

**{SA Office of Energy Policy submission}**

Date:

Mr Luke Berry  
National Competition Council  
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Dear Mr Berry

**EASTERN GAS PIPELINE-(LONGFORD TO SYDNEY) APPLICATION FOR  
COVERAGE UNDER THE NATIONAL GAS ACCESS REGIME**

I refer to NCC's Issues Paper on the above mentioned application for coverage dated January 200

I support the application by AGL for the Coverage of the above mentioned Pipeline, owned by Duke, under the National Third Party Access Code for Natural Gas Pipeline Systems (the National Code). I consider that the matters outlined in section 1.9 of the National Code, of which the NCC is required to be satisfied before it can recommend Coverage, have been satisfied. These matters have been addressed in the AGL application.

It should be noted that the issue of coverage by the National Code must be considered on its own merits, taking into consideration only the matters outlined in section 1.9 of the National Code.

I wish to take this opportunity to express some broader concerns about the likely consequences which would follow if the access undertaking under Part IIIA of the *Trade Practices Act 1974* (Part IIIA) offered by Duke to the ACCC with respect to the same above mentioned pipeline, were accepted. I consider that the regulation of the gas pipeline industry in Australia would become fragmented. Some Pipelines would be subject to the National Code, and others would be subject to undertakings under Part IIIA. Different rules, with potentially different economic and other consequences, would apply to different Pipelines. One of the fundamental policy intentions behind the development of the National Code, was Coverage of the whole industry under a single regulatory regime. This intention would be seriously undermined by the acceptance of such an undertaking.

I am not convinced that there is a firm basis for the view (outlined on page 13 of the Issues Paper) that an undertaking will do as much to promote competition as an Access Arrangement lodged under the National Code, and

is “preferable due to the limitations of the National Code.” I consider that there is sufficient flexibility in the National Code to enable Access Arrangements made under it to consider the individual circumstances of each Pipeline or Pipeline System against a common yardstick. Pipeline owners are represented on the National Gas Pipelines Advisory Committee (NGPAC) which is responsible for recommending changes to the National Code to Ministers. They can readily present proposals for Code changes to this forum.

I refer to the question (on page 4 of the Issues Paper) about the extent to which the elements of the undertaking should be consistent with the Code. This question is, arguably outside the range of matters required to be considered by the NCC under section 1.9 of the National Code, although it is of broader general interest and importance. The conditions and duration of such an undertaking are largely within the discretion of the ACCC. The terms of the undertaking could be very similar, or even virtually identical, to those that would apply under the National Code. However, this is not necessarily so. Such an outcome is only one of a wider range of possibilities under section 44ZZA of the *Trade Practices Act 1974*.

It is my understanding that even if the ACCC were to accept an undertaking, this would not of itself mean that pipeline owner would not be required to comply with the National Code as well. If both an undertaking and the National Code applied to a pipeline, the possibility of inconsistency between them would arise. This situation could give rise to complex litigation.

I am also concerned that if the undertaking under Part IIIA were accepted, further pipeline owners might (depending on the terms of the undertaking) wish to offer similar undertakings. The ACCC could, if it accepted undertakings which were “preferred” by sections of the industry, be perceived to have been “captured” by industry. If, on the other hand, the ACCC accepted only undertakings, the elements of which were identical or nearly identical to those that would apply under the National Code, there would appear to be little reason for doing so.

In summary, I strongly favour coverage of the above mentioned pipeline under the National Code. I am opposed to the opening of possibilities for “forum shopping” which would be established by the acceptance of any undertaking by the ACCC.

Yours sincerely

**Dr C W Fong**  
**EXECUTIVE DIRECTOR**