



Productivity Commission Review of the Gas Access Regime

**Submission from the Independent Gas Pipelines Access Regulator
of Western Australia**

5 September 2003



CONTENTS

1	INTRODUCTION AND SCOPE OF SUBMISSION	3
2	HISTORICAL OVERVIEW	4
2.1	Establishment of Regulatory Offices	4
2.2	Covered Pipelines	6
2.3	Principal Activities of the Regulator	7
2.3.1	Access Arrangements Approvals	7
2.3.2	Associate Contract Approvals	8
2.3.3	Ring Fencing Arrangements	8
2.3.4	Other Activities	9
3	TIMELINESS IN ACCESS ARRANGEMENT APPROVALS	11
3.1	Introduction	11
3.2	AlintaGas Distribution Systems	11
3.3	Dampier to Bunbury Natural Gas Pipeline	12
3.4	Goldfields Gas Pipeline	13
4	APPLICATION OF THE GAS ACCESS REGIME IN WESTERN AUSTRALIA	15
4.1	Regulatory Discretion	15
4.2	Status of Draft Decisions	17
4.3	Information Collection and Disclosure	18
4.3.1	Information Collection under Section 41 of Schedule 1 of the Act	18
4.3.2	Powers to Require Service Providers to Maintain and Provide Information	20
5	ALTERNATIVE REGULATORY MODELS	22
	ATTACHMENT 1	23
	CONFIDENTIAL ATTACHMENT 2	24

1 INTRODUCTION AND SCOPE OF SUBMISSION

This paper comprises a submission from the Western Australian Office of Gas Access Regulation (**OffGAR**) to the Productivity Commission and is made in relation to the Commission's review of Australia's gas access regime. OffGAR provides agency support to the Western Australian Independent Gas Pipelines Access Regulator (**Regulator**) and the Western Australian Gas Disputes Arbitrator (**Arbitrator**) in carrying out their functions under the *Gas Pipelines Access (Western Australian) Act 1998 (WA) (GPAA)*.

The purpose of this submission is to provide the Commission with information relating to the application of the GPAA, and particularly the *National Third Party Access Code for Natural Gas Pipeline Systems (Code)*, in Western Australia. It is not the purpose of the submission to provide comment on either the substantive content of the GPAA or the envisaged impact of the gas access regime in Western Australia in so far as these are matters of Government policy. Nor is it the purpose of this submission to make specific comment on any regulatory decision made in Western Australia, although some regulatory decisions are referred to by way of examples. However, it is the intention of this submission to comment on matters of process with particular attention being given to timeliness and regulatory costs.

Section 2 of this submission provides an historical overview of the establishment of the access regime in Western Australia and the activities of the Regulator, Arbitrator and OffGAR since the establishment of the office of the Regulator and that of the Arbitrator in 1999.

One of the principal functions of the Regulator is the assessment and approval of access arrangements for covered pipelines. A major concern expressed by the gas industry and gas users in respect of the access regime has been the timeliness of the assessment and approvals process. Section 3 of this submission addresses the issue of timeliness of decision making for Western Australian pipelines. It is indicated that for two transmission pipelines in Western Australia for which the assessment process has been protracted, there are particular features of the relevant pipelines that have delayed the assessment process and which cause the assessments to be "outside the ordinary" in regard to the timeliness of the assessment and approvals process.

Section 4 of this submission addresses three other issues that have arisen in the Western Australian experience of application of the access regime: the level of discretion for regulators and absence of a clear regulatory scheme to guide the exercise of this discretion; the status of draft decisions made under the Code; and the powers of the Regulator to obtain and disclose information and copies of documents. The implications that these issues have on timeliness, litigation and regulatory costs are highlighted.

2 HISTORICAL OVERVIEW

2.1 ESTABLISHMENT OF REGULATORY OFFICES

The Australian Heads of Government signed the National Gas Pipelines Access Agreement on 7 November 1997, introducing a uniform national framework for access to natural gas pipelines. This agreement facilitated the introduction of legislation across Australia to provide third party users with access to gas pipelines on fair and reasonable terms and conditions, including price. The uniform national framework was enacted in Western Australia by the GPAA. The GPAA implements the *Gas Pipelines Access (Western Australian) Law (Gas Pipelines Access Law)* comprising:

- legislative provisions set out in Schedule 1 of the GPAA; and
- the Code as set out in Schedule 2 of the GPAA.

The National Gas Pipelines Access Agreement provided Western Australia with a number of derogations, including provisions for transitional arrangements, listed as follows.

- The Gas Pipelines Access Law, which includes the uniform Code as a schedule, to be enacted by means of complementary Western Australian legislation.
- A State-based Independent Gas Pipelines Access Regulator to regulate all intra-state gas transmission and distribution pipelines. The provision of a state based Regulator is subject to review in respect of intra-state gas transmission pipelines in the event that a significant transmission pipeline delivering gas to/from another State or Territory is to be constructed, or 5 years from the date Western Australia signs this agreement, whichever is the earlier.
- The Relevant Minister in relation to all intra-state transmission pipelines means the Designated State Minister.
- A State Appeals Body to be established to deal with all appeals in respect of State bodies including the Independent Gas Pipelines Access Regulator and the Designated State Minister in respect of coverage of pipelines.
- The Supreme Court of Western Australia to have exclusive jurisdiction in respect of all matters relating to access regulation by the Independent Gas Pipelines Access Regulator of intra-state gas transmission and distribution pipelines.
- A transitional access regime, which is to enable negotiability of tariffs under a statutory declining capped reference tariff, to be deemed to comply with the Code in respect of the Dampier to Bunbury Natural Gas Pipeline (**DBNGP**) until 1 January 2000. The DBNGP to be covered by an access arrangement under the Code after that date. Existing contracts for transmission capacity

on the DBNGP to be grandfathered, although after that date an option is to be available for a shipper which is not an exempted shipper under the Gas Transmission Regulations 1994, to adopt terms and conditions (including prices) of an access arrangement under the Code in respect of such contracts. Access to be subject to contestable customer classes as for the transitional arrangements in Annex H.

- In relation to existing privately owned intra-state transmission pipelines that become covered by the Code, the State is to take all reasonable steps, including negotiation with the service provider, to seek to ensure that any rights of the service provider pertaining to third party access which exist as at the date the State signs the Intergovernmental Agreement¹ and which derive from a licence under the *Petroleum Pipelines Act 1969* (WA) or, in the case of the Goldfields Gas Pipeline, from the *Goldfields Gas Pipeline Agreement Act 1994* (WA), do not prevent or impede the application of the Code to that pipeline. The access arrangement applicable under the *Goldfields Gas Pipeline Agreement Act 1994* is to be deemed to comply with the Code to 1 January 2000.
- Until 1 January 2000 the existing access regime for the AlintaGas distribution system in the Mid-West and South-West of the State to be deemed to comply with the Code. From 1 January 2000 this distribution system to be covered by an access arrangement under the Code in accordance with the transitional arrangements set out in Annex H which phase-in access to all customers by 1 July 2002, subject to by-pass provisions to contestable customers.
- Existing distribution franchises and licensing arrangements to be retained until 1 July 2002.
- Ring fencing of the gas distribution and trading activities of AlintaGas in respect of the Mid-West and South-West distribution system, to be introduced by 1 July 2002. In the interim, existing ring fencing provisions under the Western Australian law to remain.
- A ten year trading franchise to be awarded for the Kalgoorlie/Boulder distribution system, initially limited to customer classes that fall into a consumption range of no more than 100 terajoules per year declining beyond 1 January 2002 in accordance with the transitional arrangement for the Mid-West and South-West set out in Annex H of the Intergovernmental Agreement. In addition, a ten year distribution franchise to be awarded to the distribution franchisee to own, construct and operate the Kalgoorlie/Boulder distribution system, subject to by-pass provisions for contestable customers.

The GPAA was enacted by the Parliament of Western Australia on 9 February 1999 with provisions that:

- make the Gas Pipelines Access Law (being Schedules 1 and 2 of the GPAA) a law of Western Australia;

¹ This is a reference to the Natural Gas Pipelines Access Agreement

- establish two statutory offices, being the Regulator and the Arbitrator, and a statutory body, being the Western Australian Gas Review Board (**Gas Review Board**);
- make consequential amendments to certain Acts;
- provide for transition to the new regulatory arrangements; and
- make the Code (being Schedule 2 of the GPAA) a law of Western Australia.

*Off*GAR was established on 23 February 1999 as the entity that includes the Regulator. *Off*GAR operates as a secretariat for:

- the Regulator established under Section 27 (1) of the GPAA; and
- the Arbitrator established under Section 62 (1) of the GPAA.

Under Section 56 of the GPAA, the Arbitrator is to provide administrative support to the Board. *Off*GAR operates as a secretariat for the Arbitrator and this extends to the Gas Review Board, but only to the extent that the provision of such services does not raise a conflict of interest. As the Gas Review Board can hear appeals from decisions of the Regulator, separate administrative arrangements for the provision of services to the Gas Review Board are put in place in the event of such an appeal.

2.2 COVERED PIPELINES

At its establishment, the Gas Pipelines Access Law provided for coverage of eleven pipelines in Western Australia.

- Transmission Pipelines:
 - Parmelia Pipeline
 - Dampier to Bunbury Natural Gas Pipeline (**DBNGP**)
 - Goldfields Gas Pipeline System (**GGP**)
 - Tubridgi Pipeline System (Griffin Pipeline and Tubridgi Pipeline)
 - Karratha to Cape Lambert Pipeline
 - Beharra Springs to Parmelia Pipeline
- Lateral Pipelines to the Goldfields Gas Pipeline (**GGP**) System
 - GGP to Mt Keith Power Station
 - GGP to Leinster Power Station

- Kalgoorlie to Kambalda Pipeline
- GGP to Kalgoorlie Power Station
- Distribution Systems
 - AlintaGas Distribution Systems (Mid-West and South-West Distribution Systems).

Subsequent to the establishment of the Gas Pipelines Access Law in Western Australia, coverage was revoked for the following six pipelines.

- Parmelia Pipeline
- Karratha to Cape Lambert Pipeline
- Beharra Springs to Parmelia Pipeline
- GGP to Mt Keith Power Station
- GGP to Leinster Power Station
- GGP to Kalgoorlie Power Station.

2.3 PRINCIPAL ACTIVITIES OF THE REGULATOR

2.3.1 Access Arrangements Approvals

A summary of the submission of proposed access arrangements for covered pipelines in Western Australia and the status of the Regulator's approval of these access arrangements is provided in Table 1.

Table 1: Milestone Dates in Approval of Access Arrangements

Pipeline	Submission	Draft Decision	Final Decision	Final Approval	Period for Approval
Parmelia Pipeline	7 May 1999	27 Oct 1999	29 Oct 2000	15 Dec 2000	19 months
AlintaGas Dist. Systems	30 Jun 1999	14 Mar 2000	30 Jun 2000	18 Jul 2000	12.5 months
Tubridgi Pipeline System	21 Oct 1999	7 Aug 2000	19 Oct 2001	19 Oct 2001	24 months
DBNGP	15 Dec 1999	21 Jun 2001	23 May 2003	Exp. Sep 2003	45 months
Goldfield Gas Pipeline	15 Dec 1999	10 Apr 2001 (to be amended)	–	–	–
Kalgoorlie to Kambalda	Extension of time to 1 July 2004				

Table 1 indicates that an access arrangement was approved for the Parmelia Pipeline. The access arrangement was approved before coverage for the Parmelia Pipeline was revoked.

Table 1 also indicates that an extension of time has been granted for submission of a proposed access arrangement for the Kalgoorlie to Kambalda Pipeline. The Regulator has the discretion to provide the owners of this pipeline with extensions of time to submit a proposed access arrangement. The Regulator has granted the owners of this pipeline an extension of time to submit a proposed access arrangement for two years until 1 July 2004. In granting this extension, the Regulator took into account several factors, including that the pipeline is small in size and value, and that there have been no requests for access to the pipeline that have not been able to be settled by commercial negotiation.

In the case of the Goldfields Gas Pipeline, the Regulator issued a draft decision in April 2001. The Regulator has decided to amend this draft decision. The reasons for this are described in section 3.4 of this submission.

2.3.2 Associate Contract Approvals

The Regulator has considered and approved two associate contracts between AlintaGas Networks and AlintaGas Sales, relating to a contract for gas distribution for AlintaGas Sales (18 April 2001), and a joint marketing initiative to promote the use of natural gas (30 April 2002).

2.3.3 Ring Fencing Arrangements

The Regulator has assessed and made decisions in respect of two applications from pipeline owners for the waiving of ring fencing requirements that arise under section 4 of the Code. Both applications arose in respect of relatively small transmission pipelines for which the pipeline owners submitted that the costs of meeting the ring fencing requirements were unduly costly for the relatively small pipeline businesses.

Prior to revocation of coverage of the Parmelia Pipeline, the Regulator considered an application for the waiver of ring fencing requirements arising under section 4.1 of the Code. In accordance with the Code, the Regulator commenced an assessment process that involved the issuing of a draft decision, public consultation on the draft decision and the issuing of a final decision. The draft decision, issued on 22 May 2000, declined the application for waiver of ring fencing obligations. Public submissions on this decision were invited. The application for the waiver of ring fencing obligations was subsequently withdrawn, and the pipeline owner sought an extension of time for implementation of the ring fencing obligations.

Despite the request to withdraw the application, the Regulator was bound by the Code to issue a final decision. A final decision was issued on 21 September 2000, declining the application to waive ring fencing obligations. On the same date, the Regulator issued a decision to grant an extension of time for implementation of the ring fencing obligations, to 31 March 2001, which was subsequently extended to 30 September 2001. The extensions of time were made conditional on implementation of interim ring fencing arrangements (relating to quarantining of information) and provision for review

of the extension of time in the event of any matter being raised with the Regulator regarding the effectiveness of the interim arrangements. Ring fencing arrangements were ultimately put in place in accordance with the requirements of the Code.

On the 31 March 2000, the owners of the Tubridgi Pipeline System (being Origin Energy Resources Ltd) made application for waivers of certain ring fencing obligations in respect of that pipeline. The Regulator issued a final decision on 21 November 2000 granting a waiver of ring fencing requirements subject to a number of conditions that, if realised, could cause the waiver to be reviewed and possibly revoked.

2.3.4 Other Activities

NGPAC Participation

The National Gas Pipelines Advisory Committee (**NGPAC**) is the body responsible for monitoring and advising on the effectiveness of the Code. It advises Ministers from the Commonwealth, States and Territories on the operation of gas pipeline access regulation and on desirable amendments to the Code to improve the regulatory regime. The Code may be modified by agreement between the Ministers. In August 2000 the current Regulator, Dr Ken Michael AM, was appointed to NGPAC for two years as one of two State Regulators on the Committee. The Executive Director of *Off*GAR, Mr K Peter Kolf, was appointed as the Regulator's alternate and also appointed to the NGPAC Working Group for two years.

Gas Market Deregulation

In May 2001, the Western Australian Government approved the establishment of the Gas Retail Deregulation Project with the aim of implementing full retail contestability in the gas distribution market. To achieve this aim, the Government established the Gas Retail Deregulation Steering Group. One of the matters required to be addressed under the terms of reference of the Steering Group is the interconnection between distribution and transmission systems. *Off*GAR has a presence on the Steering Group in the capacity of an observer.

Assessment and Approval of Capital Expenditure under an Access Arrangement

On 24 June 2002, AlintaGas Networks Pty Ltd (**AGN**) submitted a proposal seeking the Regulator's binding agreement, pursuant to section 8.21 of the Code, to the costs to be incurred by AGN of developing systems associated with the introduction of full retail contestability in Western Australia. The effect of this agreement, if made, would have the costs of the investment by AGN added to its capital base when its access arrangement is reviewed in March 2004 and reference tariffs for use of its Mid-West and South-West Gas Distribution Systems would be adjusted accordingly.

AGN also requested that the Regulator provide a non-binding acknowledgement that non-capital costs associated with full retail contestability are likely to satisfy the requirements of section 8.37 of the Code such that they are to be included in the next review of its access arrangement.

The Regulator did not have the power to approve these capital costs because section 8.21 of the Code does not provide for the Regulator to agree to these types of costs. The matter was raised with NGPAC in December 2002 and the Code was amended on 17 April 2003 to include this category of capital costs (Seventh Amending Agreement).

On 26 June 2003, AGN submitted a new application seeking the Regulator's binding agreement for capital costs for the introduction of full retail contestability to be included in the capital base at the time of the next review of its access arrangement. The review is due to commence on 1 April 2004 and be completed by 31 December 2004. AGN also sought a non-binding agreement to non-capital costs as before.

The draft decision on AGN's application was issued by the Regulator on 25 August 2003, agreeing that the proposed capital costs for the implementation of a Network Management Information System to a maximum of \$12 million will meet the requirements of section 8.16 of the Code. However, as the Code does not provide the Regulator with any power to provide a non-binding acknowledgement that the non-capital costs would be likely to satisfy section 8.37 of the Code, the Regulator considered that it would be inappropriate, in the circumstances, to give the non-binding acknowledgement sought.

3 TIMELINESS IN ACCESS ARRANGEMENT APPROVALS

3.1 INTRODUCTION

The Code provides that the process of approving access arrangements is to take place within a period of six months from receipt of a proposed access arrangement. In that time the Code process includes public consultation, the issuing of a draft decision, further public consultation, the issuing of a final decision and, if necessary, the submission of a revised proposed access arrangement and a further final decision. The Code gives the Regulator the discretion to extend the six month period indefinitely, but in incremental periods of up to two months.

From the milestone dates for approvals of access arrangements (Table 1), it is evident that there has been substantial variation in the time periods for approval of access arrangements by the Regulator. A range of pipeline-specific circumstances have contributed to differences in the time periods for assessment. It is the purpose of this section of the submission to describe these circumstances.

The assessment of access arrangements for the Parmelia Pipeline and Tubridgi Pipeline Systems are regarded, in hindsight, by the Regulator to have been relatively straight-forward assessment processes that were relatively unaffected by circumstances particular to the individual pipeline systems. The time periods for assessment of 24 months for the Tubridgi Pipeline System and 19 months for the Parmelia Pipeline are consistent with the periods of assessment and approval of access arrangements for other gas pipeline systems by other regulators throughout Australia (Attachment 1). Two points of note in regard to the Parmelia and Tubridgi assessments are:

- both of the pipelines are relatively small pipelines (regulatory asset values pursuant to the Code of less than \$100 million); and
- the assessment and approval of the access arrangement for the Tubridgi Pipeline included the submission by the owner of this pipeline of a revised proposed access arrangement that met the requirements of the Regulator's draft decision, allowing the Regulator to issue a final decision that approved a revised access arrangement which obviated the need for the Regulator to issue a further final decision and final approval.

For the other three pipeline systems in Western Australia for which access arrangements have been submitted, there are particular circumstances of each pipeline that have affected the time period of the assessment and approvals process. These circumstances are described below for each of the pipelines.

3.2 ALINTAGAS DISTRIBUTION SYSTEMS

During the period of submission and assessment of AlintaGas's proposed access arrangement for its Mid-West and South-West Distribution Systems, AlintaGas was a government-owned business with a privatisation sale pending.

The Regulator's final decision required relatively minor amendments to the proposed access arrangement with the Regulator accepting, after correction to exclude user-specific assets, the capital base as proposed, assessing a rate of return within 50 basis points of that proposed, and assessing a total revenue for the access arrangement period of approximately 95 percent of that proposed. After the Regulator issued the final decision, there was a period of only three weeks before a revised access arrangement was submitted and approved. The total period from submission of the proposed access arrangement to final approval was 12.5 months.

The following circumstances of the AlintaGas business may have contributed to the comparatively rapid approval process.

- The proposed access arrangement was indicated by AlintaGas representatives to have been prepared in consultation with the Western Australian State Government as the then owner of the business. This process of development of the proposed access arrangement may have been a factor contributing to the similarity between the approved access arrangement and that initially proposed.
- A sale of AlintaGas took place shortly after the approval of the access arrangement.

3.3 DAMPIER TO BUNBURY NATURAL GAS PIPELINE

The proposed access arrangement for the DBNGP was submitted on 15 December 1999. Forty two months later, following a Full Court decision by the Supreme Court of Western Australia on the Regulator's draft decision, the Regulator issued a final decision on 23 May 2003.

The Regulator's assessment of this proposed access arrangement has been complicated by a need to examine and take into account matters relating to the sale of the DBNGP to the current owners (Epic Energy) in 1998, prior to the Code coming into effect in Western Australia.

After submission of the proposed access arrangement, the Regulator invited submissions from interested parties with an original closing date for submissions of 4 February 2000. Submissions made to the Regulator included submissions from Epic Energy, AlintaGas (the previous owner of the DBNGP) and the Western Australia Government in relation to various matters concerning the sale of the DBNGP. For reasons of claimed confidentiality of submissions, the Regulator consulted with the parties making the submissions in making a determination as to public release of the submissions. Issues of confidentiality were not resolved until 20 April 2000 when submissions were publicly released and the period of public consultation extended to allow for other parties to make submissions on the released information.

Concurrently with dealing with the issues of confidentiality, the Regulator required Epic Energy to provide further information relating to the proposed access arrangement, being the provision of values for the depreciated actual cost under section 8.10(a) of the Code and depreciated optimised replacement cost under section 8.10(b) of the Code, for the pipeline assets. Epic Energy provided

further information in a revised access arrangement information submitted to the Regulator on 28 July 2000.

The Regulator proceeded to assess the proposed access arrangement and issued a draft decision on 21 June 2001.

Subsequent to issue of the draft decision, Epic Energy provided notice to the Regulator on 1 August 2001 of its intent to seek judicial review of the draft decision. On 28 August 2001, Epic Energy obtained an order nisi from the Supreme Court of Western Australia requiring the Regulator to, among other things, show cause as to why the draft decision should not be set aside. The action by Epic Energy sought to set aside the draft decision on grounds that the Regulator erred in law in his assessment of the proposed access arrangement.

A central argument of Epic Energy was that the Regulator had failed to accord the factors in section 2.24 of the Code fundamental significance in assessing whether the proposed access arrangement, including the proposed reference tariff, fulfilled the principles in sections 3.1 to 3.20 and should be approved. In particular, Epic Energy asserted the Regulator had failed to properly take into account, pursuant to section 2.24(a), its legitimate business interests by not allowing the proposed reference tariff, nor allowing a valuation of the initial capital base at a value based on the price it had paid for the pipeline.

The matter was heard by the Supreme Court of Western Australia in the period 21 – 28 November 2001. The Court delivered its decision on 23 August 2002, but declaratory orders were not finalised until 20 December 2002.

Subsequent to the Court's declaratory orders, the Regulator issued a Final Decision on 23 May 2003. In response to the final decision, Epic Energy submitted a number of documents on 8 August 2003. The Regulator is currently considering the material submitted by Epic Energy.

In total, the assessment and approval process for the proposed access arrangement for the DBNGP will have taken 45 months to the end of August 2003. Allowing for the time taken in dealing with issues associated with confidential submissions and the judicial review of the draft decision, the assessment of the proposed access arrangement has otherwise taken 24 months. This has included extended periods of consultation, amounting to 10 months, to allow parties to make submissions in respect of the submissions originally withheld from public release, and to make submissions in respect of the Court Decision. The extensions to the periods of consultation were requested by interested parties, including both the service provider and users. The period of assessment also included a considerable period of investigation into the sale of the DBNGP, which is outside of the normal process of assessment of a proposed access arrangement.

3.4 GOLDFIELDS GAS PIPELINE

The proposed access arrangement for the GGP was submitted on 15 December 1999 and the Regulator issued a draft decision on the proposed access arrangement on 10 April 2001, a period of

16 months. The Regulator is currently in the process of amending and re-issuing the draft decision. The Regulator's assessment of this proposed access arrangement has been complicated by a need to examine and take into account matters relating to the prior access regime for the pipeline, established under a State Agreement in relation to the GGP which is given statutory force by the *Goldfields Gas Pipeline Agreement Act 1994* (WA) (**State Agreement Act**).

On 13 December 2001, the owners of the GGP issued a writ in the Supreme Court of Western Australia seeking judicial review of the draft decision. The action by the owners of the pipeline was similar to the arguments by Epic Energy in its Supreme Court proceedings regarding the construction of section 2.24 of the Code. The other prime contention of the GGP action concerned the interpretation of the State Agreement Act and its impact upon the Regulator's assessment of the proposed access arrangement. Essentially, the owners of the GGP contended that the effect of clause 21(3) of the State Agreement Act was that the parts of the Code relating to the determination of reference tariffs, or their application in the particular circumstances, have no effect in respect of the GGP. Various other parties, including WMC Resources Limited, sought to be and were joined as defendants to the action in order to oppose the interpretation of the State Agreement Act contended by the GGP owners.

On 6 November 2002, the Regulator expressed in a Notice that he intended to amend his draft decision on the proposed access arrangement for the GGP to address the matters raised in the Court's Decision in respect of the DBNGP. Further, the Regulator advised in the Notice that he intended to issue a second part to the amended draft decision setting out his assessment of the extent to which the Code applied in light of submissions made regarding the applicability of clause 21(3) of the State Agreement Act. The pipeline owners of the GGP discontinued their Supreme Court action on 17 December 2002.

On 10 June 2003, WMC Resources Ltd obtained an order nisi from the Supreme Court of Western Australia requiring the Regulator to show cause before the Full Court why a Writ of Prohibition should not be issued forbidding him from considering or determining whether, under clause 21(3) of the State Agreement Act, the Code shall not have effect in relation to the GGP. In this action, WMC Resources Limited is also seeking various declarations regarding the construction and interpretation of the Code and clause 21(3) of the State Agreement Act. The State of Western Australia is a party to these proceedings and other parties, including the owners of the GGP, have indicated they will make submissions in relation to the relief sought by WMC.

The interaction of a State Agreement Act with the Code is outside of the normal course of applying the Code in an assessment of a proposed access arrangement, and has contributed to the extended period of assessment.

4 APPLICATION OF THE GAS ACCESS REGIME IN WESTERN AUSTRALIA

4.1 REGULATORY DISCRETION

The Code establishes a framework for a number of elements of regulation of third party access to natural gas pipelines, including:

- coverage – the mechanism by which pipelines become subject to the Code;
- access arrangements – requirements for the owner or operator of a covered pipeline to lodge an access arrangement with the relevant regulator for that pipeline, the required content of an access arrangement, and the administrative process by which a proposed access arrangement is assessed and approved by the relevant regulator;
- ring fencing – requirements that the pipeline business of a company be conducted separately from related businesses of producing, purchasing or selling natural gas;
- approval of associate contracts;
- agreement under section 8.21 of new facilities investment; and
- arbitration of access disputes.

Major elements of regulation are dealt with largely by different sections of the Code, each of which is preceded by an italicised preamble that is intended to provide an overview of the scope and content of the relevant section of the Code.

A feature of the Code is that it is not prescriptive on the requirements in relation to the various elements of an access arrangement, nor the methodologies or parameters in determination of regulated tariffs. Rather, the Code establishes principles and objectives for the different elements with which an access arrangement proposed by a service provider is required to comply.

Partly as a result of this underlying structure, the Code is a complex document with multiple, potentially conflicting objectives, factors and principles for the regulation of third party access to natural gas pipeline systems. The role of a regulator is to determine whether a proposed access arrangement (or proposed revisions to an existing access arrangement) complies with the relevant principles and objectives. In performing this role, a regulator is not intended to take the position of an advocate for any sectional interest, such as gas pipeline users or gas consumers, but rather is intended to perform a role in the nature of an umpire that adjudicates upon whether an access arrangement complies with the requirements of the Code. However, the substantial discretion required to be exercised by a regulator in balancing competing interests and resolving conflicting objectives may be beyond that consistent with the role of an umpire.

The absence of prescription in the Code and the multi-layered structure of the Code in statements of objectives, requirements and principles have led to difficulties and differences of view in interpretation of the Code and in establishing a hierarchy of requirements and principles that must be satisfied in respect of different elements of regulation.

Matters of construction of the Code were addressed by the Full Court of the Western Australian Supreme Court in the case brought by Epic Energy in respect of the Regulator's draft decision on the proposed access arrangement for the DBNGP.¹ In particular, the Court examined, in the context of assessing the reference tariff, reference tariff policy and ascribing a value to the initial capital base of the pipeline, the interaction between the set of factors set out in section 2.24 of the Code and the set of factors and principles set out in section 8 of the Code. In respect of an assessment of the reference tariff and reference tariff policy of a proposed access arrangement, the Court determined that the factors in section 2.24 should guide the Regulator in determining, if necessary, the manner in which objectives for a reference tariff and reference tariff policy as set out in section 8.1 of the Code can, if conflicting, best be reconciled or which of them should prevail.

In reaching its view, the Court stated that there was:

an underlying harmony and consistency in the general policy objectives of the [GPAA] stated in the preamble, and ss 2.24, 8.1, 8.10 and 8.11 of the Code. At every one of these points, however, there is also the tension of potentially conflicting considerations or objectives. The nature of that potential for conflict remains generally consistent, although given more particular and precise expression in the differing context of those provisions... [T]he scheme of the [GPAA] and the Code is to leave this potential conflict which, in part, is between the interests of a service provider in achieving a return on its investments in the pipeline and the interests of users or consumers in achieving a lower price and indeed, perhaps, in the achievement in the public interest of greater competitiveness or the effects of competition, to be resolved by the Regulator in accordance with the [GPAA] and the Code and the circumstances of each particular case"...² [O]nce the basic issues of interpretation are clarified it is for the Regulator, not this Court, to consider and weigh those factors and objectives. It is for the Regulator to assess the relevance and weight of each of these factors and objectives and to exercise the discretions that are committed by the Code to him.³

The Court's decision in respect of the action taken by Epic Energy has provided guidance in the construction of part of the Code. However, by virtue of the complex nature of the Code, in particular the structure of the objectives, principles, factors and requirements of the Code relating to the determination of reference tariffs, it is possible that further disputes will arise in the future in respect of the construction of the Code, with adverse impacts on the timeliness and costs of regulatory decisions. For example, the Regulator asked the Court in the Epic Energy proceedings to make a

¹ *Re Dr Ken Michael AM; ex parte Epic Energy (WA) Nominees Pty Ltd & Anor* [2002] 25 WAR 511

² *Re Dr Ken Michael AM; ex parte Epic Energy (WA) Nominees Pty Ltd & Anor* [2002] para 185.

³ *Ibid.* para 187.

declaration setting out the precise interaction between the potentially conflicting factors set out in section 8.10(a) to (k) of the Code, the potentially conflicting objectives in section 8.1(a) to (f) and the potentially conflicting factors in section 2.24(a) to (d) of the Code. However the Court, whilst noting that this may be the source of a future dispute, declined to make the declaration.⁴

Further, the Court's guidance on how the Regulator might best exercise the discretions given to him by the Code was limited for reason that the Court did not establish a clear scheme of objectives in the Code that would guide the Regulator in exercising discretion in a balancing of interests, such as in balancing the interests contemplated in the factors of section 8.10 and 2.24 of the Code. It is clear from the Court's decision that the Regulator cannot use the introduction or preambles in the Code as a guide as to how the Regulator may best exercise his discretion to resolve or weigh and balance the various potentially conflicting factors and objectives in the Code, as the introduction and preambles do not form part of the Code.

Revisions of the Code to more clearly establish the scheme of assessment of a proposed Access Arrangement and to more clearly state the objectives within the body of the Code, rather than in the preambles, to provide regulators with more guidance in resolving the inherent conflicts may reduce disputes, improve the timeliness of regulatory decisions and reduce costs.

4.2 STATUS OF DRAFT DECISIONS

In its decision in respect of the action taken by Epic Energy for judicial review of the Regulator's draft decision on the proposed access arrangement for the DBNGP, the Full Court of the Western Australian Supreme Court gave consideration, as a preliminary matter, to the status of a draft decision under the Code, and in particular whether a draft decision is subject to review.

The Court found that, at least in the instance of the draft decision on the DBNGP, the draft decision has a sufficient connection with the final decision so as to be seen as affecting the rights of the service provider and hence there could be justification for the Court to quash the draft decision⁵ or to prohibit the Regulator from acting in accordance with views indicated in the draft decision in proceeding to a final decision.⁶ Nevertheless, the Court also found, in the particular circumstances of that case, that it did not need to set aside the draft decision as it was a sufficient remedy for the Regulator to undertake to accept and act in accordance with the Court decision as to the relevant issues,⁷ and that declaratory relief was being granted.⁸

⁴ *Re Dr Ken Michael AM; ex parte Epic Energy (WA) Nominees Pty Ltd & Anor [2002]*, WASCA 231 (S), para 11–16.

⁵ *Ibid.* para 32.

⁶ *Ibid.* para 33.

⁷ *Ibid.* para 35.

⁸ *Ibid.* para 36,37.

The Code itself does not explicitly provide for the review or appeal of a draft decision made in respect of a proposed access arrangement and the decision of the Court therefore establishes an opportunity for review that was not explicitly contemplated by the Code in the process of assessment of a proposed access arrangement.

Regardless of the merits or otherwise of a draft decision being subject to review, the opportunity for review at this stage of the assessment process has implications for the timeliness and costs of approval of access arrangements or revisions to access arrangements. With a draft decision being subject to review, it is unlikely that regulators will be willing to use draft decisions as a vehicle for presenting analysis and tentative positions on various aspects of a proposed access arrangement for the purposes of consultation. Rather, regulators may be more inclined to present analysis and take tentative views in issues papers or discussion papers, and take more definite positions within their draft decisions. While this may have some merit in respect of the administrative process of assessments, it would add to the time requirements for assessments and approvals.

4.3 INFORMATION COLLECTION AND DISCLOSURE

4.3.1 Information Collection under Section 41 of Schedule 1 of the Act

Section 41 of Schedule 1 to the GPAA gives the Regulator power to obtain information or a copy of a document from a person where the Regulator has reason to believe that the person has information or a document that may assist the Regulator in the performance of the his duties.

The Western Australian Regulator has utilised this power in section 41 of the GPAA to obtain information and copies of documents to assist in the assessment of proposed access arrangements for the DBNGP and the GGP.

In most instances where the Regulator has utilised the power to obtain information and/or copies of documents under section 41 of the GPAA, the Regulator has consulted with the party providing such material prior to the issue of a Notice under section 41. During this consultation, parties have frequently sought that a formal request for the information be made by the Regulator in the form of a Notice under section 41 of the Act, so that they have an opportunity to address their concerns in respect of the disclosure of confidential or commercially-sensitive material to third parties. Section 42 of the GPAA imposes a restriction on the Regulator in respect of the disclosure of information provided under section 41, where the person giving the information states that it is of a confidential or commercially-sensitive nature. However, the Regulator may decide to disclose information or document contents where he satisfies himself that no detriment would be caused to those supplying the material, or that if detriment would be suffered, it is outweighed by the public benefit in disclosing the material. Before disclosing such material, the Regulator must:

- provide a written notice to the person that supplied the information to the Regulator; and
- provide a written notice to any third party of which the Regulator is aware that supplied the information to the person that provided the information to the Regulator.

In accordance with Section 42(1)(b) and (c), these written notices must specify the nature of the intended disclosure and set out the reasons why the Regulator wishes to make the disclosure. These reasons must detail why the Regulator considers that the disclosure would not cause detriment to those supplying the material or otherwise why the Regulator considers that the public interest in disclosing the material outweighs any potential detriment.

Pursuant to Section 43 of the GPAA, a person who is given a section 42 Notice and who is aggrieved by a decision of the Regulator to disclose information or the contents of a document may apply for review of a decision of the Regulator to disclose the material. In Western Australia, a determination on an application for review is made by the Gas Review Board which is established under section 50 of the GPAA. However, the Gas Review Board has to be specifically convened for the purposes of hearing each such application.

It is the experience of the Regulator and *OffGAR* that the process for disclosure of information and the contents of documents, as established by sections 42 and 43 of schedule 1 to the GPAA, is administratively complex and time consuming. There is also ambiguity in the powers of the Regulator to disclose confidential information obtained through the power in section 41 to advisers outside of the employees of the Regulator.⁹

A further complicating factor is that section 42(1) requires the Regulator to follow the processes in section 42(2) where a person claims the material provided is of a confidential or commercially-sensitive nature. Where contested by relevant parties, the process enabling disclosure of information under sections 42 and 43 of Schedule 1 to the GPAA may take many months due to:

- the time necessary to notify parties that were the original sources of material obtained by the Regulator pursuant to section 42 of Schedule 1 of the GPAA;
- the provision of seven days for the notified parties to apply for review of the Regulator's intent to disclose information;
- the time necessary to convene the Gas Review Board; and
- the time taken by the Board to arrange a hearing, consider the matters raised, publish its decision and issue orders.

The process for disclosure established by sections 42 and 43 of Schedule 1 to the Act is inconsistent with the process established by section 7.12 of the Code for disclosure of confidential or commercially-sensitive information provided to the Regulator other than pursuant to section 41 of schedule 1 of the GPAA. For disclosure under section 7.12 of the Code of claimed confidential or commercially-sensitive information, it is sufficient for the Regulator to be of the opinion that the

⁹ Section 42(3)(a) of Schedule 1 of the GPAA provides for the Regulator to disclose confidential or commercially-sensitive information to a member of the Regulator's staff. However there is divided legal

disclosure would not be unduly harmful to the legitimate business interests of the service provider or a user or prospective user. There is no requirement for the Regulator to provide notice of intended disclosure to the provider of the information or any third-party source of the information,¹⁰ nor is there any process established for review of a decision by the Regulator to disclose the information. However, an affected party is still afforded protection by being able to seek judicial review on any of the grounds for which a prerogative writ is available, including the ground that the Regulator denied an affected party procedural fairness.

4.3.2 Powers to Require Service Providers to Maintain and Provide Information

In April 2002, regulators under the Gas Access Regime provided a paper to NGPAC describing perceived deficiencies of the regime in respect of the powers of regulators to require service providers to maintain and provide information that is necessary for regulators to undertake their roles in respect of ongoing regulation of prices and service quality.

The Regulator is of the view that the problem of limited powers to require service providers to maintain and provide information and copies of documents persists and that this should be addressed in a review of the access regime. The Productivity Commission is referred to the paper prepared by the regulators in respect of this matter (Attachment 2).¹¹

The Commission is referred particularly to the discussion in the regulators' paper relating to the rules and procedures for the keeping of regulatory accounts by service providers, as set out in section 4.1 and 4.2 of the Code, and the following perceived problems in implementing requirements for the keeping of regulatory accounts and provision of the information to regulators.¹²

- Regulators do not appear to have the power to require maintenance and provision of reliable information to substantiate the reasonableness of costs, in particular costs attributable to activities undertaken under service agreements and contractual arrangements with associated businesses, or costs representing a share of costs incurred jointly between regulated and non-regulated parts of a business.
- Regulators do not appear to have the power to require maintenance and provision of reliable information to substantiate the reasonableness of asset values and cost allocations between services and customer classes.

opinion as to whether this provides for disclosure to external advisers retained to assist the Regulator on the relevant matter.

¹⁰ It is noted that although there is no statutory requirement in this respect, provision of notice of intended disclosure may be required for reasons of procedural fairness.

¹¹ Western Australian Office of Gas Access Regulation, 14 April 2002, Information Collection Powers under the Gas Pipelines Access Regime. Paper prepared for the Natural Gas Pipelines Advisory Committee.

¹² Ibid, p 13.

- Regulators do not appear to have the power to require maintenance of operational, technical or other non-financial information, such as that which may be required for effective benchmarking purposes, or information not directly required for accounting purposes, such as forecasts.
- Regulators do not have the power to require maintenance of information on the performance of service providers in relation to service quality.
- Regulators do not have the power to require reporting of information by service providers in periods between times of review of access arrangements, limiting the ability of regulators to identify any problems with the information being maintained until an access arrangement review process has commenced.

5 ALTERNATIVE REGULATORY MODELS

The Independent Gas Pipelines Access Regulator, Dr Ken Michael AM, is also the Rail Access Regulator established under the *Railways Access Act 1998* (WA). Experience in administering the two regulatory schemes in Western Australia has led Dr Michael to making observations on the relative merits of some different approaches adopted under the two regulatory schemes.

The rail access regime in Western Australia serves to regulate access to the existing freight rail network and a single metropolitan passenger rail system. The access code for the regime (Railways Access Code 2000 (WA)) is less complex than the Gas Code, providing for establishment and approval by the regulator of a number of access and pricing elements that are incorporated into individual “access arrangements” for specific routes in the rail network. The process of establishing these access arrangements under the rail access regime is one of commercial negotiation, backed up by resort to arbitration. The elements of the regulatory regime that are approved by the regulator include regulatory asset valuation, rate of return, costing principles, ceiling prices and floor prices. These elements establish bounds for commercial negotiation within a “revenue cap” regulatory model.

It is recognised that the circumstances of regulation differ between, on the one hand, a number of gas pipeline systems throughout Australia and, on the other, a rail network in Western Australia. Despite this, however, there are some elements of the rail code that are administratively simpler to implement than corresponding elements in the gas Code, and there may be some benefit in consideration of whether these elements may be usefully incorporated into the gas Code.

One significant difference between the gas and rail codes applying in Western Australia occurs with the level of prescription in asset valuation. Under the rail access code the rail assets are valued using a prescribed methodology defined in legislation, and the value determined is re-estimated periodically. By comparison, the gas Code is non-prescriptive in the application of the methodology used to establish initial regulatory asset values for covered pipelines that were in existence at the commencement of the Code. Specific guidance contained in the Code in respect of initial regulatory asset values is that the value should not “normally” fall outside the range contemplated by sections 8.10(a) and (b) of the Code. In this respect a further option for reducing the complexity of the regulatory process in the gas access regime may be for the Code to be more definitive in respect of the requirements for regulatory asset valuation.

ATTACHMENT 1

DURATION OF ACCESS ARRANGEMENT ASSESSMENT - COMPARATIVE TABLE

ACCESS ARRANGEMENT	Operator	Regulator	AA Lodged	Draft Decision	Duration (months)	Final Decision	Duration (months)	Final Approval	Duration (months)	Duration Approved	Duration WIP
Western Australia											
Parmelia Pipeline *	CMS Gas Transmission	OffGAR	7-May-99	27-Oct-99	6	20-Oct-00	18	18-Dec-00	20	20	
Mid-West & South-West Gas Distribution Systems	Alinta Gas	OffGAR	30-Jun-99	14-Mar-00	9	30-Jun-00	12	18-Jul-00	13	13	
Tubridgi Pipeline System	Sagasco	OffGAR	21-Oct-99	7-Aug-00	10	19-Oct-01	24	19-Oct-01	24	24	
DBNGP	Epic Energy	OffGAR	15-Dec-99	19-Jun-01	18	23-May-03	42				45
Goldfields Gas Pipeline	Goldfields Gas Transmission	OffGAR	15-Dec-99	10-Apr-01	16		DTD 45				45
Average Time Taken (Months)											
										19	45
Other Jurisdictions											
Victorian Transmissions Pipelines Australia	GPU Gas Network	ACCC	3-Nov-97	28-May-98	7	6-Oct-98	11	16-Dec-98	14	14	
Multinet Distribution System (Victoria)	United Energy	ORG Victoria	3-Nov-97	29-May-98	7	6-Oct-98	11	17-Dec-98	14	14	
Stratus Distribution System (Victoria)	Envestra Limited	ORG Victoria	3-Nov-97	29-May-98	7	6-Oct-98	11	17-Dec-98	14	14	
WestStar Distributions System (Victoria)	TXU Ltd	ORG Victoria	3-Nov-97	29-May-98	7	6-Oct-98	11	17-Dec-98	14	14	
Mildura Natural Gas Distribution System	Envestra Limited	ORG Victoria	17-Jun-98	3-Oct-98	4	3-Jun-99	12	3-Jun-99	12	12	
Canberra Gas Distribution System	AGL Gas Networks	ICRC ACT	5-Jan-99	1-Mar-00	14	15-Nov-00	23	17-Jan-01	25	25	
Natural Gas System NSW	AGL Gas Networks	IPART NSW	5-Jan-99	28-Oct-99	10	21-Jul-00	19	14-Sep-00	21	21	
Central West Pipeline	AGL Pipelines	ACCC	31-Dec-98	10-Sep-99	8	30-Jun-00	18	19-Oct-00	22	22	
Natural Gas Dist. System in Albury, Uindera	Albury Gas Company NSW	IPART NSW	6-Jun-98	2-Jul-99	13	3-Dec-99	18	31-Jan-00	20	20	
Natural Gas Dist. System, Wagga Wagga, NSW	Great Southern Energy.	IPART NSW	8-Apr-98	1-Sep-98	5	1-Mar-99	11	1-Sep-99	17	17	
SA Gas Distribution System	Envestra Limited	SAIPAR	22-Feb-99	13-Apr-00	14	21-Dec-01	34	17-Apr-03	51	51	
Moomba - Adelaide Pipeline System	Epic Energy	ACCC	1-Apr-99	16-Aug-00	17	12-Sep-01	30	31-Jul-02	41	41	
Moomba - Sydney Pipeline System	East Australian Pipeline Limited	ACCC	5-May-99	19-Dec-00	20		DTD 52				52
Amadeus Basin - Darwin Pipeline	NT Gas	ACCC	29-Jun-99	2-May-01	22	4-Dec-02	42	26-Mar-03	46	46	
Roma to Brisbane Pipeline	Australian Pipeline Trust	ACCC	6-Nov-00	15-Aug-01	9	16-Jan-02	15	11-Sep-02	22	22	
Sth West Qld Pipeline	Epic Energy	ACCC	17-Aug-00	13-Jun-01	10	28-Nov-01	16	4-Jun-02	22	22	
Queensland Gas Pipeline	Duke Energy	ACCC	17-Aug-00	17-Apr-01	8	1-Aug-01	12	1-Nov-01	15	15	
Carpentaria Gas Pipeline	Australian Pipeline Trust	ACCC	3-Nov-00	15-Aug-01	10	16-Jan-02	15	1-Nov-01	12	12	
Gas Corporation of Qld System	Envestra Limited	QCA	17-Oct-00	23-Mar-01	5	3-Oct-01	12	21-Dec-01	14	14	
Allgas Energy System	Allgas Energy Ltd	QCA	17-Oct-00	23-Mar-01	5	3-Oct-01	12	21-Dec-01	14	14	
Average Time Taken (Months)											
										22	52
D/TD = Duration to Date - calculated at:											
			25-Aug-03								
* = Coverage Revoked											

CONFIDENTIAL ATTACHMENT 2

**INFORMATION COLLECTION POWERS UNDER THE GAS PIPELINES ACCESS
REGIME**