

## Explanatory Memorandum

This Explanatory Memorandum is divided into Part A, which provides a general overview, and Part B, which provides the clause-by-clause commentary.

### Part A: Overview

#### Introduction

Western Australia experienced two significant natural gas supply disruptions in 2008, including a two month shut-down of operations at the Varanus Island facility. In response, the Government established the Gas Supply and Emergency Management Committee (GSEMC) in January 2009.

Comprised of Government and industry stakeholders, the GSEMC reviewed the security of WA's gas supplies and how any future gas supply disruptions are to be managed and/or mitigated. Among the GSEMC's recommendations was for a Gas Bulletin Board (GBB) and Gas Statement of Opportunities (GSOO) to be administered by an independent WA-specific entity.

In March 2011, in its report on the Inquiry into Domestic Gas Prices, the Economics and Industry Committee of the Legislative Assembly also recommended the establishment of a permanent GBB and GSOO.

The Bill establishes, through regulations, the GBB and GSOO which are to be operated by a Western Australian specific entity (the 'Operator'). The Bill assumes there will be a single Operator for the GBB and GSOO, but provides the Minister with flexibility to nominate an entity of his choice as the Operator via regulations.

In May 2010, the Independent Market Operator (IMO) was selected to be the Operator of the GBB and GSOO for Western Australia. The IMO will be conferred the functions of the Operator via subsequent regulations and consequential amendments to the *Electricity Industry (Independent Market Operator) Regulations 2004*.

The Bill also provides for the establishment of regulations and rules that will guide the detailed design of the GBB and the GSOO. It further includes protections for the Operator and gas market participants in relation to information requirements and confidentiality.

The GBB and GSOO are intended to provide information transparency across the gas supply-demand chain in relation to gas as a commodity and its transportation in the near and long term, to promote increased competition, security and reliability of natural gas in Western Australia.

The GBB will consist of a website providing near term information on gas production, transmission, storage capacity and demand. It will include an emergency information facility to assist Government and industry in the management of gas supply disruptions.

The GBB may include a voluntary facility for the introduction of buyers and sellers of gas (commodity and transport), but this will not be a formal trading platform or provide market settlement services. It may also potentially host information in relation to broader specification gas requirements.

To minimise costs, it is expected that, at an operational level, the GBB will utilise as much of the bulletin board system administered by the Australian Energy Market Operator as possible.

The GSOO will be a comprehensive and periodic document that provides a medium to long-term outlook of gas supply and demand in Western Australia. It will highlight where potential commodity shortfalls or transportation constraints may occur in future and may draw from information provided for the GBB to model gas demand and supply forecasts. Although the GSOO may primarily be based on publicly available resources, the Operator may be required to compel information from a 'gas market participant'.

The definition of a 'gas market participant' is broadly consistent with section 223(1) of the National Gas Law (NGL), with the exception of the inclusion of a 'non scheme pipeline user' in the NGL definition. In the Bill, the definition of 'gas market participant' includes a service provider, a user, a producer, a storage provider and a 'person prescribed by the regulations for the purposes of this definition'. The latter inclusion is necessary to accommodate possible changes to the industry, so that other relevant parties can be captured in the future.

The legislation confers minimal functions on the Operator in relation to the establishment and operation of the GBB and the preparation and publishing of the GSOO.

While there is no obligation under the Australian Energy Market Agreement to join up to the bulletin board arrangements implemented by way of the *National Gas (South Australia) Act 2008* (NGL SA), there are a number of provisions contained in the NGL SA and its Schedule (the 'National Gas Law') which are applicable for Western Australia.

The Bill draws from the NGL in regard to the following:

- a) Information requirements: This includes obligations on parties to supply, collect and collate relevant data, and publishing of information on the GBB required under the rules. Limits are placed on the use of information to functions of the GBB and GSOO.
- b) Protected information: This includes reasonable measures to be taken to protect data from unauthorised disclosure.

- c) Immunity from liability: This includes general immunity from liability for the Operator and industry where obligations are carried out in 'good faith' and not through negligence. It also includes immunity for participants disclosing information to the Operator which may otherwise be protected under contractual obligations.

The Bill also draws from the *Electricity Industry Act 2004* in regard to the compliance and rule development for the GBB and GSOO, so that it is broadly consistent with the arrangements for the Wholesale Electricity Market (WEM). This takes into account that there will be administrative simplicity in having similar frameworks for electricity and these gas information services.

Much of the detail of the GBB and GSOO implemented by the Bill will appear in regulations and rules, because:

- a) it will need to be at a level of detail which is inappropriate for an Act; and
- b) flexibility will be needed to deal with changed or unanticipated circumstances or unintended consequences.

The regulations are already in the first stages of development. During their development there will be further consultation with industry.

### **Part 1 of the Bill – Preliminary**

This part outlines the title of the Act and its commencement date and provides definitions of the terms used throughout the Bill.

### **Part 2 of the Bill - Gas bulletin board and gas statement of opportunities**

This part starts with a high-level definition of the GBB and of the GSOO, which is broadly consistent with the NGL. It defines the shared objectives of both initiatives to guide the Operator in the delivery of the GBB and GSOO and to guide the future amendment and development of rules.

### **Regulations**

This part enables regulations to be drafted to provide for the establishment of the GBB and the preparation and publishing of the GSOO and allows for minimal functions to be conferred on the Operator to achieve this. The Bill enables the Operator to delegate functions by way of a written instruction. There are no limits placed on what functions may be delegated by the Operator.

Regulations also allow functions to be conferred on the Minister or another person or body (established under written law) in support of the GBB and GSOO. This includes enabling the Electricity Review Board (ERB) to review 'reviewable' decisions of the Operator and the Economic Regulatory Authority (ERA) to determine the 'allowable revenue' of the IMO (as the Operator).

The regulations may provide for obligations to be imposed onto a 'gas market participant' (generally or individually) in regard to information requirements set-out by the regulations and the rules. The Operator will have the flexibility to ask for additional relevant information where necessary. Regulations may also provide for the enforcement of obligations by the Operator and place controls on the Operator in regard to the use and disclosure of protected information it obtains for the GBB and GSOO.

Until such time that regulations and rules are developed and passed to control the use and disclosure of protected information, there are provisions on interim arrangements. The Operator must take reasonable measures to protect protected information and not to disclose or make unauthorised use of protected information and, other than information that is confidential by nature, the onus is on the person providing the information to inform the Operator that the information is confidential. Furthermore, the provisions of NGL Chapter 2, Division 7 Subdivision 2 will apply.

A duty of confidence (including under a contract) cannot be used as a reason to refuse to give up required information. As there is no breach of the duty of confidence from giving information in compliance with a statutory duty to give information, no civil monetary liability would arise, meaning that the gas market participant is provided with immunity in this circumstance.

The Operator and a gas market participant are also provided with general immunity where functions and obligations respectively are performed in regard to information requirements in good faith and not through negligence. The regulations will prescribe a maximum amount for a civil monetary liability incurred for an act or omission made through negligence, and the circumstances that determine the actual amount that is applied.

Limits are also placed upon what information can be provided to the Minister. The regulations may require that the Operator keep the Minister reasonably informed only in regard to the 'general' performance of its functions. This necessarily excludes information on specific matters, such as the content of confidential information.

Regulations will provide for the imposition of fees and charges so that the Operator and the ERB (and by extension the Arbitrator) may recover costs incurred in the performance of their GBB and GSOO related functions. It is noted that the Arbitrator is not given functions under this Act, but rather supports the ERB via section 56 of *the Energy Arbitration and Review Act 1998*. It is expected that the ERB would recover its own costs and any direct costs of the Arbitrator (which would then be passed back to the Arbitrator) from the industry. The actual amounts of the fees and charges in regards to specific functions is expected to be prescribed in the rules.

The authority for the ERB to fix and determine the incidence of liability for, and the cost and expenses of, the hearing and determination of proceedings will be provided through regulations. The cost and expenses of a hearing may be applied even if the hearing is not brought to finality.

Regulations will provide (or authorise rules to provide) for the resolution of disputes arising under the Act. It is expected that the bulk of disputes will be managed through an informal dispute resolution process managed by the Operator.

Regulations will provide for the ERB to review 'reviewable' decisions made by a person on whom functions are conferred, meaning the Operator in the main. However, nothing prevents a court or a tribunal from reviewing all decisions. The ERB will be enabled to fulfil this function via consequential amendments to the *Energy Arbitration and Review Act 1998*.

Contravention of the regulations will be an offence punishable on conviction by a fine of not more than \$100,000, plus a maximum of \$20,000 for every day (or part day) the contravention continues.

## **Rules**

Regulations must provide for gas services information rules (rules) relating to the form and content of the GBB and GSOO and the operation of the GBB.

There may be initial rules, and these are to be tabled by the Minister in both Houses of Parliament. This is consistent with the arrangements that apply in the WEM.

There is scope for all changes to the initial rules to be tabled in Parliament or, alternatively, for the Operator to amend, repeal and replace the initial rules (other than protected rules) in a manner that is consistent with the regulations (and rules). The changes will need to be gazetted (as per section 41 of the *Interpretation Act 1984*).

Protected rules that cannot be changed at the Operator's discretion will set-out the process by which rules are to be amended, repealed or replaced. Protected rules and the process by which protected rules are to be changed will be developed through subsequent regulations (and rules).

A person who contravenes rules specified in regulations, or of a class specified in the regulations, will incur a civil penalty. A body corporate comes within the definition of a 'person' under the *Interpretation Act 1984*. Under regulations, a different level of penalty can be applied to a body corporate or to a 'natural person' (an individual), as there is scope to apply a penalty up to a maximum amount.

The Bill provides flexibility for regulations to limit the Operator (as opposed to the ERB) to deal with only those contraventions of the rules that are deemed to be minor, that is, contraventions that attract a civil penalty of no more than \$20,000. Where the contravention is of a serious nature, that is, a contravention that attracts a high civil penalty, the Operator may seek an order from the ERB.

The regime for compliance with rules is to be set-up via regulations. This means that regulations will prescribe civil penalty amounts for contraventions of rules up to a maximum of \$100,000, plus a daily penalty of not more than \$20,000 for each day (or part day) that the contravention continues. The regulations will further provide for demands for payments and taking of proceedings, for orders and for the manner in which amounts are to be dealt with and applied.

## Part B: Section-by-section Commentary

Section	Summary of provision	Commentary
<b>Part 1 - Preliminary</b>		
<b>1. Short title</b>		
<b>2. Commencement</b>		
<b>3. Terms used</b>		
(1)	<i>Board</i>	The Energy Arbitration Board as per section 49, <i>Energy Arbitration and Review Act 1998</i> , unless otherwise stated.
	<i>civil monetary liability</i>	Liability to pay an amount for damages or compensation ordered in a civil proceeding but does not include a civil penalty.
	<i>gas market participant</i>	Includes a service provider, a user; a producer; a storage provider; other person prescribed by regulations (for the purpose of this definition). The latter inclusion is necessary to accommodate possible changes to the industry, so that other relevant parties can be captured in the future.
	<i>GBB</i>	Gas bulletin board.
	<i>GSOO</i>	Gas statement of opportunities.
	<i>operator means the person on whom functions are conferred under section 7(2)(a).</i>	The Operator of the GBB and GSOO.
	<i>protected information</i>	Information given to the Operator under obligation that is by its nature confidential, specified to be confidential by the giver or classified as confidential under the regulations or rules.
	<i>rules</i>	Rules made under section 8.
	<i>user</i>	Includes a gas user with a contract with a service provider, or a right under an access determination, or an end user (as described by regulations).
(2)	<i>A term has the same meaning in this Act as it has in the National Gas Access (Western Australia) Law, unless the contrary intention appears, except for the term pipeline.</i>	This clarification is required to capture both covered and uncovered distribution pipelines as well as the attendant gate stations. The purpose is to prevent a situation whereby a service provider might seek to avoid providing information derived from a gate or meter station by claiming that it is not part of a pipeline.

<b>Part 2 – Gas bulletin board and gas statement of opportunities</b>		
Part 2 deals with the minimal functions that need to be conferred on the Operator in relation to the establishment of the GBB and GSOO and enables the making of regulations and rules for the operation of the GBB and the preparation and publishing of the GSOO. This includes certain obligations and protections for the Operator and gas market participants in relation to information requirements and confidentiality. Provisions for enforcement and compliance are also included.		
<b>4. Gas Bulletin Board</b>		
4(1)	Description of the GBB.	Definition of the GBB, including a high level explanation of its form and content.
(2)		The GBB may include additional information on other fuels, where that information is consistent with its primary purpose or must be included under another law, such as the <i>Gas Supply (Gas Quality Specifications) Act 2009</i> . It also allows for the inclusion of a voluntary facility for the introduction of buyers and sellers of gas (commodity and transport).
<b>5. Gas Statement of Opportunities</b>		
5(1)	Description of the GSOO.	Definition of the GSOO, including a high level explanation of its form and content. Broadly consistent with the definition provided under the NGL.
(2)		The GSOO may include additional information on other fuels, where that information is consistent with its primary purpose.
<b>6. Objectives of the GBB and GSOO</b>		
		Objectives for the GBB and GSOO have been included to guide the future amendment and development of rules.
<b>7. Regulations for the GBB and GSOO</b>		
7(1)	(a), (b) A high level, general statement that regulations will be made for the purpose of establishing the GBB and the GSOO, prior to being operational.	
(2)	(a) Enables functions to be conferred on the Operator for the operation of the GBB and GSOO.	Consequential amendment to the <i>Electricity (Independent Market Operator) Regulations 2004</i> is required.
	(b) Enables other bodies (established under law to be given functions in support of the GBB and GSOO.	For example, it enables the ERB to review 'reviewable' decisions of the Operator and consider civil penalties and the ERA to determine the 'allowable revenue' of the IMO (as the Operator). Note that a Board comes within the definition of a 'person' under the <i>Interpretation Act 1984</i> .
	(c) To enable consequential amendments to be made to regulations so that functions can be conferred on a person under (a) and	For example, to the <i>Electricity Industry (Independent Market Operator) Regulations 2004</i> , so that the IMO (as the Operator) can make compositional changes to its Board to include a member with gas industry experience.

	(b).	
	(d) Gas market participants are required to provide mandatory GBB information directly to the Operator.	
	(e) Authorises the Operator to impose obligations onto gas market participants (generally or individually) to provide information that it specifies.	There is flexibility to enable the Operator to request additional relevant information for inclusion in the GS00, for example.
	(f) Provides for the enforcement of obligations referred to in (d) and (e) through regulations.	Enforcement through regulations, rather than the rules, in terms of the information provided by the gas market participant to the Operator.
	(g) Provides for the Operator to keep the Minister reasonably informed in regard to the general performance of its functions.	The use of 'general' places limits on what information can be provided to the Minister – it excludes information on specific matters, such as the content of confidential information. This provision also enables the Treasurer to approve the IMO's operational plan.
	(h) To provide, or authorise the rules to provide, for the resolution of disputes (specifically on matters pertaining to the GBB and GS00).	It is expected that the bulk of disputes will be managed through an informal dispute resolution process.
	(i) Control the use and disclosure of confidential information obtained by the Operator.	
(3)	(a), (b), (c), (d) The functions conferred under 7(2)(a) must include collecting, collating and managing of both mandatory data and requested data for use in the GBB and GS00.	In this section, (a) and (b) deal with inputs into the GBB and GS00, that is, state that the Operator's functions must include the gathering, management and preparation of data, and its analytical use, for the specified purpose of informing the GBB or GS00. Whereas, (c) and (d) deal with the outputs of data gathering, management and analysis, that is, the Operator must produce a periodic GS00, and it must include data for the GBB that is (or may) be required for the GBB under this Act.
(4)	(a), (b) If a function being conferred under 7(2)(a) or (b), or a regulation under (c) is inconsistent with a written law, then section 7(2)(a), (b) and (c) prevails.	
(5)	(a), (b) Clarifies the meaning of a 'person on whom functions are conferred' as per (2)(a) or (b).	Section 53 of the <i>Interpretation Act 1984</i> was used as a guide.
<b>8. Rules for the GBB and GS00</b>		
Regulations to provide for there to be rules on the matters identified below:		



8(1)	Rules are to be made in regard to the form, content and operation of the GBB and the form and content of the GSOO.	The rules are limited to dealing only with those matters set-out by the regulations.
(2)	(a), (b) For rules of a certain class (specified in the regulations) to attract a <i>civil penalty</i> of not more than \$100,000 if contravened, plus \$20,000 per day for every day the contravention continues.	Note that a body corporate comes within the definition of a 'person' under the <i>Interpretation Act 1984</i> .  Under regulations, a different level of penalty can be applied to a body corporate or to a 'natural person' (an individual) as these provisions reference only the maximum penalty amount and maximum daily penalty.
	(c), (d), (e) For the enforcement of civil penalties.	This is broadly consistent with the arrangements that apply in the WEM. Provides flexibility for regulations to limit the Operator (as opposed to the ERB) to deal with only those contraventions of the rules that are deemed to be minor, that is, attract a civil penalty of no more than \$20,000.
	(f) To require that there be initial rules.	This is broadly consistent with the arrangements that apply in the WEM.
	(g) Enables rules to be changed, repealed or replaced by other rules that have been made in accordance with the regulations and rules.	It is intended that these 'other' rules are protected rules that cannot be amended by the Operator as they set-out the process by which rules are to be changed, repealed or replaced.
	(h) For the initial rules to be tabled by the Minister in both Houses of Parliament and for any rules that amend, repeal or replace those rules to also be tabled.	This is broadly consistent with the arrangements that apply in the WEM. There is scope for all changes to the initial rules to be tabled in Parliament. However, it is intended that once the initial rules are tabled, that regulations will provide for the Operator to amend, repeal and replace rules (other than protected rules), and for those changes to be gazetted (as per section 41 of the <i>Interpretation Act 1984</i> ) rather than to be tabled.
(3)	(a), (b), (c), (d), (e) Contravening a rule also extends to attempting to contravene and acting in any way (either singly or in concert with others) in order to contravene.	
(4)	The rules under this Act are not to be subject to disallowance as applies to subsidiary legislation (which includes regulations and rules). However, the amendment, repeal or replacement of rules under this Act must be gazetted to take effect.	This is broadly consistent with the arrangements that apply in the WEM. It is a practical measure and reflects that rules are highly operational and technical with relatively low legislative status. It is expected that rules may need small and frequent changes, making it inappropriate for the rules to be subject to the possibility of being disallowed.
<b>9. Regulations as to fees and charges for performance of functions</b>		
9(1)	Regulations to provide for the imposition of fees and charges for functions performed under the Act.	For functions performed by the Operator and the ERB (and by extension the Arbitrator). Note: The Arbitrator is not given functions under this

	Rules will prescribe the amounts in relation to specified functions.	Act but rather performs functions in support of the ERB via section 56 of the <i>Energy Arbitration and Review Act 1998</i> .
(2)	The reference to performance of functions in (1) includes functions performed under another Act.	Provides for the ERB (and by extension the Arbitrator) to recover costs by extending the scope of the ERB's functions under the <i>Electricity Industry Act 2004</i> .
(3)	If not appropriate to set a fee for the performance of a specific function, then a methodology can be prescribed (including one that is based on costs of performing that function).	To enable the recovery of costs for services provided in relation to this Act through the application of, for example, a formula or model.
(4)	(a), (b) Regulations may authorise the ERB to set fees for a hearing and to make any other necessary incidental provisions.	
(5)	The application of (4) covers where proceedings have started but discontinued and are not finalised.	
<b>10. No reliance on duty of confidence to avoid obligation to provide information</b>		
This is consistent with section 224, National Gas Access (WA) Act 2009. A duty of confidence (including a contract) cannot be used as a reason to refuse to provide required information. This means there is no breach of the duty of confidence as a result of providing information in compliance with a statutory duty to give information, hence no civil liability would arise.		
<b>11. Delegation of functions</b>		
11(1)	Enables the Operator to delegate a function or functions by way of a written instruction.	There are no limits placed on what may or may not be delegated.
(2)	A person performing a delegated function is considered to do so in a way that is consistent with the terms of the delegation.	
<b>12. Review by the Board</b>		
12(1)	Review by the ERB of decisions made by a person on whom functions are conferred.	This limits the ERB's review to only those decisions that are within the scope of the regulations and rules, and, specified by the regulations as being 'reviewable'.
(2)		Sets limits on the scope of the ERB's power in relation to reviews of decisions (of the type specified in 12(1)) and for other convenient or necessary matters through regulations.
<b>13. Protection of information</b>		
13(1)	Interim protection of information provisions forward of any regulation.	Operator must take all reasonable measures to protect protected information from unauthorised use or disclosure.
(2)	These are broadly consistent with section 91G and section 91FD of the	Statement that the Operator makes unauthorised use or disclosure of protected information if its use or

	NGL.	disclosure is not authorised by this Act.  Note: the provisions applied by (4) authorise the disclosure of protected information in certain specific circumstances.
(3)		The Operator may use protected information obtained under this Act to perform its functions (subject to limits or requirements).
(4)		(a), (b), (c), (d) The contents of NGL Chapter 2 Division 7 Subdivision 2 apply as if it were a part of this Act, with any necessary modifications, and as if references to the Australian Energy Market Operator were references to the Operator.
(5)	(1) to (4) have effect until regulations are made to control the use and disclosure of protected information obtained by the Operator.	
(6)	There is a requirement for the Minister to be satisfied that stakeholders have been consulted before the Governor makes any regulations controlling the use and disclosure of protected information.	Internal process will be used to gauge the Minister's satisfaction before the drafting of regulations is commenced.
(7)	References under (5) and (6) do not include a reference to regulations with regard to protected information obtained by the Operator for the purposes of its functions (via subsection 3).	This ensures that regulations made pursuant to subsection 3 continue to have effect after regulations controlling the use and disclosure of protected information have been made.
<b>14. Immunity from liability</b>		
14(1)	Immunity for the Operator and its employees from civil monetary liability should an act or omission occur while performing their functions. The only time that immunity is not applicable is if the act or omission was done in bad faith or through negligence.	Immunity for the ERB and Arbitrator is provided under sections 65 and 80 respectively of <i>the Energy Arbitration and Review Act 1998</i> . Immunity for the ERA is provided under section 56 of the <i>Economic Regulation Authority Act 2003</i> .
(2)	Immunity for the person giving information to the Operator from civil monetary liability for an act or omission, unless the act or omission was done in bad faith or through negligence.	The provision also covers a person who gives the information late. Even after the time for giving the information has expired (that is, the information is not provided) the person will still be obliged to give the information under section 7(2)(d) and (e). See also s.71(1)(d) <i>Interpretation Act 1984</i> .
(3)	If a person provides misinformation to the Operator, they will incur a civil monetary liability only if that information is given out of negligence or in bad faith.	Enforcement function.

(4)	(a), (b), (c) Regulations can set a different maximum civil monetary liability amount that may vary in their application according to certain criteria, and can also prescribe how the amount can be divided amongst claimants.	Enforcement functions.
(5)	Limits the liability of an officer (or employee) so that it cannot be extended to the officer's (or employee's) body corporate.	
<b>15. Regulations</b>		
15(1)	The making of regulations to deal with all matters necessary to establish and achieve the objectives of the GBB and the GS00.	A high level, general statement that regulations will be made for the purpose of establishing, and meeting the objectives of, the GBB and GS00.
(2)	(a), (b) Contravention of a regulation is an offence. A maximum fine of \$100,000 applies (with a daily penalty of \$20,000). A minimum fine can also be prescribed by regulations. A fine may also relate to the context of the offence and take into account whether the offence is a first offence.	Enforcement functions.
(3) (4) (5) (6)	The regulations may directly or indirectly adopt all or part of the text of a published document, as it exists at a specified date or from time to time.	For example, the text of an Australian Standard.