



Postal Address  
PO Box Z5267  
Perth St Georges Tce WA 6831  
Facsimile: + 61 8 9223 4301

**DBNGP (WA) Transmission Pty Limited**

ABN 69 081 609 190  
Level 6, 12-14 The Esplanade  
Perth WA 6000  
Telephone: +61 8 9223 4300

13 July 2012

Mr John Pierce  
Chairman  
Australian Energy Market Commission  
PO Box A2449  
SYDNEY NSW 1235

Dear Sir

**AER NATIONAL GAS RULES RULE CHANGE PROPOSAL – REFERENCE AND REBATEABLE SERVICES**

DBNGP (WA) Transmission Pty Ltd (**DBP**) thanks the Australian Energy Market Commission (**the Commission**) for the opportunity to respond to the AER's supplementary submission made on 15 June 2012. The AER's supplementary submission responds to two issues of DBP's response to the Commission's Draft Determination made 15 March 2012, namely:

- (a) the application of the revenue and pricing principles; and
- (b) the interpretation of the National Gas Rules (**NGR**) in relation to a fixed principle.

By way of this letter DBP makes a general observation and comments more specifically on the parts of the AER's supplementary submission relating to these two issues.

DBP has also sought a response from Linda Evans, a partner of Clayton Utz, to the additional opinion from Mr Scerri QC that is attached to the AER's supplementary submission. This response is discussed below and annexed to this letter.

**General observation**

It is DBP's view that the AER's supplementary submission demonstrates that sufficient uncertainty exists regarding:

- (a) the potential trigger of Most Favoured Nation (**MFN**) clauses in existing contracts; and
- (b) the impact on the Fixed Principle in the DBNGP access arrangement,

were the AER's rule change proposal to be accepted.

Accordingly, DBP is of the view that the AEMC's draft decision was correct to reject the AER's proposed change to the definition of "Rebateable Service" in the NGR.

## Specific comment on the AER's supplementary submission

### 1. Revenue and Pricing Principles

The AER concludes, in its supplementary submission, that the revenue and pricing principles are fundamental and obligatory considerations in the exercise of the AER's discretion. In arriving at its conclusion, the AER states that the text of s.2.24 is directly reflected in the text of ss.28(2)(a) and 24(6) of the National Gas Law (NGL) and relies on:

- (a) an extract from the Second Reading Speech for the *National Gas (South Australia) Bill* 2008;
- (b) *Application by Envestra Ltd (No 2)* [2012] ACompT 3 at [40]; and
- (c) *Application by Energy Australia and Others* [2009] ACompT 8 at [73].

DBP remains of the view that there is an important distinction in the drafting of the Gas Code provisions and the NGL provisions that suggests that the NGL provisions could be interpreted to mean that the Regulator may not have to give fundamental weight to the principle of the economic costs and risks of the potential for under and over investment and instead, the Regulator only has to have regard to the principle.

The AER asserts that the text of s.2.24 is "*directly reflected*" in the text of ss.28(2)(a) and 24(6) of the NGL. This assertion overlooks this distinction. Furthermore, the advice of Mr Scerri QC of 11 April 2012 notes that the provisions are 'comparable' and concludes that the statutory language under the NGL is much more general than under the Gas Code.

The AER seeks to rely on an extract from the Second Reading Speech for the *National Gas (South Australia) Bill* 2008. That extract states that "[t]hese principles are fundamental to ensuring that the Ministerial Council on Energy's intention of enhancing the efficient delivery of national gas services is achieved". That statement comments on the importance of the revenue and pricing principles to achieving the Ministerial Council on Energy's intention – it does not seek to emphasise the weight that a Regulator should attribute to the principles in making an access arrangement decision.

Page 5 of the Second Reading Speech states:

*"A key feature of the amended National Gas Law is the inclusion of six principles that guide the development of the framework for the regulation of pipeline services. These revenue and pricing principles **will guide** ... the Australian Energy Regulator when approving access arrangements"* (emphasis added).

The above extract demonstrates parliament's intention that a Regulator should have regard to and be guided by the revenue and pricing, though it does not go so far to suggest that the principles are "fundamental" as the AER asserts.

The AER refers the AEMC to *Application by Envestra Ltd (No 2)* [2012] ACompT 3 at [40], which relevantly refers to the AER's "*obligation to take into account the revenue and pricing principles when performing certain economic regulatory functions: NGL s.28*". The extract merely reiterates the mandatory obligation of the Regulator to take into account the revenue and pricing principles; it does not support the AER's contention that the principles are "fundamental" in nature.

The AER further refers the AEMC to *Application by Energy Australia and Others* [2009] ACompT 8 at [73], which states that the revenue and pricing principles are "relevant considerations" and that Energy Australia's proposal must "*be in accordance ... with the*

*revenue and pricing principles*". As the AER notes, the Tribunal was considering the provisions of the National Electricity Law, not the NGL, and accordingly such a decision does not bind a Tribunal to construct the NGL in this fashion. In any event, DBP considers that there is a real risk that the Tribunal's decision does not require the Regulator to have any greater regard for the revenue and pricing principles than that expressed in s.28(2)(a) of the NGL.

DBP notes that the recent decision of the Tribunal, *Application by WA Gas Networks Pty Ltd (No 3)* [2012] ACompT 12, merely restates that a Regulator must take into account the revenue and pricing principles in making an access arrangement decision. At paragraph 19, the Tribunal stated:

*"The ERA was also required by s 28(2)(a) of the NGL to take into account the revenue and pricing principles when making those parts of the Access Arrangement Decision that relate to a reference tariff."*

Accordingly, DBP remains of the view that there is doubt as to the role that the revenue and pricing principles play in a Regulator's decision making process under the NGL (for at least reference tariff matters), in the absence of any judicial precedent.

The AER further notes that, as explained in the Second Reading Speech, the AER's discretion is not "absolute", and accordingly the AER could not exercise its discretion in any decision to determine whether a service was rebateable or not without regard to the revenue and pricing principles. Rule 40 of the NGR states that the AER's discretion in its decision making process regarding an access arrangement proposal varies between no discretion, limited discretion and full discretion. In exercising this discretion (as applicable to each element of an access arrangement proposal), the AER must take into account the revenue and pricing principles as required by s 28(2)(a) of the NGL.

DBP does not suggest, as alleged by the AER, that the AER could exercise its discretion without regard to the revenue and pricing principles. In its submission, DBP said that it is not appropriate to establish a regime whereby it is left to a Regulator to exercise its discretion in a way that may trigger MFN clauses in existing contracts. In DBP's view, notwithstanding that a Regulator must have regard to the revenue and pricing principles, it may make a determination which triggers MFN clauses.

If the AER's submission is to suggest that in considering the revenue and pricing principles, it could not exercise its discretion in a way that may trigger a MFN clause, then DBP disagrees with this view. The obligation on a Regulator to "have regard" to the revenue and pricing principles is solely for the Regulator's judgment and does not provide sufficient certainty or guidance to give comfort to DBP that MFN clauses cannot be triggered in the exercise of a Regulator's discretion.

DBP again reiterates that to allow a third party's actions (in this instance, a Regulator) with the ability to trigger MFN clauses drastically alters the risk/reward balance in these contracts. Had the parties contemplated that these MFN clauses could be triggered by third parties, the risk/reward balance would have been structured differently to account for the increased risk in the MFN clause being triggered.

## **2. Fixed Principle in the NGR**

Further to DBP's previous submission, and with reference to the AER's submission of 15 June 2012, DBP has sought a supplementary legal opinion, authored by Linda Evans of Clayton Utz, in response to the further legal opinion of Mr Scerri QC.

The legal opinion disagrees with the views of Mr Scerri QC and notes that the advice of Mr Scerri QC overlooks a key aspect of the jurisprudence under s 109 of the Constitution, known

as “operational inconsistency”. The advice from Clayton Utz notes that the authority relied upon by Mr Scerri QC, *Momcilovic v R* (2011) 85 ADLJR 957 (amongst other cited authorities), plainly supports inconsistency between a rule and a fixed principle flowing from conduct under the rule. Put simply, an inconsistency between a rule and a fixed principle can be generated by conduct under a rule.

The advice from Clayton Utz concludes that:

- (a) the proposed rule changes would permit the Regulator to make a determination that a particular service, which is negotiated outside of the regulatory framework and currently subject to the Fixed Principles and so excluded from consideration for the purposes of the NGR, is a rebateable service;
- (b) at the time that determination is made, there is a relevant inconsistency;
- (c) in advocating the proposed rule change the AER seeks “*more flexibility for the regulatory treatment of other pipeline services*” and says that the rule change will ensure that “*where pipeline services are not subject to a reference tariff, these services are still capable of being regulated as rebateable services*”;
- (d) the objective sought to be achieved by the rule change is therefore precisely directed to an outcome which would give rise to a relevant inconsistency; and
- (e) accordingly the amendment should be rejected.

DBP reiterates that if a determination is made under an amended r 93 NGR in the present case, there is a risk that the operation of that rule will be inconsistent with the fixed principles in the DBP Access Agreement, and accordingly under r 99(4)(b) NGR, notwithstanding r 99(3) NGR, the rule will operate to the exclusion of the fixed principle.

DBP appreciates the opportunity it has had to date to engage in the Commission’s rule change assessment process. If the Commission wishes to make any queries regarding the issues raised in this submission please contact myself or Trent Leach, Manager Regulatory & Government Policy on (08) 9223 5347 or via [trent.leach@dbp.net.au](mailto:trent.leach@dbp.net.au).

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Anthony Cribb', is written over a light blue horizontal line.

**Anthony Cribb**  
**General Manager, Corporate Services**  
**Company Secretary**

## Memorandum on Inconsistency under r 99(4) of National Gas Rules

### Introduction

1. We have been asked to respond to a supplementary memorandum of advice 4 June 2012 by Charles Scerri QC (**supplementary advice**) concerning the proposed change by the Australian Energy Market Commission (**AEMC**) to r 93(4) of the National Gas Rules (**Rules**). The supplementary advice is put forward as part of a submission by the Australian Energy Regulator (**AER**) that the "proposed change to the definition of rebateable service could not result in a determination by the AER that overrode an existing fixed principle". Mr Scerri argues that the proposed change will not lead to inconsistency between a rule and a fixed principle under r 99. It is said that any inconsistency would instead be between a "*supposed determination*" under r 93 and a "*fixed principle*".
2. We do not agree with the views set out in Mr Scerri's opinion. The authority relied upon by Mr Scerri, *Momcilovic v R* (2011) 85 ALJR 957 (*Momcilovic*), plainly supports inconsistency between a rule and a fixed principle flowing from conduct under the rule. Further, if a determination is made under an amended r 93 in the present case, there is such a risk of inconsistency with the fixed principle in the Dampier-Bunbury Pipeline (**DBP**) Access Agreement that the amendment should be rejected.

### Supplementary advice

3. The critical paragraph of Mr Scerri's supplementary advice is at paragraph 18, which reads:

*"It seems to me that the inconsistency referred to [by] Clayton Utz is between the supposed determination and the fixed principle. I remain of the view that Rule 99(4) is not concerned with that kind of inconsistency. As it says, it is concerned with an inconsistency between 'a rule' and 'the fixed principle'."*

### *Momcilovic*

4. Like Mr Scerri, we consider the jurisprudence under s 109 of the Constitution is an appropriate guide to the scope of inconsistency in r 99(4)(b) of the Rules. Mr Scerri, however, has overlooked a key aspect of that jurisprudence, known as "*operational inconsistency*". Its essence is that inconsistency between a federal law and a state law can be generated by conduct under the federal law.
5. In *Momcilovic*, Gummow J said at 1026:
 

*"a statute may invest a power in a body without any issue of inconsistency arising in advance of a particular exercise of the power. In instances where each law confers a power with respect to the same subject-matter, a conflict is created if and when each authority decides that it should exercise its powers".*
6. His Honour referred at 1027 to a pertinent example, *Carter v Egg and Egg Pulp Marketing Board (Vic)* (1942) 66 CLR 557, which was summarised as follows:

*[T]he fact that a Commonwealth statute and a State statute both authorized the acquisition of eggs would not necessarily mean that the Commonwealth statute excluded the operation of the State power, but if both the Commonwealth and the State sought to acquire the same eggs, there would be a conflict in the*

*operation of the power, and in that case s 109 would give paramountcy to the Commonwealth statute which would, no doubt, be construed as meaning that the Commonwealth power of acquisition was to supersede any attempted acquisition by the State authority (emphasis added).*

7. Another example arose in *Commonwealth v Western Australia* (1999) 196 CLR 392. In that case, state mining legislation could, if authority were granted under the legislation, enable mining to be conducted on land. That land was subject to federal defence regulations. If a defence operation or practice on the land were authorised under those regulations, entry or activity on the land, including the mining, could not occur.

8. Gleeson CJ and Gaudron J said at 417:

*"there would be direct inconsistency between that authorisation and the authority granted under the Mining Act. That inconsistency would result from the inconsistent operation in the particular circumstances of the Mining Act and the Defence Regulations - "operational inconsistency", as it is called" (emphasis added).*

9. See also Gummow J at 443.

10. Of course, while conduct under a federal law can give rise to inconsistency between the federal law and a state law, the inconsistency does not arise until the conduct is performed. In *Momcilovic*, Gummow J described this at 1026 as an "important temporal distinction", which he demonstrated by reference to *Victoria v The Commonwealth* ("The Kakariki") (1937) 58 CLR 618:

*[In that case, the High Court] held that the Victorian authority might proceed to exercise its statutory authority to remove the wreck of the steamship Kakariki in the absence of any intervention by the federal authority to exercise the power conferred by the Navigation Act 1912 (Cth) for the removal of wrecks. In advance of the exercise of the statutory power by the Commonwealth, the "practical operation" of the federal law was not impaired by the State law.*

#### **Application of *Momcilovic* to Rules**

11. "Operational inconsistency" can be applied to r 99(4) of the Rules. This means that inconsistency between a rule and a fixed principle can be generated by conduct under a rule. It follows that, if a determination under an amended r 93 were in conflict with the fixed principle under the DBP Access Agreement, the determination would prevail and the fixed principle would fall away.
12. Due to the question of timing referred to by Gummow J in *Momcilovic*, the inconsistency would only arise once the determination was made. However, it would still be inconsistency between a rule and a fixed principle under r 99(4). Mr Scerri's argument that the presence of the determination precludes the inconsistency is clearly untenable.

#### **A rule change likely to give rise to inconsistency should not be made**

13. The question which arises here is whether the AEMC should make a rule change which, in its operation, is likely to give rise to an inconsistency between the rules and an existing fixed principle.

14. The proposed rule changes would permit the AER and, in the case of the Dampier to Bunbury Natural Gas Pipeline, the Economic Regulator Authority of Western Australia, to make a determination that a particular service, which is negotiated outside of the regulatory framework and which is currently the subject of the Fixed Principles and so excluded from consideration for the purposes of the Rules, is a rebateable service. At the time that determination is made, there is a relevant inconsistency.
15. In advocating the proposed rule change the AER expressly seeks "more flexibility for the regulatory treatment of other pipeline services"<sup>1</sup> and says that the rule change will ensure that "where pipeline services are not subject to a reference tariff, these services are still capable of being regulated as rebateable services"<sup>2</sup>. The objective sought to be achieved by the rule change is therefore precisely directed to an outcome which would give rise to a relevant inconsistency.

Date: 11 July 2012



**Linda Evans**  
**CLAYTON UTZ**

---

<sup>1</sup> Letter AER to AEMC 5 August 2011 p.1

<sup>2</sup> ibid p.3