APPLICATION TO THE NATIONAL COMPETITION COUNCIL FOR A RECOMMENDATION ON THE EFFECTIVENESS OF

THE VICTORIAN THIRD PARTY ACCESS REGIME FOR NATURAL GAS PIPELINES

Trade Practices Act 1974
SECTION 44M(2)

IN ACCORDANCE WITH REGULATION 6B
TRADE PRACTICES REGULATIONS

VICTORIAN GOVERNMENT
July 1999

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This application is made under section 44M(2) of the Trade Practices Act 1974 (Commonwealth) ("Trade Practices Act 1974") and the following supporting information is submitted for the National Competition Council's consideration in accordance with Regulation 6B of the Trade Practices Regulations. It seeks a recommendation from the National Competition Council ("NCC") to the Commonwealth Treasurer that the National Third Party Access Regime for Natural Gas Pipelines as applied in Victoria (the **Access Regime**) is an effective access regime in relation to:

1. services provided by Victorian natural gas transmission and distribution pipelines, which are specified in Schedule A of Schedule 2 of the Gas Pipelines Access (Victoria) Act 1998 as being under Victoria's jurisdiction and thus initially covered; and
2. services provided by natural gas transmission and distribution pipelines which subsequently become covered within Victoria.

Thus a recommendation is sought in respect of each Service provided by means of each pipeline that is or becomes a Covered Pipeline within the meaning of the Gas Pipelines Access (Victoria) Act 1998 ("the Victorian Act").

The Access Regime has been in force in Victoria since 1 July 1999, that being the day on which the Gas Pipelines Access (Victoria) Act 1998 (with the exception of Division 2 of Part 3) came into operation[1].

SECTION 1 – APPLICATION & CONTACTS

1.1 Applicant State

This application is made on behalf of the State of Victoria.

1.2 Responsible Minister

The responsible Minister for Victoria concerning this application is the Hon Jeffrey G Kennett, Premier.

1.3 Contact Officer

The contact officer for Victoria concerning this application is:

Mr John Robinson
Director, Energy Policy
Commercial Policy and Projects Division
Level 3
35 Spring Street
Melbourne Vic 3000
Tel: 03 9651 3240
Fax: 03 9651 3192

[1] ***See Victorian Government Gazette 1 July 1999, page 1521. See below for an explanation of why Division 2 of Part 3 is not in operation.***

1.4 Address of Responsible Minister

The responsible Minister's address for delivery of documents, including the notification of any decision of the Commonwealth Treasurer and recommendation of the NCC, relating to this application is:

c/o Mr John Robinson
Director, Energy Policy
Commercial Policy and Projects Division
Level 3
35 Spring Street
Melbourne Vic 3000

SECTION 2 – BACKGROUND

This section provides brief background information in relation to the Victorian gas industry.

2.1 Overview

The gas market in Victoria is more highly developed than in the other Australian States with a relatively greater proportion of the energy market being supplied with natural gas. Victoria is the largest gas consuming State in Australia with higher residential and commercial sectors.

Prior to December 1994, the Victorian gas industry was comprised of a vertically integrated monopoly utility (Gas and Fuel Corporation of Victoria) supplied primarily by a single joint venture producer (BHPP Petroleum (Bass Strait) Pty Ltd ("BHPP") and Esso Australia Resources Ltd ("Esso")) under restrictive long-term gas supply contracts.

In May 1996 the Victorian Government embarked on a reform program with the overriding priority being the development of a competitive market to ensure the long-term viability of the restructured industry and guarantee that the benefits of lower prices and higher standards of service flow through to customers.

Since the resolution of the petroleum resource rent tax dispute between the Government and BHPP and Esso in November 1996 (which carried with it agreement of a new gas supply contract so as to facilitate development of a competitive gas market in Victoria) the Victorian gas market has undergone rapid and comprehensive reform. Key areas of change are:

- creation of a competitive downstream industry structure;
- investment to link the principal Victorian and the New South Wales gas systems;
- investment to link the principal Victorian and the Western Victorian gas systems;
- development of an underground gas storage facility in Western Victoria;
- commencement of the gas spot market to facilitate pipeline balancing; and
- the successful privatisation of the former State owned gas businesses to committed experienced participants.

These changes, when coupled with forthcoming gas retail de-regulation in Victoria, will create a truly competitive gas market in Victoria bringing commensurate benefits to all users of gas. Additionally the changes facilitate competition at the upstream producer level, again with benefits to all users of gas.

In making these changes Victoria has been mindful of its commitment to achieving "free and fair trade" in natural gas and sees the changes as consistent with and readily facilitating that trade.

While at the initial stages of the change process there may have been considerable uncertainty and doubt on the part of industry participants and observers about what Victoria was proposing to do, the success of the change process, with its ending by 1999 of the State monopoly and the introduction of experienced privatised operators competing among themselves and interstate, is obvious.

Assessment of the effectiveness of the Access Regime should occur having regard to the far-reaching nature and extent of the Victorian reform process. And in that regard, the actual experience of the operation of the gas markets and the functioning of the gas industry is of most importance in laying to rest the previous uncertainty and doubt about what Victoria was proposing to do, and has done.

2.2 Gas Production in Victoria

2.2.1 The Gippsland Basin

The Gippsland Basin in the Bass Strait has historically supplied over 98% of Victoria's natural gas and contains most of Victoria's natural gas reserves. The Gippsland Basin production permits are held by a joint venture between BHPP Petroleum Pty Ltd its affiliates or subsidiaries and Esso Australia Resources Ltd ("Esso"), with Esso as the principal operator.

Gas is piped from the offshore fields and conveyed through raw gas pipelines to the processing facility operated by Esso at Longford near Sale in Victoria's southeast. The processed gas is then delivered into the high pressure gas transmission pipeline system now owned by GPU GasNet Pty Ltd. Formerly this gas transmission system was owned by Transmission Pipelines Australia Pty Ltd/Transmission Pipelines Australia (Assets) Pty Ltd ("TPA"), businesses owned by the State of Victoria.

2.2.2 The Otway Basin

Another source of Victoria's current gas is from Boral's gas reserves in the Otway Basin. Boral acquired its interest in these reserves from Cultus. Historically Boral and its predecessor Cultus, have only supplied the coastal region of western Victoria (including the towns of Warrnambool, Portland and Cobden). This accounted for approximately 2% of supply in Victoria. This region has not, up to now, been interconnected with the principal Victorian gas system.

However that interconnection has just occurred. Texas Utilities has been, since late in 1998, developing underground storage facilities at Iona. These facilities (which include a gas processing plant), together with the South West Pipeline (which has also been under construction since late in 1998), provide an alternative source of gas for Victoria from the Otway Basin. This Otway Basin gas directly competes in the area covered by the GPU GasNet transmission system with gas sourced from the Gippsland Basin and from the Cooper Basin via NSW. The first flows of gas over the Southwest Pipeline commenced at the end of June 1999. The gas was sourced from both Boral and Texas Utilities.

2.2.3 Other Gas Transmission Systems

Victoria's gas market has until recently been isolated from the rest of Australia. However, pipelines have been constructed (or are proposed to be constructed) to connect together the existing Victorian gas systems and to connect those systems to the NSW and other gas systems. Connection to the NSW gas system provides Victorian consumers with significant improvement in the diversity of their source of supply. These pipelines are:

(a) Albury to Wagga Wagga Interconnection ("the Interconnect")

East Australian Pipeline Ltd ("EAPL") and TPA have constructed a pipeline between Barnawartha near Albury and Culcairn near Wagga Wagga to enable Cooper Basin gas to flow south into Victoria, and Gippsland Basin and Otway Basin (in the latter instance, after construction of the South West Pipeline) gas to flow north to NSW. The Interconnect has a capacity which will transport up to 90 PJ gas per annum south to north or north to south.

An agreement ("the Culcairn Operating Agreement") was entered into between EAPL and VENCorp on 31 March 1999 and provides for carriage of gas over the Interconnect. The agreement came into force on 1 April 1999 (ie, after the gas spot market commenced in Victoria on 15 March 1999) and since then gas has flowed over the Interconnect in accordance with its provisions. Necessarily, the agreement contains provisions providing for the interface between EAPL's system (operated under contract carriage) and the VENCorp system (operated under the MSOR).

(b) Eastern Gas Pipeline

Duke Energy Australia is understood to be intending to construct a new 740 km pipeline between Longford in Victoria and Wilton, southwest of Sydney, following a route via Cooma, Canberra and Nowra. This would enable BHPP and Esso to supply the Sydney to Wollongong markets and other markets en route with gas from the Gippsland Basin; and

(c) South West Pipeline

As part of the development of the underground storage facilities in the Iona field near Port Campbell, a pipeline has been developed connecting the southwest transmission system and the main Victorian transmission system. See discussion above.

2.3 Extension and new reticulation projects

It is intended that main extension and new reticulation projects will proceed on a commercial basis based on contracts between the pipeline owner/developer and customers, but subject to regulation to ensure that adequate information disclosure occurs to protect the interests of customers. The pipelines will be subject to regulation for third party access.

2.4 Interstate supply sources

The Victorian Government is committed to the development of a competitive market in gas through the introduction of new sources of supply via an integrated pipeline network in Southern and Eastern Australia and supports these pipeline developments. The benefits from interconnection between Victoria and NSW include:

a) the creation of a competitive environment for gas production and supply in Victoria;

b) enhanced security of supply in Victoria; and

c) the stimulation of exploration for, and development of, gas fields in Victoria's onshore and offshore basins.

The September 1998 explosion and fire at the Longford gas processing facilities of Esso Australia Resources Ltd ("Esso") demonstrate the importance of the interconnection with NSW. Without that interconnection Victoria would have been entirely without gas for the two week period after the explosion and fire. Since then the capacity of the Interconnection has been significantly enhanced so that in the future there will be greater ability to ship gas south from NSW into Victoria or from Victoria into NSW.

2.5 Other Sources of Gas Supply and Demand Side Management

2.5.1 Underground Storage

Underground storage can provide a substantial supplemental supply of gas during periods of high seasonal demand. In addition, shippers, by having access to storage, can exercise better supply and load management.

Underground storage can be used for the following purposes:

a) the seasonal storage of off-peak gas for use during peak periods;

b) to provide operational flexibility to enable utilisation of unexpected capacity availability;

c) to provide protection against supply interruption; and

d) to facilitate load balancing when supply and demand imbalances occur.

2.6 Government Privatisation Program

The Victorian gas industry has been restructured from a State-owned monopoly to a competitive privatised industry based on providing the lowest possible cost and better service to all customers.

2.6.1 Key Structural Changes

The key structural changes include:

a) the unbundling of the distribution operations and separation of the retail operations previously performed by Gascor (the State owned monopoly supplier) into three "stapled" gas businesses, each comprising:

   i) a gas distributor linked with

   ii) a gas retailer.

b) The gas retailers act as agent for Gascor for all non-contestable customers within a defined geographic area of operation. As the gas retail market is deregulated, all customers will progressively be able to move from their incumbent retailer (acting as agent for Gascor) to any retailer. Unlike the electricity industry, the three gas distributors are not wholly aligned with the initial retail areas. In terms of gas consumption, the overlap between each gas distributor and its "stapled" gas retailer is slightly greater than 51%.

c) In the period before customers become contestable, each gas distributor will provide the use of its network on an open access basis to the two gas retailers which act as agent for Gascor in its territory. Following the progressive introduction of contestability into the retail gas market, (over the period from 1 October 1999 to 1 September 2001), the gas distributors will be required to provide open access to their pipeline system on a non-discriminatory basis to allow any licensed gas retailer to sell gas to those contestable customers or to allow the customers to purchase gas directly from a producer.

d) The disaggregation of Gascor coupled with retail deregulation ends the monopoly supply and pricing of gas to Victorian customers and allows the new gas retailers to compete for customers on the basis of price and service. It also allows gas distributors and other distribution businesses to compete for new reticulation projects. These reforms will generate benefits for industrial, business and residential customers in both city and country areas.

2.7 The Victorian Gas Industry

The former State-owned elements of the Victorian gas industry have now been restructured into:

a) three privatised gas retailers, Kinetik Energy Pty Ltd, Boral Energy (Vic) Pty Ltd (formerly Energy 21 Pty Ltd) and Energy Partnership (Retail) Pty Ltd (formerly Ikon Energy Pty Ltd), which currently sell gas to non-contestable customers as agents for Gascor Pty Ltd ("Gascor"), a State owned corporation, and then compete to supply gas to contestable customers. At establishment, each retailer served between 400,000 and 500,000 customers;

b) three privatised gas distributors, Multinet Energy Pty Ltd/Multinet (Assets) Pty Ltd ("Multinet"), Westar (Gas) Pty Ltd/Westar (Assets) Pty Ltd ("Westar") and Stratus (Gas) Pty Ltd/Stratus Networks (Assets) Pty Ltd ("Stratus"), which own and operate the existing gas distribution systems in defined areas of Victoria. As these are monopoly service providers, the terms and conditions upon which access to the networks is provided to third parties is subject to regulation by the Victorian Office of the Regulator-General ("ORG"). Each distributor currently serves between 400,000 and 500,000 customers;

c) a privatised gas transmission business, GPU GasNet Pty Ltd, which owns and maintains the former TPA gas transmission system and undertakes related activities. The terms and conditions upon which access to its network is provided to third parties is subject to regulation by the Australian Competition and Consumer Commission ("ACCC"). The GPU GasNet Access Arrangement and the Victorian Energy Networks Corporation ("VENCorp") Access Arrangement inter-relate reflecting their separate but related roles in ownership and operation of the former TPA gas transmission system. As such the two Access Arrangements need to be viewed together;

d) an independent system operator, VENCorp, a State owned corporation, which is responsible for operating the high pressure transmission pipelines and the gas spot market as well as maintaining system security. The gas spot market commenced on 15 March 1999. As noted above, VENCorp too is subject to regulation by the ACCC and its Access Arrangement needs to be viewed together with the GPU GasNet Access Arrangement.

In addition there are a number of other actual or proposed gas systems in Victoria which have never been State-owned. These include:

a) The proposed Mildura gas distribution system of Envestra Ltd. This system will serve the town of Mildura in Victoria's Northwest. The Victorian Office of the Regulator-General ("ORG") approved an Access Arrangement for this system on 3 June 1999. Envestra initially chose contract carriage for this system but then changed to market carriage and the ORG approved it on the basis of market carriage;

b) The proposed East Gippsland natural gas distribution system of Eastcoast Gas Pty Ltd. This system will service East Gippsland. The ORG approved an Access Arrangement for this system on 6 May 1999. This too is a market carriage pipeline; and

c) The Wimmera Pipeline owned by Coastal Gas Pipelines Victoria Ltd ("Coastal"). Coastal constructed, owns and operates the Wimmera Pipeline which services the towns of Ararat, Stawell and Horsham in Western Victoria. The Wimmera Pipeline is connected to the GPU GasNet gas transmission system.

2.8 Legislative Structure

2.8.1 Victorian Interim Access Regime

Up until the proclamation of the Gas Pipelines Access (Victoria) Act 1998 (the Victorian Act), which is contained in Annexure 1, the operation of the Victorian gas transmission and distribution systems has been regulated under Part 4B of the Victorian Gas Industry Act 1994 ("the Gas Act"). A copy of the Gas Act is contained in Annexure 2. Victoria enacted Part 4B of the Gas Act in December 1997 in advance of the National Access Regime (see below). However Part 4B was modelled on the National Access Regime and for most purposes the two regimes can be treated as the same.

Under the Victorian Interim Access Regime, the Victorian Third Party Access Code for Natural Gas Pipeline Systems ("Victorian Code") was made on 9 December 1997 with effect from 11 December 1997. A copy of the Victorian Code is contained in Annexure 2. The Victorian Code is (with some minor exceptions) the same as the National Third Party Access Code for Natural Gas Pipeline Systems ("National Code").

2.8.2 National Access Regime

The Gas Pipelines Access (Victoria) Act 1998 came into operation on 1 July 1999 with the exception of Division 2 of Part 3. That Division provides for the vesting of jurisdiction in the Federal Court and as such is affected by the recent High Court decision which held the cross-vesting legislation invalid[2]. Accordingly the Division is unable to be brought into force. As from 1 July 1999 the National Third Party Access Code for Natural Gas Pipeline Systems as applied in Victoria regulates the operation of the Victorian gas transmission and distribution systems.

[2] ***Re Wakim [1999] HCA 27, 17 June 1999.***

2.9 Reform Background

In February 1994 the Council of Australian Governments ("CoAG") agreed to progress a number of reforms to promote free and fair trade in natural gas in Australia. They included, amongst other things, the development of a uniform framework for the regulation of third party access to natural gas transmission pipelines.

On 7 November 1997, CoAG endorsed a national regulatory regime for natural gas transmission and distribution pipelines in Australia. This occurred through the signing of the Natural Gas Pipelines Access Agreement ("NGPAA"). The Agreement, amongst other things, records each jurisdiction's commitment in relation to implementing the national regime and maintaining its integrity. It also records each jurisdiction's obligations to carry out a range of other actions to promote free and fair trade in natural gas.

Under the Agreement, key commitments include:

- the national regime will be implemented through an application of laws model (with the exception of Western Australia which will give effect to the regime through complementary legislation) with all reasonable measures to be taken to have the necessary legislation in place by 30 June 1998;
- the legislation of each government is to be approved by all other governments prior to its enactment;
- South Australia is to be the lead legislator;
- governments will not amend their legislation without gaining the approval of all other governments;
- governments will repeal, amend or modify any other legislation that is inconsistent with the operation of the national regime;
- each State and Territory will submit the national regime as it is applied in their jurisdiction to the NCC for certification as an effective access regime under Part IIIA of the Trade Practices Act;
- transitional arrangements and derogations in relation to the national regime will only be allowed if they have been approved by all governments and are specifically identified in the relevant government's legislation; and
- franchising and licensing arrangements are to be reformed in line with principles set out in the Agreement.

The legislation put in place by South Australia ("the South Australian Act") and by the Commonwealth ("the Commonwealth Act") is also approved under the NGPAA.

In essence what has occurred pursuant to the NGPAA is that the Gas Pipelines Access Law and National Third Party Access Code for Natural Gas Pipeline Systems have been enacted by the Gas Pipelines Access (South Australia) Act 1997 ("the South Australian Act"). That Act has then been adopted in Victoria and other jurisdictions by an "Application of Laws" method.

The Access Regime, which is the subject of this application for certification, represents Victoria's enactment of the national regime pursuant to the Agreement.

SECTION 3 – OVERVIEW OF VICTORIAN ACCESS REGIME

The Gas Pipelines Access (Victoria) Act 1998 ("the Victorian Act"), the Commonwealth Act and the Victorian Gas Industry Act 1994 ("the Gas Act") form the basis of the National Access Regime in Victoria and this submission.

The National Access Regime in Victoria is established in Victoria by the Victorian Act. The Victorian Act provides as follows:

a) the Act itself applies the "Gas Pipelines Access Law" as a law in Victoria. The Act also deals with certain Victorian specific matters such as local Code bodies and transitional arrangements;

b) "Gas Pipelines Access Law" is defined in section 3(1) of the Victorian Act as:

   i) the Gas Pipelines Access Law itself (which is set out at schedule 1 to the South Australian Act), as amended from time to time; and

   ii) the National Third Party Access Code for Natural Gas Pipeline Systems (which is set out at schedule 2 of the South Australian Act) as amended from time to time.

c) The National Third Party Access Code for Natural Gas Pipeline Systems contains the detailed access principles that are to apply under the Access Regime.

Each other State and Territory (except Western Australia) has enacted legislation applying the Gas Pipelines Access Law (that is Schedules 1 and 2 to the South Australian Act) as a law in each State or Territory. Western Australia has enacted complementary legislation.

The Commonwealth Act facilitates the national coverage of the Access Regime by ensuring it will apply to offshore waters, the relevant external territories and adjacent areas, the Jervis Bay territory and to the Moomba Sydney pipeline. In addition, the Commonwealth legislation contains provisions which facilitate the use of Commonwealth bodies in the national scheme.

3.1 Victorian Act

3.1.1 The Victorian Act contains provisions:

- applying the Gas Pipelines Access Law as a law in Victoria: section 7;
- providing for the application in Victoria of regulations made under sections 10, 11 and 12 of the South Australian Act: section 8. These same regulations will be applied as regulations in each other State and Territory by the application legislation of each other State and Territory (other than Western Australia). They deal with such things as the penalties to be imposed for breach of certain provisions of the Gas Pipelines Access Law and the National Code along with defining the start of certain Covered transmission pipelines;
- defining who various bodies exercising functions under the National Code will be in Victoria: Section 9 (read in conjunction with the definitions in section 3);
- conferring functions and powers on the various Commonwealth and State Code bodies and the Federal Court: sections 10 to 16. As noted above, the provisions conferring jurisdiction on the Federal Court (sections 15 and 16) were not proclaimed on 1 July 1999 when the rest of the Victorian Act was proclaimed;
- applying the Commonwealth Administrative Decisions (Judicial Review) Act to certain decisions made under the Code: sections 17 to 18;
- providing for exemption from State duties and taxes: section 19;
- providing for actions in relation to cross-boundary pipelines: section 20;
- providing for the application of the Victorian Office of the Regulator-General Act 1994: section 21; and
- transitional provisions and consequential amendments to other legislation: sections 24 to 27. See discussion following.

3.2 Transitional Provisions

As noted above, Victoria in December 1997 put in place an Interim Access Regime.

The Interim Access Regime was established pursuant to Part 4B of the Gas Industry Act 1994 (Vic). Part 4B came into force on 11 December 1997. Section 48U of Part 4B provided for the making, by Order in Council of an Access Code. On 9 December 1997 with effect from 11 December 1997 the Victorian Third Party Access Code for Natural Gas Pipeline Systems ("Victorian Code") was made.

Other provisions of Part 4B provided for arbitration of access disputes, proceedings for contravention of Part 4B, administrative appeals and miscellaneous other matters.

The ACCC was appointed the Regulator of transmission pipelines and the ORG the regulator of distribution pipelines pursuant to the Interim Access Regime.

The Victorian Code is (with some minor exceptions) the same as the National Third Party Access Code for Natural Gas Pipeline Systems ("National Code"). Those exceptions principally are of two kinds:

- provisions enabling the continuance before the ACCC and ORG of Access Arrangement applications or other applications commenced before the coming into force of the Victorian Code: see eg sections 2.51, 2.52, 3.39 and 3.40 of the Victorian Code; and
- provisions specific to the interim regime: see eg sections 2.33, 2.48, 2.48A, 3.1, 4.11, 4.24, 7.1, 7.4, 7.20 and the definitions of "Access Arrangement", "Associate" and "Relevant Regulatory Instrument" in section 9.9. In general the exceptions in this category reflect both the fact that the empowering legislation for the Victorian Code is a different act as well as lessons learnt in 1998, during the processing of Access Arrangement applications, as to the workability of the Code.

Part 4B of the Gas Industry Act 1994 (Vic) and the Victorian Code, subject to the exceptions itemised below, ceased to have effect on 1 July 1999 upon the coming into effect of the Gas Pipelines Access (Victoria) Act 1998[3].

Sections 24A and 24B of the Gas Pipelines Access (Victoria) Act 1998 contains transitional provisions aimed at regulating the transition between the Interim Access Regime and the National Access Regime. The sections provide:

- Access arrangements "in process" at the time of coming into force of the National Access regime in Victoria may be continued with;
- Tender processes "in process" at the time of coming into force of the National Access regime in Victoria may be continued with;
- Access arrangements "in force" at the time of coming into force of the National Access regime in Victoria are continued; and
- Until the first full review of an Access Arrangement which is so "in force", certain provisions of the Victorian Access Code continue to apply to that Access Arrangement.

The provisions of the Victorian Code which thus continue to apply are as follows:

Section 2.33: This section is in all respects the same as section 2.33 of the National Code except that the restriction in section 2.33(b) of the National Code (which prevents the Regulator from approving, unless there is provision of Access Arrangement Information and consultation, immaterial revisions to Reference Tariffs or Reference Services) has been removed. The Victorian section 2.33 reflects discussions held in 1998 with the ACCC and the conclusion that if the revision was immaterial, it did not matter that it involved Reference Tariffs or Services, there was simply no point to requiring consultation or provision of Access Arrangement Information.

Section 2.48A: This section is unique to the Victorian Code and provides that when a "roll-in" application is made in respect of a New Facility, unless the Service Provider requests otherwise, the starting point is the Reference Tariffs existing immediately prior to the application. Section 2.48A was introduced to put beyond doubt that there was usually a fixed starting point for such applications, something implicit but not express in the National Code – see sections 8.15 - 8.19 of the National Code.

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[3] ***See Victorian Government Gazette 1 July 1999, page 1521.***

Section 3: Although the whole of section 3 of the Victorian Code continues to apply, the material differences between it and section 3 of the National Code lies in sections 3.1, 3.2, 3.9, 3.14, 3.20, 3.39 and 3.40 of the Victorian Code. Additionally, the Victorian Code omits section 3.8 of the National Code.

Dealing with each sub-section in turn:

1. Section 3.1 of the Victorian Code requires Access Arrangements to be in writing and to specify any "Relevant Regulatory Instruments" with which the Service Provider will comply. Section 3.2 requires the Service Provider to have "sufficient rights" in respect of its pipelines to enable it to provide services in accordance with its Access Arrangements. These sections are consequent upon the structure of the Victorian gas industry reforms whereby a market carriage model applies which is administered through the Victorian Gas Industry Market and System Operations Rules, there is an Independent System Operator (VENCorp) in respect of the principal gas transmission system and Tariffs are set by means of the Victorian Gas Industry Tariff Order 1998 which is then incorporated as an "extrinsic document" into the Service Provider's Access Arrangements.

2. Section 3.9 reflects the fact that a portion of the gas transmission system, namely the Interconnect between NSW and Victoria, is outside of Victoria. The section requires that, to the extent permitted by the law of the other State, there be no differentiation in the Access Arrangement between what is in Victoria and what is outside of Victoria. See below for further discussion of the Interconnect.

3. Section 3.14 restates the queuing policy contained in section 3.12 of the National Code reflecting the adoption of market carriage in Victoria as an alternative to contract carriage.

4. Section 3.20 contains an exception referring to "initial Access Arrangement which has a review date before 1 January 2003", ie slightly more than 5 years. This exception was introduced on the assumption that the initial Access Arrangements would run from 11 December 1997 to 31 December 2002. However due to delays in the Access Arrangement approval process occasioned by events such as the Longford explosion and fire, the initial Access Arrangements will run from December 1998 to 31 December 2002 which is considerably less than 5 years. As such this exception is irrelevant.

5. Section 3.39 and 3.40 are transitional provisions providing for tender processes "in process" at the time that the Victorian Code came into force on 11 December 1997. By reason of passage of time, these sections can be regarded as spent as all such processes should now be complete. However, to the extent that those processes are not yet complete, section 24A(5) provides for their carry over into the National Access Code too.

6. Lastly, section 3.8 of the National Code provides that no Access Arrangement based on market carriage can be accepted by the Relevant Regulator without prior consent of the Relevant Minister. However section 3.8 does not appear in the Victorian Code.

   At the time of assessment by the National Competition Council ("NCC") of the draft National Third Party Access Regime for Natural Gas Pipeline Systems, Victoria's Energy Projects Division ("EPD") made the following submission about clause 3.8:

"EPD notes that the draft of the Code dated September 1997 includes a provision that a regulator can reject an Access Arrangement solely because the pipeline is managed by common carriage but does not have the same discretion for a contract carriage pipeline (section 3.8). If an Access Arrangement otherwise satisfies all criteria and objectives of the Access Code and the Law, then it would seem inappropriate for a regulator to be able to arbitrarily impose another model than that proffered by the service provider, against the provider's wishes. This should apply equally to contract and common carriage.

EPD will be proposing to the GRIG that an alternative form of words be used to remove the bias against common carriage pipelines. A further option would be to delete clause 3.8. The removal of clause 3.8 would not prevent a regulator from addressing carriage issues in the context of the issues to be taken into account when assessing proposed Access Arrangements."

The reference to "common carriage" in the above quote is a reference to "market carriage". "GRIG" is a reference to the Gas Reform Implementation Group.

As it now appears in the National Code, section 3.8 no longer contains the regulatory discretion. Instead it requires prior Ministerial Consent before a pipeline can be a market carriage pipeline.

However, including such a provision in the Victorian Code was unnecessary because of the decision which had been taken by the Victorian Government prior to the making of the Victorian Code that the market carriage model should apply to the TPA gas transmission system. That decision of itself evidenced the necessary Ministerial Consent on the part of the Victorian Relevant Minister. As such section 3.8 was deleted from the Victorian Code.

Section 4.1: Section 24B amends both section 4.1(a) of the Victorian Code and Section 4.1(a) of the National Code as it applies in Victoria in the same terms, namely to update the provision to reflect changes in the Corporations Law (which now refers to "registered" companies, not "incorporated" companies) and to provide for foreign companies within the meaning of the Corporations Law. Currently section 4.1 does not provide for foreign companies although many of the purchasers of the newly privatised Victorian gas businesses are foreign or have foreign parents. The amendment to the National Code as it applies in Victoria is expressed as only applying until section 4.1(a) of the National Code is itself amended.

Section 7: Until 1 January 2000, the National Access Code has effect in Victoria as if the definitions of "Associate" and "Associate Contract" contained in the Victorian Access Code continued to apply. Those definitions have the effect of exempting from section 7 contracts entered into between "associates" who are in the common ownership of the Crown in Victoria. This exemption reflects the previous Crown ownership of all of the Victorian gas businesses (except the producers) and was an interim measure applying only until those businesses were privatised. Effectively, as almost all the former Victorian Crown owned businesses have been privatised, the provision can be regarded as spent.

Section 8: There is one minor difference between section 8 of the Victorian Code and Section 8 of the National Code, the omission of the word "Services" after the word "Reference" in section 8.1(f) of the National Code has been corrected.

Section 9: Section 9 of the Victorian Code only continues to apply to the extent that it relates to sections 3 and 8 of the Victorian Code. Section 9 of the Victorian Code is the definition section and is the equivalent of section 10 of the National Code. The only material differences lie in section 9.7 which provides that "Relevant Regulatory Instruments" includes amendments or replacements and section 9.9 which defines what a "Relevant Regulatory Instrument" is. These provisions are relevant to sections 3.1 – see above.

3.3 The Gas Pipelines Access Law

The Gas Pipelines Access Law contains the provisions necessary to give the National Code legal effect including provisions:

- defining the Code and providing for its amendment: sections 5 and 6 (when read in conjunction with the definition of scheme participants in section 3 and other definitions in section 2);
- establishing a procedure for classifying pipelines as transmission or distribution pipelines and for determining which jurisdiction a cross-border distribution pipeline is most closely connected with: sections 9 to 11. This is for the purpose of allocating who various Code bodies will be for the purposes of the Code: see the definitions of relevant appeals body, relevant Minister and relevant Regulator in section 2;
- prohibiting certain persons preventing or hindering access to Code pipelines: section 13;
- establishing procedures for arbitrating access disputes under the Code: sections 14 to 31;
- providing for legal proceedings to be brought in the Supreme Court or Federal Court in relation to breaches of certain provisions of the Gas Pipelines Access Law and the Code: sections 32 to 37. These provisions must be read subject to non-proclamation of sections 15 and 16 of the Victorian Act which provided for conferral of jurisdiction on the Federal Court – see earlier discussion;
- establishing a right of administrative review of certain decisions made under the Code: sections 38 to 39;
- placing an obligation on producers of natural gas who offer to supply delivered gas to also offer to supply gas at the exit flange of the producer's processing plant: section 40;
- general provisions relating to the Regulator's ability to obtain information and documents: sections 41 to 43.

3.4 The National Code

The National Code establishes, amongst other things:

- a mechanism by which natural gas pipelines become subject to the National Code (called "Covered Pipelines" or "Code Pipelines"): section 1. Within Victoria the following pipelines are specified as being Covered from the commencement of the National Access Regime:
  - i) All the natural gas transmission system pipelines described in Schedule A to the Victorian Code; and
  - ii) All the natural gas distribution system pipelines described in Schedule A to the Victorian Code.

These pipelines are more commonly known as:

- iii) The "Principal Transmission System" of GPU GasNet Pty Ltd (formerly the TPA Principal Transmission System);
- iv) The "Western Transmission System" of GPU GasNet Pty Ltd (formerly the TPA Western Transmission System);
- v) The Distribution Systems of Multinet Energy Pty Ltd/Multinet (Assets) Pty Ltd ("Multinet"), Westar (Gas) Pty Ltd/Westar (Assets) Pty Ltd ("Westar") and Stratus (Gas) Pty Ltd/Stratus Networks (Assets) Pty Ltd ("Stratus").

In addition, as a condition for acceptance of the TPA and VENCorp Access Arrangements, the ACCC has required that the interconnect gas transmission pipeline between Barnawartha in Victoria and Culcairn in NSW also be covered ("the Interconnect"). Coverage of the Interconnect was not sought at the time that the TPA and VENCorp Access Arrangements were lodged with the ACCC and submissions were lodged by EPD against its coverage based on the considerations in Chapter 1 of the National Code. However the ACCC determined that there should be coverage, saying in its Draft Decision dated 28 May 1998 on the Access Arrangements of TPA and VENCorp[4]:

> *"The Commission is particularly concerned over the exclusion of the Interconnect [from the Access Arrangements] and EPD's intention not to include it in the future. It notes the concerns raised by interested parties in submissions and agrees that this project is considered vital for the development of interstate trade between Victoria and NSW.*
>
> ……
>
> *In order for the TPA's Access Arrangement for the PTS [Principal Transmission System] to be approved, the Access Arrangement should be amended to provide that the Interconnect is to be incorporated into the Access Arrangement unless the Commission decides otherwise." (Words in square brackets added for clarity)*

This was followed up in the ACCC's Final Decision on the Access Arrangements of TPA and VENCorp[5] where the ACCC said:

> *"The Draft Decision of the Commission expressed concern that the Interconnect was not intended to be included in the PTS Access Arrangement in the future. Submissions received prior to the release of the Draft Decision also expressed concern over this decision by EPD. This resulted in the Draft decision containing Proposed Amendment A4.12 which required the Interconnect to be included with the PTS Access Arrangement.*
>
> *Subsequent to the release of the Draft Decision, EPD has advised the Commission that TPA intends to include the Interconnect with the PTS Access Arrangement through application of the revised extensions/expansions policy. Consequently, the Commission expects that once the Access Arrangements have commenced, TPA submit proposed revisions to the reference tariffs. A public consultation process will be undertaken by the Commission in accordance with section 2 of the Victorian Access Code to assess TPA's proposal. The Commission notes that under the National Access Code the consent of the NSW Minister is needed for the Interconnect to operate as a market carriage pipeline in NSW. The consent of the NSW Minister is currently being sought. In the light of submissions from interested parties, the Commission considers that this is the most appropriate approach to consider the matters raised in relation to the Interconnect."*

Accordingly TPA's Access Arrangement was in due course drafted so that it provided that the Interconnect was to be treated as part of the Principal Transmission System ("PTS") upon commencement of the TPA Access Arrangement. The ACCC granted approval to this in its Final Approval dated 16 December 1998[6]. TPA's Access Arrangements commenced on 1 January 1999.

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[4] ***See page 135 of the Draft Decision***

[5] ***See pages 144 and 145 of the Final Decision.***

[6] ***See pages 29-34 of the Final Approval.***

- a requirement that the service provider (ie owner/operator) of a Covered Pipeline establish with the relevant Regulator an up-front Access Arrangement setting out the terms on which access will be given to certain services provided by the Covered Pipeline, including the Reference Tariffs for such services: section 2. The content of an Access Arrangement, (see section 3) and the principles which must be applied in setting the Reference Tariffs (see section 8) are also specified;
- a right to arbitration where a service provider of a Covered Pipeline and a prospective user cannot agree on the terms of access to a service. The arbitrator is obliged in any such arbitration to apply the terms of the Access Arrangement established with the relevant Regulator: section 6;
- obligations on service providers of Covered Pipelines to ring fence their pipeline operations: section 4;
- obligations on service providers and users to disclose information: section 5; and
- a requirement that the service provider of a Covered Pipeline not enter into contracts with associates without first obtaining the approval of the relevant Regulator: section 7.

The National Code is applied as a law in Victoria.

3.5 The Commonwealth Act

The Commonwealth Act completes the coverage of the National Access Regime. It ensures the National Access Regime applies to offshore waters, to relevant external territories and adjacent areas (through amendments to the Petroleum Submerged Lands Act ("PSLA")), the Jervis Bay Territory, and to the Moomba-Sydney pipeline.

To facilitate a nationally consistent judicial review mechanism, the Commonwealth legislation provides for the Federal Court to deal with matters arising under Commonwealth Law and to review decisions of a Code Body under the Commonwealth Law or Regulations. It also enables the States and Territories to confer jurisdiction on the Federal Court in respect of civil and criminal proceedings and judicial review of decisions of a Code body. However these provisions must now be read subject to the recent High Court decision as to the unconstitutionality of the cross-vesting legislation[7] and the consequential non-proclamation of Division 2 of Part 3 of the Victorian Act.

The Commonwealth legislation also amends the Trade Practices Act to:

- ensure that national competition bodies can carry out functions conferred on them by States and Territories, ie. to enable the NCC to advise on coverage of pipelines under section 1 of the National Code;
- to enable the ACCC to be the Regulator for transmission pipelines;
- to enable individual jurisdictions to confer on the ACCC the regulatory role for distribution pipelines; and
- to enable the Australian Competition Tribunal to hear administrative appeals from decisions of certain Ministers in relation to Coverage decisions, and from decisions of the ACCC on specified access matters.

The Commonwealth legislation also amends Part IIIA of the Trade Practices Act to ensure it will apply to gas pipelines which extend offshore, but are within Australian territorial waters.

Related amendments to the Trade Practices Act will mitigate any perceived uncertainty surrounding the nature of the application of the Competition Principles Agreement ("CPA") which underpins the National Competition Policy, and is relevant through section 44M(4) of Part IIIA of the Trade Practices Act. The changes are to make it plain that there is flexibility in the application of the CPA principles, by the NCC and the Minister (ie Commonwealth Treasurer), in determining whether a State or Territory access regime is effective.

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[7] ***Re Wakim [1999] HCA 27, 17 June 1999.***

3.6 The Victorian Gas Industry Act 1994

The Victorian Gas Industry Act 1994 establishes part of the regulatory framework for a new competitive gas industry in Victoria.

Prior to the Gas Industry Act 1994, the former Gas and Fuel Corporation of Victoria ("GFCV") performed all the functions of transportation, distribution and retailing gas. Put shortly, GFCV was a vertically integrated monopoly utility. In December 1994, GFCV was disaggregated into Gascor and Gas Transmission Corporation ("GTC"). Gascor performed distribution and retailing functions while GTC owned and operated the gas transmission system. GTC in turn was disaggregated into TPA and VENCorp with TPA being the owner of the gas transmission system and VENCorp being the Independent System Operator of that system. Subsequent to its sale TPA became GPU GasNet Pty Ltd. Gascor was in turn disaggregated on 11 December 1997 into three distribution companies (Multinet, Westar and Stratus) operating their own distribution systems and three gas retailers.

The Gas Industry Act 1994 reflects this disaggregation and (among other things):

- establishes separate licences for gas retailers and gas distributors – see part 4A; and
- contains comprehensive provisions in Part 15 which have the effect of preventing re-aggregation of the gas transmission, retail and gas distribution businesses.

Licences are issued by the ORG. ORG is required to give public notice of applications for licences and is also required to call for submissions on any application for a licence thus ensuring accountability in their issue: see section 48E. The terms and conditions of licences are determined by ORG having regard to the factors specified in Part 4A. However, any person may apply for a licence – see section 48D – and in the grant or refusal of a licence by ORG has to have regard to the objectives specified in section 8B of the Act which include "to facilitate and promote open, efficient and competitive markets for and in relation to gas and to safeguard against misuse of monopoly power"; see section 48E. Licensing cannot be used to restrict the construction or operation of pipelines in competition with pre-existing licensed pipelines as such would be contrary to section 8B. Indeed the existence of prior competing licensees is not a relevant factor at all under Part 4A.

The Licensing Principles of the NGPAA require that a licence will not limit the services an operator may provide. No licences do such. However section 48F(fa) of the Gas Industry Act 1994 allows the ORG to fix conditions which prevent a licensee from engaging in or undertaking "specified business activities". There is a similar provision in section 48F(fc) Both sections 48F(fa) and 48F(fc) have to be read together with section 48BA which makes it an offence to operate an underground storage facility without a licence. The purpose of these provisions (and section 48F(fb)) is to allow terms and conditions in licences issued to operators of underground storage facilities that:

- ensure the management and operation of those facilities are appropriately ring-fenced; and
- prevent the facilities being re-aggregated with other of the former Victorian Government gas businesses.

In other words, these provisions are aimed at ensuring that there can be no recreation of monopoly power through reaggregation or operation as a non-ring-fenced business. These provisions are thus consistent with the overarching intent of the Licensing Principles that there be unbundling (see the first Principle).

In addition section 48F(g) allows licences to restrict the class of customers to whom the licensee may sell gas or provide services. This provision must be read together with section 6B and 48M of the Act and the notice in the Victorian Government Gazette under clause 2 of the gas retail licences[8] which determine the timetable for retail contestability. Under that timetable (which was amended both because of the necessity for more time for consideration by the ACCC and the ORG of the Access Arrangements of TPA and the three gas distributors and consequent on the September 1998 explosion and fire at the Longford gas processing plant of Esso), the first phase of retail contestability commences on 1 October 1999 with full retail contestability being achieved on 1 September 2001. This is consistent with the Franchising Principles of the NGPAA with the requirement that there be a phase out of exclusive franchise arrangements by 1 September 2001.

Overall, the above-mentioned provisions of the Gas Industry Act 1994, while facilitating access by third parties to pipeline infrastructure services, fulfils Victoria's commitment under the Licensing Principles and the Franchising Principles of the NGPAA.

The Gas Industry Act 1994 does not provide for technical standards as these are dealt with through the Gas Safety Act 1997. That act establishes an Office of Gas Safety which is an independent authority responsible for gas safety and for technical standards. A copy of the Office of Gas Safety Act is attached in Annexure 3. Additionally the Victorian Gas Industry Market and System Operations Rules ("MSOR" or "MSO Rules") contain extensive provisions governing matters such as metering and technical standards. See below for discussion of the MSOR.

3.7 Consequential amendments arising from the Access Regime

Various consequential amendments to associated Acts are made under the Victorian Act.

In summary the changes are as follows:

- Sections 24A and 24B of the Gas Pipelines Access (Victoria) Act 1998 contain transitional provisions aimed at regulating the transition between the Interim Access Regime and the National Access Regime. The sections provide:
  - i) Access arrangements "in process" at the time of coming into force of the National Access regime in Victoria may be continued with.
  - ii) Tender processes "in process" at the time of coming into force of the National Access regime in Victoria may be continued with.
  - iii) Access arrangements "in force" at the time of coming into force of the National Access regime in Victoria may be continued with.
  - iv) Until the first full review of an Access Arrangement which was so "in force" certain provisions of the Victorian Access Code continue to apply to that Access Arrangement.

Reference should be made to the discussion above for the detail of these provisions.

- the Gas Industry Act 1994 has been amended to reflect the coming into force in Victoria of the National Access Regime. In particular, provisions providing for the Interim Access Regime are repealed or amended so that reference is instead to the National Access Regime – see sections 25, 26 and 27 of the Gas Pipelines Access (Victoria) Law 1998.

3.8 Transition Timetable and Derogations

Historically gas prices in Victoria have not been fully cost reflective due to the lack of differentiation according to customer location. Such prices included the energy, haulage and retail components, which is termed a "bundled price". As such the haulage price was not transparent.

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[8] ***See the notice in the Victorian Government Gazette dated 15 July 1999, page 1649.***

The Victorian contestability timetable, which phases in the times particular customers are able to choose their retailer, is set out below. As noted above, this timetable is provided for by sections 6B and 48M of the Gas Industry Act 1994 as well as by notice in the Victorian Government Gazette under clause 2 of the gas retail licences[9].

- All customers supplied from supply points installed on or after 1 December 1997, other than a supply point installed within 1 kilometre of a distribution pipeline that was in operation on 1 July 1997, become contestable on 1 October 1999;
- all large customers (ie those whose annual site volumes are greater than or equal to 500,000 gigajoules) become contestable on 1 October 1999 in respect of a particular supply point.;
- all medium sized customers (ie those whose annual site volumes are greater than or equal to 100,000 gigajoules) are contestable on 1 March 2000 in respect of a particular supply point;
- all small customers (ie those whose annual site volumes are greater than or equal to 5,000 gigajoules) are contestable on 1 September 2000 in respect of a particular supply point; and
- the balance of the customers (including household tariff market) are to be contestable from 1 September 2001.

The above timetable differs, in-so-far as the first three classes of customers are concerned only, from the indicative timetable contained in Annex H of the NGPAA. However, as noted earlier, both the necessity for extensions of the time required for approval by the ACCC and Office of the Regulator-General of the Access Arrangements of TPA and VENCorp and the three gas distribution companies and the September 1998 explosion and fire at the Longford gas processing facilities compelled amendment to the timetable. Clause 13.1 of the NGPAA records that there must be a complete phase out of exclusive franchise arrangements by 1 September 2001. The alteration to the timetable does not affect that end date. The timetable contained in Annex H is no more than indicative - as is apparent from the reference in clause 12 of the NGPAA to the intended nature of the Annex H version of the timetable. It is not necessary to obtain approval from all jurisdictions before the timetable can be altered save and except where it is proposed to delay the onset of full contestability beyond 1 September 2001.

As noted above, historically tariffs in Victoria have not been cost reflective. However as part of the gas industry reforms effected between 1997 and 1999, prices were unbundled and cost reflectivity introduced. Thus the Victorian Gas Industry Tariff Order made on 9 December 1997 divided tariffs into four being:

i) distribution tariffs;

ii) VENCorp tariffs;

iii) transmission tariffs; and

iv) retail tariffs.

This classification was repeated with the Victorian Gas Industry Tariff Order 1998 which replaced, from 1 January 1999, the Victorian Gas Industry Tariff Order.

Distribution Tariffs:

In its Final Decision dated 5 October 1998 on the Access Arrangements of Multinet, Westar and Stratus the ORG said[10]:

> *"The Objectives of Reference Tariffs (section 8.1 of the Code), and the Office's interpretation of them, are as follows:*
>
> - *efficient costs - Reference Tariffs should be designed to allow the recovery of efficient costs only, thus excluding monopoly rents or inefficient costs;*

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[9] ***See the notice in the Victorian Government Gazette dated 15 July 1999, page 1649.***

[10] ***See pages 7-8 of the Final Decision.***

- *competitive markets - the regulator should draw upon the experience of competitive markets to the extent possible in assessing the efficiency incentives of Reference Tariffs;*
- *economic efficiency - Reference Tariffs should generate efficient signals for investment in new pipelines, the use of existing infrastructure, and for the exploitation of existing and new gas resources;*
- *incentives - Reference Tariffs should provide Service Providers with the capacity to earn greater (or less) profits than anticipated between reviews if they outperform (or under perform) against the benchmarks that are adopted in setting the Reference Tariffs; and*
- *safety - the safe and reliable operation of the industry should be a key concern, and be reflected in pricing decisions"*

On 17 December 1998 the ORG issued its Final Decision approving the Access Arrangements of Multinet, Westar and Stratus. That approval included approval of the Reference Tariffs of all three companies as reflected in the Victorian Gas Industry Tariff Order 1998, those tariffs having been assessed by the ORG against the principles outlined above. At the time of Final Approval, Dr Tamblyn, the Victorian Regulator-General, in a Media Release dated 18 December 1998 said:

> *"Dr Tamblyn reiterated his earlier comments that the Access Arrangements reflected in the Final Decision and now Final Approval strike a fair balance between the interests of customers in having lower prices for delivered gas and those of the distribution businesses in having regulatory certainty and the capacity to earn reasonable returns on their investments."*

3.8.1 VENCorp and Transmission Tariffs:

The ACCC adopted a similar approach to the ORG in setting Reference Tariffs for TPA and VENCorp stating in its Final Decision on the TPA and VENCorp Access Arrangements that:

> *"The purpose of setting a regulatory rate of return and asset base is to determine appropriate reference tariffs for third party access. The objective of the regulator in setting the rate of return is to strike a rate that eliminates excessive monopoly profits, but at the same time does not discourage investment. The regulator is also required to balance the competing interests of the service provider and those of end users."*[11]

The ACCC issued its Final Approval of the TPA and VENCorp Access Arrangements, incorporating transmission tariffs assessed according to the above principles, on 16 December 1998.

3.8.2 Retail Tariffs:

Retail tariffs for franchise (ie non-contestable) customers are "maximum uniform tariffs" under the Victorian Gas Industry Tariff Order 1998. However this restriction phases out with contestability and ends completely on 31 August 2001 consistent with the introduction (on 1 September 2001) of full retail contestability - see clause 9.1(a) (2) and the definition of "tariffed retail services" in Chapter 10 of the Victorian Gas Industry Tariff Order 1998.

[11] ***Final Decision page xii.***

A separate Tariff Order (the Wimmera and Colac Gas Supply Tariff Order 1998) regulates as from 1 January 1999 retail prices for the supply of gas in Ararat, Colac, Horsham and Stawell. These small towns in the southwest of Victoria are supplied by TLPG (Town Liquified Petroleum Gas), but are in due course expected to convert to natural gas. The Wimmera and Colac Gas Supply Tariff Order 1998 potentially can apply to retail prices up to 31 December 2013, but that potentiality is subject to a number of exceptions. In particular, the Order will cease to apply to tariffed customers in the town of Colac in June 1999 once natural gas is offered in that town because of the construction of the Southwest Pipeline (see the definition of "tariffed customer" in clause 6.1) and will cease to apply to other customers (in Colac and all the other towns) after a tariff is "altered or ended" under the Order (see clause 1.3). Additionally the Order does not apply to customers who buy gas direct from Gascor or to tariffed customers who consume more than 10TJ of gas per annum. The intent of the Order is to avoid the rate shock which otherwise might occur if customers were immediately transferred from the tariff for TLPG to a fully cost-reflective tariff for natural gas. In practical terms, because of the exceptions to the operation of the Order its effect is expected to diminish and phase out over time.

It is to be emphasised that although both these Tariff Orders are made pursuant to section 48A of the Gas Industry Act 1994, their terms are void to the extent that they are inconsistent with any approved Access Arrangement: see section 48A(5).

3.9 Victorian Description of the Service

Victoria requests that the NCC make a recommendation to the Commonwealth Treasurer that the National Access Regime as applied in Victoria is an effective access regime under Part IIIA of the Trade Practices Act 1974 in relation to:

> *"Each Service provided by means of each pipeline that is or becomes a Covered Pipeline within the meaning of the Gas Pipelines Access (Victoria) Act 1998 (the Victorian Act)."*

Service is defined in the National Access Code to mean a service provided by means of a "Pipeline", and may include without limitation firm haulage, interruptible haulage, spot haulage, backhaul and interconnection services and services ancillary to the operation of a Pipeline but does not include the production, sale or purchasing of natural gas.

Under the Victorian Act, a "Pipeline" means a pipe, or system of pipes, or part of a pipe, or system of pipes, for transporting natural gas, and any tanks, reservoirs, machinery or equipment directly attached to the pipe, or system of pipes, but does not include:

> *"(a) unless paragraph (b) applies, anything upstream of a prescribed exit flange on a pipeline conveying natural gas from a prescribed gas processing plant; or*
>
> *(b) if a connection point upstream of an exit flange on such a pipeline is prescribed, anything upstream of that point; or*
>
> *(c) a gathering system operated as part of an upstream producing operation; or*
>
> *(d) any tanks, reservoirs, machinery or equipment used to remove or add components to or change natural gas (other than odourisation facilities) such as a gas processing plant; or*
>
> *(e) anything downstream of the connection point (as defined by regulation) to a consumer."* (see the definition of "pipeline" in the Gas Pipelines Access Law (schedule 1 to the South Australian Act))"

SECTION 4 – THE VICTORIAN ACCESS REGIME AND THE COMPETITION PRINCIPLES AGREEMENT

4.1 Submission Regarding Compliance with Clause 6 of the CPA

This section addresses the consistency of the Access Regime with each of the principles in clause 6 of the CPA which are relevant to an assessment of the 'effectiveness' of the Access Regime under Part IIIA of the Trade Practices Act 1974. It is submitted that the Access Regime should be certified as effective because it:

- complies with clauses 6(2) and 6(3) of the CPA; and
- incorporates the principles set out in clause 6(4) of the CPA.

Each of these matters is discussed further below.

4.2 Prior Consultation

The Gas Reform Task Force and its successor the Gas Reform Implementation Group ("GRIG")[12] undertook extensive consultation with the energy industry and users throughout the period 1995 to 1997 with regard to developing the National Access Regime. This included seeking written submissions and conducting information seminars around Australia.

The last round of public consultation was conducted in July-August 1997 and was carried out jointly by the GRIG and the NCC. After consideration of the issues raised during the course of that public consultation process, the GRIG concluded that some minor amendments were necessary to the National Access Regime. The most notable in this regard were the changes to the Reference Tariff principles in section 8 of the National Code. The changes to these principles were intended to clarify the rights and obligations created by this section of the National Code.

Following this, the GRIG also sought and received "in-principle" agreement from the NCC that the National Access Regime satisfied the requirements in Part IIIA of the Trade Practices Act for recognition as an "effective" access regime. The NCC view was subject to a number of qualifications, which were taken into account by the GRIG in finalising the National Access Regime. See "*National Gas Access Regime, Recommendation to Gas Reform Implementation Group on the National Third Party Access Regime for Natural Gas Pipeline Systems",* September 1997 ("the 1997 Recommendation").

The Commonwealth and each of the State and Territory Governments in November 1997 subsequently endorsed the Access Regime.

[12] ***The GRIG comprised all State and Territory governments, the Commonwealth and peak industry/user associations (Australian Gas Association, Australian Production and Exploration Association, Australian Pipeline Industry Association, and the Business Council of Australia Energy Working Group).***

4.3 Clause 6 of the CPA and how it is satisfied

4.3.1 Clause 6(3) *For a State or Territory access regime to conform to the principles set out in this clause, it should:*

a) apply to services provided by means of significant infrastructure facilities where:

i) *it would not be economically feasible to duplicate the facility;*

ii) *access to the service is necessary in order to permit effective competition in a downstream or upstream market; and*

iii) *the safe use of the facility by the person seeking access can be ensured at an economically feasible cost and, if there is a safety requirement, appropriate regulatory arrangements exist.*

b) incorporate the principles referred to in subclause (4).

It is our understanding that clause 6(3) essentially sets out the types of infrastructure services which, if covered by a State or Territory access regime that incorporates the principles in clause 6(4), cannot be declared under Part IIIA of the Trade Practices Act 1974. In particular, it is understood that pursuant to clause 6(3)(a) an effective access regime should primarily cover services provided by infrastructure facilities which it would not be commercially viable to duplicate.

For the reasons set out below, it is submitted that the Access Regime satisfies the criterion set out in clause 6(3).

4.3.1.1 The Access Regime - Coverage

(a) Services and Pipelines

The National Access Regime applies to the 'Services' of transmission and distribution 'Pipelines' used for the haulage of natural gas. It does not apply to upstream facilities or services of upstream facilities such as processing facilities or gathering lines.

Specifically, 'Service' and 'Pipeline' are defined terms in the National Access Regime. The definitions are set out in the National Code and the Gas Pipelines Access Law respectively.

Section 10 of the Code defines 'Service' to mean:

> *'a service provided by means of a Covered Pipeline (or when used in section 1, a service provided by means of a Pipeline) including (without limitation):*
>
> - *haulage services (such as firm haulage, interruptible haulage, spot haulage and backhaul);*
> - *the right to interconnect with the Covered Pipeline; and*
> - *services ancillary to the provision of such services,*
>
> *but does not include the production, sale or purchasing of Natural Gas.'*

Section 2 of the Gas Pipelines Access Law defines 'Pipeline' to mean:

> *"a pipe, or system of pipes, or part of a pipe, or system of pipes, for transporting natural gas, and any tanks, reservoirs, machinery or equipment directly attached to the pipe, or system of pipes, but does not include:*
>
> *a) unless paragraph (b) applies anything upstream of a prescribed exit flange on a pipeline conveying natural gas from a prescribed processing plant; or*
>
> *b) if a connection point upstream of an exit flange on such a pipeline is prescribed, anything upstream of that point; or*
>
> *c) a gathering system operated as part of an upstream producing operation; or*

d) any tanks, reservoirs, machinery or equipment used to remove or add components to or change natural gas (other than odourisation facilities) such as a gas processing plant; or

e) anything downstream of the connection point to a consumer."

Under the Victorian Act, "Natural Gas" means a substance which is in a gaseous state at standard temperature and pressure and which consists of naturally occurring hydrocarbons, or a naturally occurring mixture of hydrocarbons and non-hydrocarbons, the principal constituent of which is methane; and which has been processed to be suitable for consumption.

(b) Covered Pipelines

There are four mechanisms under which a Pipeline may become 'Covered' and as a consequence subject to all of the obligations set out in the National Access Regime. They are:

1. Schedule A to the National Code - this is a list of the transmission and distribution Pipelines that will be Covered from the time the National Access Regime comes into operation in each State and Territory. The transmission and distribution Pipelines which will be covered from the commencement of the Access Regime in Victoria are listed in Schedule A to the National Code. These are the same pipelines as were listed in Schedule A of the Victorian Code.

2. All Governments have agreed that the Pipelines listed in Schedule A satisfy the coverage test that is contained in section 1 of the National Code. The criteria in the coverage test are based on the criteria in clause 6(3)(a) and the criteria in sections 44G and 44H of Part IIIA of the Trade Practices Act 1974 (see below). As such, it is submitted that the transmission and distribution Pipelines which are listed in Schedule A and which will be Covered in Victoria from the commencement of the National Access Regime in Victoria are ones, which exhibit the following characteristics:

   i) they would not be economically feasible to duplicate (eg. due to economies of scale and the technical and other costs associated with the laying of new Pipelines in residential and non-residential areas);

   ii) access to the Services provided by the Pipelines is necessary in order to permit effective competition in upstream and downstream markets (eg. the markets for the production and retailing of natural gas); and

   iii) the safe use of the Pipelines by parties seeking access can be ensured at an economically feasible cost under appropriate regulatory arrangements (eg. pursuant to section 2.24(c) of the National Code the Regulator is required to consider the operational and technical requirements necessary for the safe and reliable operation of the Covered Pipeline when putting in place arrangements for access).

3. section 1 of the National Code includes a case-by-case coverage process, which can be applied to Pipelines not listed in Schedule A (eg. existing Pipelines, which are not listed, or Pipelines, which come into existence in the future). Under this process, the NCC makes a recommendation to the relevant Minister (in the State or Territory that has the greatest association the particular Pipeline) as to whether the Pipeline should be covered. The Minister then makes a decision on coverage based on the recommendation. Section 1.9 of the National Code sets out the criteria which must be satisfied for the NCC to recommend that a Pipeline be covered (and for the Minister to decide that a Pipeline should be covered):

   i) that access would promote competition in at least one other market (whether or not in Australia);

   ii) that it would be uneconomical for anyone to develop another Pipeline to provide the Services provided by means of the Pipeline;

   iii) that access (or increased access) to the Services provided by means of the Pipeline can be provided without undue risk to human health or safety; and

iv) that access (or increased access) to the Services provided by means of the Pipeline would not be contrary to the public interest.

4. the owner/operator of a Pipeline can volunteer that the Pipeline be subject to the provisions of the National Code by proposing an Access Arrangement to the relevant Regulator for approval.

5. a Pipeline is automatically covered if it is subject to a competitive tendering process approved by the Regulator under section 3 of the National Code.

The National Access Regime also includes a process for administrative appeals and judicial review in relation to a coverage decision (see Part 6 of the Gas Pipelines Access Law). In addition, it includes a process for any person to apply for revocation of coverage (see section 1 of the Code) on the basis that the coverage criteria are no longer satisfied. This will ensure that only the owner/operator of those Pipelines that satisfy the coverage criteria are obliged to comply with the full requirements of the National Access Regime.

(c) Classification of Pipelines as Transmission or Distribution

All Governments have agreed to the classification of Pipelines as either transmission or distribution in Schedule A (including those listed under Victoria) to the National Code. This classification was made on the basis of the criteria specified in section 9 of the Gas Pipelines Access Law. Pipelines classified as transmission in Victoria have the primary function of conveying natural gas from processing plants such as Longford and North Paaratte to downstream markets or from NSW to downstream markets and Pipelines classified as distribution have the primary function of reticulating natural gas in various areas (eg. Melbourne).

In relation to Pipelines not listed in Schedule A, Part 3 of the Gas Pipelines Access Law sets out a process whereby relevant Ministers will decide whether a Pipeline is to be classified as a transmission or distribution Pipeline, applying the criteria specified in Part 3. If the Ministers fail to reach agreement, the NCC can be requested to make a recommendation on the matter. The Pipeline can be classified in accordance with the NCC recommendation if the Ministers are still unable to agree following a recommendation from the NCC.

4.3.2 Clause 6(4)(a)-(c) *A State or Territory access regime should incorporate the following principles:*

a) Wherever possible third party access to a service provided by means of a facility should be on the basis of terms and conditions agreed between the owner of the facility and the person seeking access.

b) Where such agreement cannot be reached, Governments should establish a right for persons to negotiate access to a service provided by means of a facility.

c) Any right to negotiate access should provide for an enforcement process.

It is understood that the NCC considers that these three clauses should be considered together because it is of the view that they establish the framework under which access negotiations should be handled in an effective access regime. In addition, it is understood that the NCC considers that these clauses require that access seekers should have recourse to an enforceable dispute resolution process where negotiations fail to result in agreement.

It is also understood that the NCC:

- recognises that limiting commercial negotiation can sometimes promote better policy outcomes by constraining market power, reducing uncertainty and producing more 'workable' outcomes;

- considers that bodies responsible for imposing any limits on commercial negotiation should be independent from all affected parties and have resources sufficient for their task. In this context, it is understood that the NCC is concerned to ensure that regulatory bodies are independent from service providers, users, potential users and governments; and
- is of the view that any constraints on commercial negotiation and dispute resolution (such as the imposition of Reference Tariffs or regulated transitional arrangements) should be imposed through transparent or robust competitive processes.

For the reasons set out below, it is submitted that the Access Regime satisfies the criterion set out in clause 6(4)(a)-(c).

4.3.2.1 The Access Regime

(a) Commercial Negotiation and Access Arrangements

The National Access Regime is primarily intended to apply in circumstances where commercial negotiations between third party access seekers and the owners/operators of Covered Pipelines are not successful. In this context it is emphasised that the National Access Regime in no way precludes parties from negotiating commercial arrangements that suit their particular needs and circumstances.

To facilitate negotiations and to provide some degree of certainty for both access seekers and owners/operators of Covered Pipelines in the event that commercial negotiations fail, the National Code requires the owners/operators of Covered Pipelines to submit an Access Arrangement to the appropriate Regulator for approval. In Victoria the Regulator in relation to transmission Pipelines is the ACCC which is an independent statutory authority established under *the Trade Practices Act 1974*. For distribution Pipelines the Regulator is the Victorian ORG, which is an independent Regulator, established under the Office of the Regulator-General Act 1994.

The Access Arrangement must include at least the following elements as set out in section 3 of the National Code:

- Services Policy - a description of the Services that are provided by the Pipeline;
- Reference Tariffs and Reference Tariff Policy - a tariff (as defined in the National Code) for one or more of the Services that are likely to be sought by a significant part of the market (Reference Services), and the principles used to derive the tariff;
- Terms and Conditions - terms and conditions on which Reference Services will be provided;
- Trading Policy - details of the rights of a user with certain capacity on a Covered Pipeline (which is a contract carriage pipeline) to trade their unused capacity. In this context it should be noted that (where commercially and technically feasible) the National Code provides that users should have a right to obtain tradeable capacity which is intended to facilitate a secondary market in capacity;
- Capacity Management Policy - the Access Arrangement must identify whether the Pipeline is a Contract Carriage Pipeline or a Market Carriage Pipeline (as defined in section 10 of the National Code)
- Queuing Policy - rules for defining the priority that access seekers have in negotiating for capacity;
- Extensions/Expansions Policy - the approach that will be adopted to determine whether an extension or an expansion to a Covered Pipeline will treated as part of the Covered Pipeline for the purposes of the National Code; and
- Review Date - a date on, or by which, revisions to the Access Arrangement must be submitted to the relevant Regulator and a date on which the revised Access Arrangement is intended to take effect.

An Access Arrangement submitted to the Regulator for approval must be accompanied by an Access Arrangement Information package. This document should enable users and prospective users to understand the derivation of the elements of the proposed Access Arrangement and must include the categories of information set out in Attachment A to the National Code.

The requirement for the Regulator to approve an Access Arrangement (and particularly Reference Tariffs) up-front is intended to provide both access seekers and owners/operators of Covered Pipelines with some certainty in relation to the likely terms and conditions of access. In particular, it is intended that this will assist in redressing the imbalance in negotiating power between owners/operators of Covered Pipelines and access seekers. It is also intended that this will encourage negotiated access to non-standard services and reduce the likelihood of dispute resolution under the National Access Regime.

(b) Approval of Access Arrangements

The regulatory process for approval of an Access Arrangement depends on the circumstances in which the Access Arrangement is submitted. In respect of an Access Arrangement which is required to be established under the National Code (because a Pipeline becomes Covered as a result of being listed on Schedule A to the Code, the case by case coverage process or an approved competitive tendering process under section 3 of the Code), the Regulator must go through a transparent process involving public consultation as set out in section 2 of the Code. Ultimately the Regulator is given the power to draft and approve its own Access Arrangement if:

- an Access Arrangement is not submitted within the required timeframe in the National Code (90 days unless the Regulator otherwise agrees); or
- an amended Access Arrangement is not submitted within the timeframe specified by the Regulator in its final decision or an amended Access Arrangement is submitted which does not incorporate any amendments specified by the Regulator in that decision; or
- in the case of revisions to an approved Access Arrangement; proposed revisions are not submitted by the date specified in that Access Arrangement or amended revisions are not submitted within the timeframe specified by the Regulator in its final decision or amended revisions are submitted which do not incorporate any amendments specified by the Regulator in that decision.

A similar process applies in relation to voluntary Access Arrangements except that the service provider may withdraw the application at any time prior to approval and the Regulator may not impose its own Access Arrangement.

The Regulator's draft and final decisions on the Access Arrangement must include reasons. Final decisions must be placed on the Public Register.

Under section 2 of the National Code the Regulator must issue a final decision on an Access Arrangement within six months of receiving the proposed arrangement. However, regulators do have the option to increase this period by two-month intervals provided notice of the extension is published in a national newspaper.

In assessing a proposed Access Arrangement, the Regulator must be satisfied that the arrangement contains the elements and satisfies the principles set out in section 3 of the National Code and section 8 (Reference Tariff Principles) of the National Code. In doing so, the Regulator is also required to take into account the following principles set out in section 2 of the National Code:

- the service provider's legitimate business interests and investment in the pipeline;
- firm and binding contractual obligations of the service provider or other persons (or both) already using the pipeline;
- the operational and technical requirements necessary for the safe and reliable operation of the pipeline;
- the economically efficient operation of the pipeline;

- the public interest, including the public interest in having competition in markets (whether or not in Australia);
- the interests of users and prospective users; and
- any other matters that the Regulator thinks are relevant.

Third parties acquire an enforceable right to negotiate access to a pipeline on a date specified by the Regulator, which must be not less than 14 days after the Regulator's decision to approve the Access Arrangement (unless the decision is subject to judicial or administrative review).

As noted above, Access Arrangements have already been approved under the Victorian Code by the ACCC in respect of TPA and VENCorp and by the ORG in respect of Multinet, Stratus and Westar. These Access Arrangements will continue in force under the National Code as applied in Victoria.

(c) Dispute Resolution

Under the National Code as applied in Victoria, parties are free to negotiate access on the basis of information (including Reference Tariffs) contained in the Access Arrangement and Access Arrangement Information package. In particular, and as noted above, parties are free to negotiate tariffs that are different to the Reference Tariffs. Moreover, the parties are free to negotiate a tariff for a non-Reference Service.

However, to the extent that commercial arrangements cannot be reached in relation to any aspect of access to a Service provided by a Covered Pipeline, section 6 of the National Code and Part 4 of the Gas Pipelines Access Law contain a dispute resolution process which can be invoked by either party referring the dispute to the relevant Regulator. If the Regulator judges that a dispute exists, the Regulator (or an independent agent appointed by the Regulator) may then arbitrate and set the terms and conditions of access.

In making a decision, the arbitrator must apply the provisions of the Access Arrangement (including the Reference Tariffs) and take account of the matters set out in section 6 of the National Code (see section 6.15). The matters to be considered by the arbitrator are consistent with those listed in clause 6(4)(i) of the CPA.

The rationale for making Reference Tariffs binding in a dispute resolution process is to facilitate timely and efficient access outcomes and thus promote the economic and competitive benefits that all Governments are seeking from the gas reform process. For example, in the absence of binding Reference Tariffs there would be a risk that parties with substantial market power may seek to have them reopened through the dispute resolution process for a variety of reasons (eg. to get higher returns or to get a better deal at the expense of other users) which would undermine the ability for approved Reference tariffs to provide a degree of certainty.

In terms of process, arbitrations are to be conducted in private and generally would be limited to the parties involved in any given dispute. The arbitrator does, however, have the ability to involve parties that it considers have an interest in the arbitration. The procedures to be followed in conducting arbitration are contained in Part 4 of the Gas Pipelines Access Law.

The final decision of the arbitrator takes effect 14 days after the decision is made. The owner/operator of the Covered Pipeline is bound by the decision. The access seeker is also bound by the decision unless it notifies the arbitrator within 14 days of the decision that it does not intend to be bound by the decision.

(d) Appeal Rights

Appeal rights have been developed with a view to striking a balance between the right of aggrieved parties to procedural fairness and ensuring the timeliness of regulatory outcomes.

All decisions made by the relevant regulators and arbitrators are subject to judicial review. Judicial review was intended to be carried out by the Federal Court under the Administrative Decisions (Judicial Review) Act 1977 of the Commonwealth pursuant to Part 3, Divisions 2 and 3 of the Gas Pipelines Access (Victoria) Act 1998. However, as noted earlier Division 2 has not been proclaimed as part of the Victorian Act and as such judicial review will have to occur in the Supreme Court of Victoria for the time being.

An administrative appeal right is also provided for in circumstances where the Regulator imposes its own Access Arrangement. Appeals from a decision of the Australian Competition and Consumer Commission can be made to the Australian Competition Tribunal. In the case of the Victorian ORG, appeals can be made to the Appeal Panel constituted under section 38(2) of the Office of the Regulator-General Act 1994: see section 21(2) of the Gas Pipelines Access (Victoria) Act 1998.

(e) Enforcement of Decisions

The Gas Pipelines Access Law provides for the enforcement of obligations created by the National Access Regime. Under Part 5 of the Gas Pipelines Access Law, a range of possible sanctions and remedies are available including injunctions and damages depending on the provision which is breached. The various sanctions and remedies were to be imposed by either the Federal Court or the Supreme Court of Victoria: see section 9 of the Gas Pipelines Access (Victoria) Act 1998, but because of the non-proclamation of Division 2 of Part 3 of that Act, for the time being only the Supreme Court will have jurisdiction.

4.3.2.2 Market Carriage Issues

Between December 1996 and June 1997 the Victorian Government Energy Projects Division ("EPD") undertook an extensive consultation process on its proposed market model. EPD sought to discuss its proposals and receive feedback and comments from a wide range of existing and potential gas and electricity industry participants, as well as government officials, regulators and representatives from other jurisdictions.

The consultation process commenced with a series of seminars and workshops for the Victorian Government gas businesses and Victorian Government officials in December 1996 designed to provide an initial understanding of the model and to solicit comments. These were followed in February 1997 with seminars/workshops for other jurisdictions, regulators, gas and electricity industry participants and advisers from whom formal comments were sought. After receipt of those comments modifications were made to the original proposals and further industry seminars were held by EPD in March 1997 and by BHP in April 1997. In June 1997 the adoption of the market model (including market carriage) was announced by the Victorian Treasurer.

Section 10 of the National Code defines "market carriage" as follows:

> *"'Market Carriage' is a system of managing third party access whereby:*
>
> *a) the Service Provider does not normally manage its ability to provide Services primarily by requiring Users to use no more than the quantity of Service specified in a contract;*
>
> *b) Users are normally not required to enter a contract that specifies a quantity of Service;*
>
> *c) charges for use of Services are normally based on actual usage of Services; and*
>
> *d) a User normally does not have a right to trade its right to obtain a Service to another User."*

This definition is to be compared with the definition of "contract carriage" also appearing in section 10 which is as follows:

> *"'Contract Carriage' is a system of managing third party access whereby:*

> *a) the Service Provider normally manages its ability to provide Services primarily by requiring Users to use no more than the quantity of Service specified in a contract;*
>
> *b) Users normally are required to enter a contract that specifies a quantity of Service;*
>
> *c) charges for use of a Service normally are based at least in part upon the quantity of Service specified in a contract; and*
>
> *d) a User normally has the right to trade its right to obtain a Service to another User."*

Market Carriage has been implemented in Victoria by the establishment of VENCorp as the Independent System Operator in respect of the GPU GasNet Pty Ltd principal gas transmission system and by the making (pursuant to section 48N of the Gas Industry Act 1994) of the Victorian Gas Industry Market and System Operations Rules (the "MSOR" or "MSO Rules"). A copy of the MSOR (incorporating all amendments to date) is attached as annexure 4. The MSOR (and thus the market carriage model) has been in force since 15 March 1999.

It needs to be noted that section 16L of the Gas Industry Act 1994 provides that in 2007 the ACCC (or another nominated person) must carry out a review of whether or not there is a continuing need for VENCorp (or a similar authority). The review is to have particular regard to the competitiveness of markets for and in relation to gas.

In its "*Recommendation to Gas Reform Implementation Group on the National Third Party Access Regime for Natural Gas Pipeline Systems*" of September 1997 ("the 1997 Recommendation") the NCC commented on what it termed "market carriage issues". The NCC had sought public comment on market carriage issues and received 14 submissions[13]. As the 1997 Recommendation *records* "*the public consultation process revealed a considerable degree of apprehension in the market*"[14]. Concerns were also raised that the market carriage model "*dilutes national uniformity in principles of access to gas pipelines*"[15].

The 1997 Recommendation goes on to say:

> *"A number of potential certification issues were raised, as set out below. However, it is the Council's view that substantive concerns relate to the specifics of market carriage application in Victoria rather than the generic principle of market carriage."*[16]

The NCC then identified in the 1997 Recommendation[17] three issues being:

a) Commercial negotiation of access;

b) A seamless and enforceable right to negotiate access; and

c) Barriers to interstate trade.

The NCC also said, in the case of each issue, that the specific concerns raised "in most instances can only be assessed by the Council in the context of Victoria's certification application"[18].

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[13] ***See 1997 Recommendation page 8.***

[14] ***See 1997 Recommendation page 8.***

[15] ***See 1997 Recommendation page 8.***

[16] ***See 1997 Recommendation page 8.***

[17] ***See 1997 Recommendation pages 10-11 and 31-34.***

[18] ***See 1997 Recommendation page 9.***

The first two issues will now be addressed in turn (the issue "barriers to interstate trade" is addressed when clauses 6(4)(p) and 6(2) of the CPA are considered - see below).

When considering these two issues, it needs to be emphasised that the Market Carriage model has now been in operation in Victoria since 15 March 1999. Though there was in 1997 "a considerable degree of apprehension in the market" about the model, that apprehension must now be set against the fact that nearly two years have passed in which the detail of the model has been settled and it has been brought into force. Thus, in as much as the apprehension related to the unknown, what was previously unknown is now well known. In that respect, the gas spot market commenced on 15 March 1999 and has operated successfully and uneventfully since that date. In addition, the recent successful privatisations of the Victorian Government gas businesses reinforces that the gas industry has become comfortable with the Victorian gas industry reforms including the market carriage model.

Additionally, the ACCC considered the market carriage model when approving the VENCorp and TPA Access Arrangements. The ACCC noted that the NCC in the 1997 Recommendation "*concluded that the generic principle of market carriage model does not appear inconsistent with the requirements of the Competition Principles Agreement*"[19]. The ACCC then went on to examine the market carriage model as implemented in Victoria and made two findings which are relevant in present context. In particular:

- in as much as opponents of the market carriage model expressed concern "at what they see as novel, untried and complex market arrangements, in particular the market carriage management system"[20], the ACCC said:

  > *"The Commission has examined issues raised in submissions and understands the concerns raised. The Commission accepts that the concepts and processes developed may be novel and complex to those newly exposed to them. However, experience in the electricity market has shown that market participants quickly become familiar with operating in a new environment."*[21]

- in as much as those opponents argued that having market carriage in Victoria and contract carriage in NSW would inhibit interstate trade and be contrary to the Competition Principles Agreement, the ACCC said:

  > *"The Commission noted in its Determination on the MSOR that even though there is a common gas transportation model in North America, the details of carriage on each pipeline are different, but this has not stopped gas markets from developing. Hence, the Commission considers that interstate trade will not be adversely affected by the different market systems in Victoria and other States."*[22]

It is to be emphasised that the market carriage model as applied in Victoria (and thus the MSOR) apply to the principal gas transmission system in Victoria. It does not apply to the Victorian gas distribution systems.

It also is to be noted that until the Western Transmission System is connected by the Southwest pipeline to the Principal Transmission System, the Western Transmission is a contract carriage pipeline. However once that connection occurs, the Western Transmission System will convert to market carriage.

(a) Commercial negotiation of access:

As noted above, this issue was the subject of detailed submissions prior to the making by the NCC of the 1997 Recommendation. A summary of those submissions appears at pages 31-33 of that Recommendation and it is not proposed to repeat what was said there.

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[19] ***See ACCC Final Decision, 6 October 1998, page 12, footnote 20.***

[20] ***See ACCC Final Decision, page 13.***

[21] ***See ACCC Final Decision, page 15.***

[22] ***See ACCC Final Decision, pages 15 and 17 (also see page 18).***

The NCC's conclusion appears at page 33 and was as follows:

> *"The Council notes that to satisfy the CPA principles, an access regime should allow commercial negotiation to satisfy a party's reasonable commercial requirements - such as the right to negotiate over price, or for certainty of supply and price. The operation of market carriage, as a general principle does not appear to be inherently inconsistent with this principle - although negotiation might sometimes occur in different contexts to those which have been traditionally used. For example, a market carriage framework might allow parties the right to negotiate "firm capacity" on the basis of "non-interruptibility" arrangements, gain price certainty through financial "hedge" instruments and negotiate discounts from reference tariffs with the service provider.*
>
> *In a broader context, while some constraints on commercial negotiation may be appropriate means of delivering good outcomes in particular market contexts, the Council will consider the processes by which those constraints are imposed -for example the independence and transparency of the arrangements.*
>
> *The Council notes that the GRIG has agreed to amend the National Regime to provide that a licensed system operator must be established for any pipeline which is subject to market carriage. The Council will consider the processes by which constraints are imposed on commercial negotiation in the Victorian model in the context of Victoria's certification application."*

The "Licensed System Operator" in relation to the GPU GasNet Pty Ltd gas transmission system is VENCorp which has been established as an Independent System Operator in respect of that system. Pursuant to Part 2, Division 2A of the Gas Industry Act 1994, VENCorp is an independent statutory corporation with specified statutory functions which include controlling the operation of the gas transmission system (see section 16C(1)(c) of the Gas Industry Act) and the operation of the gas market (see section 16C(1)(h) of the Gas Industry Act). VENCorp's Board composition is also prescribed by Division 2A. The Board comprises 10 members (including the chairman) of which at least three must be independent of the gas and electricity industries. The balance may be (and in fact are) industry representatives coming from gas producers, gas distributors and retailers, gas transmission companies and the electricity industry.

As can be seen from this, VENCorp is an independent body accountable through its Board to the Minister but incorporating the views of the gas and electricity industries.

The processes VENCorp must follow in administering market carriage are set by the MSOR. The MSOR are very detailed and it is not proposed to summarise all their provisions. However, in present context it suffices to note that the MSOR:

i) Contain extensive provisions requiring VENCorp to publicly consult on various steps it takes or proposes to take: clause 1.4;

ii) Require registration of participants and market participants: chapter 2;

iii) Requires payment of market fees ("tariffs") to VENCorp after the ACCC has approved those fees.

iv) Contain detailed provisions governing gas scheduling, determination of market price and settlements: Chapter 3;

v) Provide for such matters as connection to the transmission system, LNG storage, gas quality and metering[23]: Chapter 4;

vi) Provide for authorised MDQ ("maximum daily quantity"): Chapter 5;

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[23] ***Also note that gas quality issues are also addressed by Victoria's Office of Gas Safety pursuant to the Gas Safety (Gas Quality) Regulations 1999.***

vii) Provide for intervention and market suspension: Chapter 6; and

viii) Provide for enforcement and disputes: Chapter 7.

Thus the MSOR are designed to ensure independence and transparency in the operation by VENCorp of the market carriage model in Victoria.

Accountability and transparency was a matter of concern to the ACCC at the time that it granted authorisation of the MSOR. In its Determination on authorisation of the MSOR dated 19 August 1998, the ACCC said at pages 157-158:

> *"In its Determination on the National Electricity Code, the Commission took the view that an effective consultative process would increase the public benefit of the proposed arrangements by ensuring that all participants' interests would be represented. Similarly, the Commission considers that it cannot authorise the MSOR unless there is a formal consultation mechanism in place. Moreover, the Commission believes that any formal consultation procedures must consider the views of prospective participants and clearly state the consequences of failure to comply with the procedures."*

Although said by the ACCC in the context of consultation, the sentiments expressed plainly reflect a proper insistence on independence with accountability and transparency. The ACCC then imposed a condition for authorisation, which was subsequently complied with, requiring detailed consultation procedures in the MSOR - see clause 1.4 of the MSOR.

(b) A seamless and enforceable right to negotiate access

As is noted in the 1997 Recommendation, "*a concern raised in some submissions is that the market carriage model is unable to provide certainty to those who require it, and as such, may not create a seamless right to negotiate access*"[24]. This is an issue of "firm" supply or "firm" contractual right to gas delivery. It was also argued by those opposing market carriage that the absence of a firm contractual right to gas delivery would make parties unwilling to commit to augmentations of gas pipeline systems.

Again this was the subject of detailed submissions before the 1997 Recommendation and it is not proposed to repeat what was said then. However in its 1997 Recommendation the NCC said:

> *"The Council notes that an access regime which does not allow parties to negotiate "firm" supply might fail to create a seamless and enforceable right to negotiate access to a service, as required under the CPA principles. Certainty of supply could be managed in market carriage, for example, through the system operator negotiating sufficient interruptibility to ensure that any level of "firm" capacity demand which is reasonably foreseeable on a given day - that is, in any situation other than an emergency - can be accommodated. The application framework would also need to incorporate arrangements to provide certainty to all parties when negotiating augmentations. Such a framework should provide for recourse to appropriate commercial remedies in the case of non-performance.*
>
> *The Council's view is that market carriage is not inherently inconsistent with the principle of a seamless right to negotiate access. The Council will consider whether the Victorian model creates a seamless right to negotiate access to pipelines in the context of Victoria's certification application.*[25]*"*

Later on in its 1997 Recommendation (at page 38) the NCC said:

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[24] ***1997 Recommendation page 33***.

[25] ***1997 Recommendation, pages 33-34***

> *BHPP argues that the market carriage model fails to accommodate the commercial needs of parties who wish to negotiate contract carriage with a range of durations and conditions.*
>
> *The Council notes that while market carriage may not facilitate the negotiation of contractually firm haulage in the traditionally understood sense, it does not appear inherently inconsistent with the commercial negotiation of a range of terms and conditions of access, through for example:*
>
> - *parties being offered a choice as to whether they are interruptible or non-interruptible customers to manage certainty issues, with commercial remedies available for non-performance.*
> - *scope for negotiated discounts with the service provider.*
> - *scope for financial hedge contracts to manage risk situations relevant to the system user."*

However, the matter of "firmness" was a matter before the ACCC at the time of its consideration of the VENCorp and TPA Access Arrangements. At that time it was submitted by EPD as follows:

> *"The Access Arrangement guarantees that BHPP (or any other party) can inject gas at Longford and withdraw gas anywhere on the system, including at the interconnection with NSW, even on critical days. To obtain physically-firm service, BHPP pays the required transmission charges (which it can contract for with TPA on along term basis); cashes out its imbalances each month and pays its share of the uplift that assures gas will be physically available to those willing to pay for it. If BHPP ensures that its customers remain within their authorised MDQ then BHPP will not pay a significant share of the uplift (where the total uplift is already expected to be insignificant as these will be met largely by unauthorised users). If BHPP does not wish to manage these risks it will be able to contract middlemen (retailers or brokers) who will deal with these arrangements and take the risk of spot imbalances and occasional uplift payments on its behalf"*[26]

The concept of "authorised MDQ" which underlies this submission also needs to be appreciated. That concept also was the subject of consideration by the ACCC when it examined the VENCorp and TPA Access Arrangements. Attached to the *Further Submission by EPD to the ACCC on the Victorian Gas Access Arrangements* dated 17 July 1998 was a report to VENCorp from Ernst and Young which set out the policy to apply for the initial allocation of authorised MDQ. Ernst and Young said:

> *"It is important that the initial allocation of authorised MDQ takes full account of a range of policy issues, some of which are directly related to the allocation process whilst others are more conceptual in nature. The key conclusions on these policy issues are:*
>
> - *The initial allocation of authorised MDQ to Tariff D customers should be based on their rights to MDQ as contained in contracts with retailers;*
> - *No account should be taken of customers' future MDQ requirements;*
> - *There is to be no differentiation between Summer and Winter MDQs;*
> - *An MDQ authorisation is not lost or reduced if a customer's actual usage is lower than expected;*

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[26] ***EPD Comments on the Submission by BHPP Petroleum to the ACCC, February 1998, pages 16-17. See also the supporting paper Comments on Economic Aspects of BHPP's Response to the ACCC, Dr Larry Ruff, 6 February 1998, pages 17-18.***

- *The total availability of authorised MDQ is based on the capacity of the Longford to Melbourne pipeline; and*
- *The initial MDQ authorisation will not specify an injection point (the pathway issue).”*[27]

Subsequently an Independent Panel was convened by VENCorp to act on the Ernst and Young report and make recommendations to VENCorp as to the allocations (on a customer by customer basis) of authorised MDQ. The panel received submissions from affected customers and other parties and in October 1998 made its recommendations which were subsequently accepted by VENCorp. Allocations of authorised MDQ were then made.

In summary, under the market carriage model as implemented in Victoria, there are means whereby any party can achieve physically firm service. To that end there has been the required allocation of authorised MDQ which has been based on pre-existing usage.

Augmentations (or expansions and extensions as they are termed in the National Code) are a separate matter.

First, it is to be noted that VENCorp has no role in determining what pipeline augmentations should proceed or otherwise. Nor does it have a role in setting tariffs in respect of those pipelines. These are matters for decision by the parties involved and for negotiation between customers and pipeline owners or developers. If the pipeline owner seeks to have the cost of an augmentation included in its asset base for the purpose of setting regulated tariffs, that is a matter in respect of which that owner can make application pursuant to the National Code to the Relevant Regulator (ie the ACCC or ORG).

Second, as approved by the ACCC and ORG, the Access Arrangements of TPA and Multinet, Westar and Stratus distinguish between “significant extensions” and non-“significant extensions”. “Significant extensions” may be excluded from an Access Arrangement by the pipeline owner giving the required notice to the ACCC or ORG, as the case may be. What is a “significant extension” is separately defined for gas transmission systems and gas distribution systems. In the case of TPA it is an extension which costs more than $5 million or is greater than 10 kilometres in length (see clause 5.7.1 of the approved TPA Access Arrangement for the principal transmission system) and in the case of Multinet, Westar and Stratus it is an extension which services a minimum of 5,000 customers (see clause 5.7.1 of their approved Access Arrangements). In essence these provisions enable large extensions to be “opted out” of the approved Access Arrangements. In the case of TPA, this has the further consequence that such a large extension may be brought into operation on a basis not involving the application of a market carriage model, if TPA so chose.

4.3.3 Clause 6(4)(d)) *Any right to negotiate access should include a date after which the right would lapse unless reviewed and subsequently extended; however, existing contractual rights and obligations should not be automatically revoked.*

It is understood that the NCC considers that the intent of clause 6(4)(d) is to provide for a periodic review of the need for access regulation to apply to a particular service. In this sense, it is understood that the requirements of clause 6(4)(d) could be satisfied, for example, by providing for a review of coverage decisions. Further, it is understood that this process should not automatically revoke any existing contractual rights.

For the reasons set out below, it is submitted that the Access Regime satisfies the criterion set out in clause 6(4)(d).

[27] ***See page 4 of the Ernst and Young report.***

4.3.3.1 The Access Regime

The Gas Pipelines Access Law gives the National Code legal effect. It makes the obligations it creates in relation to Pipelines enforceable including the mechanisms in relation to coverage. It is as a result of a Pipeline becoming Covered and an Access Arrangement being approved by the relevant Regulator that an enforceable right to negotiate third party access to its Services then arises.

(a) Review of Coverage Decisions

The National Code does not include an automatic sunset/review provision in relation to decisions on coverage (ie. there is no requirement for a decision on coverage to specify a date at which time the decision will lapse or be reviewed). However, as noted above, section 1 of the National Code contains a process for the revocation of coverage decisions.

Under the process for revocation of coverage, any person may apply to the NCC requesting that coverage of a particular Pipeline be revoked. The NCC is then required to go through an open and transparent public process and make a recommendation to the Relevant Minister (in Victoria, the Treasurer) as to whether coverage should be revoked. The NCC cannot recommend that coverage is revoked and the Minister cannot decide to revoke coverage unless they are satisfied that the coverage criteria specified in the National Code are no longer satisfied.

A decision to revoke coverage would effectively mean that there would no longer be an enforceable right to negotiate access to the Services of the Pipeline concerned under the National Access Regime. It would, however, not result in any contractual (or other) rights or obligations in existence at the time being automatically revoked as a result of the operation of the National Access Regime.

(b) Approval and Review of Access Arrangements

While a Pipeline remains Covered under the National Access Regime an obligation exists to have an Access Arrangement approved by the relevant Regulator. As noted above, under section 3 of the National Code an Access Arrangement must include as one of its elements a date for review. The period between reviews is to be determined by the relevant Regulator. However, if the period is longer than five years, the Regulator must give consideration to including mechanisms to address the risk of forecast errors. An Access Arrangement may also include specific major events that may trigger a review prior to the planned date.

In addition, the National Code (see section 2) provides that the Regulator may not approve an Access Arrangement or revisions to an Access Arrangement containing provisions which would deprive a person of a contractual right in existence prior to the proposed Access Arrangement being submitted, other than an 'Exclusivity Right' which arose on or after 30 March 1995. 'Exclusivity Right' is defined in section 10 of the National Code. In this context, the treatment of Exclusivity Rights is consistent with the degree of protection provided to contractual rights under the arbitration provisions in Part IIIA of the *Trade Practices Act 1974* (see section 44W).

4.3.4 Clause 6(4)(e) *The owner of a facility that is used to provide a service should use all reasonable endeavours to accommodate the requirements of persons seeking access.*

It is understood that the NCC considers that an access regime may either incorporate the principles in this clause explicitly, or contain general provisions, which have the same effect.

For the reasons set out below, it is submitted that the Access Regime satisfies the criterion set out in clause 6(4)(e).

4.3.4.1 The Access Regime

The National Access Regime contains a number of elements, which it is submitted ensures that principle in clause 6(4)(e) of the CPA is satisfied.

(a) Information Package

Under section 5 of the National Code, the owner/operator of a Covered Pipeline must establish an information package in relation to the Pipeline. The information package must contain at least the following information:

- the Access Arrangement and Access Arrangement Information for the relevant Pipeline;
- a summary of the contents of a public register which the owner/operator of the Covered Pipeline is required to establish (under section 5.9 of the National Code) containing information on both spare and developable capacity (to the extent that it is commercially and technically possible);
- information relating to all major trunks and mains pipes which comprise the relevant pipeline;
- a description of procedures relating to specific access requests (including a detailed description of the information required in order to assess an access request); and
- any other information the relevant Regulator reasonably requires to be included to assist access seekers to decide whether or not to seek Services or to determine how to go about seeking Services.

The information package must be made available to an access seeker within 14 days of the owner/operator of a Covered Pipeline receiving a request. No fee (other than one approved by the relevant Regulator for copying the Access Arrangement Information) may be charged for the information package.

In addition, section 5 of the National Code provides that the owner/operator of a Covered Pipeline must:

- respond to a specific request for access within 30 days of its receipt;
- where the request for access can only be properly considered after further investigations, provide details of the nature of the investigations; and
- if it advises that capacity does not exist to satisfy an access request, provide an explanation outlining those aspects of the access request that cannot be satisfied, and indicate when the access request may be able to be satisfied.

(b) Access Arrangement Information

As noted earlier, Access Arrangements, which are submitted to Regulators for approval must be accompanied by Access Arrangement Information (see section 2.2 of the National Code) which is made publicly available. Section 2.6 of the National Code provides that the Access Arrangement Information must include sufficient information to enable access seekers to understand the derivation of the elements in the proposed Access Arrangement and to form an opinion as to the compliance of the Access Arrangement with the Code. Section 2.7 of the National Code provides that this must include at least the categories of information described in Attachment A to the Code.

The National Code also provides that prior to a decision being made to approve an Access Arrangement, the relevant Regulator may require changes to be made to the Access Arrangement Information in order to satisfy section 2.7 of the code. In addition, the Regulator must, if requested to do so by any person, consider whether the Access Arrangement Information meets the requirements of section 2.6 and 2.7 of the National Code and can require that changes be made accordingly.

The information included in the Access Arrangement Information may be aggregated to the extent considered necessary by the Regulator so as to ensure that its public disclosure is not unduly harmful to the legitimate business interests of the owner/operator of the Covered Pipeline, an existing user of Services provided by the Pipeline or an access seeker.

Taken together these provisions ensure that an appropriate balance is struck in each case between providing adequate information to access seekers so that they are in a position to make informed decisions and ensuring that the legitimate business interests of all parties are protected.

(c) **Access Arrangements**

Each Covered Pipeline must have an Access Arrangement approved for it by the relevant Regulator. The Access Arrangement must include the elements described above (eg. Services Policy, Reference Tariffs and Reference Tariff Policy, Queuing Policy, Capacity Trading Policy etc) and the approval process (contained in section 2 of the National Code) requires that the relevant regulators follow an open and transparent process (including extensive public consultation).

As discussed above, the up-front approval of Access Arrangements will assist in redressing any imbalances in negotiating power between owners/operators of Covered Pipelines and access seekers. It will also encourage negotiated access to non-standard Services and reduce the likelihood of dispute resolution under the National Access Regime.

4.3.4.2 Market Carriage Issues

In its 1997 Recommendation (at page 38) the NCC said:

> "*BHPP argues that the market carriage model fails to accommodate the commercial needs of parties who wish to negotiate contract carriage with a range of durations and conditions.*
>
> *The Council notes that while market carriage may not facilitate the negotiation of contractually firm haulage in the traditionally understood sense, it does not appear inherently inconsistent with the commercial negotiation of a range of terms and conditions of access, through for example:*
>
> - *parties being offered a choice as to whether they are interruptible or non-interruptible customers to manage certainty issues, with commercial remedies available for non-performance.*
> - *scope for negotiated discounts with the service provider.*
> - *scope for financial hedge contracts to manage risk situations relevant to the system user."*

Victoria agrees with the NCC on this. Additionally, it should not be forgotten that Clause 6(4)(e) of the CPA does not impose an absolute obligation "to accommodate the requirements of persons seeking access", instead all it imposes is a "reasonable endeavours" obligation. Accordingly, it cannot be the entitlement of a party under that clause to dictate exactly what form of "firm" access it is to get, instead clause 6(4)(e) must be satisfied if that party can by other means be provided with something which is substantially the same as the "firm" access it desires. This appears to be the reasoning which underlies what the NCC said above and as such is supported by Victoria as representing the correct interpretation of clause 6(4)(e) of the CPA.

4.3.5 Clause 6(4)(f) *Access to a service for persons seeking access need not be on exactly the same terms and conditions.*

It is understood that this clause is an acknowledgment that an effective access regime may have as one of its outcomes different terms and conditions of access for different users. That is, regimes, which allow for such an outcome, can be assessed as being 'effective' under the CPA.

For the reasons set out below, it is submitted that the Access Regime satisfies the criterion set out in clause 6(4)(f).

4.3.5.1 The Access Regime

The National Access Regime provides the flexibility for parties to negotiate their own arrangements for access. At the same time it establishes certain 'stakes in the ground' to facilitate those negotiations and to provide some certainty in relation to likely terms and conditions of access in the event that commercial negotiations fail.

As discussed above, each Covered Pipeline must have an Access Arrangement approved by the relevant Regulator. The Access Arrangement must, as a minimum, contain a number of elements (as specified in section 3 of the National Code) including Reference Tariffs and the terms and conditions on which Reference Services will be provided. Approval of an Access Arrangement, however, does not limit the flexibility of parties to negotiate terms and conditions of access (including tariffs) to suit their particular circumstances. In this context it is pointed out that section 2.50 of the National Code specifically provides that nothing in an Access Arrangement (except for the Queuing policy) limits the terms and conditions that the owner/operator of a Covered Pipeline can agree with an access seeker.

However, to the extent that parties are unable to reach commercial agreements for access to Services provided by Covered Pipelines, the approved Access Arrangements would be applied in any arbitration conducted under the National Access Regime. In these circumstances, the arbitrator is bound (under section 6 of the National Code) to apply the approved Access Arrangement if the dispute resolution process in the National Access Regime is invoked. To the extent that a dispute concerns access to a Service for which the Reference Tariffs and terms and conditions in the Access Arrangement are not applicable, the arbitrator is required to determine appropriate arrangements for the circumstances of the particular case.

4.3.6 Clause 6(4)(g) *Where the owner and a person seeking access cannot agree on terms and conditions for access to the service, they should be required to appoint and fund an independent body to resolve the dispute, if they have not already done so.*

It is understood that the NCC considers the fundamental requirement for consistency with this clause is that an access regime should provide for disputes to be referred to an independent body for arbitration. It is also understood that the NCC is of the view that an 'independent' dispute resolution process should be independent from both the parties to a dispute and from Government.

For the reasons set out below, it is submitted that the Access Regime satisfies the criterion set out in clause 6(4)(g).

4.3.6.1 The Access Regime

(a) Independent Dispute Resolution

Parties are free to seek resolution of their disputes through any avenues, which they can agree upon (eg. such as mediation), or through the dispute resolution process contained in section 6 of the National Code and Part 4 of the Gas Pipelines Access Law.

Under the dispute resolution process contained in the National Access Regime, where parties are unable to agree on any aspect of access to a Service provided by a Covered Pipeline, either party may refer the dispute to the Regulator. The Regulator (or an independent agent appointed by the Regulator) may arbitrate the dispute.

In reaching a decision, the arbitrator must apply the provisions of the Access Arrangement and take account of the factors listed in section 6.15 of the National Code. The matters to be considered by the arbitrator are consistent with those listed in clause 6(4)(i) of the CPA.

The arbitrator must issue a draft decision and consider submissions received from the parties before reaching a final decision. However, if the arbitrator decides that a dispute is solely over the tariff to be applied to a Reference Service, it may expedite the dispute resolution process and make a decision that the Reference Tariff be applied.

The procedures to be followed in conducting arbitration are contained in Part 4 of the Gas Pipelines Law. In summary, arbitrations are to be conducted in private and generally would be limited to the parties involved in any given dispute. The arbitrator, does however, have the ability to involve parties that it considers have an interest in the arbitration.

The allocation of costs in relation to arbitration under the National Access Regime is at the discretion of the arbitrator.

The arbitrator's decisions are subject to appeal on a question of law under Part 4 of the Gas Pipeline Access Law. In addition these decisions are also subject to judicial review. Pursuant to Part 3, Divisions 2 and 3 of the Gas Pipelines Access (Victoria) Act 1998 judicial review is to be carried out by the Federal Court under the Administrative Decisions (Judicial Review) Act 1977. However, as noted earlier Division 2 of Part 3 was not be proclaimed on 1 July 1999 when the rest of the Victorian Act was proclaimed and as such judicial review will instead proceed in the Victorian Supreme Court.

(b) Independence of Arbitration and Regulatory Functions

As set out in clause 11 of the Agreement, Victoria's policy position is that it will take such actions as are available to it and necessary to ensure that the Victorian ORG develops guidelines (including practices and procedure notes) to provide for its arbitration functions to be carried out independently of regulatory functions under the National Access Regime. These practices and procedures will include provisions to the effect that if a party to a dispute so requires, the Regulator will appoint as arbitrator a person who has not been substantially involved in regulatory decision making in relation to the pipeline subject to the dispute. The ORG is currently in the process of settling its Gas Industry Guidelines which in due course are expected to include guidelines as required by clause 11. It is also worth noting that the NCC reviewed the Office of the Regulator-General Act 1994 at the time it was considering the *Application for Certification of the Victorian Access Regime for Commercial Shipping Channels* and in its *Reasons for Decision* dated 12 May 1997 the NCC concluded that the Victorian regime satisfied clause 6(4)(g)[28].

The Commonwealth, as a party to the Agreement, is also required to take such actions as are available to ensure that the ACCC develops guidelines to ensure sufficient independence between arbitration, decision making and regulatory decisions made under the National Code. In this regard it is understood that the ACCC is currently preparing a guideline paper on its intended approach to its various arbitrator roles, including its role under the National Access Regime. It is also understood that this arbitration guideline paper will include principles that reflect the ACCC's commitment to the appropriate separation of its regulatory decision making from its arbitration roles.

4.3.7 Clause 6(4)(h) *The decisions of the dispute resolution body should bind the parties; however, rights of appeal under existing legislative provisions should be preserved.*

It is understood that the NCC considers that an access regime should contain credible enforcement arrangements to ensure an arbitrator's decision is binding if it is to comply with the principle. In addition, it is understood that the regime should preserve existing legislative rights of appeal.

For the reasons set out below, it is submitted that the Access Regime satisfies the criterion set out in clause 6(4)(h).

4.3.7.1 The Access Regime

(a) Binding Dispute Resolution

The final decision of the arbitrator made under the dispute resolution process contained in the National Access Regime takes effect 14 days after the decision is made. Pursuant to section 6 of the National Code, the owner/operator of a Covered Pipeline is bound by the decision of the arbitrator. The access seeker is also bound by the decision unless it notifies the arbitrator within 14 days of the decision that it does not intend to be bound by the decision. As part of its decision, the arbitrator may also require the parties to represent the decision in the form of a contract within 14 days. The arbitrator may resolve any terms and conditions that have not been agreed within that time.

[28] ***See pages 17-20 of the Reasons for Decision.***

The decisions of the arbitrator are enforceable under Part 5 of the Gas Pipelines Access Law. The Regulator or any other person may in accordance with the provisions of Part 5 bring civil proceedings seeking compliance with the outcome of a dispute resolution process under the National Access Regime. The sanctions and remedies, which are provided for in relation to breaches of the Access Regime (including non-compliance with the outcome of an arbitration process), are exclusive. That is, in-so-far as the action is based on a breach of the National Access Regime, the sanctions and remedies provided for in the Access Regime are the only sanctions and remedies available. However, this does not limit the remedies that are available under other laws (eg. the *Trade Practices Act 1974*) if the conduct concerned in any given situation is both a breach of the National Access Regime and another law.

(b) Appeals from the Arbitrator's Decisions

As noted earlier, the National Access Regime has been designed with the intention of striking a balance between the right of aggrieved parties to procedural fairness and the timeliness of regulatory outcomes.

In order to meet this objective, the National Access Regime provides that the arbitrator's decisions are subject to an appeal on questions of law under Part 4 of the Gas Pipeline Access Law. In addition, the arbitrator's decisions are also subject to judicial review pursuant to Part 4 of the Gas Pipeline Access Law. In accordance with Part 3 of the Gas Pipelines Access (Victoria) Act 1998 judicial review would be conducted by the Federal Court under the Administrative Decisions (Judicial Review) Act 1977 of the Commonwealth. However, as noted earlier Division 2 of Part 3 was not brought into force on 1 July 1999 when the rest of the Victorian Act was brought into force and as such judicial review will instead proceed in the Victorian Supreme Court.

A right for administrative review of an arbitrator's decision is not provided for in the National Access Regime. However, as set out above, it should be noted that the arbitrator is required to apply the Access Arrangement (including Reference Tariffs on the terms and conditions for supply of a Reference Service) that has been approved by the Regulator (under section 2 of the National Code) and a right of administrative review does exist in relation to that approvals process in certain circumstances.

Taking all of this together, it is submitted that the policy intent of clause 6(4)(h) is met by the National Access Regime.

4.3.8 Clause 6(4)(i) *In deciding on the terms and conditions for access, the dispute resolution body should take into account:*

i) the owner's legitimate business interests and investment in the facility;

ii) the costs to the owner of providing access, including any costs of extending the facility but not costs associated with losses arising from increased competition in upstream or downstream markets;

iii) the economic value to the owner of any additional investment that the person seeking access or the owner has agreed to undertake;

iv) the interests of all persons holding contracts for use of the facility;

v) firm and binding contractual obligations of the owner or other persons (or both) already using the facility;

vi) the operational and technical requirements necessary for the safe and reliable operation of the facility;

vii) the economically efficient operation of the facility; and

viii) the benefit to the public from having competitive markets.

It is understood that the NCC considers that an effective access regime should require the dispute resolution body to take account of each matter set out in clause 6(4)(i) of the CPA. It is also understood that the NCC is of the view that an access regime may require a dispute resolution body to take account of other matters so long as they are not inconsistent with the matters listed in this clause.

For the reasons set out below, it is submitted that the Access Regime satisfies the criterion set out in clause 6(4)(i).

4.3.8.1 The Access Regime

Section 6 of the National Code sets out, amongst other things, certain guidelines and restrictions that must be observed by the arbitrator in making a decision regarding a dispute over access to Services provided by a Covered Pipeline.

In summary, section 6 provides that if an arbitrator decides that the sole issue in a dispute is what tariff should apply to a Reference Service, the arbitrator may streamline the process and make an immediate decision requiring that the Service to be provided at the Reference Tariff. In other cases, the arbitrator must (among other things) take into account the matters listed in section 6.15 of the National Code. Section 6.15 of the National Code is derived from the wording of clause 6(4)(i) except for some minor wording changes to reflect the terminology used throughout the National Access Regime. As such, it is submitted that it is consistent with clause 6(4)(i).

4.3.9 Clause 6(4)(j) *The owner may be required to extend, or to permit extension of, the facility that is used to provide a service if necessary but this would be subject to:*

i) such extension being technically and economically feasible and consistent with the safe and reliable operation of the facility;

ii) the owner's legitimate business interests in the facility being protected; and

iii) the terms of access for the third party taking into account the costs borne by the parties for the extension and the economic benefits to the parties resulting from the extension.

iv) the terms of access for the third party taking into account the costs borne by the parties for the extension and the economic benefits to the parties resulting from the extension.

It is understood that the NCC considers that this clause requires that the dispute resolution body should have the power to require a pipeline to be extended or expanded to satisfy the needs of an access seeker. It is also understood that the NCC is of the view that the term 'extension' in clause 6(4)(j) includes:

- expansion of capacity; and
- extension of geographical range of a facility or allowing the construction of mechanisms to interconnect with another pipeline.

For the reasons set out below, it is submitted that the Access Regime satisfies the criterion set out in clause 6(4)(j).

4.3.9.1 The Access Regime

(a) Capacity Expansions

Section 6 of the National Code provides that the arbitrator may require the owner/operator of a Covered Pipeline to expand its Capacity to meet the requirements of an access seeker, provided that:

- the owner/operator is not required to extend the geographical range of a Covered Pipeline;
- the expansion is technically and economically feasible and consistent with the safe and reliable provision of the Service;
- the owner/operator's legitimate business interests are protected;
- the access seeker does not become the owner of a Covered Pipeline or part of a Covered Pipeline without the agreement of the owner/operator; and
- the owner/operator is not required to fund part or all of the expansion (except where the Extensions/Expansions Policy in the Access Arrangement for the Covered Pipeline states that the owner/operator will fund the New Facility and the conditions specified in the Extensions/Expansions Policy have been met).

'Capacity' is defined in section 10 of the National Code to mean 'the measure of the potential of a Covered Pipeline as currently configured to deliver a particular Service between a Receipt Point and a Delivery Point at a point in time'. Section 10 of the National Code also defines 'New Facility' to mean "any extension to, or expansion of the Capacity of, a Covered Pipeline which is to be treated as part of the Covered Pipeline in accordance with the Extensions/Expansions Policy contained in the Access Arrangement for that Covered Pipeline and any expansion of the Capacity of a Covered Pipeline required to be installed under [section] 6.22".

(b) Interconnection

As outlined earlier, the definition of 'Service' includes 'the right to interconnect' with a Covered Pipeline. A key consequence of this is that an access seeker (and/or the owner/operator of a Covered Pipeline) is able to invoke the dispute resolution process contained in section 6 of the National Code and Part 4 of the Gas Pipelines Access Law in the event of a dispute arising in relation to the terms and conditions for interconnection to a Covered Pipeline.

As such both capacity expansion and interconnection permission may be required of the Covered pipeline owner/operator by the dispute resolution body. As such it is submitted that this is consistent with clause 6(4)(j).

4.3.10 Clause 6(4)(k) *If there has been a material change in circumstances, the parties should be able to apply for a revocation or modification of the access arrangement which was made at the conclusion of the dispute resolution process.*

It is understood that the NCC is of the view that this clause should be interpreted in conjunction with clause 6(4)(a). Consequently, it is understood that the NCC considers that an access regime could satisfy clause 6(4)(k) where:

- the parties can define for themselves, during the course of commercial negotiations, what the threshold is for a 'material change in circumstances' and can insert in their agreed arrangements those events that would trigger a re-opening of negotiations; or
- an access regime makes provision for parties to refer disputes concerning what constitutes a material change in circumstances to the dispute resolution body or some other independent body.

For the reasons set out below, it is submitted that the Access Regime satisfies the criterion set out in clause 6(4)(k).

4.3.10.1 The Access Regime

The National Access Regime does not explicitly allow a party to seek revocation or modification of a contract or arrangement for access due to a material change in circumstances. However, the National Access Regime does not preclude parties from determining what may constitute a material change in circumstances in their particular circumstances and incorporating provisions to this effect into their contracts/arrangements for access. In addition, where the parties cannot agree on terms in this regard, the dispute resolution process contained in section 6 of the National Code and Part 4 of the Gas Pipelines Access Law could be used to resolve the issues.

Further, the National Access Regime does not preclude the application of common law principles (for example, the doctrine of frustration) to matters of this nature once access contracts/arrangements have been entered into.

4.3.11 Clause 6(4)(l) *The dispute resolution body should only impede the existing right of a person to use a facility where the dispute resolution body has considered whether there is a case for compensation of that person and, if appropriate, determined such compensation.*

It is understood that the NCC is of the view that if an access regime allows the dispute resolution body to impede the existing rights of a person to use a facility it must also be empowered to consider and, if appropriate, determine compensation.

For the reasons set out below, it is submitted that the Access Regime satisfies the criterion set out in clause 6(4)(l).

4.3.11.1 The Access Regime

One of the fundamental principles underpinning the National Access Regime is sanctity of contract. To this end, section 6 of the National Code provides that the arbitrator must not make a decision that:

- would impede the existing rights of a user to obtain Services provided by a Covered Pipeline;
- would deprive any person of a contractual right that existed prior to the notification of the dispute, other than an Exclusivity Right which arose on or after 30 March 1995.

In addition, section 2 of the National Code precludes a Regulator from approving an Access Arrangement (or revision to an Access Arrangement) any provision of which would, if applied, deprive any person of a contractual right in existence prior to the date the Access Arrangement was submitted, other than an Exclusivity Right which arose on or after 30 March 1995.

An 'Exclusivity Right' is defined in section 10 of the National Code to mean a contractual right that either:

- expressly prevents the owner/operator of a Covered Pipeline supplying Services to persons who are not parties to the contract; or
- places a limitation on the ability of the owner/operator of a Covered Pipeline to supply Services to persons who are not parties to the contract,

but does not include a user's contractual right to obtain a certain volume of Services.

As such, the protection of Exclusivity Rights that arose up until 30 March 1995 is consistent with the protection of contractual rights under Part IIIA of the Trade Practices Act 1974. The decision was taken not to protect Exclusivity Rights that arose on or after this time because such rights are viewed as being fundamentally at odds with the purpose behind the introduction of the National Access Regime.

In any event, however, section 6 of the National Code prevents the arbitrator from making a decision that would impede the existing right of a user to obtain Services provided by a Covered Pipeline. Consequently, the National Access Regime does not explicitly provide that the arbitrator must consider (and, if appropriate, determine) the issue of compensation.

4.3.12 Clause 6(4)(m) *The owner or user of a service shall not engage in conduct for the purpose of hindering access to that service by another person.*

It is understood that the NCC considers that an access regime may comply with this clause by explicitly incorporating the principle or if it contains general provisions which have the same effect.

For the reasons set out below, it is submitted that the Access Regime satisfies the criterion set out in clause 6(4)(m).

4.3.12.1 The Access Regime

(a) Prohibition - Preventing or Hindering of Access

Part 3 of the Gas Pipelines Access Law contains a number of provisions dealing with the issue of preventing or hindering access to a Covered Pipeline. In summary, it provides that:

- the owner/operator of a Covered Pipeline; or
- a person who is a party to an agreement with the owner/operator of a Covered Pipeline in relation to a Service provided by the Covered Pipeline; or
- a person who, as the result of an arbitration, is entitled to a Service provided by the Covered Pipeline; or
- an associate of the owner/operator of a Covered Pipeline or a person (as referred to above),

must not engage in conduct for the purpose of preventing or hindering the access of another person to a Service provided by means of a Covered Pipeline.

'Associate' is defined to have the meaning it would have under Division 2 of Part 1.2 of the Corporations Law if section 13, 14, 16(2) and 17 of that Law were repealed.

Part 3 of the Gas Pipelines Law also provides that:

- the purpose of preventing or hindering access need not be the only purpose, provided it is or was a substantial purpose; and
- purpose may be ascertained by inference from conduct or from other relevant circumstances.

(b) Enforcement

Under Part 5 of the Gas Pipelines Access Law, the Regulator may apply to the Supreme Court of Victoria (in the case of the Victorian ORG) or the Federal Court (in the case of the ACCC) seeking a pecuniary penalty in the event that a breach of the preventing/hindering access provisions is established.

(c) Other Provisions in the Access Regime

In addition to the matters discussed above, other provisions in the National Code should assist the arbitrator and Regulator to deal with situations where issues surrounding the availability of Capacity on a Covered Pipeline arise. In particular, it is pointed out in this regard that:

- under the dispute resolution provisions in section 6 of the National Code, where a dispute arises over whether the provision of a Service would be consistent with the safe operation of a Covered Pipeline and prudent pipeline practices accepted in the industry:
  - the owner/operator of the Covered Pipeline must have a 'reasonable' belief that the safe operation of the Pipeline and prudent pipeline practices accepted in the industry would be compromised and must disclose the assumptions it has used in reaching its decision on these matters; and
  - the arbitrator may require access be provided on an interruptible basis for the corresponding interruptible price, where that would be consistent with the safe operation of the Pipeline and prudent pipeline practices accepted in the industry;
- in relation to the Capacity Management policy that is to be included in the Access Arrangement for each Covered Pipeline, section 3 of the National Code provides that the Pipeline may be a Market Carriage Pipeline (as defined in section 10 of the National Code). One advantage of this type of capacity management is that the potential for hoarding of contracted capacity is removed because users cannot reserve capacity that they will not use.

4.3.12.2 Market carriage issues

In its 1997 Recommendation at page 54 the NCC noted that two submissions had raised concerns that the market carriage model could pose risks of market manipulation, through, for example, the hoarding of gas at injection points. The NCC noted the contrary views of United Energy and EPD and concluded that "*the market manipulation issues raised…are more likely to relate to markets for gas than gas haulage*"[29]. The NCC then said:

> *"In general, the market carriage model appears to be consistent with clause 6.4(m) - and has the potential to address hoarding issues that can arise under contract carriage."*[30]

Victoria agrees with this assessment.

4.3.13 Clause 6(4)(n) *Separate accounting arrangements should be required for the elements of a business, which are covered by the access regime.*

It is understood that the NCC takes the view that for an access regime to be consistent with this clause it must provide for financial information to be disaggregated:

- to the elements of a business that are subject to the access regime; and
- for each service that is potentially subject to access.

For the reasons set out below, it is submitted that the Access Regime satisfies the criterion set out in clause 6(4)(n).

4.3.13.1 The Access Regime

The National Access Regime contains a number of provisions dealing with accounting arrangements.

(a) Ring Fencing Requirements

Section 4 of the National Code requires the owners/operators of Covered Pipelines to put in place a number of arrangements to ring fence their business of providing Services using a Covered Pipeline. As a minimum, the owners/operators must:

- not carry on a Related Business (which is defined in section 10 of the National Code and essentially means produce, purchase or sell natural gas) within 6 months of a Pipeline becoming Covered;
- establish and maintain a separate set of accounts in respect of each activity that is the subject of an Access Arrangement;
- establish and maintain a separate consolidated set of accounts in respect of all of the activities undertaken by the owner/operator; and
- allocate any costs that are shared between a ring fenced activity and any other activity according to a methodology that is well accepted, fair and reasonable.

The Regulator may require that additional ring fencing obligations be put in place. The Regulator may also dispense with some of the minimum obligations (including the requirement not to carry on a related business). In either case the Regulator must comply with the procedure contained in section 4 of the National Code (including a public consultation process) and must be satisfied that the criteria specified in section 4 of the National Code are met.

Section 4 of the National Code also provides that the owners/operators of Covered Pipelines must:

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[29] ***1997 Recommendation page 54.***

[30] ***See 1997 Recommendation page 54.***

- comply with general accounting guidelines that are published by the Regulator, approved by the Regulator or which the Regulator advises will apply; and
- establish and maintain procedures to ensure compliance with the ring fencing obligations and report to the Regulator on compliance.

(b) Other Provisions

In addition to the ring fencing obligations described above, Part 7 of the Gas Pipelines Access Law confers power on the Regulator to require any person to provide to it information or documents which the Regulator has reason to believe will assist it in:

- deciding whether to approve an Access Arrangement or changes to an Access Arrangement (see section 2 of the National Code);
- deciding whether to approve a contract, arrangement or understanding between the owner/operator of a Covered Pipeline and an associate (see section 7 of the National Code); and
- monitoring compliance with the National Code (including the ring fencing requirements).

4.3.14 Clause 6(4)(o) *The dispute resolution body, or relevant authority where provided for under specific legislation, should have access to financial statements and other accounting information pertaining to a service.*

For an access regime to incorporate this principle it is understood that the NCC expects that it would provide the dispute resolution body and any other relevant body (for example, the Regulator) with the right to inspect all financial documents pertaining to the services concerned.

For the reasons set out below, it is submitted that the Access Regime satisfies the criterion set out in clause 6(4)(o).

4.3.14.1 The Access Regime

(a) Regulator Powers

As described above in relation to clause 6(4)(n), Part 7 of the Gas Pipelines Access Law confers power on the Regulator to require any person to provide to it information or documents which the Regulator has reason to believe will assist it in carrying out certain functions under the National Access Regime (including the approval of Access Arrangements). In addition, Part 7 provides that the Regulator may specify in what format the information or documents are to be produced.

Part 7 also contains provisions dealing with the handling of confidential or commercially sensitive information or documents. In summary, the Regulator is generally obliged not to disclose such information/documents to the public unless it is of the opinion that no detriment would be caused to the person who supplied it (or the person from whom that person received it) or the public benefit in disclosing it outweighs the detriment. A right of administrative appeal is provided for (under Part 7) in situations where the Regulator decides to release confidential or commercially sensitive information.

Failure to comply (without a lawful excuse) with the requirements of the Regulator in this context can attract a fine or imprisonment.

(b) Arbitrator Powers

The procedural powers of the arbitrator under the National Access Regime are contained in Part 4 of the Gas Pipelines Access Law. Under Part 4, the arbitrator is empowered to:

- gather information about any matter relevant to the access dispute in any way the arbitrator thinks appropriate;
- require evidence or argument to be presented in writing, and may decide the matters on which it will hear oral evidence or argument; and

- summons a person to appear before it to give evidence and to produce such documents as are referred to in the summons.

Part 4 also contains provisions dealing with the handling of confidential information. The arbitrator can only provide a copy of confidential information to another party if the party gives an undertaking not to disclose the information to another person except to the extent specified by the arbitrator and subject to any other conditions specified by the arbitrator.

Failure to comply (without a reasonable excuse) with the requirements of the arbitrator in this context can attract a penalty of imprisonment.

4.3.15 Clause 6(4)(p) *Where more than one State or Territory access regime applies to a service, those regimes should be consistent and, by means of vested jurisdiction or other cooperative legislative scheme, provide for a single process for persons to seek access to the service, a single body to resolve disputes about any aspect of access and a single forum for enforcement of Access Arrangements.*

4.3.16 Clause 6(2) *The regime to be established by Commonwealth legislation is not intended to cover a service provided by means of a facility where the State or Territory Party in whose jurisdiction the facility is situated has in place an access regime which covers the facility and conforms to the principles set out in this clause unless:*

a) The Council determines that the regime is ineffective having regard to the influence of the facility beyond the jurisdictional boundary of the State or Territory; or

b) Substantial difficulties arise from the facility being situated in more than one jurisdiction.

It is understood that clauses 6(4)(p) and 6(2) contain principles that are applicable in situations where an access regime applies to services of facilities extending beyond (or having an influence beyond) the jurisdictional boundary of the State or Territory seeking certification.

To incorporate the requirements of these clauses it is understood that the NCC's primary expectation is that where a service is subject to access regimes in more than one State or Territory, those regimes should be consistent and should provide for a single process, a single dispute resolution body and a single enforcement forum.

For the reasons set out below, it is submitted that the Access Regime satisfies the criterion set out in clauses 6(4)(p) and 6(2).

4.3.16.1 The Access Regime

The National Access Regime as applied in Victoria, which is the subject of this application for certification, applies, with one exception, only to Services provided by Pipelines that are located within Victoria. The Pipelines that are Covered upon proclamation of the Gas Pipelines Access (Victoria) Act 1998 are listed in the Victorian part of Schedule A to the National Code. Subject to that one exception, the National Access Regime as it applies in Victoria would not have an influence upon Pipelines beyond the borders of Victoria (or Commonwealth waters off of Victoria).

The one exception is that part of the Interconnect owned by GPU GasNet which lies in NSW. The Interconnect runs between Barnawartha in Victoria and Culcairn in NSW. Only that part of the Interconnect which is North of the Murray River is in NSW, a comparatively small portion of the total Victorian gas transmission system. The MSOR in clause 9.1.2 contains provisions for the operation of the Interconnect. In essence, that clause requires VENCorp to give effect to any agreement with East Australian Pipelines Ltd ("EAPL") which provides for the carriage of gas over the Interconnect. The clause also requires that rules be developed for incorporation in the MSOR to give effect to any such agreement. There is a requirement in the clause for public consultation on the development of those rules. Clause 9.1.2 exists because there is an agreement with EAPL providing for carriage of gas over the Interconnect. That agreement ('the Culcairn Operating Agreement") was entered into on 31 March 1999 and regularly operates to permit carriage of gas south from NSW into Victoria.

As was noted above, the ACCC required that the Interconnect be included in TPA's Access Arrangements. The ACCC also noted that once the National Access Regime was in force in Victoria, consent from the Relevant Minister in NSW would be required if market carriage was to apply to that part of the Interconnect which lies in NSW. Strictly, however, such consent is not presently required because of the saving - as a transitional measure - of section 3 of the Victorian Access Code and the absence from the Victorian Code of an equivalent of section 3.8 of the National Access Code. See discussion of transitional measures above.

However, the National Access Regime does include a number of processes to streamline regulation of cross-border Pipelines (both transmission and distribution). They are:

- Part 3 of the Gas Pipelines Access Law sets out a process under which Ministers can determine whether a Pipeline (including a cross-border Pipeline) is to be classified as a transmission or distribution Pipeline (and hence who the Regulator for that Pipeline will be). If the Ministers fail to reach agreement, they may request that the NCC make a recommendation on the matter. The Pipeline can be classified in accordance with the NCC recommendation if Ministers are still unable to agree following a recommendation from the NCC;
- Part 3 of the Gas Pipelines Access Law also sets out a process for determining the jurisdictional Regulator of a cross-border distribution Pipeline. In summary, Ministers will seek to reach agreement on which jurisdiction has the 'greatest association' with the Pipeline. Where agreement cannot be reached, the NCC can be asked to make a recommendation as to which jurisdiction has greatest association with the Pipeline. The Regulator of the Pipeline would then be the body specified in the legislation of the State or Territory with which the Pipeline concerned has the greatest association;
- the ACCC is the single national Regulator for all interstate transmission Pipelines including the Interconnect;
- the administrative appeal body in relation to decisions made by the ACCC is the Australian Competition Tribunal;
- there is a single process for coverage of cross-border transmission Pipelines. The NCC will make a recommendation on coverage to the Commonwealth Minister. The Commonwealth Minister then makes a decision on coverage based on the recommendation.
- the Regulator of distribution Pipelines in each jurisdiction is the independent body to be specified in that State or Territory's legislation (eg. in Victoria it is the Victorian ORG);
- the administrative appeals body for decisions made by jurisdictional regulators and State/Territory Ministers, is the body specified in the legislation under which the Regulator or designated Minister was acting (eg. in Victoria it is the appeal panel constituted under section 38 of the Office of the Regulator-General Act 1994);

- there is a single process for coverage of cross-border distribution Pipelines. The NCC will make a recommendation on coverage to the Relevant Minister of the jurisdiction deemed to have the greatest association with a Pipeline. The Minister then makes a decision on coverage based on the recommendation;
- an access regime with identical effect will be put in place in all jurisdictions.

So for a Covered Pipeline which lies in more than one jurisdiction, processes are to be put in place whereby each component (eg dispute resolution) of the National Access Regime is only subject to one jurisdiction's law.

4.3.16.2 Market carriage issues

In its 1997 Recommendation (at page 59) the NCC noted that a number of submissions argued that the interface between pipeline systems based on market carriage and contract carriage - especially at a State border were likely to create difficulties that pose barriers to interstate trade. Contrary submissions argued that this was really a matter of market perceptions and that while there might thereby be some initial market confusion arising from the two different models, that did not amount to non-compliance with the CPA.

The NCC said, in response to those submissions:

> *"The Council's view is that market perceptions may, indeed, have an effect on trade, especially in the initial stages of interconnection. Whether this is a substantial difficulty under clause 6.2 of the CPA would depend on the degree of certainty conferred by the specific market rules underpinning an Access Arrangement. Should these details be unclear, fail to provide reasonable certainty, or introduce unreasonable complexity to cross-border trade, the Council would consider whether these matters imposed substantial difficulties. The Council will examine these issues when assessing the Victorian application for certification. Interface issues will be subject to further scrutiny by the regulator in the process of considering Access Arrangements lodged under the Victorian access regime."*[31]

However, as we noted above, the ACCC considered this issue at the time of approval of the VENCorp and TPA Access Arrangements and said:

> *"The Commission noted in its Determination on the MSOR that even though there is a common gas transportation model in North America, the details of carriage on each pipeline are different, but this has not stopped gas markets from developing. Hence, the Commission considers that interstate trade will not be adversely affected by the different market systems in Victoria and other States."*[32]

In other words, the ACCC did not find any barrier to interstate trade arising from the presence of market carriage in Victoria and contract carriage in other States.

As previously noted, an agreement ("the Culcairn Operating Agreement") was entered into between EAPL and VENCorp on 31 March 1999 and provides for carriage of gas over the Interconnect. The agreement came into force on 1 April 1999 (ie, after the gas spot market commenced in Victoria on 15 March 1999) and since then gas has flowed over the Interconnect in accordance with its provisions. Necessarily, the agreement contains provisions providing for the interface between EAPL's system (operated under contract carriage) and the VENCorp system (operated under the MSOR).

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[31] ***1997 Recommendation page 60.***

[32] ***See ACCC Final Decision, pages 15 and 17 (also see page 18).***

Additionally, consequent on the September 1998 explosion and fire at the Longford gas processing facilities of Esso, contracts have been signed for the purchase and transportation of gas from the Cooper Basin into Victoria. Those contracts self-evidently involve carriage initially over contract carriage pipelines in NSW and then over market carriage pipelines in Victoria.

The signing of those contracts demonstrates that there are no barriers to interstate trade arising from the different systems. It also confirms the correctness of the ACCC's conclusion.

SECTION 5 – DURATION OF CERTIFICATION

The application seeks a recommendation from the NCC that the National Access Regime be recognised as effective within Part IIIA of the Trade Practices Act 1974 for a minimum of fifteen years.

Fifteen years is consistent with the period of certification recommended by the NCC when it assessed the South Australian Access Regime for Natural Gas Pipeline Systems (see page 31 of the NCC Statement of Reasons for that assessment). As there is substantial identicality between the South Australian and Victorian access regimes in that both apply the National Access Regime, there would seem little reason for recommending anything other than fifteen years. Additionally, it may be seen as inappropriate for there to be significantly different certification periods applying to South Australia, NSW and Victoria as all are now part of an interlinked gas system. Having different periods would only increase uncertainty in the regulatory environment, which as the NCC notes in is Statement of Reasons on the South Australian Regime (see page 31), is a relevant factor.

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