

Arbitration under the *Gas Pipelines Access Act 1998 (WA)*

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Abstract

The *Gas Pipelines Access Act 1998 (WA)* establishes a framework for third party access to natural gas pipelines in Western Australia in order to facilitate the development and operation of a national market for natural gas and prevent the abuse of monopoly power. The Act provides for the establishment of a Gas Arbitrator to determine disputes arising from access issues. This article describes the role of the Gas Arbitrator and makes comparisons where relevant with the role of an arbitrator under the *Commercial Arbitration Act 1985 (WA)*.

Introduction

The *Gas Pipelines Access Act 1998 (WA)* (the ‘GPAA’) establishes a national access regime for natural gas pipeline systems. The objectives of the Act are to establish a framework for third party access to gas pipelines that, in part,:¹

- facilitates the development and operation of a national market for natural gas; and
- prevents abuse of monopoly power; and
- promotes a competitive market for natural gas in which customers may choose suppliers, including producers, retailers and traders; and
- provides rights of access to natural gas pipelines on conditions that are fair and reasonable for both service providers and users; and
- provides for resolution of disputes arising from access issues relating to natural gas pipelines.

While this article examines the specific provision of the GPAA dealing with the resolution of disputes under the Act, it is relevant to consider first the provisions of the *Trade Practices Act 1974 (Cth)* (the ‘TPA’) which created the legislative framework to enable the Commonwealth, the Australian States and the Australian Capital Territory to agree to enact uniform legislation enabling third party access to natural gas pipelines.²

Access provisions of the TPA

Section 46 of the TPA prohibits circumstances where a corporation with a substantial degree of market power in a market refuses to supply goods or services which are essential to the economic survival of a third party or prevents the entry of a third party into the market. However some markets are by nature monopolistic, for example, where one party owns a facility to which other parties require access in order to compete in the market or where the nature of the industry is such that there are very high barriers to entry and the facility cannot be economically reproduced. In the oil and gas industry there may be only one owner of a pipeline, as either statutory controls or the prohibitive cost of

¹ *Schedule 2-National Third Party Access Code for Natural Gas Pipeline Systems*, Introduction.

² There are currently 3974km of natural gas pipelines in Western Australia. The two longest are the Dampier to Bunbury Pipeline (1488km) and the Goldfields Pipeline (1380kms. A diagram showing their locations appears in Schedule 2 of the GPAA.

establishing a similar facility effectively prevents others from entering the market. Other examples include electricity generation and transmission, telecommunications networks, airports, sea ports and rail networks.

Section 46 of the TPA however was not intended as a means of providing third party access to essential facilities which were exclusively owned. Consequently Part IIIA of the TPA which came into effect in October 1995 establishes a regime whereby a third party may gain access to services. Section 44B of Part IIIA defines service as follows:

Service means a service provided by a facility and includes:

- a) the use of an infrastructure such as road or railway line;
- b) handling or transporting things such as goods or people;
- c) a communications service or similar service.

The National Access Regime

The *Draft Guidelines to Part IIIA of the TPA*³ which refers to examples of facilities in sub-section (a) above, suggest that Part IIIA is intended to apply to services provided by significant infrastructure facilities. The meaning of 'facility' which is also defined in the *Guidelines* includes plant, equipment installation and establishment. Without limiting what might be covered some examples of significant infrastructure facilities include railway lines, gas pipelines, electricity grids and telephone lines.

Part IIIA does not provide an automatic third party right to access. It provides a statutory right to negotiate for access to services. One of the avenues of access is through the endorsement of an existing effective state and territory access regime. The others are through the declaration process based on the recommendations of the National Competition Council (NCC) and through the acceptance of undertakings by owners given to the Australian Competition and Consumer Council (ACCC) regarding access to facilities.

The West Australian Gas Access Regime

In March 1998 the Western Australian Government applied to the NCC seeking certification of the Western Australian Third Party Access Regime for Natural Gas Pipelines under the TPA. Upon consideration of the application in accordance with section 44 of the TPA, the NCC recommended to the Federal Minister for Financial Services and Regulation that the regime be certified as effective. Certification was subsequently granted by the Minister for a period of 15 years and the GPPA was enacted on 9 February 1999.

The certification was specifically in relation to:

- services provided by gas transmission and distribution, pipelines specified in Schedule A of Schedule 2 of the *Gas Pipelines Access Act 1998* (WA) as being under Western Australian jurisdiction and thus covered from the commencement of the Western Australian regime; and
- services provided by gas transmission and distribution pipelines which subsequently became covered by the Western Australian regime.

The Preamble to the GPPA states that the Act applies to third party access to all gas pipelines in order to:

³ Australian Competition and Consumer Commission, August 1996, 12.

- a) facilitate the development and operation of a national market for natural gas; and
- b) prevent abuse of monopoly power; and
- c) promote a competitive market for natural gas in which customers may choose suppliers, including producers, retailers and traders; and
- d) provide rights and access to natural gas pipelines on conditions that are fair and reasonable for the owners and operators of gas transmission and distribution pipelines and persons to use the services of these pipelines; and
- e) provide for resolution of disputes.

The provisions relating to the resolution of disputes are the focus of this article.

Western Australian Gas Disputes Arbitration

Arbitration is a determinative process in which parties to a dispute present arguments and evidence to an independent neutral third party (the arbitrator), who then makes a binding determination on the issues in dispute.⁴ The GPAA established the office of the Western Australian Gas Disputes Arbitrator (the Gas Arbitrator). The Gas Arbitrator is appointed by the Governor on a part time basis.⁵ Section 74 of the Act provides that the Gas Arbitrator has the function of hearing and determining disputes:

- a) connected with or arising out of contracts for;
 - i) the distribution, transportation or supply of gas; or
 - ii) access to gas pipeline systems.

At first sight it appears that the Gas Arbitrator is an arbitrator within the meaning of the *Commercial Arbitration Act 1985* (WA), (the CAA). However section 77 of the GPAA provides that the Arbitrator is not an Arbitrator within the meaning of the CAA and the dispute resolution processes provided for under the CAA are not arbitrations within the meaning of the GPAA.

Nevertheless the dispute resolution procedures and the powers of the Gas Arbitrator under the GPAA in many instances mirror those as set out in the CAA and it is considered that guidance in the application of the arbitration process under GPAA will be assisted by reference to case law decisions dealing with issues arising from practice and procedures under the CAA.⁶ At the time of writing there have been no determinations made by the Gas Arbitrator under the GPAA.⁷

Comparison of arbitration procedures

Appointment of Arbitrator

The appointment of the Arbitrator under the GPAA differs from an appointment under the CAA. Under the GPAA, a single Arbitrator is appointed by the Governor⁸ for a term of office between 3 and 5 years.⁹ By comparison, under the

⁴ See AS 4608-2004; Dispute Management Systems.

⁵ Sections 62(2) & (3). The current Gas Arbitrator is Mr Laurie James, Senior In House Counsel, Kott Gunning Lawyers. Mr James was appointed in 1999 and again in April 2003 for a further 5 years.

⁶ Personal Communication Mr L. James. 13 March 2006.

⁷ See *Gas Disputes Arbitrators Annual Report 2003-2004* <www.era.wa.gov.au>.

⁸ Section 62(2).

⁹ Section 65.

CAA the Arbitrator is appointed pursuant to the terms of a contract in accordance with the arbitration agreement or dispute resolution clause.¹⁰

The GPAA Arbitrator may resign from office by a signed notice of resignation addressed to the Minister.¹¹ There is no equivalent provision in the CAA, the presumption being that once the arbitrator has entered on to the reference they will continue with the arbitration until the handing down of a binding determination or award.¹²

Suspension and removal of Arbitrator

Section 67 of the GPPA provides that if the Governor is satisfied that the Arbitrator:

- a) is physically or mentally incapable of performing the functions of office;
- b) has shown incompetence or neglect in performing those functions; or
- c) has been guilty of misbehaviour;

then the Governor may suspend the Arbitrator from office.

Misbehaviour includes conduct that renders the Arbitrator unfit to hold office as Arbitrator whether or not the conduct relates to any function of the office.¹³

Misbehaviour under the GPAA is much broader than the concept of misconduct under the CAA. By comparison misconduct under the CAA includes corruption, fraud, partiality, bias and a breach of the rules of natural justice.¹⁴ Misconduct under the CAA does not involve any issue of moral turpitude, and often simply relates to what might be described as technical misconduct.¹⁵

The removal of the Gas Arbitrator under the GPAA requires approval by each House of Parliament following suspension by the Governor.¹⁶ Under section 44 of the CAA, where the Supreme Court is satisfied that:

- a) there has been misconduct on the part of the Arbitrator or umpire, or
- b) an Arbitrator or Umpire has misconducted the proceedings; or
- c) undue influence has been exercised in relation to an Arbitrator or Umpire, or
- d) an Arbitrator is incompetent or unsuitable to deal with a particular dispute;

Then the Court may on the application of a party to the arbitration agreement remove the Arbitrator or Umpire.

Independence of the Arbitrator

¹⁰ Sections 4, 6 and 7 of the *Commercial Arbitration Act 1985* (WA).

¹¹ Section 66.

¹² See sections 28 and 29.

¹³ Section 67(2).

¹⁴ Section 4

¹⁵ *Du Toit v Vale and Another* (1993) 9 WAR 139; *Shirley Sloan Pty Ltd v Merril Holdings t/a Airen Constructions* [2000] WASC 99.

¹⁶ Section 68.

The Gas Arbitrator is generally independent of direction or control by the Crown or any Minister or Officer of the Crown in the performance of the Arbitrator's functions.¹⁷ However the Minister may give directions in writing to the Arbitrator as long as these directions relate only to general policies to be followed by the Arbitrator in matters of administration¹⁸ but the Minister cannot restrain the Arbitrator with respect to the performance of his functions.¹⁹

By comparison under the CAA, subject to the provisions of the CAA and the arbitration agreement, the arbitrator may conduct the proceedings under the agreement in such manner as the arbitrator or umpire thinks fit.²⁰ Nevertheless this discretion is always subject to the rules of natural justice.²¹

Delegation

Section 87(1) of the GPPA permits the Gas Arbitrator to delegate the performance of a function to a person who is in the opinion of the Arbitrator competent to perform that function. However the arbitration hearing and subsequent determination of the issues may not be delegated.²² There is no provision in the CAA for delegation of any function by the Arbitrator.

Conflict of interest

If the Gas Arbitrator has any direct or indirect interest in any business or body corporate or any other direct or indirect interest that may conflict with the Arbitrator's duties, the Arbitrator must inform the Minister in writing.²³

An interesting feature of the provision is that failure to inform the Minister is an offence subject to a penalty of \$10,000. In the event of any conflict, the Minister may direct the Arbitrator to resolve a conflict in relation to a particular matter and if the conflict is not resolved the Minister may disqualify the Arbitrator from acting in relation to the matter.²⁴ By comparison under the CAA, a reasonable apprehension of the possibility of bias will give rise to an application to the Supreme Court for removal of the Arbitrator²⁵ by a party to the arbitration.

The Supreme Court has ordered the removal of commercial Arbitrators on a number of occasions which might at first sight be considered as minor or inconsequential conflicts.²⁶

Consultants

The Gas Arbitrator may engage persons to provide professional or technical assistance as he considers necessary for the performance of his functions.²⁷ There is no equivalent provision under the CAA.

Immunity

¹⁷ Section 75(1).

¹⁸ Section 75(2).

¹⁹ Section 75(3)(b). The Minister is the Minister for Energy, the Hon E. S. Ripper.

²⁰ Section 14.

²¹ *Oldfield Knott Architects Pty Ltd v Ortiz Investments Pty Ltd* [2000] WASC 141.

²² Section 78(2).

²³ Section 79.

²⁴ Section 79(2)(e) and (b).

²⁵ Sections 4 and 44.

²⁶ *Giustiniano Nominees Pty Ltd v Minister for Works* (1995) 16 WAR 87; *Du Toit v Vale and Another* (1993) 9 WAR 139; *Shirley Sloan Pty Ltd v Merrill Holdings t/a Airen Constructions* [2000] WASC 99.

²⁷ Section 80.

Both the GPAA and the CAA provide immunity to the Arbitrator. Under the GPAA no liability attaches to the Gas Arbitrator or his delegate or any person acting under his direction for an act or omission in good faith in the performance or purported performance of official functions.²⁸

Whilst there has been considerable discussion regarding the duty to act in good faith in the context of contractual relationships²⁹ there have not been any decisions elaborating the concept of good faith in the exercise of arbitral functions. The issue of good faith however has been recently considered with respect to the role of adjudicators determining disputes under security of payment legislation adjudication processes.³⁰ For example in *Timwin Constructions Pty Ltd v Façade Innovations*³¹ McDougal J referred to the speech of Lord Sumner in *Roberts v Hopwood*³² where it was stated a requirement to act in good faith means; ‘that the board are putting their minds to the comprehension of their wills to the discharge of their duty to the public whose money and locality which they administer’.

The immunity of an arbitrator under the CCA is confined to negligence in that an arbitrator is not liable for negligence in respect to any act or omission in the capacity of arbitrator. However the arbitrator will be liable for fraud in respect of anything done in the capacity as arbitrator.³³

The arbitration process

Arbitration hearings under GPAA are held in private.³⁴ There is no provision under the CAA requiring arbitrations to be held in private however this requirement will normally be a term of the arbitration agreement between the parties. Under the GPAA, if the parties agree, an arbitration hearing may be conducted in public³⁵ however the Gas Arbitrator must have regard to the wishes of the parties and issues of commercial confidentiality.³⁶

Confidentiality

The Gas Arbitrator may give orders that information given in the course of the arbitration not be divulged without the arbitrator’s permission.³⁷ The GPPA further provides that a party to an arbitration hearing may request the arbitrator to treat material as confidential and request the arbitrator not to give a copy of that information to any other party.³⁸ While arbitrations under the provisions of the CAA are conducted in private there is no express or implied condition of confidentiality.

In *Esso Australia Resources Ltd. v. Plowman*³⁹ the High Court held that although arbitration may be conducted in private between the parties it does not follow that documents or information supplied by any of the parties to any other party during the arbitration is to be treated as subject to confidentiality. It was held that there was nothing inherent in

²⁸ Section 85.

²⁹ See *Cheshire & Fifoot’s Law of Contract*, (8th Australian ed., 2002), 418.

³⁰ *Building and Construction Industry Security of Payment Act 1999* (NSW); *Construction Contracts Act 2004* (WA).

³¹ [2005] NSWSC 548.

³² [1925] AC 578 at 603.

³³ Section 51.

³⁴ Section 18.

³⁵ Section 18(2).

³⁶ Sections 18(3) and (4).

³⁷ Section 24(1).

³⁸ Section 29.

³⁹ (1995) 128 ALR 391.

the nature of arbitration contracts in Australia which would give rise to such an obligation.⁴⁰ The effect of the High Court's decision in *Esso Australia Resources* is that unless the parties' agreement contains an express requirement of confidentiality, there is no assurance that information disclosed during the course of the arbitration will not be used outside the arbitration or made public.

Representation

Under the GPAA there is an automatic right to representation.⁴¹ The CAA provides that a party to an arbitration agreement may only be represented by a legal practitioner where:

- a) a party is, or is represented by, a legally qualified person;
- b) all the parties agree;
- c) the amount or value of the claim exceeds \$20,000;
- d) the Arbitrator gives leave for representation.⁴²

A legally qualified person may be a legal practitioner or a person, who whilst not a practitioner, has qualifications or experience in law.⁴³

Rules of evidence

The Gas Arbitrator is not bound by technicalities, legal forms or rules of evidence.⁴⁴ This provision mirrors that of the CAA.⁴⁵ The intention of the GPAA is to enable a speedy resolution of the dispute but at the same time providing for a proper consideration of the dispute and of all matters affecting the merits and fair settlement of the dispute.⁴⁶ This provision, under both the GPAA and CAA does not however allow the Arbitrator to 'act like a bull in a china shop'.⁴⁷

An arbitrator must always be mindful to observe the rules of natural justice. Secondly it is considered that there are some legal principles regarding evidence which could not be dispensed with under this discretion. For example the parole evidence rule.⁴⁸

Form of submissions

Arbitration proceedings are normally conducted by way of an oral hearing with evidence presented similar to civil litigation procedure. The GPAA permits the Gas Arbitrator to determine if evidence or submissions are to be presented in writing or orally.⁴⁹ Under the CAA, the manner of presentation of submissions is dependent upon the terms of the arbitration agreement and the arbitrator will be bound by these terms unless otherwise agreed by the parties to the

⁴⁰ The High Court did not follow the approach of the English Courts in the cases of *Dolling-Baker v. Merrett* [1990] WLR 1205; *Hassneh Insurance v. Mew* [1993] Lloyd's Rep. 243.

⁴¹ Section 19.

⁴² Section 20.

⁴³ Section 20(6)(b).

⁴⁴ Section 20(1)(a).

⁴⁵ Section 19(3).

⁴⁶ Section 20(1)(b).

⁴⁷ See J. A. Sharkey & J. B. Dorter, *Commercial Arbitration* (1986) 153.

⁴⁸ *Mercantile Bank of Sydney v Taylor* (1891) 12 LR (NSW) 252; *Codelfa Constructions v State Rail Authority of NSW* (1982) 149 CLR 337.

⁴⁹ Section 20(3).

arbitration agreement. In smaller disputes the Arbitrator may, with the authority of the parties, undertake what is termed expedited arbitration.⁵⁰ Here the arbitrator may direct that:

- there will not be pleadings;
- discovery will be limited;
- opening and closing submissions will be limited in time; or
- all submissions will be in writing;
- any issue is to be determined by reference to general justice and fairness rather than according to law.

Powers of the arbitrator

The powers of the Gas Arbitrator are very broad.⁵¹ For example the Arbitrator may:

- hear the arbitration in the absence of a party (providing that the party has been given notice of the hearing);
- refer any matter to an independent expert and accept the expert's report as evidence;
- make an interim determination.

While proceeding *ex parte* is permitted under the CAA⁵² a commercial arbitrator would be very hesitant to do so. Hearing evidence in the absence of a party to the dispute may give rise to an application to have the arbitrator's award set aside on the basis of misconduct for a breach of the rules of natural justice.

Also the referral of an issue for determination by an expert would not be permitted under the CAA. While the submission of expert reports is a common feature of commercial arbitration, the experts will be selected by the parties, the reports exchanged and subject to examination under oath. Additionally the Arbitrator's determination must only take into account material presented by the parties. In the case of *Shirley Sloan Pty Ltd v Merril Holdings t/a Airen Constructions*⁵³ the arbitrator took into account a minor matter not raised by the parties in making his determination and his award was set aside by the Supreme Court on the basis of misconduct.

Interim determinations are permitted under each Act.⁵⁴ The object of an interim determination is to determine a preliminary issue which may assist the parties in settling the dispute. The interim award does not determine all of the issues in dispute but often the determination of a preliminary issue will preempt subsequent issues. While an arbitrator may make further interim determinations with respect to other issues and subsequently hand down a final determination, once having determined a particular issue the arbitrator is *functus officio* and cannot revisit these issues unless directed by the court or to correct a clerical or arithmetical error.⁵⁵

Determination of issues and reasons for decision

⁵⁰ See *Expedited Commercial Arbitration Rules* (1999) Institute of Arbitrators and Mediators Australia, <www.iama.org.au>.

⁵¹ Section 21(1).

⁵² Section 18(3).

⁵³ [2000] WASC 99.

⁵⁴ Section 21(2) GPAA; Section 23 CAA.

⁵⁵ *Fidelitas Shipping Co Ltd v V/O Expertchlab* [1996] 1 QB 630.

The GPPA specifies the matters that the Gas Arbitrator must take into account in making a determination.⁵⁶ These include:

- the Service Provider's legitimate business interests and investments in the Covered Pipeline;
- the interests of all users of the pipeline;
- the existence of firm and binding contractual obligations of the Service Provider or other persons already using the Covered Pipeline; and
- the benefits to the public as a result of a competitive market.

By comparison a commercial arbitrator is only required to consider the issues for dispute as agreed by the parties or contained in the pleadings if pleadings are ordered.⁵⁷

The Gas Arbitrator is required to make a determination on all the issues in dispute. The determination must be in writing and include the reasons for the determination.⁵⁸ The requirement mirrors the provisions under the CAA.⁵⁹ Where a commercial arbitrator does not address all the issues in dispute the Court may remit the matter back to the arbitrator or remove the arbitrator.⁶⁰ Both Acts permit the arbitrator to correct the award in the event of a clerical mistake or an error arising from an accidental slip or omission.⁶¹

The Gas Arbitrator may before arbitrating a dispute require the parties to continue negotiations or engage in some other alternative dispute resolution process and require written reports from the parties.⁶² After considering submissions the Gas Arbitrator must provide a draft decision⁶³ to the parties and request submissions from the parties by a specified date. After consideration of these submissions the Gas Arbitrator is required to make a final determination on the issues in dispute.⁶⁴

The Gas Arbitrator may, if he considers it appropriate, seek written submissions from persons who are not parties to the dispute.⁶⁵

The Gas Arbitrator must provide a final decision to the parties within 3 months of receipt of the parties' submissions.⁶⁶ Under the CAA, unless the period is specified in the arbitration agreement, or agreed between the commercial arbitrator and the parties, the arbitrator is only required to hand down the determination promptly at the conclusion of the hearing.⁶⁷

⁵⁶ Section 6.15(a) to (h).

⁵⁷ See *Vilani and Anor v Delstrat Pty Ltd* [2002] WASC 112; *Oldfield Knott Architects Pty Ltd v Ortiz Investments Pty Ltd* [2000] WASC 141; *Shirley Sloan Pty Ltd v Merril Holdings t/a Airen Constructions* [2000] WASC 99.

⁵⁸ Section 22.

⁵⁹ Section 29.

⁶⁰ See *Pindan Constructions Pty Ltd v Uniseal group of Companies* [2004] WASC 152.

⁶¹ Section 22 (2) GPPA; section 30 CAA.

⁶² Schedule 2; s 6 *Dispute Resolution*.

⁶³ Schedule 2; s 6.9(b).

⁶⁴ Schedule 2; s 6.9(d).

⁶⁵ Schedule 2; s 6.10.

⁶⁶ Schedule 2; s 6.11.

⁶⁷ *Bremer v Westzucker* [1981] 2 Lloyd's Report 130 at 133.

A commercial arbitrator is not required, when stating reasons, to go to the same lengths as a Judge is required. It was stated in *Bremer Handel. v Bunge G.m.b.h.*:⁶⁸

All that is necessary is that the Arbitrators should set out what, on their view of the evidence, did or did not happen and should explain succinctly why, in the light of what happened, they have reached the decision and what their decision is. This all that is meant by a 'reasoned order' ... It is not technical, it is not difficult to draw, and above all it is something which can and should be produced promptly and quickly at the conclusion of the hearing.

Costs

Under both the GPAA and the CAA, the award of the costs of the arbitration is at the discretion of the arbitrator who may direct to and by whom and in what manner the whole or any part of the costs shall be paid.⁶⁹ However an arbitrator is under an obligation to act judicially and at the same time ensure that the costs are dealt with in a fair and equitable manner.⁷⁰ The starting point is that in the absence of any special circumstances, the arbitrator should award the costs to the successful party.⁷¹

Whilst an arbitrator is not entitled to determine the successful party on the basis of the balance of who has been successful on the most issues,⁷² where there are a number of separate claims the situation is different where the defendant succeeds on a number of discrete and substantial issues. If an arbitrator is confronted by a set of facts where the issues in dispute are separate and distinct so that one party is clearly identifiable as being the 'winner' in respect of a specific issue, the alternative is to apportion costs between the parties.⁷³

Appeals from arbitrator's decisions

Under the GPAA a party may appeal to the Supreme Court on a question of law from a determination of an arbitrator.⁷⁴ An appeal must be instituted in accordance with the Rules of the Supreme Court.⁷⁵ The Supreme Court may then make orders staying or affecting the determination of the arbitrator that the Court thinks appropriate.

By comparison, section 38 of the CAA is headed 'Judicial review of awards' and provides that the court may set aside or remit an award on a question of law arising out of an award. Section 38(4) allows an appeal to be brought by any of the parties to the arbitration agreement:

- a) with the consent of all the other parties to the arbitration agreement; or
- b) subject to section 40, with the leave of the Supreme Court.

In accordance with section 38(5) the Supreme Court shall not grant leave under section 38(4) unless it considers that:

⁶⁸ (1981) Lloyds Rep 130 at 132.

⁶⁹ Section 34(1) CAA; Section 30 GPAA.

⁷⁰ See *Lloyd del Pacifico v Board of Trade* (1930) 35 Com Cas 325.

⁷¹ See *Oshlack v Richmond River Council* (1998) 193 CLR 72 per McHugh J at 97.

⁷² See *Miles & Anor v Palm Bridge Pty Ltd* [2001] WASC 42.

⁷³ See *Triden Contractors Pty Ltd v Belvista Pty Ltd*, unreported, Supreme Court NSW, 26 September 1989.

⁷⁴ Section 31.

⁷⁵ Section 31(2)(b).

- a) having regard to all the circumstances, the determination of the questions of law concerned could substantially affect the rights of one or more of the parties to the arbitration agreement; and
- b) there is:-
 - i a manifest error of law on the face of the award; or
 - ii strong evidence that the arbitrator or umpire made an error of law and that the determination of the question may add, or may be likely to add, substantially to the certainty of commercial law. For the meaning that should be attributed to the criteria set out in s 38(5)(b), see *Lamac Developments Pty Ltd v Devaugh Pty Ltd*.⁷⁶

With respect to the application to remove the arbitrator, section 44 provides that:

Where the Court is satisfied that –

- (a) there has been misconduct on the part of an arbitrator or umpire or an arbitrator or umpire has misconducted the proceedings;
 - (b) undue influence has been exercised in relation to an arbitrator or umpire; or
 - (c) an arbitrator or umpire is incompetent or unsuitable to deal with the particular dispute,
- the Court may, on the application of a party to the arbitration agreement, remove the arbitrator or umpire.

Conclusion

The access to services regime provided by the TPA is essential to the creation of competition in the provision of both public and private utilities such as gas, water and electricity. The certification of the Western Australian Third Party Access Regime for Natural Gas Pipelines under the TPA and the subsequent enactment of the GPAA assists that access by facilitating the development and operation of a national market for natural gas preventing the abuse of monopoly power and assisting with promoting a competitive market for natural gas.

The arbitration process under the GPAA attempts to provide a mechanism, where there are disputes relating to access to these facilities, which is fair and reasonable for both service providers and users. To date, access disputes in Western Australia have been resolved through the use of conferences called by the Gas Arbitrator, using his powers under the GPAA, without resort to an arbitration hearing.

Consequently there is no case law to assist both parties and legal representatives in the application and interpretation of the arbitral functions under the GPAA. Many of the provisions of the GPAA dealing with the process of arbitration mirror or are similar to provisions in the CAA. The information in this article will assist parties in access disputes to services to understand the arbitration process in the event of a dispute proceeding to a formal arbitration hearing under the GPAA.

Acknowledgment

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⁷⁶ [2002] WASCA 245.