PETROLEUM AMENDMENT BILL 1995

EXPLANATORY NOTES

GENERAL OUTLINE

OBJECTIVE OF THE LEGISLATION

The principal objective of the Bill is to encourage competition in the petroleum industry by providing for open access arrangements for the transport of petroleum by licensed pipelines and for services provided by associated facilities. This is to be achieved by amending the *Petroleum Act 1923* ("the Act").

The amendments will—

- enable third parties, and, in some instances, existing facility users, to negotiate with the owners or operators of pipelines licensed under the Act (unless prescribed by regulation), the State Gas Pipeline and other prescribed associated facilities for use of spare or developable capacity of the pipeline or facility.
- provide for independent arbitration under the *Commercial Arbitration Act 1990* of disputes about access, for example, if agreement for access to spare capacity cannot be agreed by negotiation between a facility owner (or a person with access entitlements) and a person desiring access.
- set the entitlements and obligations of the parties wishing to participate in provision or use of access to ensure—
    - the facility owner, or person with contracted capacity, provides relevant information on a non-discriminatory basis to third parties to enable fair and reasonable terms and conditions to be negotiated for use of spare capacity;
    - reasonable arrangements for the determining of priority in

negotiations for access to spare or developable capacity of a facility;

- access agreements are in accordance with the relevant indicative tariff schedule, tariff setting principles and basic terms and conditions prepared by the facility owner and approved or decided by the Minister;
- access is, where possible, made available and not hindered.

- define the regulatory arrangements applicable to third party access to the pipelines and other facilities to which these provisions apply.

Another objective is to amend some provisions of the Act so that its provisions are in accord with current drafting practices and principles for legislation.

ESTIMATED COST FOR GOVERNMENT OF IMPLEMENTATION

Licence fees for new pipelines will cover administration costs for those pipelines under these provisions.

However, it is estimated that an allocation from the Consolidated Fund to the Department of Minerals and Energy will be necessary to cover the administration of the provisions of the Bill including the setting of access arrangements and monitoring compliance. It is anticipated that these costs could be approximately $100,000 in 1995-96 and 1996-97 and thereafter $50,000 per annum.

CONSULTATION

Consultation has taken place with a wide cross-section of the petroleum industry including existing and prospective pipeline owners, gas and oil producers, industry associations and consumers of petroleum.

A discussion paper outlining the principles and proposed regulatory arrangements was circulated to industry for comment.

NOTES ON PROVISIONS

Clause 1 gives the Bill a short title.

Clause 2 provides for clauses 6 and 7 to commence on 1 July 1995. Those clauses omit the provisions of the Act about the Pipelines Tribunal. The deferral of the commencement of the clauses enables persons, before 1 July 1995, to bring matters before a Tribunal that may be established by the Governor in Council and to have the matters determined by the Tribunal. The remaining clauses of the Bill will commence on the Bill's assent.

Clause 3 provides for the Act to be amended by the Bill.

Clause 4 amends section 3 of the Act which contains definitions of terms used in the Act by—

- defining terms used in the provisions inserted by the Bill
- omitting existing definitions that are no longer needed or which are redefined in accordance with current drafting practice.

Clause 5 inserts new sections 3A to 3D in the Act.

- New section 3A adopts as the meaning of words used in the Act, the meaning given in the *Mineral Resources Act 1989* to those words.
- New section 3B identifies "non-discriminatory" in relation to a person desiring access to spare or developable capacity of a petroleum pipeline or associated facility (a "facility") so that the person receives substantially the same information as other persons desiring access to the capacity.
- New section 3C identifies a person who gives notice to a facility owner or facility user with spare capacity of the facility to start to negotiate for access to the facility as a "proposed facility use". Also, "proposed facility user" includes an existing facility user who gives notice to the access provider to start negotiations for continuing access to a facility.
- New section 3D defines "spare capacity" of an access provider and ensures that access that is committed or agreed to, has been determined by arbitration, is the subject of an option under an agreement or is required for operational purposes of the facility is

not spare capacity. Also, capacity that an access provider requires for the access provider's own purposes is not spare capacity.

Clause 6 amends a heading in the Act to make it consistent with the Act as amended by the Bill.

Clause 7 omits sections 4B to 4H of the Act.

- Sections 4B to 4G relate to the Pipelines Tribunal whose role will be supplanted by the new access provisions which provide for independent arbitration of disputes about access to facilities.
- Section 4H relates to adjustment of pipeline charges for the Moonie to Brisbane pipeline. These provisions will not be required for charges after 30 June 1994.

Clause 8 omits section 20A of the Act which is a transitional provision. Under recent amendments to the Acts Interpretation Act there is now no need to retain this provision.

Clause 9 amends section 41A of the Act by omitting definitions. Clause 4 inserts appropriate definitions in section 3 of the Act.

Clause 10 makes a minor drafting change to section 42.

Clause 11 restates the existing section 44 to conform to current drafting styles and principles.

Clause 12 replaces section 45 of the Act with new sections 45 to 45AH which conform to current drafting styles and principles.

- New sections 45 to 45AB have substantially the same effect as the existing provisions.
- New section 45AC deals with the grant of pipeline licences and is substantially the same as the current provisions except that it also provides that, for a pipeline to which the new access provisions will apply (a "relevant pipeline"), the licence must not be granted until proposed access principles for the pipeline are approved.
- New section 45AD is a new provision by which an applicant for a licence for a relevant pipeline must submit to the Minister proposed access principles for the pipeline and for approval of the principles. Provision is made that the Minister may require the principles, on approval, to be applied to access agreements made before a licence is granted. As this may not be appropriate for all

applications for licences, provision is made for pipelines to be exempted by regulation. It is an offence not to comply with a requirement with a maximum penalty of 100 penalty units ($6,000).

- New section 45AE states conditions that may be included in pipeline licences. Some of the significant conditions that may be included are—
    - a condition for the taking over, or vesting, of the pipeline's construction, operation or ownership by or in the Minister (as the corporation sole under the Act) in stated circumstances;
    - a condition that the licensee comply with approved access principles for the pipeline;
    - a condition providing for review of the conditions and the access principles for the pipeline on stated events ("review events");
    - a condition requiring the Minister's approval before expanding the capacity of the pipeline beyond its nominal capacity.
- New section 45AF incorporates provisions about the effect of contravention of conditions of licences or refinery permissions under the Act. In particular, if a condition of the licence or permission allows the suspension or cancellation of the licence or permission for a stated contravention, this section authorises the Minister to give a notice requiring the contravention to be remedied and requiring the holder to pay to the State $2,000 per day (or another amount for a period provided for in the licence) until the contravention is remedied. If the contravention is not remedied the Minister may cancel or suspend the licence or permission. Prior notice to approved persons with interests in the licence or permission must be given before the cancellation.
- New section 45AG restates the existing provisions about recovery of amounts payable to the State under the new section 45AF.
- New section 45AH restates existing provisions about assignment and other dealings with refinery permissions, licences and other

interests concerning refineries or pipelines.

Clause 13 amends section 45F of the Act to conform to current drafting styles and principles.

Clause 14 inserts a new Part 6A to the Act about access to facilities. These amendments are the principal changes being made by this Bill.

- New section 61D sets out the objects of the Part relating particularly to the fostering of competition in the petroleum industry and to access to capacity of facilities.
- New section 61E provides that except in stated circumstances (or stated by regulation) Part 6A applies to all relevant pipelines. Relevant pipelines are licensed pipelines and pipelines owned by the Minister as a corporation sole under the Act, unless excluded by regulation. Also, a regulation may only be made excluding the operation of Part 6A to particular licensed pipelines if the Minister has considered stated matters. This is designed to encourage competition and to look at the economic viability of establishment of another facility. Also, as provision is being made in the new section 45AD for approval of access principles for pipelines before the pipeline licence is granted, this section deems them to be facilities to which Part 6A applies on the approval of the principles by the Minister.
- New section 61F provides that a regulation may declare an associated facility to be a facility to which Part 6A applies if the Minister considers the stated matters such as promotion of competition, whether access to the facility is essential for transporting petroleum, can be safely provided and is economically feasible, and whether other facilities could not be economically developed. Also, Part 6A will apply to an associated facility not declared to be a facility if the owner voluntarily complies with Part 6A.
- New section 61G provides that a regulation may exclude from the operation of Part 6A facilities with capacity within or less than a stated range. However, a regulation may provide that Division 5 of Part 6A (Arbitration provisions) apply to access agreements for a capacity within a stated range. Provision is also made to address access agreements in existence on the passing of the Bill or when a facility becomes a facility. Part 6A does not apply to

access agreements in existence when the facility becomes a facility for up to 5 years (or if made before the commencement of this section till 1 January 2002). However if the agreements are amended Part 6A will apply unless the Minister is satisfied the amendment does not affect access and the Minister approves the amendment.

- New section 61H states how joint venturers are to be treated in the application of Part 6A. Usually each party is jointly and severally responsible for compliance with Part 6A.
- New section 61I requires an applicant for a pipeline licence (and allows a prospective associated facility owner) to give proposed tariff setting principles, indicative tariff schedules and indicative access conditions for the facility to the Minister. Failure of an applicant to give the principles is an offence with a maximum penalty of 100 penalty units ($6,000).
- New section 61J provides for access principles for pipelines in existence at the commencement of the section to be approved within 6 months of Part A first applying to the facility or a longer period approved by the Minister. The facility owner must give the Minister proposed access principles for the facility within 3 months of Part A first applying to the facility (or a longer period approved by the Minister). If the facility owner does not submit proposed access principles or submits principles that are unacceptable to the Minister, the Minister may decide the principles. This ensures there is no undue delay in settling the principles. Also failure to give the principles is an offence with a maximum penalty of 100 penalty units ($6,000).
- New section 61K provides for access principles for associated facilities to be approved within 6 months of its declaration as an associated facility. The facility owner must give the Minister proposed access principles for the facility within 3 months of its declaration as an associated facility. If the facility owner does not submit proposed access principles or submits principles that are unacceptable to the Minister, the Minister may decide the principles. This ensures there is no undue delay in settling the principles. Also failure to give the principles is an offence with a maximum penalty of 100 penalty units ($6,000).

- New section 61L provides for the Minister to approve access principles for a facility but only after first considering stated things. These include—
  - the objects of Part 6A (see new section 61D)
  - legitimate business interests of the parties
  - fair and efficient market conduct with respect to tariff arrangements and access conditions
  - matters concerning the physical operation of the facility
  - costs and other economic concerns.

  Also the Minister may require the facility owner to give the Minister information to enable the Minister to properly consider the access principles. Failure to give the principles is an offence with a maximum penalty of 100 penalty units ($6,000). However, the facility owner is not required to give the information if the giving of it may tend to incriminate the facility owner.
- New section 61M provides for review of access principles on the happening of a "review event" which is stated in the conditions of the licence or by regulation. There are provisions similar to new section 61L about the Minister requiring the giving of information for reviews under this section. Owners of facilities where there is an increase in the nominal capacity of the facility cannot be required, without their agreement, by the new access principles to pay all or part of the cost of the increase.
- New section 61N provides that if, on notice in the Government Gazette of access principles for a facility, there is an access agreement which is not consistent with the principles, the parties must amend the agreement to make it consistent with the principles. The Minister may exclude the operation of these provisions for particular access agreements. A party who contravenes this section commits an offence and is liable to a maximum penalty of 500 penalty units ($30,000).
- New section 61O requires facility owners or facility users to ensure that information given to proposed facility users is given on a non-discriminatory basis. A facility owner or facility user who contravenes this section commits an offence and is liable to a

maximum penalty of 100 penalty units ($6,000).

- New section 61P provides that, if asked by a proposed facility user, the facility owner or facility user must give the access principles and other information about current and anticipated future spare and developable capacity within 21 days. This is to encourage fair competition and use of the facility. A facility owner or facility user who contravenes this section commits an offence and is liable to a maximum penalty of 100 penalty units ($6,000).
- New section 61Q requires facility owners and facility users to allow proposed facility users to negotiate for spare or developable capacity of the access provider and to negotiate in good faith for a fair and reasonable access agreement that is consistent with the access principles for the facility. Also a proposed facility user is required to negotiate in good faith.
- New section 61R provides a mechanism by which negotiations for access may be started where the spare capacity is the subject of an option existing at the commencement of the section. If the parties to the option agreement and the proposed facility user cannot reach a satisfactory agreement there is an access dispute and the arbitration provisions apply.
- New section 61S requires that negotiations for spare capacity are not unreasonably affected by later negotiations with another proposed facility user. Also negotiations to continue access to the extent of the existing capacity entitlement in the last year before an existing access agreement ends will take priority if the new access agreement is made at last 2 years before the existing agreement ends.
- New section 61T provides that, on parties agreeing about access and capacity entitlements, the capacity covered by the agreement ceases to be spare capacity (and so there is no right to negotiate for access to it) but, if a written access agreement is not made within 3 months, or a longer period up to 6 months approved by the Minister, the capacity again becomes spare capacity. This is to ensure that a written record of the agreements is kept and that there is certainty of availability of spare capacity.
- New section 61U places an obligation on a facility user to advise

the facility access provider under the agreement information for the safe and reliable operation of the facility and steps are taken to ensure the facility operator has the information. A person who contravenes this section commits an offence and is liable to a maximum penalty of 100 penalty units ($6,000).

- New section 61V requires access providers to honour agreements with facility users and, as far as is practicable, to ensure the facility user complies with the facility owner's requirements for use of the facility. An access provider who contravenes this section commits an offence and is liable to a maximum penalty of 500 penalty units ($30,000). However, an access provider may restrict access in an emergency or for safety reasons.
- New section 61W regulates what access agreements may be made and what they must, and must not, provide. A provision that contravenes certain of the requirements is void. This is in order to preserve entitlements, to bring about access that is fair and reasonable and not inconsistent with the access principles and to ensure the access agreement does not adversely affect the operation of the facility.
    - The agreement must not prejudice existing access rights of other facility users.
    - The agreement must be consistent with the access principles.
    - Unless the Minister otherwise approves, the agreement must allow for renegotiation of the agreement if new access principles or changed pipeline conditions adversely affect the facility user.
    - The agreement must not, without the Minister's approval, restrict or tend to restrict the facility user making access agreements.
    - The agreement must not be for access that is not technically feasible or is likely to adversely affect the safe and reliable operation of the facility.
    - An agreement with a related corporation must not give the corporation an unfair advantage over other facility users.

    The section provides for offences for failure to comply with its provisions with maximum penalties from 100 to 500 penalty

units ($6,000 to $30,000).

- New section 61X requires registers of access agreements for facilities to be kept and for inspection of the registers. Failure to keep a register or to allow inspection of the register is an offence with a maximum penalty of 20 penalty units ($1,200).
- New section 61Y makes provision about development of capacity of facilities to meet the needs of proposed users by providing for approval of an increase in the nominal capacity of facilities. If the facility will not be able to meet the demand of facility users and proposed facility users, the facility owner must ask the Minister to increase the nominal capacity of the facility. An increase in the nominal capacity of a facility is a review event under which access principles for the facility are to be reviewed. New section 61M(8) restricts the Minister's right to require, when approving new access principles, facility owners, without their agreement, to contribute to the costs of developing the increased capacity.
- New section 61Z, with a view to fair competition for transport of petroleum through pipelines and provision of services through associated facilities, places restrictions on the facility owners. These restrictions limit their activities to the services provided by the facility or similar services or investment in such services. Also a facility owner must not trade in petroleum except for operational requirements. The section also imposes strict financial requirements designed to preserve the integrity of the operation from other activities and to ensure confidential information supplied to the facility owner is not given to related corporations of the facility owner. A regulation may be made by the Governor in Council restricting the operation of this section in particular instances. This is likely to be used where existing facilities that are combined operations would be required under the section to separate the activities at some cost. The regulation could allow them to continue to operate as a combined operation subject to conditions in the regulation. The section also provides that contravention of the requirements are offences with maximum penalties of 100 penalty units ($6,000).
- New section 61ZA provides for assignment of interests in access agreements.

- New sections 61ZB to 61ZM relate to arbitration of disputes about access to facilities. Generally the provisions in the *Commercial Arbitration Act 1990* apply to arbitration of these disputes.
    - New section 61ZB states that the provisions about arbitration apply if there is an access dispute.
    - New section 61ZC defines an access dispute—basically a dispute about conditions for access, spare or developable capacity, tariffs, negotiation or renegotiation of access agreements or amendment upon change to access principles. However, refusal by a proposed facility user to accept an agreement consistent with the approved access principles is not an access dispute. It should be noted that section 61R deems certain situations about access to capacity entitlements that are the subject of an option to be access disputes.
    - New section 61ZD authorises the Minister to appoint a panel of persons as approved arbitrators for access disputes.
    - New section 61ZE provides a procedure for appointment of an arbitrator after notice of an access dispute. If the Minister has appointed a panel of persons as approved arbitrators for the facility, the arbitrator must be appointed from the panel.
    - New section 61ZF provides the things the arbitrator must take into account to ensure a fair and reasonable award is made. These include the objects of Part 6A (set out in new section 61D), access principles for the facility, the interests of relevant entities, fair and efficient market conduct for tariff arrangements and access conditions for the facility, operational requirements for the facility, any licence conditions and criteria specified by regulation. Other things stated in subsection (2) may be considered if they are relevant and not inconsistent with the previous matters.
    - New section 61ZG allows for a facility owner who is not a party to an arbitration to be notified, if the arbitrator considers the owner's interests may be adversely affected by the dispute, and for the owner to be able to take part in the arbitration process.

- New section 61ZH provides for the production by the parties, on the direction of the arbitrator, of documents relevant to an arbitration. It is an offence not to comply with the direction with a maximum penalty of 100 penalty units ($6,000) unless there is a reasonable excuse. The fact that production may incriminate the party is a reasonable excuse.
- New section 61ZI allows confidentially to be observed in appropriate cases by the arbitrator imposing conditions limiting access to or disclosure of information or documents. A person who contravenes a condition or uses confidential information (other than in the arbitration) commits an offence and is liable to a maximum penalty of 100 penalty units ($6,000).
- New section 61ZJ allows an arbitrator to end an arbitration if the arbitrator believes on reasonable grounds it is not a genuine access dispute or has been previously decided and there is no material change in the circumstances. The arbitration may also end if the parties agree by written notice to the arbitrator. Provision is also made for the return of documents to the parties on completion of proceedings.
- New section 61ZK provides the arbitrator's power to make awards. The powers and their limitations are intended to ensure that awards are fair and reasonable to the parties while allowing access where there is spare capacity on reasonable terms and conditions consistent with the relevant access principles.
- New section 61ZL provides for the effect of the arbitrator's award. If a proposed facility user does not give notice of acceptance of the award within 28 days (or, with the parties agreement, 3 months) to the other parties, the award is not enforceable. If the award is accepted, the parties must make a written agreement giving effect to the award within 3 months or, with the Minister's approval, 6 months. Failure to make a written agreement is an offence with a maximum penalty of 100 penalty units ($6,000).
- New section 61ZM overrides the *Commercial Arbitration Act 1990* in that it provides that the parties to an arbitration

bear their own cost of the arbitration. That Act still applies to the determination of the arbitrator's costs and who pays them.

- New section 61ZN provides that, in proceedings for offences against Part 6A, an act or omission by, and a state of mind of, a representative of a person for an act or omission by the representative within the representative's actual or apparent authority is an act or omission of the person with the state of mind unless the person took all reasonable steps to prevent the act or omission.

- New section 61ZO provides for financial information about the facility and other information relevant to the administration of Part 6A to be given to the Minister by facility owners. It is an offence not to give the information with a maximum penalty of 100 penalty units ($6,000) unless there is a reasonable excuse. The fact that production may incriminate the party is reasonable excuse. Copies of access agreements are also to be given to the Minister by facility owners and also by facility users who make access agreements giving access to other facility users.

Clause 15 amends section 62B of the Act by inserting the existing penalty that applies to a breach of the section. This conforms to current drafting practice.

Clause 16 amends section 62C of the Act by inserting the existing penalty that applies to a breach of the section. This conforms to current drafting practice.

Clause 17 omits section 67 of the Act which is a transitional provision. Under recent amendments to the Acts Interpretation Act there is now no need to retain this provision.

Clause 18 inserts new sections 68 to 71 in the Act.

- New section 68 provides that section 20A of the Acts Interpretation Act 1954 applies to section 67. The effect is that the existing section does not lose its effectiveness on its repeal by the Bill.

- New section 69 provides transitional provisions allowing a Pipelines Tribunal established by the Governor in Council under section 4B of the Act to continue in existence to complete hearing

any matter before it before the provisions about the Tribunal are repealed by clause 7.

- New section 70 provides that adjustments may be made to pipeline charges for the year ended 31 July 1994 under section 4H of the Act although that section 4H is repealed by clause 7 of the Bill.
- New section 71 has been included at the request of the Parliamentary Counsel and provides that the Act must be renumbered under section 43 of the *Reprints Act 1992* when the Act is next reprinted.

The Schedule to the Bill makes minor amendments to the Act mainly related to current drafting practice.