

# Tasmanian Access Regime for Natural Gas Pipeline Services

Application for Certification under  
Section 44M(2) of the Trade Practices  
Act 1974

Final Recommendation:  
April 2005

National Competition Council

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# 1 Background and process

- 1.1 In October 2004, the Tasmanian Government applied to the Council to recommend that the State's access regime for natural gas pipelines services (**the Tasmanian Regime**) is an effective access regime under section 44M of the *Trade Practices Act 1974* (TPA). If a regime is declared as effective, the services subject to the regime cannot be 'declared' for access under Part IIIA of the TPA.
- 1.2 The Tasmanian Regime is set down in the *Gas Pipelines Access (Tasmania) Act 2000* which adopts the *Gas Pipelines Access (South Australia) Act 1997*, Schedules 1 and 2 of which comprise the 'Gas Pipelines Access Law'. Schedule 1 of the South Australian Act is concerned with Third Party Access to Natural Gas Pipelines, and Schedule 2 sets down the National Third Party Access Code for Natural Gas Pipeline Systems (the 'National Gas Code').
- 1.3 In considering the Tasmanian Regime's effectiveness, the Council has applied the principles set out in the relevant clauses of the Competition Principles Agreement (**CPA**). These clauses are clauses 6(2) to 6(4). The Council has taken into account the nature of the gas access regimes on the mainland that have been previously certified.
- 1.4 This final recommendation follows the Council's release of its draft recommendation paper in early February 2005 and its concurrent seeking of submissions. No submissions were received up to the due date of 17 March 2005.

## 2 Final recommendation

- 2.1 The Council's consideration of Tasmania's application has taken into account its 1997 report on the National Gas Code and its 1998 consideration of South Australia's application of the Code, together with its recommendations (and the Minister's decisions) on gas pipeline certification applications in several other jurisdictions. After detailed consideration of the Tasmanian application against this background, the Council's conclusion is that the Tasmanian gas pipelines access regime meets the criteria for effectiveness laid down in section 44M of the TPA, and its recommendation is that the Tasmanian Regime be certified as effective. The Council's view is that the regime should be certified for 15 years.

## **3 The Tasmanian Regime: an overview**

### **A new gas network**

- 3.1 The Tasmanian Regime has been introduced into an environment in which the Tasmanian Government is seeking to encourage the use of natural gas in the State through private sector development of a distribution and transmission network. The Tasmanian Natural Gas Project (TNGP) involves:
- (a) the construction of an undersea gas transmission pipeline of 305 kilometres from Victoria to Tasmania, and 430 kilometres of onshore gas transmission pipelines within Tasmania, to supply natural gas to the north, north-west and south of the State;
  - (b) the distribution and retailing of natural gas to smaller commercial, industrial and residential customers; and
  - (c) the conversion of the oil-fired Bell Bay Power Station to natural gas and the sale of gas-generated electricity through the Tasmanian network.
- 3.2 Duke Energy signed a Development Agreement with the State in 2001 to construct, operate and maintain the undersea gas transmission pipeline between Victoria and Tasmania; develop onshore natural gas transmission pipelines comprising two transmission pipeline spurs, purchasing processed gas from Esso/BHP under a long-term contract at the processing plant in Longford, Victoria; and supplying natural gas via lateral transmission pipelines to certain industrial customers in Tasmania. Duke's pipeline was commissioned in December 2002 and natural gas is currently being delivered to three large foundation customers.
- 3.3 Duke Energy also contracted with Hydro Tasmania to convert the Bell Bay Power Station from an oil-fired to gas-fired plant. This conversion was completed in October 2003.<sup>1</sup>

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<sup>1</sup> In April 2004, Alinta Limited acquired Duke Energy's gas infrastructure and power generation assets in Australia and New Zealand.

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- 3.4 The Tasmanian Government has been fostering the development of gas distribution and retailing in Tasmania. The Government commenced a tender process (that was compliant with the National Gas Code) in September 2002, but terminated it a year later because the bidders failed to meet the Government's aims in terms of coverage, speed of roll-out and risk allocation. Following a subsequent competitive selection process (which was not conducted under the tender provisions of the National Gas Code), the Tasmanian Government selected Powerco Ltd as its preferred distribution developer. Under Stage 1 of its Memorandum of Understanding (MOU) with the Tasmanian Government, Powerco will roll out a distribution network to a maximum of 23 major industrial and commercial customers in up to ten areas around Tasmania. The Stage 1 network — construction of which commenced in October 2003 and is scheduled to be completed by January 2005 — will have capacity to allow future development of the distribution network.<sup>2</sup>
- 3.5 Under Stage 2 of the MOU, Powerco will construct, between 2005 and 2007, a network that will roll out past 38 500 industrial, commercial and residential customers. The Tasmanian Government may negotiate further rollout stages prior to April 2007.
- 3.6 Currently, there are no Tasmanian gas pipelines that are 'covered' — that is, subject to the obligations of the National Gas Code. The two likely ways in which a pipeline could become covered in Tasmania is if a person applied to the National Competition Council for coverage of a pipeline, or if a pipeline service provider proposed an access arrangement to the regulator (for Tasmanian distribution pipelines, the regulator is the Government Prices Oversight Commission (GPOC), and it is the Australian Competition and Consumer Commission (ACCC) for transmission pipelines). More information on coverage mechanisms is provided later in this paper.

## **Regulatory framework**

- 3.7 The Tasmanian Regime forms part of a wider regulatory framework through which the Tasmanian Government seeks to provide

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<sup>2</sup> To underpin the viability of the network rollout as the Tasmanian natural gas industry gets off the ground, the Tasmanian Government has provided Powerco with a non-renewable exclusive distribution franchise for the 23 'foundation customers' identified in Stage 1. This franchise arrangement does not give rise to certification issues.

incentives and certainty to developers, promote competitive outcomes and appropriate consumer protection, and ensure the development and operation of safe gas infrastructure and services.

3.8 This regulatory framework is underpinned by three main pieces of legislation:

- (a) The Gas Pipelines Access (Tasmania) Act regulates access to gas pipelines by, among other things, adopting the Gas Pipelines Access (South Australia) Act, schedules 1 and 2 of which comprise the 'Gas Pipelines Access Law'. Schedule 1 of the South Australian Act is concerned with Third Party Access to Natural Gas Pipelines, and Schedule 2 sets down the National Third Party Access Code for Natural Gas Pipeline Systems (the 'National Gas Code'). (South Australia was the first State to adopt the Code in legislation which has been used as template legislation by other States and Territories.) The Government Prices Oversight Commission (GPOC) has been appointed as the regulator of third party access to gas distribution pipelines under the Gas Pipelines Access (Tasmania) Act, and the ACCC as the regulator of transmission pipelines.
- (b) The *Gas Pipelines Act 2000* regulates the construction and operation of gas transmission pipeline facilities in Tasmania.
- (c) The *Gas Act 2000* regulates the distribution and retailing of gas in Tasmania and includes provisions for the appointment of the Director of Gas Safety and the Director of Gas, for the latter Director to issue industry codes and licences for gas distributors and retailers, and for gas safety regulations to be issued. Codes issued under the Gas Act outline the detailed regulatory framework for gas distribution and retailing to small customers. The Commissioner of the GPOC has been appointed to the position of Director of Gas under the Gas Act.

3.9 The Tasmanian Government does not propose to establish any retail gas franchise arrangements. Full retail contestability will be available when gas market operations commence at the commissioning of Stage 1 of the gas distribution network. Under the exclusive distribution franchise arrangement, no other pipelines will be able to supply the franchise customer premises until 2010, but the customer will be able to enter into a retail contract with any retailer

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willing to supply through the distribution network. From 2010, the supply of gas to up to the 23 customer premises will be wholly contestable. The Tasmanian Government anticipates that competition will be effective in the retail sector, because establishment costs will present low barriers to entry for new retailers and because gas retailers will face competition from other fuel sources.

## **The Tasmanian Regime**

### **Structure of the regime**

- 3.10 The Tasmanian Regime is based on the Gas Pipelines Access (Tasmania) Act, which applies the Gas Pipelines Access Law as a law in Tasmania. This Act commenced on 14 November 2000. The Gas Pipelines Access Law contains provisions to give the National Gas Code legal effect, including provisions that define the Code and the means for its amendment, establish a procedure for classifying pipelines as transmission or distribution pipelines, prohibit certain persons from preventing access to Code pipelines and establish procedures for arbitrating access disputes.
- 3.11 The National Gas Code has been applied in each of the other States and Territories (in Western Australia, there were some modifications to facilitate the enactment of complementary legislation). Tasmania has no derogations from, or savings and transitional provisions under, the Code. The Code includes ten sections:
- (a) Section 1 ('Coverage') describes the kinds of gas infrastructure that are subject to the Code and sets out four ways in which particular infrastructure is or may become subject to the Code.
  - (b) Section 2 ('Access arrangements') requires that, where a pipeline is covered, the service provider must establish with the relevant regulator an up-front access arrangement for that pipeline.
  - (c) Section 3 ('Content of an access arrangement') sets out the minimum content of an access arrangement and the process for determining reference tariffs through a competitive tender process.

- (d) Section 4 ('Ring fencing arrangements') requires a service provider to ring fence its business of providing services using a covered pipeline.
- (e) Section 5 ('Information and timelines for negotiation') states the obligations on service providers and users to disclose to the market information relevant to obtaining access to services provided by a covered pipeline.
- (f) Section 6 ('Dispute resolution') establishes an arbitration mechanism where a service provider of a covered pipeline and a prospective user cannot agree on the terms of access to a service. In any such arbitration, the arbitrator must apply the terms of the access arrangement established with the relevant regulator.
- (g) Section 7 ('General Regulatory and Miscellaneous Provisions') is concerned with matters such as the approval of associate contracts, decisions made by regulatory bodies, extensions to time limits and the treatment of confidential information.
- (h) Section 8 ('Reference tariff principles') sets out the principles with which reference tariffs and a reference tariff policy included in an access arrangement must comply.
- (i) Section 9 ('Code change') sets out the process for amending the Code.
- (j) Section 10 ('Interpretation') sets out the basis for interpreting the Code.

3.12 Section 8 of the Gas Pipelines Access (Tasmania) Act applies the regulations in force under part 3 of the Gas Pipelines Access (South Australia) Act, being the Gas Pipeline Access (South Australia) Regulations.

**Viewing the Tasmanian Regime**

Tasmania's Gas Pipelines Access (Tasmania) Act 2000, Gas Pipelines Act 2000 and Gas Act 2000 can be viewed at <http://www.thelaw.tas.gov.au/index.w3p>

The National Gas Code can be viewed at the Code Registrar's website at: [www.coderegistrar.sa.gov.au](http://www.coderegistrar.sa.gov.au).

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## Services covered by the Tasmanian Regime

3.13 When the Natural Gas Pipelines Access Agreement was signed in 1997, Tasmania was the only Australian State or Territory that did not have access to natural gas. In other jurisdictions, access regimes apply to new pipelines and to spare and developable capacity in natural gas pipelines. In Tasmania, the access regime applies to new pipelines to which the National Gas Code applies.<sup>3</sup> There are no derogations on coverage and no transmission or distribution pipelines that are exempt from the Code's coverage provisions.

3.14 The generic type of service that may be covered by the Tasmanian Regime is defined in s.10.8 of the National Gas Code as a service provided by means of a covered pipeline including:

- (a) haulage services (such as firm haulage, interruptible haulage, spot haulage and backhaul);
- (b) the right to interconnect with the covered pipeline; and
- (c) services ancillary to the provision of such services;

but does not include the production, sale or purchasing of natural gas.

3.15 'Pipeline' is defined in the Gas Pipelines Access Law 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:

- (i) unless paragraph (ii) applies, anything upstream of a prescribed exit flange on a pipeline conveying natural gas from a prescribed gas processing plant; or
- (ii) if a connection point upstream of an exit flange on such a pipeline is prescribed (by regulation), anything upstream of that point; or
- (iii) a gathering system operated as part of an upstream producing operation; or

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<sup>3</sup> As mentioned earlier, no Tasmanian pipelines are currently covered under the National Gas Code. Coverage of a pipeline would potentially arise if a person were to apply to the Council or if the owner/operator of a pipeline were to propose an access arrangement to the relevant regulator.

- (iv) 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
- (v) anything downstream of the connection point (as defined by regulation) to a consumer.

### **Coverage mechanisms**

3.16 Coverage of a pipeline under the Tasmanian Regime makes it subject to the obligations of the National Gas Code. Under the Code, there are four ways a pipeline may become 'covered' and therefore subject to all of the obligations in the Tasmanian access regime:

- (i) Pipelines listed on Schedule A of the Code. This is a list of transmission and distribution pipelines that will be covered from the time an access regime comes into operation (s.1.1 of the Code). Tasmania does not have any 'scheduled' pipelines.
- (ii) Any person may apply to the National Competition Council for a pipeline not listed in Schedule A to be covered under a case-by-case coverage mechanism in the National Gas Code. The Council must consider the matter through open and transparent processes, and make a recommendation to the relevant Minister (in the State or Territory that has the closest connection with the particular pipeline) as to whether the pipeline should be covered. The Minister then makes a decision on coverage based on the recommendation (ss.1.2-1.9 of the Code). The coverage criteria to be observed by the Council and Minister are set out in s.1.9 of the Code. The s.1.9 coverage criteria require that: access would promote competition in another market; it would be uneconomic for anyone to develop another pipeline to provide the services of the pipeline in question; access can be provided without undue risk to human health or safety; and access would not be contrary to the public interest. The National Gas Code also allows parties to apply to the Council for revocation of coverage. On receipt of the application, the Council assesses whether the coverage criteria continue to apply to the relevant pipeline.
- (iii) The owner/operator of a pipeline may propose an access arrangement to the relevant regulator. If the regulator approves the proposal, the pipeline becomes covered under the National Gas Code (s.1.20 of the Code).
- (iv) A pipeline is automatically covered if it is subject to a competitive tendering process approved by the regulator under s.3 of the Code.

## Classification of covered pipelines

- 3.17 Part 3 of the Gas Pipelines Access Law sets out a process under which relevant Ministers can decide whether a pipeline is to be classified as a transmission or distribution pipeline, following criteria set out in the Law. If the Ministers fail to reach agreement, they may request that the Council make a recommendation on the matter.
- 3.18 The Tasmanian Government has powers under the Gas Act and the Gas Pipelines Act to declare that a pipeline be treated as a transmission or distribution pipeline for the purposes of the Acts. These powers do not relate to the classification of pipeline status under the Gas Pipelines Access Law.

# 4 Statement of reasons

## Background

- 4.1 Section 44M of the TPA provides for the Council to recommend to the Commonwealth Minister on the effectiveness of an access regime established by a State or Territory government. The Council must recommend that the regime is either effective or not effective. If the Council recommends certification, it must also recommend the period for which the Minister's decision should be in force.
- 4.2 In making its recommendation, the Council must consider the relevant principles in clauses 6(2) to 6(4) of the Competition Principles Agreement (clause 6 principles — see below), and must not consider any other matters (s.44M(4) of the TPA). In doing so, the Council must treat each principle as having the status of a guideline rather than a binding rule (s.44DA(1) of the TPA). Further, an effective access regime may contain additional matters that are not inconsistent with the CPA clause 6 principles (s.44DA(2)).

### The clause 6 principles

**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.

**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; and

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

**6(4)** 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.
- (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.
- (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.
- (f) Access to a service for persons seeking access need not be on exactly the same terms and conditions.
- (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.
- (h) The decisions of the dispute resolution body should bind the parties; however, rights of appeal under existing legislative provisions should be preserved.
- (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

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- (viii) the benefit to the public from having competitive markets.
  - (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.
  - (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.
  - (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.
  - (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.
  - (n) Separate accounting arrangements should be required for the elements of a business which are covered by the access regime.
  - (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.
  - (p) Where more than one State or Territory regime applies to a service, those regimes should be consistent and, by means of vested jurisdiction or other co-operative 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.

## **Clause 6 principles: clause by clause assessment**

- 4.3 This section provides the Council's assessment of the Tasmanian Regime against each of the clause 6 principles.
- 4.4 In its assessment of the National Gas Code in 1997 (see NCC 1997) and in its 1998 report on South Australia's application of the Code (see NCC 1998), the Council found that the National Gas Code framework satisfies each of the CPA clause 6 principles. The Code framework was certified as effective by the Australian Government Minister for Financial Services and Regulation with respect to the South Australian gas access regime in December 1998.

### **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.

#### **Background**

4.5 Clause 6(3) sets out the threshold criteria that limit the scope of effective access regimes to a narrow range of infrastructure services.

#### **The Tasmanian Regime**

4.6 The Tasmanian Regime applies to the services of covered 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.

4.7 'Service' and 'pipeline' are defined terms in the Tasmanian Regime (see paragraphs 3.14-3.15 of this report).

4.8 'Coverage' of a pipeline makes it subject to the obligations of the National Gas Code, which contains four coverage mechanisms (and a revocation mechanism) and sets out coverage criteria that closely reflect clause 6(3)(a) of the CPA. An outline of the coverage mechanisms is provided in paragraph 3.16.

#### **Issues and analysis**

4.9 In its assessment of the National Gas Code (NCC 1997), the Council noted with respect to clause 6(3)(a)(i) that construction of natural gas pipelines involves large capital outlays and relatively low variable operating costs. These features result in significant economies of scale which can act as a natural barrier to entry and hence competition. This means that natural gas pipelines have tended to have natural monopoly characteristics. However, this is not necessarily the case for all pipelines and the situation may change over time as markets evolve.

4.10 The Council noted with respect to clause 6(3)(a)(ii) that access to the services of gas pipelines may promote competition in gas production and gas retailing by addressing the natural monopoly problem

commonly associated with gas haulage infrastructure. The Council was not aware of safety issues arising under clause 6(3)(a)(iii) with regard to the Natural Gas Code framework.

- 4.11 The National Gas Code's revocation provisions enable parties to seek an independent assessment of whether the coverage principles continue to apply to a particular pipeline. These provisions ensure that should the clause 6(3) principles no longer apply, coverage may be revoked.

### **Recommendation**

- 4.12 *The Council's view is that the Tasmanian Regime satisfies clause 6(3).*

### **Clauses 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.

### **Background**

- 4.13 Clauses 6(4)(a)-(c) are considered together because jointly they establish a framework for negotiations to proceed in an effective access regime. Clause 6(4)(a) establishes commercial negotiation as a cornerstone in determining access outcomes. This principle is complemented by clauses 6(4)(b) and (c), which recognise the need for underpinning regulatory measures where a service provider has considerable market power. In this sense, clauses 6(4)(a)-(c) require an appropriate balance between commercial negotiation and regulatory intervention to facilitate credible negotiations.
- 4.14 Independent regulatory guidance to third parties may be needed to create an environment conducive to effective negotiations. This is especially true of industries where third parties have limited information on which to base negotiations or where many disputes are likely. In such circumstances, third parties may lack sufficient information and bargaining strength to negotiate reasonable terms and conditions, and credible pricing structures may only emerge through lengthy and potentially costly arbitrations. This prospect would be inimical to a genuine negotiation process.

- 4.15 To address these issues, regulatory processes should address information and market power asymmetry to give third parties a workable platform from which to enter negotiations. In the absence of such measures, an access regime may establish a right to negotiate in theory, but may put third parties in a position of negotiating blindly with a monopoly provider or of being offered potentially inappropriate prices (for example, prices that include monopoly rents) on a ‘take it or leave it’ basis. The latter may amount to a constructive denial of access, and cannot be viewed as satisfying 6(4)(a)-(c).
- 4.16 Addressing information and market power asymmetry is likely to require, among other things, guidance on appropriate access prices or price boundaries established through either:
- (i) independent and transparent regulatory processes that provide for stakeholder consultation. The National Gas Code provides price guidance in the form of reference tariffs for access to services provided by covered pipelines; the tariffs are approved by the independent regulator following an open and transparent regulatory process; or
  - (ii) a robust competitive process, subject to independent oversight, that determines terms and conditions of access. The National Gas Code provides for a competitive tender process (approved by the independent regulator) for the determination of reference tariffs.
- 4.17 In considering whether an access regime provides appropriate guidance to market participants, the Council focuses, in the first instance, on whether regulatory processes are sufficiently robust to make the guidance credible. In particular, market guidance should be independent, and developed through open and transparent processes that allow stakeholders to participate, and provide them with reliable information to inform their views. Regulatory processes should be derived from appropriate legislative underpinnings, rather than being applied on an ad hoc basis, and should be clearly defined and made publicly available, to allay concerns of bias or perceptions of agreements made ‘behind closed doors’.
- 4.18 While the clause 6 principles do not specify particular outcomes, they provide that outcomes should strike a balance between a range of factors including the legitimate business interests of the access provider, the interests of other parties, the delivery of cost-related pricing, the efficient use of infrastructure, and the public benefits arising from competitive markets (clause 6(4)(i)). These factors,

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taken as a whole, point to the pursuit of efficient outcomes through the regulatory process.

- 4.19 The clause 6 principles recognise the need for an independent arbitration mechanism (clauses 6(4)(g)-(h)) to complement the negotiation/regulatory framework. In considering clauses 6(4)(a)-(c), the Council is conscious that the dispute resolution framework will affect the environment for negotiation. In particular, parties are more likely to engage in genuine negotiations if a robust mechanism is available to settle disputes.

### **The Tasmanian Regime**

- 4.20 Tasmania's application for certification states that the Tasmanian 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. The Tasmanian Regime is not intended to preclude parties from negotiating commercial arrangements that suit their particular needs and circumstances.

- 4.21 As noted earlier, the Tasmanian Regime adopts the National Gas Code (and other aspects of the Gas Pipelines Access Law) as law in Tasmania. Section 2 of the National Gas Code requires the service provider associated with a covered pipeline to establish an access arrangement for the pipeline to the satisfaction of the relevant regulator. An access arrangement is a statement of the policies and the basic terms and conditions which apply to third party access to a covered pipeline. The service provider and a user (or prospective user) are free to agree to terms and conditions that differ from the access arrangement (with the exception of the queuing policy, which is outlined below). If an access dispute arises, however, and is referred to the relevant regulator, the regulator must apply the provisions of the access arrangement in resolving the dispute. If a pipeline is not covered, a service provider may voluntarily propose an access arrangement to the relevant regulator for approval. Upon approval the pipeline becomes a covered pipeline.

- 4.22 The National Gas Code requires an access arrangement to be submitted to the relevant regulator for approval. The relevant regulator in the case of transmission pipelines in the Tasmanian Regime is the ACCC, and in the case of distribution pipelines, the regulator is prescribed in the Gas Pipelines Access (Tasmania) Regulations 2001, namely the GPOC.

- 4.23 The requirement under the National Gas Code (and the Tasmanian Regime) for the regulator to approve an access arrangement ‘up-front’ is intended to provide both access seekers and owners/operators of covered pipelines with some certainty about the likely terms and conditions of access. The requirement is also intended to reduce the likelihood of disputes (requiring resolution) under the access regime.
- 4.24 The relevant regulator may approve an access arrangement only if it satisfies the requirements set out in section 3 of the National Gas Code:
- (a) *Services policy*: an access arrangement must include a description of the services to be offered and, where reasonable, allow prospective users to obtain a service that includes only those elements that the user wishes to be included in the service and to obtain separate tariffs for those elements.
  - (b) *Reference tariff*: an access arrangement must contain one or more reference tariffs, which operate as benchmarks for specific services. Unless the reference tariff has been determined through a competitive tender process, it must comply (in the relevant regulator’s opinion) with the reference tariff principles set down in section 8 of the National Gas Code. (The section 8 principles have the objectives of providing the service provider with the opportunity to earn a stream of income that recovers the efficient costs of delivering the reference service over the expected life of the assets used in delivering the service, replicating the outcomes of a competitive market, ensuring the safe and reliable outcome of a pipeline, not distorting investment decisions in pipeline transportation systems or in upstream and downstream industries, achieving efficiency in the level and structure of the reference tariff, and providing an incentive to the service provider to reduce costs and develop the market for reference and other services.)
  - (c) *Terms and conditions*: an access arrangement must include the terms and conditions on which the service provider will supply each reference service.
  - (d) *Capacity management policy*: an access arrangement must state whether the covered pipeline is a contract carriage

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pipeline or a market carriage pipeline, as defined in section 10 of the Code.

- (e) *Trading policy*: an access arrangement for a contract carriage pipeline must include a policy on the trading of capacity, enabling users with unused capacity to trade it.
- (f) *Queuing policy*: an access arrangement must include a policy for defining the priority that access seekers have in negotiating for capacity.
- (g) *Extensions/expansions policy*: an access arrangement must include a policy setting out a method for determining whether an extension or expansion to the covered pipeline is or is not to be treated as part of the covered pipeline for the purposes of the Code.
- (h) *Review date*: an access arrangement must include a date on or by which revisions to the access arrangement must be submitted and a date on which the revised access arrangement is intended to commence.

4.25 An access arrangement submitted to the relevant regulator for approval must be accompanied by an access arrangement information package, which 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 identified in Attachment A to the Code.

4.26 The regulator has six months (from receipt of the proposed access arrangement) in which to issue a final decision on it. In deciding whether to approve an access arrangement, the regulator must undertake a transparent process involving public consultation. The regulator must assess whether the arrangement contains the elements and satisfies the principles set out in sections 3 and 8 of the National Gas Code. Section 2 of the Code states that the Regulator's assessment should take into account the service provider's legitimate business interests and investment in the covered pipeline; firm and binding contractual obligations of the service provider or other persons already using the covered 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); the interests of users and prospective users; and other matters that the regulator considers are relevant. The regulator's

draft and final decisions on the access arrangement must include reasons, and the final decision must be placed on the public register.

- 4.27 Parties are free to negotiate access on the basis of information contained in the access arrangement and the access arrangement information package. It is possible for them to negotiate tariffs that are different from the reference tariffs. Section 6 of the Code contains a dispute resolution mechanism if commercial agreements cannot be reached. This mechanism can be invoked by either party referring the dispute to the relevant regulator who may then arbitrate and set the terms and conditions of access. In doing so, the arbitrator must apply the provisions of the access arrangement and the matters set down in section 6.15 of the Code (which are similar to those listed in clause 6(4)(i) of the CPA).
- 4.28 All decisions made by the relevant regulators and arbitrators are subject to judicial review.
- 4.29 Part 5 of the Gas Pipelines Access Law provides for the enforcement of obligations created by the access regime. A range of possible sanctions and remedies are available including injunctions and damages depending on the provision that is breached. The various sanctions and remedies would be imposed by either the Federal Court or the Supreme Court of Tasmania.

### **Issues and analysis**

- 4.30 The Council has previously found that the broad framework of the National Gas Code (which the Tasmanian Regime adopts) provides a balance between commercial negotiation and regulation under clauses 6(4)(a)-(c). The model of enforceable access arrangements approved by an independent regulator provides an appropriate platform for third parties to enter commercial negotiations, with binding dispute resolution available to settle disputes (NCC 1997, 1998).
- 4.31 In particular, the Code provides price guidance in the form of reference tariffs set through independent regulatory processes or competitive tendering arrangements with independent regulatory oversight. Such guidance is made credible by the use of independent and transparent regulatory processes.
- 4.32 The Council's 1997 report on the National Code noted that a proper 6(4)(a)-(c) assessment of State applications of the Code would also require consideration of State-specific features. In particular, the Council would need to consider whether State-specific regulatory and

appeals bodies are independent and adequately resourced to fulfil their functions; and whether State-specific transitional arrangements and any derogations are consistent with the clause 6 principles.

#### Independence of regulators and appeal bodies

- 4.33 The Tasmanian Regime confers considerable powers on regulatory agencies upon which third parties rely significantly for guidance. To ensure that all parties can be confident about regulatory processes, it is important that regulatory bodies undertake their duties in an impartial and objective manner. Regulators must be independent and undertake open and transparent processes.
- 4.34 The essential criterion for independence is an arms length separation from facility owners, current users, access seekers, governments and other stakeholders (NCC 1997, 1999a and 1999b). A government minister or department may not be appropriately independent for the purpose of access regulation due to the potential for conflicts of interest to arise.
- 4.35 Regulatory bodies should enjoy a separate legal mandate, with freedom from day-to-day ministerial control in exercising regulatory functions. This degree of independence is necessary to avoid the reality or perceptions of conflicts of interest, and so engender confidence that regulatory guidance is free of bias.
- 4.36 Under the Tasmanian Regime:
- (a) the ACCC is the regulator for gas transmission pipelines;
  - (b) the administrative appeal body in relation to decisions made by the ACCC is the Australian Competition Tribunal;
  - (c) the judicial review body for decisions of the ACCC is the Federal Court under the *Administrative Decisions (Judicial Review) Act 1997* (Cth);
  - (d) the regulator of distribution pipelines in Tasmania is the GPOC;
  - (e) the administrative appeal body for decisions made by the GPOC is the Australian Competition Tribunal; and
  - (f) the judicial review body for decisions of the GPOC is the Supreme Court of Tasmania.

*ACCC and the Australian Competition Tribunal*

- 4.37 The Council has previously considered the independence and resourcing of the ACCC and the Tribunal and considers that they are sufficiently resourced and independent to properly carry out their tasks under the Tasmanian Regime (NCC 1999a; NCC 2001).

*Government Prices Oversight Commission*

- 4.38 The GPOC was established under the Tasmanian *Government Prices Oversight Act 1995*. Under clause 9 of the Act, the GPOC is a body corporate and may sue and be sued in its corporate name.

- 4.39 Clause 15 of the Gas Pipelines Access (Tasmania) Act 2000 provides that the person prescribed as the local regulator (which is the GPOC in the case of gas distribution pipelines) is not subject to the control and direction of any Minister or officer of the Crown in the performance or exercise of any function or power.

- 4.40 Clause 20 of the Government Prices Oversight Act provides for the GPOC to ask a range of government entities to provide assistance and facilities for it to perform its functions, and clause 21 provides for money to be appropriated by Parliament for the purposes of the GPOC.

- 4.41 The GPOC is adequately independent and resourced to properly carry out its tasks under the Tasmanian Regime.

Transitional arrangements and derogations

- 4.42 The Tasmanian Regime does not include any derogations from, or savings and transitional provisions under, the National Gas Code.

**Recommendation**

- 4.43 *The Council's view is that the Tasmanian Regime satisfies clause 6(4)(a)-(c).*

**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.

**Background**

- 4.44 Under clause 6(4)(d), an effective regime should contain a mechanism to review, over time, the right to negotiate access to a service. Further, this process should not automatically revoke any existing contractual rights.

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- 4.45 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. For example, while a facility might not be economically feasible to duplicate at present (and warrant application of an access regime), market evolution might change this situation over time and remove the need for access regulation.
- 4.46 As such, the review provisions in clause 6(4)(d) relate to the point in time at which a decision is made to apply an access regime to a particular service. In this sense, clause 6(4)(d) could be satisfied, for example, by way of a review provision on coverage decisions.

### **The Tasmanian Regime**

- 4.47 The Tasmanian Regime gives legal effect to the National Gas Code. As such, the regime embodies the coverage (and revocation of coverage) set out in the National Code. The Council recommended in September 1997 (with respect to the National Code) and in 1998 (with respect to the South Australian application of the National Code) that this framework satisfies clause 6(4)(d). The framework was certified as effective by the Australian Government Minister for Financial Services in December 1998.
- 4.48 Under the Code, when a pipeline is covered and an access arrangement is approved by the relevant regulator, an enforceable right to negotiate access to its services then arises. Any person can apply to the Council for coverage of a particular pipeline to be revoked. The Council is then required to undertake an open and transparent public process and make a recommendation to the relevant Minister about whether coverage should be revoked. Both the Council's recommendation and the Minister's decision must be based strictly on the coverage provisions in the National Code. 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 Tasmanian Regime. However, it would not disturb any contractual (or other) rights or obligations in existence at the time.
- 4.49 In addition to the provisions for reviewing and possibly revoking coverage, the National Code incorporates provision for periodic review of access arrangements. Under section 3 of the Code, an access arrangement must include a date for review, with the period between reviews to be determined by the relevant regulator.

### **Issues and analysis**

- 4.50 The Tasmanian Regime embodies the coverage and revocation of coverage framework set out in the National Gas Code and certified as effective.

### **Recommendation**

- 4.51 *The Council's view is that the Tasmanian Regime satisfies clause 6(4)(d).*

### **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.

### **Background**

- 4.52 The Council considers that an access regime may either incorporate clause 6(4)(e) explicitly, or through general provisions that have the same effect.

### **The Tasmanian Regime**

- 4.53 The Tasmanian Regime adopts the National Gas Code as the law, and as such incorporates the provisions of the Code on this matter.
- 4.54 Under section 5 of the Code, the service provider of a covered pipeline must establish an information package containing, at least:
- (a) the access arrangement and access arrangement information for the pipeline;
  - (b) a summary of the contents of the public register containing information on capacity;
  - (c) information relating to all major trunks and mains pipes comprised in the pipeline;
  - (d) description of procedures relating to specific access requests (including the detailed information required to assess an access request); and
  - (e) any further information the regulator reasonably requires to be included to assist potential users to decide whether or not to seek access to services provided by covered pipelines or to determine how to go about seeking access to these services.

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- 4.55 The service provider must provide the package to the access seeker within 14 days of receiving the request, and the regulator may direct further information to be included in the information package.
- 4.56 Section 2.6 of the National Gas Code requires that the access arrangement information for a pipeline include sufficient information to enable prospective users to understand the derivation of the elements in the access arrangement, including the reference tariffs — the relevant information includes access pricing principles, capital costs, system capacity and key performance indicators. The regulator must, if requested, consider whether the access arrangement information meets the requirements of sections 2.6 and 2.7 of the Code and may require that changes be made.
- 4.57 Under section 2.8 of the National Gas Code, the regulator may permit the owner-operator to categorise or aggregate the information to the extent necessary to ensure the disclosure of the information is not unduly harmful to the legitimate business interests of the owner/operator.
- 4.58 Under section 3.2 of the National Gas Code, the services policy to be included as an access arrangement must, to the extent practicable and reasonable, enable a user to obtain only those elements that the user wishes to purchase at an unbundled price.
- 4.59 Section 5 of the Code provides that a service provider must respond to a specific request for access within 30 days of its receipt; provide details of the nature of investigations where the request can only be properly considered after further investigations; if it advises that spare capacity does not exist to satisfy an access request, provide an explanation outlining those aspects of the access request that cannot be satisfied, and also provide an indication of likely prospects for future access.

### **Issues and analysis**

- 4.60 In assessing the National Gas Code in September 1997, the Council noted that information disclosure must be sufficient to facilitate market assessments and fair and reasonable regulatory outcomes, especially given that the regulator-approved reference tariffs cannot be reassessed in arbitration. The Council also commented that the information disclosure provisions should not be used as a device to unduly harm the service provider's competitive position in the market, which could undermine investment in gas infrastructure and potential access to spare capacity.

### **Recommendation**

- 4.61 *The Council's view is that the Tasmanian Regime satisfies clause 6(4)(e).*

### **Clause 6(4)(f)**

Access to a service for persons seeking access need not be on exactly the same terms and conditions.

### **Background**

- 4.62 This clause is intended to remove any doubt that access may be provided on different terms and conditions to different users. Wherever access agreements are negotiated commercially, access will most likely be provided on different terms and conditions. One reason is that there are different costs and risks associated with providing access to different users.

### **The Tasmanian Regime**

- 4.63 The Tasmanian Regime is consistent with the National Gas Code and requires pipeline owners/operators to submit an access arrangement which must include terms and conditions on which a service provider will supply each reference service. However, parties have the flexibility to negotiate terms and conditions of access (including tariffs) to suit their particular circumstances (as provided for in section 2.50 of the Code).

### **Issues and analysis**

- 4.64 The Council is satisfied that the terms and conditions set out in the access arrangements under the Tasmanian Regime do not limit the scope for commercial negotiation. Rather, they act as a safety net where a reasonable outcome cannot be commercially negotiated. The Council previously found in its analysis of the National Gas Code in 1997 and the South Australian gas access regime in 1998 that the approach set out in the Code (and now incorporated in the Tasmanian Regime) is consistent with clause 6(4)(f). The Australian Government Minister certified this framework to be effective with respect to the South Australian regime in December 1998.

### **Recommendation**

- 4.65 *The Council's view is that the Tasmanian Regime satisfies clause 6(4)(f).*

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## 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.

### Background

- 4.66 Under clause 6(4)(g), an effective access regime must contain a mechanism to ensure that the parties to a dispute have recourse to an independent dispute resolution process. The arbitrator should be independent of all stakeholders, including service providers, current users, access seekers and governments.
- 4.67 The Council's previous work in certification has raised an issue — the arbitrator's independence may be compromised if that body performs the dual role of regulator and arbitrator. For example, a dispute may arise over an access arrangement that the arbitrator has previously approved in its capacity as the regulator.
- 4.68 The process of dispute resolution includes all mechanisms available for resolving disputes, including appeals processes. The Council regards this set of mechanisms as a package, with different elements capable of satisfying independence issues. Alternative approaches to independent dispute resolution may include:
- (a) separation of the regulator from the arbitrator (for example, by vesting each function in separate bodies); or
  - (b) a mechanism enabling either party to a dispute to require the arbitrator to appoint an alternative body if a question of bias arises; or
  - (c) an independent appeals process to address questions of arbitrator bias or independence.
- 4.69 These alternatives do not preclude other approaches from satisfying clause 6(4)(g).

### The Tasmanian Regime

- 4.70 Under the Tasmanian Regime, parties can seek to resolve disputes through the dispute resolution process provided for in section 6 of the National Gas Code and part 4 of schedule 1 of the Gas Pipelines Access Law which Tasmania has adopted in its Gas Pipelines Access (Tasmania) Act.<sup>4</sup> Under the regime, parties may refer a dispute to

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<sup>4</sup> Parties are also free to seek to resolve their disputes through private negotiation.

the regulator. The regulator (or an independent party appointed by the regulator) may arbitrate the dispute. In making a decision, the arbitrator must apply the provisions of the access arrangement and take into account the matters set out in section 6.15 of the National Gas Code, which include the service provider's business interests and investment in the pipeline, the costs to the service provider of providing access, the interests of all users, contractual obligations of the service provider or other persons already using the pipeline, the safe and economically efficient operation of the pipeline, and the benefit to the public from having competitive markets. These matters are consistent with those listed in clause 6(4)(i) of the Competition Principles Agreement.

4.71 The arbitrator must issue a draft decision and consider submissions from the parties. However, if the dispute is solely about the tariff to be applied to a reference service, the arbitrator must apply the reference tariff. The procedures to be followed in conducting arbitration are contained in part 4 of the Gas Pipelines Access Law. In summary, arbitrations are to be conducted in private and are usually limited to the parties involved in any given dispute. The arbitrator has discretion on the allocation of costs.

4.72 The arbitrator's decisions are subject to appeal on a question of law under Part 4 of the GPAL. In addition, these decisions are also subject to judicial review.

### **Issues and analysis**

4.73 During the Council's consideration of the National Gas Code in 1997, some parties expressed concern that, if a body acts as both a regulator and arbitrator, it is open to a conflict of interest if called on to arbitrate with respect to an access arrangement it previously approved as the regulator.

4.74 In its certification application, Tasmania states that it will ensure that the regulator of gas distribution pipelines (the GPOC) develops arbitration guidelines that will include practices and procedures to be carried out independently of regulatory functions under the Tasmanian 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.

4.75 Under the Tasmanian Regime, the ACCC is the regulator with respect to gas transmission pipelines. As a party to the Natural Gas

Pipelines Access Agreement (NGPAA), the Australian Government is required to take such actions as are available to ensure that the ACCC develops guidelines to ensure sufficient independence between regulatory and arbitration decision making by the ACCC. The ACCC is preparing arbitration guidelines setting out its approach to arbitration of disputes involving gas transmission pipelines covered by the National Gas Code. It released a consultation paper entitled 'Outline of arbitration guidelines for gas access disputes' in November 2003, followed by a draft guideline entitled 'Resolution of transmission pipeline access disputes under the Gas Code' in May 2004. The draft guideline indicated that the ACCC proposes to undertake arbitrations itself or to appoint an independent arbitrator. The ACCC is not expected to release the final guideline until later in 2005.

- 4.76 The Tasmanian Regime makes adequate provision for the arbitration of disputes involving access. The independence of the dispute resolution bodies — the ACCC in the case of gas transmission pipelines and the GPOC in the case of gas distribution pipelines — was discussed earlier in the analysis of Tasmania's arrangements to deal with clauses 6(4)(a)-(c) of the Competition Principles Agreement. These bodies are established and resourced in ways that ensure their independence. However, the Council notes that the GPOC and the ACCC are yet to finalise their arbitration guidelines and the Council's acceptance of the arbitration arrangements is based on the premise that these guidelines will require the regulator to appoint an arbitrator other than itself in those circumstances where interested parties consider this is required.

### **Recommendation**

- 4.77 *The Council's view is that the Tasmanian Regime satisfies clause 6(4)(g).*

### **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.

### **Background**

- 4.78 An effective access regime should have credible enforcement arrangements to ensure an arbitrator's decision is binding. In addition, the regime should preserve existing legislative rights of appeal. This does not require the insertion of lengthy appeals provisions into a State or Territory access regime. However, a regime

may offend this clause if it precludes any right of appeal against the legality of the dispute resolution body's decision under judicial review (for example, on account of breaches of rules of judicial fairness).

### **The Tasmanian Regime**

4.79 In accord with the National Gas Code, a decision made by the arbitrator under the Tasmanian gas pipelines access regime takes effect 14 days after the decision is made. Under section 6 of the Code, the owner/operator of a covered pipeline is bound by the arbitrator's decision. The access seeker is also bound by the decision unless it notifies the arbitrator within 14 days of the decision being made that it does intend to be bound.

4.80 Decisions made by the arbitrator are enforceable under Part 5 of the GPAL. The regulator or any other person may bring civil proceedings seeking compliance with the outcome of a dispute resolution process under the Tasmanian Regime. The sanctions and remedies, which are provided for in relation to breaches of the regime (including non-compliance with the outcome of an arbitration process) are exclusive to those provided for in the regime. However, remedies are available under other laws (for example, the Trade Practices Act) if the conduct is both a breach of the access regime and another law.

4.81 The Tasmanian Regime provides for the arbitrator's decisions to be subject to an appeal on the question of law under Part 4 of the GPAL, as noted in the discussion above of clause 6(4)(g). In addition, the arbitrator's decisions are subject to judicial review. The arbitrator's decision is not subject to administrative review, but the regulator's decision in regard to approval of the access arrangements on which arbitration decisions may be based, are subject to administrative appeal in the circumstances discussed under the analysis of clauses 6(4)(a)-(c).

### **Issues and analysis**

4.82 The Tasmanian Regime embodies the arbitration and appeals framework set out in the National Gas Code. The Council recommended in its 1997 report on the National Gas Code and its 1998 report on South Australia's application of the Code that this framework satisfies clause 6(4)(h).

4.83 Some submissions to the Council's assessment of the National Gas Code expressed concern over the inability of parties to administratively appeal arbitration decisions. However, under the

National Code, terms and conditions of access are primarily determined by the regulator. The arbitrator is constrained to apply the terms of the access arrangement, including the reference tariffs approved by the regulator. In this sense, the appropriate forum for appeals may be in relation to decisions by the regulator. Overall, the limitation on administrative appeals strikes a reasonable balance between the rights of aggrieved parties to procedural fairness and the timeliness of regulatory outcomes.

- 4.84 The Tasmanian Regime embodies the arbitration and appeals framework set out in the GPAL, which the Australian Government Minister for Financial Services and Regulation certified as effective with respect to the South Australian gas access regime in December 1998.

### **Recommendation**

- 4.85 *The Council's view is that the Tasmanian Regime satisfies clause 6(4)(h).*

### **Clause 6(4)(i)**

- (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.

### **Background**

- 4.86 An effective access regime should require a dispute resolution body to take account of each matter set out in clause 6(4)(i) of the Competition Principles Agreement. An effective access regime may

also require a dispute resolution body to take account of other matters which are not inconsistent with those in this clause.

### **The Tasmanian Regime**

- 4.87 The Tasmanian Regime applies the National Gas Code. Section 6 of the Code sets out guidelines and restrictions that must be observed. Under this section, if the arbitrator decides that the sole subject of dispute is the tariff that should apply to the gas pipeline reference service, the arbitrator may end the dispute resolution process and make an immediate decision requiring the reference service to be provided at the reference tariff. In any other case, the arbitrator must (under section 6.15) apply the provisions of the access arrangement<sup>5</sup> and take into account the factors listed in section 6.15 of the Code. The wording in this section is very similar to the wording in clause 6(4)(i) of the CPA.

### **Issues and analysis**

- 4.88 In assessing the national gas pipeline access regime in 1997, the Council considered whether the requirements of the National Gas Code that the arbitrator apply the reference tariffs in a dispute about the price of a service, and in other types of dispute apply the provisions of the access arrangement, unduly constrain the arbitrator's ability to consider matters listed in clause 6(4)(i). The Council concluded that the requirements were not inconsistent with the clause 6(4)(i), which requires only that the arbitrator take into account the clause 6(4)(i) matters.
- 4.89 Overall, the effect of the Tasmanian Regime is that either directly or indirectly, the arbitrator must take into account the matters listed in clause 6(4)(i). These factors are taken into account directly by the arbitrator when it considers a dispute about a matter other than the price of a reference service. In a dispute concerning the tariff charged for a reference service, these matters are taken into account indirectly in the sense that when the regulator decided the tariff for the reference service it was required to have regard to these factors.

### **Recommendation**

- 4.90 *The Council's view is that the Tasmanian Regime satisfies clause 6(4)(i).*

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<sup>5</sup> The regulator can only approve access arrangements after taking into account factors listed in section 2.24 of the National Gas Code. These factors are similar to those listed in clause 6(4)(i) of the CPA and 6.15 of the Code.

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## 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.

### Background

4.91 In some situations, the needs of an access seeker can only be met by extending the geographical range of a facility or by expanding the capacity of the facility. These matters should be subject in the first instance to negotiation between the parties. However, clause 6(4)(j) provides for the arbitrator to require the owner of the pipeline to 'extend or permit extension' of a pipeline to satisfy the needs of the access seeker. The Council considers that the term 'extension' includes:

- (a) expansion of capacity; and
- (b) expansion of geographical range of a facility or permitting interconnection. The latter would mean that a business seeking geographic extensions to an existing facility could construct the necessary pipelines itself and seek interconnection to the owners' infrastructure.

### The Tasmanian Regime

4.92 The Tasmanian Regime adopts the National Gas Code and thus incorporates section 6.22 of the Code which states that the arbitrator may require the service provider (that is the owner/operator) to expand the capacity of a covered pipeline to meet the requirements of a prospective user (that is, access seeker), provided that:

- (a) the service provider is not required to extend the geographical range of a covered pipeline;
- (b) the expansion is technically and economically feasible and consistent with the safe and reliable provision of the service;
- (c) the service provider's legitimate business interests are protected;

- (d) the prospective user does not become the owner of a covered pipeline or part of a covered pipeline without the agreement of the service provider; and
- (e) the service provider is not required to fund part or all of the expansion (except where the extensions/expansions policy in the access arrangement for covered pipelines states that the service provider will fund the new facility and the conditions specified in the extensions/expansions policy have been met).

4.93 The Tasmanian Regime incorporates the National Gas Code's definition of 'services' which includes the 'right to interconnect' with a covered pipeline. This means that an access seeker can invoke the arbitration process contained in section 6 of the Code and part 4 of the GPAL in the event of a dispute over terms and conditions for interconnection with a covered pipeline.

#### **Issues and analysis**

4.94 The Council is satisfied that both capacity expansion and permission to interconnect may be required of the owner/operator of the covered pipeline by the dispute resolution body under the Tasmanian Regime. This would cater for those situations where it would be efficient to provide for interconnection to a gas pipeline and allow the access seeker to construct an extension, and for those situations where it would be efficient to expand pipeline capacity incrementally.

#### **Recommendation**

4.95 *The Council's view is that the Tasmanian Regime satisfies clause 6(4)(j).*

#### **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.

#### **Background**

4.96 The Council believes that this clause should be considered in conjunction with clause 6(4)(a) which places an emphasis on commercial negotiation. The parties could define for themselves, during the course of commercial negotiations, what the threshold is for material change in circumstances and insert in the contract those events that would trigger a reopening of negotiations. Alternatively,

an access regime could make provision for parties to refer disputes concerning what constitutes a material change in circumstances to the dispute resolution body or some other body.

### **The Tasmanian Regime**

- 4.97 The Tasmanian Regime applies the principles of the National Gas Code with regard to this matter. The regime does not specifically allow a party to seek revocation or modification of a contract due to a material change in circumstances. However, parties may determine in advance what constitutes a material change in circumstances in drawing up contracts/arrangements for access. Further, where parties cannot agree on terms in this regard, the issue may be referred to dispute resolution. The Tasmanian Regime also does not preclude the application of common law principles (such as the doctrine of frustration) to matters of this nature once contracts have been entered into.

### **Issues and analysis**

- 4.98 Under the Tasmanian Regime, once a contract has been signed, it governs the relationship between the parties. However, common law principles are not precluded, and parties may agree in advance on the circumstances under which the contract may be reopened and incorporate provisions to this effect in their contract. The Council considers that this framework adequately meets the requirements of clause 6(4)(k).

### **Recommendation**

- 4.99 *The Council's view is that the Tasmanian Regime satisfies clause 6(4)(k).*

### **Clause 6(4)(I)**

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.

### **Background**

- 4.100 The Council considers that this clause requires arbitrators, where the effect of their decision would be to impede the existing rights of a person to use the facility, to consider and, where appropriate, award compensation.

### **The Tasmanian Regime**

- 4.101 The Tasmanian Regime adopts the National Gas Code, section 6.18 of which provides that the arbitrator must not make a decision that would impede the existing right of a user to obtain services or would deprive any person of a contractual right that existed prior to the notification of the dispute, other than an ‘exclusivity right’ that arose on or after 30 March 2005.<sup>6</sup>
- 4.102 In addition, section 2.25 of the Code precludes a regulator from approving an access arrangement that, if applied, would deprive any person of a contractual right, other than an exclusivity right which arose on or after 30 March 1995.

### **Issues and analysis**

- 4.103 In the Council’s assessment of the national gas access regime, it concluded that:
- (a) because the arbitrator under the National Gas Code is unable to impede an existing contractual right (other than an exclusivity right arising on or after 30 March 1995), there is no need for the arbitrator to consider compensation; and
  - (b) the existing right of a person to use a facility is unlikely to be impeded by the regulator — in the sense that the regulator’s decision relates to the terms and conditions of access to spare capacity in a pipeline. The potential to impede a party’s contractual right to use a facility would be more likely to arise from subsequent decisions through arbitration, but section 6.18 of the National Gas Code prohibits this.
- 4.104 Exclusivity rights are effectively contractual rights held by a third party that prevent or limit the ability of the owner/operator from offering spare capacity to other third parties. The non-protection of exclusivity rights that arose after 30 March 1995 is consistent with clause 6(4)(l) because such rights are considered fundamentally at odds with the purpose behind the introduction of the access

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<sup>6</sup> An exclusivity right is defined in the National Gas Code as a contractual right that by its terms either expressly prevents a service provider supplying services to persons who are not parties to the contract, or expressly places a limitation on the service provider’s ability to supply services to persons who are not parties to the contract.

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provisions in Part IIIA of the TPA. The National Gas Code's treatment of exclusivity rights is consistent with the requirements of clause 6(4)(l).

### **Recommendation**

- 4.105 *The Council's view is that the Tasmanian Regime satisfies clause 6(4)(l).*

### **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.

### **Background**

- 4.106 The Council considers that an access regime may incorporate this clause explicitly or contain provisions that have the same effect.

### **The Tasmanian Regime**

- 4.107 The Tasmanian Regime applies part 3 (section 13) of the GPAL to address hindering issues. Part 3 (section 13(1)) provides that:

- (a) the owner/operator of the covered pipeline; or
- (b) a person who is party to an agreement with the owner/operator regarding the service provided by the covered pipeline, or
- (c) a person who, as a result of arbitration, is entitled to a service provided by the covered pipeline; or
- (d) an associate of the owner/operator of a covered pipeline or a person (as referred above)

must not engage in conduct that prevents or hinders access to a service provided by a covered pipeline.

- 4.108 Section 13(2) provides that hindering access need not be the only reason for the action; only that it is a substantial purpose.

- 4.109 Under Part 5 of the GPAL, the regulator may apply to the relevant court seeking a pecuniary penalty in the event that a breach of the preventing/hindering access provisions is established. Under the Tasmanian Regime, the relevant regulator is the ACCC in the case of transmission pipelines and the GPOC in the case of distribution pipelines.

### **Issues and analysis**

- 4.110 The Tasmanian application for certification refers to another provision in the National Gas Code that deals with the issue of hoarding of capacity. Where an owner/operator refuses access to a service on the basis that the service cannot be provided safely, the owner/operator must have a 'reasonable' belief that the safe operation of the pipeline would be compromised by the provision of the service in dispute, and must disclose the assumptions on which it has based this decision. Where service is denied on this basis, the arbitrator may require that access be provided on an interruptible basis, where that would be consistent with the safe operation of the pipeline.
- 4.111 The Council is satisfied that the provisions of the Tasmanian Regime provide a workable framework to address potential hindering and hoarding issues.

### **Recommendation**

- 4.112 *The Council's view is that the Tasmanian Regime satisfies clause 6(4)(m).*

### **Clause 6(4)(n)**

Separate accounting arrangements should be required for the elements of a business which are covered by the access regime.

### **Background**

- 4.113 This clause is designed to ensure the availability of financial information disaggregated to the elements of a business that are subject to the access regime, and for each service that is potentially subject to access.

### **The Tasmanian Regime**

- 4.114 The Tasmanian Regime applies the ring fencing arrangements in section 4 of the National Gas Code. Under these provisions, owner/operators must, as a minimum:
- (a) not carry on a related business within six months of the pipeline being covered;
  - (b) establish and maintain a separate set of accounts for each activity that is the subject of an access arrangement;

- (c) establish and maintain a separate consolidated set of accounts in respect of all activities undertaken by the owner/operator; and
- (d) allocate any costs that are shared between a ring fenced activity and any other activity according to a methodology that is well accepted.

4.115 In addition, the regulator may require the service provider to meet additional ring fencing requirements or waive any of the minimum obligations. Under both situations, the regulator must comply with the procedures set out in section 4 of the Code, including calling for public submissions, before making a decision to add or waive ring fencing obligations. A decision by the regulator to impose additional ring fencing obligations or waive minimum ring fencing obligations is subject to review by the appeals body.

4.116 Section 4 of the Code provides that owner/operators of covered pipelines must comply with general accounting guidelines published, approved or indicated as applying by the regulator, and establish and report to the regulator on compliance procedures to ensure compliance with ring-fencing requirements.

### **Issues and analysis**

4.117 The ring fencing provisions in the Code address the requirements of clause 6(4)(n) in a rigorous manner.

### **Recommendation**

4.118 *The Council's view is that the Tasmanian Regime satisfies clause 6(4)(n).*

### **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.

### **Background**

4.119 An effective access regime would provide the dispute resolution body and other relevant bodies (for example, regulators and appeals bodies) with the right to inspect all financial documents pertaining to the service.

### **The Tasmanian Regime**

4.120 Part 7 of the Gas Pipelines Access Law (GPAL) confers on the regulator the power to require any person to provide it with information or documents which the regulator has reason to believe will assist it in carrying out certain functions under the Tasmanian Regime. The regulator can also specify the form in which information or documents should be provided.

4.121 Under part 4 of the GPAL, the arbitrator is able to:

- (a) gather information about any matter relevant to the access dispute in any way the arbitrator thinks appropriate;
- (b) require evidence or argument to be presented in writing, and may decide the matters on which it will hear oral evidence or argument; and
- (c) summons a person to appear before it to give evidence and to produce such documents as are referred in the summons.

4.122 Parts 4 and 7 contain provisions relating to handling of confidential information by the arbitrator and regulator respectively. Under part 4, 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. Under part 7, the regulator must not disclose confidential or commercially sensitive information to the public unless the regulator considers that no detriment would be caused to the person who supplied the information or the public benefit from disclosing it outweighs the detriment.

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

### **Issues and analysis**

4.124 The approach incorporated in the National Gas Code allows regulators and arbitrators to have adequate access to the financial information that they would require to conduct their roles in dispute resolution.

## Recommendation

- 4.125 *The Council's view is that the Tasmanian Regime satisfies clause 6(4)(o).*

### 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.

### Clause 6(4)(p)

Where more than one State or Territory regime applies to a service, those regimes should be consistent and, by means of vested jurisdiction or other co-operative 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.

## Background

- 4.126 Clauses 6.2 and 6(4)(p) relate to the services of facilities extending beyond the boundary of the State or Territory seeking certification. Clause 6(2) suggests that a State or Territory access regime might be found to be ineffective due to its influence beyond the jurisdictional boundary of the State or Territory, or substantial difficulties arising because the infrastructure subject to the regime crosses a State or Territory border. Clause 6(4)(p) provides 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. To satisfy these clauses, the relevant State or Territory access regimes should establish access regimes that remove any interjurisdictional obstacles and provide for a seamless process for obtaining access to a service.

## The Tasmanian Regime

- 4.127 The Tasmanian Regime, by incorporating the Gas Pipelines Access Law, includes a number of processes to streamline regulation of cross-border pipelines:
- (a) An access regime with virtually identical effect is being implemented in all States and Territories.

- (b) The ACCC is the single national regulator for all transmission pipelines, including those which cross borders. The administrative appeal body in relation to decisions of the ACCC is the Australian Competition Tribunal.
- (c) For distribution pipelines that cross borders, the regulator and appeals body are determined by which jurisdiction has the 'closest connection' with the facility. Under part 3 of the GPAL, the relevant bodies are those specified in the legislation of that jurisdiction. Ministers of jurisdictions in which the pipeline exists will seek to reach an agreement on which jurisdiction has the closest connection with the pipeline. If agreement cannot be reached, the Code Registrar must notify the National Competition Council which must make a determination of the jurisdiction with the closest connection.
- (d) The National Gas Code includes a single process for coverage of all cross-border pipelines. For a transmission pipeline, the decision maker is the designated Australian Government Minister. For a distribution pipeline, the relevant Minister is determined under the 'closest connection' test.
- (e) The Tasmanian Regime incorporates a national process for determining whether a covered pipeline is classified as a transmission or distribution pipeline and thus who is the relevant regulator.

### **Issues and analysis**

- 4.128 In its 1997 report on the National Gas Code, the Council found that the Code is consistent with clauses 6(2) and 6(4)(p) and provides for a consistent and seamless approach across cross-border pipeline services. The Council is satisfied that the Tasmanian adoption of the National Gas Code establishes a single regulatory process (including enforcement of access arrangements and dispute resolution) for access to each service covered by the Tasmanian Regime.

### **Recommendation**

- 4.129 *The Council's view is that the Tasmanian Regime satisfies clauses 6(2) and 6(4)(p).*

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## 5 Duration of certification

### Background

- 5.1 Section 44M(5) of the TPA provides that when the Council recommends that the Australian Government Minister make a decision on the effectiveness of a State or Territory access regime, it must also recommend the period for which any certification should be in force.
- 5.2 In recommending a certification period, the Council seeks to balance the need to establish the certainty necessary for infrastructure investment with the need to ensure that changes in technology or market structures do not lead to the access regime becoming obsolete or inappropriate.

### The Tasmanian Regime

- 5.3 Tasmania seeks a recommendation from the Council that its access regime be certified as effective for a minimum of 15 years.

### Issues and analysis

- 5.4 Previously, the Council has recommended that applications of the National Gas Code (similar to that being proposed in Tasmania) in Victoria, New South Wales, Western Australia, South Australia, the ACT and the Northern Territory, be certified for a period of 15 years. In these cases, the Council considered the views of applicant governments and interested parties and sought to balance the need of stakeholders (including those developing new infrastructure and potential users) for regulatory certainty and the likely impact of changes in technology and market structure on the relevance and appropriateness of the regime over time.
- 5.5 Taking these considerations into account, the Council is satisfied that certification for a period of 15 years would represent an appropriate balance of the interests of pipeline owner/operators and users.

### Recommendation

- 5.6 *The Council's view is that the Tasmanian gas pipeline access regime satisfies the CPA principles and should be certified as effective for 15 years.*

## Abbreviations

ACCC	Australian Competition and Consumer Commission
CPA	Competition Principles Agreement
GPAL	Gas Pipelines Access Law
GPOC	Government Prices Oversight Commission (Tasmania)
MOU	Memorandum of Understanding
NCC	National Competition Council
NGPAA	Natural Gas Pipelines Access Agreement
TNGP	Tasmanian Natural Gas Project
TPA	<i>Trade Practices Act 1974</i>

## References

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