B8 Gas

B8.1 NCP commitments

Under the April 1995 *Agreement to Implement the National Competition Policy and Related Reforms*, the first tranche NCP obligation in gas was that (relevant) States and Territories implement any arrangements agreed between the parties as necessary to introduce free and fair trading in gas, between and within the States, by 1 July 1996 – or such other date as agreed between the parties, in keeping with the 1994 COAG gas reform agreement.

The central plank of the 1994 COAG gas reform program was a uniform national framework for third party access to natural gas transmission pipelines. In addition, COAG agreed to remove all legislative and regulatory barriers to trade in gas and to achieve structural reform of gas utilities.

The second tranche NCP obligation in gas is that (relevant) jurisdictions fully implement free and fair trading in gas, between and within the States, including the phasing out of transitional arrangements in accord with a schedule to be agreed between the jurisdictions.

In accord with the COAG principles on free and fair trade in gas, the Council's second tranche assessment considers jurisdictions' performance against the following obligations:

- effective implementation of the National Gas Pipelines Access Code, including satisfactory progress in phasing out transitional arrangements;
- removal of all legislative and regulatory barriers to free and fair trade in gas; and
- structural reform of gas utilities.

The National Gas Pipelines Access Code

The 1994 COAG agreement envisaged that a national code for access to gas transmission pipelines be in place by 30 June 1996. However, both COAG's original timetable and the scope of the reform agenda were modified after the NCP agreements were signed in April 1995.

In June 1996, COAG broadened the scope of reform and extended the timeframe, deciding that the national access framework should apply to distribution systems as well as transmission pipelines, and that the reforms be in place by 30 September 1996.

When this timeframe was not met, the Prime Minister in December 1996 proposed a new timeframe for introducing the national gas pipelines access code. The Prime Minister also sought agreement on certain regulatory and implementation issues. Apart from Western Australia, which expressed concern with the pace of deregulation and the proposed national transmission regulator, all jurisdictions agreed to the Prime Minister's proposals.

Subsequently, all Heads of Government signed *the Natural Gas Pipelines Access Agreement* (1997 Gas Agreement) on 7 November 1997. The Agreement incorporates a National Gas Pipelines Access Code (National Code), a legislative framework under which each jurisdiction would implement the Code, and a revised implementation deadline of 30 June 1998.

As at 30 June 1998, all States and Territories other than Western Australia and Tasmania had enacted legislation to give effect to the National Code.[43] However, at the time, the Commonwealth had not enacted the legislative amendments necessary for the State and Territory laws to become operational.[44] By 30 June 1999, the National Code was operational in all relevant jurisdictions other than Queensland.

The 1997 Gas Agreement established a number of implementation schedules, including a timetable under which each jurisdiction agreed to submit its application of the National Code to the Council for certification as an effective access regime under Part IIIA of the *Trade Practices Act 1974* (TPA). As at 30 June 1999, all relevant jurisdictions other than Victoria and the Northern Territory had applied for certification.

In addition, the Agreement established principles for the approval and phasing out of transitional arrangements and derogations from the National Code. In particular, transitional arrangements and derogations must be approved by all Ministers, be identified in the relevant jurisdiction's access legislation, and – except in certain specified instances – be phased out or removed by 1 September 2001. As at 30 June 1999, the Council is not aware of any jurisdictions imposing transitional arrangements and derogations outside the parameters of the Agreement.

Alongside the provisions on access, the 1997 Gas Agreement establishes complementary reform commitments on franchising principles and licensing principles. The Council regards these as ongoing commitments.

In accord with the 1995 NCP agreements, read in conjunction with the 1997 Gas Agreement, the Council assesses jurisdictions as having met their second tranche obligations in regard to the national gas access framework subject to:

- the National Code being operational in the jurisdiction;
- the continued phasing out of transitional arrangements in accord with the schedule in the 1997 Gas Agreement; and
- continued observance of the franchising principles and licensing principles in the 1997 Gas Agreement.

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[43] Western Australia passed its access legislation on 23 December 1998. Tasmania's commitments on this matter are not activated until such time as a natural gas industry commences in that State.

[44] The Commonwealth legislation received Royal Assent on 30 July 1998.

Removing regulatory barriers to free and fair trade in gas

Jurisdictions agreed under COAG 1994 to remove all legislative and regulatory barriers to free and fair trade in gas, between and within their boundaries, by 1 July 1996. The Council regards this an ongoing commitment.

The Council understands that many jurisdictions are addressing this area of reform in the context of their legislation review programs under clause 5 of the Competition Principles Agreement (CPA). As such, all relevant jurisdictions have scheduled gas-related legislation and regulation for review by the year 2000.

The Council has previously indicated that the June 1999 assessment will consider progress by jurisdictions in addressing any regulatory or legislative barriers to free and fair trade in gas, identified by the Upstream Issues Working Group (UIWG), which reported to COAG in December 1998.

Two areas highlighted by the UIWG are:

- the need for greater transparency in acreage bidding processes, including the publication of winning acreage bids; and

- the need for progress on access to upstream facilities.

The Council would expect that these principles be reflected in reviews under the clause 5 legislation review program of petroleum legislation, ratification Acts and other relevant legislation and regulation.

Given that a number of such reviews are currently in progress, the Council will continue to monitor reform in this area for the third tranche assessment.

Structural reform of gas utilities

COAG 1994 included a number of commitments on structural reform of gas utilities:

- structural separation of publicly owned transmission and distribution activities;

- the introduction of legislation to 'ring fence' transmission and distribution activities operated by the private sector by 1 July 1996; and

- corporatisation of gas utilities owned by the Commonwealth, State and Territory governments by 1 July 1996.

The Council regards these commitments as ongoing.

The Council notes that the National Code applies provisions on ring fencing to all gas transmission and distribution service providers. The provisions take effect in a particular jurisdiction once the National Code is operational in that State or Territory, in accord with Section 4 of the Code.

Conduct Code compliance: legislation relying on section 51 of the Trade Practices Act

As noted in Section B3, the Conduct Code Agreement requires that jurisdictions notify the Australian Competition and Consumer Commission (ACCC) of legislation reliant on section 51(1) of the TPA.

Because legislation reliant on section 51(1) is *prima facie* anti-competitive, jurisdictions are required to demonstrate that such legislation satisfies the competition test in clause 5(5) of the CPA.

As such, assessment issues in gas arise with regard to section 51(1) exemptions that might potentially affect free and fair trade in gas. In particular, the Council expects that the competition test in section 5(5) has been applied.

B8.2 Progress against NCP commitments

Commonwealth

National Code

The Gas Pipelines Access (Commonwealth) Bill was passed on 9 July 1998. The Commonwealth Act, which received Royal Assent on 30 July 1998, underpins the National Code by providing for the use of Commonwealth bodies, such as the ACCC and the Council, in the operation of the National Code. The Act also ensures that the Code applies to offshore waters and to the Moomba-Sydney pipeline.

The Commonwealth legislation provides for a derogation from the Code to allow for the continuation of any existing arbitration determinations which rely on Part 6 of the *Moomba-Sydney Pipeline Systems Sale Act 1994*, to allow for their continuing enforcement. This derogation was provided for in the 1997 Gas Agreement.

Removing regulatory barriers to free and fair trade in gas

The Council is not aware of Commonwealth legislative or regulatory barriers currently affecting free and fair trade in gas.

The Commonwealth has scheduled a number of Acts, affecting the supply of gas, for review under its clause 5 legislation review program. These include the *Moomba-Sydney Pipeline System Sale Act 1994* and the *Petroleum (Submerged Lands) Act 1967* (both scheduled for review in 1999-2000).

The Commonwealth amended the *Moomba-Sydney Pipeline System Sale Act 1994* and the *Petroleum (Submerged Lands) Act 1967* in 1998, under the *Gas Pipelines Access (Commonwealth) Act 1998,* to facilitate the application of the National Code in all jurisdictions and in Commonwealth waters.

Structural reform of gas utilities

The Council is not aware of any issues for the Commonwealth relating to structural reform of gas utilities.

Assessment

The Council assesses that the Commonwealth has satisfied its second tranche commitments in gas.

- The *Gas Pipelines Access (Commonwealth) Act 1998* is operational.
- The Commonwealth derogation affecting the Moomba-Sydney pipeline was specified in the National Code.
- The Council considers there are no matters relevant for the Commonwealth in respect of regulatory or legislative barriers to free and fair trade in gas.
- The Council considers there are no matters relevant are relevant to the Commonwealth in respect of structural reform issues.

New South Wales

National Code

New South Wales introduced an interim access regime in 1996, based on an early version of the National Code, to give customers access to the State's gas distribution networks.

The *Gas Pipelines Access (New South Wales) Act 1998* implements the National Code as adopted by all jurisdictions in November 1997. The legislation was passed on 3 June 1998 and was proclaimed on 14 August 1998.

The New South Wales Gas Pipelines Access Regime (incorporating the National Code) contains transitional arrangements, derogations and savings provisions consistent with the 1997 Gas Agreement. In February 1999, New South Wales notified the Council that it was delaying its customer contestability timetable under the National Code. However, the revised timetable remains ahead of the final deadline required under the 1997 Agreement.

New South Wales applied to the Council for certification of its access regime on 28 October 1998. The Council's recommendation has been conveyed to the Commonwealth Minister for Financial Services and Regulation.

Removing regulatory barriers to free and fair trade in gas

New South Wales has scheduled a number of Acts affecting the supply of gas for review under its clause 5 legislation review program. These include the *Gas Industry Restructuring Act 1986* and the *Pipelines Act 1967*.

New South Wales reports that a fundamental review of the *Pipelines Act 1967* was undertaken during 1998. The review examined transparency and effectiveness of approvals procedures; barriers to entry; whether government and non-government entities would be treated differently; and whether there is any urgent need to remove the third party access provisions of the Act.

Accordingly, the review examined restrictions on competition in the context of pipeline approvals, construction and operation. The review identified some provisions of the Act which, in theory, could restrict competition. These matters have been taken into account in the preparation of an Issues Paper on the Pipelines Act review, which is expected to be released for public consultation in the first half of 1999.

Structural reform of gas utilities

There are no publicly owned gas transmission utilities in New South Wales. The distribution network in the Wagga Wagga area is operated by Great Southern Energy, a New South Wales Government-owned electricity distribution business, which operates on a commercial footing.

Transmission and distribution services in New South Wales are operated by separate businesses: EAPL and Transmission Pipelines Australia (transmission); and AGL, the Albury Gas Company and Great Southern Energy (distribution). EAPL is 51 per cent owned by AGL. No company in New South Wales operates *both* transmission and distribution services.

The National Code establishes ring-fencing principles to apply to all gas transmission and distribution assets. AGL has implemented a corporate restructure to separate its network operations from retail functions, to comply with the provisions of the National Code.

More generally, New South Wales is providing for the staged removal of cross-subsidies provided by industrial to domestic gas markets. The State has also reviewed arrangements for dealing with Community Service Obligations to facilitate competitive neutrality between the gas and electricity sectors of the energy market.

Assessment

The Council assesses that New South Wales has satisfied its second tranche commitments in gas for the following reasons.

- The National Code is operational in New South Wales.
- New South Wales' transitional arrangements and derogations under the National Code are within the parameters of the 1997 Gas Agreement.
- The Council considers there are no matters relevant for New South Wales in respect of regulatory or legislative barriers to free and fair trade in gas.
- New South Wales is satisfactorily progressing the structural reform commitments in the COAG 1994 Agreement on gas.

Victoria

National Code

Victoria introduced the Victorian Access Code in December 1997. The Code mirrors the National Code, and was introduced as an interim measure to allow for the introduction of a package of gas reforms in the State.

The *Gas Pipelines Access (Victoria) Act 1998*, which applies the National Code in Victoria under the 1997 Gas Agreement framework, was passed on 19 May 1998 and proclaimed on 29 June 1999.[45] Victoria has informed the Council that proclamation was delayed due to interface issues between the Victorian Code – and processes already commenced under it – and the National Code. Victoria had also sought an amendment to the savings provisions in the Act, requiring the approval of COAG Ministers.

Removing regulatory barriers to free and fair trade in gas

Historical legislative and regulatory barriers to free trade in gas were removed as part of the November 1996 settlement of the dispute between the Commonwealth Government, Victorian Government and the Bass Strait producers (Esso-BHPP) regarding liability for the Petroleum Resource Rent Tax on Bass Strait gas production.

The settlement removed the State's exclusive contractual franchise and allowed other gas suppliers to enter the market on a competitive basis. In particular, restrictions were removed that had prevented:

- Esso or BHPP from selling gas, directly or indirectly, to end consumers;
- GASCOR buying gas from suppliers other than Esso or BHPP; and
- GASCOR's customers from on-selling gas.

Victoria has scheduled a number of Acts, affecting the supply of gas, for review under its clause 5 legislation review program. These include the *Petroleum Act 1958* (to which the Government responded in March 1999) and the *Pipelines Act 1967* (review completed February 1997). Victoria has listed the *Gas Industry Act 1998* and *Gas Safety Act 1997* as new legislation that restricts competition. The State's Annual Report to the Council includes an explanation as to why the benefits of the restrictions are considered to outweigh the costs.

Significant Producer Legislation

Concerns have been raised with the Council regarding Victoria's Significant Producer Legislation (SPL), set out in the *Gas Industry (Amendment) Act 1998.*

Esso and BHPP argue that the legislation imposes restrictions on significant producers in both the wholesale and retail markets, with adverse consequences for competition.

The SPL has two elements:

- introduction of a *Competition Rule* which prohibits significant producers from engaging in conduct that discriminates amongst gas retailers in a manner that has

[45] With the exception of provisions conferring jurisdiction on the Federal Court. Victoria received legal advice following a recent High Court decision on cross-vesting that these provisions may not be workable.

the purpose, effect or likely effect of substantially lessening competition in a Victorian gas market; and

- prohibition on significant producers from retailing gas to any customer using less than 5 Petajoules (PJ) per year (essentially the 35 largest customers in Victoria).

The Council considered that elements of the legislation could be anti-competitive and sought information from the Victorian Government on the costs and benefits of the restrictions to the community, as well as evidence that the objectives of the legislation could not have been achieved in a less restrictive manner.

The Victorian Government responded that the provisions of the SPL were to address specific competition concerns that may arise during the transition to a fully competitive Victorian gas market. These concerns arose from the dominance of the upstream natural gas market in Victoria by Esso/BHP.

The Government was concerned that producers could act to restrict the development of competition in two possible ways:

- a significant producer could offer special terms for gas supply to retailers who did not seek alternative supplies; and

- a significant producer could specifically target (by means of special deals) customers of retailers who seek those alternative supplies.

The Government feared that the effect of either would be that retailers might not pursue alternative supplies and that this would limit the development of a more diversified producer structure in the Victorian gas market.

Esso and BHPP argue that the legislation is unnecessary in that any anti-competitive behaviour could be dealt with under Part IV of the TPA. They further argue that the Competition Rule in SPL could have the effect of reducing competition by requiring them to offer standard term contracts to all purchasers and preventing legitimate discrimination. SPL also prevents them from getting a retail licence to sell gas to customers taking less than 5PJ per year.

The Victorian Government denies that the SPL would require only standard term contracts being offered, and argues that Part IV of the TPA is insufficient to deal with the issues of regulating competition in a developing competitive market, claiming that SPL is analogous to Part XI of the TPA.

The SPL is to be reviewed before June 2003 to assess the costs and benefits of the legislation and determine whether it should be repealed.

The Council recognises the concerns of the Victorian Government in seeking to ensure that increased downstream competition is not frustrated by the behaviour of dominant upstream players. The Council accepts that the Government has carefully analysed the issues and developed the approach it believes is most appropriate.

The Council raised with the Victorian Government the concern that the SPL could have the unintended consequence of limiting legitimate contract variation between significant producers and retailers. Both Esso and BHPP claimed that this was the

position and provided legal advice to support their arguments. It is difficult to assess the practical impact of the legislation before it has a chance to operate and the Council was concerned that the review in 2003 may be too late to deal with negative competitive impacts.

The Victorian Government has given an undertaking to the Council that if there is evidence that the provisions of SPL are adversely affecting the development of the market and competition, the review will be brought forward.

The Council is satisfied that this is an appropriate way to deal with the issues and will be monitoring the operation of the legislation. The Council will further consider this issue in its assessment in June 2001.

Structural reform of gas utilities

Under the *Gas Industry Act 1994*, Victoria has structurally divided its state-owned gas transmission, gas distribution and gas retailing activities into separate corporations.

The new gas distribution and retail structure comprises three holding companies each owning one retailer and one distributor. Each of the 'stapled' businesses is subject to legal and operational separation in accord with the National Code and Victoria's interim Access Code. The Victorian Government has privatised all three gas retailer/distributors.

The former transmission corporation, GTC, has been separated into Transmission Pipelines Australia Pty Ltd (which maintains high pressure transmission pipelines in Victoria) and an independent system operator, Victorian Energy Networks Corporation (VENCorp), to manage capacity on the transmission network and the proposed spot market in gas. Victoria privatised Transmission Pipelines Australia Pty Ltd in 1999.

Conduct Code compliance: legislation relying on section 51 of the Trade Practices Act

The Council has been advised by the ACCC of the following new legislation reliant on section 51(1) of the *Trade Practices Act 1974:*

- *Gas Industry Act 1994* (notified 17 July 1998);
  - Part 6B, Competition Policy Authorisation;
    - section 62M as from 3 June 1997, amended by 91/97;
    - section 26 as from 8 June 1998;
    - section 27 as from 11 December 1997 and amended by 40/98;
    - section 62O as from 3 June 1997;
    - section 62P as from 3 June 1997;
  - Part 6C, Master Agreements;

= section 62Q, section 62S and section 62T as from 8 June 1998.

Victoria informs the Council that Parts 6B and 6C of the Gas Industry Act implement a section 51(1) exemption under the TPA for revised arrangements between Esso/BHPP and GASCOR (and, by extension, the companies disaggregated from GASCOR) following resolution of the Petroleum Resource Rent Tax dispute in November 1996. Victoria notes that the use of section 51(1) was agreed by the Commonwealth and Victorian Governments as a means to provide commercial certainty as part of the resolution of the dispute.

In addition, a statutory exemption under section 51(1)(b) of the TPA was provided on 2 February 1999 for section 62PA of the Gas Industry Act, granting statutory authorisation to the Victorian Gas Industry Market and System Operation Rules (MSO Rules). The authorisation is co-incident within Victoria with the authorisation of the MSO Rules granted by the ACCC on 19 August 1998.

Assessment

The Council assesses that Victoria has satisfied its second tranche commitments in gas.

- The National Code is operational in Victoria.
- Victoria's transitional arrangements and derogations under the National Code are consistent with the 1997 Gas Agreement.
- Victoria is progressing reforms of regulatory and legislative barriers to free and fair trade in gas.
- Victoria satisfies the structural reform commitments in the COAG 1994 Agreement on gas.

Queensland

National Code

Queensland introduced the Gas Pipelines Access (Qld) Bill into Parliament on 21 April 1998. It was passed on 13 May and assented to on 18 May. The legislation had not been proclaimed as at 30 June 1999, and was therefore not operational.

Queensland informs the Council that it has chosen to delay making the National Code operational in the State until the Council has determined whether the Queensland Gas Pipelines Access Regime (incorporating the National Code) should be certified as an effective access regime under Part IIIA of the TPA.

Queensland's access legislation incorporates a number of derogations from the National Code affecting major transmission pipelines in the State. Queensland has indicated to the Council that it regards the derogations as an integral part of the State's access regime.

The Council notes that Queensland's derogations significantly alter the application of the National Code to the affected pipelines. While the derogations were signed off by

all jurisdictions in the 1997 Gas Agreement, the Council is currently in the process of determining possible implications for certification.

The Council accepts that, given the extensive nature of the derogations and the pending issue of certification, it may be a practical for Queensland to await the conclusion of the Council's certification process before making the National Code operational.

The Council would expect that this matter be resolved once the certification process has been completed.

Removing regulatory barriers to free and fair trade in gas

Queensland has reported to the Council that, in accord with issues raised by the UIWG, the Government is currently undertaking a targeted public review of the *Petroleum Act 1923*, the *Gas Act 1965* and *Gas Regulations 1989*.

Queensland has informed the Council that it intends to update the legislation to ensure that it is consistent with the UIWG recommendations in regard to the following key upstream gas issues:

- greater transparency in processes for allocating exploration permits and the award of acreage on an open and competitive basis; and

- provisions to enable the incorporation of a national approach to third party access to upstream gas production facilities, should UIWG's current work in this area recommend such an approach.

Queensland has also indicated that the review of these Acts will allow for amendments in accord with the licensing and franchising principles in the 1997 Gas Agreement. More generally, Queensland has reported that the COAG principles on open-ended franchises have been observed in the State. Approvals to develop new distribution franchises have been granted on the understanding that they will be subject to full open access provisions upon the introduction of the National Code.

Queensland has listed the *Gas Pipelines Access (Queensland) Act 1998* as new legislation enacted in 1998 that restricts competition. The restriction reflects the fact that gas pipelines owners and users must comply with the State's access regime.

Structural reform of gas utilities

Queensland's transmission and distribution activities are not structurally integrated. Currently in Queensland there are three main transmission pipeline operators – Epic Energy, AGL and Duke Energy. There are two main natural gas distributors – Envestra, formerly part of Boral Energy, and Allgas, now owned by Energex.

The National Code establishes ring fencing principles to apply to all gas transmission and distribution assets. Queensland reports that major gas industry participants are aware of these provisions, which will be activated once the National Code is operational in the State.

Energex, a Government-owned electricity corporation, made a successful takeover bid for Allgas in 1998. Energex is a corporatised business subject to competitive neutrality principles. Queensland reports to the Council that Energex is free to pursue its day-to-day business but is required to report to Shareholding Ministers on its Statement of Corporate Intent.

Assessment

The Council assesses that Queensland has satisfied its second tranche commitments in gas for the following reasons.

- The Council accepts that the delay in making the National Code operational in Queensland reflects practical concerns arising from the current certification process. The Council expects that this matter will be resolved once the certification process has been completed.

- Queensland's transitional arrangements and derogations under the National Code are consistent with the 1997 Gas Agreement.

- Queensland is progressing reform of regulatory and legislative barriers to free and fair trade in gas.

- Queensland satisfies the structural reform commitments in the COAG 1994 Agreement on gas.

The Council will consider whether Queensland has satisfied its obligations with respect to the National Code in the context of a supplementary assessment to be made on 30 June 2000.

Western Australia

National Code

The *Gas Pipelines Access (Western Australia) Bill 1998* was introduced to Parliament on 18 June 1998 and was passed on 23 December 1998. The Act was proclaimed on 27 January 1999 and took effect from 9 February 1999.

The Act is complementary legislation applying the Gas Pipelines Access Law – including the National Code – and establishing State bodies for regulation and arbitration of disputes. Currently a number of pre-existing access regimes apply to major pipeline systems until 1 January 2000 by way of derogations set out in the Code.

Western Australia's timetable for phasing out derogations and transitional arrangements is consistent with the 1997 Gas Agreement.

Removing regulatory barriers to free and fair trade in gas

Western Australia is implementing a deregulation schedule to unwind the exclusive franchise enjoyed by AlintaGas for gas distribution services to small use customers. The timetable culminates in full access to householder level by 1 July 2002, in accord with a State derogation in the 1997 Gas Agreement

AlintaGas is restricted until 2005 from participating in the Pilbara gas market. Western Australia maintains that this restriction is a necessary part of restructuring the previous gas supply contract between the former State Energy Commission of Western Australia and the North West Shelf Joint Venture, to allow for the development of competition in the Pilbara region.

The Council's first tranche assessment noted that restrictions then in place on the licensing of an alternative pipeline from the Pilbara to the State's south-west constituted a regulatory barrier to free and fair trade in gas. To satisfy the Council's concerns, Western Australia agreed to conduct an open and transparent process to determine whether anyone wished to build a second pipeline.

Western Australia reported to the Council that it has advanced the expressions of interest process for the construction of a second pipeline. The Government nationally advertised an indicative registration of interest process in September 1998.

The Government informed the Council that eleven companies lodged a registration of interest, but none indicated a willingness to proceed immediately with construction. Three firms were subsequently invited to participate in an expression of interest process, all of which have confirmed their willingness to do so.

In the meantime, the Government is taking steps to widen the Dampier to Bunbury Natural Gas Pipeline (DBNGP) corridor under the *Dampier to Bunbury Pipeline Act 1997* to promote competition in gas transmission services from the Pilbara to the south-west. Action has commenced to implement this expansion, which would allow the construction of additional pipelines – including loopings – which would compete with the DBNGP.

Western Australia has scheduled a number of Acts affecting the supply of gas for review under its clause 5 legislation review program. These include the *Dampier to Bunbury Pipeline Regulations 1998,* the *Gas Corporations Act 1994*, the *Gas Transmission Regulations 1994*, the *North West Gas Development (Woodside) Agreement Act 1979,* the *North West Gas Development (Woodside) Agreement Amendment Act 1994* and the *Petroleum (Submerged Lands) Act 1982 and Regulations.*

The reviews of the *Gas Corporations Act 1994* and the *North West Gas Development (Woodside) Agreement Amendment Act 1994* have been completed, with key recommendations endorsed by Cabinet.

Western Australia has listed the following as new legislation that restricts competition: *Dampier to Bunbury Pipeline Regulations;* the *North West Gas Development (Woodside) Agreement Amendment Bill 1996* (see below); and the *Energy Coordination Amendment Bill 1997*. The State's Annual Report to the Council includes an explanation as to why the benefits of the restrictions are considered to outweigh the costs and non-restrictive alternatives considered.

Structural reform of gas utilities

The *Gas Corporation Act 1994* allows AlintaGas to operate in the generation, transmission, distribution and trading/retail segments of the gas market. A clause 5

review of the Act found the legislated vertical integration of AlintaGas to be anti-competitive.

A number of recent events are likely to mitigate the corporation's market power. Firstly, with the sale of the DBNGP, AlintaGas is no longer involved in the gas transmission market.

Second, the National Code's ring fencing provisions will be applied to the corporation's gas distribution business (requiring separation from its trading/retailing arms) from 1 July 2002 when full access to the network becomes available. This is a slower implementation of the National Code's ring fencing principles than in other jurisdictions, but was a derogation approved by governments under the 1997 Gas Agreement.

In December 1998, the Government announced its intention to privatise the distribution, trading and retail businesses of AlintaGas. The Government has committed to a structural review of the corporation under clause 4 of the CPA prior to privatisation.

For pipelines other than the AlintaGas distribution networks in the mid and south-west of the State, the National Code's ring fencing principles are activated once the National Code applies to the relevant pipelines – for the State's major pipelines, this occurs on 1 January 2000.

Conduct Code compliance: legislation relying on section 51 of the Trade Practices Act

The Council has been advised by the ACCC of the following new legislation reliant on section 51(1) of the *Trade Practices Act 1974:*

- *North West Gas Development (Woodside) Agreement Amendment Act 1996*.

Section 41A of the Act provides for a State authorisation, under section 51(1)(b) of the TPA, of a gas contract between the North West Shelf "Domga" Joint Venture Participants and BHP Direct Reduced Iron Pty Ltd. Aspects of the contract that were identified as possibly restricting competition were its length and volume, as well as the provision that incremental gas must be taken from the contract supplier rather than the open market.

Western Australia notified the ACCC of this new statutory exemption within 30 days of enactment of the legislation. Western Australia has informed the Council that a clause 5 review of the Act recommended retention of anti-competitive restrictions on the basis of net public benefit, and followed an assessment that there were no viable alternative means to achieve the objectives of the legislation.

Assessment

The Council assesses that Western Australia has satisfied its second tranche commitments in gas for the following reasons.

- The National Code is operational in Western Australia, although it is not applicable to key pipelines until 1 January 2000 under Code derogations.

- Western Australia's transitional arrangements and derogations under the National Code are consistent with the 1997 Gas Agreement.

- Western Australia is progressing reforms of regulatory and legislative barriers to free and fair trade in gas.

- Western Australia is progressing the structural reform commitments in the COAG 1994 Agreement on gas.

South Australia

National Code

The *Gas Pipelines Access (South Australia) Act 1997* was passed in December 1997 and came into effect upon the commencement of the complementary Commonwealth legislation on 30 July 1998.

As 'lead legislator' for the National Code, South Australia was the first jurisdiction to seek certification of its state-based application of the Code. The South Australian access regime was certified as an effective access regime by the Minister for Financial Services and Regulation on 8 December 1998.

South Australia's derogations and transitional arrangements are consistent with the 1997 Gas Agreement.

Removing regulatory barriers to free and fair trade in gas

South Australia's *Cooper Basin (Ratification) Act 1975* provides concessions to the Cooper Basin producers and exempts certain agreements from the operation of the Trade Practices Act. The ACCC has previously identified the Cooper Basin (Ratification) Act as a significant legislative barrier to free and fair trade in gas.

South Australia reviewed the Act during 1998, releasing its review report on 28 May. The review identified a number of restrictions on competition where the costs outweighed public benefits. It noted that some of the restrictions arise because of the lack of a third party access regime to the Cooper Basin facilities, and because separate marketing by the Cooper Basin producers is effectively precluded. The review recommended that these restrictions be removed.

South Australia is yet to make an official response to the review. South Australia's Annual Report to the Council quotes the following section of a speech by the Deputy Premier, the Hon Rob Kerin MP, given in October 1998:

> *(the) Government has determined that we will establish a transparent process enabling the consideration of any third party access application to use Cooper Basin infrastructure. The infrastructure would encompass facilities from field satellites to the point of sale of the gas and liquids. The favoured minimum option is for an industry based self regulatory Code.* (Kerin 1998)

The Minister's Speech also stated that:

> *My preferred option is for such a code to include publication of access arrangements including capacity and pricing principles, be based on commercial negotiation, and provide for binding arbitration in the event of a dispute. There may be a need to wrap the industry code inside a skin of State legislation to provide a right of access, to guarantee arbitration and appeals on matters of law, and to shield the Industry Code from any Trade Practices Act entanglements.*

In a speech given on 22 March 1999, the Minister noted that the review of the *Cooper Basin (Ratification) Act 1975* had also identified criteria for Petroleum Production Licences as a barrier to trade in gas. The Minister commented that:

> *The Act will be amended to provide that applications for Petroleum Production Licences will be subject to the criteria established under the Petroleum Act.* (Kerin 1999)

South Australia is yet to make an official response to the review. As such, it is not possible at this stage for the Council to be satisfied that the Government has met its commitments in regards to removal of regulatory barriers to free and fair trade in gas. The Council will make a supplementary assessment on this matter in December 1999.

South Australia lists a number of other Acts, affecting free and fair trade in gas, for clause 5 reviews. Reviews have been completed into the *Natural Gas (Interim Supply) Act 1985* (to be repealed), and the *Natural Gas Pipelines Access Act 1995* (partly redundant following implementation of the National Code). A review is currently underway into the *Petroleum Act 1940.*

Acts scheduled for review in 1999 include the *Gas Act 1997* and the *Petroleum (Submerged Lands) Act 1982.*

Structural reform of gas utilities

South Australia's gas transmission and distribution pipelines are privately owned.

South Australia's transmission pipelines are owned and operated by Epic Energy – with exception of the Riverland Pipeline System, which is owned by Envestra Ltd and operated by Epic Energy Pty Ltd. Envestra Ltd also owns and operates the State's gas distribution networks. Neither Epic Energy nor Envestra have been issued with a licence to retail natural gas.

Boral Energy is the principal gas retailer in the State, along with other entities that include Optima Energy. The retailers have not been issued with licences to operate gas pipelines.

The case of Envestra owning both a transmission pipeline and distribution systems in the south-east of the State raises possible concerns under clause 10 of the COAG 1994

Gas Agreement, which requires the ring fencing of transmission and distribution activities.

South Australia argues that the principal issue should be to ensure separation of the natural monopoly elements of the gas industry (gas pipelines) from potentially competitive parts, such as retailing. The State argues that the latter form of separation has been achieved in South Australia. South Australia argues, in its Annual Report to the Council, that the terminology 'distribution activities' in clause 10 pertains to the retailing of gas.

This issue is likely to be addressed under the National Code, which applies ring fencing requirements to specific pipeline assets.

Assessment

On three matters, the Council assesses that South Australia has satisfied its second tranche commitments in gas.

- The National Code became operational in South Australia upon the commencement of complementary Commonwealth legislation on 30 July 1998.
- South Australia's transitional arrangements and derogations under the National Code are consistent with the 1997 Agreement.
- South Australia is satisfactorily progressing the structural reform commitments in the COAG 1994 Agreement on gas.

The Council is unable to provide a positive assessment of South Australia's progress in removing regulatory barriers to free and fair trade until it is notified of South Australia's official response to the review of the *Cooper Basin (Ratification) Act 1975*. The Council will consider this matter in the context of a supplementary assessment to be made on 31 December 1999.

Tasmania

National Code

While there is currently no natural gas industry in Tasmania, the State actively participated with other jurisdictions in the development of the National Code, and was a signatory to the 1997 Gas Agreement.

Under the Agreement, Tasmania's obligations to implement the National Code are not activated until approval for a natural gas pipeline in the State has been granted, or before a competitive tendering process for a natural gas pipeline in the State commences.

The Government intends to introduce Tasmania's access legislation during the 1999 Autumn Session of Parliament, paving the way for a possible introduction of natural gas to Tasmania by the year 2002.

Removing regulatory barriers to free and fair trade in gas

The Council considers there are no matters relevant for Tasmania in regard to regulatory barriers to free and fair trade in gas.

Structural reform of gas utilities

The Council considers there are no matters relevant for Tasmania relating to structural reform of gas utilities.

Assessment

The Council assesses that Tasmania has satisfied its second tranche commitments in gas.

Australian Capital Territory

National Code

The *Gas Pipelines Access Act 1998* was passed by the ACT Legislative Assembly on 30 June 1998. It was proclaimed on 14 August 1998, giving the National Code legal effect in the ACT.

The Council received an application to certify the regime on 11 January 1999.

The ACT's transitional arrangements are consistent with the 1997 Gas Agreement. The ACT has proposed no other derogations from the National Code.

Removing regulatory barriers to free and fair trade in gas

The *Gas Act 1992* was repealed in 1998 and replaced with the *Gas Supply Act 1998* in order to remove barriers to free and fair trade in natural gas. The *Gas Supply Act 1998* introduces a new gas authorisation framework that effectively separates distribution and retail activities to ensure that the National Code's ring fencing requirements are met.

The ACT Government has not identified any other legislative or regulatory barriers to free and fair trade in gas.

Structural reform of gas utilities

There are no publicly owned transmission or distribution activities in the ACT. Gas is transmitted to the ACT via the EAPL pipeline, while gas distribution services are separately owned by AGL Networks.

The ACT Government reports that AGL is currently restructuring its corporate entities in the ACT to separate distribution and retail activities, and put in place operating procedures and reporting mechanisms to meet the ring fencing requirements of the National Code.

Assessment

The Council assesses that the ACT has satisfied its second tranche commitments in gas for the following reasons.

- The National Code is operational in the ACT.
- The ACT's transitional arrangements are consistent with the 1997 Gas Agreement.
- The ACT has progressed reforms of identified regulatory and legislative barriers to free and fair trade in gas.
- The ACT is satisfactorily progressing the structural reform commitments in the COAG 1994 Agreement on gas.

Northern Territory

National Code

The Gas Pipelines (Northern Territory) Act was passed in April 1998 and commenced on 2 September 1998. Consequential amendments were required to the Energy Pipelines Act and the Petroleum (Submerged Lands) Act to make the National Code operational. These amendments commenced on 13 January 1999.

The Northern Territory Regime incorporates no transitional arrangements or derogations from the National Code.

The Territory informed the Council that its certification application will soon be submitted. Negotiations are proceeding with the terms of agreement for the ACCC to act as the Northern Territory regulator for gas distribution services. It is expected that this appointment will commence on 1 July 1999.

Removing regulatory barriers to free and fair trade in gas

The Territory has reviewed, or is in the process of reviewing a number of pieces of legislation affecting trade in gas. Reviews into the Energy Pipelines Act, the Petroleum (Submerged Lands) Act and the Petroleum Act are in progress. The Petroleum (Prospecting and Mining) Act has been repealed.

The Territory has previously informed the Council that its legislation pertaining to gas exploitation, development and transportation contains no legislative or regulatory impediments to the sale of gas.

Structural reform of gas utilities

With the exception of a small minority interest in NT Gas Pty Ltd held by the public sector, the Territory's gas pipelines are owned and operated by the private sector.

As outlined below, transmission and distribution activities in the Territory reflect significant structural integration.

- The 1557 km Palm Valley to Darwin transmission pipeline is leased and operated by NT Gas Pty Ltd (AGL owns 96 per cent of the corporation) under a 20 year

agreement. NT Gas Pty Ltd also operates gas distribution and gas retailing services in the Darwin area.

- The Palm Valley to Alice Springs pipeline is owned by Envestra Ltd, with Boral Energy Asset Management as operator of the pipeline. Gas distribution in Alice Springs is also owned by Envestra and operated by Boral Energy Asset Management. Gas retailing is conducted by Boral Energy.

The Northern Territory Government has informed the Council that ring fencing issues arising from structural integration will be addressed under section 4 of the National Code, now operational in the jurisdiction.

The National Code requires that a service provider, in respect of a pipeline covered by the Code, not carry on a related business (such as retailing). The Code also requires separate accounts in respect of the services provided by each covered pipeline and applies cost allocation principles.

Assessment

The Council assesses that the Northern Territory has satisfied its second tranche commitments in gas for the following reasons.

- The National Code is currently operational in the Territory.
- The Territory's application of the National Code contains no transitional arrangements or derogations.
- The Territory is reviewing gas-related legislation under its clause 5 legislation review program.
- Structural reform issues arising under the COAG 1994 Agreement on gas will be addressed under section 4 of the National Code.