, such as “glide paths”, can be used.</p>	<p>Awaiting 3rd Amending Agreement.</p>
<p>High court decision in Wakim - changes to jurisdictions' legislation to amend elements of the GPAL relating to the appeal process following the decision by the High Court concerning ability of the States to confer jurisdiction on the Commonwealth.</p>	<p>Legislative (not Code) change has been progressed by jurisdictions.</p>

(2) SPECIFIC CODE CHANGE PROPOSALS FOR WHICH NGPAC UNDERTOOK PUBLIC CONSULTATION BEFORE MAKING RECOMMENDATIONS TO MINISTERS (cont)

Short description of proposed amendment	Status as at 30 June 2001
<p>Epic - APIA Regulatory Overlap</p> <p>Proposal to amend the Code in order to remove (on an interim basis pending the outcome of any forthcoming review) the possibility of overlapping regulation of a new pipeline under both the Code and Part IIIA of the Trade Practices Act, 1974 ("TPA").</p>	<p>Recommendation to Ministers on 2 April 2001 that the owner or operator of a new pipeline not be required to submit an Access Arrangement under the Code where there is in force an access undertaking under Part IIIA of the TPA (NB The Recommendation to Ministers was subsequently withdrawn pending clarification of the implications of the Eastern Gas Pipeline decision (refer Item 3 of the Report).</p>

(3) ISSUES WHICH ARE CURRENTLY BEING PRIORITISED AND PUT INTO A WORK PROGRAM. SOME OF THESE ISSUES, PARTICULARLY THOSE THAT RELATE TO GREENFIELDS PIPELINE DEVELOPMENT, ARE RATED BY NGPAC AS BEING OF A HIGH PRIORITY

Short description of proposed amendment	Status as at 30 June 2001
<p>Administration of surcharges - to clarify the scope of the method that applies for the administration of surcharges, including in relation to new connections.</p>	<p>On work program medium priority.</p>
<p>Clearer ring fencing obligations - to create more clearly identifiable ring fencing obligations to aid enforcement.</p>	<p>On work program awaiting review.</p>
<p>Changes proposed by the Code Registrar.</p>	<p>On work program awaiting review.</p>
<p>Competing pipelines - to clarify what pricing and other rules should apply in the case of competing pipelines.</p>	<p>On work program awaiting prioritisation.</p>
<p>Asset valuation - to change the asset valuation approach to better reflect uncertainty about future load and to provide for consistency in the treatment of new and existing capital.</p>	<p>QCA asked to clarify proposal.</p>

Issues identified in relation to the development of greenfields pipelines	
1.1 Actual capital cost not known in advance.	Assessing priority.
1.2 Access request before Pipeline in service.	Assessing priority.
1.3 Information — What would be required to be included in any Access Arrangement Information (“AAI”) submitted for a prospective Pipeline?	Assessing priority.
1.4 Limits on the duration of an Access Arrangement.	Assessing priority.
1.5 Certainty on tariffs across periods.	Assessing priority.
1.6 Scope for market-based tariffs.	Assessing priority.
1.7 Delays — The experience to date has shown that a significant period elapses between the date proposed Access Arrangements are submitted and the date final approval is granted by relevant regulators.	Assessing priority.
1.8 Prescription, flexibility and regulatory discretion. While the intent behind the Code was probably to provide a non-prescriptive system, similar to that under Part IIIA of the TPA, the inclusion of a number of sections such as sections 3 and 8 (which include very prescriptive provisions) has served to reduce the flexibility of the Code.	Assessing priority.
Treatment of Gas Networks	
1 The queuing policy for requirements for gas networks.	To be addressed in Fourth Amending Agreement.
2 Spare capacity register requirement for gas networks.	To be addressed in Fourth Amending Agreement.
3 Recovery of market development costs.	Assessing priority.
Coverage of Greenfields Pipelines/Network Expansions – Section 1.9.	Assessing priority.
Greenfields Projects – Market Outcomes.	Assessing priority.

(4) LESS SIGNIFICANT CHANGES WHICH ARE CURRENTLY BEING PROGRESSED, ANALYSED, OR HAVE BEEN ACCORDED A LOWER PRIORITY PENDING THE AVAILABILITY OF RESOURCES	
Short description of proposed amendment	Status as at 30 June 2001
Scope of the Code - to clarify the extent to which the Code should overlap with legislation in certain other areas.	On work program low priority.
Derivation of the elements - to clarify what level of information should be required to be provided by the Service Provider to explain the basis for the proposed Reference Tariffs.	On hold pending precedents.
Collection and maintenance of financial data - to clarify what information a Service Provider may be required to collect and maintain during the Access Arrangement period.	Regulator and jurisdiction consulting with industry.
Apportionment issues - issues concerning methods of nomination, apportionment, balancing and settlement.	Issue transferred to Gas Policy Forum. Matter being addressed by individual jurisdictions.
Procedures for managing access and retail contestability issues at the interface of the pipeline and the retail industries.	Issue transferred to Gas Policy Forum. Matter being addressed by individual jurisdictions.
Regulation of service standards - clarifying the role of the Code in regulation of service standards.	Regulators to provide a further paper.
Clarification of the scope of the Initial Capital Value – Section 10.8 (Definition).	No further action required.
Civil Penalty Provisions Sections 7.20 and 7.21 of the Code.	SA to report back to August meeting.
Variation of the Corporations Power.	SA to seek the required Ministerial approvals and report for noting at the August 2001 meeting.
SA item re amending procedures in Section 10 of Schedule 1.	Being progressed by SA.
Coverage of Competing Pipelines - Section 1.9	Assessing priority.
New Tariff Determination Methods - Section 8.3 and new section.	Proposed for Fourth Amending Agreement.

Strengthening of Appeals Rights - Gas Pipelines Access Law.	Proposed in conjunction with Fourth Amending Agreement.
Access Pricing Determinations - Section 8.1.	Assessing priority.
Valuation of Capital Base - Section 8.10.	Assessing priority.
Retaining of Service Provider Inspired Efficiencies – Section 8.45 - 8.46.	Progressed in Third Amending Agreement – sent to Ministers for approval.

Appendix 4 Summary of Code/Law Change Activity by NGPAC

	Code change Issue/s	History at NGPAC, with key meeting dates noted	Final or Current Status
1	Reaching a decision Clause 2.16 – should a Regulator be able to accept an access arrangement that substantially incorporates the draft decision.	Raised by Vic, 10 Feb 1999 Project Team paper, 26 May 1999 Public consultation Recommendation to Ministers	Second Amending Agreement, 9 Nov 2000.
2	Derivation of the elements Clause 2.6 – this clause is difficult to interpret, increases process difficulties and adds little beyond other processes and protections.	Raised by Vic, 10 Feb 1999 Project Team paper, 26 May 1999	Agreement was not reached on the need for a change. Held in reserve pending the development of precedents and the development of guidelines by Regulators, 26 May 1999.
3	Associate contracts, section 7 – the definition of the term was missing from the Code.	Raised by Vic, 10 Feb 1999 Project Team paper, 26 May 1999 Agreed to repeat definition in Code and to modify, agreed not a significant change, 26 May 1999. Recommendation to Ministers	First Amending Agreement, 23 Dec 1999.
4	Real vs Historical cost approach, section 8 – need for clarification regarding ability to express costs and revenues in real and historical cost terms.	Raised by Vic, 10 Feb 1999 Picked up in IPART/ORG paper, 26 May 1999. Recommendation to Ministers	First Amending Agreement, 23 Dec 1999.
5	Who can be a Service Provider? Clause 4.1(a) – suggested change to definition.	Raised by Vic, 10 Feb 1999 Project Team paper, 26 May 1999 Public consultation Recommendation to Ministers	Second Amending Agreement, 9 Nov 2000.
6	Scope of the Code – how far does the Code extend? The interaction of the Code/Law with extrinsic laws needs consideration to avoid inconsistencies, gaps and overlaps.	Raised by Vic, 10 Feb 1999, subsequently put on hold pending priority or a major review of the Code. Related issues raised by Gas Policy Forum, NGPAC agreed a matter primarily for the Forum. Forum replaced by Energy Market Development Committee of MCE, 30 July 2002.	On hold pending priority or a major review of the Code, primarily a matter for Energy Market Development Committee of MCE.

7	<p>Tax implications from ring fencing obligations Clause 4.15A – Code change to clarify that a tax liability can be considered a cost of complying with ring fencing obligations.</p>	<p>Raised by WA, 10 Feb 1999 Project Team paper, 26 May 1999 Public consultation Recommendation to Ministers</p>	<p>Second Amending Agreement, 9 Nov 2000.</p>
8	<p>Release of end user information 4.1 (f) to (g) – need to correct anomalies such as permission of a user or prospective user required to obtain end users usage data.</p>	<p>Raised by IPART, 10 Feb 1999 IPART/ORG paper, 26 May 1999 Public consultation on ‘obligation to release’ Recommendation to Ministers</p>	<p>First Amending Agreement, 23 Dec 1999 (ability to release). Second Amending Agreement, 9 Nov 2000 (obligation to release).</p>
9	<p>Information Collection during the period – deficiencies in powers to collection and maintain information outside of a review.</p>	<p>Raised by IPART, 10 Feb 1999 IPART/ORG paper 26 May 1999. IPART paper and Scoping paper, NGPAC asked Regulators to define what information they required and consult with Service Providers before returning to NGPAC, 25 August 1999. Agreed that user representatives also to be included in discussions, and if unable to develop a joint position any of the three parties may call on the Project Team as a facilitator, 29 November 1999. Paper from IPART, NGPAC agrees to convene Working Group 15 August 2001. Working Group report, 21 Nov 2001, NGPAC agrees for Project Team to progress paper in consultation with Working Group. Project Team/WG paper, 20 March 2002. NGPAC agree to preparation of draft information memorandum as the basis for a final decision by NGPAC on whether to progress at May meeting. May meeting cancelled so out of session vote taken, result was no unanimous support for whether the regulators case for additional powers had been made. 14 August 2002, NGPAC agreed to Project Team paper to explore alternatives. Draft information memorandum prepared, 4 Apr 2003, NGPAC agreed to refer the issue to the major review of the Code.</p>	<p>NGPAC agreed to refer the issue to the major review of the Code, 4 Apr 2003.</p>

10	Procedures for managing access and retail contestability – powers and procedures required at the interface of access/retail to introduce contestability.	Raised by IPART, 10 Feb 1999 IPART/ORG paper 26 May 1999	NGPAC agreed that this was a matter for individual jurisdictions, 26 May 1999.
11	Cross period incentive mechanisms – incentive mechanisms currently limited to within the period, benefits in extending to cross periods.	Raised by IPART, 10 Feb 1999 IPART/ORG paper, 26 May 1999 IPART paper, 29 Nov 1999 IPART paper, 29 Feb 2000 Project Team Paper, 24 May 2000 Project Team Paper, 29 Aug 2000 Public Consultation Recommendation to Ministers	Third Amending Agreement, 22 Nov 2001.
12	Apportionment – scope for apportionment processes to be used to delay or frustrate access	Raised by Commonwealth, 10 Feb 1999	Issue to be addressed by jurisdictions, 10 Feb 1999.
13	Reference Tariff Formula – is it necessary to clarify that the Regulator approve a tariff formula as well as a tariff.	Raised by IPART/ORG, 26 May 1999 Project Team paper, 29 Feb 2000 Vic paper, 29 Aug 2000 Project Team paper, 2 Mar 2001 Public consultation Recommendation to Ministers	Amendments to Law 6 February 2003. Fourth Amending Agreement, 6 Feb 2003.
14	Administration of surcharges sections 8.25 to 8.26 and 6.19 – administrative simplicity of approval of guidelines rather than requirement for Service Provider to advise in writing.	Raised by IPART/ORG, 26 May 1999	On work program, not progressed as low priority.
15	Regulation of service standards sections 3.1 and 3.2 – Code is largely silent on regulation of service standards that are implicit in price regulation.	Raised by IPART/ORG, 26 May 1999, Regulator to provide a further paper.	Proposal not progressed further by Regulators.
16	Internet form of public register – is a hot link sufficient to comply with Code?	Raised by IPART/ORG, 26 May 1999	NGPAC agreed no need for a Code change, 25 August 1999.
17	Information to Code Registrar – clarification of the means of providing certain information by Ministers and the NCC to the Code Registrar.	Raised by SA, 26 May 1999	Amendment to Law in operation 6 February 2003.

18	Appeals – a range of issues around the appeals process, in particular the timing of when an appeal can be made.	<p>Raised by IPART (without discussion), 26 May 1999</p> <p>IPART paper, 25 Aug 1999</p> <p>IPART paper, 29 Nov 1999</p> <p>Project Team paper</p> <p>SA Paper, 2 Mar 2001</p> <p>Public consultation</p> <p>Recommendation to Ministers</p>	<p>Amendments to Law in operation 6 February 2003.</p> <p>Fourth Amending Agreement 6 Feb 2003.</p>
19	Wakim – following the High court decision on Wakim, need to make changes to legislation to provide alternatives to cross-vesting of jurisdiction in the Law.	<p>Raised by SA, 29 May 1999</p> <p>SA and Project Team to help coordinate gas issues in changes to legislation, no need for a Code change.</p>	<p>Amendments to Law, in operation 28 Jan 2001.</p>
20	Clauses 4.12 and 4.13 – concern regarding lack of civil penalty provisions.	<p>Raised by WA, 25 Aug 1999</p>	<p>Assessed as low priority, defer consideration, 25 August 1999.</p>
21	Reopening of initial asset base clause 8.14 – proposal to allow the re-opening of the valuation of initial capital base at subsequent reviews.	<p>Raised by QCA, 29 Nov 1999, NGPAC suggests QCA should explore alternative approaches.</p>	<p>Withdrawn by QCA, 29 August 2000.</p>
22	Competing pipelines – issues surrounding competing pipelines including should losses of revenue on an existing pipeline from competing duplication be able to be recouped elsewhere in the network.	<p>Raised by NSW, 29 Nov 1999</p> <p>NSW paper, 29 Feb 2000</p> <p>Project Team paper, 24 May 2000</p> <p>Project Team Paper, 28 Nov 2000, NGPAC to revisit after ACT decision on EGP coverage.</p> <p>Issue of market based tariffs picked up in new investment and the Code (see below).</p>	<p>NGPAC agreed to be refer to PC review of Code.</p>
23	Classification of pipelines – changes to streamline classification provisions in section 10 of Law.	<p>Raised by SA, 24 May 2000</p> <p>SA Paper 29 Aug 2000</p>	<p>Problems to be addressed by changes in administrative procedures.</p>
24	Overlap of Code and Part IIIA undertaking – proposal to amend Code to avoid overlap between an undertaking under Part IIIA of the TPA and the Code.	<p>Raised by EPIC/APIA 28 Nov 2000</p> <p>Draft IM considered, 2 Mar 2001</p> <p>Public consultation</p> <p>Recommendation to Ministers</p> <p>NGPAC agrees to withdraw the recommendation until the outcome of the EGP decision could be clarified, 2 March 2001.</p>	<p>NGPAC confirms withdrawal of recommendation following clarification of EGP outcome.</p>

25	<p>Initial capital value – clarification of the definition required.</p>	<p>Raised by SA, 28 Nov 2000</p>	<p>Withdrawn by SA, 23 May 2001.</p>
26	<p>New investment and the Code – a series of issues were raised around the incentives for new investment under the Code, many as part of the debate on the overlap of the Code and Part IIIA including:</p> <ul style="list-style-type: none"> • Clarifying key terms • Actual capital cost not known in advance • Access request before pipeline in service • Information requirement for prospective pipelines • Limits on duration of an access arrangement • Certainty on tariffs across periods • Scope for market based tariffs • Delays • Prescription, flexibility and regulatory discretion <p>Other issues includes:</p> <ul style="list-style-type: none"> • Issues surrounding extension of distribution systems 	<p>Initially raised in EPIC/APIA submission on overlap of Code and Part IIIA, 28 Nov 2000, subsequently taken up by NGPAC.</p> <p>Project Team paper, 23 May 2001, Agreed to Code change on issue of ‘clarifying key terms’ with other issues to a Working Group.</p> <p>Working Group assessment of broad issues tabled 15 August, NGPAC noted and asked for paper on priority issue of market based tariffs for competitive pipelines.</p> <p>Papers from APIA and ACCC on the development of draft guidelines for greenfields pipelines noted, 21 Nov 2001.</p> <p>Project Team paper on market based tariffs and ACCC response, 21 Nov 2001, NGPAC agreed to defer until after Productivity Commission Report available.</p> <p>ACCC draft greenfields guidelines noted, 14 August 2002.</p> <p>Project Team paper following PC review proposes study, NGPAC to reconsider when terms of reference for PC review of Gas Access Regime are available, 4 April 2003.</p>	<p>Agreed to Code change for ‘clarifying key terms’ to be progressed at next opportunity.</p> <p>NGPAC to reconsider any further work on investment issues when terms of reference for PC review of Gas Access Regime are available, 4 Apr 2003.</p>
27	<p>Queuing policy – clause 3.12, allow Regulator discretion on whether required for distribution.</p>	<p>Raised by AGA 15 August 2001 Recommendation to Ministers</p>	<p>Fourth Amending Agreement 6 Feb 2003.</p>
28	<p>Register of spare capacity – clause 5.9, allow Regulator discretion on whether required.</p>	<p>Raised by AGA 15 August 2001 Recommendation to Ministers</p>	<p>Fourth Amending Agreement 6 Feb 2003.</p>
29	<p>Market development costs – clarification that certain market development costs can be recovered in reference tariffs.</p>	<p>Raised by AGA 15 August 2001 Recommendation to Ministers</p>	<p>Fifth Amending Agreement, 27 June 2002.</p>

30	Merging of covered pipelines – allow for a single access arrangement in the case of multiple covered pipelines with same owner/operator.	Raised by AGA 15 August 2001 Project Team paper, 20 March 2002 Public consultation Recommendation to Ministers	Sixth Amending Agreement, 24 Apr 2003.
31	New facilities investment, actual vs estimates costs – need to modify a provision on new facilities investment to better reflect original intent.	Raised by WA, 4 Dec 2002 Recommendation to Ministers	Seventh Amending Agreement, 17 Apr 2003.
32	End Users Advocacy funding – proposal for funding of end user representation.	Raised by EMRF/EUAA. 4 Dec 2002, Lack of strong support to progress at NGPAC, is a jurisdictional issue noting some measures already exist.	Identified as a matter for jurisdictions.

Appendix 5

Public Information Memorandum on the overlap of the Code and Part IIIA of the TPA

See attached PDF File