

National Gas (Queensland) Bill 2008

Explanatory Notes

Introduction

Short Title of the Bill

The short title of the Bill is the *National Gas (Queensland) Bill 2008*.

Policy Objectives

The objective of the Bill is to establish a framework, in the form of a new National Gas Law (NGL) which will apply in Queensland to enable third parties to gain access to certain natural gas pipeline services; to repeal the *Gas Pipelines Access (Queensland) Act 1998* (GPAQ); and to make particular amendments to Acts as set out in parts 6 and 7.

The objective of the new NGL is to promote efficient investment in, and efficient operation and use of, natural gas services for the long term interests of consumers of natural gas with respect to price, quality, safety, reliability and security of supply of natural gas.

Policy Rationale

Queensland has participated in a uniform national regulatory regime for natural gas transmission and distribution pipelines (the Access Regime) since 1998. The Access Regime operates through national scheme legislation applied by the GPAQ.

The Access Regime is designed to:

- prevent abuse of monopoly power by gas transmission and distribution pipelines;
- facilitate the development and operation of a competitive market for natural gas in which customers may choose suppliers, including producers, retailers and traders;

- provide right of access to natural gas pipelines on conditions that are fair and reasonable for both service providers and users; and
- provide for resolution of disputes.

In 2001, the Council of Australian Governments (COAG) established the Ministerial Council on Energy (MCE) to instigate a broad energy reform process to address the opportunities and challenges facing Australia's energy sector and to oversee the continued development of a national energy market.

The ongoing objectives of the MCE reform agenda are to:

- strengthen the quality, timeliness and national character of governance of the energy market and improve the climate for investment;
- streamline and improve the quality of economic regulation across energy markets, to lower the cost and complexity of regulation facing investors, enhance regulatory certainty and lower barriers to competition; and
- further increase the penetration of natural gas to lower energy costs and improve energy services, particularly in regional Australia, and reduce greenhouse gas emissions.

The MCE has approved a range of reforms to the Access Regime based on the above objectives and on many of the recommendations from Productivity Commission (PC) Review of the regime in 2004, including:

- (a) introducing an overarching objects clause to clarify the Access Regime's objectives;
- (b) changes to the Access Regime's scope to align it more closely with the national third party access regime under the *Trade Practices Act 1974* (TPA);
- (c) a light-handed regulatory option for gas pipelines; and
- (d) incentives to encourage investment in new pipeline infrastructure to facilitate the development and operation of a national market for natural gas.

These reforms have been endorsed by COAG through the Australian Energy Market Agreement (AEMA) and have resulted in development of the NGL, which will replace the existing GPAL and National Third Party Access Code for Natural Gas Pipeline Systems (Gas Code).

As part of the reforms agreed to under the AEMA, two new energy market bodies, the Australian Energy Market Commission (AEMC) and the Australian Energy Regulator (AER) were created and commenced operation in July 2005 for electricity, with gas to be brought across from commencement of the NGL. The AEMC has responsibility for rule-making and market development, while the AER has responsibility for economic regulation and rule enforcement.

Item (d) above, relating to incentives for greenfield pipelines and international pipelines, was fast-tracked through amendments to the GPAL in 2006 to provide certainty to pipeline investors. These provisions, which provide for a 15 year no-coverage determination for greenfield pipelines and a 15 year ‘holiday’ from tariff regulation for international pipelines, will be replicated in the new NGL.

In accordance with the goal of increasing gas penetration and improving natural gas services, in October 2006 the MCE also agreed to request the Gas Market Leaders Group (a group comprised of industry participants and market operators established by the MCE to make recommendations on gas market development) to develop an electronic gas Bulletin Board as a means of improving transparency and lowering barriers to market entry. The Bulletin Board will provide daily information on natural gas supplies and system availability, facilitating trade in natural gas and improving management of gas emergencies. The NGL provides for implementation of the gas Bulletin Board.

The Bill contains transitional arrangements for three ‘derogated pipelines’ (the South West Queensland Pipeline, the Carpentaria Gas Pipeline, and the Queensland Gas Pipeline) to protect tariff arrangements approved by the Queensland Government prior to the commencement of the Access Regime in 1998, which effectively exempt the pipelines from certain aspects of the Access Regime. Queensland is obliged under the AEMA to use reasonable endeavours to:

- phase out derogations from the uniform national regime; and
- achieve certification of the Queensland Gas Access regime.

In 2006, the Commonwealth Minister refused to certify Queensland’s regime as an effective Access Regime due to the existence of derogations. This allowed for the possibility that access seekers could apply for declaration of any pipeline in Queensland under the TPA’s default access regime. In effect, two access regimes could apply to the Queensland gas regime raising issues of uncertainty for the industry.

How objectives are achieved

In line with MCE agreements, the NGL is being passed by the South Australian (SA) Parliament and applied in Queensland (and other participating jurisdictions) through application acts. The Bill will give effect to the NGL in Queensland and provide for the repeal of the existing GPAQ.

Key changes in the NGL will:

- complete the implementation of a common legislative framework for access pricing for gas and electricity transmission and distribution networks as set out in the NGL and the National Electricity Law and supported by the National Gas Rules (NGR) and National Electricity Rules:
 - as part of this process, the NGL completes the transfer of jurisdictional governance and institutional arrangements for economic regulation of gas transmission and distribution to the national framework under the AER and the AEMC, already in place for electricity;
- implement policy changes to the national Access Regime developed from the MCE's Response to the PC review, including an overarching objectives clause and an option for light-handed regulation. Key features of light-handed regulation are:
 - a pipeline owner will be free to negotiate prices and other terms and conditions with access seekers, with dispute resolution procedures provided for under the NGL;
 - other existing regulatory measures will continue to operate – namely ring fencing obligations, the requirement not to hinder access and provisions related to contracts with associates; and
 - requirements for disclosure of information, with the disclosure requirements able to be tailored to the specific circumstances of each pipeline to ensure compliance costs are minimised. Disclosure will include, at a minimum, capacity and utilisation information, performance against key performance indicators, and periodic reports on access negotiations.
- introduce new arrangements providing for the review of the AER's economic regulatory decisions in certain circumstances (i.e. limited merits review) by the Australian Competition Tribunal. Decisions subject to merits review are:

- ministerial decisions in relation to coverage of gas pipelines;
- determinations by the National Competition Council (NCC) on the form of regulation to apply in gas (including whether the light handed regulation determined should apply, known as a ‘light-handed regulation determination’);
- AER network revenue or pricing determinations for electricity and gas; and
- other decisions as prescribed by Regulations.

The NGL also provides for review of the merits review scheme within seven years after commencement of the NGL to assess its effectiveness.

- implement a common framework for revenue and network pricing (based on the report of an MCE-established Expert Panel on its Review of Energy Access Pricing), adopting recommendations on pricing principles and a ‘fit-for-purpose’ decision making framework; and
- strengthen consumer advocacy arrangements with the introduction of a long term funding model for gas.

The NGL provides for the establishment of a gas Bulletin Board by including a power to appoint a Bulletin Board Operator who is obligated to establish and maintain the Bulletin Board, with much of the detail to be set out in the NGR. It imposes an obligation on transmission pipeline operators, gas storage providers and gas producers in key production and demand zones to provide information on daily gas supply and pipeline capacity to the Bulletin Board Operator. In practical terms, the Bulletin Board is a website covering all major gas production fields, major demand centres and transmission pipeline systems and will be accessible by market participants, governments and the general public.

To enable the finalisation of appropriate arrangements for Queensland’s derogated pipelines, the Bill provides a power to make a regulation to enable Queensland’s existing gas transmission tariff derogations to be appropriately transitioned into the new regime. The power to make a regulation will ensure that a regulation can be made regarding issues such as coverage or the form of regulation to apply to the derogated pipelines.

The NGL will be supplemented by the NGR and a limited number of regulations dealing with transitional matters, minor matters and the prescription of civil penalties.

Alternative method of achieving policy objectives

There are no other options that would be consistent with Queensland's obligations under the AEMA.

Estimated administrative costs to Government for implementation

For the access regulation changes in the NGL, any implementation issues largely fall with the AER and AEMC, which are already preparing for the commencement of their new responsibilities. Any costs of implementing the Bill within Queensland are expected to be minor and will be met by the Department of Mines and Energy from within existing agency resources.

The gas Bulletin Board implementation has been funded by all jurisdictions through the MCE funding arrangements. Ongoing operational costs of the Bulletin Board are to be funded through user fees.

Consistency with Fundamental Legislative Principles

Clause 18 of the Bill provides for a regulation-making power to establish arrangements to transition Queensland's existing pipeline tariff derogations made prior to and under the GPAQ.

The regulation-making power could potentially conflict with the Fundamental Legislative Principles (FLPs) because it may be construed as excluding from the scrutiny of the Parliament a matter which may be considered substantive in nature and not typical of subordinate legislation. This is commonly known as a 'Henry VIII clause'.

The Scrutiny of Legislation Committee considers that there are four possible justifiable uses of the 'Henry VIII clause', two of which apply to this Bill: where it facilitates transitional arrangements and to facilitate the application of national scheme legislation.

The ability to make a regulation will give the Government the flexibility to fully consider and consult on an appropriate transitional mechanism:

- that would transition the tariff arrangements approved by the Queensland Government prior to development of the national Access Regime in a manner that will give the Queensland Gas Access Regime the greatest chance of certification; and
- that contributes to Queensland's obligations under the AEMA to use reasonable endeavours to -

- phase out derogations from the uniform national regime; and
- achieve certification of the Queensland Gas Access regime (noting the Commonwealth's refusal to certify Queensland's regime under the Gas Code due to the presence of the derogations).

To address this FLP issue, the regulation making power has been limited so that it does not broadly empower the making of regulations that would change the scope of the Act. A regulation under this power will be specific to the three affected pipelines and will apply for no longer than the period of the existing derogations.

A further FLP issue is that the regulation-making power does not provide for its own expiry, however under S18(6) of the Bill, a regulation made under this power would expire after three years. Retaining a regulation-making power is considered necessary in this Bill as the regulation may require changing in the event that Queensland's gas regime is again not certified. The NCC is unable to give a definitive answer on whether our transitional measures will be capable of certification prior to a formal application being lodged after the NGL commences.

The three year duration of the regulation sunset clause allows reasonable time for application to the NCC for a recommendation on certification and a decision by the relevant Commonwealth Minister. This also means that any regulation created needs to be reviewed and renewed every three years, or enacted as legislation.

While Queensland's previous application for certification took approximately five years from application to decision, the NCC anticipates the planned concurrent and coordinated applications by the jurisdictions for certification of the new NGL Access Regime will be considered more quickly. Once certification is achieved, it is envisaged the regulation will be transitioned into legislation via an amendment to the Act, and the Regulation repealed.

Options for Regulation

The options open to the Government in making a regulation include:

- deeming the pipelines not to be covered by the regime for a specific period;
- providing for the pipelines to be subject to light-handed regulation for a specific period; or

- maintaining, shortening, or modifying the existing derogations.

The creation of a regulation may potentially impact on natural justice processes and affect the rights of individuals, including those who may wish to:

- apply for coverage of the pipelines under the NGL; or
- apply for a pipeline to be the subject of full access regulation rather than light-handed regulation.

Continuation of the specific exemptions in some form or other maintains the Queensland Government's policy position of promoting and protecting investment in new pipelines.

While rights may be constrained temporarily, existing users generally already hold long-term contracts for access that cover a significant proportion of the remaining period of derogation. Potential users are expected to have a greater ability to negotiate access to the pipelines in the medium and longer term given the new transitional arrangements are likely to substantially shorten the term of the existing derogations, or provide users with access to greater dispute resolution provisions in relation to pipelines subject to light-handed access regulation. Potential users are generally large companies with strong countervailing market power to negotiate reasonable terms of access.

Ultimately, any perceived departure from the FLPs has occurred in the context of tension between the FLPs as defined, and Government policy commitments and stakeholder expectations in relation to preserving existing derogated arrangements.

Consultation

There has been extensive industry consultation through MCE processes on the NGL and NGR. The results of the final consultation process were largely supportive, with a number of suggested changes dealt with by the jurisdictions. All submissions were considered in the process of finalising the NGL and the NGR.

Discussions have been held with the relevant market participants and industry bodies affected by the State-specific provisions relating to the transitional arrangements for the derogated pipelines. These parties are being consulted in the development of a Regulation.

Notes On Provisions

Part 1 Preliminary

Clause 1: Short Title

This clause provides for the short title of the Bill.

Clause 2: Commencement

Subsection 1 provides for commencement of the Bill on a day to be fixed by proclamation.

Subsection 2 provides for Part 6 to commence when Section 7 of the *Offshore Petroleum Act 2006* (Cwlth) commences.

Clause 3: Interpretation

This clause provides definitions of various terms used in the Bill and also clarifies that words and expressions used in the national gas legislation (the National Gas Law) applied as the National Gas (Queensland) Law have the same meaning as they have in that law.

Clause 4: Act Binds the State

This clause provides that the legislation binds the State.

Clause 5: Application to coastal waters

This clause applies the legislation to the coastal waters of the State.

Clause 6: Extra-territorial operation

This clause provides for the extra-territorial operation of the legislation.

Part 2 National Gas (Queensland) Law and National Gas (Queensland) Regulations

Clause 7: Application in Queensland of National Gas Law

This clause applies the National Gas Law as set out in a schedule to the National Gas (South Australia) Act 2008 (the South Australia Act) as a law of Queensland.

The clause also provides that the Law as so applying in Queensland may be referred to as the *National Gas (Queensland) Law*.

Clause 8: Application in Queensland of Regulations under National Gas Law

This clause provides that the regulations in force under Part 3 of the South Australian Act apply as regulations in force for the purposes of the *National Gas (Queensland) Law*.

The clause also provides that the Regulations as so applying in Queensland may be referred to as the *National Gas (Queensland) Regulations*.

Clause 9: Interpretation of expressions in National Gas Queensland Law and National Gas (Queensland) Regulations

This clause interprets a number of expressions or terms used in the South Australian Law and Regulations for the purposes of applying them in Queensland under the *National Gas (Queensland) Law* and the *National Gas (Queensland) Regulations*.

The clause also disapplies the *Acts Interpretation Act 1915* (SA) and other Acts of South Australia as the National Gas Law has its own comprehensive interpretation provision. This ensures the applied National Gas Law has, as far as possible, the same meaning throughout Australia.

Part 3 Cross vesting of powers

Clause 10: Conferral of powers on Commonwealth Minister and Commonwealth bodies to act in this State.

Under this clause, powers to act in this State are conferred on the Commonwealth Minister as well as Commonwealth bodies, the Australian Energy Regulator, the National Competition Council and the Australian Competition Tribunal, in relation to functions or powers conferred on them by the national gas legislation of another participating jurisdiction.

Clause 11: Conferral of powers on Ministers of participating States and Territories to act in this State.

Under this clause, powers to act in this State are conferred on the Ministers of other participating jurisdictions, to the extent that the Minister has the power to act in or in relation to this State under the national gas legislation of another participating jurisdiction.

Clause 12: Conferral of functions or powers on State Minister

In the event that the national gas legislation of another participating jurisdiction confers a function or power on the Queensland Minister, this clause clarifies that the Minister may perform that function or exercise that power and perform ancillary functions.

Part 4 Miscellaneous

Clause 13: Exemption from Taxes

This clause provides that where transfer of assets or liabilities by a business is to comply with the ring fencing requirements of the National Gas Law, taxes of the State other than stamp duty will not be payable. The *Duties Act 2001*, section 428, provides that stamp duty will not be payable – see clause 30.

Clause 14: Actions in relation to cross boundary pipelines

This clause provides that where a pipeline crosses State borders, action taken in one of the jurisdictions under the Law applicable in that jurisdiction is to be regarded as also having been taken under the national gas legislation of each participating jurisdiction in whose area part of the pipeline is situated.

Subsection 2 provides that no proceeding for judicial review or a declaration or injunction or writ or order or remedy may be brought before a Court or question an action of a relevant Minister in relation to a cross

boundary distribution pipeline unless the jurisdiction is the participating jurisdiction with which the distribution pipeline is most closely connected. The intent of this provision is to limit proceedings to be brought in only the jurisdiction with which the pipeline is most closely connected, to prevent choice of a less appropriate forum.

Clause 15: Conferral of functions and powers on Commonwealth bodies

This clause applies Clause 2 of Schedule 2 of the National Gas (Queensland) Law as if it formed part of the *National Gas (Queensland) Law*.

Clause 16: Regulation-making power

This clause allows the Governor in Council to make regulations under this Act.

Part 5 Repeal and transitional provisions

Division 1 Repeal of Gas Pipelines Access (Queensland) Act 1998

Clause 17: Repeal

This clause repeals the *Gas Pipelines Access (Queensland) Act 1998* (Act No. 28 of 1998).

Division 2 Transitional provisions

Clause 18: Transitional regulation-making power for particular pipelines

Subsection 1 allows a savings and transitional regulation to be made in relation to a transition pipeline as defined by subsection 8.

Subsection 2 provides examples for the type of transitional regulation that might be made. The examples traverse the transitional arrangements that are likely to be made for the transition pipelines:

- Subsection 2(a) allows a regulation to vary or revoke tariff arrangements for the transition pipelines that were established by section 58 of the *Gas Pipeline Access (Queensland) Act 1998*.
- Subsection 2(b) allows a regulation to be made about whether a transition pipeline is covered or uncovered;
- Subsection 2(c) provides for a transition pipeline to be exempt from a coverage application for a specified period of time;
- Subsection 2(d) allows for a covered pipeline to be classified a distribution pipeline or a transmission pipeline. Primarily, this provision will be used to classify the Carpentaria Gas Pipeline (pipeline licence number 41) a transmission pipeline if that is required for the purposes of regulating that pipeline;
- Subsection 2(e) allows for a transition pipeline to be declared the subject of a light regulation determination;
- Subsection 2(f) allows for the creation of the terms of any limited access arrangements for a pipeline which is taken to be the subject of a light regulation determination;
- Subsection 2(g) allows or prevents a transition pipeline declared subject to a light regulation determination from being made the subject to a full access arrangement.

Subsection 3 limits the effect of the regulation for the transition pipelines to the period for which the approved tariff arrangements would have been in force. These are:

Pipeline Licence Number	Common name of pipeline	Where pipeline starts and ends	Tariff derogation expiry under section 58 of the <i>Gas Pipelines Access (Queensland) Act 1998</i>
24	South West Queensland Pipeline	Ballera to Wallumbilla	31 December 2016
30	Queensland Gas Pipeline	Wallumbilla to Rockhampton	The date when the capacity of the pipeline is greater than the nominal capacity of the pipeline when its configuration is as specified in Schedule 1 to the Licence or when the regulator approves revisions submitted on 31 August 2016 (whichever comes first)
41	Carpentaria Gas Pipeline	Ballera to Mt Isa	30 April 2023

Subsection 4 allows a transitional regulation be retrospectively applied, but no earlier than the commencement of the Act.

Subsection 5 provides that a transitional regulation must be identified as such.

Subsection 6 provides that a transitional regulation expires 3 years after the day the regulation commences. Within 3 years, the regulation must be reviewed and re-made, or made within the Act and the regulation repealed. The intention with the transitional regulation is that once the Queensland Gas Access Regime is certified effective under the TPA, that the transitional regulation will be repealed and made in the Act.

Subsection 7 makes explicit that under section 20A of the *Acts Interpretation Act 1954* the declaratory or validating effect of the regulation does not end merely because of the repeal expiry of the regulation.

Subsection 8 explains terms used within the Act. It also defines a transition pipeline, including the relevant period referred to in subsection 3 above.

Clause 19: References to Gas Pipelines Access (Queensland) Law

This clause provides that a reference to the *Gas Pipelines Access (Queensland) Law*, if it makes sense, is to be taken to be a reference to this Act.

Clause 20: References to Gas Pipelines Access (Queensland) Regulations

This clause provides that a reference to the regulations under the *Gas Pipelines Access (Queensland) Law*, if it makes sense, is to be taken to be a reference to the regulations under this Act.

Part 6 Amendment of this Act when Offshore Petroleum Act 2006 (Cwlth) commences

Clause 21 and 22: Amendment of this Act when Offshore Petroleum Act 2006 commences.

These clauses provide for the amendment of this Act with respect to adoption of certain definitions under the *Offshore Petroleum Act 2006*, once it commences operation.

Part 7 Amendment of other Acts

Division 1 Amendment of Acts Interpretation Act 1954

Clause 23: Act amended in div 1

This clause provides that this Division amends the *Acts Interpretation Act 1954*.

Clause 24: Amendment of s36 (Meaning of commonly used words and expressions)

This clause amends section 36 of the *Acts Interpretation Act 1954* to remove the definitions of the *Gas Pipelines Access (Queensland) Law* and *Gas Pipelines Access (Queensland) Regulations* and replace them with definitions for the *National Gas (Queensland) Law* and the *National Gas (Queensland) Regulations*.

Division 2 Amendment of Gas Supply Act 2003

Clause 25: Act amended in div 2

This clause provides that this Division amends the *Gas Supply Act 2003*.

Clause 26: Amendment of sch 2 (Dictionary)

This clause provides for amendments to the Dictionary of the Gas Supply Act to provide that a reference to the *Gas Pipelines Access Law* will mean all of the following: the *National Gas (Queensland) Law*; the *National Gas (Queensland) Regulations*; and the *National Gas (Queensland) Act 2008*.

Division 3 Amendment of Petroleum (Submerged Lands) Act 1982

Clause 27: Act amended in div 3

This clause provides that this Division amends the *Petroleum (Submerged Lands) Act 1982*.

Clause 28: Amendment of s6A (Relationship of Act to Gas Pipelines Access (Queensland) Law)

This clause provides for a reference to the *Gas Pipelines Access (Queensland) Law* to be replaced with a reference to the *National Gas (Queensland) Law*.

Division 4 Amendment of Duties Act 2001

Clause 29: Act amended in div 4

This clause provides that this Division amends the *Duties Act 2001*.

Clause 30: Amendment of s428 (Exemption-particular instruments and transactions under Gas Pipelines Access (Queensland) Act)

This clause provides for a particular reference to the *Gas Pipelines Access (Queensland) Act 1998* to be replaced with a reference to the *National Gas (Queensland) Act 2008*.

Division 5 Amendment of Federal Courts (State Jurisdiction) Act 1999

Clause 31: Act amended in div 5

This clause provides that this Division amends the *Federal Courts (State Jurisdiction) Act 1999*.

Clause 32: Amendment of s 3 (Definitions)

This clause provides for a reference to the *Gas Pipelines Access (Queensland) Act 1998* to be omitted and for re-numbering of the section.

Division 6 Amendment of Petroleum Act 1923

Clause 33: Act amended in div 6

This clause provides that this Division amends the *Petroleum Act 1923*.

Clause 34: Amendment of s 7 (Application of Act)

This clause provides for a reference to the *Gas Pipelines Access (Queensland) Law* to be replaced with a reference to the *National Gas (Queensland) Law*.

Division 7 Amendment of Energy Ombudsman Act 2006

Clause 35: Act amended in div 7

This clause provides that this Division amends the *Energy Ombudsman Act 2006*.

Clause 36: Amendment of s 19 (Restrictions on disputes that can be referred)

This clause provides for a reference to the *Gas Pipelines Access (Queensland) Law* to be replaced with a reference to the *National Gas (Queensland) Law*.

Attachment to the National Gas (Queensland) Act 2008

The Bill for the National Gas (South Australia) Act 2008 is the attachment to this Act.