

Recommendation Of The National Gas Pipelines Advisory Committee To Relevant Ministers – Who may be a Service Provider

1. Recommendation – Who may be a Service Provider

Each State and Territory has applied or proposes to apply the Gas Pipelines Access Law, comprising Schedule 1 (Third Party Access to Natural Gas Pipelines) and Schedule 2 (the National Third Party Access Code for Natural Gas Pipeline Systems) (the *Code*), as a law of that State or Territory. The Commonwealth has also applied the Gas Pipelines Access Law in certain Commonwealth territories and adjacent areas. The Code can be amended by agreement between Relevant Ministers of the Commonwealth, States and Territories following a recommendation from the National Gas Pipelines Advisory Committee (*NGPAC*).

NGPAC recommends to Relevant Ministers that the Code be amended as follows:

In section 4.1 of the Code for paragraph (a) **substitute**:

- (a) be a legal entity registered under the Corporations Law, a foreign company within the meaning of the Corporations Law that has appointed a local agent in accordance with sections 601CF and 601CG of the Corporations Law, a statutory corporation, a government or an entity established by royal charter.

This recommendation is made pursuant to section 9.1 of the Code and section 6(1) of Schedule 1 of the Gas Pipelines Access Law.

2. Reasons for Recommendation

(a) Background

Section 4 of the Code imposes a number of “ring fencing” obligations on Service Providers. The object of the ring fencing obligations is to separate activities in a market dominated by a natural monopoly (the market for services provided by means of a covered pipeline) and activities in potentially contestable markets (for example, the market for the sale of natural gas). So, for example, an entity which previously both owned a covered pipeline and was a retailer of gas, is required by the Code to establish separate companies, one owning the pipeline and the other carrying on the retail business.

In order to facilitate the application of these ring fencing obligations, section 4.1(a) of the Code requires each Service Provider to “be a legal entity incorporated pursuant to the Corporations Law, a statutory corporation, a government or an entity established by Royal Charter”. Each owner or operator of the whole or any part of a covered pipeline will be a “Service Provider”.

One effect of section 4.1(a) is that an owner or operator of a covered pipeline cannot be a company incorporated in another country. A

foreign company that wishes to own or operate a covered pipeline must establish an Australian subsidiary to own or operate the covered pipeline.

(b) Proposed Amendment

It has been suggested to NGPAC that this requirement may discourage foreign investment in Australian covered pipelines because the need to establish an Australian subsidiary may impose additional administrative and Australian taxation costs on the foreign investor concerned. The Victorian Gas Pipelines Access (Victoria) Act, which applies the Code in Victoria, already permits foreign companies to be Service Providers. The catalyst for NGPAC considering the proposed amendment is the desirability of ensuring the Code is applied in a consistent manner nationally. The benefits of not permitting foreign companies to be Service Providers appear to be limited (they are discussed in Chapter 4 of the attached Information Memorandum). NGPAC therefore recommends that the Code be amended to permit foreign companies (and certain other entities) to be Service Providers.

3. Unanimous Recommendation

The members of NGPAC make this recommendation unanimously.

4. Significance and Public Consultation

The members of NGPAC considered the amendment recommended to be “significant” for the purposes of the Code. The public consultation process required under the Code for significant amendments was therefore followed.

A copy of the Information Memorandum distributed to seek public comments on the proposal is attached. The Information Memorandum discusses the issues associated with the amendment in more detail (see especially Chapter 4).

NGPAC received one submission in favour of the amendment (from CMS) and one submission opposing the amendment (from Duke). Duke opposed the amendment because foreign companies would not be subject to the same ASIC registration and reporting requirements as Australian companies.

NGPAC considered the issues raised by Duke. NGPAC is of the view that ASIC registration and reporting requirements do not materially add to the requirements of the Code. For example, the Code already contains more extensive information provision obligations than the Corporations Law.

As a consequence, NGPAC decided unanimously to make this recommendation.

National Gas Pipelines Advisory Committee

Date: 10 May 2000