



Australian Energy Market Amendment (Gas Legislation) Bill 2006

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Law and Bills Digest Section

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Australian Energy Market Amendment (Gas Legislation) Bill 2006

Date introduced: 29 November 2006

House: House of Representatives

Portfolio: Industry, Tourism and Resources

Commencement: A variety of dates as set out below

Purpose

The Bill contains amendments to the *Australian Energy Market Act 2004* and related legislation to facilitate the creation of a national regulatory environment for the electricity and gas infrastructure and the creation of a Greenfields Gas Pipeline scheme.

Background

The rules governing the operation of the gas and electricity markets have undergone fundamental re-writes over the preceding decade as policy makers, governments and industry have moved towards a more national approach to market regulation.

To date, the electricity market has seen the most significant shift to a truly national regulatory environment. Regulation of the gas market is now starting to catch up to the electricity market with a series of regulatory reforms to the current scheme currently under consideration.

Ministerial Council on Energy

In recent years, the Commonwealth, states and territories have coordinated their energy regulation policy development through the Ministerial Council on Energy (MCE) acting under the Council of Australian Governments (COAG) as set out in the Australian Energy Market Agreement signed in 2004.¹

The Bills Digest to the Australian Energy Market Bill 2004 explained the history of the MCE as follows²:

In June 2001, the Council of Australian Governments (CoAG) established the Ministerial Council on Energy (MCE) to provide effective policy leadership to meet the opportunities and challenges facing the energy sector and to oversee the continued development of a national energy policy.

The Council comprises Ministers with responsibility for energy from the Australian Government and all States and Territories. The Australian Government Minister for

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Industry, Tourism and Resources chairs the Council and the Department provides secretariat support.

The CoAG's Energy Market Review (the Parer Review) was presented to Government in December 2002 in a report titled [Towards a Truly National and Efficient Energy Market](#).³

The MCE has agreed to introduce a cooperative national legislative framework for the Australian energy market on a collaborative basis between Commonwealth, State and Territory Governments and pursuant to a new inter-governmental agreement, titled the *Australian Energy Market Agreement*, being finalised by CoAG.⁴ Under this agreement, the MCE is to assume a national policy oversight role for the Australian energy market, including for electricity and gas, superseding the National Electricity Market Ministers Forum.

Gas access regime

The Gas Access Regime sits alongside, and interacts with, the national access regime for essential services (which is set out in Part IIIA of the *Trade Practices Act 1974* (TPA)).⁵ Further information regarding the background to and operation of the national access regime can be found in the Bills Digest on the Trade Practices Amendment (National Access Regime) Bill 2005.⁶

The Gas Access Regime puts in place an infrastructure access regime which is specifically tailored to meet the needs of Australia's natural gas sector. The Gas Access Regime is a co-operative regime put in place by the Commonwealth, states and territories.

Gas Code

One of the key features of the Gas Access Regime is the Gas Code. The National Competition Council has described the Gas Code as follows:

The National Gas Code is a key feature of National Competition Policy (NCP) reforms and aims to promote free and fair trade in gas. The code sets out principles for access to Australian natural gas transmission and distribution pipeline services. It allows third parties to negotiate access within an independent regulatory framework, with arbitration available to resolve disputes.⁷

The Gas Code was developed by the Gas Reform Task Force, a working group comprising the Commonwealth, state and territory governments, the gas pipeline industry, gas producers and retailers, gas users and regulators.⁸

All jurisdictions agreed that the objectives of the Gas Code should be to:⁹

- (a) facilitate the development and operation of a national market for natural gas;

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- (b) prevent abuse of monopoly power
- (c) promote a competitive market for natural gas in which customers may choose suppliers, including producers, retailers and traders;
- (d) provide rights of access to natural gas pipelines on conditions that are fair and reasonable for both service providers and users; and
- (e) provides for resolution of disputes.

Natural Gas Pipeline Access Agreement

On 7 November 1997, the states, territories and the Commonwealth signed the intergovernmental Natural Gas Pipeline Access Agreement (intergovernmental agreement).¹⁰ This agreement had the objective of establishing a uniform national framework for third party access to natural gas pipelines. As a result of this agreement, the states and territories agreed to enact the Gas Code as a law of each state or territory.

State and territory legislation to enact the Gas Code

South Australia passed the first piece of legislation to enact the Gas Code [*Gas Pipeline Access (South Australia) Act 1997*].¹¹ This Act applied the Gas Pipelines Access Law (comprising Schedule 1 (which is called ‘Third Party Access to Natural Gas Pipelines’) and Schedule 2 (which is called ‘National Third Party Access Code for Natural Gas Pipeline Systems’ – the Gas Code) of the Act as a law of South Australia.

All other states (apart from Western Australia) and territories passed application legislation applying the Gas Pipeline Access Law as law of that jurisdiction. Western Australia enacted the *Gas Pipelines Access (Western Australia) Act 1998* and applied the Gas Pipelines Access Law as set out in the Schedules to the Western Australian Act as law of the state of Western Australia.

Commonwealth legislation

The Commonwealth also passed legislation to facilitate national coverage of the gas access regime. In particular, the Commonwealth passed the *Gas Pipelines Access (Commonwealth) Act 1998*. This legislation applies the gas access regime that is contained within the South Australian legislative scheme to offshore waters and adjacent areas and covered interstate pipelines. It also gives Commonwealth bodies powers in relation to the operation of the gas access regime.¹² Relevant provisions were also included in the *Petroleum (Submerged Lands) Act 1967*.

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Operation of the Gas Access Regime

It is beyond the scope of this digest to explore in detail the operation of the gas access regime. The following is a brief summary of the key aspects of the regime and an explanation of the interaction between the gas access regime and the national access regime in Part IIIA of the TPA. Further information may be found in the Productivity Commission Report *Review of the Gas Access Regime* (PC Report).¹³

There are three key aspects to the gas access regime;

- certification of state and territory access regimes as effective access regimes in accordance with clause 6(3) of the Competition Principles Agreement
- coverage of pipelines
- access agreements

Certification of state and territory access regimes - the link between the gas access regime and the national access regime

As stated above, the Gas Access Regime is an industry-specific access regime that operates alongside the national access regime in Part IIIA of the TPA. It is linked to the national access regime through the process of certification.

The Productivity Commission has explained the link in the following useful way:

Certification involves each State and Territory government submitting its Gas Access Regime to the NCC to establish that the regime satisfies clause 6(3) of the Competition Principles Agreement. The NCC makes a recommendation to the Australian Government Minister, who then makes the final decision on whether the regime is certified as effective.

The aim of certification is to avoid regulatory duplication of, and possible forum shopping among regimes that meet the Competition Principles Agreement criteria for an effective regime. Once an access regime is certified as effective, access seekers cannot use Part IIIA of the TPA to seek access to infrastructure covered by that regime.¹⁴

Therefore, the state and territory gas access regimes operate alongside the Commonwealth access regime in Part IIIA of the TPA so that where state or territory access regimes have been certified by the National Competition Council (NCC) as operating in accordance with the principles in Clause 6 of the CPA, access to gas infrastructure regulated by this regime cannot be sought under Part IIIA of the TPA.¹⁵ Access can only be sought under the state/territory based access regime.

Apart from Queensland, all states and territories have had their gas access regimes certified by the NCC, as an effective access regime under Part IIIA.¹⁶

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Coverage of pipelines

In each state and territory, the Gas Code applies to pipelines that are ‘covered’ by it. A gas pipeline can become ‘covered’ in a number of ways including automatic coverage where the pipeline was listed in schedule A of the Gas Code at the time the Code was enacted or by any person applying to the NCC requesting coverage. In determining whether to recommend to the Minister that the pipelines be covered, the NCC must consider whether the pipeline meets all of the criteria in section 1.9 of the Gas Code.

Once a pipeline is ‘covered’ the pipeline operator must comply with provisions in the Gas Code. Section 2 of the Gas Code requires that the Service Provider establish an Access Arrangement that satisfies the independent regulator. For transmission pipelines the independent regulator has usually been the ACCC and for distribution, the independent regulator is the state or territory regulator (see Table 3.1 below).

Access agreements

As noted above, under the Gas Code, covered pipeline operators must submit their access arrangements to an independent regulator for approval. An access arrangement must set out the terms and conditions of access, including reference tariffs for reference services (benchmark prices for services likely to be sought by a significant part of the market). The regulator undertakes a public consultation process in deciding whether to approve a proposed access arrangement, and may require amendments to the arrangement.¹⁷

Third parties can gain access to covered services on the terms and conditions set out in the access arrangement. Parties are free, however, to negotiate around the reference tariffs.

Relevant regulators

Under the Intergovernmental Agreement, the states and territories have been able to appoint their own regulatory body, determine who the responsible Minister would be and decide on an appeals body. As a result, different states and territories have different institutional arrangements for transmission and distribution products.

The following is a table extracted from the PC Report which sets out the institutional arrangements for the different jurisdictions at the time the Report was released.¹⁸

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Decision making bodies for the gas access regime

	<i>Transmission</i>	<i>Distribution</i>
Coverage decisions		
Recommendations	NCC	NCC
Decisions		
If the pipeline is located in one jurisdiction	Australian Government Minister, except in SA, WA and NT, where it is the State or Territory Minister	State or Territory Minister
If the pipeline is located in two or more jurisdictions	Australian Government Minister	State or Territory Minister of the jurisdiction 'most closely connected'
Administrative appeals		
Appeals of Australian Government Minister decisions	Australian Competition Tribunal	..
Appeals of State or Territory Minister decisions	Australian Competition Tribunal, except in SA and WA, where it is the State appeals body ^a	Australian Competition Tribunal, except in SA, Qld, Vic and WA, where it is the State appeals body ^a
Regulatory decisions, including those on access arrangements		
Decision	ACCC except in WA where it is the State regulator ^b	State or Territory regulator ^b
Administrative appeals	Australian Competition Tribunal, except in WA, where it is the State appeals body ^a	Australian Competition Tribunal, except in Qld, SA, WA and Vic, where it is the State appeals body ^a

^a The State or Territory appeal bodies are the Queensland Gas Appeals Tribunal, the District Court (South Australia), the Essential Services Commission Appeals Panel (Victoria), and the Western Australian Gas Review Board. ^b The State or Territory regulators are the Independent Competition and Regulatory Commission (the ACT), the Independent Pricing and Regulatory Tribunal (New South Wales), the ACCC (Northern Territory), the Queensland Competition Authority, the Essential Services Commission of South Australia, the Tasmanian Energy Regulator, the Essential Services Commission (Victoria), and the Economic Regulation Authority (Western Australia, which has assumed the responsibilities of the former Office of Gas Access Regulation). .. Not applicable.

Sources: COAG 1997; NGPAC, sub. 34, pp. 40–1.

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Review of the Gas Access Regime

Since the Gas Access Regime was established, it has been subject to a number of reviews. The Productivity Commission produced its report titled *Review of the Gas Access Regime*¹⁹ (PC Report) which contained a broad range of suggested amendments to the current Gas Access Regime.

As well as producing a written response to the PC Report,²⁰ the Ministerial Council on Energy has developed a draft new National Gas Law (NGL) and National Gas Rules (NGR) which will be implemented by state and territory Parliaments later in 2007.

Many of the amendments in the Australian Energy Market Amendment (Gas Legislation) Bill 2007 (the Bill) relate to the arrangements made for the operation of the gas access regime. In particular the Bill will:

- For that part of the gas access regime for which the Commonwealth has jurisdiction, namely the offshore area, the Bill will pass laws to put in place the new regime as contained within the NGL and NGR.
- Give the Australian Energy Regulator regulatory responsibility for gas transmission and distribution (note discussion on page 6-7 regarding relevant regulators)
- Vest the Australian Energy Market Commission with responsibility for making new NGR.

Most importantly, most of the changes to the Commonwealth legislative scheme are contained within the new NGL and NGR. Once the NGL and NGR are enacted by the South Australian and Western Australian Parliaments, they will be automatically picked up and applied as Commonwealth laws, by virtue of the amendments contained within this Bill. Therefore, if there are concerns about the implications, at the Commonwealth level, of the detail contained within the NGL or NGR, then those concerns should be raised during the debate on the Bill.

Electricity

The National Electricity Market (NEM) was established in 1999 and it covers the Southern and Eastern parts of Australia. Under the co-operative scheme, New South Wales, Victoria, Queensland, South Australia and the Australia Capital Territory are participants in the NEM.²¹

The first National Electricity Law was enacted as a schedule to the *National Electricity (South Australia) Act 1996 (SA)*. It was adopted by corresponding legislation in the other participating states. The NEL was reviewed and the changes to the law commenced on 1 July 2005.

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The *Trade Practices Amendment (Australian Energy Markets) Act 2004* established the Australian Energy Regulator (AER). The *National Electricity (South Australia) Act 1996* (SA) established the Australian Energy Market Commission (AEMC). The *Australian Energy Market Act 2004* and the National Electricity Rules (NEL) combined to vest power in the Australian Energy Regulator (AER) to perform the function of regulating electricity transmission, a task which was previously performed by state and territory regulators.²² The AEMC has been vested with the power to make the rules for the electricity market.

Some of the amendments contained within the Bill make small changes to the current commonwealth legislative arrangements for the regulation of electricity.

Main provisions

Amendment to *Administrative Decisions (Judicial Review) Act 1977*

Schedule 1, Part 1, item 1 amends the *Administrative Decisions (Judicial Review) Act 1977* (AD(JR) Act). Schedule 3 of the AD(JR) Act lists state and territory Acts that are ‘enactments’ for the Act’s purposes. The Bill inserts **new paragraphs (d), (daa) and (dab)** into schedule 3. These new paragraphs include in schedule 3 of the AD(JR) Act the National Gas Law in schedule 1 to the *National Gas (South Australia) Act 2007*, an enactment of the South Australian Parliament, and as adopted by any other state, the ACT or the NT, and the National Gas Access Law in schedule 1 to the *National Gas Access (Western Australia) Act 2007*, an enactment of the Parliament of Western Australia. The effect is that, when a Commonwealth officer or authority makes a decision (of an administrative character) under the National Gas Law or the National Gas Access Law (WA) it will potentially be subject to judicial review under the ADJR Act.

The Bill in **item 45**, extends the application of the *Administrative Decision (Judicial Review) Act 1977* to other regulatory bodies involved in the regulation of the electricity market.

Amendments to *Australian Energy Market Act 2004*

Items 2 to 30 amend section 3 of the *Australian Energy Market Act 2004* (AEMA), by removing redundant definitions and inserting definitions relevant to the new National Gas regime.

Item 30 repeals the existing sections 4 and 5 of the AEMA, and inserts new sections 4 and 5. These sections relate to the application of the Act and associated laws to the Crown, and the extra-territorial operation of the National Gas regime. **New section 4** provides that the Crown is bound by the Commonwealth laws and regulations enacted under the regime. **New section 5** is intended to extend, as far as possible, the operation of the National Gas

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regime laws and regulations. The explanatory memorandum to the Bill explains that it is necessary to extend the operation of the laws extraterritorially ‘to ensure, for example, that contractual arrangements entered into outside of Australia are not used to undermine the regime’.²³

The Bill in **items 32-50** divides Part 2 of the AEMA into 3 divisions, dealing with electricity laws, gas laws, and uniform energy laws, respectively.

Electricity laws

The amendments made in relation to electricity are mainly technical in nature. Item 38 inserts **new section 10A** into the Act specifically confirming that the Australian Competition Tribunal has the functions and powers conferred on it under the National Electricity (Commonwealth) Law and Regulations. This provision in combination with a conferral of powers by the states and territories, gives this Australian Competition Tribunal the power to conduct a merits review of the decisions made by the Australian Energy Regulator.

Gas Laws

Item 43 inserts **Division 2** which has a number of new provisions in relation to gas laws.

Areas adjacent to Australia and its external territories and some selected external territories

Subdivision A of Division 2 sets out the arrangements for the Commonwealth’s application of the National Gas Laws apart from in relation to offshore Western Australian pipelines. In summary, the Commonwealth will apply the laws set out in the Schedule to the *National Gas (South Australia) Act 2007* and regulations as amended from time to time to areas adjacent to and in certain Australian Territories apart from offshore Western Australian pipelines (**proposed section 11A and 11B**).

Subdivision A also confirms that the Australian Energy Market Commission and the Australian Energy Regulator have the functions and powers that are conferred on them by the National Gas (Commonwealth) Law and Regulations (**proposed section 11C and 11D**). In essence, the Australian Energy Market Commission will be responsible for the development of new Gas Rules and the Australian Energy Regulator will be the industry regulator, taking over functions that were previously performed by the Australian Competition and Consumer Commission and state and territory regulatory bodies (refer to table 3.1 above).

Proposed sections 11E, 11F and 11G in Subdivision A confirms that the National Competition Council, the Australian Competition Tribunal and the Commonwealth Minister has such functions and powers that are conferred by the National Gas (Commonwealth) Law and Regulations.

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Offshore Western Australian Pipelines

Subdivision B sets out the arrangements for Offshore Western Australian Pipelines. As noted above, the Western Australian gas regime will be established by the *National Gas Access (Western Australian) Act 2007*. The Bill picks up and applies this Western Australian legislation as Commonwealth legislation for the purpose of regulating offshore Western Australian pipelines (**proposed section 11J and 11K**). The Western Australian legislation makes the Economic Regulatory Authority (ERA) (rather than the Australian Energy Regulator) the regulator for the purposes of gas legislation.

The Bill also confirms that the Australian Energy Market Commission, the National Competition Council, the Australian Competition Tribunal and the Western Australian Minister have such functions and powers that are conferred by the Western Australian Pipelines (Commonwealth) Law and Regulations (**proposed section 11L, 11N, 11P and 11Q**).

Amendments to the Trade Practices Act 1974

The Bill makes some technical amendments to the *Trade Practices Act 1974* to facilitate the operation of the new regime.

Greenfields Gas Pipelines

The Bill makes some amendments to facilitate the operation of the Greenfields gas pipelines arrangements. These arrangements were established by amendments to the *Gas Pipelines Access (South Australia) Act 1997* and changes to the Commonwealth regime made by the *Energy Legislation Amendment Act 2006*.

The Greenfield pipeline arrangements are designed to promote investment in new gas pipeline infrastructure by providing a regulatory regime that gives new pipeline owners an 'upfront ruling on whether the full price regulation in the gas access regime applies to a new pipeline'²⁴ and exemptions from price regulation under the gas access regime for 15 years.²⁵

The Bill, in **items 74-79**, makes some amendments to facilitate the operation of the Greenfield pipeline arrangements.

Concluding comments

The Bill forms part of a package of bills designed to bring about a more national approach to the regulation of access to gas pipelines. The Bill makes a series of amendments with one of the key changes being that it picks up and applies the revised National Gas Laws and National Gas Rules as enacted by the Parliament of South Australia and Western

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Australia, and applies them as Commonwealth laws in some external territories and offshore areas. The Bill also vests the Australian Energy Regulator with significantly broader regulatory powers.

Endnotes

1. *Energy Legislation Amendment Bill 2006, Explanatory Memorandum*, p. 2.
2. Peter Prince and Mike Roarty, *Bills Digest No 171 2003-04*, Australian Energy Market Bill 2004, <http://www.aph.gov.au/library/pubs/bd/2003-04/04bd171.htm>, p. 2.
3. <http://www.industry.gov.au/assets/documents/itrinternet/FinalReport20December200220040213110039.pdf?CFID=242389&CFTOKEN=11377123>
4. *Energy Legislation Amendment Bill 2006, Explanatory Memorandum*, p. 1.
5. Productivity Commission, Review of the Gas Access Regime Productivity Commission Inquiry Report No. 31, June 2004, p. 76.
6. Susan Dudley, *Bills Digest No. 186 2004-05*, Trade Practices Amendment (National Access Regime Bill, <http://www.aph.gov.au/library/pubs/bd/2004-05/05bd186.htm>. [26 March 2006]
7. National Competition Council web-site, <http://www.ncc.gov.au/sector.asp?sectorID=6>, [22 February 2007].
8. National Competition Council web-site, <http://www.ncc.gov.au/sector.asp?sectorID=6> [22 February 2007].
9. Intergovernmental Natural Gas Pipeline Access Agreement (intergovernmental agreement). A copy of this agreement is located at [\[http://www.coag.gov.au/ig_agreements/natural_gas_pipelines.htm\]](http://www.coag.gov.au/ig_agreements/natural_gas_pipelines.htm) [22 February 2007]
10. *ibid.*
11. *Gas Pipelines Access (South Australia) Act 1997* [\[http://www.legislation.sa.gov.au/LZ/C/A/GAS%20PIPELINES%20ACCESS%20\(SOUTH%20AUSTRALIA\)%20ACT%201997.aspx\]](http://www.legislation.sa.gov.au/LZ/C/A/GAS%20PIPELINES%20ACCESS%20(SOUTH%20AUSTRALIA)%20ACT%201997.aspx).
12. Productivity Commission, *op cit.*, p. 68.
13. *ibid.*, p. 61-82.
14. *ibid.* p. 76.
15. Susan Dudley, *Bills Digest No. 186 2004-05*, Trade Practices Amendment (National Access Regime Bill, <http://www.aph.gov.au/library/pubs/bd/2004-05/05bd186.htm>. [23 March 2006]
16. <http://www.ncc.gov.au/actInSector.asp?actID=31§orID=5&page=>
17. National Competition Council Website, <http://www.ncc.gov.au/sector.asp?sectorID=6>, [26 March 2006].

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18. Productivity Commission, op cit., p. 75. This is table 3.1 in the Productivity Commission Report.
19. *ibid.*
20. Ministerial Council on Energy Decision, Review of the National Gas Pipeline Access Regime, May 2006,
<http://www.mce.gov.au/assets/documents/mceinternet/FinalMCEDecisionGasAccessReview20060508160235%2Epdf>
21. S G Corones, *Competition Law in Australia*, Fourth edition, Law Book Company, 2007, p. 650.
22. S G Corones, *Competition Law in Australia*, Fourth edition, Lawbook Company, 2007, p. 649.
23. *Australian Energy Market Amendment (Gas Legislation) Bill 2006 Explanatory Memorandum*, p. 16.
24. Energy Legislation Amendment Bill 2006 Explanatory Memorandum, p. 4.
25. Energy Legislation Amendment Bill 2006 Explanatory Memorandum, p. 4.

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