
# REPORT OF THE

# STANDING COMMITTEE ON LEGISLATION

IN RELATION TO

# *Energy Coordination Amendment Bill 1997*

Presented by the Hon Bruce Donaldson (Chairman)

Report 41, October 1997

# STANDING COMMITTEE ON LEGISLATION

**Date first appointed:**

16 May 1990

**Terms of Reference:**

A Bill originating in either House, other than a Bill which the Council may not amend, may be referred to the Committee after its second reading or during any subsequent stage by motion without notice. . . A referral under [this paragraph] includes a recommital.

The functions of the Committee are to report on Bills referred under this order.

**Members as at the date of this report:**

Hon Bruce Donaldson MLC (Chairman)
Hon Bill Stretch MLC (Deputy Chairman)
Hon John Cowdell MLC
Hon Giz Watson MLC
Hon Derrick Tomlinson MLC

**Staff as at the date of this report:**

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See Appendix II

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## APPENDIX I

# Report of the Legislation Committee

# in relation to

# *Energy Coordination Amendment Bill 1997*

## 1 Executive summary and recommendations

### Executive summary

1.1 The *Energy Coordination Amendment Bill 1997* ("*Bill*") introduces a scheme for the licensing of gas distribution within designated areas to be known as "supply areas". The Coordinator of Energy ("Coordinator") is responsible for administering most aspects of the scheme, in particular for granting licences.

1.2 The *Bill* as a whole was supported in the Legislative Council. However, a number of issues were raised in debate, the most significant of which related to the following aspects of the *Bill*:

1.2.1 Under the *Bill*, the Coordinator has a very broad discretion in a number of matters, particularly as to whether to grant a licence to an applicant and the terms and conditions which are to apply to a licence. Although the *Bill* sets out a number of matters to which the Coordinator may have regard, the Coordinator's discretion is not confined by these matters.

1.2.2 The *Bill* imports a number of provisions of other Acts, notably the *Energy Corporations (Powers) Act 1979* and the *Land Acquisition and Public Works Act 1902*.

1.2.3 The *Bill* contains a "Henry VIII" clause, enabling the promulgation of regulations which over-ride the operation of provisions of the *Energy Corporations (Powers) Act 1979* and possibly other enactments.

1.2.4 To facilitate the operation of gas supply systems under the *Bill*, the *Bill* makes broad provision for the grant to a licensee of rights in Crown land, land held by public authorities and private land.

1.3 A further subject of debate was the fact that the *Bill* appears inconsistent in a number of ways with the proposed **National Access Regime for Gas** ("proposed Regime") currently under discussion by State and Territory governments. The Committee has briefly reviewed the potential for inconsistency but, this being essentially a matter of

policy and therefore outside the Committee's purview, has not made any recommendations in this regard.

**List of recommendations**

*Recommendation: that consideration is given to the desirability of amending clause 11H so that the* Petroleum Pipelines Act 1969 *continues to operate during the transition period under clause 11K.* (See paragraph 8.5.)

*Recommendation: that consideration be given to the desirability of enabling existing operators to continue to operate under their current licences.* (See paragraph 8.6.)

*Recommendation: that the classification of licences under clause 11D is clarified so as to ensure that licences may be granted for all activities requiring licences under clause 11I.* (See paragraph 8.6).

*Recommendation: that clause 11K is redrafted so that the transition periods for which it provides commence from the time a supply area is constituted, not from the commencement of section 7 of the* Bill. (See paragraph 8.8.)

*Recommendation: that clause 11N(1) be re-drafted so as to clarify the extent of the Coordinator's powers in relation to matters dealt with by or relating to other clauses of the* Bill. (See paragraph 8.10.)

*Recommendation: that clause 11N(4) is deleted.* (See paragraph 8.11.)

*Recommendation: that clause 11R(3) is amended so that fees may be reduced in respect of a supply area, not in respect of a licensee*. (See paragraph 8.13.)

*Recommendation: that consideration be given to deleting clause 11X (2). If the clause is retained, it should be redrafted so as to make clear that it does not affect clause 11X(1).* (See paragraph 8.15.)

*Recommendation: if it is intended that a licensee is to be obliged under clause 11ZG to leave a system in place following cancellation of a licence, this should be made clear.* (See paragraph 8.18.)

*Recommendation: that clause 11ZG imposes an obligation to maintain a distribution system in safe condition at all times, including without limitation at the time of cancellation, transfer or expiry of the licence.* (See paragraph 8.18.)

*Recommendation: that consideration is given to imposing obligations in the* Bill *about other matters of community interest.* (See paragraph 8.18.)

*Recommendation: that the drafter of the* Bill *confirms that the procedures applying to easements under clauses 11ZK, 11ZL and 11ZM are acceptable to the Department of Land Administration and other relevant agencies* (See paragraph 8.19.).

*Recommendation: that clauses 11ZK, 11ZL and 11ZM are redrafted to ensure that the rights available to licensees under those clauses are no greater than the rights of AlintaGas under the* Energy Corporations (Powers) Act 1979. (See paragraph 8.19.)

*Recommendation: that clause 11ZQ(1) sets out the powers available to each class of licensees without requirement of prescription.* (See paragraph 8.20.)

*Recommendation: that clause 11ZQ(2) is redrafted to the effect that where a licensee is prescribed under clause 11ZQ(1), a transferee of the licence is deemed to be also prescribed.* (See paragraph 8.21.)

*Recommendation: that consideration is given to replacing the Henry VIII clause with substantive clauses concerning licensee powers.* (See paragraph 8.22.)

*Recommendation: if the Henry VIII clause is regarded as necessary, that clause 11ZQ(3) is amended so that:*

- *regulations can restrict the powers available to licensees but not augment those powers or remove restrictions on licensees;*
- *regulations apply to all licensees in a particular class in a particular supply area, not individual licensees; and*
- *in clause 11ZQ(3)(a), references to "an enactment" are replaced by references to "a provision referred to in Schedule 2".* (See paragraph 8.22.)

*Recommendation: that in clause 11ZR(1)(b)(i) the expression "15" is amended to "14".* (See paragraph 8.23.)

*Recommendation: that guidelines are prepared and incorporated into the* Bill *to govern access rules in a manner similar to the access rules set out in Schedules 5 and 6 of the* Gas Corporation Act 1994. (See paragraph 8.24.)

## 2 Reference

The *Bill* was referred to the Legislation Committee on 28 August 1997 on a motion by Hon Mark Nevill MLC with an amendment proposed by Hon N.F. Moore MLC. The reference is in the following terms:

> "*That the Energy Coordination Amendment Bill 1997 be referred to the Standing Committee on Legislation for consideration and report no later than Thursday, 18 September 1977* [sic]."[1]

[1] 1997 Western Australian Parliamentary Debates 28 August 1997

## 3 Origin of the *Bill*

3.1 The *Bill* was first introduced in the Legislative Assembly on 1 May 1997. Following its passage in that House it was introduced in the Legislative Council on 10 June 1997 and referred to this Committee following the second reading debate.

3.2 The *Bill* has not been opposed at any of these stages. However a number of concerns were raised in relation to the *Bill* during the second reading debate in the Council. Among other things, this Report is intended to review those concerns.

## 4 Contents of the *Bill*

4.1 The *Bill*'s long title is as follows:

> "*A Bill for AN ACT to amend the* Energy Coordination Act 1994 *to make provision for a scheme for licensing the supply of gas in certain areas of the State, to make consequential amendments to other Acts, and for related purposes.*"

4.2 The bulk of the *Bill*'s provisions form a new Part 2A of the *Energy Coordination Act 1994*. The *Bill* makes only minor amendments to existing provisions of the principal Act and does not affect its operation. It also makes brief but significant amendments to other Acts.

4.3 The new Part 2A is headed "*Licensing of Gas Supply*" and is divided into 10 Divisions, the main effects of which may be summarised as follows.

*Division 1 - Supply areas* (clauses 11A - 11C)

The Governor may constitute, alter or cancel a supply area.

*Division 2 - Licence classification and area of operation* (clauses 11D, 11E)

There are separate licences, relating to supply areas or part thereof, for each of:

- transmission of gas, authorizing transportation of gas through a system operating at 1.9 megapascals pressure or more;
- distribution of gas, authorizing construction of a system operating at less than 1.9 megapascals and transportation of gas through it; and
- trading of gas, authorizing sale of gas transported through a transmission or distribution system.

*Division 3 - Licensing requirements* (clauses 11F - 11K)

Unless exempted by the Governor, following the initial transitional period a person must not supply gas (other than non-pipeline liquid petroleum gas) in a supply area without a licence.

*Division 4 - Licence application, grant etc* (clauses 11L - 11W)

The Coordinator is empowered to grant, transfer, amend or renew a licence, subject to conditions (which may but need not relate to a list of matters set out in Schedule 1) determined by the Coordinator.

*Division 5 - Duty to supply* (clauses 11X, 11Y)

A licence may include a condition that the licensee is to supply gas or operate a distribution system in certain ways, except in case of emergency, accident etc.

*Division 6 - Other duties included in licence* (clauses 11Z, 11ZA, 11ZB)

It is a condition of every licence that the licensee meets requirements in relation to asset management and reporting thereof, meets technical standards and provides independent performance audits.

*Division 7 - Enforcement* (clauses 11ZC - 11ZH)

Where there is a breach of a licence condition, depending on the circumstances of the breach the Governor may cancel a licence or the Minister may impose sanctions on the advice of the Coordinator.

*Division 8 - Appeal* (clause 11ZI)

A person aggrieved by certain decisions of the Coordinator may appeal to the Minister.

*Division 9 - Powers in relation to land*

In relation to a distribution licence, the Government may grant an easement over Crown or public authority land to a licensee or exercise the land acquisition powers of the *Land Acquisition and Public Works Act 1902* for the benefit of a licensee.

*Division 10 - Extension of* Energy Corporations (Powers) Act 1979 *to licensees*

If prescribed or of a prescribed class, a licensee has a number of the powers which the Gas Corporation ("AlintaGas") has under the *Energy Corporations (Powers) Act 1979* (for example in relation to entry onto land).

4.4 The *Bill* also amends the *Energy Corporations (Powers) Act 1979* and the *Gas Undertakings Act 1947* so that the respective prohibitions under those Acts in relation to supplying gas and establishing a gas undertaking do not apply to a licensee.

## 5 The procedure of this inquiry

5.1 Following the reference of the *Bill* on 28 August 1997 the Committee met on 3 September 1997 and determined to invite Hon Mark Nevill MLC, the Office of Energy and the Minister for Resources or their representatives to appear before the Committee on 10 September to discuss the *Bill*. Mark Nevill was unavailable and the Minister declined the invitation.

5.2 On 10 September the Office of Energy appeared before the Committee through its representatives Dr Les Farrant (the Coordinator), Mr Vince Walsh and Mr Neil Parry. The Committee thanks them for their assistance.

5.3 On 17 September the Committee resolved to seek an extension to the reporting date for the Bill, until 23 October 1997. The House granted the extension on 17 September.

5.4 The Committee contacted a number of parties whom the Committee considered might be able to assist the inquiry by commenting on the Bill. No submissions containing any substantive comments were received.

## 6 Outline of the Committee's method and findings

6.1 Parliamentary proceedings are such that it is not the role of a Committee to bring into question the policy or principle of a *Bill* referred to it for consideration. The policy of a *Bill* is debated during its Second Reading. Once the Second Reading is agreed to, the policy is established. Accordingly, while the Committee is not prevented from commenting on the policy of the *Bill* or other matters it believes to be relevant to its terms of reference, the Committee is bound by the policy established in the Second Reading.

6.2 The role of the Committee is therefore primarily to consider matters of detail such as the feasibility or clarity of particular clauses or the way a particular element of the statutory schema is administered.

6.3 The remainder of this Report is laid out as follows:

**Section 7** reviews, by way of background, the current regulatory regime applying to gas in Western Australia.

**Section 8** is the central section of the Report. It discusses specific provisions of the Bill, primarily those which were the subject of comment in the House but also other provisions which the Committee regards as deserving comment.

**Section 9** discusses a number of ancillary issues which were raised in debate in the House.

**Appendix I** discusses the most significant policy matter relating to the *Bill*: the relationship between the *Bill* and the proposed

Regime. As noted, it is not the Committee's role to make recommendations on policy matters. Nonetheless, the Committee considers it useful to canvass the issues raised in relation to the proposed Regime.

## 7 Current regulation of gas distribution and sale in Western Australia

7.1 Regulation of the sale and distribution of gas in Western Australia is currently governed by a number of State Acts under the administration of different departments. The key Acts are:

- *Petroleum Pipelines Act 1969* (Minister for Mining), which governs the construction and operation of all pipelines other than those specifically governed by other Acts;
- *Gas Corporation Act 1994* (Minister for Energy), which governs the activities of the Gas Corporation (trading as AlintaGas) and provides for access by other persons to Gas Corporation gas facilities where ordered by the Minister. The *Gas Transmission Regulations 1994, Gas Referee Regulations 1995* and *Gas Distribution Regulations 1996* under the Act provide further detail about the terms on which gas transmission and distribution capacity are to be provided;
- *Energy Corporations (Powers) Act 1979* (Minister for Energy), which sets out the powers of the Gas Corporation. Establishment of new gas undertakings (other than private undertakings) by anyone other than the Gas Corporation is only allowed with the approval of the Coordinator of Energy.
- *Gas Standards Act 1972* (Minister for Energy), which sets out safety standards and so on for the provision of gas.
- *Goldfields Gas Pipeline Agreement Act 1994*, (Minister for Resources Development) which sets out the agreement between the Government and the proponents of the goldfields gas pipeline from the north west gas fields to Kalgoorlie-Boulder.

7.2 In the absence of new legislation such as the *Bill*, establishment of a new system for transmission or distribution of gas would have to be effected under s.55(b) of the *Energy Corporations (Powers) Act 1979*, which allows the Coordinator of Energy to approve a new gas undertaking. That Act provides no guidance as to the conditions which would apply to distribution and sale of gas from such an undertaking.

7.3 In the context of the statutory schema relating to gas, the *Bill* may be described as an attempt to replace the "blunt instrument" of s.55(b) with a more clearly defined set of rules for the establishment and operation of gas supply systems.

## 8 Specific provisions of the *Bill*

8.1 In this section the Committee considers in more detail specific clauses of the *Bill* which have been the subject of comment in the House or otherwise considered by the Committee.

8.2 The Committee notes that concerns which have been raised in relation to a number of the provisions discussed in this section stem from claimed inconsistency between those provisions and the proposed Regime. These matters are not strictly within the Committee's terms of reference and are discussed in Appendix I rather than in relation to particular provisions.

8.3 Clause 11A

This clause empowers the Governor to constitute, cancel or alter a supply area. The criticism has been voiced that it is unsatisfactory to allow the Executive to determine which areas will be supply areas, and to cancel such an area at any time.
The Committee notes that constitution of an area as a supply area does not in itself determine whether gas is available there. Gas may be available under another Act even where the area is not a supply area. Conversely, gas is not necessarily available simply because an area is a supply area.

It does not appear to the Committee that this provision raises any difficulty.

8.4 Clause 11D and 11I

Clause 11D describes the three types of licence: transmission, distribution and trading. The criticism has been made that division into three types of licence is over-regulation.

The Committee notes that the distinction between transmission and distribution licences accords with the approach of the proposed Regime. The Committee does not have sufficient information to comment on whether the actual definitions of the terms are acceptable (for example, by according with industry practice and being readily ascertainable). No criticism has been raised in this regard.

The definition of trading licence is very broad, covering the sale of any gas transported through any pipeline system. Read together with the prohibition on supplying gas without a licence (clause 11I), the definition amounts to a significant restraint on commercial activities such as sale of gas on spot and secondary markets. The question may be asked whether it is appropriate to give the Coordinator such a degree of control over these markets, as opposed to providing, for example, an "as of right" system whereby trade is permitted provided certain objective criteria are met.

The Committee accepts that there is an argument that this check is necessary at this early stage in the restructuring of the gas industry. As with most other matters regarding the Coordinator's role, review would be needed were the proposed Regime to be implemented.

8.5 Clause 11H

This clause excludes the operation of the *Petroleum Pipelines Act 1969* from transmission activities covered by the *Bill*. This in itself raises no difficulty (although see the related matter raised by clause 11I, below). It means that when a supply area is constituted, transmission activities in that area which were previously covered by the *Petroleum Pipelines Act 1969* become subject to the *Bill* instead.

However the exclusion leads to the apparent anomaly that transmission activities covered by the *Bill* will be unregulated for up to 12 months after a supply area is constituted, because:

- clause 11H excludes the operation of the *Petroleum Pipelines Act 1969*; and
- clause 11K allows an existing operator to continue transmission as if licensed under this *Bill* for up to 12 months without actually obtaining a licence.

It may be that this situation has been anticipated and it is not considered necessary to regulate transmission during the transitional period. Other laws applying to safety standards and so on will continue to apply. However the Committee sees some benefit in reviewing the desirability of allowing such a gap in the regulatory structure to arise.

*Recommendation: that consideration is given to the desirability of amending clause 11H so that the* Petroleum Pipelines Act 1969 *continues to operate during the transition period under clause 11K.*

8.6 Clause 11I

This clause imposes the licence requirement central to the working of the *Bill*. In the Committee's view it raises two issues (in addition to that discussed in relation to clause 11D above).

First, the question may be asked whether the range of activities which will require a licence under this clause is broader than that discussed in the second reading speech. In that speech the responsible Minister states that:

> *"To enable new commercially-based natural gas distribution in Kalgoorlie-Boulder, and as appropriate in other areas of the State where natural gas may be economically supplied by gas transmission pipelines, it is necessary to modify existing energy legislation. . . . The Bill before the House details these amendments and will facilitate gas distribution development in Kalgoorlie-Boulder and also provide a statutory framework that will help to facilitate subsequent development in other areas."*

A similar description of the *Bill*'s intention was given by the Coordinator in his submission to the Committee. It is clear from these statements that the primary intention of the *Bill* is to regulate future expansion of the gas industry rather than to add to the regulatory structure applying to existing pipelines.

The concern has been voiced that the licensing requirement adds a further layer of regulation on top of existing laws. The Committee does not fully accept this view. Clause 11H significantly reduces the potential for duplication of licence requirements by excluding the operation of the *Petroleum Pipelines Act 1969* from transmission covered by the *Bill*. The *Bill* largely replaces existing laws rather than adding to them.

Nonetheless, it remains of some concern that distributors currently operating under the *Petroleum Pipelines Act 1969* (and other Acts such as State Agreement Acts relating to pipelines) will need to obtain a licence under this *Bill* merely to carry on their current operations. This result seems to be at odds with the explanation of the *Bill*'s intention proffered by the Minister and the Coordinator.

*Recommendation: that consideration be given to the desirability of enabling existing operators to continue to operate under their current licences.*

The second issue noted by the Committee is an apparent difficulty in the drafting of the clause. The clause 11I licensing requirement applies to "gas", which is broadly defined in the principal Act to include any gas intended for use as a fuel **or in any chemical process.** Gas, so defined, cannot be supplied in a supply area except under the authority of a licence granted under the *Bill*.

The difficulty arises when one turns to what is permitted by a licence under clause 11D. Licences permit transmission of gas through a transmission system and a distribution system, which are defined to refer only to pipelines transporting gas from "generating works" as defined in the *Energy Corporations (Powers) Act 1979*. The potential anomaly is that generating works are defined in terms of generation of energy, and do not include chemical processes.

Therefore there is, conceptually at least, potential for the situation to arise whereby a person wishing to transmit gas for use in a chemical process is prohibited from doing so by clause 11I, but at the same time is unable to obtain a licence to do so because the gas is not for use in the generation of energy.

The Committee has not undertaken inquiries into whether this anomaly is likely to result in a practical difficulty but notes the desirability of reconciling the prohibition under clause 11I with the licensed activities under clause 11D, if only from a drafting point of view.

*Recommendation: that the classification of licences under clause 11D is clarified so as to ensure that licences may be granted for all activities requiring licences under clause 11I.*

8.7 Clause 11J

Under this clause the Governor can exempt a person from the requirement for a licence. The criticism has been made that this power is somewhat arbitrary and diminishes certainty in the market.

The Minister responsible for the *Bill* in the Council stated in his second reading speech that:

> "*Cabinet noted on the 17 February the intention of the Minister for Energy to seek an exemption on behalf of AlintaGas for its current areas of operation.*"

The Committee accepts that making provision for such exemptions is arguably appropriate and may be needed to provide flexibility in future.

8.8 Clause 11K

This clause provides a transitional period during which existing operators of gas supply systems are exempted from the licensing requirement under clause 11I.

There is an apparent difficulty with the clause. An existing operator has 4 months during which to apply for a licence and 12 months during which it may continue to operate without a licence (unless its application is refused in the interim). The difficulty is that these periods are expressed to run from the commencement of section 7 of the *Bill*, while the licence requirement, on the other hand, commences only once a place is constituted as a supply area.

This means that:

- if an area is constituted as a supply area more than 4 months after the commencement of section 7, the transitional application period has already elapsed, meaning that an existing operator in that area is unable to apply for a licence;

- if an area is constituted as a supply area more than 12 months after the commencement of section 7, the transitional operations period has already elapsed, meaning that an existing operator in that area is immediately in breach of clause 11I.

It appears unlikely that these are the intended results of the provisions.

*Recommendation: that clause 11K is redrafted so that the transition periods for which it provides commence from the time a supply area is constituted, not from the commencement of section 7 of the* Bill.

8.9 Clause 11L(2)

This clause requires an applicant for a licence to inform the Coordinator on a number of matters. The criticism has been made that some of these matters are not relevant to the Coordinator's decision whether to grant a licence.

In the Committee's view it is difficult to determine what matters are relevant to decisions of the Coordinator, as the *Bill* provides no criteria by which those decisions are to be guided.

The Committee notes that it would be of benefit to discuss matters of this type with industry participants to promote understanding of the reasons for these requirements.

8.10 Clause 11N(1)

Under this clause the terms of a licence may be determined by the Coordinator. Two distinct concerns which have been raised about this clause are that the non-exhaustive list of possible terms in Schedule 1 is adapted to specifically favour AlintaGas, and that the clause is unclear in its intention.

In relation to the first concern, the Committee accepts the Coordinator's explanation that the status of AlintaGas as a publicly owned corporation may require some differential treatment at this stage. This approach may require review under the proposed Regime.

In relation to the second concern, the Committee is concerned that it is not clear whether the Coordinator is able to impose licence conditions about matters which are dealt with by other sections of the *Bill*. Clearly, there are some limits on the form which a licence condition can take: conditions of a licence cannot be inconsistent with the *Bill* or any other legislation, while clause 11ZI gives a person who is aggrieved by a decision of the Coordinator a right of appeal to the Minister.

However, it is not clear whether, for example, the Coordinator could effectively circumvent the operation of clause 11ZF, dealing with the cancellation of a licence by the Governor, by imposing conditions allowing the Coordinator to cancel a licence in additional circumstances. If the Coordinator cannot do so (as seems likely), can he or she nevertheless impose conditions providing for suspension or automatic termination (as opposed to cancellation) under given circumstances?

In the Committee's view it is necessary for the sake of certainty and to avoid litigious dispute as to the extent of the Coordinator's powers that these matters be clarified.

Again, this difficulty arises because of the unusually broad power of the Coordinator to determine licence conditions.

*Recommendation: that clause 11N(1) be re-drafted so as to clarify the extent of the Coordinator's powers in relation to matters dealt with by or relating to other clauses of the* Bill.

8.11 Clause 11N(4)

This clause provides that an accounting requirement imposed on AlintaGas cannot be inconsistent with requirements under other legislation. The criticism has been made that if it is desirable to impose an accounting requirement on AlintaGas which is inconsistent with that other legislation, the problem lies with the other legislation and that legislation should be amended.

The Committee does not accept this view. Two requirements may be inconsistent without either being in itself unsatisfactory. This clause seems to be a practical way of addressing the possibility of inconsistency.

Nonetheless the Committee has difficulties with this clause. First, as a general rule of statutory interpretation, a person empowered to exercise discretion under one Act is prevented from exercising that discretion to the extent that the exercise would be inconsistent with other Acts. It is not clear why it is regarded as necessary to give statutory expression to this rule in this particular instance. Secondly, there is no justification for singling out accounting matters amongst the many potential areas of overlap between this *Bill* and other legislation. The clause appears redundant, if not confusing.

*Recommendation: that clause 11N(4) is deleted.*

8.12 Clause 11R

This clause provides for payment of licence fees prescribed by regulations promulgated by the Governor (and subject to the usual disallowance procedure). The concern has been voiced that fees may be unnecessarily high.

This question is outside the Committee's purview.

8.13 Clause 11R(3)

This provision allows the Coordinator to reduce licence fees in particular circumstances. The concern has been raised that this approach could distort competition in the relevant markets.

The Committee agrees that this mechanism has the potential to amount to a subsidy by the State of selected gas operations. The Committee is not convinced that this is necessarily a bad thing, as it could facilitate the supply of gas in areas which would not otherwise be supplied. However the Committee is of the view that to avoid distorting the market, all licensees competing in the same supply area should be treated equally.

There may also be scope for an argument that the clause should reverse its approach by allowing variation generally, rather than requiring that a particular case be made out.

*Recommendation: that clause 11R(3) is amended so that fees may be reduced in respect of a supply area, not in respect of a licensee.*

8.14 Clause 11S

This clause prevents transfer of a licence without the Coordinator's approval. It has been suggested that approval should not be able to be unreasonably withheld.

This concern is the same as other concerns in relation to the broad discretion of the Coordinator, with the proviso that a decision in relation to transfer of existing rights may be more amenable to judicial review than a decision in relation to the initial grant of a licence. As with other such clauses, the Coordinator's discretion in this matter would require review under the proposed Regime.

8.15 Clause 11X(2)

This clause appears intended to preserve the protection offered to AlintaGas under section 28(4) of the *Gas Corporation Act 1994*.

The clause is not well drafted, which has given rise to a concern that it could be used to weaken the force of licence conditions applying to AlintaGas under this Act. The Committee on balance disagrees with this interpretation, but agrees that there is sufficient doubt on the point to justify a recommendation that the clause be redrafted.

The Committee has other concerns with the clause. First, the clause is probably redundant as clause 11X(1) does not purport to affect and would not naturally be regarded as affecting the operation of s.28(4) of the other Act. Secondly, it is not clear why this protection is expressly offered in regard to clause 11X(1) conditions but not in relation to conditions applicable to AlintaGas licences under clause 11N.

*Recommendation: that consideration be given to deleting clause 11X (2). If the clause is retained, it should be redrafted so as to make clear that it does not affect clause 11X(1).*

8.16 Clauses 11Z(1) and 11ZB

These clauses set out reporting, asset management and independent audit requirements. The concern has been raised that the requirements are onerous given reporting requirements under regulations relating to gas standards.

The Committee accepts the Coordinator's argument that these requirements do not unduly overlap with requirements of existing regulations, but are appropriately directed towards the purposes of the *Bill*. Given the Coordinator's explanation that these clauses are related to the Coordinator's powers to impose pricing controls, this approach may require review under the proposed Regime.

The Committee notes by way of general comment that greater consultation with industry prior to the introduction of clauses such as this might lead to a greater degree of understanding and acceptance of the need for such provisions.

8.17 Clauses 11ZC and 11ZF

These clauses set out sanctions for various matters. The view has been expressed that the sanctions should be mandatory rather than discretionary. The Committee disagrees with this view.

In relation to clause 11ZF, the view has been expressed that the clause is unclear as to whether offences under other Acts are included and whether AlintaGas is subject to the clause. The Committee's interpretation of the clause is that offences under other Acts are included and AlintaGas is subject to the clause. If this is the case, no amendment is necessary.

8.18 Clause 11ZG

This clause requires a licensee on cancellation of a distribution licence to ensure the system is left in a safe condition.

The Committee accepts the explanation of the Coordinator that the clause deals only with distribution licences, not transmission licences, because transmission systems are covered by the *Petroleum Pipelines Act 1969*.

The Coordinator also suggested that the intention of the clause is to prevent a distribution licensee whose licence is cancelled from removing the distribution system. The Committee agrees that this is desirable, but queries whether the clause is effective to achieve this.

*Recommendation: if it is intended that a licensee is to be obliged under clause 11ZG to leave a system in place following cancellation of a licence, this should be made clear.*

The Committee is not clear as to why the obligation to maintain a distribution system in safe condition applies only where a licence is cancelled, as opposed to during the term of the licence, where a licence expires and where a licence is transferred. The Coordinator's explanation that those matters may be dealt with by way of licence conditions is somewhat reassuring, but it is the view of the Committee that there is no justification for enshrining the safety obligation in statute in the case of cancellation, while leaving it to the discretion of the Coordinator at all other times.

It is also unclear why, if an obligation concerning safety has been included in the *Bill* at all, obligations concerning quality of service, continuity of service, customer rights and other matters of public interest are left to be determined by the Coordinator.

*Recommendation: that clause 11ZG imposes an obligation to maintain a distribution system in safe condition at all times, including without limitation at the time of cancellation, transfer or expiry of the licence.*

*Recommendation: that consideration is given to imposing obligations in the* Bill *about other matters of community interest.*

8.19 Clauses 11ZK, 11ZL and 11ZM

These sections provide for grant of easements or other interests (referred to in this paragraph for brevity as "easements") over Crown land, over public authority land and under the *Land Acquisition and Public Works Act 1902*, respectively, in relation to a distribution licence.

The Committee questioned the Coordinator as to why there is no provision for the cancellation of easements on the cancellation, expiry or transfer of a licence, either immediately or on application by the relevant authority. The Coordinator noted that a previous licensee is in practice unable to utilise an easement in its favour if it does not have a licence under the *Bill*. Multiple easements can be held over a given piece of land.

The Committee is not convinced that allowing multiple easements to subsist over a single piece of land is desirable, regardless of the fact that only the most recent in time is likely to be of practical use at any given date. The Committee understands, however, that the *Bill* has been reviewed by the Department of Lands Administration and defers to the expertise of that Department in this area. It would also be appropriate to ensure that the *Bill* is acceptable to other Government departments and agencies affected by these provisions.

*Recommendation: that the drafter of the* Bill *confirms that the procedures applying to easements under clauses 11ZK, 11ZL and 11ZM are acceptable to the Department of Land Administration and other relevant agencies.*

The Committee also queried whether the grant of easements would be subject to applicable environmental regulations. The response of the Office of Energy to this question was to the effect that grant of an easement under the *Bill* would not affect the operation of other relevant laws.

This would appear to be the case for a grant of land under the relevant provisions of the *Land Acquisition and Public Works Act 1902* pursuant to clause 11ZM, under which land may be taken "as if for a public work within the meaning of that Act". Restrictions operating under that *Act* will therefore apply.

However the Office of Energy's explanation appears incorrect in relation to the grant of an interest in land to a licensee by a public authority under clause 11ZL. Clause 11ZL(1) allows the public authority to grant such an interest **on any terms agreed** with the licensee. Clause 11ZL(2) provides that "this section has effect despite any other written law." This means that rules relating to environment, safety, planning, consultation, etc applying to a public authority by relevant legislation **do not apply to a licensee** granted an easement over the land. The only restrictions are those (if any) agreed between the public authority and the licensee.

For example, it would appear that easements could be granted, without regard to the restrictions which would otherwise apply, over national parks, conservation parks, nature reserves and so on held by the National Parks and Nature Conservation Authority under the *Conservation and Land Management Act 1984*. There would in this case be no restrictions on the licensee's activities in that easement other than

those agreed with the National Parks and Nature Conservation Authority. The same issues arise in relation to land held by a number of other public authorities, prominent examples being the Water Corporation, the Lands and Forest Commission, local councils and authorities and the Swan River Trust.

This is of some concern, if only because there is no equivalent power under the *Energy Corporations (Powers) Act 1979*. Section 49 of that *Act* gives AlintaGas certain powers to carry out works on any land, but sections 50 and 120 significantly constrain the manner in which those works may be carried out. For example, damage is to be minimised, sources of danger are not to be created and compensation for damage is payable.

It is not clear why the rights of licensees under the *Bill* are apparently intended to be greater than those under which AlintaGas has operated hitherto.

*Recommendation: that clauses 11ZK, 11ZL and 11ZM are redrafted to ensure that the rights available to licensees under those clauses are no greater than the rights of AlintaGas under the* Energy Corporations (Powers) Act 1979.

8.20 Clause 11ZQ(1)

This clause empowers prescribed licensees to take advantage of certain powers in relation to entry onto land and so on which are currently enjoyed by AlintaGas under the *Energy Corporations (Powers) Act 1979*. The criticism has been made that empowering licensees in this indirect manner is not an efficient method of drafting.

The Committee accepts that there may be a need for licensees to have some but not all of the powers available to AlintaGas. This method of achieving that aim is viable.

However it is the Committee's view that the *Bill* would achieve greater certainty and ensure parity of treatment between licensees by setting out clearly the powers available to each class of licensees without requirement of prescription of individual licensees.

*Recommendation: that clause 11ZQ(1) sets out the powers available to each class of licensees without requirement of prescription.*

8.21 Clause 11ZQ(2)

The clause provides that prescription of a licensee for the purposes of clause 11ZQ(1) includes a transferee. The concern has been raised that this could result in transfers being subject to parliamentary disallowance under clause 11S.

The Committee on balance disagrees with this interpretation, preferring the view that the intention of the clause is that where a licensee is prescribed, a transferee of that license is deemed to be also prescribed. However the Committee agrees that the clause is badly drafted and should be reviewed.

*Recommendation: that clause 11ZQ(2) is redrafted to the effect that where a licensee is prescribed under clause 11ZQ(1), a transferee of the licence is deemed to be also prescribed.*

8.22 Clause 11ZQ(3)

This clause is a Henry VIII clause, meaning that it enables the operation of an Act of Parliament to be modified by the Executive.

Generally speaking, these clauses are undesirable for the reason that they derogate from the supremacy of Parliament over the Executive and derogate from certainty as to the application of statute law.

The *Bill* does not set out a comprehensive schema for gas regulation but rather relies on adoption of existing provisions of the *Energy Corporations (Powers) Act 1979*. The Henry VIII clause is arguably needed in this instance to modify those provisions where they turn out not to be appropriate.

However, the Committee would prefer:

- to limit the operation of clause 11ZQ(3)(a) so that regulations can restrict the powers available to licensees under the *Energy Corporations (Powers) Act 1979* listed in Schedule 2 but not augment them. Such an amendment would allay concerns that the Executive is being empowered to give licensees powers in excess of those available historically to AlintaGas; and

- that prescribed restrictions of powers apply not to individual licensees but to all licensees in a particular supply area. This would allay concerns about parity of treatment between licensees competing against each other.

Of particular concern is the ambiguity of clause 11ZQ(3)(a). The clause refers to modification etc of "an enactment". The better view is probably that this phrase should be read down to refer to only those provisions of the *Energy Corporations (Powers) Act 1979* listed in Schedule 2. However there is sufficient room for doubt on this matter to justify amending the clause.

*Recommendation: that consideration is given to replacing the Henry VIII clause with substantive clauses concerning licensee powers.*

*Recommendation: if the Henry VIII clause is regarded as necessary, that clause 11ZQ(3) is amended so that:*

- *regulations can restrict the powers available to licensees but not augment those powers or remove restrictions on licensees;*

- *regulations apply to all licensees in a particular class in a particular supply area, not individual licensees; and*

- *in clause 11ZQ(3)(a), references to "an enactment" are replaced by references to "a provision referred to in Schedule 2".*

8.23 Clause 11ZR

This clause is an unusual provision over-riding the procedure in accordance with which regulations generally come into operation under the *Interpretation Act 1984*. It provides that regulations under clause 11ZQ do not come into operation until a given period has passed without parliamentary steps being taken towards disallowance.

For the sake of completeness, the Committee notes its agreement with a view previously taken by other Committees of this House and other Westminster jurisdictions, that the fact that Parliament is given an opportunity to disallow regulations modifying Acts does not cure the inherent problems of a Henry VIII clause, although it might make the clause more palatable.

The Committee notes that there is potential for confusion in the period relating to disallowance being 15 sitting days in this clause, as opposed to 14 sitting days under the *Interpretation Act 1984*.

*Recommendation: that in clause 11ZR(1)(b)(i) the expression "15" is amended to "14".*

8.24 Schedule 1, item (c)

If included in a licence by the Coordinator, this provision would require a licensee to provide access to gas transmission or distribution capacity on terms to be determined by the Coordinator.

As with many provisions, this broad discretion of the Coordinator would require review should the proposed Regime be adopted.

Regardless of whether the proposed Regime is adopted, the Committee believes that the Coordinator's decision in this matter should be subject to guidelines similar to those in Schedules 5 and 6 of the *Gas Corporation Act 1994*. It appears anomalous that rules for access to AlintaGas facilities under that Act are spelt out in some detail, while no guidance is given as to access rules under the *Bill*.

*Recommendation: that guidelines are prepared and incorporated into the* Bill *to govern access rules in a manner similar to the access rules set out in Schedules 5 and 6 of the* Gas Corporation Act 1994.

8.25 Schedule 1, item (k)

If included in a licence by the Coordinator, this provision would require a licensee to fulfil community service obligations determined by the Coordinator.

The concerns raised in relation to this provision are that this provision could see obligations imposed on new entrants which are greater than those imposed on AlintaGas, or alternatively that no obligations will be imposed on any supplier.

The Committee notes that AlintaGas has no community service obligations outside this *Bill* and is in the same position as other suppliers under this *Bill* in that it may but need not be subjected to community service obligations. The Committee sees no difficulty with this position. See also comments in relation to clause 11X.

## 9 Some policy matters

### Introduction

9.1 In addition to the central policy concern discussed in Appendix I about the compatibility of the *Bill* with the proposed Regime, a number of other concerns were raised in Second Reading debate about policies underlying the *Bill*. Time does not permit the Committee to give full consideration to all issues raised, but for the sake of completeness a brief overview of the issues canvassed follows.

### The general scheme of gas regulation in W.A.

9.2 The claim was made that the *Bill* adds to an already unwieldy legislative schema governing the supply of gas in the State. The Committee notes that responsibility for matters relating to gas supply is distributed through a number of Acts and responsible authorities (see section 6 above). It is likely that the schema will require further adaptation if the proposed Regime is adopted by the State.

9.3 The Committee disagrees with the criticism insofar as it rejects any need for new legislation. The opening up of a monopolistic utility to competition presents a considerable challenge and clearly requires a legislative framework.

9.4 However the question might be asked whether the *Bill*'s approach is adequate to deal with the complexities of a newly competitive industry. On two key points it would seem arguable that the *Bill* fails to give the kind of guidance which might be expected, instead equipping the Coordinator with extremely broad powers to make up its own rules:

9.4.1 One key question is what rights and obligations of the previous monopolist (for example, in relation to easements and power of entry) should be granted to new entrants in the market. The *Bill* takes a simple approach, listing a number of powers under the *Energy Corporations (Powers) Act 1979* as applicable to licensees under the *Bill*. However a large margin for error is allowed: only *prescribed* licensees have the powers, and the Coordinator can modify or delete particular powers in relation to a particular licensee or a class thereof.

9.4.2 Another key question is what rules should apply to suppliers (for example, in relation to quality and continuity of service). The *Bill*

simply gives the Coordinator discretion to impose any licence conditions.

**Monopoly in the Kalgoorlie-Boulder area**

9.5 It is envisaged that the first licences awarded under the *Bill* would be granted to AlintaGas as preferred proponent in the Kalgoorlie-Boulder supply area. The claim has been made that this will create a vertically integrated monopoly by granting both distribution and trading licences to AlintaGas.

9.6 The Committee notes that AlintaGas was one of a number of tenderers for the proposed licence in the supply area mentioned. The integrity of the tender process has not to the Committee's knowledge been called into question.

9.7 In his Second Reading speech the Minister responsible for the *Bill* in the Council noted that to encourage the establishment of "greenfields" projects requiring considerable capital outlay it may be necessary, as in the case of the Kalgoorlie-Boulder project, to offer the preferred proponent a degree of exclusivity in the time and scope of the licence. This course of action has not been criticised to the Committee's knowledge.

9.8 The broader question is whether the Coordinator's ability to grant an exclusive licence over a supply area is consistent with free and fair competition as envisaged under the proposed Regime. This question is addressed in Appendix I.

**Community service obligations**

9.9 Division 5 of the *Bill* allows the Coordinator to include in licences a condition requiring supply of gas in certain circumstances. However there is no guarantee that this will be the case. As is the case with many of the *Bill*'s provisions, the Coordinator has a broad discretion to determine what appears to be a matter of significant concern. The issue raised in debate on the *Bill* is whether community service obligations should be included as part of all licences rather than left to the discretion of the Coordinator.

9.10 The Committee regards this matter as purely a question of policy and therefore has not inquired into whether the *Bill* should impose community service obligations. However the Committee records its view that dealing with this issue in the Act rather than leaving it to the discretion of the Coordinator would promote certainty.

**Power consumption**

9.11 It has been claimed that the deregulation of the gas industry will, if improperly managed, lead to increased consumption of energy as competitors in the market offer incentives to purchase greater amounts of gas in order that they may compete effectively. Increased consumption could have deleterious effects on the environment, negating the benefits of natural gas over some other forms of energy.

9.12 The Committee considers that this is a valid concern and worthy of careful consideration in the course of opening energy markets to competition. However it is not clear that the *Bill* will contribute to the effect under discussion.

## 10 Timing and nature of amending legislation

Some members of the Committee expressed the view that the *Energy Coordination Amendment Bill 1997* be withdrawn, on the basis that it is clearly in need of significant amendment, that it may conflict with the proposed National Access Regime for gas and would therefore require further amendment, and that current suppliers could be regulated in the short term under existing legislation.

## APPENDIX I

## THE *BILL* AND THE PROPOSED NATIONAL ACCESS REGIME FOR GAS

### 1 National competition policy

1.1 Australia's gas industries, together with other energy industries, have historically been governed by State rather than Federal law. Nevertheless the energy sector has become increasingly the subject of national concerns in recent years, particularly in the wake of the Federal report on competition policy known as the "Hilmer Report" and the subsequent promotion by the Federal government of a national competition policy.

1.2 As one of many responses to the Hilmer Report, the Council of Australian Governments in February 1994 agreed in principle to the adoption by each State of what is called a "National Access Regime" for the regulation of the gas industry.[2] The key aims of the proposed Regime are to:

- facilitate access to natural gas pipeline systems by persons other than the owners of the pipelines; and
- provide a level playing field on which government-owned gas enterprises (such as AlintaGas) will compete on equal terms with private enterprises which are expected to enter the market at wholesale or retail level once a suitable access regime is in place.

1.3 It is not the role of the Committee to review the *Bill* for compliance with the proposed Regime. Firstly, the form which the template legislation and code will take has not as yet been settled. Secondly, once it is settled it may be some time before it is adopted by Western Australia as part of the legislative schema of the State. However as the question of the *Bill*'s concordance with the Regime has been raised in the Second Reading debate on the *Bill* and elsewhere, some comments are appropriate.

### 2 The impetus for the National Access Regime

2.1 As part of the ongoing reform process following the Hilmer Report and consequent to the Commonwealth *Competition Policy Reform Act 1995,* a **Gas Reform Implementation Group** ("GRIG") has been formed, comprising representatives of the Australian State, Territory and Federal governments, the gas industry and gas users.

2.2 GRIG is moving towards completion of the proposed Regime. The proposed Regime is intended to meet the requirements under Part IIIA of the Commonwealth *Trade Practices Act 1974* ("TPA") for certification by the Federal Treasurer, on the recommendation of the National Competition Council, as an "effective" regime for

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[2] *Policy Information Paper: National Access Regime for the Natural Gas Industry*, Gas Reform Implementation Group, July 1997, p.1

gas. Although key elements of the Regime are intended to be uniform across the country, each State's regime will require individual certification.

2.3 The chief benefit of certification is that a certified regime over-rides the unwieldy access procedures under Part IIIA of the TPA. Failure by a State to implement an "effective" gas regime will not lead to any penalty under the legislation. It will, however, mean that access to gas in the State will be governed potentially by the TPA through the regulators of that Act, the National Competition Council and Australian Competition and Consumer Commission.

2.4 In summary, while there is no obligation on the State to participate in the National Access Regime process and eventually implement the template legislation determined by that process, there appear to be some significant benefits to the State in doing so.

## 3 The form of the National Access Regime

3.1 As the Committee understands it, the Regime is proposed to consist of 3 key documents, each currently in draft:

- an **Intergovernmental Agreement** between Federal, State and Territory governments, setting out the aims of the Regime and the State and Territory governments' agreement to enact legislation giving effect to it;
- State by State legislation, which will establish the regulatory framework for each State and include as a Schedule the **National Gas Pipelines Access Law** ("Access Law"). The Access Law will give force to the code described below. The legislation will be enacted initially by South Australia and subsequently by other States on their own terms, except that the Access Law will be uniform; and
- the **National Third Party Access Code for Natural Gas Pipeline Systems** ("Code") which sets out the actual rules for access to gas, key issues being pricing, access availability, transparency and information availability.

## 4 Key elements of the National Access Regime

4.1 The Gas Reform Implementation Group has published the **Policy Information Paper: National Access Regime for the Natural Gas Industry**. The document lists the following criteria as those which the Council of Australian Governments considered necessary for a free and fair national gas access regime:[3]

- no legislative or regulatory barriers to both inter- and intra-jurisdiction trade in gas;

[3] GRIG, p.1

- third party access rights to both inter-and intra-jurisdiction supply networks;
- uniform national pipeline-construction standards;
- increased commercialisation of the operations of publicly-owned gas utilities;
- no restrictions on the uses of natural gas (for example, for electricity generation);
- franchise arrangements consistent with free and fair competition.

The bodies overseeing the proposed Regime will be:[4]

- the Australian Competition and Consumer Commission as the national regulator for transmission (essentially large volume interstate) pipelines; and
- an independent regulator (simplistically, a regulator not responsible to a State Minister) who may be either the ACCC or a regulator established by each State, as the regulator for distribution pipelines within that State.

The following timetable is envisaged for the introduction of the Regime[5]:

October 1997
signing of Intergovernmental Agreement

Oct-Nov 1997
passage of South Australian lead legislation

November 1997
submission of S.A regime for Treasurer's certification

Nov-97- June 98
passage of legislation in other States

## 5 Is the *Bill* consistent with the National Access Regime?

[4] GRIG, p.4

[5] GRIG, p.5

5.1 If the *Bill* is passed (whether in its current form or with amendments) and Western Australia subsequently determines to implement the National Access Regime, the Act resulting from the *Bill* will, like all Western Australia's laws dealing with gas supply, require careful consideration as to its compatibility with the Regime. In this section a number of points likely to require particular attention are briefly canvassed.

5.2 To foreshadow the conclusion reached in this section, the Committee believes that there is some inconsistency between the approach to gas regulation evidenced in the *Bill* and the approach proposed under the Regime. The Committee draws no conclusion from this concerning the merits of the *Bill*.

## 6 Do the areas of operation of the *Bill* and the proposed Regime overlap?

6.1 As a threshold question, the Committee has endeavoured to ascertain whether the *Bill* and the proposed Regime are likely to affect the same types of gas distribution activities.

6.2 The Coordinator of Energy's view is that the proposed Regime will primarily be concerned with access to pipelines as opposed to distribution systems:

> "*The national access code is about access to pipelines. It is driven principally by the issues of access to transmission pipelines and leaves the regulation of distribution systems - one of which is Kalgoorlie-Boulder, for example - to the State-based authority to administer.*"

6.3 If this is the case, the proposed Regime will not affect the *Bill*'s regulation of the distribution of gas. As the Committee understands it, it is not possible to make a definitive pronouncement on this point at this time for the reason that the meaning of the term "Pipeline", the key term delineating the scope of the Code, will be defined under the Access Law,[6] the draft of which the Committee understands to be still under preparation.

6.4 However, the current proposal for the Regime indicates that there will be a number of ways in which a "Pipeline" can become subject to the Regime.[7] As these are relatively open-ended (as would be expected in accordance with the general tenets of the TPA), there appears to be real potential for overlap between the gas supply activities regulated by the proposed Regime and those regulated by the *Bill*. The Committee notes that of the pipelines already proposed for inclusion in the Code, a number in New South Wales, for example, operate at pressures as low as 210 kilopascals. The *Bill* deals with pipelines operating at both above and below 1.9 megapascals. The Committee's conclusion is that there is a real possibility that pipelines governed by the *Bill* will also become subject to the proposed Regime.

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6 Code, p.66

7 Draft Code, pp2-8

6.5 Accordingly, the Committee believes it appropriate for the sake of discussion to assume that the activities covered by the *Bill* will overlap at least to a degree with those covered by the Regime. The following paragraphs deal on this basis with particular aspects of the *Bill* which could require further consideration were the proposed Regime to be implemented in Western Australia.

## 7 Proposed Regime requirement of no legislative barriers to trade in gas

7.1 Under the proposed Regime it is intended that there will be no legislative barriers to trade in gas. This proscription must be regarded as a broad aim rather than a definitive rule: clearly, it is not intended that a completely non-interventionist or laissez-faire regime be established without consideration for safety, continuity of supply, environmental standards and so on.

7.2 Nonetheless, it would appear safe to assert that the proposed Regime will not be compatible with an administrative formula which gives a broad discretion to a regulator as to whether or not to permit the transmission, distribution or trading of gas. The intention of the proposed Regime is clearly to promote free trade in gas by removing the power of regulators to arbitrarily deny approval to deal in gas.

7.3 The target of the proposed Regime would appear to be provisions such as s.55(b) of the *Energy Corporations (Powers) Act 1979*, which vest untrammelled discretion in the regulator.

7.4 In this respect, the schema of the *Bill* is similar to that of s.55(b) of the *Energy Corporations (Powers) Act 1979*. The Coordinator's discretion under the Bill as to whether to grant a licence is not limited in any significant way, despite the fact that clause 11L(2) of the *Bill* lists a number of matters about which an applicant for a licence must inform the Coordinator and the Coordinator is prevented by clause 11M from granting or renewing a licence unless satisfied on certain points.

7.5 Further, the Coordinator is empowered by clause 11N(1) to grant a licence subject to such terms and conditions as he or she determines. A number of matters are listed in Schedule 1 as possible subjects for such terms and conditions, but the presence of the list does not confine the Coordinator's powers in any way.

7.6 Accordingly, it appears likely that implementation of the proposed Regime would require modification of the Coordinator's broad discretion as to the granting of licences and their terms and conditions.

## 8 Proposed Regime requirement of third party access rights

8.1 The Regime proposes that persons wishing to acquire gas should have a right to do so, together with a readily ascertainable framework to facilitate negotiation of the costs and conditions of access.

8.2 The *Bill* addresses the issue of access rights only tangentially. One of the conditions to which a licence may be subject, if so determined by the Coordinator, is a provision "*requiring a licensee to provide access to gas distribution capacity or gas*

*transmission capacity to other persons on such terms and conditions as may be determined by the Coordinator*;"[8].

8.3 The Committee notes that the treatment of access rights under the *Bill* could be incompatible with the proposed Regime on two counts. First, the **Coordinator's power** to require a licensee to grant access to third parties does not equate to a **third party right** to such access. Secondly, even if a general requirement of access were included as a licence condition, the right could be regarded as somewhat circumscribed in that its terms and conditions are determinable by the Coordinator rather than being referable to objective criteria such as the Reference Tariff proposed under the Regime.[9]

## 9 Proposed Regime requirement of free and fair competition

9.1 The proposed Regime is intended to prevent arrangements which stifle competition by granting exclusivity or unfair advantage to particular suppliers.

9.2 The *Bill* provides a heavily controlled form of competition. Once a supply area is constituted there is scope for the grant of licences in that area on either an exclusive or non-exclusive basis, depending on decisions of the Coordinator appealable to the Minister. The question arises whether this form of franchising is consistent with the proposed Regime's aim of free and fair competition.

9.3 The Committee notes that debate in the House on this issue focused on whether the *Bill* is a step in the direction of deregulation or on the contrary involves increased regulation, with the Minister responsible for the *Bill* claiming the former and other speakers the latter (while disagreeing on the merits of such regulation).[10]

9.4 The Committee takes the view that this dispute is somewhat rhetorical, being more a matter of emphasis than of fact. It is a truism that where a previously restricted market is opened up to competition, as is envisaged will occur under the *Bill*, deregulation takes place in that the general prohibition on competition is lifted, while at the same time new regulations are needed to govern the new activities associated with competition.

9.5 Therefore the Committee wishes to focus on the narrower question of whether the degree of power given in the *Bill* to the Coordinator to determine the existence and level of competition would be consistent with the proposed Regime.

9.6 Clause 11O empowers the Coordinator to grant more than one licence of a particular classification in a supply area or part thereof. However the Coordinator has a broad discretion whether to do so. There is therefore no guarantee that more than one

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8 Proposed Schedule 1 is set out at clause 8 of the *Bill*. The condition quoted is item (c) of Schedule 1.

9 GRIG, p.6

10 The Minister responsible for the *Bill* (Hon Norman Moore), Hon Mark Nevill, Hon Helen Hodgson and Jim Scott each addressed the issue of deregulation.

franchise will be granted for a supply area, regardless of the merits of introducing competition into that area.

9.7 Accordingly, the Committee is of the view that the *Bill* does not establish free and fair franchising arrangements. If franchising arrangements turn out eventually to be free and fair under the *Bill*, it will be because administrative decision-making tends that way rather than because the *Bill* promotes this. In effect, the *Bill* places the decision whether to allow free and fair trading in the hands of the Executive.

9.8 A related issue is whether areas already supplied with reticulated gas by AlintaGas will be opened up to competition in a free and fair manner, consistent with the Regime's proposed "level playing field" approach. The threshold requirement for this to occur is that the area is constituted by order of the Governor as a "supply area" under clause 11A of the *Bill*. Again, it appears likely that the degree of discretion allowed to the Minister as to whether to recommend to the Governor that an area be so constituted will be incompatible with the free and fair franchising approach proposed under the Regime.

## 10 Proposed Regime requirement of an independent regulator

Under the proposed Regime it is envisaged that each State will have a regulator which is independent of the Government (ie is not answerable to a Minister). Clearly, this aspect of the Regime is inconsistent with the *Bill*, under which the Coordinator of Energy, who is directly responsible to the Minister, is responsible for most administrative decisions made under the *Bill*.

## 11 Possible relaxation of the requirements of the proposed Regime

11.1 As a general qualification to the comments in this Appendix, the Committee notes that informal discussion with the National Competition Council has indicated that there may be scope for some relaxation of the proposed Regime so as to allow for:

- limited exceptions to the requirements of no legislative barriers to trade in gas, third party right of access and free and fair competition, particularly where granting an exclusive licence for a period of time is regarded as necessary to encourage establishment of a gas supply system in a particular supply area; and

- a transition period during which existing arrangements could continue to operate.

11.2 If these proposals are incorporated into the proposed Regime, the scope for conflict between the *Bill* and the Regime might be reduced to a degree. For example, the regulator of the proposed Regime might be given a discretion to limit gas access rights, despite the general tenet of the proposed Regime, where this was in the public interest. Nonetheless the untrammelled discretions enjoyed by the Coordinator under the *Bill* would most likely remain incompatible with the proposed Regime.