

JURISDICTION : WESTERN AUSTRALIAN GAS REVIEW BOARD

LOCATION : PERTH

**CORAM : MR CKS MERRIAM, PRESIDING MEMBER
: MR D KIRK-BURNNAND, EXPERT MEMBER
: MR JG KUEHNE, EXPERT MEMBER**

HEARD : 9 NOVEMBER 2000

DELIVERED : 11 DECEMBER 2000

FILE NO/S : APPEALS 1 AND 2 OF 2000

**BETWEEN : ALINTAGAS NETWORKS PTY LTD
Applicant**

AND

**COORDINATOR OF ENERGY
Respondent**

**AND BETWEEN : ALINTAGAS SALES PTY LTD
Applicant**

AND

**COORDINATOR OF ENERGY
Respondent**

Legislation:

Energy Coordination Act 1994 (WA)

Gas Pipelines Access (Western Australia) Act 1998 (WA)

Result:

Decision of Respondent, to impose in gas distribution licences clauses in relation to third party access and technical guidelines, affirmed; decision of Respondent, to impose in gas distribution licences and gas trading licences clause in relation to indemnity, varied.

Representation:*Counsel:*

Applicants : Mr MT McKenna
Respondent : Mr GTW Tannin and Ms CL Bathurst

Solicitors:

Applicants : Hunt & Humphry
Respondent : Crown Solicitor for the State of Western Australia

Case(s) referred to in determination:

Azevedo v. Secretary, Department of Primary Industries and Energy (1992) 106 ALR 683
Drake v. Minister for Immigration and Ethnic Affairs (1979) 24 ALR 577
Perre v Apand Pty Ltd (1999) 73 ALJR 1190
Searle Australia Pty Ltd v. Public Interest Advocacy Centre (1992) 108 ALR 163

Case(s) also cited:

Anthony Lagoon Station Pty Ltd v Moorhouse (1987) 74 ALR 77
Australian Securities Commission v Kavenagh (1993) 11 ACSR 148
BTR and Anor v Westinghouse Brake and Signal Company (Australia) Ltd (1992) 34 FCR 246
Builders Licensing Board v Sperway Constructions (Syd) Pty Ltd (1976) 135 CLR 616
Burswood Management Ltd v Attorney General (Cth) (1990) 23 FCR 144
Cairns Port Authority v Albeitz [1995] Qd R 470
CJ Burland Pty Ltd v Metropolitan Meat Industry Board (1968) 120 CLR 400
Clissold v Perry [1904] 1 CLR 363
Colonial Sugar Refinery Co Ltd v Melbourne Harbour Trust Commissioners [1927] AC 343
Commonwealth v Hazeldell Limited (1918) 25 CLR 552
Dickinson v Motor Insurance Trust (1987) 163 CLR 500
Keeffe v McLean-Carr (1993) Aust Torts Rep 81-224
Kotevski v T & S Simeonov Pty Ltd (1997) 9 ANZ Ins cases 31-367
March v Stramare (1991) 171 CLR 506
Nintendo Co Ltd v Centronics Systems Pty Ltd (1994) 121 ALR 577
Minister for Aboriginal Affairs v Peko-Wallsend (1986) 60 ALJR 560
Minister for Immigration and Ethnic Affairs v Teoh (1995) 69 ALJR 423
NRMA v New South Wales Grain (1995) 22 MVR 317
Springhall v Kirner [1988] VR 159
State Government Insurance Commission v Stevens Bros. Pty Ltd (1984) 154 CLR 552
Transport Accident Commission (Vic) v Hoffman (1988) 11 MVR 193

TABLE OF CONTENTS

ISSUES	4
APPLICATIONS	4
APPLICANTS' CONTENTIONS AND SUBMISSIONS	5
RESPONDENT'S CONTENTIONS AND SUBMISSIONS	9
SOME RELEVANT STATUTORY PROVISIONS	13
CONSIDERATIONS	20
- Nature Of Review	20
- Light-handed Regulation	22
- Third Party Access - Power	24
- Third Party Access - Discretion	33
- Guidelines - Discretion	43
- Indemnity - Discretion	49
- Costs	59
CONCLUSION	61
ORDERS - APPEAL 1 OF 2000	62
ORDERS - APPEAL 2 OF 2000	63

ISSUES

- 1 ALL MEMBERS: The issues in this application are generally as follows:
 - Does the Respondent, and so the Western Australian Gas Review Board ("Board"), have the power to include issues of third party access as a term or condition of a gas distribution licence (as has been done by clause 9)?
 - What are the merits of including the obligation to comply with Office of Energy Guidelines as a condition of the gas distribution licences (as required by clause 14(2))?
 - What are the merits of including the issues of third party access as a term or condition of a gas distribution licence (as addressed by clause 9)?
 - What are the merits of including the indemnity requirements as a term or condition of a gas distribution licence and a gas trading licence (as addressed by clause 22/23 of the gas distribution licences and clause 24 of the gas trading licences)?

- 2 The Board's review requires a determination as to whether the clauses in question:
 - should not be included, or
 - should be included in their current form, or
 - should be included in a different form.

APPLICATIONS

- 3 Two applications, dated 14 July 2000, were received from the Applicants for review of the Respondent's decisions as to a number of the terms and conditions contained in three gas trading licences and three gas distribution licences issued to them on 1 July 2000.

APPLICANTS' CONTENTIONS AND SUBMISSIONS

The Applicants' contentions and submissions in support of the application include:

4 General

- Review is required of clauses 9, 14(2) and 23 of Gas Distribution Licences GDL1 and GDL3, clauses 9, 14(2) and 22 of Gas Distribution Licence GDL2 and clause 24 of Gas Trading Licenses GTL1, GTL2 and GTL3.
- The review to be undertaken is generally a reconsideration of the decision of the Respondent under section 11ZH(9) of the Energy Coordination Act 1994 (WA) ("ECA").
- The licence conditions in question ought not to have been imposed or ought not to have been imposed in the terms used.
- The Applicants request that the Board vary the Respondent's decision by the following action:
 - Delete or modify clause 9 of GDL1, GDL2 and GDL3, (clause 9 relates to third party access to the Applicants' distribution network capacity).
 - Delete or modify clause 22/23 of GDL1, GDL2 and GDL3 and clause 24 of GTL1, GTL2 and GTL3, (clauses 22/23 and 24 relate to the Applicants indemnifying the State for various actions).
 - Delete or modify clause 14(2) of GDL1, GDL2 and GDL3, (clause 14(2) relates to an obligation to comply with guidelines).
- The Minister intended that regulation under the ECA should be "light handed" and none of the clauses in question are necessary for operation of the licences so imposing them is not "light handed".
- The granting of other licences on the same terms does not affect the power of the Board to review the merits of incorporating such terms in a licence.

5 **Third party access - power**

- Such power is expressly not authorised as a condition under section 11M(5)(a) of the ECA; and/or
- The exercise of such power is inconsistent in its terms with the operation of the National Third Party Access Code for Natural Gas Pipelines (“NAC”) and therefore was expressly not authorised as a condition under section 11M(5)(a) of the ECA.
- Section 11M and Schedule 1(i), (ia) and (ib) of the ECA do not require third party access to the distribution network.
- It is manifestly beyond the power of the Coordinator (and the Board) to impose a clause dealing with third party access in a distribution licence.

6 **Third party access - discretion**

- Clause 9 amounts to, in intention and in effect, a third party access regime.
- Imposing a condition that applies to the same subject matter as is dealt with under the NAC is unnecessary and not in the public interest, or
- There is no significant public benefit in imposing third party access for pipelines not covered under the NAC, and/or
- It is not in the public interest for a pipeline owner and operator:
 - to be obliged to provide such access where only trivial public benefit would result; and/or
 - to be potentially subject to two or more different regimes governing third party access; and/or
- The Gas Pipelines Access (Western Australia) Act 1998 (WA) (“GPA(WA)A”) and the NAC provide exclusive cover for third party access to gas distribution pipelines by way of the pipelines being “covered” or not

“covered”, hence any attempt to provide access through licence conditions is inconsistent with the NAC.

- If a third party access clause can be imposed, then the terms of the clause should be modified to be more consistent with the NAC.
- The dispute resolution tests set out in clause 9 are materially different to those set out in the NAC. Under the NAC the tests must be satisfied. Under clause 9 the tests must merely be taken into account.
- If the clause is not necessary or of trivial public benefit then the Minister’s intention for light-handed regulation would require that the clause not be imposed or not be imposed in its present form.
- Imposition of a third party access regime involves an expropriation of the Applicants’ private property rights, which the ECA does not clearly and unambiguously authorise.
- The Respondent’s assumption that the process suggested in clause 9 would take less time than the process under the NAC is not valid.
- Applications for third party access to the distribution network can be expected from holders of trading licences not from individual small use customers.
- The administrative costs to the Applicants of administering small use third party access arrangements would make the service not viable and/or would result in higher network tariffs, which would not be in the public interest.

7 **Guidelines - discretion**

- The Guidelines were developed to provide only technical guidelines in respect of engineering issues and it was intended that they would not deal with matters such as contractual issues.

- Policy, commercial, regulatory or legal aspects were excluded from the Guidelines and were to be the subject of an additional working group.
- The Guidelines are confusing as to whether they impose an obligation to follow what is set out or an obligation to take them into account.
- They could affect or be inconsistent with existing commercial, contractual and regulatory arrangements.
- They are stated to be guidelines and not rules.
- They have no wide industry recognition and status.

8 **Indemnity - discretion**

- An indemnity is not necessary and therefore should not have been included as a licence condition.
- The indemnity is unreasonably onerous and is contrary to the public interest.
- The Respondent failed to properly take into account the following considerations:
 - “Servants, agents and contractors” of the State ought not to be the subject of the indemnity.
 - The indemnity ought to be limited to losses caused by the licensee’s actions.
 - The indemnity should not apply to liability for actions by “the State”.
 - The indemnity should not create liability for consequential or economic losses of the State or others without some monetary cap on that liability.
- The Respondent was in error in asserting that the indemnity terms of another licence referred to provided a similarly broad liability.

- The Respondent was in error in suggesting that such indemnity was typical in comparable licenses and that, in fact, it seems most common for licence terms not to include an indemnity.
- For the trading licences indemnity ought to be restricted to contractual damages negating the need for the indemnity clause imposed.
- Rather than ensure that the Applicants use best practices in their own works in order to ensure the security of gas supply, the indemnity punishes the Applicants for the negligence of officers and agents of the State.

9 **Costs**

- Costs for the initial hearing on 19 September 2000 should be in the cause, whereby the loser in the substantive proceedings pays.
- The Respondent should pay the Applicants' costs of the proceedings of 6 October 2000 with a certificate for senior counsel.
- Costs of the parties of the substantive proceedings should follow the event, whereby the loser pays.
- If the findings are split and costs apportioned accordingly, then 80% of the costs should be allocated to the third party access issue and 10% each to the indemnity and guidelines issues.
- The appropriate scale for award of costs is the Supreme Court scale.
- The Board's costs should also follow the event.

RESPONDENT'S CONTENTIONS AND SUBMISSIONS

The Respondent's contentions and submissions in response to the applications include:

10 **General**

- The imposition of the licence conditions in question, in their current form, was and is necessary on the grounds of public interest and public policy.
- The ECA does not refer to “light handed” regulation and there is no such principle of statutory construction.
- The appropriate determinant of what should be the extent of the Respondent’s power is the Parliament. It is not open to the Board to find otherwise.
- The Minister has stated that Government should regulate where there is clearly a need for such regulation. The Respondent has determined that a dispute resolution provision for third party access is necessary to facilitate supply to small use customers.
- The Applicants have failed to take into account any interests other than their own.
- The grant of other licences with identical provisions, which are not the subject of an application for review, is evidence that the Applicants’ claims for review are misconceived.
- The Respondent (and the Board) is required to maintain consistency between licences covering facilities with the same classification within the same supply area.

11 **Third party access - power**

- The ECA provides the Respondent with both implicit and explicit powers to impose a condition relating to third party access. These powers are unlimited and consistent with the legislation.

- The ECA specifically authorises the inclusion of clauses which would effectively require the holder of a gas distribution licence to grant a third party access to the distribution network.
- The ECA, in Schedule 1, clearly authorises the expropriation of private property rights by licence conditions.

12 **Third party access - discretion**

- The GPA(WA)A and the NAC do not provide exclusive cover for third party access to gas distribution pipelines.
- Imposition of the clauses is in the public interest.
- The clause has been drafted generally consistently with the dispute resolution provisions of the NAC.
- The licence clause does not conflict with the GPA(WA)A or the NAC, as it is only applicable if the pipeline system is not “covered” and the NAC provisions only come into force if the system is “covered”.
- Some pipelines in Western Australia are already subject to more than one access regime.
- Clause 9 is not a standing obligation for third party access; it is a dispute resolution mechanism for “non-covered” pipelines, should the parties be unable to agree on access to the service. It first requires the Respondent to determine if arbitration is appropriate and then the Arbitrator to determine if the service should be provided on a case-by-case basis.
- There is a real need for the Respondent to impose a fast and cost effective alternative to an access arrangement for “non-covered” systems the subject of a distribution licence, which supply gas to small customers.

- It is essential that a mechanism exists which can review the reasonableness of a distribution licensee not being willing to grant third party access for the supply of a particular small use customer.
- The Respondent, under a licence, has an obligation to ensure that the interests of these small use customers are protected.
- The Applicants gave a specific undertaking, in their bid to reticulate gas to the Kalgoorlie-Boulder region, to implement third party access arrangements. There are restrictions that prevent other operators laying pipelines in that region for the first ten years. The licence condition will help to ensure that third parties can gain access to the distribution network and is clearly in the public interest.

13 **Guidelines - discretion**

- The Guidelines were jointly developed with the explicit recognition that they would be the subject of a licence condition.
- The clause states that the licensee, where “reasonably practical”, undertake the activities within the Guidelines.

14 **Indemnity - discretion**

- One of the pre-conditions of Government withdrawing from direct involvement in the Western Australian gas market and enabling new participants to enter is that the State and its agents be indemnified by a licensee.
- The NSW gas licence indemnity provision was simply cited as an example of the inclusion of an indemnity clause within a gas licence.
- The holder of a Trading Licence has powers to undertake activities beyond the sale of gas and in fields where such an indemnity would be appropriate.

- The presence of the very broad indemnity clause is necessary to ensure that the Applicants will use the very best practices in their work and so ensure the highest possible security of supply of the gas resource.

15 **Costs**

- There is a public interest in having the Respondent appear before the Board represented by counsel of suitable seniority.
- A rigid loser pays approach would adversely impact on the effectiveness of judicial review hearings.
- It would be fairest if the parties bore their own costs, regardless of the result.
- An order for payment of the Board's costs against the parties would act to discourage the parties' counsel from assisting the Board in its determination.

16 **SOME RELEVANT STATUTORY PROVISIONS**

Sections 11D, 11G, 11H(3), 11J, 11K, 11M, 11V, 11ZH and Schedule 1 of the ECA provide:

11D

"(1) Licences are classified as follows-

(a) distribution, which authorises the licensee-

(i) to construct a distribution system and to transport gas through the system; or

(ii) to transport gas through an existing distribution system, and if required for that purpose to make alterations to the system,

and to operate and maintain the system; or

(b) trading, which authorises the licensee to sell to small use customers gas transported through a distribution system.

- (2) *A licence is to be designated by reference to one of the classifications referred to in subsection (1)".*

11G

"(1) *A person must not in a supply area or part of a supply area-*

- (a) *construct, alter or operate a distribution system; or*
- (b) *transport gas through a distribution system,*

except under the authority of a distribution licence granted by the Coordinator that applies to that area or that part of that area.

Penalty: \$100,000 and a daily penalty of \$5,000.

- (2) *A person must not in a supply area or part of a supply area sell to small use customers gas transported through a distribution system except under the authority of a trading licence granted by the Coordinator that applies to that area or that part of that area.*

Penalty: \$100,000 and a daily penalty of \$5,000."

11H

"(3) *The Governor, in determining whether the making of the order would not be contrary to the public interest, may take into account one or more of the following matters-*

- (a) *environmental considerations;*
- (b) *social welfare and equity considerations, including community service obligations;*
- (c) *economic and regional development, including employment and investment growth;*
- (d) *the interests of gas customers generally or of a class of gas customers;*
- (e) *the interests of any licensee, or applicant for a licence, in respect of the supply area or part of a supply area to which the order, if made, would apply;*
- (f) *the importance of competition in gas industry markets;*
- (g) *any other matter that he or she considers relevant."*

11J

"This Division and Division 8 have effect subject to sections 90 and 92 of the Gas Pipelines Access (Western Australia) Act 1998."

11K

- "(1) *The Coordinator must not exercise a power conferred by this Division unless he or she is satisfied that it would not be contrary to the public interest to do so.*
- (2) *The Coordinator, in determining whether the exercise of the power would not be contrary to the public interest, may take into account one or more of the matters referred to in section 11H(3)."*

11M

- "(1) *A licence is subject to such terms and conditions as are determined by the Coordinator.*
- (2) *Without limiting subsection (1), the terms and conditions may include provisions relating to any matter provided for by Schedule 1.*
- (3) *[(3) repealed]*
- (4) *Subject to subsection (3), the terms and conditions of a licence must be substantially similar to the terms and conditions of any other licence with the same classification under section 11D(1) that applies in the same area or part of a supply area.*
- (5) *The terms and conditions of a licence must not be inconsistent with-*
- (a) *the Gas Pipelines Access (Western Australia) Law; or*
- (b) *regulations made under section 15 of the Gas Standards Act 1972."*

11V

- "(1) *The grant, renewal or transfer of a licence does not affect the licensee's obligations to comply with any other written law in relation to the matters covered by the licence.*
- (2) *Without limiting subsection (1) or sections 90 and 92 of the Gas Pipelines Access (Western Australia) Act 1998, a licence has effect subject to the Gas Pipelines Access (Western Australia) Law."*

11ZH

- "(1) *In this section-*

“Board” means the Western Australian Gas Review Board established by the Gas Pipelines Access (Western Australia) Act 1998.

- (2) *A person adversely affected by a decision of the Coordinator-*

...

(d) *as to any term or condition of a licence;*

...

may apply to the Board for a review of the decision within 14 days after receiving notice in writing of the decision from the Coordinator.

- (3) *The Board must make its determination on the review within 90 days after receiving the application for review.*
- (4) *The Board may extend, or further extend, the period referred to in subsection (3) by a period of 30 days if it considers that the matter cannot be dealt with properly without the extension either because of its complexity or because of other special circumstances.*
- (5) *If the Board extends the period, it must, before the end of the period, notify the applicant of the extension and the reasons for it.*
- (6) *An application under this section does not operate to stay the decision unless the Board otherwise determines.*
- (7) *On the application of a party to proceedings under this section, the Board may conduct the proceedings in the absence of the public.*
- (8) *The Board may require the Coordinator to give information and other assistance, and to make reports, as specified by the Board.*
- (9) *In proceedings under this section, the Board may make an order affirming, or setting aside or varying immediately or as from a specified future date, the decision under review and, for the purposes of the review, may exercise the same powers with respect to the subject matter of the decision as may be exercised with respect to that subject matter by the Coordinator.*
- (10) *The Board may make such orders (if any) as to costs in respect of a proceeding as it thinks fit.*
- (11) *The Board may refuse to review a decision if it considers that the application for review is trivial or vexatious.*
- (12) *A determination by the Board on the review of a decision has the same effect as if it were made by the Coordinator.*
- (13) *A reference in Part 6, Division 2 of the Gas Pipelines Access (Western Australia) Act 1998 to proceedings before the Board includes a reference to proceedings under this section."*

Schedule 1

"A licence may include provisions-

- (a) *requiring the licensee to enter into agreements on specified terms or on terms of a specified type, other than agreements relating to the provisions*

of access to gas distribution capacity that are covered by the Gas Pipelines Access (Western Australia) Law;

(b) requiring the licensee to observe specified industry codes with such modifications or exemptions as may be determined by the Coordinator;

(c) requiring the licensee to maintain specified accounting records and to prepare accounts according to specified principles;

...

(f) specifying methods or standards to be applied in supplying gas under the authority of the licence;

...

(i) regulating the construction, alteration, operation or maintenance of a distribution system;

(ia) if the licence is a distribution licence, requiring the licensee to undertake an extension of, or an expansion to, the distribution system located within an area specified in the licence;

(ib) if the licence is a trading licence, requiring the licensee to ensure the supply of gas to existing or new customers who require it, in such circumstances as may be specified in the licence whether by reference to a class of gas customer, the amount of gas to be supplied to the customer or customers of a class, where the gas is to be consumed, or any other factor;

(ic) if the licence is a trading licence, regulating the extent to which the licensee's gas customers may be of a particular class;

...

(j) relating to the performance of functions by the licensee including-

(i) the range of functions that may be performed by the licensee;

(ii) performance criteria to be met by the licensee; and

(iii) community service obligations, that is obligations that are not commercially justified, to be discharged by the licensee;

...

(n) relating to the disposal or transfer of property, rights or liabilities of a specified kind either during the term of the licence or on or after its expiration by effluxion of time including provisions-

(i) prohibiting any disposal or transfer of property except with the approval of a specified person;

- (ii) *prohibiting the giving of any encumbrance over specified property except with the approval of the Coordinator;*
- (iii) *requiring the transfer of property, rights or liabilities of a specified kind to a specified person on or within a specified time after the expiration of the licence;*
- (iv) *with respect to the consideration to be provided in respect of any disposal or transfer;*
- (v) *with respect to the arbitration of disputes that arise in connection with any disposal or transfer; and*
- (vi) *of a supplementary, consequential or transitional nature in relation to any disposal or transfer."*

17 Sections 57, 58, 59 and 87 of the GPA(WA)A provide:

57

- "(1) *Subject to the Gas Pipelines Access (Western Australia) Law and any determination of the Board, proceedings before the Board are to be conducted by way of a fresh hearing and for that purpose the Board may receive evidence given orally or, if the Board determines, by affidavit.*
- (2) *The Board-*
 - (a) *is not bound by the rules of evidence and may inform itself as it thinks fit; and*
 - (b) *must act according to equity, good conscience and the substantial merits of the case and without regard to technicalities and forms.*
- (3) *Questions of law or procedure arising before the Board are to be determined by the presiding member and other questions by unanimous or majority decision of the members."*

58

- "(1) *The Board may, for the purposes of proceedings before the Board-*
 - (a) *by summons signed on behalf of the Board by a member of the Board require the attendance of a person before the Board;*
 - (b) *by summons signed on behalf of the Board by a member of the Board require the production before the Board of any relevant books, papers or documents;*
 - (c) *inspect any books, papers or documents produced before it and retain them for such reasonable period as it thinks fit and make copies of any of them or any of their contents;*

- (d) *require any person to make an oath or affirmation to answer truly all questions put by a member of the Board, or by a person appearing before the Board relating to a matter before the Board; or*
 - (e) *require any person appearing before the Board to answer any relevant questions put by a member of the Board or by a person appearing before the Board.*
- ...”

59

"(1) The Board may-

- (a) sit at any time or place;*
 - (b) adjourn proceedings from time to time and from place to place;*
 - (c) refer a matter to an expert for report and accept the expert's report in evidence.*
- (2) The Board must give the parties to proceedings reasonable notice of the time and place of the proceedings.*
- (3) A party is entitled to appear before the Board personally or by counsel or other representative.*
- (4) Subject to the Gas Pipelines Access (Western Australia) Law, a party must be allowed a reasonable opportunity to call or give evidence, to examine or cross-examine witnesses and to make submissions to the Board.*
- (5) The Board may make a determination in any proceedings in the absence of a party to the proceedings if satisfied that the party was given reasonable opportunity to appear but failed to do so.*
- (6) At the conclusion of proceedings, the Board must give to each party a written statement of the reasons for its decision."*

87

- "(1) Without limiting section 86, regulations made under that section may make provision for and in relation to the imposition and payment of fees and charges in connection with any matter under this Act, including in connection with the performance of the respective functions of the Regulator, the arbitrator and the Board under this Part.*
- (2) If it is inappropriate to prescribe a set fee or charge in connection with the performance of a particular function the regulations may provide for the*

method of calculating the fee or charge, including calculation according to the cost of performing that function.

- (3) *Without limiting subsection (1) and (2) the regulations may-*
- (a) *authorise the Board established by section 50 to fix, and determine the incidence of liability for, the cost and expenses of the hearing and determination of proceedings before the Board; and*
 - (b) *make any incidental or supplementary provision that is expedient for the purposes of paragraph (a).*
- (4) *The application of subsection (3) extends to the cost and expenses of proceedings that are commenced but discontinued or otherwise not brought to finality."*

18 Regulation 9 of the Gas Pipelines Access (Western Australia) (Funding) Regulations 1999 (WA) provides:

9

"(1) In this regulation-

“proceedings” includes proceedings that are commenced but discontinued or otherwise not brought to finality.

- (2) *The Board may fix an amount that represents the cost and expenses incurred by the Board in connection with the hearing and determination of particular proceedings before it.*
- (3) *The Board may determine-*
- (a) *which of the parties to the proceedings is liable for payment of the whole or any part of an amount fixed under subregulation (2); and*
 - (b) *the manner in which, and time within which, payment is to be made."*

CONSIDERATIONS

NATURE OF REVIEW

19 THE PRESIDING MEMBER: A person affected by a decision of the Coordinator as to any term or condition of a licence may apply to the Board for a review of the decision (s.11ZH(2)(d) ECA). The Board may make an order affirming, or setting aside or varying, the decision under review (s.11ZH(9) ECA). The Board may

exercise the same powers with respect to the subject matter of the decision as the Coordinator (s.11ZH(9) ECA). A determination by the Board on the review of a decision has the same effect as if it were made by the Coordinator (s.11ZH(12) ECA).

- 20 Proceedings before the Board are to be conducted by way of a fresh hearing (s.57(1) GPA(WA)A). The Board may receive evidence orally or by affidavit (s.57(1) GPA(WA)A). The Board is not bound by the rules of evidence and may inform itself as it thinks fit (s.57(2)(a) GPA(WA)A). The Board must act according to equity, good conscience and the substantial merits of the case and without regard to technicalities and forms (s.57(2)(b) GPA(WA)A). Questions of law or procedure are to be determined by the presiding member and other questions by unanimous or majority decision of the members (s.57(3) GPA(WA)A).
- 21 The Board may inspect any books, papers or documents produced before it (s. 58 (1)(c) GPA(WA)A). The Board may require any person to answer any relevant questions, including on oath or by affirmation (s. 58(1)(d) and (e) GPA(WA)A). A party must be allowed a reasonable opportunity to call or give evidence, to examine or cross-examine witnesses and to make submissions to the Board (s. 59(4) GPA(WA)A).
- 22 The Board is required to reach a view for itself as to the terms or conditions of the licences the subject of the review (*Drake v. Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577 at 589; 599; *Searle Australia Pty Ltd v. Public Interest Advocacy Centre* (1992) 108 ALR 163 at 166).

- 23 The Board is to determine what is the correct or preferable decision on the material before it (*Drake v. Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577 at 589; *Azevedo v. Secretary, Department of Primary Industries and Energy* (1992) 106 ALR 683 at 696).

LIGHT-HANDED REGULATION

- 24 The Applicants submit that the approach of the Respondent and of the Board in relation to each of the clauses under review should be "light-handed regulation". The Applicants submit that under this approach the Respondent, and the Board, should regulate only where necessary: the Respondent, and the Board, should first consider whether there is a need to impose the clause, and if there is no need it should not be imposed.

- 25 The Applicants refer to a letter of 7 March 2000 from the Minister for Energy to the Respondent, which states on page 1 in paragraph 3:

"As a general policy, the Government should regulate only when it can be clearly shown that there is a need for regulation ..."

- 26 The Applicants also refer to Hansard 1 May 1997 at page 2116 (Legislative Assembly: Energy Coordination Amendment Bill, Second Reading), where the Minister for Works, on behalf of the Minister for Energy, stated:

"Schedule 1 of the Bill outlines licence terms and conditions that may be included in the granting of a licence. An example is the requirement for a licensee to observe open access principles and to specify its pricing methodology and principles.

The Office of Energy, which will administer the new provisions, will provide a light-handed regulatory oversight with the threat of intervention if the need arises. Prices charged and economic evaluation of the success of licensees will be monitored by the Office of Energy."

27 There is a further reference to "light-handed regulation" in Hansard 15 June 1999 at p.8934 (Legislative Assembly: Energy Coordination Amendment Bill, consideration of Legislative Council's amendments), where the Minister for Energy stated:

"The legislation is now consistent with the general licensing arrangements that operate in other States. However, the legislation is probably less prescriptive in nature and in that sense is a more light-handed form of regulation."

28 The Respondent opposes the approach of "light-handed regulation" on the basis that there is no authority for it, and that it is inconsistent with the public interest requirement in respect of the imposition of conditions.

29 The Coordinator, and the Board, are required to apply the legislation as enacted. The ECA does not refer to "light-handed regulation" either by that name or otherwise. "Light-handed regulation" is not a general principle of statutory interpretation.

30 The Minister's letter does not fall within one of the categories in s.19(2) of the Interpretation Act 1984, although these categories do not limit the generality of s.19(1). The Hansard extracts fall within s.19(2)(f) and s.19(2)(h) respectively. As stated by the Applicants, the Minister's letter was dealing with a specific issue not the subject of the present review, and the Hansard extract of 1 May 1997 was dealing with amendments at that time to the ECA by the Energy Coordination Amendment Bill, which bill was subject to further amendment before being passed (it was assented to on 24 June 1999). The ECA was further amended by the Gas Corporation (Business Disposal) Act 1999 (WA) (assented to on 24 December 1999). It would therefore be unsafe to seek assistance in the construction of the ECA, under s.19(1) of the Interpretation Act 1984 (WA), from the Minister's letter

or from the earlier Hansard extract, as urged by the Applicants, even if there were appropriate circumstances under s.19(1)(a) or s.19(1)(b). The second Hansard extract appears to be a comment about the ECA itself, rather than about the approach to be taken in regulation under the ECA, and it does not set out what the Minister meant by "a more light-handed form of regulation". Accordingly, it would not be appropriate to seek assistance from it under s.19(1) even if appropriate circumstances existed under s.19(1)(a) or s.(19)(1)(b).

THIRD PARTY ACCESS - POWER

31 Clause 9 of each of Gas Distribution Licences GDL1, GDL2 and GDL3, is in the following terms:

- “(1) This clause applies where a person ("**applicant**") applies to the licensee seeking third party access to a service (as defined in the National Access Code) ("**service**") provided using those parts of the licensed distribution system that are not part of a covered pipeline ("**non-covered pipeline**").*
- (2) If the applicant and the licensee are unable to agree on one or more aspects of access to the service, the applicant or the licensee may notify the Coordinator in writing ("**referral**") that a dispute ("**access dispute**") exists.*
- (3) On receiving a referral under subclause (2), the Coordinator must decide that:*
 - (a) the dispute should be arbitrated under this clause; or*
 - (b) the dispute should not be arbitrated under this clause.*
- (4) The Coordinator must decide under subclause (3)(a) that the dispute should be arbitrated under this clause, where he or she is reasonably satisfied that:*
 - (a) the referral under subclause (2) is neither vexatious, trivial, misconceived, lacking in substance, unreasonable nor made not in good faith; and*
 - (b) there is good reason, taking into account each of the matters referred to in section 1.9(a) to (d) of the National Access Code, for his or her intervention in the access dispute; and*
 - (c) the licensee has not made an offer of terms (which includes tariffs and a tariff path) to the applicant which is reasonable taking into*

account the factors listed in section 6.15 of the National Access Code; and

(d) the licensee and the applicant have been endeavouring in good faith to negotiate the terms for third party access to a non-covered pipeline but have been unable, and are unlikely to agree on mutually acceptable terms for access.

(5) If the Coordinator decides under subclause (3)(a) that the dispute should be arbitrated under this clause, then:

(a) the arbitration is to be heard by:

*(i) if regulations have been made under section 74(2)(a) of the Gas Pipelines Access (Western Australia) Act 1998 granting jurisdiction to the Western Australian Gas Disputes Arbitrator ("**Gas Disputes Arbitrator**") in respect of disputes which include an access dispute - the Gas Disputes Arbitrator;*

*(ii) otherwise - the person who from time to time occupies the office of the Western Australian Gas Disputes Arbitrator or his or her nominee ("**other arbitrator**")*

(b) if the dispute is being arbitrated:

(i) under subparagraph (a)(i), then the arbitration must be conducted under the regulations referred to in that subparagraph;

(ii) under subparagraph (a)(ii), then:

A. subject to this clause, the arbitration must be conducted as though it was an arbitration submitted under the Commercial Arbitration Act 1985 and under the Institute of Arbitrators and Mediators Australia Rules for the Conduct of Commercial Arbitrations; and

B. the other arbitrator must make a decision on access by the applicant to a service; and

C. this clause 9 is an arbitration agreement between the applicant and the licensee; and

D. the following sections of the National Access Code, read with appropriate modifications, apply to the arbitration:

i. sections 6.8 to 6.12;

ii. sections 6.15 to 6.17;

iii. section 6.18(b) and (c);

- iv. *sections 6.20 to 6.22 but disregarding the words in parentheses in section 6.22(e);*
- v. *section 6.23 (c);*
- vi. *section 6.24;*
- vii. *section 6.26; and*
- viii. *section 6.27;*

and

(c) *where sections in the National Access Code are stated by this clause to be read with appropriate modifications, then without limiting that statement a reference in the National Access Code to:*

- (i) *"Service Provider" is a reference to the licensee;*
- (ii) *"Prospective User" is a reference to the applicant; and*
- (iii) *"Arbitrator" is a reference to the Gas Disputes Arbitrator or other arbitrator as applicable."*

32 A licence is subject to such terms and conditions as are determined by the Coordinator (s.11M(1) ECA).

33 Without limiting s.11M(1), the terms and conditions may include provisions relating to any matter provided for by Schedule 1 (s.11M(2) ECA).

34 A licence may include provisions:

- requiring the licensee to enter into agreements on specified terms or on terms of specified type, other than agreements relating to the provision of access to gas distribution capacity that are covered by the Gas Pipelines Access (Western Australia) Law ("GPA(WA)Law")(ECA Schedule 1 paragraph (a));
- regulating the construction, alteration, operation or maintenance of a distribution system (ECA Schedule 1 paragraph (i));

- if the licence is a distribution licence, requiring the licensee to undertake an extension of, or an expansion to, the distribution system located within an area specified in the licence (ECA Schedule 1 paragraph (ia));
- relating to the performance of functions by the licensee including community service obligations, that is obligations that are not commercially justified, to be discharged by the licensee (ECA Schedule 1 paragraph (j)(iii));
- relating to the disposal or transfer of property, rights or liabilities of a specified kind, either during the term of the license or on or after its expiration by effluxion of time including provisions:
 - with respect to the consideration to be provided in respect of any disposal or transfer;
 - with respect to the arbitration of disputes that arise in connection with any disposal or transfer (ECA Schedule 1 paragraph (n)(iv) and (v)).

35 The terms and conditions of a licence must be substantially similar to the terms and conditions of any other licence with the same classification under section 11D(1) that applies in the same supply area or part of a supply area (s.11M(4) ECA).

36 The terms and conditions of a licence must not be inconsistent with the GPA(WA) Law or regulations made under section 15 of the Gas Standards Act 1972 (WA) (s.11M(5) ECA).

37 The Coordinator must not exercise a power conferred by Part 2A Division 4 of the ECA unless satisfied that it would not be contrary to the public interest to do so (s.11K(1) ECA).

- 38 The Coordinator, in determining whether the exercise of the power would not be contrary to the public interest, may take into account one or more of the following matters:
- (a) environmental considerations;
 - (b) social welfare and equity considerations, including community service obligations;
 - (c) economic and regional development including employment and investment growth;
 - (d) the interests of gas customers generally or of a class of gas customers;
 - (e) the interests of any licensee, or applicant for a licence, in respect of the supply area or part of a supply area;
 - (f) the importance of competition in gas industry markets;
 - (g) any other matter which the Coordinator considers relevant (s.11K(2) ECA) and s.11H(3) ECA).
- 39 The grant, renewal or transfer of a licence does not affect the licensee's obligations to comply with any other written law in relation to the matters covered by the licence (s.11V(1) ECA).
- 40 Without limiting s.11V(1) or 90 and 92 of the GPA(WA)A, a licence has effect subject to the GPA(WA)Law (s.11V(2) ECA).
- 41 The power to impose terms and conditions under s.11M(1) ECA is wide, and includes, but is not limited to, the matters provided for by Schedule 1 to the ECA.
- 42 There are certain limits to the power to impose terms and conditions, namely, substantial similarity with other licenses, non-inconsistency with the

GPA(WA)Law, the public interest, and a licence having effect subject to the GPA(WA)Law (s.11M(4) and (5), 11K and 11V ECA). These issues will be considered later.

43 For purposes of paragraph (a) of Schedule 1 to the ECA, clause 9 is a provision requiring the licensee to enter into agreements of specified terms or on terms of specified type.

44 Paragraph (a) specifically excludes agreements relating to the provision of access to gas distribution capacity that are covered by the GPA(WA)Law. "Covered", in relation to a pipeline or part of a pipeline, and "Covered Pipeline" are defined terms in the GPA(WA)Law (s.10.8 of Schedule 2 to the GPA(WA)A). However, "agreements covered by the GPA(WA)Law", as used in paragraph (a), is not a defined term in the ECA or the GPA(WA)A. The Applicants submit that such agreements are "covered" by the GPA(WA)Law, whether or not the pipeline is a "Covered Pipeline", on the basis that the GPA(WA)Law exists and applies generally (in the Applicants' words "covers the field"), whether or not the pipeline is "Covered" or a "Covered Pipeline". This submission is to be rejected. Agreements relating to the provision of access to gas distribution capacity can only be "covered" by the GPA(WA)Law when a gas distribution pipeline is or becomes "Covered" or a "Covered Pipeline". Accordingly, the exception to paragraph (a) does not exclude clause 9 from falling within paragraph (a).

45 Clause 9 also falls within paragraphs (i) and (ia) of Schedule 1 to the ECA, which are set out previously.

- 46 It is also reasonable to consider clause 9 as falling within paragraph (j)(iii) of Schedule 1 to the ECA in respect of community service obligations that are not commercially justified.
- 47 The Applicants submit that clause 9 potentially abrogates the Applicants' private property rights and that the ECA does not clearly and unambiguously authorise interference with the propriety rights held by the owners of pipelines that fall within the scope of the ECA. This submission is to be rejected on the basis of the specific powers in the ECA, as discussed above, and also in particular paragraph (n), including subparagraphs (iv) and (v), of Schedule 1 to the ECA.
- 48 It is now appropriate to deal with each of the limitations, mentioned above, to the power to impose terms and conditions.
- 49 As to the requirement that the terms and conditions of a licence must be substantially similar to the terms and conditions of any other licence with the same classification that applies in the same supply area or part of the supply area (s.11M(4) ECA), the Respondent refers to the grant on 31 August 2000 of two gas distribution licences at Leinster and Margaret River (GDL4 and GDL5) to Westfarmers Kleenheat, each of which contains a clause identical to clause 9 in GDL1, GDL2 and GDL3. The Respondent submits that the Board should look to achieve consistency in licensing outcomes and that the Respondent has received no complaint from Westfarmers Kleenheat about the clause. These submissions by the Respondent are to be rejected. S.11M(4) of the ECA does not limit the exercise of the Board's discretion or limit an applicant's ability to seek review. The grant of licences subsequent to the grant of the licences the subject of the review, or

subsequent to an application for review being made, does not limit the Board's powers and functions or limit the ability of an applicant to seek review.

50 The Applicants submit that the Respondent, or the Board, should not exercise a power conferred by Part 2A Division 4 of the ECA to impose clause 9 on the basis that it is not in the public interest to do so (s.11K ECA). The Applicants have not established that it would be contrary to the public interest to do so, either generally, or taking into account one or more of the matters referred to in s.11H(3) of the ECA (see in particular items (b), (c), (d), (e) and (f) of s.11H(3) of the ECA). Provided that the Respondent, or the Board, is satisfied that it would not be contrary to the public interest to do so, the Respondent, or the Board, may impose clause 9.

51 As to the requirement that the terms and conditions of a licence must not be inconsistent with the GPA(WA)Law (s.11M(5) of the ECA), that a licence has effect subject to the GPA(WA)Law (s.11V(2) of the ECA) and that Division 4 and Division 8 of the ECA have effect subject to sections 90 and 92 of the GPA(WA)A (s.11J of the ECA), it should be noted that clause 9 (1) provides that clause 9 only applies to those parts of the licensed distribution system that are not part of a "covered pipeline". Clause 9 does not apply to those parts of the licensed distribution system that are, or become, part of a "covered pipeline". See also the discussion above in relation to Schedule 1(a) ECA. Clause 9 is not inconsistent with the GPA(WA)Law (s.11M ECA). The power to impose clause 9 is not restricted by s.11V(2) or s.11J of the ECA.

52 To the extent that any possible overlap may occur between clause 9 and the NAC under the GPA(WA)Law, there already exists, in relation to distribution pipelines,

overlap as to third party access between transitional arrangements under the now-repealed Gas Distribution Regulations 1996 (WA) made under the Gas Corporation Act 1994 (WA) and the GPA(WA) Law. In relation to transmission pipelines, there exists overlap as to third party access between s.47 and Schedule 1 of the Dampier to Bunbury Pipeline Act 1997 (WA), s.21 of the Petroleum Pipelines Act 1969 (WA), s.73 of the Petroleum (Submerged Lands) Act 1982 (WA), Part IIIA of the Trade Practices Act 1974 (Cth) and the GPA(WA)A.

53 Finally, the amendments to Schedule 1 to the ECA achieve a position of avoiding inconsistency between the ECA and the GPA(WA)A. Contrary to the submission by the Applicants, the amendments do not preclude the inclusion of clause 9 in the licences. The Respondent, and the Board, are required to apply the legislation as enacted. The Applicants refer to the Hansard extracts of 11 May 1999 at p8080 and of 15 June 1999 at p8934 and p8935. The Hansard extracts fall within s.19(2)(h) Interpretation Act 1994 (WA). Assistance may be sought in the construction of Schedule 1 ECA from the Hansard extracts, (1) to confirm that the meaning is the ordinary meaning conveyed by the text (s.19(1)(a) Interpretation Act 1994 (WA)) or (2) to determine the meaning when the provision, particularly as to the word “covered” in paragraph (a), is ambiguous (s.19(1)(b)(i) Interpretation Act 1984 (WA)). Even if such assistance is sought, it confirms the construction of Schedule 1 of the ECA set out above.

54 Accordingly, there is power for the Coordinator, and the Board, under the ECA to include clause 9 in the Gas Distribution Licences GDL1, GDL2 and GDL3.

THIRD PARTY ACCESS – DISCRETION

55 ALL MEMBERS: The contentions and submissions of the parties in regard to the discretion of the Respondent to impose clause 9 of GDL1, GDL2 and GDL3 have been summarised previously. Clause 9 is set out in the previous section dealing with the power of the Respondent to include such a clause in the distribution licenses.

56 The parties have agreed the following facts:

1. One of the key components in an access arrangement is the tariff that can be charged by the owner of the distribution network for a specified purpose.
2. The calculation and justification of a reference tariff under the National Access Code may require substantive and complex accounting analysis.

57 Access to a distribution system is essential for:

- a trader proposing to sell gas to customers located in the area served by that distribution system; and
- any person desiring to convey gas through that distribution system to a place of consumption.

58 All such persons are entitled to expect that access to the distribution system would be provided by the system owner and operator on reasonable commercial terms. A system owner and operator would normally be expected to make access available on reasonable commercial terms to all applicants so as to expand its business and maximise its revenue.

59 The owner of a distribution system holding a distribution licence has a privileged position as the monopoly owner of a piece of infrastructure which provides an

essential service to the public in the area served by that system. That privilege carries with it the responsibility to ensure that the system is managed so that a reasonable balance is struck between private profit and public benefit. Moreover, equity requires that all applications for access to the system should be assessed on the same basis, avoiding any preference to affiliates or associates of the distribution system owner.

60 Any person desiring access to a distribution system should be able to obtain access on reasonable terms so as to:

- make gas available to as many consumers as possible; and
- to promote competition in the supply of gas to consumers.

61 It would not be in the public interest for a distribution system owner and operator to unreasonably refuse access to any person desiring it, or to offer access only on unreasonable terms. The Respondent is required to consider the public interest in determining the conditions to apply to distribution licences (s.11K(2) and s.11H(3) ECA).

62 Clause 9 applies only to distribution systems which are not part of a “covered pipeline” as defined in the GPA(WA)A. Access to distribution systems which are covered under the GPA(WA)A is available to all parties desiring it under the access arrangements which the owners and operators of covered systems must submit to, and have approved by, the Regulator. An access arrangement is a statement of the policies and the basic terms and conditions which apply to third party access to a covered distribution system. The parties are free to agree terms and conditions which differ from the access arrangement (except for queuing policy). If an access

dispute arises however, and is referred to the Regulator, the Regulator must apply the terms of the access arrangement in resolving the dispute.

63 Non-covered distribution systems are likely to be smaller than those covered under the GPA(WA)A. However, such systems are not trivial when they provide the only means of supplying gas to consumers in the areas served by those systems. Those consumers are entitled to expect a similar level of service in gas supply as that enjoyed by consumers served by a Covered Pipeline, including competition in gas supply. It follows that it would also be appropriate for some mechanism to be available to resolve disputes which may arise regarding access to non-covered distribution systems. The Respondent has addressed this issue by including clause 9 in distribution licences GDL1, GDL2 and GDL3. An assessment of the operation of clause 9 follows.

64 Upon receiving a referral from an aggrieved party under clause 9, the Respondent is required to decide whether or not the dispute should be arbitrated. The Respondent is required to refer the matter to arbitration if he is reasonably satisfied that all four of the following conditions are met:

- (a) the referral is neither vexatious, trivial, misconceived, lacking in substance, unreasonable nor made not in good faith; and
- (b) there is good reason, taking into account each of the matters referred to in section 1.9(a) to (d) of the NAC, for intervention in the dispute; and
- (c) the licensee has not made an offer of terms (which includes tariffs and a tariff path) to the complainant which is reasonable taking into account the factors listed in section 6.15 of the NAC; and

(d) the licensee and the complainant have been endeavouring in good faith to negotiate the terms for third party access to a non-covered pipeline but have been unable, and are unlikely, to agree on mutually acceptable terms for access.

65 Subclause (a) acts to ensure that only substantive disputes would be further considered for referral to arbitration.

66 Under subclause (b) the Respondent is required to consider the dispute in the context of sections 1.9(a) to (d) of the NAC, as follows:

"(a) that access (or increased access) to Services provided by means of the Pipeline would promote competition in at least one market (whether or not in Australia), other than the market for the Services provided by means of the Pipeline;

(b) that it would be uneconomic for anyone to develop another Pipeline to provide the Services provided by means of the Pipeline;

(c) that access (or increased access) to the Services provided by means of the Pipeline can be provided without undue risk to human health or safety; and

(d) that access (or increased access) to the Services provided by means of the Pipeline would not be contrary to the public interest."

67 In effect, the Respondent must have regard to the same considerations to which the National Competition Council ("NCC") must address itself when considering whether any pipeline or distribution system should be recommended for coverage. This provides a further and quite stringent test that the issue in dispute is indeed substantive.

68 Under subclause (c) the Respondent must be reasonably satisfied that the licensee has not made an offer of access which is reasonable, taking into account the following factors as set out in section 6.15 of the NAC:

- "(a) the Service Provider's legitimate business interests and investments in the Covered Pipeline;*
- (b) the costs to the Service Provider of providing access, including any costs of extending the Covered Pipeline, but not costs associated with losses arising from increased competition in upstream or downstream markets;*
- (c) the economic value to the Service Provider of any additional investment that the Prospective User or the Service Provider has agreed to undertake;*
- (d) the interests of all Users;*
- (e) firm and binding contractual obligations of the Service Provider or other persons (or both) already using the Covered Pipeline;*
- (f) the operational and technical requirements necessary for the safe and reliable operation of the Covered Pipeline;*
- (g) the economically efficient operation of the Covered Pipeline; and*
- (h) the benefit to the public for having competitive markets."*

69 The factors listed are those which an Arbitrator appointed under the NAC must take into account in arbitrating an access dispute applying to a Covered Pipeline or distribution system. Taken together, the factors act to ensure that the interests of prospective users and consumers are fairly balanced with the legitimate interests of the owner of the system (the Service Provider).

70 Finally, under subclause (d), the Respondent must be reasonably satisfied that the parties have made a bona fide attempt to resolve the dispute but that resolution is unlikely.

71 The four provisions described constitute a stringent series of tests which will act to ensure that only genuine, substantive and significant disputes would be referred to arbitration by the Respondent.

72 If the Respondent decides that the dispute should be arbitrated, the Arbitrator is to be the Western Australian Gas Disputes Arbitrator (s.61 to s.85 of the GPA(WA)A), or his nominee. The arbitration is to be conducted under the regulations made under s.86 of the GPA(WA)A, or, in the absence of such regulations, under the Commercial Arbitration Act 1985 (WA) and the Institute of Arbitrators and Mediators Australia Rules for the Conduct of Commercial Arbitrations.

73 If the arbitration is conducted under the latter provisions, the following sections of the NAC, read with appropriate modifications, are to apply to the arbitration:

"6.8 The Arbitrator's decision may deal with any matter relating to the provision of a Service to a Prospective User. By way of example, the decision may:

- (a) require the Service Provider to offer to enter into a contract to provide a Service to the Prospective User at a specified Tariff and on specified terms and conditions; or*
- (b) require the Service Provider to install a New Facility to increase the Capacity of the Covered Pipeline pursuant to section 6.22.*

The decision does not have to require the Service Provider to provide a Service to the Prospective User.

6.9 Subject to section 6.14, in making a decision under section 6.7 the Arbitrator must:

- (a) consider submissions received from the parties before the date specified by the Arbitrator under section 6.4;*
- (b) after considering submissions received by the date specified by the Arbitrator under section 6.4, provide a draft decision to the parties and request submissions from the parties by a specified date;*
- (c) consider submissions received from the parties before the date specified by the Arbitrator under paragraph (b); and*
- (d) after considering submissions received by the date specified by the Arbitrator under paragraph (b) provide a final decision to the parties.*

- 6.10 *The Arbitrator may, but need not, by whatever means it considers appropriate seek written submissions from persons who are not parties to the dispute and take those submissions into account in making its decision under section 6.7.*
- 6.11 *The Arbitrator must provide a final decision under section 6.7 within three months of requiring parties to make submissions under section 6.4. The Arbitrator must also ensure that there is a period of at least 14 days:*
- (a) between requiring parties to make submissions under section 6.4 and the last day for such submissions specified by the Arbitrator; and;*
 - (b) between providing a draft decision to the parties under section 6.9(b) and the last day for submissions on the draft decision specified by the Arbitrator.*

In all other respects the timing for the taking of each of the steps set out in section 6.9 is a matter for the Arbitrator to determine.

- 6.12 *The Arbitrator may increase the period of three months specified in section 6.11 by periods of up to one month on one or more occasions provided it provides the parties (and each person who has made a written submissions, to the Arbitrator) with a notice of the decision to increase the period.*
- 6.15 *When arbitrating a dispute the Arbitrator must, subject to sections 6.18(b), (c) and (d), apply the provisions of the Access Arrangement for the Covered Pipeline concerned. In addition, the Arbitrator must take into account:*
- (a) the Service Provider's legitimate business interests and investment in the Covered Pipeline;*
 - (b) the costs to the Service Provider of providing access, including any costs of extending the Covered Pipeline, but not costs associated with losses arising from increased competition in upstream or downstream markets;*
 - (c) the economic value to the Service Provider of any additional investment that the Prospective User or the Service Provider has agreed to undertake;*
 - (d) the interests of all Users;*
 - (e) firm and binding contractual obligations of the Service Provider or other persons (or both) already using the Covered Pipeline;*
 - (f) the operational and technical requirements necessary for the safe and reliable operation of the Covered Pipeline;*
 - (g) the economically efficient operation of the Covered Pipeline; and*
 - (h) the benefit to the public from having competitive markets.*

- 6.16 *A Service Provider must comply with a decision of the Arbitrator made under this section 6 from the date specified by the Arbitrator.*
- 6.17 *The Arbitrator may refuse to make a decision that requires the Service Provider to provide a particular Service to the Prospective User if, without limitation, the Arbitrator considers there is substantial competition in the market for the provision of the Service in question.*
- 6.18 *Subject to sections 6.19 and 6.20 and to the Queuing Policy contained in the Access Arrangement, the Arbitrator must not make a decision that:*
- (b) would impede the existing right of a User to obtain Services;*
 - (c) would deprive any person of a contractual right that existed prior to the notification of the dispute, other than an Exclusivity Right which arose on or after 30 March 1995.*
- 6.20 *If a User or Prospective User claims it has funded the construction of all or part of a Covered Pipeline, either directly or by agreeing to pay the Service Provider a higher charge than it would have paid in the absence of such a capital contribution, then in making a decision the Arbitrator must:*
- (a) consider whether the User or Prospective User did make a capital contribution to the construction of all or part of the Covered Pipeline; and*
 - (b) consider the extent to which the User or Prospective User has recouped any such capital contribution.*

If the Arbitrator considers that the User or Prospective User has made a capital contribution which has not been fully recouped, the Arbitrator's decision under section 6.7 or section 6.13 may require the Service Provider to provide the Service at a Tariff set in a way that allows the User or Prospective User to recoup some or all of the unrecouped portion of the capital contribution.

- 6.21 *Where the Service Provider reasonably believes that it is not possible to accommodate a Prospective User's requirement for a Service consistently with the safe operation of the Covered Pipeline and prudent pipeline practices accepted in the industry:*
- (a) the Arbitrator must not make a decision that the Service Provider reasonably believes is not consistent with the safe operation of the Covered Pipeline and prudent pipeline practices accepted in the industry;*
 - (b) where the Service is being sought by the Prospective User on a non interruptible basis, the Arbitrator may require the Service Provider to offer a similar Service on an interruptible basis and for the corresponding interruptible price, where that would be consistent with the safe operation of the Covered Pipeline and prudent pipeline practices accepted in the industry; and*

- (c) *the Service Provider must disclose to the Prospective User the assumptions it has used in determining that it is not possible to accommodate the Prospective User's requirement for a Service consistently with the safe operation of the Covered Pipeline and prudent pipeline practices accepted in the industry and must provide the Prospective User with the option of having an independent expert nominated by the Service Provider, at the cost of the Prospective User, give a (non binding) opinion on the matter.*

- 6.22 *In making a decision under section 6.7 or section 6.13 the Arbitrator may require the Service Provider to expand the Capacity of a Covered Pipeline to meet the requirements of a Prospective User, provided that :*
 - (a) *the Service Provider is not required to extend the geographical range of a Covered Pipeline;*
 - (b) *the expansion is technically and economically feasible and consistent with the safe and reliable provision of the Service;*
 - (c) *the Service Provider's legitimate business interests are protected;*
 - (d) *the Prospective User does not become the owner of a Covered Pipeline or part of a Covered Pipeline without the agreement of the Service Provider; and*
 - (e) *the Service Provider is not required to fund part or all of the expansion.*

- 6.23 *If the Arbitrator requires the Service Provider to install a New Facility under section 6.22 and the Prospective User bears the cost of the expenditure on the New Facility, then*
 - (c) *the terms of access for the Prospective User shall reflect the value to the Service Provider of the contribution made by the Prospective User.*

- 6.24 *Where a decision made under section 6.7 or section 6.13 requires the Service Provider to provide, and the Prospective User to accept, a Service on terms and conditions specified in the decision, then:*
 - (a) *subject to paragraph (b), the Prospective User becomes bound by the decision on the 14th day after the day on which the decision was made, or, if earlier, on the day the Prospective User notifies the Service Provider that it intends to be bound by the decision; and*
 - (b) *the Prospective User is not bound by the decision if it notifies the Arbitrator that it does not intend to be bound by the decision within 14 days after the day on which the decision was made (unless it has previously notified the Service Provider under paragraph (a), in which case paragraph (a) applies.*

- 6.26 *Where a decision under section 6.7 or section 6.13 requires the Service Provider to provide a Service to the Prospective User on terms and*

conditions specified in the decision, the Arbitrator may, as part of that decision, require the Service Provider and Prospective User to represent that decision in the form of a contract between the parties and to submit to the Arbitrator, within 14 days following the date the decision comes into effect, either (at the choice of the Service Provider or Prospective User):

(a) a copy of a draft contract; or

(b) a copy of a signed contract.

6.27 If the parties do not submit the draft contract (or a copy of a signed contract) to the Arbitrator within the 14 day period referred to in section 6.26, then the Arbitrator may make a decision on the form of any terms and conditions in the draft contract that have not been resolved within that time."

74 In the absence of specific regulations under the GPA(WA)A, the provisions to apply to any arbitration under clause 9 are consistent with, and largely identical to, the arbitration provisions applying to disputes regarding access to covered pipelines under the NAC.

75 Any arbitration decision made will apply only to the parties to the particular dispute. While the result of arbitration may be the granting of access on certain terms and conditions, there is nothing in clause 9 to require or suggest that another party seeking access would necessarily be able to obtain access on identical terms. Clause 9 is therefore a dispute resolution mechanism and not a third party access regime per se.

76 There is no provision in the ECA or the GPA(WA)A that regulation be "light handed". In any event, the foregoing discussion of the operation of clause 9 and the tests which must be satisfied before a dispute can be referred for arbitration, indicates that the inclusion of clause 9 in the distribution licences is not "heavy

handed". Rather, it is a reasonable provision for the resolution of access disputes applying to non-covered distribution systems.

77 The Board is of the view that the inclusion of clause 9 as a condition of the three distribution licences issued to the Applicants is:

- in accordance with the Respondent's duty to provide support in the resolution of energy related disputes (s.6(h) ECA);
- not inconsistent with the GPA(WA)A; and
- not contrary to the public interest.

78 Accordingly, the Board finds that the terms of the existing clause 9 are appropriate.

GUIDELINES – DISCRETION

79 The gas distribution licences GDL 1, GDL 2 and GDL 3 include clauses 14(1) and 14(2) as follows:

"14(1) The licensee must use reasonable endeavours to continue to plan for future expansion and to seek opportunities to expand the coverage of the licensed distribution system within the licence area.

14(2) The licensee must where reasonably practical undertake any activities under subclause (1) in accordance with the Office of Energy Guidelines for the Design and Planning of Interconnected Gas Distribution Networks dated February 2000."

80 The Guidelines in the preface state that:

"Gas distribution networks have traditionally been owned and operated by a single network owner. As the gas industry opens up to competition, it is possible for new network owners to set up discrete distribution networks

that are connected to existing networks. While the Third Party Access Code provides for third parties to transport gas through Covered Pipelines, there is no legislation or code that provides guidelines on interconnection issues between networks owned by different parties.

The following Guidelines have been developed to assist new network owners in planning, operating and obtaining a connection to an existing network."

81 The Guidelines in the introduction state that:

"1.1 This document provides guidance on the planning of distribution networks so that, as far as possible, continuity of gas supply is maintained to consumers on the network, and at sufficient pressure that gas appliances continue to operate at all times (unless load shedding has been initiated).

1.5 These guidelines do not attempt to make the use of any method or specification obligatory. New and improved practices may be adopted which achieve the same result.

1.6 In this document the term:

a) "should" prescribes a procedure which will be complied with unless, after prior consideration, deviation is considered to be acceptable.

b) "shall" prescribes a procedure which will be complied with in full and without deviations.

c) "must" identifies a requirement by law at the time of publication."

82 A reading of the Guidelines reveals that use of the term "should" is widespread throughout the document while use of the term "shall" is limited to only two instances (clauses 3.2.3 and 4.3.2) and "must" is also used only twice (clauses 1.4 and 3.4.2). The terms "is", "needs", "will", "can", "would" and "may" are also used to indicate the degree of obligation but are not defined.

83 The ECA states:

11M(2) *"Without limiting subsection (1). The terms and conditions may include provisions relating to any matter provided for by Schedule 1."*

Schedule 1

"A licence may include provisions-

(b) requiring the licensee to observe specified industry codes with such modifications or exemptions as may be determined by the Coordinator."

11M(4) *"Subject to subsection (3) [repealed], the terms and conditions of a licence must be substantially similar to the terms and conditions of any other licence with the same classification under section 11D(1) that applies in the same supply area or part of a supply area."*

84 The issue to be considered here is with regard to the merits of the obligation, included in clause 14(2), to comply with the Office of Energy Guidelines and to determine whether the clause should be (a) not included, (b) included in its current form or (c) included in a different form in GDL 1, GDL 2 and GDL 3.

85 The Guidelines were prepared by a working group comprising key members from industry and government with the express intention of producing, as detailed in the Working Group Brief: *"... an industry Code of Practice, Conditions for Distribution Licence holders, Guidelines for Land Developers, or a combination of these mechanisms, ..."*. The final report of the working group (dated February 2000) included a statement that (section 4): *"The working group recommends that compliance with the guidance document, Guidelines for the Design and Planning of Interconnected Gas Distribution Systems, be included as a condition of a distribution licence and the issues of commercial implications be resolved as soon as possible"*.

86 The wording in the Guidelines themselves (section 1.1): *"This document provides guidance on the planning of distribution networks..."* and in the final report of the working group (dated February 2000) referred to (section 4) *"... the guidance*

document” make it clear that they were intended to be, and are in fact, guidelines and not rules to assist in the planning of extensions to the network by third parties.

87 The Guidelines state that (section 2.3.1): *“This document contains guidance on the planning and design of natural gas distribution networks...”* and (section 3): *“Planning a distribution network involves designing a suitable pipeline network to meet”*. The final report of the working group (dated February 2000) states that: *“Although development of a technical solution to all of the issues was possible the group recognised that some of the issues had a commercial implication which were outside of the brief of the working group.”* Both documents make it clear that the Guidelines, as written, were intended to, and do in fact, address technical matters and not policy, commercial, regulatory or legal matters.

88 The recommendations of the final report of the working group, (dated February 2000) state that: *“The working group recommends that compliance with the guidance document be included as a condition of a distribution licence and the issues that have commercial implications be resolved as soon as possible.”* It was clearly intended, as has been done, that compliance with the Guidelines be included as a condition of a gas distribution licence. The proviso in the final report that (section 2): *“The commercial implications will need resolving in a different forum before some of the technical solutions can be implemented”* does not prevent the Guidelines being used. It is apparent that there was an expectation that commercial issues would be resolved in the near future (section 4): *“The working group recommends that ... the issues that have commercial implications be resolved as soon as possible.”* and might be incorporated into the Guidelines before use. This matter does not appear to have been followed up by the Office of

Energy and should be addressed and resolved as soon as possible in order to clarify the implementation of the Guidelines.

- 89 The inclusion in the licence term of the wording “*where reasonably practical*”, the wording “*These guidelines do not attempt to make use of any method or specification obligatory*” and the extensive use of the term “*should*” throughout the Guidelines soften the compliance requirement of the licences. They provide a means by which a distribution network owner might justify not following the Guidelines and so avoid unsatisfactory commercial (and technical) outcomes. This should also avoid issues of inconsistency with other regulatory, legal and commercial arrangements.
- 90 The requirement in the Guidelines for the Primary Network Owner (PNO) to verify the design of a Secondary Network Owner (SNO) specifically refers to (section 2.3.2 and 3.2.7): “*those sections of the design that have the potential to impact on the overall distribution network design.*”. It also states that: “*The Secondary Network Owner (SNO) is to be responsible for the design of its network*”. It was recognised by the working group that it is necessary and probably unavoidable that the PNO carry out this review. It is also sensible that the PNO limit its review as indicated in the Guidelines so its potential liability for the design of the SNO system is limited. It is sensible that the PNO should be able to recover the appropriate cost of this review in its charges.
- 91 The Guidelines were developed in conjunction with the major stakeholders in the Western Australian gas distribution market (including AlintaGas and the Office of Energy). The associated correspondence and reports indicate that they require further development to reach their full potential. The final report of the working

group (dated February 2000) states that: *‘The commercial implications will need resolving in a different forum before some of the technical solutions can be implemented’* and *“...it was pointed out by several working group members that the question of payment of the additional costs would need to be resolved.”*

Despite the document not being fully mature, it nonetheless provides an important tool for assisting both the major network operator and any sub network operator to provide a better integrated overall network. While the Guidelines may not be recognised outside this State, they clearly have recognition by the major local industry players who contributed to their formulation. It is apparent from the correspondence and the concerns raised by the Applicants that the Office of Energy and the various stakeholders in the industry should consider what further development of the Guidelines may be required to make them more mature and acceptable to industry participants.

- 92 A discussion paper by Mr Geoff Wood, Principal Engineer Gas Supply of the Office of Energy, (dated 11 August 1999) highlighted the point that experience in the United Kingdom had indicated a clear need to ensure that an orderly industry framework for allowing efficient extensions to gas distribution networks was put in place. Competition in the construction of network extensions in the UK had led to extensions being built to suit only the specific needs of those customers directly affected. There was no framework to comply with a master network development plan, resulting in inefficiencies in system performance and capital investment. This finding shows that there is a clear public interest in ensuring that such an industry framework is put in place and the Guidelines address this matter.

- 93 It is considered by the Board that clause 14(2) should be included in the gas distribution licences in its current form as this is how the Guidelines were intended

to be applied by the joint industry and government group that prepared them. There is significant merit in the Guidelines despite the fact that they do not cover every conceivable issue regarding interconnection of gas distribution networks. The obligation in clause 14(2) addresses the clear public interest in ensuring a suitable framework is in place to allow efficient development of distribution networks. The obligation in clause 14(2) is tempered by the adjacent wording and so does not turn the Guidelines into rules, which they were never intended to be. Further development of the Guidelines to address commercial issues that have been identified and to remove uncertainty in implementation is clearly required and should be undertaken by the stakeholders as a matter of some urgency.

INDEMNITY - DISCRETION

94 Note: The Parties have referred throughout their submissions to the indemnity imposed under clause 23 of Gas Distribution Licences GDL1, GDL2 and GDL3 and under clause 24 of Gas Trading Licences GTL1, GTL2 and GTL3; however, in GDL2 the indemnity is imposed under clause 22, not clause 23.

95 Clause 23 of each of Gas Distribution Licences GDL1 and GDL3, clause 22 of Gas Distribution Licence GDL 2, and clause 24 of each of Gas Trading Licences GTL1, GTL2 and GTL3, is in the following terms:

“The licensee must indemnify and hold harmless and keep indemnified the State of Western Australia including, but not limited to, the Minister for Energy, the Coordinator and the Office of Energy and the State’s instrumentalities, servants, agents and contractors (“State”) against:

(a) all actions, claims, costs, proceedings, suits and demands whatsoever which may at any time be brought, maintained or made against the State by any person whether during or after the expiration of this licence:

(i) in respect of any loss, injury or damage of or any nature or kind of property;

(ii) *in respect of any death or injury sustained by any person; and*

(iii) *in respect of any loss or damage including, but not limited to, consequential loss, loss of profits, business interruption and opportunity loss,*

caused by, arising out of, or in connection with or as a result of the licensee's activities or obligations under this licence or under the Act;

(b) *the full cost of rectifying any breach of the provisions of this licence or the Act by the licence, its servants, agents or subcontractors whether or not the State is liable for any reason to any person to carry out such rectification; and*

(c) *the reasonable legal costs of the State in relation to any of the matters set out in paragraphs (a) and (b) above.”*

96 The ECA specifies the requirement for a distribution licence and a trading licence respectively (s.11G ECA).

97 A licence is subject to such terms and conditions as are determined by the Coordinator (s.11M(1) ECA).

98 Without limiting s.11M(1) ECA, the terms and conditions may include provisions relating to any matter provided for by Schedule 1 (s.11M(2)ECA).

99 The terms and conditions of a licence must be substantially similar to the terms and conditions of any other licence with the same classification under section 11D(1) ECA that applies in the same supply area or part of a supply area (s.11M(4) ECA).

- 100 The Coordinator must not exercise a power conferred by Part 2A Division 4 of the ECA unless satisfied that it would not be contrary to the public interest to do so (s.11K(1) ECA).
- 101 The Coordinator in determining whether the exercise of the power would not be contrary to the public interest, may take into account one or more of the following matters:
- (a) environmental considerations;
 - (b) social welfare and equity considerations, including community service obligations;
 - (c) economic and regional development including employment and investment growth;
 - (d) the interests of gas customers generally or of a class of gas customers;
 - (e) the interests of any licensee, or applicant for a licence, in respect of the supply area or part of a supply area;
 - (f) the importance of competition in gas industry markets;
 - (g) any other matter that the Coordinator considers relevant (s.11K(2) ECA and s.11H(3) ECA).
- 102 The State may take specified action in the event of a failure by a licensee to comply with a licence. (Part 2A Division 7 ECA).
- 103 Specified powers in relation to land may be exercised in relation to a distribution licence (Part 2A Division 9 ECA).

- 104 Specified provisions of the Energy Corporations (Powers) Act 1979 (WA) are applicable in relation to distribution licences and trading licences respectively (s.11ZO and Schedule 2 ECA).
- 105 The Applicants do not suggest that the Respondent did not have, nor that the Board does not have, power to impose an indemnity.
- 106 The Applicants submit that the indemnity should be deleted, or, alternatively, that its terms should be modified.
- 107 The Applicants submit that the imposition of an indemnity is not in the public interest, that the indemnity should not be imposed unless the Board finds it necessary, and that the indemnity is unreasonably and unworkably onerous.
- 108 The Respondent submits that the indemnity is in the public interest, that it is necessary, and that its broad terms are appropriate.
- 109 In relation to the Gas Trading Licences, the Applicants submit that a trading licensee acts commercially and not physically and that it is accordingly difficult to see to what the indemnity is intended to apply. To this, the Respondent submits that the holder of a trading licence is afforded significant land access powers, and, further, might undertake activities beyond the sale of gas. In reply, the Applicants submit that the land access powers, and any additional activities, are only exercisable in relation to activities under the trading licences.
- 110 The Applicants have referred to one distribution licence in South Australia, four distribution licences in Victoria, three trading licences in Victoria and the standard

form trading licence in NSW, all of which do not include an indemnity. The Applicants point out that only the standard form distribution licence in New South Wales contains an indemnity.

111 The Applicants also refer to Pipeline Licences PL24, PL26 and PL43, under the Petroleum Pipelines Act 1969 (WA), and point out that these do not contain an indemnity and nor is an indemnity set out in that Act.

112 The Respondent submits that indemnities are contained in the Goldfields Gas Pipeline Agreement Act 1994 (WA) and the Pilbara Energy Project Agreement Act 1994 (WA), and, further, that PL24 relates to the Goldfields Gas Pipelines Agreement Act 1994 (WA). The Respondent also submits that Gas Distribution Licences GDL4 and GDL5 contain the same indemnity as Gas Distribution Licences GDL1, GDL2, GDL3 and Gas Trading Licences GTL1, GTL2 and GTL3.

113 The indemnity in clause 35 of Schedule 1 to the Goldfields Gas Pipeline Agreement Act 1994 (WA) is in the following terms:

“The Joint Venturers shall indemnify and keep indemnified the State and its servants, agents and contractors in respect of all actions, suits, claims, demands or costs of third parties arising out of or in connection with any work carried out by or on behalf of the Joint Venturers pursuant to this Agreement or relating to their activities hereunder or arising out of or in connection with the construction, maintenance or use by the Joint Venturers or their servants, agents, contractors or assignees of the Joint Venturers’ works or services the subject of this Agreement of the plant, apparatus or equipment installed in connection therewith PROVIDED THAT without in any way affecting the Joint Venturers’ obligations to the State under Clause 26, the foregoing provisions of this Clause shall not apply to any resumption by the State pursuant to Clause 26 AND PROVIDED FURTHER THAT, subject to the provisions of any other relevant Act such indemnity shall not apply in circumstances where the State, its servants, agents or contractors are negligent in carrying out work for the Joint Venturers pursuant to this Agreement.”

114 Clause 32 of Schedule 1 to the Pilbara Energy Project Agreement Act 1994 (WA)

is in the following terms:

“The Joint Venturers shall indemnify and keep indemnified the State and its servants agents and contractors in respect of all actions suits claims demands or costs of third parties arising out of or in connection with any work carried out by or on behalf of the Joint Venturers pursuant to this Agreement or relating to their activities hereunder or arising out of or in connection with the construction maintenance or use by the Joint Venturers or their servants agents contractors or assignees of the Joint Venturers’ works or services the subject of this Agreement or the plant apparatus or equipment installed in connection therewith PROVIDED THAT the foregoing provisions of this Clause shall not apply to any resumption by the State pursuant to Clause 24 AND PROVIDED FURTHER THAT subject to the provisions of any relevant Act such indemnity shall not apply in circumstances where the State, its servants, agents, or contractors are negligent in carrying out work for the Joint Venturers pursuant to this Agreement.”

115 Clause 13(4) of the New South Wales standard form distribution licence is in the following terms:

“The Authorisation Holder must indemnify the Minister, the Director and the Ministry of Energy and Utilities, and shall keep them indemnified, against all of the following:

- (a) all liability or loss arising from and any costs (including legal costs on a full indemnity basis), charges or expenses incurred as a result of any breach of this Authorisation or any negligent act or omission of the Authorisation Holder, its employees or agents;*
- (b) the full cost of rectifying any breach of the Act, the Regulations or this Authorisation by the Authorisation Holder, its servants or agents; and*
- (c) all legal costs (on a full indemnity basis) incurred by the Minister, the Director of the Ministry of Energy and Utilities in connection with the enforcement of the indemnity provided under this Clause.”*

116 The Applicants submit that if an indemnity is to be included, appropriate wording is as follows:

“The licensee must indemnify and keep indemnified the State and its employees in respect of actions, suits, claims, demands or costs of third parties arising out of or in connection with negligent acts or omissions of

the licensee in carrying out, or having carried out on its behalf, work pursuant to this licence.”

117 Previously, by letter dated 11 April 2000, the Applicants had suggested to the Respondent that the wording should be:

“The licensee must indemnify and keep indemnified the State and its servants, agents and contractors, in respect of actions, suits, claims, demands or costs of third parties arising out of or in connection with negligent acts or omissions of the licensee in carrying out, or having carried out on its behalf, work pursuant to this licence.”

118 Mr Trickett, an employee of an insurance broker, gave evidence by affidavit and orally on behalf of the Applicants. He stated in his affidavit that, in his opinion:

- "(a) it is not possible to insure for an unlimited amount;*
- (b) to cover to a substantive amount in excess of the amount for which AlintaGas is already insured will mean added premium and fees;*
- (c) additionally, it always needs to be remembered that no insurance covers every event;*
- (d) in particular, cover for consequential losses can be restrictive and cover for loss of opportunity costs is not readily available.”*

119 In cross-examination Mr Trickett confirmed that he did not believe that it was possible to insure for an unlimited amount, and that he believed that if the Applicants had to cover for an amount in excess of what they were already having to insure for, then they would have an additional premium.

120 The terms and conditions of a licence must be substantially similar to the terms and conditions of any other licence with the same classification that applies in the same supply area or part of a supply area (s.11M(4) ECA). On 31 August 2000 two gas distribution licences at Leinster and Margaret River (GDL4 and GDL5) were granted to Westfarmers Kleenheat, each of which contains an identical indemnity

to that in question. The grant of licences subsequent to the grant of the licences the subject of the review, or subsequent to an application for review being made, does not limit the Board's powers and functions or limit the ability of an applicant to seek review.

121 In addition to the documents to which the parties have referred, the Board has also considered the inclusion or non-inclusion, and the terms, of any indemnity in the following State agreement acts:

- Alumina Refinery Agreement Act 1961 (WA)
- Uranium (Yeelirrie) Agreement Act 1978 (WA) (Sch 1 cl 42)
- North West Gas Development (Woodside) Agreement Act 1979 (WA) (Sch 1 cl 34)
- Western Mining Corporation Limited (Throssell Range) Agreement Act 1985 (WA) (Sch cl 38)
- Tailings Treatment (Kalgoorlie) Agreement Act 1988 (WA) (Sch cl 22)
- Iron and Steel (Mid West) Agreement Act 1997 (WA) (Sch 1 cl 30)

122 The inclusion, or non-inclusion, of indemnities under other statutes and in other jurisdictions, and the terms of any indemnities imposed, are useful for comparative purposes. However, it is for the Respondent, and the Board, to determine whether the present indemnity should be included and, if so, in what terms.

123 The Respondent submits that it is in the public interest that, in the opening of gas markets to competition, the licensees should indemnify the State. The Board accepts this submission. The Applicants submit that the indemnity potentially poses a significant barrier to entry into and participation in a relevant market, that it accordingly discourages competition in gas industry markets and is against the

public interest (s.11K(2) and s.11H(3)ECA). The Board does not accept this submission. Further, in considering the issue of public interest generally, and particularly the matters set out in s.11H(3) ECA, the Board is satisfied that it would not be contrary to the public interest to include an indemnity.

124 The Board has considered the additional submissions by the parties as to whether an indemnity should be included in the trading licences, even if it should be included in the distribution licences. The Board considers that the State should be indemnified in the trading licences for the same reasons set out in the preceding paragraph, rather than on the basis of the matters canvassed in the submissions.

125 Turning to the terms of the indemnity, the Applicants seek the deletion of "servants, agents and contractors" and the substitution of "employees". "Servants" and "employees" are essentially the same. As to "agents and contractors" of the State, it is appropriate to extend the indemnity to them. The State will often act, not just through its employees, but also through its agents and contractors. It is also to be noted that the wording of the indemnity suggested in the Applicants' letter of 11 April 2000 extended to "servants, agents and contractors".

126 The Applicants submit that the indemnity is too broad with the inclusion of the words "caused by", "arising out of", "in connection with" and "as a result of", in view of the extent of these expressions as decided in the various authorities cited by the Applicants. The Board considers that the indemnity is indeed broad, but that it is appropriate to include the above expressions of association (see the indemnities in the various State agreement acts mentioned above).

- 127 The Applicants propose the limitation of the indemnity to losses caused by the licensee's activities or breach of its obligations. The Board considers that the broad range of circumstances to which the indemnity applies is appropriate, without such limitation (see the indemnities in the various State agreement acts mentioned above).
- 128 The Applicants submit that the indemnity should not apply to liability to the extent caused or contributed to by the State or its employees, agents or contractors. There is a similar, but more limited, exclusion in the form of indemnity in most of the State agreement acts mentioned above. The Board considers that the indemnity in the distribution licences and the trading licences should incorporate such an exclusion in the more limited terms of the indemnities in most of the State agreement acts mentioned above.
- 129 As to the inclusion of consequential loss, loss of profits, business interruption and opportunity loss, the Board notes Mr Trickett's opinion that "cover for consequential losses can be restrictive and cover for loss of opportunity costs is not readily available". The statements as to public policy in *Perre v Apard Pty Ltd* (1999) 73 ALJR 1190 at 1269, to which the Applicants refer, do not resolve this issue. The Board considers that the Applicants have not established that, on the grounds of public policy, such losses should not be included, or should only be included if there is a monetary cap on liability. The Board considers that it is appropriate that such losses should be included in the indemnity, and should be included without a monetary cap.
- 130 Having considered the indemnity in relation to the distribution licences, and separately in relation to the trading licences, the Board considers that the indemnity

should be included in the distribution licences and in the trading licences, but that the terms of the indemnity should be varied so that the indemnity should not apply where the State is negligent in carrying out work for the licensee pursuant to the licence.

COSTS

- 131 The Applicants have submitted that the costs of the parties of the preliminary proceedings of 19 September 2000 and the substantive proceedings should follow the event, that is, the loser pays. In regard to the costs of the parties applicable to the proceedings of 6 October 2000, which were reserved, the Applicants have submitted that costs be awarded against the Respondent, with a certificate for senior counsel. In regard to the Board's costs, to the extent that the Board should see fit to make an order for such costs, the Applicants have submitted that the loser should also pay those costs.
- 132 The Respondent has submitted that the parties should bear their own costs regardless of the result. In regard to the Board's costs, the Respondent has submitted that it would be inappropriate to require the parties to meet those costs.
- 133 There is a general principle in legal proceedings that costs should follow the result. However, the Board is mindful that a recipient of a licence might be deterred from appealing against a decision with regard to a licence if it believed that, in the event of losing the appeal, all the Respondent's costs would be awarded against it. On the other hand, a general expectation that appeals are unlikely to be cost free, even if an appeal was successful, may encourage the parties to attempt to resolve differences by negotiation.

134 The Board is therefore of the view that unless there are compelling reasons to the contrary, the most equitable arrangement is for the parties to bear their own costs. There do not appear to be any compelling reasons to depart from this approach in the substantive proceedings in the present case. However, in regard to the preliminary hearing of 19 September 2000 and the proceedings of 6 October 2000, the Board is of the view that certain actions of the Respondent contributed to delays in the hearing of the applications and increased the costs of the parties. In particular, the Respondent initially argued that the Applications for Review had not been lodged within time, but chose not to pursue this matter at the preliminary hearing on 19 September 2000. At that hearing, the Respondent handed up an outline of submissions arguing that the Applications for Review should be dismissed for failure to state the grounds for review. Consideration of that submission necessitated a delay until 6 October 2000 at which hearing the application to dismiss the Applications for Review was itself dismissed by the Board and the hearing of the Applications for Review was scheduled for 9 November 2000.

135 The Board has therefore decided that the Respondent should pay the Applicants' costs of and incidental to the Respondent's application to dismiss the Applications for Review on the grounds that the Applications for Review were out of time and the Respondent's application to dismiss the Applications for Review on the grounds that the Applications for Review did not state the grounds of review. The Board has further decided that each party should bear its own costs of the substantive proceedings and accordingly that there should be no order as to the parties' costs in relation to the substantive proceedings.

136 In regard to the Board's costs, reg.9 of the Gas Pipelines Access (Western Australia) (Funding) Regulations 1999 (WA) gives the Board power to determine the Board's costs of any proceedings before it and to make orders for the payment of such costs. While this may be an unusual provision as regards legal proceedings, it is consistent with the increasingly common principle of "user pays" in respect of services provided by public authorities. The Board has therefore determined that its costs be fixed at \$79,188.70 and are to be paid as to one half by the Applicants and one half by the Respondent.

CONCLUSION

137 Accordingly, the Board determines:

1. The Respondent has, and the Board has, power under the ECA to include clause 9 (Third Party Access) as a term or condition in each of Gas Distribution Licences GDL1, GDL2 and GDL3.
2. The inclusion in its current terms of clause 9 (Third Party Access) as a term or condition in each of Gas Distribution Licences GDL1, GDL2 and GDL3 is appropriate.
3. The inclusion in its current terms of clause 14(2) (Guidelines) as a term or condition in each of Gas Distribution Licences GDL1, GDL2 and GDL3 is appropriate.
4. The inclusion of clause 22 (Indemnity) as a term or condition in Gas Distribution Licence GDL2, clause 23 (Indemnity) as a term or condition each of Gas Distribution Licences GDL1 and GDL3 and clause 24 (Indemnity) as a term or condition in each of Gas Trading Licences GTL1, GTL2 and GTL3 is appropriate, but each such clause should be varied by the addition at the end of each such clause of the following:

"PROVIDED THAT, subject to the provisions of any other relevant Act, such indemnity shall not apply in circumstances where the State, its servants, agents or contractors are negligent in carrying out work for the licensee pursuant to this licence."

5. The Respondent should pay the Applicants' costs of and incidental to the Respondent's application to dismiss the Applications for Review on the grounds that the Applications for Review were out of time and the Respondent's application to dismiss the Applications for Review on the grounds that the Applications for Review did not state the grounds of review. Each party should bear its own costs of the substantive proceedings and accordingly there should be no order as to the parties' costs of the substantive proceedings.
6. The Board's aggregate costs and expenses of both appeals, fixed at \$79,188.70, should be paid as to one half by the Applicants and as to one half by the Respondent.

ORDERS – APPEAL 1 OF 2000

138 In Appeal 1 of 2000 there will be orders as follows:

1. The decision of the Respondent to include clause 9 (Third Party Access) as a term or condition in each of Gas Distribution Licences GDL1, GDL2 and GDL3 be affirmed.
2. The decision of the Respondent to include clause 14(2) (Guidelines) as a term or condition in each of Gas Distribution Licences GDL1, GDL2 and GDL3 be affirmed.
3. The decision of the Respondent to include Clause 22 (Indemnity) as a term or condition in Gas Distribution Licence GDL2 and clause 23 (Indemnity) as a term or condition in each of Gas Distribution Licences GDL1 and GDL3 be

varied immediately by the addition at the end of each such clause of the following:

"PROVIDED THAT, subject to the provisions of any other relevant Act, such indemnity shall not apply in circumstances where the State, its servants, agents or contractors are negligent in carrying out work for the licensee pursuant to this licence."

4. The Respondent do pay the Applicants' costs (on the basis of one set of costs only covering both Appeals 1 and 2 of 2000) of and incidental to (1) the Respondent's application to dismiss the Applications for Review on the grounds that the Applications for Review were out of time, and (2) the Respondent's application to dismiss the Applications for Review on the grounds that the Applications for Review did not state the grounds of appeal, such costs to be agreed or taxed by the Presiding Member on the basis of the Supreme Court Scale, with a certificate for Senior Counsel in respect of the latter application.
5. The Board's aggregate costs and expenses in connection with the hearing and determination of Appeals 1 and 2 of 2000 be fixed at \$79,188.70 and the Applicants in Appeals 1 and 2 of 2000 do pay in aggregate one half of such amount, and the Respondent do pay in aggregate one half of such amount, to the Western Australian Gas Disputes Arbitrator within one month after the date of delivery of these Orders.

ORDERS – APPEAL 2 OF 2000

140 In Appeal 2 of 2000 there will be orders as follows:

1. The decision of the Respondent to include Clause 24 (Indemnity) as a term or condition in each of Gas Trading Licences GTL1, GTL2 and GTL3 be varied immediately by the addition at the end of each such clause of the following:

"PROVIDED THAT, subject to the provisions of any other relevant Act, such indemnity shall not apply in circumstances where the State, its servants, agents or contractors are negligent in carrying out work for the licensee pursuant to this licence."

2. The Respondent do pay the Applicants' costs (on the basis of one set of costs only covering both Appeals 1 and 2 of 2000) of and incidental to (1) the Respondent's application to dismiss the Applications for Review on the grounds that the Applications for Review were out of time, and (2) the Respondent's application to dismiss the Applications for Review on the grounds that the Applications for Review did not state the grounds of appeal, such costs to be agreed or taxed by the Presiding Member on the basis of the Supreme Court Scale, with a certificate for Senior Counsel in respect of the latter application.
3. The Board's aggregate costs and expenses in connection with the hearing and determination of Appeals 1 and 2 of 2000 be fixed at \$79,188.70 and the Applicants in Appeals 1 and 2 of 2000 do pay in aggregate one half of such amount, and the Respondent do pay in aggregate one half of such amount, to the Western Australian Gas Disputes Arbitrator within one month after the date of delivery of these Orders.

CKS MERRIAM
PRESIDING MEMBER

D KIRK-BURNNAND
EXPERT MEMBER

JG KUEHNE
EXPERT MEMBER