

SOUTH AUSTRALIA

NATURAL GAS PIPELINES ACCESS ACT 1995

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NATURAL GAS PIPELINES ACCESS ACT 1995

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Natural Gas Pipelines Access Act 1995
No. 45 of 1995 [Assented to 11 May 1995]¹

¹ Came into operation (except s. 11) 1 July 1995, s. 11 came into operation 1 August 1995: *Gaz.* 29 June 1995, p. 2977.

An Act to provide for access to pipelines for the haulage of natural gas; and for other purposes.

The Parliament of South Australia enacts as follows:

**PART 1
PRELIMINARY**

Short title

1. This Act may be cited as the *Natural Gas Pipelines Access Act 1995*.

Commencement

2. This Act will come into operation on a day to be fixed by proclamation.

Objects

3. The objects of this Act are—

- (a) to facilitate competitive markets in the gas industry; and
- (b) to promote the efficient allocation of resources in the gas industry; and
- (c) to provide for access to pipelines on fair commercial terms and on a non-discriminatory basis.

Definitions

4. In this Act—

"**access**" to a pipeline means the right to a haulage service provided by means of the pipeline and includes incidental rights necessary to give effect to the right such as the right to connect pipes and other apparatus for the supply of natural gas to, and the delivery of natural gas from, the pipeline or to have appropriate modifications made to the pipeline to increase its capacity;

"**access contract**" means a contract giving access to a pipeline or a contractual variation of an access contract affecting access to the pipeline in a significant way or to a significant extent;

"**access dispute**" means a dispute about an access proposal;

"**access proposal**"—*See section 14(1)*;

"**controlling associate**" in relation to an operator means another body corporate that—

- (a) has (either as a supplier or purchaser)—
 - (i) a substantial degree of power in a wholesale market for natural gas (*ie* a market for the supply of natural gas by gas producers) in South Australia that is served by the pipeline; or
 - (ii) a substantial degree of power in a retail market for natural gas (*ie* a market for the supply of natural gas to end users) in South Australia that is served by the pipeline; and

- (b) is related to the operator or a body corporate that is related to the operator, and includes a body corporate (other than the operator) that is related to a controlling associate;
- "**costs**" of an arbitration means the fees, costs and expenses of the arbitrator, including the fees, costs and expenses of any expert or lawyer engaged by the arbitrator;
- "**Court**" means the Supreme Court of South Australia;
- "**firm contract**" means an access contract that is not an interruptible contract;
- "**haulage service**" means the service of hauling or backhauling natural gas through a pipeline;
- "**Industry Code of Practice**" means the Pipeline Access Code adopted by the Australian Gas Association in February 1994 (as varied from time to time);
- "**interruptible contract**"—*See section 17(2)*;
- "**lawyer**" means a person qualified and entitled to practise as a legal practitioner under the law of an Australian State or Territory;
- "**natural gas**" means a naturally occurring hydrocarbon or mixture of hydrocarbons that is or would be gaseous at Standard Temperature and Pressure;
- "**non-discrimination principles**" means the principles stated in section 9;
- "**officer**" has the same meaning as in the *Corporations Law*;
- "**operator**" of a pipeline means the body corporate¹ licensed to operate the pipeline under the *Petroleum Act 1940*;
- "**party**" to an arbitration—*See section 23*;
- "**pipeline**" means a natural gas pipeline licensed under the *Petroleum Act 1940*, or part of such a pipeline, declared by regulation to be a pipeline to which this Act applies;
- "**pipeline user**" means a person for whom the operator of a pipeline is bound by a contract or an award to provide access to the pipeline;
- "**proponent**" means the person who makes an access proposal;
- "**regulator**" means an authority, officer or person to which the functions of the regulator under this Act are assigned by proclamation;²
- "**related**"—bodies corporate are **related** if they are related bodies corporate under the *Corporations Law*;
- "**respondent**" to an access proposal—*See section 14(4)*.

¹ A licence to operate a pipeline may only be held by a body corporate. (*See the Petroleum Act 1940 s. 80d(7)*)

² *See section 5.*

The regulator

5. The Governor may, by proclamation—

- (a) assign the functions of the regulator under this Act to a nominated authority, officer or person; or
- (b) vary or revoke an earlier assignment of those functions.

PART 2
CONDUCT OF PIPELINE BUSINESS

Segregation of businesses

6. (1) The operator of a pipeline may only provide haulage services for pipeline users; the operator must not haul natural gas on the operator's own account (except to the extent necessary for the operation of the pipeline or ancillary equipment).

(2) The operator of a pipeline must not carry on a business other than an authorised business.

(3) The following are **authorised businesses**—

- (a) operating the pipeline or other natural gas pipelines;
- (b) providing services ancillary to the operation of the pipeline or other natural gas pipelines;
- (c) trading in natural gas to the extent necessary for the proper operation of the pipeline or other natural gas pipelines operated by the same operator;
- (d) investing in natural gas pipelines (including investment in the share capital of bodies corporate that own natural gas pipelines);
- (e) designing, constructing or maintaining natural gas pipelines;
- (f) providing consultancy, technical or other services related to investment in natural gas pipelines, or the design, construction, maintenance or operation of natural gas pipelines.

Segregation of accounts and records

7. (1) The operator of a pipeline must keep accounts and records of its pipeline business separately from accounts and records of other businesses of the operator.

(2) If the operator operates two or more pipelines, separate accounts and records must be kept for each pipeline.

(3) The accounts and records must be kept in a way that gives—

- (a) a comprehensive view of the operator's legal and equitable rights and obligations in relation to the pipeline (or each pipeline) and its operation; and
- (b) a true and fair view of—
 - (i) income and expenditure derived from, or relating to, the pipeline (or each pipeline); and
 - (ii) assets and liabilities of the operator's business so far as they relate to the pipeline (or each pipeline).

Segregation of officers

8. (1) The operator must—

- (a) ensure that none of its officers (other than a validly appointed non-executive director) is also an officer of a controlling associate who manages or takes part in any other way in the business activities of the associate that relate to the haulage or supply of natural gas; and
- (b) ensure that none of its consultants or contractors is also an officer of a controlling associate who manages or takes part in any other way in the business activities of the associate that relate to the haulage or supply of natural gas unless the regulator approves in writing the engagement of the officer as a consultant or contractor; and
- (c) ensure that confidential information in its records relating to its pipeline business (other than shared technical information) is not made available to a controlling associate.

(2) An approval under subsection (1)(b)—

- (a) may be given on terms and conditions the regulator considers appropriate; and
- (b) may be revoked by the regulator for breach of a term or condition.

(3) **Shared technical information** is information about the operation of the pipeline that a pipeline user requires for the safe and efficient supply of haulage services to the pipeline user.

Unfair discrimination

9. (1) An operator must not unfairly discriminate between proponents in preferring one access proposal to another.

Example—

If, for example, proponents A and B make access proposals to the operator, and both A and the operator are subsidiaries of the same holding company, it would be unfair discrimination for the operator to prefer A's access proposal on the basis of the relationship between them. It would also be unfair discrimination to prefer A's access proposal on the basis of price if B offers a fair price and the higher price offered by A is merely a transfer-pricing arrangement transferring profits from one part of a corporate group to another.

(2) An operator must not unfairly discriminate between a proponent and existing pipeline users in terms and conditions of access.

(3) An operator must not unfairly discriminate between pipeline users by—

- (a) waiving rights under access contracts or awards on a non-uniform basis; or
- (b) making a kick-back arrangement or arrangements (*ie* arrangements directly or indirectly returning a proportion of the consideration to which the operator is entitled under the contract or award to pipelines users or their associates) on a non-uniform basis.

Example—

If, for example, the operator provides haulage services for a pipeline user (A) at a discounted price, and but does not give a corresponding discount to another pipeline user (B) because B is a competitor of a body corporate associated with the operator, the discrimination would be unfair.

(4) A person must not be a party to discrimination by an operator that is contrary to this section.

(5) A person is a **party** to discrimination if the person—

- (a) aids, abets, counsels or procures the discrimination; or
- (b) induces the discrimination through threats or promises or in some other way; or
- (c) is knowingly concerned in the discrimination; or
- (d) conspires with the operator to discriminate.

Preventing or hindering pipeline access

10. (1) An operator or pipeline user, or a body corporate related to an operator or pipeline user, must not engage in conduct for the purpose of preventing or hindering access to the pipeline.

Conduct includes negative conduct such as a failure or refusal to act or delay.

The **purpose** of conduct is to prevent or hinder access to a pipeline if that is one of the purposes of the conduct.

(2) In deciding a body corporate's purpose, the state of mind of directors, agents, employees and others who are in a position to control or influence the body corporate's conduct must be imputed to the body corporate.

PART 3
INFORMATION RELEVANT TO ACCESS

Information brochure

11. (1) An operator must prepare and keep up-to-date an information brochure containing—

- (a) a schedule giving a general indication of the tariffs charged to pipeline users for the haulage of natural gas by means of the pipeline; and
- (b) a statement of the pricing principles on which the schedule is based; and
- (c) the general terms and conditions for obtaining access to the pipeline; and
- (d) other information required by regulation.

(2) The form of the information brochure must comply with requirements imposed by regulation.

(3) The operator must, within 14 days after preparing or revising the information brochure, give a copy to the regulator.

(4) The operator must give a copy of the information brochure, on request, to a person who appears to have a legitimate interest in information contained in the brochure.

Operator's obligation to provide information about access

12. (1) An operator must, on the application of a person with a proper interest in making an access proposal to the operator, provide the applicant with information reasonably requested by the applicant about—

- (a) the capacity of the pipeline; and
- (b) the extent to which the capacity is presently being utilised; and
- (c) the extent the capacity of the pipeline is reserved by contract or award presently and in the future; and
- (d) the extent it would be necessary, and technically and economically feasible, to increase the capacity of the pipeline to meet requirements stated in the application; and
- (e) whether a haulage service of a specified description could be provided by means of the pipeline and—
 - (i) if so, the general terms and conditions (including an indication of the likely tariff) on which the operator would be prepared to provide the haulage service; and
 - (ii) if not, the reason why the haulage service cannot be provided.

(2) The operator may make a reasonable charge for providing information under this section.

(3) If the operator makes a charge for providing information under this section, the operator must give the regulator written notice of the amount of the charge and the nature of the information provided.

Information to be provided on non-discriminatory basis

13. The operator must provide information to persons interested in making access proposals to the operator on a non-discriminatory basis.

**PART 4
NEGOTIATION OF ACCESS**

Proposal for provision of haulage service

14. (1) A person (the "**proponent**") who wants access to a pipeline, or who wants to vary an access contract in a significant way or to a significant extent, may put a written proposal (the "**access proposal**") to the operator of the pipeline setting out—

- (a) the nature and extent of the required access or variation; and
- (b) terms and conditions for the provision of access, or for making the variation, that the proponent considers reasonable and commercially realistic and to which the proponent is prepared to agree.

(2) If the implementation of an access proposal would require an increase in the capacity of the pipeline, the access proposal may include a proposal for increasing the capacity of the pipeline.

(3) When the operator receives an access proposal (other than a proposal that is only for an interruptible contract), the operator must give written notice of the nature of the access proposal and the extent of any haulage service sought to existing pipeline users and other proponents.

(4) The **respondents** to the proposal are—

- (a) if the proposal is for a firm contract—
 - (i) the operator; and
 - (ii) pipeline users and proponents entitled to notice of the proposal under subsection (3);
- (b) if the proposal is for an interruptible contract—the operator.

Duty to negotiate in good faith

15. (1) The operator must negotiate in good faith with the proponent with a view to reaching agreement on whether the proponent's requirements as set out in the access proposal (or some agreed modification of the requirements set out in the access proposal) could reasonably be met, and, if so, the terms and conditions for the provision of access for the proponent.

(2) The other respondents (if any) whose rights (or prospective rights) would be affected by implementation of the access proposal must also negotiate in good faith with the proponent with a view to reaching agreement on the provision of access to the proponent and any consequent variation of their rights (or prospective rights) of access.

Limitation on operator's right to contract to provide access

16. (1) An operator must not enter into an access contract (other than an interruptible contract¹) unless—

- (a) there is no other respondent to the access proposal; or
- (b) all other respondents to the access proposal agree; or

-
- (c) the operator gives the other respondents written notice of the proposed access contract and—
- (i) no formal objection to the proposed contract is made within 21 days of the notice; or
 - (ii) a formal objection, or formal objections, are made within the 21 day period, but all objections are later withdrawn.

(2) A respondent to an access proposal makes a formal objection to a proposed access contract by giving written notice setting out the grounds of the objection to—

- (a) the proponent; and
- (b) the operator; and
- (c) the other respondents to the access proposal.

(3) A contract entered into in contravention of this section is void.

¹. See section 17.

Interruptible contracts

17. (1) An operator may enter into an interruptible contract by accepting an access proposal for such a contract made by a proponent.

(2) An interruptible contract is an access contract under which—

- (a) the haulage service provided by the operator is liable to be interrupted or curtailed by the operator as and when operational requirements of the pipeline require on 24 hours notice or less; and
- (b) the rights of access given by the contract are liable to be displaced by rights of access under firm contracts.

Limitation on assignment

18. A right of access under an access contract or award may only be assigned by the operator's acceptance of an access proposal made by the proposed assignee with the consent of the pipeline user who proposes to assign the right.

PART 5
ARBITRATION OF ACCESS DISPUTES

DIVISION 1—ACCESS DISPUTES AND REQUESTS FOR ARBITRATION

Access dispute

19. (1) An access dispute exists if—

- (a) the operator or another respondent to an access proposal fails to respond to the proposal within 30 days after the proposal is given to the operator or other respondent; or
- (b) the operator or another respondent to an access proposal refuses or fails to negotiate in good faith with the proponent on the access proposal; or
- (c) the proponent, after making reasonable attempts to reach agreement with the operator and other respondents, fails to obtain an agreement on the proposal or an agreed modification of the proposal; or
- (d) a respondent to an access proposal makes a formal objection to a proposed access contract of which notice has been given under Part 4.¹

¹ See section 16.

(2) A proponent may, by written notice given to the regulator, ask the regulator to refer an access dispute of the kind described in subsection (1) to arbitration.

(3) A copy of a notice under this section must be given to all respondents to the access proposal.

Presumptive dispute in case of competing access proposals

20. (1) An access dispute is taken to exist if—

- (a) two or more access proposals have been made; and
- (b) the capacity of the pipeline does not (or may not) allow for implementation of both or all proposals.

(2) A proponent under any one of the proposals may, by written notice to the regulator, ask the regulator to refer a dispute of the kind described in subsection (1) to arbitration (*ie* to refer all proposals to a single arbitration to decide whether haulage services are to be provided for any of the parties and, if so, which parties and on what terms and conditions).

(3) A copy of a notice under this section must be given to all other proponents and to all respondents.

DIVISION 2—REFERENCE OF DISPUTE TO ARBITRATION

Reference of dispute to arbitration

21. (1) On receipt of a request to refer a dispute to arbitration, the regulator must appoint an arbitrator and refer the dispute to the arbitrator.

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(2) The arbitrator must be a person who is properly qualified to act in the resolution of the dispute and has no direct or indirect interest in the outcome of the dispute.

(3) Before appointing an arbitrator, the regulator must consult with each of the parties to the dispute and must attempt (but is not bound) to make an appointment that is acceptable to all parties.

(4) The regulator is not obliged to refer the dispute to arbitration if, in the regulator's opinion—

- (a) the subject matter of the dispute is trivial, misconceived or lacking in substance; or
- (b) the person seeking arbitration of the dispute has not negotiated in good faith; or
- (c) the regulator is satisfied on the application of a party to the dispute that there are good reasons why the dispute should not be referred to arbitration.

(5) If, before the dispute is referred to arbitration, conciliation proceedings are started (either under the Industry Code of Practice or on some other basis), or it appears that such proceedings are about to start, the regulator must defer reference of the dispute to arbitration until the conciliation proceedings are concluded or it appears that they are unlikely to result in a resolution of the dispute.

(6) A dispute cannot be referred to arbitration if—

- (a) the dispute involves only one proponent and, before the appointment of the arbitrator, the proponent notifies the regulator that the proponent does not want to proceed with the arbitration; or
- (b) the dispute involves two or more proponents and, before the appointment of the arbitrator, all proponents notify the regulator that they do not want to proceed with the arbitration.

DIVISION 3—PRINCIPLES OF ARBITRATION

Principles to be taken into account

22. (1) The arbitrator must take into account—

- (a) the objects of this Act; and
- (b) the non-discrimination principles; and
- (c) the operator's legitimate business interests and investment in the pipeline; and
- (d) the cost to the operator of providing access to the pipeline and the cost of providing the proposed haulage service (excluding costs arising from increased market competition); and
- (e) the economic value to the operator of additional investment the proponent proposes to undertake; and
- (f) the economically efficient operation of the pipeline; and

- (g) the interests (including the haulage requirements) of all existing pipeline users; and
 - (h) the contractual obligations of the operator and existing pipeline users; and
 - (i) the operational requirements for the safe and reliable operation of the pipeline; and
 - (j) the public interest in market competition; and
 - (k) relevant technical and legal issues.
- (2) The arbitrator may take into account other matters the arbitrator considers appropriate.

DIVISION 4—PARTIES TO ARBITRATION

Parties to arbitration

23. (1) The parties to an arbitration are—

- (a) the proponent and respondents to the access proposal; and
- (b) any other person who has, in the Minister's opinion a material interest in the outcome of the arbitration and is nominated by the Minister as a party to the arbitration; and
- (c) any other person who is joined by the arbitrator as a party to the arbitration.

(2) However, a party whose interests are unlikely to be materially affected by the outcome of the arbitration may, by leave of the arbitrator, withdraw from the arbitration.

Representation

24. A party may be represented in the arbitration proceedings by a lawyer or, by leave of the arbitrator, another representative.

Minister's right to participate

25. (1) The Minister may participate in arbitration proceedings under this Act.

(2) If the Minister participates, the Minister may call evidence and make representations on the questions subject to the arbitration.

DIVISION 5—CONDUCT OF ARBITRATION PROCEEDINGS

Arbitrator's duty to act expeditiously

26. An arbitrator must proceed with the arbitration as quickly as the proper investigation of the dispute, and the proper consideration of all matters relevant to the fair determination of the dispute, allow.

Hearing to be in private

27. (1) Arbitration proceedings must be conducted in private unless all parties agree to have the proceedings (or part of the proceedings) conducted in public.

(2) An arbitrator may give directions about who may be present at arbitration proceedings conducted in private.

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(3) In giving directions under subsection (2), the arbitrator must have regard to the wishes of the parties and the need for commercial confidentiality.

(4) A person must comply with a direction under subsection (2).

Maximum penalty: Division 4 fine¹.

¹ *Ie.* \$15 000.

Procedure on arbitration

28. (1) An arbitrator—

- (a) is not bound by technicalities, legal forms or rules of evidence; and
- (b) may obtain information on matters relevant to the dispute in any way the arbitrator thinks appropriate.

The arbitrator may, for example, conduct proceedings by—

- telephone; or
- closed circuit television; or
- other means of communicating at a distance.

(2) An arbitrator may require the presentation of evidence or argument in writing and may decide matters on which the arbitrator will hear oral evidence or argument.

Procedural powers of arbitrator

29. (1) An arbitrator may—

- (a) give procedural directions;
- (b) make orders requiring—
 - (i) the delivery of documents clarifying the issues between the parties;
 - (ii) the discovery and inspection of documents;
- (c) sit at any time or place;
- (d) adjourn the arbitration proceedings from time to time and from place to place;
- (e) refer a matter to an expert for report, and accept the expert's report in evidence;
- (f) do anything else necessary for the expeditious hearing and determination of the dispute.

(2) An arbitrator may proceed with arbitration proceedings in the absence of a party if the party has been given notice of the proceedings.

(3) An arbitrator may engage a lawyer to provide advice on the conduct of the arbitration and to assist the arbitrator in drafting the award.

Giving of relevant documents to the arbitrator

30. A party to the arbitration may give the arbitrator a copy of all documents (including confidential documents) the party considers to be relevant to the dispute.

Power to obtain information and documents

31. (1) If an arbitrator has reason to believe that a person is in a position to give information, or to produce documents, that may be relevant to the dispute, the arbitrator may, by written notice—

- (a) require the person within a period stated in the notice—
 - (i) to give the arbitrator a written statement of specified information; or
 - (ii) to produce to the arbitrator specified documents or copies of specified documents; or
- (b) require the person to appear before the arbitrator at a specified time and place to give evidence.

(2) A written statement must, if the arbitrator so requires, be verified by statutory declaration of the person providing the information or, if the person is a body corporate, an appropriate officer of the body corporate.

(3) If documents (whether originals or copies) are produced to an arbitrator, the arbitrator may—

- (a) take possession of, make copies of, and take extracts from, the documents; and
- (b) keep the documents for as long as is necessary for the purposes of the arbitration.

(4) A person must—

- (a) comply with a requirement of the arbitrator under subsection (1) or (2); and
- (b) if the person is required to appear as a witness before the arbitrator—comply with further requirements to make an oath or affirmation, or to answer questions.

Maximum penalty: Division 4 fine¹.

¹ *I.e.* \$15 000.

(5) However, a person need not give information or produce a document if—

- (a) the information or the contents of the document is the subject of legal professional privilege, or would tend to incriminate the person of an offence; and
- (b) the person objects to giving the information or producing the document by giving written notice of the ground of the objection to the arbitrator or, if the person is appearing as a witness before the arbitrator, by an oral statement of the ground of objection.

Confidentiality of information

32. (1) A person who gives the arbitrator information, or produces documents, may ask the arbitrator to keep the information or the contents of the documents confidential.

(2) The arbitrator may, after considering representations from the parties (or the other parties), impose conditions limiting access to, or disclosure of, the information or documentary material.

(3) A person must not contravene a condition imposed under subsection (2).

Maximum penalty: Division 1 fine¹.

¹ *I.e.* \$60 000.

DIVISION 6—EARLY TERMINATION OF ARBITRATION**Termination of arbitration in cases of triviality, etc.**

33. (1) The arbitrator may terminate an arbitration if the arbitrator thinks—

- (a) the subject matter of the dispute is trivial, misconceived or lacking in substance; or
- (b) the person on whose application the dispute was referred to arbitration has not engaged in negotiations in good faith.

(2) The arbitrator may terminate an arbitration by consent of the parties.

Proponent's right to terminate arbitration

34. (1) If an arbitration involves only one proponent, the proponent may terminate the arbitration, and if it involves two or more proponents, the proponents may together terminate the arbitration.

(2) The arbitration is terminated under this section by giving notice of termination to—

- (a) the arbitrator and the regulator; and
- (b) the other parties to the arbitration.

DIVISION 7—AWARDS**Awards**

35. (1) Before the arbitrator makes an award, the arbitrator must give each of the parties and the Minister a copy of the draft award and may take into account representations that any of them may make on the proposed award.

(2) An award must—

- (a) be in writing; and
- (b) set out the reasons on which it is based.

(3) If an award confers a right of access to the pipeline, it must—

- (a) state the period for which the proponent is entitled to access; and

- (b) state the terms and conditions on which the proponent is to have access; and
- (c) resolve, or provide for the resolution of, all related and incidental matters.

(4) The arbitrator must, within seven days after an award is made (including an award made by consent), give a copy of the award to—

- (a) the regulator; and
- (b) the parties to the arbitration.

Restrictions on awards

36. (1) An arbitrator cannot make an award that would have the effect of requiring the operator to bear any of the capital cost of increasing the capacity of the pipeline unless the operator agrees.

(2) An arbitrator cannot make an award that would prejudice the rights of an existing pipeline user to haulage services under an earlier contract or award unless—

- (a) the pipeline user agrees; or
- (b) the arbitrator is satisfied that—
 - (i) the pipeline user's entitlement to haulage services exceeds the entitlement that pipeline user actually needs and there is no reasonable likelihood that the pipeline user will need to use the excess entitlement; and
 - (ii) the proponent's requirements cannot be satisfactorily met except by transferring the excess entitlement (or some of it) to the proponent.

Example—

Suppose that—

- (a) a proponent (A) requires the haulage of natural gas quantities of y gigajoules per day and the operator of the pipeline is committed to provide haulage services to the full extent of the pipeline's capacity;
- (b) a pipeline user (B) has a contractual right to the haulage of x gigajoules of natural gas per day over a 10 year period;
- (c) the arbitrator is satisfied on an arbitration that B's daily requirements will not exceed $x-y$ gigajoules for the first seven years of the contract period but cannot assess B's likely requirements for the last three years;
- (d) the arbitrator is satisfied that A's requirements cannot be satisfactorily met except by diminishing B's contractual entitlement.

In that case the arbitrator could make an award entitling A to the haulage of natural gas in quantities of y gigajoules per day for the first seven years of the contract period and making a corresponding diminution of B's contractual right. However, the award could not, in this case, affect B's contractual right for the last 3 years of the contract period.

Consent awards

37. If—

- (a) the parties to an arbitration consent to a proposed award; and
- (b) the arbitrator is satisfied that the award is appropriate in the circumstances,

the arbitrator may make an award in the terms proposed.

DIVISION 8—WITHDRAWAL FROM AWARD**Proponent's option to withdraw from award**

38. (1) A proponent may, within seven days after the making of an award or such further time as the regulator may allow, elect not to be bound by the award by giving written notice of the election to the regulator.

(2) The regulator must, within seven days after receiving a notice of election under subsection (1), notify the operator and the other parties to the arbitration.

(3) If the proponent elects not to be bound by an award—

- (a) the award is rescinded; and
- (b) the proponent is precluded from making another access proposal for 12 months from the date the notice of election was given unless the regulator authorises a further access proposal within that period.

(4) An authorisation under subsection (3)(b) may be given on conditions the regulator considers appropriate.

DIVISION 9—VARIATION OF AWARDS**Variation of award**

39. (1) The regulator may vary an award if all parties affected by the variation agree.

(2) If the parties to a proposed variation are unable to agree on a proposed variation of an award, the regulator may, on the application of one or more of the parties, refer the dispute to arbitration.

(3) However, the regulator will not refer the dispute to arbitration if the regulator is of the opinion that there is no sufficient reason for varying the award.

(4) In deciding whether to refer a dispute to arbitration under this section, the regulator must have regard to—

- (a) the time that has elapsed since the award was made or last varied; and
- (b) the nature of the matters in dispute; and
- (c) other matters the regulator considers relevant.

(5) The provisions of this Part (other than Division 8) about the arbitration of a dispute arising from an access proposal apply with necessary modifications to a dispute about the proposed variation of an award.

DIVISION 10—MISCELLANEOUS

Appeal from award on question of law

40. (1) An appeal lies to the Court from an award, or a decision not to make an award, on a question of law.

(2) On an appeal, the Court may exercise one or more of the following powers—

- (a) vary the award or decision;
- (b) revoke the award or decision;
- (c) make an award or decision that should have been made in the first instance;
- (d) remit the matter to the arbitrator for further consideration or re-consideration;
- (e) make incidental or ancillary orders (including orders for costs).

(3) An award or decision of an arbitrator cannot be challenged or called in question except by appeal under this section.

Costs

41. (1) The costs of an arbitration are to be borne by the parties in proportions decided by the arbitrator, and in the absence of a decision by the arbitrator, in equal proportions.

(2) However, if the proponent terminates an arbitration or elects not to be bound by an award, the proponent must bear the costs in their entirety.

(3) The regulator may recover the costs of an arbitration as a debt.

Removal and replacement of arbitrator

42. (1) The regulator may remove an arbitrator from office if the arbitrator—

- (a) becomes mentally or physically incapable of carrying out the arbitrator's duties satisfactorily; or
- (b) is convicted of an indictable offence; or
- (c) becomes bankrupt or applies to take the benefit of a law for the benefit of bankrupt or insolvent debtors.

(2) If an arbitrator resigns, is removed from office, or dies, the regulator may appoint another person to take the arbitrator's place.

Non-application of Commercial Arbitration Act 1986

43. The *Commercial Arbitration Act 1986* does not apply to an arbitration under this Part.

PART 6
MONITORING HAULAGE CHARGES

Regulator's duty to monitor haulage charges

44. The regulator must keep haulage charges under review.

Copies of access contracts to be supplied to regulator

45. An operator must provide the regulator, on a confidential basis, with a copy of every access contract made with the operator—

- (a) if the contract was made before the commencement of this Part—within 30 days after the commencement of this Part; and
- (b) if the contract is made after the commencement of this Part—within 30 days after the making of the contract.

Operator's duty to supply information and documents

46. (1) The regulator may, by written notice, require an operator to give the regulator, within a stated time or at stated intervals, specified information or copies of specified documents related to the provision of haulage services by the operator.

Examples—

The regulator might require the operator to provide the regulator with financial statements and reports referred to in section 316 of the *Corporations Law* together with any further information that might be necessary to enable the regulator to assess the impact of this Act on the operator's financial position and business interests.

The regulator might require the operator to provide the regulator with periodic reports on the extent to which transactions that were not entered into at arm's length are affecting the operator's financial position.

(2) An operator must not, without reasonable excuse, contravene, or fail to comply with, a notice under this section.

Maximum penalty: Division 1 fine¹.

¹ *Ie.* \$60 000.

Confidentiality

47. (1) The regulator must maintain the confidentiality of confidential information obtained under this Part.

(2) However, the regulator may disclose confidential information to the Minister if it is in the public interest to do so.

Duty to report to Minister

48. (1) The regulator must, within two months after the end of each financial year, report to the Minister on haulage charges.

(2) The regulator may at any other time, and must at the request of the Minister, report to the Minister on haulage charges or any other aspect of the operation of this Act.

PART 7
ENFORCEMENT OF THIS ACT

Injunctive remedies

49. (1) The Court may grant an injunction—

- (a) restraining a person from contravening a provision of this Act or a provision of an award; or
- (b) requiring a person to comply with a provision of this Act or a provision of an award.

(2) The power of the Court to grant an injunction restraining a contravention of a provision of this Act or an award may be exercised—

- (a) whether or not the defendant has previously contravened the same provision; and
- (b) whether or not there is imminent danger of substantial damage to any person.

(3) The power of the Court to grant an injunction requiring compliance with a provision of this Act or an award may be exercised—

- (a) whether or not the defendant has previously failed to comply with the provision; and
- (b) whether or not there is imminent danger of substantial damage to any person.

(4) The Court may grant an interim injunction under this section.

(5) An application for an injunction under this section may be made by—

- (a) the regulator; or
- (b) a person with a proper interest in whether the relevant provision is complied with.

(6) The Court may grant an injunction by consent without inquiring into the merits of the application.

(7) If the regulator makes an application for an injunction, the Court cannot require the regulator or any other person to give an undertaking as to damages as a condition of granting the injunction.

(8) The Court may, on application by the regulator or an interested party, discharge or vary an injunction.

Compensation

50. (1) If a person contravenes a provision of this Act or an award, the Court may, on application by the regulator or an interested person, order compensation of persons who have suffered loss or damage as a result of the contravention.

(2) An order may be made under this section against the person who contravened the provision and others involved in the contravention.

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- (3) A person is **involved in the contravention** if the person—
- (a) aided, abetted, counselled or procured the contravention; or
 - (b) induced the contravention through threats or promises or in some other way; or
 - (c) was knowingly concerned in, or a party to, the contravention; or
 - (d) conspired with others to contravene the provision.

Enforcement of arbitrator’s requirements

51. (1) If a person fails to comply with an order, direction or requirement of an arbitrator under this Act, the arbitrator may certify the failure to the Court.

(2) The Court may inquire into the case and make such orders as may be appropriate in the circumstances.

**PART 8
MISCELLANEOUS**

Application of Act to joint ventures

52. (1) If an operator, a pipeline user or a proponent consists of the participants in a joint venture, the participants are jointly and severally liable to the obligations under this Act.

(2) The participants in the joint venture may from time to time give the regulator written notice of a representative (who may—but need not be—a participant in the joint venture) who is authorised to give and receive notices on their behalf.

(3) A notice given by or to the authorised representative is taken to have been give by or to all participants in the joint venture.

(4) If no representative is currently nominated under this section, a notice given to any one of the participants in the joint venture is taken to have been given to all.

(5) A **joint venture** includes a partnership.

Regulations

53. (1) The Governor may make regulations for the purposes of this Act.

(2) A regulation may prescribe a fine (not exceeding a division 7 fine¹) for contravention of the regulation.

¹ *Ie.* \$2 000.