

Not Relevant

32. DPC019/98CS

Cooper Basin (Ratification) Act 1975

**APPROVED**

*Premier*

Not Relevant

## C A B I N E T   C O V E R   S H E E T

**TITLE:** Cooper Basin (Ratification) Act 1975

**MINISTER:** The Premier

**PURPOSE:** To approve release of the report of the review of the Cooper Basin (Ratification) Act 1975.

**RESOURCES REQUIRED:** No additional resources sought at this time.

**RELATIONSHIP TO POLICY:** Release of the report is consistent with previous commitments made by the Government.

**CONSULTATION:** The Crown Solicitor's Office and Department for Primary Industries and Resources have been consulted in the development of the proposed Government response to the review report. A draft of this submission has been discussed with the Office of the Minister for Primary Industries, Natural Resources and Regional Development.

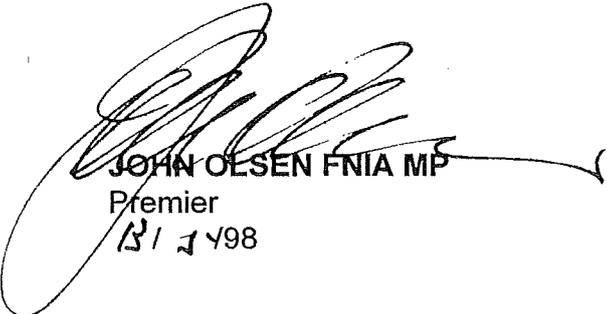
**FAMILY IMPACT STATEMENT:** No immediate family impacts envisaged.

**URGENCY:** The report has been with the Government since September 1997, and should be released as soon as possible.

**RECOMMENDATIONS:**

That Cabinet:

- approve release of the report of the review of the Cooper Basin (Ratification) Act 1975 by the Premier, with press release as at Attachment 2;
- endorse the terms of the Government response to the report as outlined in 3.6 of the Submission;
- note that the National Competition Policy Ministerial Committee, in conjunction with the Minister for Primary Industries, Natural Resources and Regional Development, will further progress the Government's response to the report.

  
JOHN OLSEN FNIA MP

Premier

13/1/98

## TO CABINET

### COOPER BASIN (RATIFICATION) ACT 1975

#### 1. PROPOSAL

To approve release of the report of the review of the Cooper Basin (Ratification) Act 1975.

#### 2. BACKGROUND

- 2.1. A review of the Cooper Basin (Ratification) Act 1975 (hereafter referred to as the Act) was undertaken by an independent consultant, Mr Nick Dyki, during 1997. The Secretariat for the review was provided by Mines and Energy SA (now Department of Primary Industries and Resources). Pursuant to the requirements of National Competition Policy, the review sought to identify any restrictions to competition, or barriers to free and fair trade in gas, within the legislation and to recommend appropriate action in relation to such restrictions or barriers.
- 2.2. Mr Dyki's report (refer Executive Summary and Recommendations at Attachment 1) has been with the Government since September 1997. On 5 January 1998, Cabinet considered the release of the report, but deferred the matter.
- 2.3. Since that time, discussions have taken place with the National Competition Council (NCC) concerning the review. The NCC has been provided with a confidential copy of the Dyki report.

#### 3. DISCUSSION

- 3.1. It is now urgent that the report be released as soon as possible, because:
  - the review was conducted in a transparent manner, and there is an industry expectation that the report will be released;
  - SA's upstream gas reform (ie exploration and production) credentials will be boosted through release of the report.
- 3.2. Discussions with the NCC have focussed on the Government's possible response to the report, as well as the NCC's expectations about upstream gas reform in the Cooper Basin.
- 3.3. The NCC's formal response on this issue is non-committal about possible amendments to the Act, but highlights the NCC's perception about two key upstream gas reform issues for the Cooper Basin:
  - pro-competitive exploration and production licensing processes;
  - third party access to existing processing facilities.

- 3.4. It is recommended that the Dyki report be released as soon as possible by means of a press release issued by the Premier (refer draft at Attachment 2).
- 3.5. In releasing the report, the Premier would:
- stress the Government's commitment to upstream gas reform, in particular the encouragement of competitive bidding for new exploration licences in the Cooper Basin from February 1999;
  - indicate in broad terms the Government response to the report's recommendations.
- 3.6. A Government response to the report should stress two fundamentals:
- the Government supports reform of the upstream gas sector necessary to ensure long term gas supplies at a competitive price to SA consumers;
  - consistent with the Dyki recommendations, the Government believes there is substantial public benefit in continuing to honour past commitments in relation to Cooper Basin development.

In responding to the specific Dyki recommendations, the following points (which have been discussed with the NCC) are highlighted in the draft press release, but only in general terms:

- The Government will move to tighten the conditions for granting of Petroleum Production Licences (recommendation 4);
- Suggested amendments to the AGL Letter of Agreement (recommendation 3) have been overtaken by a recent decision by the Australian Competition Tribunal, in that the ACCC authorisation remains in place even if the SA Government's exemption is lifted. However, possible amendments to Clause 10 to permit delivery into either the Sydney or Adelaide pipelines will be pursued with the Producers, as will corresponding amendments in relation to SA contracts.
- The Government accepts the need to develop an effective regime for third party access to facilities (recommendation 2). It notes that the present legislative framework does not prevent this, while Part IIIA of the Trade Practices Act will apply to Cooper Basin facilities should the relevant criteria be satisfied. To promote transparency, the Producers will be required to notify the Minister if any firm, bonafide third party access application for use of gathering systems or Moomba plant is received by them in the future and, following negotiation, rejected by them;
- The Government intends to reserve its right to grant S.51(1) Trade Practices Act exemptions for both existing and future gas sales agreements (recommendation 6 (iii));
- There will be no automatic TPA exemption for any future amendment to the Unit Agreement or AGL Letter of Agreement unless that amendment is first approved by the Minister for that purpose (recommendation 1). Housekeeping amendments to S.16 of the Act will be contemplated, subject to advice from the Crown Solicitor.

Any further response to the report, and development of upstream gas reform measures, will be oversights by the National Competition Policy Ministerial Committee (comprising the Premier, Deputy Premier, Treasurer and Attorney General) in consultation with the Minister for Primary Industries, Natural Resources and Regional Development. That group will also oversight negotiations with the Producers.

Cabinet should note that a review of upstream gas reform issues has recently commenced under the umbrella of the Australian and New Zealand Minerals and Energy Council. SA will be an active participant in that review, and any final response from the Government to upstream gas reform matters should await its outcome.

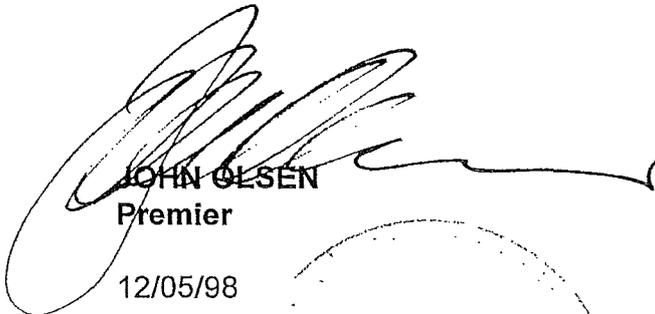
3.7. Consultation

The Crown Solicitor's Office and Department for Primary Industries and Resources have been consulted in the development of the proposed Government response to the review report. A draft of this submission has been discussed with the Office of the Minister for Primary Industries, Natural Resources and Regional Development.

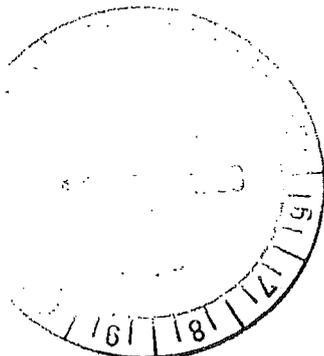
4. RECOMMENDATIONS

That Cabinet:

- 4.1. approve release of the report of the review of the Cooper Basin (Ratification) Act 1975 by the Premier, with press release as at Attachment 2;
- 4.2. endorse the terms of the Government response to the report as outlined in 3.6 of the Submission;
- 4.3. note that the National Competition Policy Ministerial Committee, in conjunction with the Minister for Primary Industries, Natural Resources and Regional Development, will further progress the Government's response to the report.

  
JOHN OLSEN  
Premier

12/05/98



*In Cabinet*

19 MAY 1998



**REVIEW OF THE COOPER BASIN (RATIFICATION) ACT  
REPORT BY N DYKI - SEPTEMBER 1997**

**EXECUTIVE SUMMARY**

This is a review of the Cooper Basin (Ratification) Act 1975 under clause 5 of the Competition Principles Agreement. The Ratification Act provides concessions to the Cooper Basin Producers and exempted certain agreements from the operation of the Trade Practices Act.

The terms of reference, reflecting clause 5 of the Competition Principles Agreement, require the review to identify, analyse and assess:

- any restrictions on competition contained within the Ratification Act or any of the agreements exempted by the Ratification Act;
- the costs of any such restrictions, ie their effect on competition;
- the benefits to the community of the restrictions;
- reach a conclusion on the balance of the costs and benefits; and
- if costs outweigh the benefits propose arrangements which establish a net public benefit.

In short the review must assess and balance the costs and benefits of any restriction.

The review of the Ratification Act occurs against a background of significant change in the gas industry in Australia and, of particular relevance to this review, in South East Australia. Some of the significant changes and salient features of the industry are:

- the concerted effort by the Commonwealth and the States (as evidenced in CoAG resolutions, the Intergovernmental Agreements and recent Commonwealth and State legislation) to increase industry, including the gas industry, efficiency through increased competition;
- the development of third party access regimes to apply to transmission and distribution pipelines;
- the imminent introduction of contestability in the downstream sector of the gas industry;
- the removal of government from the gas industry through the sale of transmission, distribution, retail and producing assets;

- the proposed construction of two major transmission pipelines linking Bass Strait to Sydney, and
- the limited competition which exists at the producer level in South East Australia where supply is dominated by two producing basins (and effectively two joint ventures) with one participant having significant interests in both basins.

This contrasts with the position of the gas industry in South East Australia in 1975. At that time there was a monopoly supplier and a monopsonist purchaser, the State, in each of Adelaide and Melbourne. The 1975 Cooper Basin arrangements resulted in a sole supplier to AGL. Moreover, the States were heavily involved in the ownership of transmission, distribution, retail and producing assets. The Commonwealth was shortly to become the owner of the Moomba to Sydney pipeline.

A legislation review and, in particular, the assessment of public benefits is not straight forward in the case of legislation, like the Ratification Act, which gives effect to, and is the result of, an agreement. The difficulty with such an assessment is that the benefits and the objectives of such legislation may have accrued shortly after it was passed or, at least, by the time the review is undertaken.

In the case of the Ratification Act the main related objectives were to facilitate a major development in SA which development exploited SA's petroleum reserves. The development, moreover, held out the prospect of significant future gas and liquids developments. These objectives, and benefits, have been achieved. They are past benefits or historic benefits.

Other claimed public benefits on a forward looking basis are not true public benefits. Thus, given the infrastructure now in place, new agreements and structures can be developed to replace the existing Cooper Basin agreements and structures. In short, it cannot be said that the current arrangements are more beneficial than alternative arrangements which may be structured to avoid anti-competitive elements. This is true of security of supply. Moreover, in the current climate of a more competitive gas industry co-operative Producer arrangements can lead to substantial producer benefit but not public benefit. Consumers will pay the market price for gas which may be higher than it would be but for the co-operative arrangements.

However, there are substantial public benefits in continuing concessions and exemptions previously granted even if the objective of the legislation has been achieved. This arises through a State continuing to honour the commitments it has made. Not to do so can have an effect on future investment, create uncertainty and engender lack of confidence in business dealings with governments. For a State to adhere to commitments is a considerable public benefit. This is even more so where third party agreements are involved.

Against this legal framework and industry background the restrictions on competition in the Ratification Act and the exempted agreements were identified and assessed and balanced in terms of the costs and benefits to the community.

### Ratification Act

Two relatively minor restrictions were identified and amendments proposed. Leaving aside S.16 which exempts various agreements from the operation of the Trade Practices Act, none of the other sections confer any ongoing advantage to Producers which can in any sense be regarded as a restriction on competition.

### Exemption of the Indenture Agreement

Nothing in the Indenture Agreement has been identified as requiring the Indenture Agreement to be the subject of a S.51(1) exemption. Accordingly the review recommends the removal of this exemption.

### Exemption of the Unit Agreement

Two significant restrictions on competition were identified where the costs outweighed the public benefits. The first arises because of the lack of a third party access regime in relation to the Unit facilities. The second because the Unit Agreement effectively precludes separate marketing by the Cooper Basin Producers.

It is recommended that these restrictions be removed as a condition of the continued exemption of the Unit Agreement from the operation of the Trade Practices Act. These conditions require the implementation of a third party access regime to the Cooper Basin facilities (either by legislation or by an Industry Code) and the amendment of the Unit Agreement to incorporate a workable mechanism which permits a Producer to separately market if it so desires.

It is also recommended that only amendments to the Unit Agreement which are approved by the Minister should continue to be exempted.

### Exemption of the Letter of Agreement

Seven restrictions on competition were considered. It was found that the costs outweighed the benefits in respect of three of the restrictions. Accordingly it is recommended that the AGL Letter of Agreement continue to be exempted subject to the removal of the tying provisions (clauses 12 and 20) and the amendment of the single delivery provision (clause 10). It is also recommended that the exemption of amendments to the Letter of Agreement be removed.

### Exemption of the Liquids Contracts

It is recommended that this exemption in the Ratification Act be removed as such contracts are exempted by the Stony Point (Liquids Project) Ratification Act 1981.

### Exemption of acts or things done thereunder

It is recommended that the current words be replaced with words which exempt all contracts, acts or things which give effect to rights and obligations under the exempted agreements.

#### Exemption of the 1989 Gas Sales Agreements

These agreements are not exempted by the Ratification Act but are currently authorised. However, it would not be inappropriate for the State to grant exemption to disaggregated NGASA contracts provided that the terms and conditions of the disaggregated contracts largely reflected the current NGASA contracts.

#### Exemption of the 1996 Gas Sales Agreements

These agreements are not exempted by the Ratification Act nor are they authorised. The State should not grant exemption to gas sales contracts which are not currently the subject of a State exemption or ACCC authorisation.

#### Exemption of the Fixed Factor Agreement

The Fixed Factor Agreement is not exempted. It is not inappropriate for the State to grant an exemption provided that a third party access regime is implemented and a mechanism which permits separate marketing is introduced in the manner discussed earlier.

In summary, the result of the review are recommendations which provide:

- the Ratification Act (other than S.16) remains in place with two relatively minor amendments proposed to the Ratification Act and the Petroleum Act;
- the S.51(1) State exemption of the Unit Agreement and the AGL Letter of Agreement continue but subject to conditions which remove the adverse effect upon competition of these agreements, and
- for the removal of other State exemptions as unnecessary.

#### RECOMMENDATIONS

1. Clause 16 of the Ratification Act be replaced with a new clause which for the purposes of the Trade Practices Act authorises and approves:
  - (i) the provisions of the Unit Agreement as those provisions are amended with the consent of the Minister (subject to recommendation 2);
  - (ii) the provisions of the Letter of Agreement (subject to recommendation 3); and
  - (iii) such contracts acts or things which give effect to the rights and obligations of the parties pursuant to the Unit Agreement or the Letter of Agreement.

2. The provisions of the Unit Agreement be exempted provided that:
  - (i) the State implements a third party access regime to the Cooper Basin facilities either by legislation or an Industry Code. The access regime must provide for non discriminatory access, published tariffs and terms, compulsory dispute resolution, separate accounting in relation to the facilities and the ability for an appropriate regulator to monitor tariffs; and
  - (ii) the Unit Agreement be amended to incorporate a mechanism which permits, but does not require, a Cooper Basin Producer to separately market.
3. The AGL Letter of Agreement be exempted provided that Clauses 12 and 20 are removed and Clause 10 is amended so as to permit delivery into either the Sydney or Adelaide pipelines.
4. S.9 of the Ratification Act or S.27(1a) of the Petroleum Act be amended to ensure that a Petroleum Production Licence shall not be granted to the Producers if the quantity or quality of the petroleum is not sufficient to warrant production.
5. S.80L of the Petroleum Act be amended so that the section applies to pipelines between Petroleum Production Licences which are not licensed.
6. This recommendation is closely related to the subject matter of the review but is strictly outside the terms of reference:
  - (i) a S.51(1) State exemption be granted, if requested, to disaggregated NGASA contracts provide that the terms and conditions of such contracts reflect the existing contract:
  - (ii) a S.51(1) State exemption be granted to the Fixed Factor Agreement, if requested, but only on the condition that a third party access regime applies to the Cooper Basin facilities and a mechanism exists which permits a Cooper Basin Producer to separately market; and
  - (iii) a S.51(1) State exemption should not be granted to existing gas sales agreements not currently authorised or future gas sales agreements. Such authorisations should be left to the ACCC.

**DRAFT PRESS RELEASE**

**COOPER BASIN (RATIFICATION) ACT 1975**

The Premier, John Olsen, today released for public consideration a report detailing the results of a review of the Cooper Basin (Ratification) Act 1975 (hereafter referred to as the Act).

The review was commissioned by the State Government and undertaken during 1997 by Mr Nick Dyki, an independent consultant with wide experience in commercial and legal issues in the gas sector.

The review was undertaken pursuant to the State's obligations under the 1995 Competition Principles Agreement to review and, where necessary, reform legislation which restricts competition in a specified market. In addition the review sought to establish whether or not the Act constitutes a barrier to free and fair trade in gas.

In releasing the report, the Premier stressed that the Act and associated agreements have been of fundamental importance in the commercial development of Cooper Basin gas reserves. Among other things, the Act provides Trade Practices Act exemption for a number of agreements; establishes rights with regard to construction of facilities and a particular form of production tenement; establishes the method for royalty calculation; and provides freehold title to land at Moomba.

"Mr Dyki's report stresses that, while the objectives of the Act have largely been achieved, there are substantial public benefits in the State continuing to honour past commitments; not to do so could engender lack of confidence in business dealings with the Government" said the Premier. "This philosophy underpins the Government's response to the report".

"However, the Government is aware of the importance of continued reform of the gas sector in Australia" said the Premier. "South Australia has played a leading role in the establishment of a national framework for access to gas pipelines, and it is important that the reform process not exclude the upstream (ie exploration and production) gas sector".

The Premier indicated that the Government's response to the review of the Act was just one aspect of its approach to upstream gas reform. Another vital aspect concerns the need to facilitate competition for new exploration licenses in the Cooper Basin upon expiry of Petroleum Exploration Licences (PELs) 5 and 6 in February 1999. "The opening up of this area to competitive bidding is an essential part of a long term approach to enhancing the State's supply of competitively priced gas" said the Premier. "The Government has established operational ground rules for bidding for new licences upon expiry of PELs 5 and 6".

The Premier indicated that the Government's detailed response to the review of the Act would be guided by the outcome of a review of upstream gas reform issues which has recently commenced through the Australian and New Zealand Minerals and Energy Council, as well as by discussions with the Cooper Basin Producers and

other affected parties. However, the Government has already determined the following elements of its response:

- Petroleum Production Licences will be granted only where the quality or quantity of petroleum is sufficient to warrant production;
- Establishment of a transparent process whereby any firm, bonafide third party access application for use of Cooper Basin gathering systems or Moomba plant may be considered;
- The need to facilitate delivery of gas into either the Sydney or Adelaide pipelines;
- The Government reserves its right to grant Trade Practices Act exemptions for both existing and future gas sales agreements.

Comments on the report are invited and should be submitted in writing by Friday 12 June 1998 to

Dr Patrick Walsh  
Director, Micro Economic Reform Branch  
Department of Premier and Cabinet  
GPO Box 2343  
ADELAIDE SA 5001  
Telephone: (08) 8226 0902  
Fax: (08) 8226 1111

Attachment: Executive Summary and recommendations of the report of the review.