

# REPORT OF THE AUDITOR GENERAL



Auditor General

Western Australia



AlintaGas



## **Sale of the Gas Corporation's Businesses**

Report No. 1  
February 2001



## Auditor General

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## Auditor General

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THE SPEAKER  
LEGISLATIVE ASSEMBLY

THE PRESIDENT  
LEGISLATIVE COUNCIL

### **AUDITOR GENERAL'S REPORT - SALE OF THE GAS CORPORATION'S BUSINESSES**

This Special Report has been prepared consequent to the requirement of Section 37(1) of the *Gas Corporation (Business Disposal) Act 1999*.

As required by Parliament, the Report examines certain matters relating to any obligations, duties or liabilities taken over by or imposed on, or any indemnities or guarantees given by, or on behalf, of the State arising from the sale of the Gas Corporation's businesses.

A handwritten signature in black ink, appearing to read 'D D R Pearson'.

D D R PEARSON  
AUDITOR GENERAL

February 14, 2001

# Contents

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1.	Summary of Findings	4
2.	Background	5
3.	Section 37 Examination	6
	❑ Overview	6
	❑ Obligations, Duties, Liabilities, Indemnities and Guarantees	6
	❑ Other Matters Arising from the Examination	7
4.	Appendices	10
	❑ Appendix A - Glossary of Terms	10
	❑ Appendix B - Obligations, Duties and Liabilities imposed on the State under the <i>Gas Corporation (Business Disposal) Act 1999</i> , as set out in the Transfer Orders published in the Government Gazettes of June 28 and September 22, 2000.	12
	❑ Appendix C - Indemnities and Guarantees given by or on behalf of the State under the <i>Gas Corporation (Business Disposal) Act 1999</i> , as identified by audit procedures.	17
	❑ Appendix D - Deeds of Indemnity to the Gas Corporation and AlintaGas Limited Directors and Officers, and Others as set out in the ASSC “Report on the Sale of the Businesses of the Gas Corporation”.	19

# 1 **Summary of Findings**

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- ❑ The commitments imposed on the State by virtue of the sale of the businesses of the Gas Corporation were normal and consistent with a transaction of this nature.

# 2 Background

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On December 24, 1999, the *Gas Corporation (Business Disposal) Act 1999* (“the Act”) was assented to by the Governor.

The Act authorised the sale of the then state-owned gas distribution and gas trading and retail businesses conducted by the Gas Corporation under the trading name AlintaGas.

To assure the Parliament, and hence the people of Western Australia, about the nature and extent of the State’s commitments arising from the transaction, Section 37 of the Act directed the Auditor General to examine and report on certain matters relating to “*any obligations, duties, or liabilities taken over by or imposed on the State*”, and “*any indemnities or guarantees given by or on behalf of the State*”, within 60 days of the proclamation of Part 6, Division 3 of the Act, which occurred on December 16, 2000. The report has been prepared to satisfy Parliament’s direction.

The report has been prepared on the basis that the intent underlying Section 37 was for the Auditor General to ascertain whether there were any unusual or noteworthy commitments entered into in relation to the sale transaction.

The approach adopted for the examination primarily involved a review of the legislation, the minutes of the AlintaGas Sale Steering Committee (ASSC) meetings, contracts, agreements and related documents. Interviews were undertaken with key staff and consultants supporting the ASSC and relevant agencies. Written confirmations of oral statements were obtained where appropriate from each of these parties, and legal advice was obtained to confirm audit conclusions. A Glossary of Terms appears in Appendix A to this report.

The examination did not cover the process followed in the selection of the Cornerstone Investor, the preparation of the Public Offer Document, the price set for the Stapled Securities or costs incurred in the sale. These were covered in the “Report on the Sale of the Businesses of the Gas Corporation” by the ASSC, tabled in the Legislative Assembly on November 21, 2000.

# 3 Section 37 Examination

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## Overview

Section 37 of the *Gas Corporation (Business Disposal) Act 1999* (“the Act”) required the Auditor General to examine and report on the following matters:

- ❑ Any obligations, duties or liabilities taken over by or imposed on the State under the Act.
- ❑ Any indemnities or guarantees given by or on behalf of the State under the Act.
- ❑ Any other matter that arises out of or is connected with the matters referred to above.

The examination found:

- ❑ Obligations, duties and liabilities, as listed in Appendix B to this report, were taken over or imposed on the State under the Act. These are considered normal and consistent with an asset sale of this nature.
- ❑ Indemnities, as listed in Appendices C and D to this report, were granted. These are also considered normal in the context of a sale of this nature.
- ❑ No indication that any guarantees were given.

## Obligations, Duties, Liabilities, Indemnities and Guarantees.

As a result of the sale of AlintaGas, the State took on a number of obligations, duties, and liabilities. These were identified in Transfer Orders gazetted on June 28 and September 22, 2000 and are reported on in Appendix B together with audit findings.

The examination disclosed that as a result of the sale of AlintaGas, certain indemnities were effectively given by or on behalf of the State. Those in relation to the Australian Stock Exchange and the Cornerstone Investor are reported on in Appendix C together with audit findings.

The examination also disclosed indemnities in favour of the Gas Corporation and AlintaGas Limited directors and officers, and others. Appendix D lists these indemnities. Under the *Gas Corporation Act 1994* the directors of the Gas



Corporation had the same fiduciary relationship with the Gas Corporation as directors of a company under the Corporations Law and were required to act in the best interests of the Gas Corporation. At the same time, Section 7(1) of the *Gas Corporation (Business Disposal) Act 1999* gave the Minister for Energy the power to direct the directors with respect to bringing about the disposal. However, the legal duties imposed upon the directors under the *Gas Corporation Act 1994* still remained.

To protect the directors from any exposures under the *Gas Corporation Act 1994*, the Treasurer, on behalf of the State, gave indemnities to the directors against any liability incurred as a consequence of acting in accordance with a Ministerial direction.

The indemnities cover the directors to the extent that relevant insurance policies taken out by the Gas Corporation do not.

The examination concluded that:

- ❑ Each of the obligations, duties, liabilities and indemnities in Appendices B, C and D is considered normal and consistent with a transaction of the nature authorised by the Act.
- ❑ There was no indication that any other obligations, duties, liabilities, indemnities or guarantees were taken over, imposed on, or made by the State under the Act.

## Other Matters Arising from the Examination

In the course of the examination, the following additional matters were identified as warranting mention under Section 37.

### 1. Agreement for Sale made June 30, 2000

On the winding-up of the Gas Corporation, the State took over the Corporation's liability, if any, for any matters arising out of the Agreement for Sale made on June 30, 2000, to sell the Gas Corporation's businesses to AlintaGas Limited and two of its subsidiaries, AlintaGas Networks Pty Ltd and AlintaGas Sales Pty Ltd.

This liability is considered the normal liability carried by every party to a contract and involves warranting to undertake the transaction in good faith.

No warranties were given in respect to the condition of the assets sold.

## 2. Western Power Corporation

Prior to the issue of the Public Offer Document the Government announced its intention that Western Power Corporation would be prohibited from selling or supplying gas in the areas specified in the Trading Licences granted to the Gas Corporation on July 1, 2000, for a period of three years commencing on the date the direction was gazetted. This was intended to provide some level of assurance to the purchaser of and investors in AlintaGas Limited that the State, having sold its gas businesses, would not immediately re-enter the gas market through its other energy utility Western Power Corporation.

The undertaking was discharged by the Western Power Corporation (Gas Supply) Direction 2000 made by the Governor in Executive Council and gazetted on October 17, 2000. The direction stipulated that Western Power Corporation “*must not sell or supply gas within, or for delivery or consumption within, the specified area during the period of three years commencing on*” the date of publication. This does not, however, prevent Western Power Corporation transporting gas for its own use, or continuing to perform its obligations or exercising its rights under any pre-existing agreement for the sale or supply of gas.

There is considerable precedent in private sector sales transactions for a seller to agree to make “restraint of trade” undertakings. This undertaking is considered to be reasonable.

## 3. Herdsman Lake Land

The Gas Corporation was party to an agreement with AlintaGas Limited with respect to various parcels of land at Osborne Park, commonly referred to as the Herdsman Lake land. The agreement gives AlintaGas Limited an option to purchase the Herdsman Lake land at market value as determined by the Valuer General’s Office. The option must be exercised within two years from December 16, 2000. At the date of this report, the option had not been exercised.

The land was not actively being used by the Gas Corporation’s businesses prior to the sale of the businesses. There was a prospect, however, that it might have been needed in the future. Accordingly, a two-year option to buy is reasonable.

## 4. Rates and Taxes.

Prior to the sale, local government rates and taxes were not levied on the Gas Corporation in relation to its distribution network. (This was also the case in relation to private distribution networks.) To maintain this position after the sale, the Act states, in Section 67, that the presence of a pipeline does not constitute occupation of land for the purposes of the *Local Government Act 1995*.

## 5. Gas Corporation Employee Entitlements

The examination found:

- (a) Two Gas Corporation employees did not accept the offer to transfer employment from the Gas Corporation to AlintaGas Limited. Both accepted offers of employment with the Office of Energy prior to the date the Gas Corporation was wound up. One of the employees subsequently accepted a voluntary redundancy severance. At the date the Gas Corporation was wound up, it had no remaining liability to any of its former employees.
- (b) The Gas Corporation had agreed to reimburse employees transferring employment from the Gas Corporation to AlintaGas Limited and AlintaGas Networks Pty Ltd, for the 1.75 per cent withdrawal penalty normally levied by the Government Employees Superannuation Board (GESB) on members leaving GESB-administered funds.

This was part of the incentive package offered to encourage the Gas Corporation employees to transfer employment to AlintaGas Limited and AlintaGas Networks Pty Ltd.

The agreement to reimburse the penalty is considered consistent with recent practice in relation to the transfer of publicly-owned businesses to the private sector.

The undertaking was discharged by the Gas Corporation paying the relevant amounts to the employees.

The examination found nothing further warranting reporting arising out of or connected with the reportable matters mentioned in Section 37 of the Act.

# 4 Appendices

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## Appendix A – Glossary of Terms

This glossary covers terms used in this report.

**Act** means the *Gas Corporation (Business Disposal) Act 1999*.

**AlintaGas** means the State-owned gas distribution and gas trading and retail businesses disposed of under the Act.

**AlintaGas Limited** means the corporate vehicle established for the purposes of giving effect to the disposal.

**AlintaGas Sale Steering Committee** means the entity formed to advise the Western Australian Government on the sale of AlintaGas.

**ASSC** means the AlintaGas Sale Steering Committee.

**Cornerstone Investor** means WA Gas Holdings Pty Ltd (ACN 093 370 739), a company ultimately owned by UtiliCorp United Inc and United Energy Limited (ACN 064 651 029).

**Corporate Vehicle** means AlintaGas Limited.

**Gas Corporation** means the body corporate established under the *Gas Corporation Act 1994*.

***Gas Corporation (Business Disposal) Act 1999***, also referred to as the Act in this report, means the legislation enacted to authorise the sale of AlintaGas.

**Liability** means any liability:

- (a) whether actual, contingent or prospective, liquidated or unliquidated; or
- (b) whether owed alone, or jointly, or jointly and severally, with any other person.

**Public Offer Document** means the Public Offer Document issued to prospective investors in AlintaGas Limited.

**Retained Matters** means any asset, right, contract, or any other matter or information which was retained by the Gas Corporation under the Transfer Order of June 23, 2000 and gazetted on June 28, 2000.

**Right** means any right, power, privilege or immunity whether actual, contingent or prospective, but does not include any privilege or immunity enjoyed as an agent of the Crown except in so far as it relates to anything done or omitted to be done before the transfer time.

**Share Sale Agreement** means the agreement under which the State agreed to sell 45 per cent of AlintaGas Limited to the Cornerstone Investor.

**Stapled Securities** means securities in AlintaGas Limited comprising one fully paid ordinary share and one loan note, which must be dealt with together.

**Transfer Order** means an order made under Section 15 of the Act transferring the businesses, assets, liabilities, rights, obligations and contracts of the Gas Corporation to AlintaGas Limited and its wholly owned subsidiaries, Alinta Finance Pty Ltd (ACN 089 531 993), AlintaGas Networks Pty Ltd (ACN 089 531 975) and AlintaGas Sales Pty Ltd (ACN 089 531 984) or any of them.

**WA Gas Holdings Pty Ltd** – see **Cornerstone Investor**.

**Appendix B – Obligations, Duties and Liabilities imposed on the State under the *Gas Corporation (Business Disposal) Act 1999*, as set out in the Transfer Orders published in the Government Gazettes of June 28 and September 22, 2000.**

Summary Description	Finding
<p>Any liability arising from the agreement entered into by the Gas Corporation to sell the Dampier to Bunbury Natural Gas Pipeline to Epic Energy (WA) Nominees Pty Ltd (ACN 081 609 289) and others on or about March 3, 1998, or arising from the Confidentiality Release Deed entered into by the same parties and the State on the same date.</p>	<p>These liabilities arose out of the pipeline sale and did not relate to the Gas Corporation’s businesses sold pursuant to the Act. It was therefore considered reasonable for the State to retain this liability.</p>
<p>Any liability arising from the Share Sale Agreement: the sale by the Gas Corporation of a 45 per cent interest in AlintaGas Limited, to the Cornerstone Investor, WA Gas Holdings Pty Ltd.</p>	<p>It is normal commercial practice for a vendor to give undertakings and warrant that they have the capacity to fulfil the obligations under the agreement. No warranties as to the underlying assets of the businesses were given as part of the Share Sale Agreement.</p>

Summary Description	Finding
<p>Any liability for payments to be made by the Gas Corporation to the Government Employees Superannuation Board for contributions to superannuation schemes or pension schemes due on or prior to, July 1, 2000 the transfer time specified in the Transfer Order made June 23, 2000 and gazetted on June 28, 2000.</p>	<p>It is normal commercial practice for a vendor to assume responsibility for liabilities up to the transfer time. The payments envisaged by the arrangement have been made.</p>
<p>Any liability arising out of the inquiry commenced in 1999 by the Australian Competition and Consumer Commission (ACCC) into the Gas Corporation's use of market power, under the <i>Trade Practices Act 1974 (Cth)</i>.</p>	<p>It is normal commercial practice for the vendor to retain liability for past actions and where conduct may result in penal sanctions, it is not possible to transfer the liability.</p> <p>The ACCC informed the Gas Corporation on April 23, 2000 that it had discontinued its investigation.</p>
<p>Any liabilities that may arise out of the activities previously conducted on gas works sites at Albany, East Perth, Geraldton, Fremantle and Spearwood by predecessors of the Gas Corporation.</p>	<p>It is normal commercial practice for the vendor to retain liability for past actions where the actions are unrelated to the current operations of the business being sold.</p> <p>The examination found no indication of any claims having been made in relation to this matter.</p>

#### 4. Appendices

Summary Description	Finding
Any liability arising out of a claim for compensation by Brookside Lane Pty Ltd (ACN 008 996 254) relating to the compulsory acquisition of an interest in land for the extension of the Dampier to Bunbury Natural Gas Pipeline.	<p>This liability arose out of the pipeline sale and did not relate to the Gas Corporation's businesses sold pursuant to the Act. It is therefore considered reasonable for this liability to be retained by the State.</p> <p>At the time the examination was conducted, this claim was still current and had not been settled.</p>
Any liability under the consultancy services agreement dated February 1, 2000 entered into between the Gas Corporation and Ian Baker.	<p>As these services were contracted to assist the vendor in the sale process, it is considered reasonable that any liability under the agreement remain with the State.</p> <p>The examination found no indication of any claims having been made under the agreement.</p>
Any liability under contracts appointing or retaining consultants or advisers in relation to the disposal of the Gas Corporation's businesses under the Act, and any liability under leases of premises in the Central Park Building and the AMP Building.	<p>As the services of the consultants and advisers were retained by the ASSC, the entity formed to advise the Western Australian Government on the sale of AlintaGas, it is considered reasonable that any liability under these contracts remain with the State. In relation to the leases of premises, these were for the benefit of the ASSC, and it is considered reasonable for any liability to remain with the State.</p> <p>The examination found no indication that any claims had been made in relation to these contracts.</p>



Summary Description	Finding
<p>Any liabilities for, or in relation to, Tax Equivalent Payments (TEP) incurred, existing or accrued in the period prior to the transfer time.</p>	<p>This was a transitional provision designed to ensure that the State received any TEP owing to it prior to the transfer time.</p> <p>It is considered reasonable that the liabilities referred to were retained in order for the State to receive any TEP owing up to the transfer time.</p> <p>The TEP payments have been made.</p>
<p>Any liability for outstanding borrowings relating to the assets the subject of the Transfer Order made June 23, 2000 and gazetted on June 28, 2000.</p>	<p>It is common practice for government businesses to be sold debt-free. In such a case, the seller is able to negotiate a higher price but retains the liability to discharge the debt. In addition, the provider of the debt finance to the Gas Corporation was the Western Australian Treasury Corporation which is authorised to lend only to “authorities” under its legislation.</p> <p>As part of the settlement arrangements, all the Gas Corporation borrowings were repaid to the Western Australian Treasury Corporation from the proceeds of sale prior to the Gas Corporation being wound up.</p>

#### 4. Appendices

Summary Description	Finding
Any liability in connection with the payments to be made to employees transferring employment from the Gas Corporation to either AlintaGas Limited or to AlintaGas Networks Pty Ltd.	<p>It is common practice, where publicly owned businesses are transferred to the private sector, to negotiate incentive payments with employees to encourage them to transfer with the business.</p> <p>These payments were made as part of the settlement arrangements. No claims are outstanding.</p>
Any liability in connection with the allocation of \$1 000 worth of shares in AlintaGas Limited to be made to each employee under the transitional arrangements made in relation to the employees' transfer of employment from the Gas Corporation to AlintaGas Limited or its subsidiaries.	<p>It is common practice, where publicly owned businesses are floated, to offer employees small allotments of free shares as part of the inducement package to transfer to the new employer.</p> <p>These shares have been issued and no claims are outstanding.</p>

**Appendix C – Indemnities and Guarantees given by or on behalf of the State under the *Gas Corporation (Business Disposal) Act 1999*, as identified by audit procedures.**

Summary Description	Finding
<p>The Gas Corporation entered into a Deed of Undertaking with the Australian Stock Exchange (ASX) on October 6, 2000, by which it undertook to take certain action in relation to the listing of the Stapled Securities in AlintaGas Limited on a deferred settlement trading basis. The deed also contained an indemnity to the ASX in the event the undertakings were not performed. AlintaGas Limited was admitted to the official list of the ASX on October 13, 2000.</p>	<p>This is a normal listing requirement imposed by the ASX. The Stapled Securities were quoted for trading on October 17, 2000 and no longer trade on a deferred settlement basis.</p>
<p>Indemnities were given to the Cornerstone Investor under and by virtue of the following warranties, contained in the Share Sale Agreement with the Cornerstone Investor referred to in Appendix B:</p> <ul style="list-style-type: none"> <li>□ As part of the Share Sale Agreement the Gas Corporation gave a warranty that it had the legal right to sell the Stapled Securities and that it had complied with all relevant laws in the setting up of the companies.</li> </ul>	<p>These warranties and indemnities are considered a normal requirement in relation to commercial transactions.</p>

Summary Description	Finding
<ul style="list-style-type: none"> <li data-bbox="575 387 993 555">❑ A similar warranty was given that, in respect to the Public Offer Document, the Gas Corporation had complied with all relevant laws.</li> <li data-bbox="575 595 993 936">❑ The Gas Corporation warranted that there were no third party guarantees given by AlintaGas Limited or its subsidiaries to a third party to guarantee any other person’s obligations or liabilities or to indemnify any person against the acts or omissions of any third party, other than in respect of debt finance.</li> <li data-bbox="575 976 993 1491">❑ In respect to company borrowings, the Gas Corporation warranted that there would be no loans or financial accommodation, made or incurred by or on behalf of AlintaGas Limited or any of the subsidiaries, other than the debt finance arranged to acquire the businesses from the Gas Corporation; or any encumbrances on the assets of AlintaGas Limited or any of the subsidiaries other than the permitted encumbrances.</li> <li data-bbox="575 1532 993 2004">❑ The Gas Corporation also warranted that there were no powers of attorney or other authority given by AlintaGas Limited or its subsidiaries to any persons express, implied or ostensible (other than to a director, the Chief Executive Officer, a general manager, or the general counsel of AlintaGas Limited) which is still outstanding or effective to enter into any contract or commitment to do anything on its behalf.</li> </ul>	

## Appendix D – Deeds of Indemnity to the Gas Corporation and AlintaGas Limited Directors and Officers, and Others, as set out in the ASSC “Report on the Sale of the Businesses of the Gas Corporation”.

The following is the list of indemnities referred to on page 17 to this report.

- (a) Deed of Indemnity in favour of each of the directors of AlintaGas Limited for consenting to and/or signing the issue of the Public Offer Document for the initial public offering of the 55 per cent of the Stapled Securities in AlintaGas Limited.
- (b) Deed of Indemnity in favour of each of the directors of the Gas Corporation for consenting to and/or signing the issue of the Public Offer Document for the initial public offering of the 55 per cent of the Stapled Securities in AlintaGas Limited.
- (c) Deed of Indemnity in favour of Murray King, John Cahill, Rob Fruin and Steve Melville as Managers of AlintaGas Limited in respect of certain acts or omissions as an employee of the Gas Corporation in pursuance of, or relating or incidental to, the disposal of the businesses of the Gas Corporation prior to the coming into force of the Act.
- (d) Deed of Indemnity in favour of each of the directors of the Gas Corporation in respect of acts or omissions as a director of the Gas Corporation in pursuance of, or relating or incidental to, the disposal of the businesses of the Gas Corporation prior to the coming into force of the Act arising on the passing of the *Gas Corporation (Business Disposal) Bill 1999*.
- (e) Deed of Indemnity in favour of each of the directors of the Gas Corporation in respect of acts or omissions as a director of the Gas Corporation in pursuance of, or relating or incidental to, the disposal of the businesses of the Gas Corporation after the coming into force of the *Gas Corporation (Business Disposal) Bill 1999*.
- (f) Deed of Indemnity in favour of Dr Des Kelly as a Representative of the ASSC in respect of acts or omissions in pursuance of, or relating or incidental to, the disposal of the businesses of the Gas Corporation prior to the coming into force of the Act.

#### 4. Appendices

- (g) Deed of Indemnity in favour of Dr Des Kelly as a Representative of the ASSC in respect of acts or omissions in pursuance of, or relating or incidental to, the disposal of the businesses of the Gas Corporation after the coming into force of the Act.
- (h) Deed of Indemnity in favour of each of the directors of the Gas Corporation for execution of the Share Sale Agreement and the undertaking of any other acts in accordance with the *Gas Corporation (Share Sale Agreement) Direction 2000* given by the Minister for Energy.
- (i) Deed of Indemnity in favour of each of the directors of AlintaGas Limited for execution of the Complying Final Bid Amending Deed and the undertaking of any other acts as procured by the directors of the Gas Corporation in accordance with the *Gas Corporation (Share Sale Agreement) Direction 2000* given by the Minister for Energy.
- (j) Deed of Indemnity in favour of each of the directors of the Gas Corporation for execution of the Master Share Transfer and the Master Loan Note Transfer, and the undertaking of any other acts in accordance with the *Gas Corporation (Master Transfers) Direction 2000* given by the Minister for Energy.
- (k) Deed of Indemnity in favour of each of the new directors of the Gas Corporation (“Representative”) for any act or omission of the Gas Corporation, the Board of Directors of the Gas Corporation and the Representative in performing the function and exercising the powers of the Gas Corporation and acting as a member of the Board of Directors of the Gas Corporation from the time of the Representative’s appointment until the earlier of the time the Representative ceases to be a director of the Gas Corporation or the time of repeal of the *Gas Corporation Act 1994*.