

# **SUBMISSION TO THE NATIONAL COMPETITION COUNCIL AND THE GAS REFORM IMPLEMENTATION GROUP IN RESPECT OF THE NATIONAL THIRD PARTY ACCESS REGIME FOR NATURAL GAS PIPELINE SYSTEMS**

**August 1997**

## **Summary**

Western Australia is endeavoring to continue to meet its commitments to National Gas Reform within the context of National Competition Policy. The State has been an active contributor to CoAG's Gas Reform Task Force and the follow-up Gas Reform Implementation Group which has been finalising a proposed Intergovernmental Agreement, draft National Access Code and Implementing Legislation in relation to third party access to gas pipelines. This involvement has occurred despite Western Australia having had third party access rights to privately owned pipelines under State legislation for more than two decades and the prospect that there will be no major interstate gas pipelines from Western Australia in the foreseeable future.

Western Australia commends the current draft of the National Access Code to the National Competition Council for consideration as to "in principle" approval as part of the proposed National Gas Access Regime subject to certain principles set out in this submission and which the State views as necessary and appropriate to be recognised for this State to adopt such a regime through implementing legislation in its jurisdiction.

## **Introduction**

At the core of this submission is that for the foreseeable future, there is no likelihood of any cross border linkage of natural gas transmission pipelines between the State of Western Australia and the Northern Territory or the State of South Australia which adjoin it. Nevertheless, as the history of this State's participation in the development of free and fair trade in natural gas and competition policy reform more generally has shown, Western Australia is supportive of a national gas pipeline access regime.

This submission reflects Western Australia's desire to be a participant in the proposed uniform national framework for third party access to gas pipelines, but also to recognise that there are practical considerations in achieving precise alignment with an access regime that encompasses provisions that have little if any bearing on the operations of the present Western Australian gas pipeline systems.

The thrust of the COAG meeting of 25 February 1994, was that complementary legislation to implement a uniform national framework to apply to third party access to all gas transmission pipelines would be developed co-operatively between the parties. What has emerged with the latest draft of the Intergovernmental Agreement (IGA), the proposed Implementing Legislation and the draft National Third Party Access Code for Natural Gas Pipeline Systems (the Code) is a level of centralisation and rigidity in structure of the National Gas Access Regime which far exceeds the level envisaged by Western Australia as an appropriate outcome of that meeting.

This submission is intended to convey the principles pursuant to which Western Australia would wish to participate in the finalisation of the structuring of the uniform national framework as a National Gas Access Regime which subsequently the National Competition Council (NCC) will recommend as an "effective access regime" under Part IIIA of the Trade Practices Act 1974.

## **The National Gas Access Regime**

Western Australia is supportive of the format of the proposed uniform national framework, namely an IGA to be reflected in individual State/Territory legislation, the National Gas Pipeline Access Law (NGPAL) and the Code. However, the rigidity of each of these three components as currently drafted makes it difficult for the unique aspects of individual jurisdictions to be successfully accommodated, bearing in mind that the evolutionary processes by which each State or Territory has arrived at its present arrangements for access to gas pipelines is different.

The IGA recognises that there will be a transitional phase and there will be derogations to allow for individual differences between the States and Territories in adopting the Code.

The subject matter of this submission relates to fundamental points of principle that need to be included in the IGA. The manner in which those principles are accommodated may have to be by way of derogations in the jurisdiction's implementing legislation from specific provisions of the NGPAL or the Code.

Western Australia believes that it is the substance of the Code to which adherence is required on a national basis. The individual requirements for the proper and

practicable administration of that Code in individual States such as Western Australia, should not be sacrificed for the sake of uniformity.

Western Australia believes that if the NGPAL or the Code incorporates the modifications that are proposed in this submission to accommodate Western Australia's unique position, the aims of the COAG reforms for gas will be able to be met. That is, there will then exist a uniform national framework in respect of access to pipelines that will make feasible a nationally integrated and competitive natural gas industry in which consumers can contract directly with the gas supplier of their choice and contract separately with a pipeline operator for the transportation of gas.

Western Australia would then be confident in addressing the necessary supporting legislation to deal with issues such as functions and powers of the State-based Regulator and any relevant appeals body. In so doing, the State would need to adhere to all relevant aspects of the National Competition Policy and, of course, the IGA.

The issues of principle relating to the NGPAL and Code which Western Australia considers to be critical and seeks to have addressed are detailed below.

**(1) State Appointed Regulator.**

***State Regulator to oversee both transmission and distribution pipelines in States where no interstate pipelines are involved in the foreseeable future***

At the present time, the Draft IGA provides that for transmission pipelines, the regulator will be the Australian Competition and Consumer Commission (ACCC) and for distribution systems the regulator will be a State appointee. In a situation where transmission pipelines already cross State/Territory boundaries, or there is an expectation that this will occur in the foreseeable future, the duality of regulators which this produces, has some justification. It is logical that a National Independent Regulator be appointed to preside over the regulation of inter-state transmission pipelines and that a State appointed Regulator would deal with distribution systems which are typically wholly within a State.

It is not anticipated that Western Australia will, in the foreseeable future, have a major transmission pipeline crossing its State border. The geographical vastness of the State and the way in which the present system operates to accommodate both domestic and industrial demands for natural gas within the State has placed the State in a unique position. The focus of Western Australia will therefore not be on interstate issues, but on ensuring that there is cohesion and consistency in the single administration of both transmission and distribution pipelines in the State.

Western Australia believes that it can best meet the requirements of competition policy outlined in clause 6(4) of the Competition Principles Agreement of April 1995, by vesting the regulation of both gas transmission pipelines and gas distribution systems in the control of a single State appointed Regulator. We point out that this aspect of our submission deals with the appointment of the Regulator only. The powers of the Regulator and the principles upon which the

Regulator would exercise those powers would, of course, need to be consistent with the requirements of the Code.

In developing the proposed Code, the focus of interested parties has been on the virtue of having a separate regulator for transmission irrespective of whether those pipelines cross jurisdictional borders. Western Australia believes that while that is of significance, in order to accommodate the State's unique position, the focus should also centre on the desirability of the appointment of a State Regulator to oversee both transmission and distribution in States where no inter-state pipelines are involved or likely to be involved in the foreseeable future.

## (2) **Jurisdiction of the Supreme Court of Western Australia**

### *Appeals involving decisions of a State-based regulator to that State's Supreme Court*

It is noted that under clause 22 of the draft National Gas Pipeline Access Bill, presently called the National Gas (South Australia) Bill, jurisdiction is conferred on the Federal Court with respect to civil (and possibly) criminal matters relating to a breach or alleged breach of a regulatory provision. Having regard to the matters referred to above which go to the desirability of localised administration of the Western Australian transmission pipeline and distribution systems, Western Australia submits that the jurisdiction for pipeline issues in Western Australia should be vested in the Supreme Court of Western Australia.

It is also noted that under clause 25 of the South Australian Bill, the Administrative Decisions (Judicial Review) Act 1977 of the Commonwealth applies as a law of the State to any matter arising in relation to a decision of a Code Body under the NGPAL or the Code as if they were laws of the Commonwealth and not laws of the State.

Western Australia submits that for appeals that only involve issues relating to the decisions of the Western Australian Government appointed Regulator, dealing purely with intrastate matters, the Supreme Court of Western Australia has jurisdiction.

It has already been noted that there is no prospect of Western Australia having to deal with cross-border access disputes for the foreseeable future. Therefore, in order to achieve consistency of approach the Supreme Court of Western Australia should be nominated as the court to adjudicate on access disputes for Western Australia.

The advantages of a single jurisdiction are that it prevents "forum shopping", which is generally perceived as undesirable as it can give rise to poor perceptions, namely that a judge of one jurisdiction will deal with a matter differently to a judge of another jurisdiction.

Furthermore, multiple jurisdictions can lead to an undesirable situation where one court dealing with one part of a claim is not able to deal with another part of the claim because of lack of jurisdiction.

Finally, as touched on earlier, with one court having jurisdiction there is less danger of a proliferation of decisions of courts of other jurisdictions dealing with the same subject matter which can lead to inconsistency and therefore uncertainty in the market place.

**(3) Intergovernmental Agreement**

***Provision in the IGA for an access regime for the Dampier to Bunbury Natural Gas Pipeline consistent with the National Gas Access Regime***

As already indicated above, Western Australia intends meeting all of its obligations under existing CoAG agreements on free and fair trade in natural gas and in respect of agreements dealing with Competition Policy Reform more generally. Western Australia also wishes to continue as a fully participating jurisdiction in respect of National Gas Reform, however, this requires a degree of flexibility in the IGA in respect of the legislative approach and the availability of what may amount to persistent derogations until Western Australia's gas pipeline systems are interconnected with those of other jurisdictions.

Western Australia has already announced its intention to apply an access regime consistent with the proposed Code to the Dampier to Bunbury Natural Gas Pipeline (DBNGP) commencing 1 January 2000, and seeks appropriate provisions under the proposed IGA for such a regime.

**(4) Transitional Arrangements**

***Transitional arrangements to move the access regime for the Dampier to Bunbury Natural Gas Pipeline to a regime consistent with the National Gas Access Regime***

Western Australia has since January 1995, been progressing a deregulation schedule that has provided a fully competitive open market for natural gas in the Pilbara and the Eastern Goldfields regions of the State. In the South West of the State the opening up of the gas market is being phased in according to a deregulation schedule that presently allows customers consuming at least 500 terajoules per year at a single site supplied from either the gas transmission or distribution systems to be free to choose their supplier of gas for use at that site. This threshold will be reduced to 250 TJ per annum on 1 January 1998 and 100 TJ per annum on the 1 January 2000. Phasing in of the deregulation schedule in respect of the South West of the State has been necessary to accommodate take-or-pay gas contract obligations entered into in the early 1980's which were necessary to underpin the domestic gas phase of the North West Shelf gas developments. The phasing in of the deregulation schedule is also necessary to ameliorate, in an orderly way, a built up inventory of gas over the period.

Western Australia has announced the 100% sale of the DBNGP which has been operated as a "ringfenced" business of AlintaGas, the State owned corporatised gas business. Invitations have recently been issued to potential purchasers of

the DBNGP to express their interest in the pipeline, the sale of which is intended to be completed by the end of 1997.

Regulation of the DBNGP has since 1 January 1995 been under the comprehensive Gas Transmission Regulations 1994 (GTR) which are provided for under the State's Gas Corporation Act 1994. With the sale of the pipeline, it is intended that provision for the regulation of the DBNGP will be made under the privatisation legislation to be introduced into the Western Australian Parliament shortly and that the GTR will be restructured to apply effectively to a private owner of the DBNGP. A transitional regime to provide for declining capped transmission charges and full negotiability of both tariffs and other terms and conditions for new contracts and the renegotiation of existing transmission contracts will be available until the introduction on 1 January 2000 of an access regime to be consistent with the National Access Code, as announced by the Government recently.

In view of the considerable interest shown in the development of a second and competitive gas transmission pipeline into the South West of Western Australia, the Government has also agreed to facilitate this by the calling of expressions of interest for the construction of a second pipeline, before the middle of 1998.

Western Australia submits that the above mentioned transitional arrangements are needed for the major gas transmission pipeline in the State to move shippers from the existing contractual arrangements under the GTR to contractual arrangements and regulation consistent with the National Access Code, but seeks the necessary derogations from the proposed National Gas Access Regime for this purpose.

**(5) Applications of Laws Approach**

***Implementation of the National Gas Access Regime permissible by complementary legislation***

In view of Western Australia's unique position and considering that it is unlikely for some time for there to be a gas transmission pipeline linking this State's pipeline systems with that of other jurisdictions, the degree of uniformity imposed by the "applications of laws" approach is unnecessary for Western Australia. The State considers that the implementation of complementary legislation adopting the uniform national framework as originally envisaged by the February 1994 CoAG agreement on free and fair trade in natural gas, is a suitable and preferred approach.

**(6) Coverage Advisory Body**

***State Appeals Body to hear appeals on coverage***

Western Australia submits that the provisions of the National Gas Access Regime in respect of the Coverage Advisory Body would apply to both gas transmission and distribution pipelines in Western Australia in line with the provisions of the Code. Also, that the NCC would be the Coverage Advisory Body to recommend on the coverage of pipelines in this State to the Designated Minister which for intrastate transmission and distribution pipelines would be the State Minister. Western Australia proposes that the State Appeals Body to be established for coverage of distribution pipelines would also have jurisdiction over intrastate transmission pipelines.

**(7) Franchising**

***Limited period franchise on sale of gas to be available to all States***

A recent addendum to the draft of the IGA relates to “Franchising Principles”. Clause 2 provides that no new exclusive franchises should be granted for the sale of gas in a geographic area through a specific facility except in the case of Tasmania for a prospective gas pipeline service which meets certain specified criteria.

Western Australia cannot subscribe to the substance of clause 2 unless it is modified to reflect the reality that, depending on the level of commercial risk arising from a specific project, it may be necessary for a degree of franchising to be permitted in any State or Territory for a prospective promoter to ensure that a particular gas supply project is not denied to the State and is commercially viable. [In general terms Western Australia subscribes to paragraphs (a) to (c) inclusive of the proposal of the Office of Energy Planning and Conservation Tasmania entitled “Limited Period Retail Franchises for the Sale of Natural Gas in Tasmania” a copy of which is annexed as Attachment A.]

This matter has been taken up again by the Gas Reform Implementation Group and the State expects that provision will be made for all jurisdictions to have available limited period retail franchises for the sale of natural gas in certain limited circumstances as proposed by Tasmania.

Western Australia also submits that it cannot subscribe to any proposed early removal or phasing out of existing franchise arrangements, but recognises the need to consider further reform of such arrangements.

**(8) Licensing**

***Consider licensing arrangement reform to be consistent with National Gas Access Regime***

Western Australia is unable to commit to the proposed early removal or phasing out of pipeline licensing arrangements for purposes in addition to those listed in the attachment to the IGA, but recognises the need to consider further reform of licensing arrangements to be consistent with the National Gas Access Regime.

**(9) Administrative Appeals**

***Providing for review of specific aspects to decisions of the Regulator***

The Code in its current form only provides a limited opportunity for administrative appeals in respect of:

- a determination by the Designated Minister to cover a pipeline under the Code;
- a determination by the Designated Minister to revoke coverage of a pipeline;
- a determination by the Regulator to impose additional ring fencing obligations or to waive ring fencing obligations; and
- a determination by the Regulator to approve or not approve an affiliate contract.

Western Australia submits that while it may not be appropriate for an appellant to be able to reopen before the appeals body, the entire performance of the Regulator in carrying out its functions, there is merit in permitting review of discrete aspects to decisions of the Regulator where, to deprive a party of such review, would subject that party to unreasonable or prejudicial behaviour without redress.

**(10) Structure of the National Gas Access Regime**

***Interpretation and definition provisions to be made more workable***

Western Australia recognises that formulating a regulatory structure that involves individual States and Territories in passing their own adoptive legislation is complex. However, there is concern at the abundance of interpretative and definition provisions. The second draft of the National Gas (South Australia) Bill contains four separate “interpretation” provisions plus a whole schedule dedicated to “Miscellaneous Provisions Relating to Interpretation”. It also contains four separate “definition” provisions. In addition, the draft Code contains a separate interpretation section which contains a definition provision.



Western Australia submits that measures be taken to ensure that the overall legislative/Code package is drafted with the minimum number of interpretation and definition provisions so that confusion and inconveniences are avoided.

**(11) A Spot Market for Transmission Capacity and Other Services**

***Spot market for short term capacity to be available***

Western Australia submits that in addition to reference services at reference tariffs, service providers may provide a range of other services including a spot market service for transmission and distribution pipeline capacity and other services at prices determined by the market.

**(12) Operation of the Code in New South Wales**

***Further consider amendments in light of the recent NSW experience***

Problems in respect of pricing principles, approval of affiliate contracts, ring fencing, public involvement in dispute resolution and problems such as inadequate timelines as raised by the NSW application of its Gas Access Code which was based on an earlier version of the draft national Code, need to be kept under review and any further necessary changes arising from this review be adopted before the Code is finalised.

This submission has been prepared by Western Australia in the interests of progressing the implementation of a national uniform framework for access to gas pipelines in Australia. The submission seeks flexibility in approach giving recognition to the unique circumstances applying in this State and in particular, the need for regulatory uniformity between fully interconnected pipeline systems such as the transmission and distribution systems in Western Australia as distinct from arbitrary and rigid regulatory uniformity across all transmission pipelines throughout Australia irrespective of their physical interconnection.

Western Australia welcomes the assessment of the draft “National Third Party Access Regime for Natural Gas Pipeline Systems” by the NCC which seeks to determine whether the National regime complies with the criteria for “certification” under Part IIIA of the Trade Practices Act 1974. The State also looks forward to the NCC’s second phase of public consultation scheduled for late 1997, designed to consider how a jurisdiction’s supporting legislation applies the National Gas Access Regime in that jurisdiction. Should the NCC find the draft Code acceptable in principle, then Western Australia expects that it will seek derogations on particular aspects of the National Gas Access Regime and that it would look to certification by the NCC once this State’s supporting legislation is enacted to implement a consistent access regime in this State. This State commends the draft Code to the NCC on this basis.