



**FINAL DECISION:
WAIVER OF RING FENCING OBLIGATIONS
PARMELIA PIPELINE**

Application Submitted by:

CMS GAS TRANSMISSION AUSTRALIA

**INDEPENDENT GAS PIPELINES ACCESS REGULATOR
WESTERN AUSTRALIA**

21 September 2000



PREFACE

On the 31 March 2000, CMS Gas Transmission Australia (CMS) made application for waiver of certain ring fencing obligations under section 4.15 of the *National Gas Pipelines Access Code for Natural Gas Pipeline Systems* (the Code). The application was lodged in respect of the Parmelia Pipeline (Pipeline Licence Numbers WA: PL 1 – 3, 5 and 23).

The procedures for considering the waiver of ring fencing obligations require that a Draft Decision be issued within 14 days after the last day of the first period of submissions and that a Final Decision be issued within 21 days after the last day of the second period of submissions. The Regulator has no discretion to extend the time for issuing these decisions.

Submissions were initially called on 7 April and closed on 8 May 2000. The Draft Decision was issued on 22 May 2000 which marked the commencement of the second public consultation period. The Draft Decision was to not grant the waiver.

There were, however, a number of issues that required additional information before all issues could be adequately addressed under the Code. The Code did not provide sufficient time for this information to be obtained and considered by the Regulator prior to issuing the Draft Decision. Accordingly, the required information was obtained after the Draft Decision was issued and made public in the Regulator's Notice dated 18 August 2000. An extended public consultation period to 31 August 2000 was provided for to allow sufficient time for the required information to be obtained and considered.

On 30 August 2000, CMS advised that it planned making a further submission shortly after the close of the public submission period concerning its application for waiver of ring fencing obligations. On 5 September 2000, CMS lodged a submission withdrawing its application for waiver of ring fencing obligations and made application for an extension of time to comply with the ring fencing obligations of sections 4.1(a), (b), (h) and (i) of the Code.

The submission from CMS advised that CMS Energy (the parent of CMS Gas Transmission of Australia) had embarked on an evaluation of its activities in Western Australia relating to its holdings in gas pipeline, gathering, processing and storage assets. The submission contends that in the circumstances it is not possible to establish with any degree of certainty the corporate structure under which the Parmelia Pipeline would operate. A copy of the CMS submission is available from the OffGAR website (www.offgar.wa.gov.au).

Further information may be obtained by contacting Mr Mike Jansen at the Office of Gas Access Regulation telephone +61 8 9213 1925 or facsimile +61 8 9213 1999.

KEN MICHAEL
GAS ACCESS REGULATOR

FINAL DECISION

On 5 September 2000, CMS withdrew its application for waiver of ring fencing obligations under sub-sections 4.1(b), (h) and (i) of the Code. Consequently, the Regulator will not issue a notice under section 4.15 of the Code waiving any of the Service Provider's obligations under sub-sections 4.1(b), (h) and (i) of the Code.

On the basis of the reasons given by CMS in its submission dated 5 September 2000, the Regulator has determined that the Service Provider is required to comply with the obligations of sub-sections 4.1(b), (h) and (i) by 1 April 2001.

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1 INTRODUCTION

CMS Gas Transmission Australia submitted an application for a waiver of certain ring fencing requirements for the Parmelia Pipeline on 31 March 2000. This application was made under *the National Third Party Access Code for Natural Gas Pipeline Systems* (“the Code”) to the Independent Gas Pipelines Access Regulator (the Regulator).

2 PROCEDURES FOR A WAIVER OF RING FENCING OBLIGATIONS

The Code (sections 4.16 to 4.24) sets out the procedures to be followed by the Regulator in considering a request for waiver of ring fencing obligations. In this particular case the application was received on 31 March 2000, and the actions taken were:

- A notice was issued to interested parties on Friday 7 April 2000 and advertisements were placed in the *West Australian* and the *Australian* newspapers on Wednesday 12 April 2000. Included in the advertisements was a call for public submissions.
- The closing date for public submissions was set at 4pm WST Monday 8 May 2000.
- An Issues Paper to assist with the submissions was placed on the Office of Gas Access Regulation web site on 20 April 2000.
- Two submissions were received in respect of this call for submissions.
- The Draft Decision was issued on 22 May 2000.
- A copy of the Draft Decision was forwarded to the Service Provider on 22 May 2000.
- Submissions were invited on the Draft Decision to be received by the Office of Gas Access Regulation (*OffGAR*) no later than at 4pm WST Thursday 31 August 2000.
- A Notice was issued on 18 August 2000, providing additional information on the issuing of a waiver of ring fencing obligations that is made subject to specified conditions.
- Two submissions were received in respect of the call for submissions on the Draft Decision.
- This Final Decision was issued on 21 September 2000.

3 THE OBJECTIVE OF RING FENCING REQUIREMENTS

A Service Provider of a gas pipeline “covered” under the provisions of section 1 of the Code is required to meet the various obligations specified in the Code. If the pipeline Service Provider also participates in the production, trading or sales of gas, then the Code requires that the Service Provider undertake a number of obligations designed to separate the gas transmission/distribution business activities from other activities and to maintain the

confidentiality of information provided in respect of the gas transport business from other business activities of the Service Provider.

The purpose of these obligations was to ensure that if a third party approached a pipeline Service Provider who was also a competitor in the gas production/gas sales business, information supplied to the gas transport activity, as a condition of seeking access, would not be provided to the gas production/gas sales activity and used to the detriment of the third party.

4 CODE REQUIREMENTS

Section 4.1 of the Code sets out the minimum requirements for ring fencing.

- 4.1 A person who is a Service Provider in respect of a Covered Pipeline (regardless of whether they are also a Service Provider in respect of a Pipeline that is not Covered) must comply with the following (but in the case of paragraphs (a), (b), (h) and (i), as from the date that is 6 months after the relevant Pipeline became Covered):
- (a) be a legal entity incorporated pursuant to the Corporations Law, a statutory corporation, a government or an entity established by royal charter;
 - (b) not carry on a Related Business;
 - (c) establish and maintain a separate set of accounts in respect of the Services provided by each Covered Pipeline in respect of which the person is a Service Provider;
 - (d) establish and maintain a separate consolidated set of accounts in respect of the entire business of the Service Provider;
 - (e) allocate any costs that are shared between an activity that is covered by a set of accounts described in section 4.1(c) and any other activity according to a methodology for allocating costs that is consistent with the principles in section 8.1 and is otherwise fair and reasonable;
 - (f) ensure that all Confidential Information provided by a User or Prospective User is used only for the purpose for which that information was provided and that such information is not disclosed to any other person without the approval of the User or Prospective User who provided it, except:
 - (i) if the Confidential Information comes into the public domain otherwise than by disclosure by the Service Provider; or
 - (ii) to comply with any law, any legally binding order of a court, government, government or semi-government authority or administrative body or the listing rules of any relevant recognised Stock Exchange;
 - (g) ensure that all Confidential Information obtained by the Service Provider or by its servants, consultants, independent contractors or agents in the course of conducting its business and which might reasonably be expected to affect materially the commercial interests of a User or Prospective User is not disclosed to any other person without the approval of the User or Prospective User to whom that information pertains, except:
 - (i) if the Confidential Information comes into the public domain otherwise than by disclosure by the Service Provider; or
 - (ii) to comply with any law, any legally binding order of a court, government, government or semi-government authority or administrative body or the listing rules of any relevant recognised Stock Exchange;

- (h) ensure that its Marketing Staff are not also servants, consultants, independent contractors or agents of an Associate that takes part in a Related Business and, in the event that they become or are found to be involved in a Related Business contrary to this section, must procure their immediate removal from its Marketing Staff; and
- (i) ensure that none of its servants, consultants, independent contractors or agents are Marketing Staff of an Associate that takes part in a Related Business and, in the event that any servants, consultants, independent contractors or agents are found to be the Marketing Staff of such an Associate contrary to this section, must procure their immediate removal from their position with the Service Provider.

5 PROVISIONS FOR WAIVER OF RING FENCING OBLIGATIONS

The legislation also recognised that the ring fencing obligations may not always be appropriate, either because of the particular circumstances of a given pipeline with respect to the potential for the misuse of information, or the cost of meeting the ring fencing obligations relative to the benefits. Provision was made by section 4.15 of the Code for the Regulator to waive certain of the ring fencing requirements as follows:

- 4.15 The Relevant Regulator may by notice to a Service Provider waive any of a Service Provider's obligations under:
- (a) section 4.1(b) where the Relevant Regulator is satisfied that:
 - (i) either the Covered Pipeline is not a significant part of the Pipeline system in any State or Territory in which it is located or there is more than one Service Provider in relation to the Covered Pipeline and the Service Provider concerned does not have a significant interest in the Covered Pipeline and does not actively participate in the management or operation of the Covered Pipeline; and
 - (ii) the administrative costs to the Service Provider and its Associates of complying with that obligation outweighs any public benefit arising from the Service Provider meeting the obligation, taking into account arrangements put in place by the Service Provider (if any) to ensure that Confidential Information the subject of sections 4.1(f) and (g) is not disclosed to the Service Provider or is not disclosed to the servants, consultants, independent contractors or agents of the Service Provider who take part in a Related Business; and
 - (iii) an arrangement has been established between the Service Provider and the Relevant Regulator which the Relevant Regulator is satisfied replicates the manner in which section 7.1 would operate if the Service Provider complied with section 4.1(b); and
 - (b) sections 4.1(h) and (i) where the Relevant Regulator is satisfied that the administrative costs to the Service Provider and its Associates of complying with that obligation outweigh any public benefit arising from the Service Provider meeting the obligation.

In section 4.15(a)(iii) above, mention is made of Section 7.1 that reads:

- 7.1 A Service Provider must not enter into an Associate Contract without first obtaining the approval of the Relevant Regulator. The Relevant Regulator must not refuse to approve a proposed Associate Contract unless it considers that the contract would have the effect, or would be likely to have the effect, of substantially lessening, preventing or hindering competition in a market.

An "Associate Contract" is defined in Section 10.8 as:

- (a) a contract, arrangement or understanding between the Service Provider and an Associate in connection with the provision of a Service; or

- (b) a contract, arrangement or understanding between the Service Provider and any person in connection with the provision of a Service which provides a direct or indirect benefit to an Associate and which is not an arm's length transaction.

By only providing for waiver of the ring fencing obligations specified by sub-sections 4.1(b), (h) and (i), the legislation clearly intends that no waiver be available in respect of the following obligations:

- the requirements to be a legal entity (sub-section 4.1(a));
- the requirements for separate accounts (sub-sections 4.1(c), 4.1(d), and 4.1(e)); and
- the requirements for non-disclosure of confidential information (sub-sections 4.1(f) and 4.1(g)).

The waiver provisions of section 4.15 of the Code set out a series of tests for the Regulator to consider in assessing an application for waiver of the ring fencing obligations.

For a waiver of sub-section 4.1(b) (“not carry on a Related Business”) there are three separate tests required by sub-section 4.15(a) of the Code, all of which must be met before the Regulator can approve a waiver of this requirement. These tests were used as the basis of the Regulator’s Draft Decision not to grant a waiver of the sub-section 4.1(b) requirement.

6 ABILITY TO GRANT A CONDITIONAL WAIVER

At the time of the Draft Decision, the Regulator was seeking advice on whether a waiver, once given, could be revoked. If the Code did not provide for a waiver to be revoked or withdrawn the Regulator would be required to take into account the potential as well as the present use of a pipeline in determining its significance.

The Regulator was also seeking advice on whether a waiver could be given subject to conditions, which if they were not met would terminate the waiver.

In the circumstances of the tests required by section 4.15 of the Code, the Regulator has discretion to grant a waiver of sub-sections 4.1(b), (h) and (i) if all of the tests set out in section 4.15 are met.

As there was not sufficient time to obtain the necessary advice in the time that the Draft Decision was required to be issued, the Regulator considered the application by CMS on the basis that a waiver could not be made subject to conditions nor, once given, could be revoked or withdrawn. On this basis the Draft Decision concluded that:

- (i) the application by CMS did not satisfy the tests of sub-section 4.15(a); and
- (ii) the administrative costs of complying with the Code did not outweigh the public benefit from the obligation to maintain separated staff.

Additional information received since the Draft Decision has indicated that a waiver can be given subject to specified conditions.

7 SUBMISSIONS FROM INTERESTED PARTIES

Two submissions were received one from AlintaGas Trading Pty Ltd and another from CMS Gas Transmission Australia.

AlintaGas Trading Pty Ltd

AlintaGas supports the Regulator's Draft Decision and opposes the Regulator granting a conditional waiver, as contemplated in the Notice.

In his Draft Decision, dated 22 May 2000, the Regulator supported the arguments made by AlintaGas in AlintaGas's submission dated 8 May 2000. The reasons for the Regulator not granting a waiver of the ring fencing requirements for the Parmelia pipeline are:

- the Parmelia pipeline is a significant pipeline;
- the Parmelia pipeline has the potential to be associated with new gas market developments in Western Australia;
- the ring fencing arrangements would not impose a burden that outweighs the public benefit; and
- the ring fencing arrangements should engender public confidence that confidential information is used appropriately.

AlintaGas fully supports the Regulator's reasons for not granting a waiver of the ring fencing requirements for the Parmelia pipeline, reasons that can readily be justified by an assessment of the gas market and the significant role the Parmelia pipeline plays in that market.

As a result, AlintaGas can see no justification for a conditional waiver of the ring fencing requirements for the Parmelia pipeline. The proposals contemplated by the Regulator in his Notice, if implemented, would significantly reduce the effectiveness of the National Access Code's ring fencing requirements.

While the AlintaGas submission supports the reasoning set out in the Draft Decision, AlintaGas does not give reasons why a conditional waiver would not be appropriate in the case of the Parmelia Pipeline.

The Code seeks to achieve a rational balance between the costs and benefits of complying with its requirements. Conditional waivers provide the Regulator with flexibility over the implementation of these requirements while retaining a clear focus on the intent of the Code.

The second submission was from CMS Gas Transmission withdrawing its application for waiver of ring fencing obligations and seeking an extension of time in respect of the obligations under sub-sections 4.1(a), (b), (h) and (i).

8 WITHDRAWAL OF APPLICATION FOR WAIVER

On 5 September 2000, CMS informed the Regulator that it is currently undertaking a review of its global assets including the structure of its operations in Western Australia. As a consequence, CMS withdrew its current application for waiver of ring fencing obligations and sought an extension of time until 31 March 2001 to comply with the ring fencing requirements of sub-sections 4.1(a), (b), (h) and (i) of the Code for the Parmelia Pipeline.

CMS submitted to the Regulator that if the Final Decision of the Regulator was to be the same as the Draft Decision, the obligation to create separate businesses should be allowed to proceed in line with this broader review of corporate structure. As the ring fencing requirements call for well-defined structures identifying separately the Service Provider from related businesses, CMS requested that the ring fencing obligations should apply as from 1 April 2001.

9 FINAL DECISION

In the Draft Decision, and on the basis that a conditional waiver was not possible, the Regulator concluded that the Parmelia Pipeline was a significant pipeline that has the potential to be associated with new gas developments in Western Australia. In addition, the Regulator concluded that the costs of fully separating the gas transport business from other associated businesses would not outweigh the public benefit from having such separation of staff.

Since CMS withdrew its application for waiver of the ring fencing obligations on the 5 September 2000, the Regulator has not given further consideration to whether the additional flexibility available by being able to grant a conditional waiver would have a material effect on the Draft Decision. The Final Decision of the Regulator is therefore to not issue a notice under section 4.15 of the Code waiving any of CMS' obligations under sub-sections 4.1(b), (h) and (i) of the Code.

On the basis of the reasons given by CMS in its submission dated 5 September 2000, the Regulator has determined that the Service Provider is required to comply with the obligations of sections 4.1(b), (h) and (i) by 1 April 2001.

10 GLOSSARY

Terms used in the Final Decision have the meanings ascribed to them under the *Gas Pipelines Access (WA) Act 1998* or as otherwise defined in the documents pertaining to the application by CMS for a waiver of ring fencing obligations. In order to assist understanding, summary definitions of several terms that may be relevant to this Final Decision are provided below.

Access Arrangement	A statement of policies and the basic terms and conditions that apply to third party access to a covered pipeline.
Access Arrangement Information	Additional and/or supplemental information pertaining to the Access Arrangement.
Access Request	A request for access to a Service made in accordance with the Access Arrangement.
Associate	Has the meaning given in the Gas Pipelines Access Law.
Capacity	The potential of a pipeline, as currently configured and operated in a prudent manner consistent with good pipeline industry practice, to deliver a particular service between a Receipt Point and a Delivery Point at a point in time.
Code	The <i>National Third Party Access Code for Natural Gas Pipeline Systems</i> .
Confidential Information	Information that is by its nature confidential or is known by the other party to be confidential and includes: <ul style="list-style-type: none"> (a) any information relating to the financial position of the party and in particular includes information relating to the assets or liabilities of the party and any other matter that affects or may affect the financial position or reputation of the party; (b) information relating to the internal management and structure of the party or the personnel, policies and strategies of the party; (c) information of the party to which the other party has access, other than information referred to in paragraphs (a) and (b), that has any actual or potential commercial value to the first party or to the person or corporation which supplied that information; and (d) any information in the party's possession relating to the other party's clients or suppliers and like information.

Contracted Capacity	The nominal quantity of gas transportation to be undertaken under a service agreement between a User and the Service Provider.
Covered Pipeline	The whole or particular part of a pipeline which is regulated under the Code.
Grandfathered Contract	A contract for the provision of gas transportation services by CMS, whether or not in conjunction with other services, entered into before the date for complying with the ring fencing provisions of the Code.
National Gas Pipelines Access Agreement	A national agreement endorsed by CoAG and signed by all Australian Heads of Government on 7 November 1997 to introduce a national gas pipelines access regime.
Parmelia Pipeline	The pipeline system that is the subject of Pipeline Licenses PL1, PL2, PL3, PL5 and PL23 issued under the <i>Petroleum Pipeline Act 1969</i> (WA).
Prospective User	A person who seeks or who is reasonably likely to seek to enter into a Service Agreement with a Service Provider and includes a User who seeks or may seek to enter into a Service Agreement for an additional Service.
Reference Services	A Service that is specified as a Reference Service in an Access Arrangement.
Reference Tariff	A tariff specified in an Access Arrangement as corresponding to a Reference Service.
Regulator	Independent Gas Pipelines Access Regulator in Western Australia established under the <i>Gas Pipelines Access (WA) Act 1998</i> .
Related Business	The business of producing, purchasing or selling Natural Gas, but does not include purchasing or selling of Natural Gas to the extent necessary: <ul style="list-style-type: none"> (a) for the safe and reliable operation of a Covered Pipeline; or (b) to enable a Service Provider to provide balancing services in connection with a Covered Pipeline.
Ring Fencing	A requirement on a Service Provider to establish arrangements to segregate or “ring fence” its business of providing Services using a covered pipeline from other business activities.
Service	A Reference Service or Non-Reference Service relating to the transportation of gas by a Service Provider, and in the case of a Service Agreement means the particular reference Service or Non-Reference Service the subject of that Service Agreement.

Service Agreement	An agreement between a Service Provider and a User for the provision of a Service.
Service Provider	In relation to a pipeline or proposed pipeline, means the person who is, or who is to be, the owner or operator of the whole or any part of the pipeline or proposed pipeline.
User	A person who has a current Service Agreement or an entitlement to a Service as a result of arbitration under Section 6 of the Code.

11 ABBREVIATIONS

AA	Access Arrangement
AAI	Access Arrangement Information
ACCC	Australian Competition and Consumer Commission
CoAG	Council of Australian Governments
CMS	CMS Gas Transmission Australia
DBNGP	Dampier to Bunbury Natural Gas Pipeline
GJ	Gigajoules (10^9 joules)
OffGAR	Office of Gas Access Regulation
PJ	Petajoules (10^{15} joules)
TJ	Terajoules (10^{12} joules)