20/12/1999

110. **MPNR**071/99CS

Government Response to the Dyki NCP Review of the Cooper Basin (Ratification) Act 1975
APPROVED AS AMENDED MINISTER EVANS WAS ABSENT DURING DISCUSSION ON THIS SUBMISSION.

Premier & Cabinet Minister

Not Relevant

CABINET COVER SHEET

1.	**TITLE:**	**FINAL RESPONSE TO THE DYKI NATIONAL COMPETITION POLICY (NCP) REVIEW OF THE *COOPER BASIN (RATIFICATION)* ACT *1975*.**
2.	**MINISTER:**	Rob Kerin **DEPUTY PREMIER** **MINISTER FOR PRIMARY INDUSTRIES** **MINISTER FOR MINERALS AND ENERGY** **MINISTER FOR REGIONAL DEVELOPMENT**
3.	**PURPOSE:**	To seek Cabinet endorsement of the Government's final response to the Dyki NCP review of the *Cooper Basin (Ratification) Act 1975* and attached letter to be sent by the Minister for Minerals and Energy to the President of the National Competition Council.
4.	**RESOURCES REQUIRED FOR IMPLEMENTATION:**	No direct financial implications.
5.	**RELATIONSHIP TO GOVERNMENT POLICY:**	The recommendations in this submission: 1. are considered to be in accord with the Government's NCP obligations relating to the Cooper Basin, but not so as to "modify the rights or increase the obligations of the Producers"; 2. are broadly compatible with earlier Government statements providing initial response to the Dyki recommendations; and 3. differ from the 24 August 1998 Cabinet decision only in that the recommended response now adopts a position of minimal change to the *Cooper Basin (Ratification) Act 1975*, but with such change not to be contingent on Producer agreement.
6.	**CONSULTATION:**	Premier and Cabinet and the Crown Solicitor's Office.
7.	**FAMILY IMPACT:**	None
8.	**URGENCY:**	Normal

9. **RECOMMENDATIONS:**

It is recommended that Cabinet:

4.1 Endorse the response outlined in this submission to the Dyki review of the Cooper Basin (Ratification)Act 1975

4.2 Endorse the attached letter being sent to the President of the National Competition Council.

SIGNATURE OF MINISTER:

PORTFOLIO: **DEPUTY PREMIER**
MINISTER FOR PRIMARY INDUSTRIES
MINISTER FOR MINERALS AND ENERGY
MINISTER FOR REGIONAL DEVELOPMENT

Date: 14/12/99

MINUTES forming ENCLOSURE to: MPNR071/99CS

TO: THE PREMIER FOR CABINET

RE: GOVERNMENT RESPONSE TO THE DYKI NCP REVIEW OF THE *COOPER BASIN (RATIFICATION)* ACT *1975*

1. PROPOSAL

1.1 To seek Cabinet endorsement of a final response to the recommendations made in the Dyki NCP review of the *Cooper Basin (Ratification) Act 1975* and a letter to be sent to the President of the National Competition Council.

2. BACKGROUND

2.1 A review of the *Ratification Act* was carried out during 1997 by an independent consultant, Mr Nick Dyki, as part of the Government's NCP obligations.

2.2 The National Competition Council's 30 June 1999 Second Tranche Assessment noted that South Australian legislation that restricts intra-basin competition in the Cooper Basin has been reviewed, but that the Government still hadn't responded formally to the recommendations of the review. The NCC indicated that it would revisit this reform area in a supplementary assessment before 31 December 2000.

2.3 Cabinet has considered the Dyki Report previously, the last time being on 24 August 1998 when it agreed to the following response:

Trade Practices Act Authorisations:

- Negotiate with the Cooper Basin joint venturers and other relevant stakeholders (particularly the NCC) to amend the authorisation and approval pursuant to Section 51 of the *Trades Practice Act 1974*, contained in Section 16 of the *Cooper Basin (Ratification Act) 1975*, so that it will better reflect current contractual arrangements and legal interpretations.

  Addresses Dyki recommendations 1 and 6

Access to Upstream Facilities:

- Negotiate with the Cooper Basin joint venturers and other relevant stakeholders (particularly the NCC) to achieve the establishment by the joint venturers of an upstream facilities access arrangement that has at least the following features:

  1. publication of access arrangements (capacity and pricing principles);
  2. based on commercial negotiation; and
  3. binding arbitration in the event of a dispute.

  Addresses Dyki recommendation 2(i)

Single versus Joint Venture Marketing:

- Defer resolution of the separate marketing issue awaiting the outcome of the CoAG / ANZMEC Upstream Issues Working Group (UIWG) process.

  Addresses Dyki recommendation 2(ii)

Amendment to AGL Agreement:

- That no action at this time be taken on the recommendation to amend the AGL Letter of Agreement.

  Addresses Dyki recommendation 3

Criteria for PPLs:

- Amend Section 9 of the *Cooper Basin (Ratification) Act 1975* to ensure that PPLs only be granted in accordance with the criteria of Section 27(1a) of the *Petroleum Act 1940* and note that it may be necessary to amend that section of the *Petroleum Act 1940* such that these criteria specify that PPLs be granted only where the discovery is capable of being exploited in the near future.

  Addresses Dyki recommendation 4

Access to Gas Gathering Lines:

- That no action be taken on the issue of pipelines built pursuant to Section 12 of the *Cooper Basin (Ratification) Act 1975*, which are not required to be licensed under the *Petroleum Act 1940* and hence avoid the access regime in Section 80L of the *Petroleum Act 1940*, provided a satisfactory upstream access arrangement is instituted by the Producers.

  Addresses Dyki recommendation 5

Future Trade Practices Act Exemptions:

- That, unless requested by the Producers, no action be taken on granting authorisation and approval to the disaggregated NGASA gas contracts or to the Fixed Factor agreement; however, the Government reserves its right to consider granting further exemptions pursuant to Section 51(1) of the *Trade Practices Act 1974* for current or future gas sales contracts.

  Addresses Dyki recommendation 6

- The Government intends to reserve its right to grant Section 51(1) *Trade Practices Act 1974* exemptions for both existing and further gas sales agreements.

  Addresses Dyki recommendation 6 (iii)

3. DISCUSSION

3.1 A meeting was convened with Santos representatives on 3 December 1998, chaired by the Minister for Minerals and Energy, to negotiate implementation of the Government's response to the Dyki recommendations.

3.2 There was no agreed position arising from that meeting, except that the Government would reconvene the consultations when it had a draft of an access code and of amending legislation.

3.3 At that meeting Santos indicated that it was not inclined to accept any proposal for access to Cooper Basin facilities, and that it did not see why it should agree to any amendment to the Cooper Basin (Ratification) Act 1975. Santos was inherently suspicious of any proposal to amend the Cooper Basin (Ratification) Act 1975 and it's approach was that while NCP obligations might bind the Government, they did not bind the Producers.

Further negotiations between PIRSA officials and Santos have not developed a firm position on the issue of access to upstream facilities.

3.4 Since the Dyki Report there have been significant developments in the gas industry that are relevant to the Government's response to that Report. In addition further changes have occurred since the meeting with Santos on 3 December 1998. These developments justify the Government taking a more de minimus position on amendments to the Cooper Basin (Ratification Act) 1975, as set out in the attached letter to the NCC.

3.5 Major developments since Cabinet consideration of the Dyki report in August 1998 have included:

- the introduction of the sales gas pipeline access arrangements and the Government's electricity asset lease policy, both having considerable implications for the dynamics of the downstream segment of the energy industry in this State;
- the UIWG report was delivered; it recommended against mandated access to upstream facilities and mandated separate marketing with the 'Voluntary' Industry Code developed by the Australian Petroleum Production and Exploration Association Ltd ("APPEA") being seen as a possible model for gas production basins;
- the development and introduction of a new Petroleum Bill in South Australia;
- significant Cooper Basin petroleum exploration acreage release programs;
- negotiation with the Cooper Basin Producers over PPLs in general;
- the South Australian Cooper Basin being increasingly seen as a declining resource, and upstream access therefore becoming a matter of lower order priority; and

- the granting of a *Petroleum Act 1940* pipeline licence to Boral for a short diversion pipeline between the Sydney and Adelaide pipelines (close to the "Y" junction at Moomba) such that the delivery point restriction in clause 10 of the AGL Letter of Agreement is no longer relevant. In addition, AGL has recently sold gas to Terra Gas Trader Pty Ltd, sending gas directly to Adelaide, with the consent of the Producers.

These matters have been the focus of activity by the Department of Primary Industries and Resources over the last twelve months.

3.6 They have caused a reconsideration of the Government's response to the Dyki *Report*. If the NCC agrees to the Government's proposed response, it can be implemented without the concurrence of the Producers because:

3.6.1 it adopts a less interventionist approach to existing Cooper Basin arrangements; and

3.6.2 those legislative changes that are proposed have either already been agreed by the Producers (letter from Managing Director Santos Limited of 30 October 1997), or do not impact on the Producers' commercial position.

3.7 Nevertheless, it is still proposed to communicate with the Producers, and ask for their suggestions on the detail of the amendments to the *Cooper Basin (Ratification) Act 1975*. However, it is proposed that the Government proceed unilaterally with the amendments if the Producers do not agree with the Government's preferred outcome.

3.8 The proposed revised response to the Dyki Report differs from Cabinet's August 1998 decisions in the following material particulars:

3.8.1 Trade Practices Act Authorisations:

No material change:

- There is a need to make section 16 of the *Cooper Basin (Ratification) Act 1975* more transparent (there is no actual reference by name to the AGL Letter of Agreement) and to bring it up-to-date (delete references to agreements long since extinguished, extend the exemption to the Conduct Code, etc).

- The Unit Agreement and the AGL Letter of Agreement will continue their exemption from the *Trade Practices Act 1974*.

- There will be an exemption for the Liquids Contracts in so far as Producer conduct involves joint marketing, pricing, sale and supply. Liquids Contracts exemptions, currently duplicated in the Stony *Point (Liquids Project) Ratification Act 1981* and the *Cooper Basin (Ratification) Act 1975* will be located in the *Cooper Basin (Ratification) Act 1975* for convenience and transparency.

- The Producers will be asked if they want an exemption for the Fixed Factor Agreement which is, essentially, an extension of the Unit Agreement.

- Any request by the Producers for a *Trade Practices Act 1974* exemption for other agreements will be considered on its merits, with a transparent cost benefit analysis.

3.8.2 Access to Upstream Facilities:

To become a voluntary outcome - not mandated:

- The linkage between the Producers accepting upstream access arrangements and the Government maintaining the *Trade Practices Act 1974* exemption for the Unit Agreement will be removed.

- Mandated upstream access is a real sticking point with Santos, and likely to be the 'deal breaker' in the Government's previous response to the Dyki report. The UIWG Report did not recommend a mandated upstream access regime, instead noting that a 'Voluntary' Industry Access Code has been adopted by APPEA.

- Therefore, while removing the linkage between access and *Trade Practices Act 1974* exemptions, the Government will continue to encourage the Producers to, at least, signify their adherence to a 'Voluntary' Industry Access Code, as a matter of the Government's own policy development. This outcome is more likely to be achieved over time, out of the NCP spotlight.

- The Government would consider the minimum acceptable outcome to be a 'Voluntary' Code such as that developed by APPEA, with the additions of a right to arbitration and tariffs based on cost reflective pricing.

3.8.3 Single versus Joint Venture Marketing:

Essentially, no change:

- The Dyki Report recommended a mandated 'borrow and loan' arrangement to facilitate single marketing. Cabinet's August 1998 decision deferred its decision until UIWG had reported.

- The UIWG Report recommended against mandating single marketing at this stage of market development, and the Australian Competition Tribunal has described 'borrow and loan' arrangements as "cumbersome administrative processes", better suited to more mature markets such as that in North America.

- Thus, there will be no requirement for a 'borrow and loan' arrangement as a condition of maintaining the *Trade Practices Act 1974* exemption for the Unit Agreement.

3.8.4 Amendment to AGL Letter of Agreement:

No Change:

- The licensing of the Boral pipeline, linking the Sydney and Adelaide pipelines at Moomba, undermines the anticompetitive effect of the clause 10 delivery point requirement (under which AGL could only haul gas purchased under that agreement to Sydney). In addition, AGL has recently sold gas to Terra Gas Trader Pty Ltd, sending gas directly to Adelaide, with the consent of the Producers.

- Further, the impact of the Australian Competition Tribunal's decision is that it is no longer sustainable to argue for removal of the exemption for the Letter of Agreement in the *Cooper Basin (Ratification Act) 1975*. Given its continuing Part VII, *Trade Practices Act 1974* authorisation, the *Cooper Basin (Ratification) Act 1975* exemption has no anticompetitive impact of its own. In any event, the Tribunal's reasoning would apply to the analysis of both the ACCC and the *Cooper Basin (Ratification) Act 1975* exemptions.

3.8.5 Criteria for PPLs:

No Change:

- Amend Section 9 of the *Cooper Basin (Ratification) Act 1975*, and clause 6 of the Indenture, so that any PPLs sought by the Producers are assessed under the criteria in the *Petroleum Act 1940*.

- As *quid pro quo* for receiving PPLs over the Nappamerri Trough, the Managing Director of Santos Limited wrote to the Premier on 30 October 1997 agreeing that, for future PPLs, the Producers would voluntarily place themselves under the Sections 27 & 28 *Petroleum Act 1940* regime. Thus, there is already agreement on this proposed amendment to the *Cooper Basin (Ratification) Act 1975*.

3.8.6 Access to Gas Gathering Lines:

Not to be a mandated outcome:

- Raw gas trunk pipelines built pursuant to Section 12 of the *Cooper Basin (Ratification) Act 1975* are not required to be licensed under the *Petroleum Act 1940*, and hence avoid the access regime in Section 80L of that Act. This was considered by the Dyki Report to be 'an impediment to free and fair trade'. Cabinet's decision of August 1998 was that this could be cured by a satisfactory upstream access arrangement.

- Further examination of this issue discloses the following argument:

  1. Access to the trunklines is not relevant if there is no access to the Moomba Processing Facility (which is not a facility covered by the general access regime in Part IIIA of the *Trade Practices Act 1974*) - unless the new entrant has constructed its own processing facilities at Moomba.

  2. If new facilities are constructed, access to the trunklines is possible under Part IIIA of the *Trade Practices Act 1974*. The NCC is the 'gatekeeper' for the Declaration process for Part IIIA access and therefore controls access to these pipelines itself. Further, mixing raw gas with different specifications, belonging to different owners, creates commercial and technical difficulties, rendering access inappropriate.

3.8.7 Consultation with the Producers:

Changed - there is still consultation, but the outcomes are not contingent on Producer agreement.

- It is noted that none of the proposed changes to the *Cooper Basin (Ratification) Act 1975* (or placing the *Stony Point (Liquids Project) Ratification Act 1981* Liquids Contracts exemption in the *Cooper Basin (Ratification) Act 1975*) impact adversely on the Producers' commercial position, or "modify the rights or increase the obligations of the Producers" in terms of clause 2.(4) of the Indenture.

- There is an absolute need to dispose of this matter to the satisfaction of the NCC, or risk a threat to South Australia's competition Payments.

- The previous strategy of only making changes with the agreement of both the NCC and Santos placed the Government between 'the rock and the hard place' !

- Santos' stance of non-cooperation is a threat to obtaining any outcome that can be sold to the NCC.

3.9 The proposal now is to sell the Government's response to the Dyki Report; first, to the NCC, and then to implement it after consulting with the Producers on the detail of the amendments, but not so as to allow them any veto.

3.10 Impacts

3.10.1 Economic, Financial and Budget Implications

There are no direct costs associated with implementation of the recommendations of this submission.

3.10.2 Family Impact

None.

3.10.3 Consultation

This submission has been developed by PIRSA, Crown Solicitor's Office and the Department of Premier and Cabinet.

4. RECOMMENDATIONS:

It is recommended that Cabinet:

4.1 Endorse the response outlined in this submission to the recommendations of the Dyki review of the *Cooper Basin (Ratification) Act 1975*

4.2 Endorse the attached letter with amendments proposed by Treasury being sent to the President of the National Competition Council.

Minister Evans was absent during discussion on this submission.

Rob Kerin
DEPUTY PREMIER
MINISTER FOR PRIMARY INDUSTRIES
MINISTER FOR MINERALS AND ENERGY
MINISTER FOR REGIONAL DEVELOPMENT

Date: 14/12/99

Premier's Dept. 15 DEC 1999

In Cabinet

20 DEC 1999

APPROVED
PREMIER

DRAFT

Ref:

Date:

Mr Graeme Samuel
President
National Competition Council
GPO Box 250B
MELBOURNE VIC 3001

Dear Mr Samuel

I am writing to you in relation to the Legislation Review of the Cooper Basin (Ratification) Act 1975 (SA), ("the Ratification Act"). The National Competition Council's ("the Council") 30 June 1999 Second Tranche Assessment noted that legislation that restricts intra-basin competition in the Cooper Basin has been reviewed ("the Dyki Report"), but that the South Australian Government has yet to respond formally to the recommendations of the review. The Council indicated that it would revisit this reform area in a supplementary assessment by 31 December 2000 (Council "overview" document, Part A, page 31).

In the period following the Dyki Report the South Australian Government has been, and continues to be, significantly involved in a number of activities relating to the gas industry. These have included the introduction of the gas pipeline access arrangements and the electricity asset lease policy, both having considerable implications for the dynamics of the downstream segment of the energy industry in this State; the deliberations of the Upstream Issues Working Group ("UIWG"); the development and introduction of a new Petroleum Act in South Australia; a significant Cooper Basin petroleum exploration acreage release program; and negotiation with the Cooper Basin Producers over Petroleum Production Licences ("PPLs"), including PPLs in the Nappamerri Trough sought pursuant to existing arrangements in the Ratification Act. I am sure that the Council has noted developments in this area and the various media releases and public statements by the Government.

Further, as a result of the Government's focus on issues concerning the lease of its electricity assets, it has become increasingly apparent that the South Australian Cooper Basin is a declining resource as far as deliverable gas is concerned, and unless further significant economic discoveries are made, the State's gas consumers will soon have to consider the importation of the majority of their needs. At that time, other arrangements may also need to be considered to secure supply of sales gas, including 'swaps' and new pipelines.

Nevertheless, the South Australian Government has developed an appropriate response to the Dyki Report and takes this opportunity to inform the Council of its proposals.

Dyki Report Recommendations:

1. Section 16 of the Ratification Act be replaced by a new section giving section 51 Trade Practices Act 1974 (C/wth), ("the TP Act"), exemptions for:

   1.1 the Unit Agreement as in 2 below;
   1.2 the AGL Letter of Agreement as in 3 below; and
   1.3 all things which give effect to rights and obligations under the Unit Agreement and the Letter of Agreement.

   SA Government response:

   Section 16 will be brought up to date and made more transparent. The new section will exempt the Unit Agreement, the AGL Letter of Agreement, and the Liquids Contracts, and things done to give effect to those agreements. Redundant references in section 16 will be repealed.

   Subject to a request from the Producers, the Government will consider authorising the Fixed Factor Agreement which is, in effect, an extension of the Unit Agreement. Clause 10(1)(b) of the Indenture requires the Government to consider exempting agreements when requested by the Producers. Any such consideration will, of course, include a transparent assessment of costs and benefits in line with NCP legislation Review obligations and the UIWG recommendation in that regard.

   To give simplicity and transparency, all TP Act exemptions for Liquid Petroleum Contracts, which are presently referred to in both the Ratification Act and the *Stony Point (Liquids Project) Ratification Act 1980 (SA)*, will all be placed in the Ratification Act. The exemption will be restricted to joint marketing, pricing, sale and supply. Given the small volumes to which these contracts relate, and the international nature of the market for these products, the Government believes that there will be no difficulty in justifying their exemption.

2. The Unit Agreement continue to be exempted provided a third party infrastructure access regime, and a mechanism for separate marketing (a 'borrow and loan' mechanism), is implemented.

   SA Government response:

   The Unit Agreement does not concern marketing or sales, and does not prohibit single marketing if any of the Producers so desire [1]. The Government believes that the justification for the arrangements underpinned by the Unit Agreement (joint appraisal, development and production within the 'Subject Area') is entirely satisfied, independent of any requirement for access and 'borrow and loan' mechanisms.

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[1] The UIWG Report expressed sympathy with the large number of public submissions that argued that the Australian gas market, compared to the North American market, was not mature enough to support separate marketing. In particular it recommended against mandating separate marketing at this stage of the Australian gas market's development (paragraph 5.1).

Given that the Subject Area is now a mature area (the development infrastructure has been put in place, new Petroleum Exploration Licences are being issued, and the time is now exhausted for the Producers to seek new PPLs), it is a nonsense to require that the joint arrangements for the Producers' continuing operations in the Subject Area now be dismantled. If anything, the only outcome would be the monopoly ownership of the existing infrastructure. The declining nature of reserves in the Basin also mitigates against dismantling joint arrangements that allow operations on an optimal economic scale.

Finally, while tying the requirement for access and 'borrow and loan' mechanisms to the continuation of the exemption for the Unit Agreement may have seemed a convenient way of ensuring that such pro-competitive arrangements were put in place, the SA Government does not consider that placing positive pro-competitive arrangements in legislation is a function of the CoAG legislation review obligation, otherwise every NCP legislation review would be conducted in a 'blue sky' policy environment.

However, as a matter of its own policy initiative, the SA Government wishes to encourage the Producers to establish a 'Voluntary' Industry Access Code as recommended by the UIWG. There have already been some discussion between Santos and SA officials regarding a draft 'Voluntary' Access Code for Moomba Facilities. The Code developed by the Australian Petroleum Production and Exploration Association Ltd ("APPEA") is another possibility, but the Government would like to see the addition of a right to arbitration, and tariffs based on cost reflective pricing. The Government will continue its efforts to encourage the Producers to publicly signify their adherence to such an Industry Access Code.

The Government believes that 'borrow and loan' arrangements are complex and probably more suited to a deeper, more diverse, market [2]. If they are required in the future and private commercial arrangements prove inadequate, no doubt industry participants will discuss the matter with the Government.

Of course, as a matter of the Government's own policy, it will continue to monitor and observe Cooper Basin arrangements. The Government would reserve the right to introduce further measures if it considered that the situation warranted it.

3. **The AGL letter of Agreement continue its exemption provided clauses 12 (first right of refusal) and 20 (exclusive dealing) are removed and clause 10 (delivery point) amended.**

SA Government response:

Following the Australian Competition Tribunal's decision on the Producers' Application to review the ACCC's revocation of the Part VII, TP Act, authorisation of the AGL Letter of Agreement, it is no longer sustainable to argue for removal of the exemption for the Letter of Agreement in the Ratification Act. Given its continuing Part VII, TP Act authorisation, the Ratification Act exemption has no competitive impact of its own and, in any event, the Tribunal's reasoning would apply to the analysis of both exemptions.

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2 At paragraph 9.3.1 of the Australian Competition Tribunal's decision in the AGL Letter of Agreement authorisation matter, the Tribunal describes 'borrow and loan' arrangements as "cumbersome administrative processes".

In defence of Mr Dyki, however, it is noted that he was asked to review the provisions of the Letter of Agreement in isolation of each other, and not as a whole document, and so the public benefits found by the Tribunal were not available to him. In retrospect, this was a failing in the terms of reference given to him.

It is noted that there are few years left for the Letter of Agreement to run, and together with the expansion of demand in the Sydney market, the declining volumes available under the Letter of Agreement, and the prospect that alternative suppliers will soon be able to supply sales gas to the Sydney market from Gippsland, there is now even less reason to remove the exemption for the AGL Letter of Agreement. Further, one of the continuing gas industry developments has been the grant of a Pipeline Licence to Boral to connect the Sydney and Adelaide pipelines immediately downstream of the "Y" junction. This immediately overcomes the impact of the AGL Letter of Agreement's stipulation regarding delivery point (clause 10). I note that AGL has recently sold gas to Terra Gas Trader Pty Ltd, with the consent of the Producers, and the recently signed "Deed of Apportionment" agreement will directly override Clause 10.

4. The Ratification Act be amended to make the grant of PPLs subject to "economic criteria".

SA Government response:

This recommendation refers to section 9 of the Ratification Act and to clause 6.(1) of the Indenture. Together they give the Producers a right to a PPL "on application". It was under this provision that the Producers were granted PPLs within the geographic area known as the Nappamerri Trough that contains significant quantities of presumed uneconomic 'tight gas'.

As a result of the Government's negotiation stance with the Producers, not only did they commit to a significant exploration program and to a relinquishment requirement, but they also agreed that: "for the future, PPLs will only be applied for in respect of fields which meet the criteria established in Sections 27 and 28 of the *Petroleum Act 1940 (SA)*."

On the basis of this undertaking, the Government will amend section 9 and clause 6.(1) to ensure that the grant of any future PPLs to the Producers is subject to the criteria in the Petroleum Act.

5. Section 80L of the Petroleum Act be applied to the Producer's Cooper Basin pipeline infrastructure.

SA Government response:

Section 80L of the Petroleum Act imposes an access requirement upon 'licensed pipelines' - except those subject to the National Natural Gas Pipelines Access Scheme.

However, section 12 of the Ratification Act enables the Producers, *inter alia*, to construct and operate pipelines (in practice, raw gas 'trunk' pipelines), without a Petroleum Act licence, for areas outside PPLs but within the Subject Area (the area relevant to the Unit Agreement) - thus, the section 80L access arrangements do not apply to the Producers' trunk-lines within the Subject Area.

The scheme of the Petroleum Act is that pipelines within PPLs do not require a licence and are regarded as 'flow-lines'. Section 12 treats all of the Producers' pipelines within the Subject Area as 'flow-lines'.

The South Australian Government considers that the Dyki Report has overblown both the anticompetitive impact of section 12 and any impact it could possibly have on 'free and fair trade' in gas. Of course, if there is to be an Industry Access Code applying to the Cooper Basin, it will include (at least) all trunk-lines, thus rendering the Ratification Act section 12 issue redundant.

It is sound economics that access should not be made available where it is economic to duplicate the relevant infrastructure. This is reflected in the test in Part IIIA of the TP Act, which is determined by the Council itself. Of course, the issue of whether it is economic to construct new gas trunk-lines will be determined by the size of the discovery, the price obtained for it, and the distance to processing facilities.

Processing facilities, including skid-mounted facilities, could be located at either the well-head end or the Moomba end of the pipeline, thus determining whether a trunk-line is for sales gas or raw gas. If a new entrant considers it uneconomic to construct a trunk-line to haul gas from its PPL boundary to the start of the Sydney or Adelaide transmission pipelines (to which the National Access Scheme applies), the new entrant could locate processing facilities close to the transmission pipelines and seek Part IIIA TP Act access to the Producers' raw gas trunk-line [3] - if there is one adjacent to the new entrant's PPL.

As the Part 111A recommendation process is in the hands of the Council, if it does not make a section 44G recommendation for the declaration of the Producers' trunklines it is the Council itself that is concluding either: that it would be economic for the applicant to build its own trunkline; or, that the service provided by the Producers' pipeline is not "of national significance". Either reason for refusing a recommendation supports a conclusion that section 12 has no significant economic impact.

6. (1) That a section 51 TP Act exemption be granted to the suite of contracts entered into by the Pipelines Authority of South Australia (now: the Natural Gas Authority of South Australia - "NGASA") when they have been 'disaggregated';

(2) That the Fixed Factor Agreement be exempted if a Third Party Access regime is implemented; and

(3) That no further exemptions should be granted, either to the 1996 gas sales contracts or to future gas sales contracts.

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[3] Potentially, a section 44H TP Act access declaration can be made of a service provided by raw gas pipelines, unless they are defined as a "production process" within the rule relied upon in the *Hamersley* decision. If that is held to be the case then the same facts that would satisfy a *Hamersley* finding would also disable the ACCC, pursuant to section 44W.(a) of the TP Act, from making an access determination - because such a determination would impact on the Producers' reasonably anticipated requirements. A *Hamersley* outcome would be the corollary of a finding that the Producers were relying upon the flow of gas along a pipeline as an essential element of their production schedule (*viz.* 'anticipated requirements').

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SA Government response:

The **D**yki **R**eport itself (page 3**6**) acknowledged that this recommendation was: "closely related to the subject matter of the review but is strictly outside the terms of reference".

However, while the Government does not consider that a response to recommendation **6** is required, it is pleased to inform the Council of its views on these issues.

The Government has always anticipated that the **NGASA** contracts (the 1989 Gas **S**ales Agreements that are presently the subject of an ACCC interim authorisation, and the back-to-back **E**nd User contracts) would be disaggregated - that is, that **NGASA** would be taken out of the contractual chain and the **E**nd Users (Boral and Terra Gas Trader) would have direct contractual relationships with the Producers. However, none of the non-government parties have yet been willing to entertain such an arrangement. If a section 51 exemption facilitates such an outcome, the Government would consider it.

The Government is considering the **NGASA** contracts and related matters as part of its examination of gas market issues related to the lease of its electricity assets.

The fixed **F**actor **A**greement is discussed under **R**ecommendation 1 above.

Finally, the **S**outh Australian Government does not accept that there should be any sectoral 'carve-out' for the gas industry from the general rule applying to TP Act section 51 exemptions. While support is not necessary for this proposition, I note that the UIWG **R**eport stated: "The UIWG notes that it is an **NCP** agreed right that individual **S**tates can introduce legislation that exempts application of the TP Act to certain arrangements, where the benefits to the community are considered to outweigh the costs. The UIWG endorses the importance of jurisdictions providing a transparent assessment of these costs and benefits."

If the Council wishes to discuss any of these matters with the **S**outh Australian Government I am sure that appropriate arrangements can be made. Please do not hesitate to write to me.

Yours sincerely

Rob Kerin
DEPUTY PREMIER
MINISTER FOR PRIMARY INDUSTRIES
MINISTER FOR MINERALS AND ENERGY
MINISTER FOR REGIONAL DEVELOPMENT