JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA

TITLE OF COURT : THE FULL COURT (WA)

CITATION : RE DR KEN MICHAEL AM; EX PARTE EPIC ENERGY (WA) NOMINEES PTY LTD & ANOR [2002] WASCA 231

CORAM : MALCOLM CJ
ANDERSON J
PARKER J

HEARD : 21-28 NOVEMBER 2001

DELIVERED : 23 AUGUST 2002

FILE NO/S : CIV 2166 of 2001

MATTER : An application for a writ of *certiorari*, a writ of prohibition and a writ of *mandamus* against Dr Ken Michael AM, the Independent Gas Pipelines Access Regulator in Western Australia

EX PARTE

EPIC ENERGY (WA) NOMINEES PTY LTD
(ACN 081 609 289)
First Applicant

EPIC ENERGY (WA) TRANSMISSION PTY LTD
(ACN 081 609 190)
Second Applicant

Catchwords:

Administrative law - *Certiorari*, prohibition, *mandamus*, declaratory relief - Third party access to natural gas pipeline - Assessment for approval by Regulator of proposed access arrangement - Whether Regulator misconceived duty and failed to perform statutory function - Whether Regulator misconstrued Access Code, failed to consider relevant matters, considered irrelevant matters, made findings unsupported by evidence - Declaratory relief granted

Administrative law - *Certiorari* - "Draft decision" - Detailed statutory stages for decision - Whether application premature - Whether rights sufficiently affected

Statutory interpretation - Tariff for use of gas pipeline by third parties - Owner purchased pipeline before Access Code applied to pipeline - Pipeline purchased from State agency - Purchase by public tender - Whether purchase price relevant to establishment of capital base for calculation of tariff - National Third Party Access Code, 1997, s 2.24(a), s 8.1, s 8.10 and s 8.11

Statutory interpretation - Regulator "must take" into account several factors including owner's "legitimate business interests and investment" in pipeline - Whether factors must be given weight as fundamental elements in decision whether to approve - National Third Party Access Code, 1997, s 2.24

Statutory Interpretation - Access Code stipulates factors to be taken into account by Regulator in assessing whether Access Arrangement satisfies principles in s 3.1 - s 3.20 - By s 3.4 compliance with principles in s8 required - Whether stipulated factors to be taken into account in assessing compliance with s 8 - Whether s 8 self-contained "Code" - National Third Party Access Code, 1997, s 2.24, s 3.4, s 8

Statutory Interpretation - Design of tariff for use of gas pipeline by third parties - Statutory objective that "efficient" costs be recovered - Whether imports notion of "economic efficiency"

Statutory objective of "not distorting investment decisions" in pipeline systems - Whether includes investments made before Access Code applied to a pipeline - National Third Party Access Code, 1997, s 8.1(a), s 8.1(d)

Legislation:

Gas Pipelines Access (Western Australia) Act 1998
National Third party Access Code for Natural Gas Pipeline Systems 1997

Result:

Declarations granted

Category: A

Representation:

Counsel:

First Applicant	:	Mr C L Zelestis QC & Mr G H Murphy & Mr J A Thompson
Second Applicant	:	Mr C L Zelestis QC & Mr G H Murphy & Mr J A Thompson
The Independent Gas Pipelines Access Regulator	:	Mr S J Gageler SC & Mr C G Colvin SC
AlintaGas Limited and AlintaGas Sales Pty Ltd	:	Mr J Gleeson SC & Mr A Willinge
CMS Gas Transmission of Australia	:	Mr A G Casteldine

Solicitors:

First Applicant	:	Mallesons Stephen Jaques
Second Applicant	:	Mallesons Stephen Jaques
The Independent Gas Pipelines Access Regulator	:	Corrs Chambers Westgarth
AlintaGas Limited and AlintaGas Sales Pty Ltd	:	Blake Dawson Waldron
CMS Gas Transmission of Australia	:	Minter Ellison

Case(s) referred to in judgment(s):

Ainsworth v Criminal Justice Commission (1992) 175 CLR 564
Australian Capital Television Pty Ltd v Minister for Transport and Communications & Ors (1989) 86 ALR 119
Australian Lighting and Hardware Pty Ltd v (Falkner) Brightlight Nominees Pty Ltd (1994) 1 VR 553
Bowes v Shand (1877) 2 App Cas 455
Burger King Corporation v Registrar of Trademarks (1973) 128 CLR 417
Clark v Ryan (1960) 103 CLR 486
Collector of Customs v Agfa-Gevaert Ltd (1996) 186 CLR 389
Collector of Customs v Pozzolanic Enterprises Pty Ltd (1993) 43 FCR 280

Craig v The State of South Australia (1995) 184 CLR 163
General Accident Fire and Life Assurance Corporation Ltd v Commissioner of Pay-Roll Tax (NSW) (1982) 42 ALR 365
Homestake Australia Ltd v Metana Minerals NL (1994) 11 WAR 435
Hot Holdings Pty Ltd v Creasy (1996) 185 CLR 149
K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd (1985) 157 CLR 309
Marine Power Australia Pty Ltd v Comptroller-General of Customs (1989) 89 ALR 561
Metropolitan Gas Co v Federated Gas Employees Industrial Union (1925) 35 CLR 449
Minister for Immigration and Multicultural Affairs v Yusuf (2001) 180 ALR 1
Pepsi 7-Up Bottlers Perth Pty Ltd v Federal Commissioner of Taxation (1995) 62 FCR 289
Queensland Medical Laboratory& Ors v Blewett & Ors (1988) 84 ALR 615
R v Australian Broadcasting Tribunal; Ex parte Hardiman (1980) 144 CLR 13
R v Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co Pty Ltd (1953) 88 CLR 100
R v Bonython (1984) 38 SASR 45
R v Hunt; Ex parte Sean Investments Pty Ltd (1979) 180 CLR 322
R v Perry (1990) 49 A Crim R 243
R v Toohey; Ex parte Meneling Station Pty Ltd (1982) 158 CLR 327
Rathborne v Abel (1964) 38 ALJR 293
Re Queensland Co-operative Milling Association Ltd
Royal Insurance Australia Ltd v Government Insurance Office of NSW (1994) 1 VR 123
Saraswati v The Queen (1991) 172 CLR 1
Singh v Minister for Immigration and Multicultural Affairs [2001] FCA 389
ULV Pty Ltd v Scott (1990) 19 NSWLR 190

Case(s) also cited:

Ainsworth v The Ombudsman (1988) 17 NSWLR 276
Allnut v Inglis (1810) 12 East 527
Arnotts Ltd v Trade Practices Commission (1990) 24 FCR 313
Attorney General (NSW) v Quin (1990) 170 CLR 1
Australian Fisheries Management Authority v P W Adams Pty Ltd (1995) 61 FCR 314
Bank of Toronto v Lambe (1887) 12 App Cas 575
Bannister Quest Pty Ltd v Australian Fisheries Management Authority (1977) 77 FCR 503

BTR Plc v Westinghouse Brake and Signal Company (Australia) Ltd (1992) 34 FCR 246
Clifton v Masini [1967] VR 718
Collector of Customs v Bell Basic Industries Ltd (1988) 83 ALR 251
Corporation of the City of Enfield v Development Assessment Commission (2000) 199 CLR 135
Creasy v Hot Holdings Pty Ltd [1999] WASC 69
D & R Henderson (Manufacturing) Pty Ltd v Collector of Customs (NSW) (1974) 48 ALJR 132
Ex parte MacKaness and Avery Pty Ltd (1943) 43 SR (NSW) 239
Ex parte Waldron [1986] QB 824
Gemsted Pty Ltd v Gosford City Council (1993) 78 LGERA 395
H A Bachrach Pty Ltd v Caboolture Shire Council (1992) 80 LGERA 230
Herbert Adams Pty Ltd v Federal Commissioner of Taxation (1932) 47 CLR 222
Hockey v Yelland (1984) 157 CLR 124
Holt v Cox (1994) 15 ACSR 313
Idoport Pty Ltd v National Australia Bank Ltd (2000) 50 NSWLR 640
Markell v Wollaston (1906) 4 CLR 141
Maunsell v Olins [1975] AC 373
National Competition Council v Hamersley Iron Pty Ltd (1999) 167 ALR 109
Northern Territory of Australia v GPAO (1999) 196 CLR 553
O'Toole v Charles David Pty Ltd (No 2) (1991) 171 CLR 232
P W Adams Pty Ltd v Australian Fisheries Management Authority (1995) 60 FCR 387
Parker & Ors v Anti-Corruption Commission, unreported; FCt SCt of WA; Library No 990162; 31 March 1999
Pollock v Wellington (1996) 15 WAR 1
Pownall v Conlan Management Pty Ltd (1995) 12 WAR 370
Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355
Public Service Association (SA) v Federated Clerks' Union of Australia (1991) 173 CLR 132
Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd (1989) 167 CLR 177
R v Bouch [1982] 3 All ER 918
R v Milk Board; Ex parte Tomkins [1944] VLR 187
R v War Pensions Entitlement Appeal Tribunal; Ex parte Bott (1933) 50 CLR 228
Rail Access Corporation v New South Wales Minerals Council Ltd (1998) 87 FCR 517
Re Castioni [1891] 1 QB 149
Re Duke Eastern Gas Pipeline Pty Ltd [2001] A CompT 2

Re Monger; Ex parte Dutch [2001] WASCA 220
Re National Market Access Code (1998) ATPR (Com) 50-268
Re New South Wales and the Australian Capital Territory Newsagent Authorisation (1998) ATPR (Com) 50-253
Re Refugee Tribunal & Anor; Ex parte Aala (2000) 176 ALR 219
Re The Medical Board of Western Australia; Ex parte P (2001) 24 WAR 127
Refrigerated Express Lines Pty Ltd (Australasia) v Australia Meat & Livestock Corporation (No 2) (1980) 29 ALR 333
Ricciardello v Caltex Oil (Australia) Pty Ltd [1991] ANZ ConvR 445
Telstra Corp Ltd v Seven Cable Television Pty Ltd (2000) 102 FCR 517
Trade Practices Commission v Ansett Transport Industries Operations Pty Ltd (1978) 20 ALR 31
TXU Electricity Ltd v Office of the Regulator General (2001) 3 VR 93
Yu Feng Pty Ltd v Maroochy Shire Council [2000] 1 Qd R 306

1 **MALCOLM CJ**: I have had the benefit of reading in draft the reasons to be published by Parker J. I am in agreement with his Honour's reasons and conclusions. There is nothing which I wish to add. I am prepared to hear further submissions on the precise terms of the declaratory relief required to give effect to his Honour's conclusions.

2 **ANDERSON J**: I have had the opportunity of reading in draft the reasons for judgment by Parker J. I agree with his Honour's reasons and with the proposed orders.

3 **PARKER J**: This is the return of an order *nisi* for writs of *certiorari*, prohibition and *mandamus.* The order *nisi* was granted by Templeman J on 28 August 2001.

4 The first and second applicants Epic Energy (WA) Nominees Pty Ltd and Epic Energy (WA) Transmission Pty Ltd are respectively the owner and operator of the Dampier to Bunbury Natural Gas Pipeline ("DBNGP"). This is a pipeline which is over 1,500 kilometres in length, with associated service delivery pipelines, and which connects the natural gas fields located off the northwest coast of the State with the cities of Perth and Bunbury and other areas of significant gas consumption and major commercial consumers of gas in the southwest of the State. It is the only pipeline available for this purpose.

5 In these reasons it will usually be convenient and adequate to refer to either or both applicants as "Epic" even though, strictly, a distinction between them and their interests might be apt and more accurate in the particular context.

6 Relevantly, by virtue of the *Gas Pipelines Access (Western Australia) Act 1998* ("the Act") the DBNGP is a pipeline that is a "Covered Pipeline" under the *National Third Party Access Code for Natural Gas Pipeline Systems 1997* (the "Code"). The Code was Schedule 2 to the Act when it was first enacted. The Code has since been amended in accordance with the procedure authorised by the Act. The argument and this decision proceeds on the basis of the Code as last amended on 9 November 2000. The Code is applied as a law of Western Australia by s 9 of the Act, it being part of the Gas Pipelines Access Law as provided by s 3(1) of the Act.

7 The applicants seek relief in respect of a draft decision dated 21 June 2001 of Dr K Michael AM, the Independent Gas Pipelines Access Regulator in Western Australia (the "Regulator"). The draft decision was

in respect of the submission to the Regulator for approval, by the applicants who are "Service Providers" for the purposes of the Code, of a proposed Access Arrangement by which third parties would be permitted rights of access to the use of the DBNGP. A number of third parties, being parties privy to gas transmission contracts with the applicants, were among those who had lodged submissions with the Regulator in respect of the proposed access arrangement.

8 Two of these, AlintaGas Limited and AlintaGas Sales Pty Ltd (together "Alinta"), were granted leave to appear on the hearing in this Court in opposition to the application. Another, CMS Gas Transmission of Australia, appeared, but at its request was excused from further participation in the argument. The Regulator also appeared but, having regard to his statutory role and the principle in ***R v Australian Broadcasting Tribunal; Ex parte Hardiman*** (1980) 144 CLR 13 at 35 – 36, his appearance by counsel was limited to adducing evidence and making submissions as to the proper construction of the Code and the procedures of the Regulator.

9 By the order *nisi*, *certiorari* is sought to quash the draft decision of the Regulator together with prohibition to prevent the Regulator proceeding further with the draft decision. *Mandamus* is sought to direct the Regulator to consider again Epic's proposed Access Arrangement for the DBNGP according to law. Further, or alternatively, declarations are sought. The same extensive and detailed grounds are advanced in respect of each form of relief sought.

10 It is not necessary to set out the grounds in full. The following incomplete summary of the nature of the issues raised will serve as an indication which is adequate for present purposes. Epic contends, reflecting the grounds in the order *nisi*, *inter alia* that the Regulator:-

- misconstrued the Code in many identified respects, in particular with respect to s 2.24 and its intended application within the Code and the weight which should be given to the factors it identifies, and also, with respect to s 8, especially s 8.1, s 8.10 and s 8.11;
- erred in law by failing to take into account many particularised matters which were relevant, and by failing to give to a number of them effect as fundamental factors as the Code required; and

- further erred in law by taking into account a number of irrelevant considerations and by reaching conclusions which were unsupported by any evidence;

with the consequence that the Regulator misconceived his duty and failed to perform his statutory function.

11 In his draft decision of 21 June 2001, with particular reference to the determination of the reference tariffs which would govern what might be charged by Epic for the "service" of transmitting natural gas for third parties utilising the DBNGP, the Regulator proposed to adopt an initial Capital Base for the DBNGP in the order of $1.234 billion. The first applicant had, however, purchased the DBNGP at a price of some $2.407 billion in March 1998. Before that the DBNGP had been publicly owned by the Gas Corporation of the State pursuant to the *Gas Corporation Act 1994*. Its sale was by competitive public tender which was conducted in accordance with the *Dampier to Bunbury Pipeline Act 1997*, an Act which dealt specifically with the process for the sale of the DBNGP. The proceeds of the sale were for the benefit of the State, being shared between the Gas Corporation, the Consolidated Fund and a trust account established pursuant to the 1997 Act, in accordance with ministerial direction, as contemplated by the 1997 Act; see s 8 and s 45.

12 If implemented in the final decision of the Regulator, the adoption of an initial Capital Base in the order of $1.234 billion in the calculation of the reference tariffs would seriously adversely affect the financial return Epic would receive from third parties in respect of their access to the use of the pipeline. The difference between the Capital Base figure proposed by the Regulator, and the purchase price paid of $2.407 billion, in the determination of the charges which Epic might make for the use of the DBNGP is so significant, it is submitted, as to threaten the viability of Epic's operations. Hence the significance of this application.

13 Epic contends in essence that in adopting an initial Capital Base in the order of $1.234 billion, the Regulator has misconstrued the Code. The Regulator does not agree and advances a different view of the true construction of the relevant provisions. Alinta takes yet a third position about the construction of the Code, although one which to a substantial degree accords with the view of the Regulator.

The Act

14 By the preamble to the Act it is recited that:

> "The Council of Australian Governments agreed, in February 1994, to general principles of competition policy reform to enable third parties, in particular circumstances, to gain access to essential facilities.
>
> The Council of Australian Governments, as part of that commitment to reform, agreed to more specific proposals for the development of free and fair trade in natural gas.
>
> The Commonwealth, the States of New South Wales, Victoria, Queensland, South Australia, Western Australia and Tasmania, the Northern Territory and the Australian Capital Territory agreed in November 1997 to the enactment of legislation in the Commonwealth and those States and Territories so that a uniform national framework applies for third party access to all gas pipelines that –
>
> (a) facilitates the development and operation of a national market for natural gas; and
>
> (b) prevents abuse of monopoly power; and
>
> (c) promotes a competitive market for natural gas in which customers may choose suppliers, including producers, retailers and traders; and
>
> (d) provides rights of 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 wishing to use the services of those pipelines; and
>
> (e) provides for resolution of disputes."

The uniform national framework to which the Council of Australian Governments ("COAG") agreed in November 1997, as recited in the preamble, is the Code. It was pursuant to the November 1997 agreement by all Australian Governments that the Act was enacted in this State. Corresponding enactments have been enacted by all the other Australian Parliaments, so that it is now the case that the Commonwealth, the States and the Territories are all scheme participants within the meaning of s 3 of Schedule 1 of the Act. By this means there is substantially corresponding legislation in force throughout Australia, its coastal waters and to some degree extra-territorially; see s 6 and s 7 of the Act. The legislation including the Code binds the Crown in its various Australian capacities so far as the legislative capacity of each enacting Parliament permits; see the Act s 5.

15 The Code itself describes its objective as the establishment of a framework for third party access to gas pipelines that meets criteria which are expressed in identical terms to subparagraphs (a) – (e) in the third paragraph of the preamble quoted earlier. By s 1 the Code is limited to pipelines used for the haulage of natural gas. Pursuant to s 1 there are listed in Schedule A to the Code those natural gas pipelines in Australia that were to be a "Covered Pipeline" from the date of the commencement of the Code. Section 1 also provided that other pipelines might become "Covered", by decision of the relevant Minister, after application and after a recommendation to the relevant Minister is made by the National Competition Council established pursuant to s 29A of the *Trade Practices Act 1974 (Cth)*.

16 The first of the Acts to implement the Code was the *Gas Pipelines Access (South Australia) Act 1997* which received Royal Assent on 18 December 1997. *The South Australian Act* did not come into operation, however, until the *Gas Pipelines Access (Commonwealth) Act 1998 (Cth)* received Assent, which was on 30 July 1998. *The (Western Australian) Act* completed its parliamentary passage on 23 December 1998, and received Royal Assent on 15 January 1999. Its operation commenced on 9 February 1999 pursuant to Proclamation.

17 An issue in this application is whether terms or phrases used in the Code were intended by the legislature to be interpreted and applied in special technical senses used in the field of economics and, if so, what was the accepted meaning of those words or phrases. For this purpose it is usual to have regard to usage at the date of enactment of legislation, ie 15 January 1999 for the (WA) Act. In this particular case, however, as the Australian legislatures were enacting essentially uniform legislation pursuant to intergovernmental agreement, the more relevant date would appear to be that on which the first of the implementing Acts was enacted. For our purposes this was the *South Australian Act* so that the relevant date is 18 December 1997. For this reason I will proceed on the basis that for this purpose regard should be had to usage as at 18 December 1997. I would note, however, that the evidence relevant to this issue, which was led before the Court, and which I will consider later in these reasons, does not establish that the position was materially different as at 15 January 1999.

The Regulator

18 The Regulator holds office pursuant to s 27 of the Act. In accordance with s 36(1)(a) the Regulator has the functions which are conferred on a "local Regulator" under the Gas Pipelines Access (Western Australian) Law, which comprises Schedule 1 to the Act and the Code. The Regulator is the "relevant Regulator" for the purposes of the Code in respect of the DBNGP as it is situated in Western Australia. The Regulator is to approve "Access Arrangements" for the DBNGP for the purposes of the Code. An Access Arrangement may be described as a statement of the policies and conditions which apply to third party access to a Covered Pipeline. The Code requires that there be an Access Arrangement for each Covered Pipeline. That Access Arrangement must be approved by the relevant Regulator. An Access Arrangement is required by s 3 of the Code to include a reference tariff policy which describes the principles that are to be used to determine a reference tariff (s 3.5), and also a reference tariff for each "service" that is likely to be sought by a significant part of the market for which the pipeline caters (s 3.3). In this context a reference tariff is in effect the charge for a reference service.

19 It is the scheme of the Code, however, that a reference tariff, although approved by the Regulator, is not necessarily binding between the service provider and a prospective user of the service. They are free to negotiate and reach agreement on the terms governing the access of that prospective user to the pipeline. If they are unable to agree on one or more aspects of the terms of access the disputed matters may be referred to an arbitrator, relevantly the Western Australian Gas Disputes Arbitrator, an office created by s 62 of the Act, in accordance with s 6 of the Code. By s 6.18 the Arbitrator must not make a decision, however, that requires a service provider to provide, or the prospective user to accept, a reference service at a tariff other than the reference tariff provided by the Access Arrangement which the Regulator has approved. Further, the arbitrator must not make a decision which is inconsistent with the Access Arrangement; see also s 6.13. In this way, subject only to contrary agreement, a reference tariff in an Access Arrangement is ultimately binding on the service provider and a prospective user.

20 In view of some issues raised by Epic, it is to be noted that by s 37 of the Act the Regulator is independent of direction or control by the Crown in the performance of the functions of the Regulator.

Interim Access Arrangements

21 At the time of the sale of the DBNGP to Epic on 25 March 1998, pursuant to the *Dampier to Bunbury Pipeline Act 1997 (WA)*, there was implemented pursuant to that Act an interim third party access regime for the DBNGP. This was substantially the same as had applied to the DBNGP pursuant to the *Gas Corporation Act 1994. The Gas Transmission Regulations 1994* and *The Gas Referee Regulations 1995* provided much of the detail of that regime. Access contracts which had already been entered into under that regime were preserved, the interests of the State being transferred to Epic on the sale. Pursuant to s 95 of the Act, those existing Access Arrangements were taken to be an approved Access Arrangement under the Code until 1 January 2000, but Epic was required to submit to the Regulator a proposed Access Arrangement under the Code and applicable Access Arrangement information; see s 95(3). On 15 December 1999 Epic formally submitted to the Regulator its proposed Access Arrangement and applicable Access Arrangement information. By s 7 and s 8 of Schedule 3 to the Act the existing Access Arrangement continues to operate, beyond 1 January 2000, as a transitional access scheme until Epic's proposed Access Arrangement under the Code is approved. That is the present position. It was pursuant to this history that the draft decision of the Regulator, which is the subject of this application, came to be given on 21 June 2001.

Draft decision – prerogative relief

22 The procedure by which a proposed Access Arrangement must be submitted to the Regulator and may be approved by the Regulator is set out in s 2 of the Code. Epic, as the service provider, must first submit a proposed Access Arrangement to the Regulator pursuant to s 2.2. This must be accompanied with Access Arrangement information which is to enable users and prospective users to understand the derivation of the elements of the proposed Access Arrangement and to form an opinion as to its compliance with the Code: see s 2.6, s 2.7 and Attachment A. The Regulator must publish notice of the proposed Access Arrangement and request submissions, as well as informing all interested parties known to the Regulator; s 2.10.

23 The Regulator must then consider any submissions received, s 2.12, and after considering those submissions the Regulator must issue a "draft decision" which either proposes to approve the Access Arrangement or proposes not to approve the Access Arrangement. In the latter case, the Regulator is required in the draft decision to state the amendments (or the

nature of the amendments) which "would have to be made to the Access Arrangement in order for the … Regulator to approve it"; s 2.13.

24 By s 2.14 the Regulator is required to provide a copy of the draft decision to the service provider, those who made submissions, and any person who requests a copy, and request further submissions from those to whom the draft decision is provided by a date specified by the Regulator. The Regulator must consider any submissions received by that date.

25 Under s 2.15A the service provider may then resubmit a revision of the Access Arrangement incorporating or substantially incorporating the amendments specified by the Regulator in the draft decision, or otherwise address the matters the Regulator had identified in the draft decision as being the reasons for requiring the amendments specified by the Regulator. The Code then provides by s 2.16 that the Regulator must next issue a "final decision" which either approves the Access Arrangement, or a revised Access Arrangement submitted under s 2.15A, or does not approve the Access Arrangement. If the Arrangement is not approved, the Regulator must state in the final decision the amendments that would have to be made to the Access Arrangement in order for the Regulator to approve it, and the date by which a (further) revised Access Arrangement must be resubmitted. That final decision is required to be provided to the service provider and persons who had made submissions. By s 2.16A, however, the Regulator may only approve a revised Access Arrangement, which has been submitted pursuant to s 2.15A, if the Regulator is satisfied that the revision incorporates or substantially incorporates the amendments specified by the Regulator in the draft decision, or otherwise addresses to the Regulator's satisfaction the matters identified by the Regulator in the draft decision as being the reasons for requiring the specified amendments.

26 If the "final" decision of the Regulator does not approve the Access Arrangement the service provider may submit yet another revised Access Arrangement by the date specified by the Regulator in the final decision. In that event, the Regulator must issue a "further final decision". If the Regulator is satisfied that that the revised Access Arrangement incorporates the amendments specified by the Regulator in the final decision, or otherwise addresses to the Regulator's satisfaction the matters identified by the Regulator in the final decision, the Regulator may approve the revised Access Arrangement in the further final decision. In any other case the Regulator must issue a further final decision that does not approve the revised Access Arrangement.

27 By s 2.20 of the Code, in a case where the service provider does not submit a revised Access Arrangement following the final decision of the Regulator, or where the Regulator does not approve the revised Access Arrangement, the Regulator is required to draft and approve its own Access Arrangement instead of the Access Arrangement proposed by the service provider. Where the Regulator drafts and approves his own Access Arrangement there is a right to have the decision of the Regulator reviewed by the Western Australian Gas Review Board established pursuant to s 50 of the Act. Subject to that, the Regulator's decision to approve an Access Arrangement has effect on the date specified by the Regulator.

28 Epic contends that in the draft decision the Regulator, in particular, fell into jurisdictional error by misconstruing the Act and the Code with the result that he misconceived the nature of the function he was performing and was led to identify wrong issues and ask wrong questions which affected the Regulator's decision: ***Craig v The State of South Australia*** (1995) 184 CLR 163 at 179; ***Minister for Immigration and Multicultural Affairs v Yusuf*** (2001) 180 ALR 1 at [82]. With particular regard to s 2.24 of the Code, it is submitted that where the Regulator is required in exercising a statutory power to take into account or to give effect to a specified matter, he is required to give weight to that matter as a fundamental element in making the determination; ***R v Hunt; Ex parte Sean Investments Pty Ltd*** (1979) 180 CLR 322, ***R v Toohey; Ex parte Meneling Station Pty Ltd*** (1982) 158 CLR 327, ***Queensland Medical Laboratory& Ors v Blewett & Ors*** (1988) 84 ALR 615. A failure to do so, it is submitted, arising from a misconstruction of the statute, constitutes jurisdictional error. While there is a live issue as to the true effect of s 2.24, I do not understand there to be serious dispute between the parties as to these principles.

29 It is clear that the ultimate decision of the Regulator in this case will directly affect the rights of Epic in the relevant sense. There is a difference between the parties, however, whether the application is premature, even if there is substance in Epic's contentions. It is argued against Epic that the Regulator's decision is but a draft decision.

30 It is important, however, not to be misled by the statutory term "draft". While the relevant provisions of the Code contemplate a draft, a final and even a further final decision, as well as an Access Arrangement drafted by the Regulator himself, these are all steps in a carefully regulated decision making process. In a case such as the present, where the Regulator, in a draft decision which proposes not to approve the

Access Arrangement, identifies amendments which are required to the Access Arrangement in order for the Regulator to approve it, those amendments appear to have continuing force to the end of the process, unless the Regulator is later satisfied that those amendments have been incorporated by amendment, or that the reasons for requiring the amendment have been otherwise addressed. Obviously, in the present case, Epic may put further submissions and submit further material to the Regulator with a view to trying to persuade the Regulator that the matters identified by the Regulator as requiring amendment have been satisfactorily addressed. Nevertheless, it is clear that unless Epic is successful in persuading the Regulator in this respect, the expectation must be, given the Code provisions, that the Access Arrangement will not eventually be approved.

31 In the present case, where the essential issue is a fundamental difference between the view of the Regulator and Epic as to the true interpretation of material provisions of the Code, the likelihood is obviously strong that the position of the Regulator revealed in the draft decision may well prevail to the end of the decision making process. Unless the issues of statutory interpretation can be resolved, the processes of further submission and further decision seem unlikely to offer the prospect of any material change of position by the Regulator.

32 Given the very particular statutory scheme for decision making provided by s 2 of the Code, the draft decision of the Regulator the subject of this application appears to have a sufficient connection with the ultimate decision so as to be seen as affecting the rights of Epic, in the sense considered in ***Hot Holdings Pty Ltd v Creasy*** (1996) 185 CLR 149 at 159 – 165. Hence, although the considerations may be somewhat finally balanced in the particular circumstances presented by this case, there would be sufficient justification, even at this stage, for a grant of *certiorari* if Epic's primary contentions on the merits are made good.

33 The position with respect to prohibition is clearer. For the reasons indicated, it can be reasonably anticipated, or there is at least a real likelihood, that the Regulator will act in accordance with his views indicated in the draft decision in reaching his ultimate decision. These are said to involve jurisdictional error; see ***R v Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co Pty Ltd*** (1953) 88 CLR 100 at 119. If Epic's contentions on the merits are made good prohibition is available.

34 As I understand the submissions of the parties no issue is raised against the availability of *mandamus*, at least if *certiorari* is granted.

35 Nevertheless, even if some or all of the relief sought may be technically available, there may be reason at this stage of the process to hold back from granting prerogative relief as a matter of discretion. The Regulator is a public official seeking to perform a statutory function. By his counsel he readily undertakes to accept and act in accordance with any decision as to the issues in this case. This may be a sufficient remedy should material error be found in the draft decision. The further stages of the statutory decision making process may well provide an adequate opportunity to again seek prerogative relief should this expectation not be realised.

36 Further, declaratory relief is sought as an alternative remedy. It may be granted in these proceedings: ***Ainsworth v Criminal Justice Commission*** (1992) 175 CLR 564 at 581, 582. I do not understand the Regulator or Alinta to contend that declaratory relief is not available.

37 The question of relief will be considered further, having regard to these principles, in light of the precise nature of the issues to be dealt with later in these reasons and the effect of any relevant error identified.

The Code provisions

38 Earlier in these reasons I have indicated the general nature and purpose of the Act which was to give effect to the Code which established a national access regime for selected natural gas pipeline systems. Earlier in these reasons I have set out the preamble to the Act. Apart from the preamble there are no particular provisions of the Act itself which are critical to the issues in this case. The main argument centres on the Code itself.

39 I have already outlined sufficient of the provisions of the Code which deal with the procedure by which a service provider must submit a proposed Access Arrangement to the Regulator for approval. The following provisions of the Code deal with the process, relevant to the present case, by which the Regulator reaches a decision whether or not to approve a proposed Access Arrangement.

40 Section 2.24 of the Code is a critical provision for the purposes of this application. It provides:

> "2.24 The Relevant Regulator may approve a proposed Access Arrangement only if it is satisfied the proposed Access Arrangement contains the elements and satisfies the principles set out in sections 3.1 to 3.20. The Relevant Regulator must not refuse to approve a proposed Access Arrangement solely for the reason that the proposed Access Arrangement does not address a matter that sections 3.1 to 3.20 do not require an Access Arrangement to address. In assessing a proposed Access Arrangement, the Relevant Regulator must take the following into account:
>
> (a) the Service Provider's legitimate business interests and investment in the Covered Pipeline;
>
> (b) firm and binding contractual obligations of the Service Provider or other persons (or both) already using the Covered Pipeline;
>
> (c) the operational and technical requirements necessary for the safe and reliable operation of the Covered Pipeline;
>
> (d) the economically efficient operation of the Covered Pipeline;
>
> (e) the public interest, including the public interest in having competition in markets (whether or not in Australia);
>
> (f) the interests of Users and Prospective Users;
>
> (g) any other matters that the Relevant Regulator considers are relevant."

Section 2.25 also provides that the Regulator must not approve an Access Arrangement, any provision of which would "deprive any person of a contractual right in existence prior to the date the proposed Access Arrangement was submitted …".

41 Section 3 of the Code deals with the content of an Access Arrangement. There are 36 subsections. Those identified in s 2.24 are the first 20 of these subsections. A reference to the headings within s 3 in respect of these first 20 subsections is enough to provide a general understanding of their subject matter. The headings are – Services to be

offered (s 3.1 – s 3.2); Reference tariffs and reference tariff policy (s 3.3 – s 3.5); Terms and conditions (s 3.6); Capacity management policy (s 3.7 – s 3.8); Trading policy (s 3.9 – s 3.11); Queuing policy (s 3.12 – s 3.15); Extensions/expansions policy (s 3.16); and Review and expiry of the Access Arrangement (s 3.17 – 3.20). It is clear from the Code and the nature of an Access Arrangement that an Access Arrangement may deal with a number of matters beside those that are dealt with in s 3.1 to s 3.20. Whatever else an Access Arrangement may provide, however, it is clear from the first sentence that it must contain at least the elements dealt with in s 3.1 to s 3.20 and satisfy the principles that are set out in those subsections.

42 It is with s 3.3 to s 3.5 that this application is next directly concerned. These deal with Reference Tariffs and Reference Tariff Policy and provide:

> "3.3 An Access Arrangement must include a Reference Tariff for:
>
> (a) at least one Service that is likely to be sought by a significant part of the market; and
>
> (b) each Service that is likely to be sought by a significant part of the market and for which the Relevant Regulator considers a Reference Tariff should be included.
>
> 3.4 Unless a Reference Tariff has been determined through a competitive tender process as outlined in sections 3.21 to 3.36, an Access Arrangement and any Reference Tariff included in an Access Arrangement must, in the Relevant Regulator's opinion, comply with the Reference Tariff Principles described in section 8.
>
> 3.5 An Access Arrangement must also include a policy describing the principles that are to be used to determine a Reference Tariff (a *Reference Tariff Policy*). A Reference Tariff Policy must, in the Relevant Regulator's opinion, comply with the Reference Tariff Principles described in section 8."

43 With respect to s 3.3 – s 3.5 it may be said that, in this case, the essential service is the transportation of gas in the DBNGP. As gas is transported by the pipeline to a variety of destinations there is scope for

transportation to one location to be designated as a different service from transportation of gas to another destination. In this case there has not been a competitive tender process for the determination of a reference tariff, so that part of s 3.4 may be put aside. What is critical to the submissions of the parties is the requirement in s 3.4 that an Access Arrangement and any reference tariff included in an Access Arrangement must, in the Regulator's opinion, "comply with the Reference Tariff Principles described in section 8". Section 3.5 contains a similar provision with respect to a reference tariff policy.

44 Section 8 of the Code is headed "Reference Tariff Principles. The most material provisions are as follows:

> "***General Principles***
>
> 8.1 A Reference Tariff and Reference Tariff Policy should be designed with a view to achieving the following objectives:
>
> (a) providing the Service Provider with the opportunity to earn a stream of revenue that recovers the efficient costs of delivering the Reference Service over the expected life of the assets used in delivering that Service;
>
> (b) replicating the outcome of a competitive market;
>
> (c) ensuring the safe and reliable operation of the Pipeline;
>
> (d) not distorting investment decisions in Pipeline transportation systems or in upstream and downstream industries;
>
> (e) efficiency in the level and structure of the Reference Tariff; and
>
> (f) providing an incentive to the Service Provider to reduce costs and to develop the market for Reference and other Services.
>
> To the extent that any of these objectives conflict in their application to a particular Reference Tariff determination, the Relevant Regulator may determine the manner in

which they can best be reconciled or which of them should prevail.

8.2 The factors about which the Relevant Regulator must be satisfied in determining to approve a Reference Tariff and Reference Tariff Policy are that:

(a) the revenue to be generated from the sales (or forecast sales) of all Services over the Access Arrangement Period (the *Total Revenue*) should be established consistently with the principles and according to one of the methodologies contained in this section 8;

(b) to the extent that the Covered Pipeline is used to provide a number of Services, that portion of Total Revenue that a Reference Tariff is designed to recover (which may be based upon forecasts) is calculated consistently with the principles contained in this section 8;

(c) a Reference Tariff (which may be based upon forecasts) is designed so that the portion of Total Revenue to be recovered from a Reference Service (referred to in paragraph (b)) is recovered from the Users of that Reference Service consistently with the principles contained in this section 8;

(d) Incentive Mechanisms are incorporated into the Reference Tariff Policy wherever the Relevant Regulator considers appropriate and such Incentive Mechanisms are consistent with the principles contained in this section 8; and

(e) any forecasts required in setting the Reference Tariff represent best estimates arrived at on a reasonable basis.

Form of Regulation

8.3 Subject to these requirements and to the Relevant Regulator being satisfied that it is consistent with the objectives contained in section 8.1, the manner in which a

Reference Tariff may vary within an Access Arrangement Period through implementation of the Reference Tariff Policy is within the discretion of the Service Provider. For example, a Reference Tariff may be designed on the basis of:

(a) a 'price path' approach, whereby a series of Reference Tariffs are determined in advance for the Access Arrangement Period to follow a path that is forecast to deliver a revenue stream calculated consistently with the principles in this section 8, but is not adjusted to account for subsequent events until the commencement of the next Access Arrangement Period;

(b) a 'cost of service' approach, whereby the Tariff is set on the basis of the anticipated costs of providing the Reference Service and is adjusted continuously in light of actual outcomes (such as sales volumes and actual costs) to ensure that the Tariff recovers the actual costs of providing the Service; or

(c) variations or combinations of these approaches.

Total Revenue

8.4 The Total Revenue (a portion of which will be recovered from sales of Reference Services) should be calculated according to one of the following methodologies:

Cost of Service: The Total Revenue is equal to the cost of providing all Services (some of which may be the forecast of such costs), and with this cost to be calculated on the basis of:

(a) a return (*Rate of Return*) on the value of the capital assets that form the Covered Pipeline (*Capital Base*);

(b) depreciation of the Capital Base (*Depreciation*); and

(c) the operating, maintenance and other non-capital costs incurred in providing all Services provided by the Covered Pipeline (*Non-Capital Costs*).

IRR: The Total Revenue will provide a forecast Internal Rate of Return (IRR) for the Covered Pipeline that is consistent with the principles in sections 8.30 and 8.31. The IRR should be calculated on the basis of a forecast of all costs to be incurred in providing such Services (including capital costs) during the Access Arrangement period.

The initial value of the Covered Pipeline in the IRR calculation is to be given by the Capital Base at the commencement of the Access Arrangement Period and the assumed residual value of the Covered Pipeline at the end of the Access Arrangement Period (*Residual Value*) should be calculated consistently with the principles in this section 8.

NPV: The Total Revenue will provide a forecast Net Present Value (NPV) for the Covered Pipeline equal to zero. The NPV should be calculated on the basis of a forecast of all costs to be incurred in providing such Services (including capital costs) during the Access Arrangement Period, and using a discount rate that would provide the Service Provider with a return consistent with the principles in sections 8.30 and 8.31.

The initial value of the Covered Principle in the NPV calculation is to be given by the Capital Base at the commencement of the Access Arrangement Period and the assumed Residual Value at the end of the Access Arrangement Period should be calculated consistently with the principles in this section 8.

The methodology used to calculate the Cost of Service, an IRR or NPV should be in accordance with generally accepted industry practice."

"8.6 In view of the manner in which the Rate of Return, Capital Base, Depreciation Schedule and Non Capital Costs may be determined (in each case involving various discretions), it is possible that a range of values may be attributed to the Total Revenue described in section 8.4. In order to determine an appropriate value within this range the Relevant Regulator may have regard to any financial and operational performance indicators it considers relevant in order to determine the level of costs within the range of feasible outcomes under section 8.4 that is most consistent with the objectives contained in section 8.1."

"***Principles for Establishing the Capital Base***

8.8 Principles for establishing the Capital Base for the Covered Pipeline when a Reference Tariff is first proposed for a Reference Service (ie, for the first Access Arrangement Period) are set out in sections 8.10 to 8.14."

"***Initial Capital base – Existing Pipelines***

8.10 When a Reference Tariff is first proposed for a Reference Service provided by a Covered Pipeline that was in existence at the commencement of the Code, the following factors should be considered in establishing the initial Capital Base for that Pipeline:

(a) the value that would result from taking the actual capital cost of the Covered Pipeline and subtracting the accumulated depreciation for those assets charged to Users (or thought to have been charged to Users) prior to the commencement of the Code;

(b) the value that would result from applying the "depreciated optimised replacement cost" methodology in valuing the Covered Pipeline;

(c) the value that would result from applying other well recognised asset valuation methodologies in valuing the Covered Pipeline;

(d) the advantages and disadvantages of each valuation methodology applied under paragraphs (a), (b) and (c);

(e) international best practice of Pipelines in comparable situations and the impact on the international competitiveness of energy consuming industries;

(f) the basis on which Tariffs have been (or appear to have been) set in the past, the economic depreciation of the Covered Pipeline, and the historical returns to the Service Provider from the Covered Pipeline;

(g) the reasonable expectations of persons under the regulatory regime that applied to the Pipeline prior to the commencement of the Code;

(h) the impact on the economically efficient utilisation of gas resources;

(i) the comparability with the cost structure of new Pipelines that may compete with the Pipeline in question (for example, a Pipeline that may by-pass some or all of the Pipeline in question);

(j) the price paid for any asset recently purchased by the Service Provider and the circumstances of that purchase; and

(k) any other factors the Relevant Regulator considers relevant.

8.11 The initial Capital Base for Covered Pipelines that were in existence at the commencement of the Code normally should not fall outside the range of values determined under paragraphs (a) and (b) of section 8.10.

Initial Capital Base – New Pipelines

8.12 When a Reference Tariff is first proposed for a Reference Service provided by a Covered Pipeline that has come into existence after the commencement of the Code, the initial Capital Base for the Covered Pipeline is, subject to section 8.13, the actual capital cost of those assets at the time they first enter service. A new Pipeline does not need to pass the tests described in section 8.16."

45 Section 8 of the Code contains altogether 49 subsections. In addition to the subsections quoted above provisions are made under the following headings which provide a sufficient indication of their subject matter – Initial Capital Base – After the Expiry of an Access Arrangement, New Facilities Investment, Forecast Capital Expenditure, Capital Contributions, Surcharges, Capital Redundancy, Rate of Return, Depreciation Schedule – Cost of Service, Application of Depreciation Principles to the IRR/NPV Methodology, Non-Capital Costs, Allocation of Revenue (Costs) between the Services, Allocation of Revenue (Costs) between Users, Prudent Discounts, Use of Incentive Mechanisms, and Certain Reference Tariff Principles Not Subject to Periodic Review. By s 8.49 it is provided that the Regulator may determine its own policies for assessing whether a reference tariff meets the requirements of this section 8.

46 In the present case Epic chose to approach the matter of Total Revenue in its proposed Access Arrangement by using the Cost of Service methodology, which is the first of the three methodologies dealt with in s 8.4. In accordance with that methodology, as provided by s 8.4, the Total Revenue was to be calculated on the basis of a return "on the value of the capital assets that formed the Covered Pipeline (Capital Base)", that Capital Base being depreciated, and by allowing for operating, maintenance and other non-capital costs. It is the value of the capital assets that formed the DBNGP, ie the Capital Base, that is the point of dispute on which this application focuses.

47 By s 8.8 the principles for establishing the Capital Base when, as in this case, a reference tariff is first proposed for a reference service, are set out in s 8.10 to 8.14. Of these, s 8.10 and s 8.11 provide the principles for establishing the initial Capital Base for a pipeline that was in existence at the commencement of the Code, which is the case for the DBNGP. It was constructed in 1984 by instrumentalities of the State. It should be noted, however, that by s 8.12, in the case of a new pipeline that is constructed after the Code comes into existence the Capital Base is "the actual capital cost" at the time the pipeline first enters service.

48 The Capital Base as so determined, together with the Rate of Return, Depreciation and Non-Capital Costs, leads to a determination of Total Revenue. Section 8.6 has the effect of ensuring that one single figure or value is arrived at for the Total Revenue.

49 Three further matters are to be noted. "Asset" is a defined term. The definition is extensive and need not be set out as all parties accept that it

clearly extends to cover the DBNGP pipeline as purchased and now owned by the first applicant and operated by the second applicant. Secondly, by s 10.8 of the Code "Total Revenue" has the meaning given in s 8.2. Essentially, as provided by s 8.2(a), the Total Revenue is the revenue to be generated from sales (or forecast sales) of all services over the Access Arrangement period. Thirdly, s 8.4 provides that the Capital Base, as calculated in the Cost of Service methodology, is also expressly utilised in each of the other two methodologies. As a consequence no direct assistance is to be gained for present purposes from a consideration of those other methodologies.

Code Section 2.24 – "Must take into Account"

50 It is in the context of the provisions set out above that the issues in this application arise. It is convenient, at the outset, to deal with the construction of the third sentence of s 2.24. This provides that in assessing a proposed Access Arrangement the Regulator "must take the following into account". What follows in s 2.24 are the factors identified in par (a) to par (g).

51 Epic submits that the third sentence of s 2.24 requires that the Regulator take into account and give them weight as fundamental considerations each of the factors in par (a) to par (g). Against this it is submitted that all that is required is for the Regulator merely to consider those factors.

52 The submissions of the parties in this regard proceeded by analogy with legislative requirements such as "must have regard to" or "shall have regard to". The researches of counsel had not identified any decision in which the precise phrase used in s 2.24 had been the subject of judicial consideration. In ***R v Hunt; Ex parte Sean Investments Pty Ltd*** (1979) 180 CLR 322 the question arose in the context of a statutory requirement that a departmental head "have regard to costs necessarily incurred" when determining the scale of fees. At 329 Mason J (Gibbs J concurring), said:

> "When sub-s(7) directs the Permanent Head to 'have regard to' the costs, it requires him to take those costs into account and to give weight to them as a fundamental element in making his determination. There are two reasons for saying that the costs are a fundamental element in the making of the determination. First, they are the only matter explicitly mentioned as a matter to be taken into account. Secondly, the scheme of the provisions is that, once the premises of the proprietor are

> approved as a nursing home, he is bound by the conditions of approval not to exceed the scale of fees fixed by the Permanent Head …. In the very nature of things, the costs necessarily incurred by the proprietor in providing nursing home care in the nursing home are a fundamental matter for consideration."

53 In the ***R v Toohey & Anor; Ex parte Meneling Station Proprietary Limited & Ors*** (*supra*) the issue arose in the context of s 50 of the *Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)* which, in subsection (3), required that the Commissioner in making a report in connection with a traditional land claim "shall have regard to the strength or otherwise of the traditional attachment by the claimants to the land claimed, and shall comment on" each of a number of matters. At 333 Gibbs CJ observed:

> " … the section draws a clear distinction between those matters to which the Commissioner 'shall have regard' and those upon which he 'shall comment'. When the section directs the Commissioner to 'have regard to' the strength or otherwise of the traditional attachment by the claimants to the land claimed … it requires him to take those matters into account and to give weight to them as a fundamental element in making his recommendation. (His Honour referred to *R v Hunt*). When the section directs him to comment on the matters mentioned in pars (a) to (d) of sub-s(3), it requires him to remark upon those matters and to express his views upon them. The change in language is so significant that notwithstanding the difficulties of the section I find it impossible to reach any conclusion other than that a significant change of meaning is intended, and that the matters which form the subject of the comment are not matters to which the Commissioner is bound to have regard in making his recommendation."

54 However, as Sackville J observed in ***Singh v Minister for Immigration and Multicultural Affairs*** [2001] FCA 389 at [54] the expression "have regard to" is capable of different meanings, depending on its context, and

> " … can simply mean to give consideration to something (Shorter Oxford English Dictionary). In this sense a direction to a decision-maker to have regard to certain factors may require him or her merely to consider them, rather than treat them as fundamental elements in the decision-making process."

In that case, the learned Judge was persuaded that the requirement in s 54(1) of the *Migration Act 1958 (Cth)* that the Minister, in determining a visa application, must have regard to all the information in the application, did not require the Minister to take into account the information in the application as a fundamental element in the decision-making process because at [57]:

> "It could hardly have been contemplated by the drafters that every piece of information selected for mention by an applicant, no matter how marginal its relevance to the issues to be determined, must be treated by the decision-maker as a 'fundamental element' in making the determination."

In this context, Alinta relied on ***Rathborne v Abel*** (1964) 38 ALJR 293 where the issue was whether, in the determination of the fair rent of prescribed premises under the *Landlord and Tenant (Amendment) Act 1948-1961 (NSW)*, the current capital value of the premises might properly be taken into account even though this was not among a list of matters that by s 21(1) the Board was "to have regard to", and even though it was regarded by the members of the Court as "truly material to the fairness of a determination", per Kitto J at 301. As is apparent from the reasons of Barwick CJ at 295 there was a marked contrast between earlier legislation which for this purpose prescribed what his Honour described as almost a mechanical process of calculation, and the scheme of the 1948 Act which was to give a wide discretion "doing no more than to require the Tribunal, the Board, 'to have regard to' a number of matters, which include 'the justice and merits of the case' and 'the circumstances and conduct of the parties'". The generality of such matters and the breadth of discretion which they contemplated, together with the contrast with the previous legislation, were clearly factors which persuaded the Court that the specified matters were not intended implicitly to exclude a factor which was truly material or necessarily central to the legislative task in question. The decision in ***Rathborne v Able*** is strongly influenced by the particular statutory scheme which had a "rather different scope and purpose" from the present Code, to borrow the words and view expressed by Gummow J of ***Rathborne v Able*** in ***Australian Capital Television Pty Ltd v Minister for Transport and Communications & Ors*** (1989) 86 ALR 119 at 145. In that case, in the context of s 94M(1) of the *Broadcasting Act 1942 (Cth)*, in respect of the matters which the Minister was required "to have regard to" when considering whether or not to approve a television license, Gummow J was persuaded that the matters specified were required to be taken into account by the Minister and to be given weight as fundamental elements in his decision. His Honour reached a similar view of the requirement in the Schedule to the *Health Insurance Act 1973 (Cth)* that the Minister's Advisory Committee "shall have regard to" certain matters when undertaking a general or fee review in ***Queensland Medical Laboratory & Ors v Blewett & Ors*** (*supra*) at 623.

55 It is clear that an expression such as "have regard to" is capable of conveying different meanings depending on its statutory context. In s 2.24 the phrase "must take the following into account" is apt to convey as an ordinary matter of language that the Regulator must not fail to take into account each of the six matters stipulated in (a) to (f), and by (g) any other matter the Regulator considers relevant. If anything, "take into account appears, as a matter of language, little different from "have regard to". Indeed, in ***R v Hunt*** the expression "have regard to" was understood as requiring that the specified matters be taken into account. The matters specified in (a) to (f) appear, by their nature, to be highly material to the task of assessing a proposed Access Arrangement, given the legislative purpose and objects of the Act and the Code in this regard. It is difficult to conceive that it could have been intended that the Regulator might decide to give no weight at all to one or more of the factors stipulated in s 2.24(a) to (f). In my view, in the context of the Act and the Code, the Regulator is required by s 2.24 to take the stipulated factors into account and to give them weight as fundamental elements in assessing a proposed Access Arrangement with a view to reaching a decision whether or not to approve it.

56 A similar issue arises with respect to s 8.10 which requires that factors (a) to (k) "should be considered in establishing the initial Capital Base" for a pipeline. Given the scheme of s 8 with respect to the Total Revenue and the relevance to that of the Capital Base, and the nature of the factors identified in s 8.10, including (k) which enables the Regulator to also consider any other factor the Regulator considers relevant, I am persuaded that the Regulator is required by s 8.10 to take into account factors (a) to (k) and to give weight to them as fundamental elements in his decision in establishing the initial Capital Base.

Code Section 2.24 – First and Third Sentences

57 Contrary to the submissions of Epic and the Regulator, Alinta contends that the first sentence of s 2.24 stands apart from, and is to be applied independently of, the third sentence and par (a) to par (g). As I understand the submission, Alinta reads the first three sentences as though they were independent and in effect sequential in their commands to the

Regulator. On this view, by the first sentence, the Regulator must first consider s 3.1 to s 3.20. Only if the Regulator is satisfied that the Access Arrangement contains the elements and satisfies the principles in s 3.1 to s 3.20 need the Regulator proceed any further. If the Regulator is so satisfied and continues on to consider the other aspects of the proposed Access Arrangement (other than the s 3.1 – s 3.20 elements and principles), it is then that the command of the second sentence of s 2.24 applies to preclude a refusal of approval solely for the reason indicated. Having satisfied the command of the first sentence, and heeding that of the second, the Regulator may be called on, in Alinta's submission, to exercise discretion as to whether or not to approve the proposed Access Arrangement. It is in the exercise of the Regulator's discretion in this general respect that the factors in par (a) to par (g) are to be taken into account by the Regulator. The effect of this submission is that the factors in s 2.24(a) to (g) are never to be taken into account by the Regulator as he considers s 3.1 to s 3.20 for the purposes of the first sentence.

58 In my view this is a strained approach to the construction of s 2.24 and it gives rise to difficulty. As a matter of ordinary construction of the language of the section there is no reason to treat the three sentences as dealing with distinct processes or involving sequential stages. On its most natural reading, in my view, the section is dealing with a single process to be undertaken by the Regulator to decide whether or not to approve a proposed Access Arrangement. The process appears to be naturally and sensibly described as an "assessment" as indicated by the third sentence. In carrying out that assessment process the Regulator may only approve if certain matters are satisfied (first sentence), may not refuse approval solely because of other matters (second sentence), and must take into account factors (a) to (g) (third sentence). No obvious difficulty is presented by such a construction.

59 A significant difficulty presented by Alinta's contended construction, however, arises from the content of s 3.1 to s 3.20. Many of these subsections require evaluation, the exercise of judgement, the formation of opinion, or other exercises of discretion by the Regulator. Examples include what is practicable and reasonable (s 3.2); whether the terms and conditions of an Access Arrangement are reasonable (s 3.6); the duration of the Access Arrangement (s 3.18); whether mechanisms to address the risks of incorrect forecasts should be included where the duration is more than 5 years; and, if so, what mechanisms (s 3.18). In the exercise of such discretions it is clear the Regulator needs policy guidance. An obvious purpose and function of s 2.24(a) to (g) is to provide that guidance. Yet on Alinta's submission that could not occur and the Regulator would be

forced to resort to such guidance as he could glean from the scope and objects of the Act.

60 Section 3.13 provides that a Queuing Policy *inter alia* "must accommodate, to the extent reasonably possible, the legitimate business interests of the Service Provider and of Users and Prospective Users, and generate, to the extent reasonably possible, economically efficient outcomes". Section 3.14 further enables the Regulator to require the Queuing Policy to deal with any other matter the Regulator thinks fit "taking into account the matters listed in s 2.24". It is submitted that this offers support for Alinta's submission that the s 2.24 factors have no application to s 3.1 to s 3.20, because otherwise the express reference to s 2.24 in s 3.14 would be unnecessary and s 3.13 overlaps with s 2.24(a) and (f). To the extent that this is the case I do not see this to be a telling consideration. Section 3.13 in particular is modifying the emphasis of s 2.24 in respect of Queuing Policy, and s 3.14 is reaffirming that s 2.24, without that modification, applies to the discretion to be exercised under s 3.14.

61 In my view, contrary to Alinta's submission, the legislative intention appears to be clear that in assessing a proposed Access Arrangement, which includes the consideration of s 3.1 to s 3.20 for the purposes of the first sentence of s 2.24, the Regulator is required to take into account, in the sense indicated earlier, the factors set out in s 2.24(a) to (g).

62 It does not follow from this, however, that those factors are intended to be, or are capable of being, applied to every issue presented by s 3.1 to s 3.20. The precise nature of the elements and principles set out in s 3.1 to s 3.20 will determine whether there is scope for the application of the s 2.24(a) to (g) factors to guide the exercise of discretion by the Regulator in his assessment.

63 These views appear to accord with the submissions of Epic and the Regulator.

Application of s 2.24 Factors to s 3.4 and s 3.5

64 It is as at this point that the submissions of Epic and the Regulator diverge. The Regulator contends that s 3.4, and also s 3.5, do not call for the exercise of discretion by the Regulator. Hence, there is no scope for the application to them of the s 2.24(a) to (g) factors. In the Regulator's submission, the only issue posed by s 3.4 is whether a proposed Reference Tariff "complies with the Reference Tariff Principles described in section

8". The same issue is posed by s 3.5 with respect to the Reference Tariff Policy included in the proposed Access Arrangement.

65 The Regulator submits that the s 8 Principles produce a single Total Revenue figure from which is derived a single dollar value for each reference tariff. There is no range of possible outcomes and no discretionary element in respect of which the Regulator could apply the s 2.24(a) to (g) factors. All that s 3.4 requires, it is submitted, is a 'yes' or 'no' answer.

66 There are difficulties in the way of accepting this submission. First, there appears to be a misconception, implicit in elements of the Regulator's submission, which, in effect, involves a barrier being drawn between s 3.4 and s 3.5, as being within the reach of the first sentence of s 2.24, and s 8, as beyond its reach. The "Reference Tariff Principles described in section 8" are expressly the subject of both s 3.4 and s 3.5. By express reference those principles are incorporated into s 3.4 and s 3.5. While drafting convenience has led to those principles being described in s 8, the effect of s 3.4 and s 3.5 is as though the s 8 principles were set out fully in each of those subsections.

67 Secondly, a consideration of s 3.3, s 3.4 and s 3.5 reveals that they involve much scope for discretion in the assessment of interrelated matters which may well bear directly on a proposed reference tariff, even one expressed as a single dollar value. As an example, from s 3.3 there must be a determination by the Regulator of which services warrant a reference tariff. In this case the proposed Access Arrangement designated transport from Dampier to Perth as one service. Transport from Dampier to the industrial area of Kwinana, which is a little south of Perth, was proposed to be the subject of a different service. The Regulator's draft decision proposed that transport from Dampier to Kwinana (which would include Dampier to Perth) would be one service. Such a decision, pursuant to s 3.3, both involves and gives rise to a number of interrelated issues under the s 8 Principles. These are likely to affect directly the single dollar value (if it is so expressed) for that service. The Regulator must form an opinion as to these for the purposes of s 3.4. Further, s 3.4 requires the Regulator to form an opinion as to the compliance of the whole of proposed Access Arrangement, as well as each proposed reference tariff, with the s 8 Principles. Likewise, s 3.5 requires the Regulator to form an opinion as to the compliance of the proposed reference tariff policy with the s 8 Principles.

68 Thirdly, while a reference tariff for a particular service may be expressed as a single dollar value, that is not necessarily the case pursuant to the s 8 Principles. Section 8.3 provides an indication of the way in which the reference tariff policy may lead to variations in the actual dollar value of a reference tariff during an Access Arrangement period. It also reveals that a tariff may be adjusted during the Access Arrangement period, either according to predetermined events, or having regard to actual progressive outcomes, or a combination of these approaches. In many cases the decision to express a tariff in a single dollar value will involve the discretionary rejection of such possibilities. It is also the case that those aspects of a reference tariff and a reference tariff policy that are concerned with the allocation of Total Revenue between a number of services, or between a number of users of a reference service, provide examples of the range and potential complexity of issues the Regulator may be required to consider to form an opinion as to compliance with the s 8 Principles, even though he is assessing an Access Arrangement, such as the present one, which proposes a number of reference tariffs each expressed as a single dollar value. There are many more examples of this nature.

69 These considerations tell powerfully, in my view, against acceptance of the Regulator's submission that there is no scope for the application of the s 2.24(a) to (g) factors to the Regulator's task as he considers the principles set out in s 3.4, ie compliance with the s 8 Principles, for the purposes of the first sentence of s 2.24.

Code: Section 2.24 and section 8

70 The Regulator's task under s 3.4 relevant to the present application, is to form an opinion whether the reference tariffs in the proposed Access Arrangement comply with the Reference Tariff Principles described in s 8. It is necessary, therefore, to consider those Principles in s 8 which are relevant to this application to determine to what extent, if at all, the factors in s 2.24(a) to (g) could be applied and, ultimately, to what extent they are intended by the Code to be applied to the relevant s 8 Principles. In this respect, as has been indicated, both the Regulator and Alinta submit that the s 2.24(a) to (g) factors are not intended to have any application whatever to any part of s 8, whereas Epic submits they are intended to apply at every point of s 8 which calls for the exercise of discretion by the Regulator. In this case, in Epic's submission, that includes the process for the establishment of the initial Capital Base for the DBNGP pursuant to s 8.10 and s 8.11.

71 This difference of approach to the construction of the Code is of critical importance to the parties. Section 2.24(a) is relied on by Epic as the most clear recognition in the Code that Epic's actual investment in the DBNGP, ie the purchase price of $2.407 billion, must be taken into account by the Regulator when he assesses Epic's proposed Access Arrangement, including the establishment of the initial Capital Base pursuant to s 8.10 and s 8.11. The submissions of both the Regulator and Alinta would preclude s 2.24(a) having any application to the establishment of the initial Capital Base, or to any other matter within s 8.

72 When s 8 is considered for its general effect, it is immediately apparent that s 8.1 contains principles which are a statement of the objectives which are to guide the design of a reference tariff and a reference tariff policy. This feature, together with the apparently comprehensive statement of relevant principles that are to be found in s 8.1 to s 8.49, are suggestive of an essentially self-contained and exhaustive statement of principles relevant to reference tariffs and reference tariff policies. Section 8.2 identifies factors of which the Regulator "must be satisfied" in determining to approve a reference tariff and a reference tariff policy. All but one of these factors require consistency with the principles "contained in" s 8; that of course appears to include the general principles in s 8.1 which identify the objectives for the design of a reference tariff and a reference tariff policy. If this be correct, the pervasive influence of s 8.1 is illustrated when it is realised that each of s 8.2(a) to (d) deal with matters that are also the subject of specific principles in s 8. Section 8.2(a) is concerned with Total Revenue to which the principles in s 8.4 to s 8.37 apply; s 8.2(b) concerns the allocation of revenue between services which is the subject of s 8.38 to s 8.41; s 8.2(c) concerns the allocation of revenue between users which is the subject of the principles in s 8.42 and s 8.43; and s 8.2(d) concerns incentive mechanisms to which s 8.44 to s 8.46 relate. At many other points in s 8 there are other express references to consistency with the principles in s 8 or with the objectives contained in s 8, eg s 8.3, s 8.6, s 8.22, s 8.31 and s 8.38. Entirely absent from s 8 is any reference to the s 2.24(a) to (g) factors.

73 There are many points, however, at which the principles enunciated in s 8 call for evaluation, the exercise of judgement, the formation of opinion and other exercises of discretion by the Regulator. With particular reference to the establishment of the initial Capital Base for a Covered Pipeline that was in existence at the commencement of the Code, s 8.10 and s 8.11 provide ready examples of this. While s 8.10(a) and (b) specify two valuation methodologies, s 8.10(c) requires the Regulator to

consider other well recognised valuation methodologies. Further, s 8.10(d) requires the Regulator to weigh the advantages and disadvantages of each methodology. Even were the task of the Regulator simply to strike a value for the pipeline, the evidence discloses that each of the s 8.10(a) and (b) methodologies is considerably influenced by subjective and discretionary factors, s 8.10(c) involves potentially a selection from range of methodologies, each of which influenced by further subjective and discretionary factors, and s 8.10(d) clearly calls for evaluation and judgement.

74 The task of the Regulator under s 8.10 appears not to be simply one of valuation, however, despite the reference to value in s 8.4(a). It is described in s 8.8 and s 8.10 as "establishing" the Capital Base. The factors identified in s 8.10(e) to (j) require the Regulator to consider a variety of other considerations, including the basis on which past tariffs have been set; the historical returns to the service provider from the pipeline; the reasonable expectations of persons under the regulatory regime that applied to the pipeline prior to the commencement of the Code; and the price paid for any asset recently purchased. These various factors bring into account a number of matters which are not directly related to the value of the pipeline in the ordinary sense, and which by their nature require the consideration of disparate issues which may well tend in different directions. The process is more than one of mere valuation. There is, necessarily, a discretionary evaluation of what weight should be attached to each of these factors in the ultimate establishment of the Capital Base. Factor (k) enables the Regulator to take into account any other factor which the Regulator considers relevant, which in itself requires further evaluation and discretionary judgement by the Regulator.

75 Further, notwithstanding the variety of values and other factors which s 8.10 requires to be considered, there is the principle stated in s 8.11 that the initial capital base "normally should not fall outside the range of values determined under" s 8.10(a) and (b). There is obvious tension between the requirement of s 8.10 to consider factors (c) to (k) in establishing the Capital Base and the provision in s 8.11 that, normally, the resulting Capital Base should not fall outside the range determined under factors (a) and (b). The process clearly involves the exercise of discretion in the weighing of divergent considerations.

76 Hence, in seeking to give effect to s 8.10 and s 8.11, the Regulator will be in need of guidance as to how and with what purpose he should evaluate and weigh the diverse factors in reaching a decision as to the initial Capital Base. In the absence of express statutory provision in this

regard one would normally turn to the general policy and objects of the Act for such guidance. Within s 8, however, s 8.1 contains a statement of principles which define the objectives of s 8 with respect to reference tariffs and reference tariff policies. This suggests *prima facie* that it is the objectives in s 8.1 which should guide the Regulator in the exercise of discretion for the purposes of s 8.10 and s 8.11. As the initial Capital Base is one element of the calculation of the Total Revenue, s 8.2(a) also offers some confirmation of the view that s 8.1 should guide the Regulator in the exercise of discretion for the purposes of s 8.10 and s 8.11.

77 The submissions of Epic, however, involve the proposition that the Regulator is required, by virtue of the first sentence of s 2.24 and s 3.4 and s 3.5, both to take into account the factors in s 2.24(a) to (g) and to seek to achieve the objectives in s 8.1 when establishing the initial Capital Base, and more generally when dealing with a reference tariff and a reference tariff policy. While in some respects the s 2.24 factors bear some relationship to the objectives in s 8.1, in each such respect they differ in their precise formulation. In other respects there are clear differences. This will be considered further later in these reasons. The differences are such, however, that an attempt by the Regulator to apply both to his task under s 8.10 and s 8.11, and more generally to other aspects of s 8, would appear to be fraught with considerable difficulty. Indeed, on the submissions of the Regulator and Alinta the two are fundamentally inconsistent, but that is an issue to which I shall turn shortly. Even if that not be so, however, the application of both to the one task does not suggest itself to be practical, or to have been likely to have been intended, given the differences between the s 2.24 factors and the s 8.1 objectives.

78 Section 8.6 recognises that the manner in which the initial Capital Base may be determined involves various discretions. Similarly, discretions are involved in the other components relevant to the calculation of the Total Revenue. By virtue of this, s 8.6 recognises it is possible that a range of values may be attributed to the Total Revenue. Should that occur, in order to determine "an appropriate value within this range", the relevant Regulator may have regard to financial and operational performance indicators to determine which value within that range "is most consistent with the objectives contained in s 8.1". While this does not require that, in exercising the discretions to establish the initial Capital Base, the Regulator must have regard to s 8.1, s 8.6 does suggest that, at the end of the process of which the establishment of the initial Capital Base is a part, s 8.1 is the controlling provision rather than s 2.24(a) to (g).

79 The submissions of the parties have identified other provisions of the Code which may have some bearing on the question whether s 2.24(a) to (g) was intended to apply to s 8, whether in conjunction with or notwithstanding s 8.1.

80 Section 2.46 is a provision dealing with the approval by the Regulator of proposed revisions to an Access Arrangement. It is to similar effect as s 2.24, except that in assessing the proposed revisions, in addition to the s 2.24 factors the Regulator must take into account the provisions of the Access Arrangement. Section 2.47 complements s 2.46 to similar effect as s 2.25 complements s 2.24. While s 2.46 raises the same constructional issues as s 2.24 it does not afford any additional assistance in the resolution of those issues.

81 By s 3.17, in approving a revisions submissions date in an Access Arrangement and a revisions commencement date, the Regulator "must have regard to the objectives in" s 8.1. Section 3.18 confirms that the Regulator may approve an Access Arrangement longer than 5 years "having regard to the objectives of" s 8.1. These may be seen as an example of issues where the s 2.24 factors and the s 8.1 objectives are each to be applied to the one issue, which would support Epic's position. Alternatively, these subsections may be seen as requiring regard to the s 8.1 objectives, rather than the s 2.24 factors, for the particular issues identified in those subsections. My tentative view would favour the second for these. As no particular issue arises in this case concerning the application of s 3.17 or s 3.19, it is preferable that no final view be offered. At best for Epic, however, as s 3.17 and s 3.18 are somewhat equivocal, they do not offer any clear assistance for present purposes.

82 Particular emphasis is placed on s 6.15 by Epic. This subsection provides guidance for an arbitrator under the Code (in Western Australia the Western Australian Gas Disputes Arbitrator: see s 62 of the Act) when a dispute arises between a prospective user and the Service Provider as to the terms and conditions of access. The arbitral procedure is available on notice to the arbitrator by either party and is binding. Section 6.15 requires an arbitrator to apply the provisions of the Access Arrangement for the Covered Pipeline. In addition the arbitrator "must take into account" factors (a) to (h) which replicate or substantially replicate the factors (a) to (f) of s 2.24, although not the general public interest limb of s 2.24(e). In addition, s 6.15(b) and (c) deal specifically with the costs to the Service Provider of providing the disputed access, and the economic value to the Service Provider of any investment the prospective user has agreed to make. With these two additions, which are relevant to the

particular case being arbitrated, the requirement that the arbitrator must take into account essentially the s 2.24 factors in determining an access dispute is submitted by Epic as revealing that the s 2.24 factors where intended to be relevant to all aspects of an Access Arrangement, including a reference tariff and a reference tariff policy. The apparent force of this argument appears to be negated, however, by s 6.18. This precludes the arbitrator from making a decision which is inconsistent with the Access Arrangement (which of course contains the reference tariff policy and the reference tariff), or which requires the Service Provider to provide, or the user or prospective user to accept, "a Reference Service at a Tariff other than the Reference Tariff". The effect of s 6.18 is to heavily qualify the scope for decision by an arbitrator. Rather than supporting Epic's position it appears to insulate a reference tariff approved by the Regulator from any arbitral review.

83 It is also instructive to note that s 3.4, which requires the Regulator to be satisfied of compliance of an Access Arrangement and any reference tariff with the reference tariff principles described in s 8, contemplates an alternative method of determination of a reference tariff. That is a competitive tender process as outline in s 3.21 to s 3.26. If regard is had to those provisions it can be seen that by s 3.28(b) the Regulator must be satisfied that the tender approval request is an appropriate mechanism "for ensuring that reference tariffs achieve the objectives in s 8.1". And by s 3.33(c) the Regulator must be satisfied that reference tariffs determined in accordance with the tender process "achieve the objectives in s 8.1". This tends to offer further confirmation of the view suggested by the structure of s 8 that a reference tariff, as well as a reference tariff policy, should be designed with a view to achieving the objectives in s 8.1. If that be correct it would also indicate that the s 8.1 objectives should guide the Regulator, where necessary, in his consideration of s 8.10 and s 8.11.

84 Before reaching a final view on this issue, however, it is necessary to consider whether treating the principles reflected in the objectives in s 8.1 as guiding the Regulator's evaluation of the matters contained in s 8.10 and s 8.11, leads to inconsistency or incongruity or otherwise commends a different construction. Much of what follows will be relevant to that enquiry. Subject to that significant issue, my tentative view is to favour the construction that it is s 8.1, rather than s 2.24(a) to (g), which is intended by the Code to guide the Regulator in the establishment of the initial Capital Base insofar as s 8.10 and s 8.11 require the exercise of discretion by the Regulator.

85 There is, however, one significant exception to this general tentative proposition which should be stated immediately. The last paragraph of s 8.1 recognises that the objectives (a) to (f) in s 8.1 may conflict in their application to a particular reference tariff determination, in which event the Regulator may determine the manner in which they can best be reconciled or which of them should prevail. Contrary to the submissions of the Regulator and Alinta, the discretionary task of seeking to reconcile conflicting objectives within s 8.1, and even more significantly of determining which of them should prevail, cannot be decided by reference to s 8.1 itself. Of necessity, the Regulator must have guidance outside of s 8.1 in exercising those discretions. In this regard it appears from the structure and provisions of the Code that have been canvassed that s 2.24(a) to (g) would most naturally guide the Regulator in the exercise of these discretions, and was intended to do so. That is, in exercising the discretions contemplated by the last paragraph of s 8.1 the Regulator should take into account the factors in s 2.24(a) to (g). I will return to the implications of this later in these reasons. Were that not so, inevitably the Regulator would need to have regard to the general scope and objects of the Act, as revealed by the preamble, in exercising the discretions contemplated by the last paragraph of s 8.1.

Interpretation of the Code – General Provisions

86 I turn now to a range of issues as to the true interpretation of particular provisions of the Code. This is done for two principal reasons. First, whether from a true understanding of its terms, inconsistency or incongruity or some other matter will shed further light on whether the s 2.24(a) to (g) factors were intended to apply to s 8.10 and s 8.11 and, if so, how they are reconciled with s 8.1. Secondly, to better understand how the Code is intended to deal with a case, such as the present, in which the Service Provider has purchased a Covered Pipeline and seeks to have the purchase price paid for the pipeline established as the initial Capital Base for the purposes of the Access Arrangement for the pipeline. There are, however, many issues which have been raised which must be considered before those two matters can be dealt with directly.

87 By s 3(3) and s 25 of the Act the provisions of the *Interpretation Act 1984 (WA)* apply for the purposes of the Act but do not apply to the Code. Provisions in the appendix to Schedule 1 of the Act and in s 10 of the Code itself deal with the interpretation of the Code. Nevertheless, whether by virtue of the *Interpretation Act* or these special interpretative provisions, it is provided that a purposive interpretation is to be preferred

to any other. By virtue of the special interpretative provisions consideration may be given to extrinsic material if a provision of the Code is ambiguous or obscure or if the ordinary meaning leads to a result that is manifestly absurd or unreasonable. Extrinsic material may also be used to confirm that the meaning of a provision is the ordinary meaning. In determining the ordinary meaning regard would normally be had, of course, to the ordinary meaning conveyed by a provision having regard to its context and to the scope and purposes of the Code.

Interpretation of the Code - The Hilmer Report – COAG Agreement

88 The Act expressly identifies the relevance to its objects of the Council of Australian Governments' Agreement dated 25 February 1994. This agreement in turn had its origins in the National Competition Policy Review which was undertaken by a Committee chaired by Professor Hilmer for the Heads of Australian Governments in 1993, and is the subject of a report to those Heads of Government dated August 1993. This is commonly referred to as the "Hilmer Report". The executive overview of the Hilmer Report commends the benefits of fostering more competitive markets in Australia. It noted that competition policy is not about the pursuit of competition *per se*. Rather, it seeks to facilitate effective competition to promote efficiency and economic growth, while accommodating situations where competition does not achieve efficiency or conflicts with other social objectives. The Report considered six elements of a competition policy. Among them was the reform of the structure of public monopolies to facilitate competition, an element which appears to have led directly to the rearrangement of the natural gas transportation and distribution organisation within governmental structures in Western Australia, as reflected in the *Gas Corporation Act 1994 (WA)*, and eventually to the sale of the DBNGP in 1998. Another element was to provide third party access to certain facilities that are essential for competition. The Hilmer Report confirms that gas transportation pipelines were within this category. The competition in issue, however, was not competition in the transportation by pipeline of gas itself, but in the markets that were upstream and downstream of the pipeline. Another element was the restraining of monopoly pricing behaviour. This was proposed to be a function of the Prices Surveillance Authority.

89 The executive overview to the Hilmer Report also noted that the introduction of competition in some markets required that competitors be assured of access to certain facilities that could not be duplicated

economically. The Committee recommended that a new legal regime be established under which firms could, in certain circumstances, be given a right of access to specified "essential facilities", on fair and reasonable terms. The regime proposed would provide safeguards to the owner of the facility and to users by means of an access declaration, which would specify pricing principles and other terms and conditions relating to access designed to protect the legitimate interests of the owner of the facility.

90 In Chapter 1 of the Hilmer Report, the view was advanced that Australia had no choice but to improve the productivity and international competitiveness of its firms and institutions so that they would become more efficient, more innovative and more flexible. Competition was seen to have a role in meeting those challenges, offering a promise of lower prices, improved choice for consumers, greater efficiency, higher economic growth and increased employment opportunities for the economy as a whole.

91 The relationship between competition and community welfare was discussed Chapter 1 of the Hilmer Report in terms of the "impact of competition on economic efficiency and on other social goals". A specific discussion followed on p 3 – p 4 of "Economic Efficiency". In this respect, the Report said (in part):

> "Efficiency is a fundamental objective of competition policy because of the role it plays in enhancing community welfare. There are three components of economic efficiency:
>
> - Technical or productive efficiency, which is achieved where individual firms produce the goods and services that they offer to consumers at *least cost*. Competition can enhance technical efficiency by, for example, stimulating improvements in managerial performance, work practices, and the use of material inputs.
>
> - Allocative efficiency is achieved where resources used to produce a set of goods or services are allocated to their highest valued uses (ie, those that provide the greatest benefit relative to costs). Competition tends to increase allocative efficiency, because firms that can use particular resources more productively can afford to bid those resources away from firms that cannot achieve the same level of returns.

- <u>Dynamic efficiency</u> reflects the need for industries to make timely changes to technology and products in response to changes in consumer tastes and in productive opportunities. Competition in markets for goods and services provides incentives to undertake research and development, effect innovation in product design, reform management structures and strategies and create new products and production processes."

At p 4 – p 5 the Report observed:

> "The promotion of effective competition and the protection of the competitive processes are generally consistent with maximising economic efficiency."

On p 6 the Report continued:

> "Competition policy is not about the pursuit of competition for its own sake. Rather, it seeks to facilitate effective competition in the interests of economic efficiency while accommodating situations where competition does not achieve economic efficiency or conflicts with other social objectives."

92 Chapter 11 of the Report dealt with access to essential facilities which were seen to be "a monopoly, permitting the owner to reduce output and/or service and charge monopoly prices, to the detriment of users and the economy as a whole." At p 242 the Report noted:

> "As a general rule, the law imposes no duty on one firm to do business with another. The efficient operation of a market economy relies on the general freedom of an owner of property and/or supplier of services to choose when and with whom to conduct business dealings and on what terms and conditions. This is an important and fundamental principle based on notions of private property and freedom to contract, and one not to be disturbed likely.
>
> The law has long recognised that this freedom may require qualification on public interest grounds in some circumstances, particularly where a form of monopoly is involved."

At p 248 the Report noted:

> "The Committee is conscious of the need to carefully limit the circumstances in which one business is required by law to make its facilities available to another. Failure to provide appropriate

> protection to the owners of such facilities has the potential to undermine incentives for investment."

This theme was taken up again on p 251:

> "Moreover, when considering the declaration of an access right to facilities, any assessments of the public interest would need to place special emphasis on the need to ensure access rights did not undermine the viability of long-term investment decisions, and hence risk deterring future investment in important infrastructure projects."

93 At p 253 the Report dealt with the determination of access prices saying:

> "Access to a facility should only be declared if the legitimate interests of the owner of the facility are protected through a requirement for a "fair and reasonable" fee for providing access, and other appropriate terms and conditions.
>
> Neither the application of economic theory nor general notions of fairness provide a clear answer to the appropriate access fee in all circumstances. Policy judgments are involved as to where to strike the balance between the owner's interest in receiving a high price, including monopoly rents that might otherwise be obtainable, and the user's interest in paying a low price, perhaps limited to the marginal costs associated with providing access. Appropriate access prices may depend on factors such as the extent the facility's existing capacity is being used, firmly planned future utilisation and the extent to which the capital costs of producing the facility have already been recovered. Decisions in this area also need to take account of the impact of prices on the incentives to produce and maintain facilities and the important signalling effect of higher returns in encouraging technical innovation. For example, relatively low access prices might contribute to an efficient allocation of resources in the short term, but in the longer term the reduced profit incentives might impede technical innovation."

94 At p 255 the Committee considered two approaches, one a broad discretion entrusted to an independent Regulator perhaps guided by some broad and general guidelines, and the second to have the relevant Minister stipulate pricing principles leaving the parties free to negotiate but, in the absence of agreement, to be subject to binding arbitration in accordance

with the declared principles. The Committee favoured the second of these approaches, a policy which was not taken up in the case of access to natural gas pipelines.

95 Chapter 12 of the Report dealt with monopoly pricing. At p 269 the Report noted that the general approach proposed did not seek to regulate "high" pricing directly, "relying instead on the competitive process". The Report went on to observe:

> "Where the conditions for workable competition are absent – such as where a firm has a legislated or natural monopoly [a footnoted example being gas pipelines] or the market is otherwise poorly contestable – firms may be able to charge prices above the efficient level for periods beyond those justified by past investments and risks taken or beyond a time when a competitive response might reasonably be expected. *Such* "monopoly pricing" is seen as detrimental to consumers and to the community as a whole. The primary goal of competition policy is to increase the competitive pressures in these industries …." (emphasis added)

96 Relevantly, as already indicated, that Report led to the February 1994 agreement on general principles of competition policy reform to enable third parties to gain access to essential facilities. In turn that led to the further agreement by COAG for more specific proposals for the development of a free and fair trade in natural gas. These are contained in the Code and the November 1997 agreement for its enactment as a uniform national framework for third party access to identified gas pipelines. It is convenient to restate the access criteria as set out in the preamble to the Act, and the introduction to the Code. They were:

> "(a) facilitates the development and operation of a national market for natural gas; and
>
> (b) prevents abuse of monopoly power; and
>
> (c) promotes a competitive market for natural gas in which customers may choose suppliers, including producers, retailers and traders; and
>
> (d) provides rights of 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 wishing to use the services of those pipelines; and

(e) provides for resolution of disputes."

The origins of these criteria in the Hilmer Report is apparent. Of course, not every precise recommendation in the Report was accepted.

97 The COAG agreement of the 25 February 1994 provided in cl 6(4) for the establishment of a regime for third party access to services provided by means of significant infrastructure facilities and provided for State or Territory access regimes which incorporated the following relevant principles:

"(i) In deciding on the terms and conditions for access, the dispute resolution body should take into account:

(i) the owner's legitimate business interests and investment in the facility;

(ii) the costs to the owner of providing access, including any costs of extending the facility but not costs associated with losses arising from increase competition in upstream or downstream markets;

(iii) the economic value to the owner of any additional investment that the person seeking access or the owner has agreed to undertake;

(iv) the interests of all persons holding contracts for use of the facility;

(v) firm and binding contractual obligations of the owner or other persons (or both) already using the facility;

(vi) the operational and technical requirements necessary for the safe and reliable operation of the facility;

(vii) the economically efficient operation of the facility; and

(viii) the benefit to the public from having competitive markets."

The echo of these principles in the s 2.24(a) to (g) factors of the Code is obvious.

98 By s 44DA of the *Trade Practices Act 1974 (Cth)* those principles in the competition principles agreement have also been enacted as guidelines for the National Competition Council in deciding whether access should be declared to a particular service, and whether an access regime is effective. By s 44X of the *Trade Practices Act* somewhat similar principles must be taken into account by the Australian Competition and Consumer Commission in making a determination in respect of a dispute, where a person seeking access to an essential service has been unable to reach agreement on the terms and conditions of that access with the owner or provider of the service. There is a further interrelationship with the *Trade Practices Act* in that the Code was enacted by the Western Australian Parliament on the basis that it would be submitted for approval as an effective access regime under Part IIIA of the *Trade Practices Act*. On 31 May 2000 the Commonwealth Minister announced the approval of the Code under s 44N of the *Trade Practices Act*.

99 The terms of the preamble to the Act and the introduction to the Code, the intergovernmental competition policy reform background, and the interrelationship with the competition provisions of the *Trade Practices Act*, are all strongly indicative of the discipline of economics. Within the Code itself concepts are used such as the economically efficient operation of a pipeline and competition in markets in s 2.24, efficient costs and efficiency in the level and structure of a tariff in s 8.1, the depreciated optimised replacement cost methodology in valuing a pipeline, the impact on the international competitiveness of energy consuming industries, and the economically efficient utilisation of gas resources in s 8.10, which provide reason to consider whether some specialised usage or meaning from the discipline of economics is contemplated by such concepts, rather than what may be made of their meanings according to everyday word usage.

Interpretation of the Code – Admission of Expert Evidence

100 In this context a body of expert evidence was adduced. Three economists gave affidavit and oral evidence. The economists were Mr G J Houston called by the Regulator, Mr H I Ergas called by Alinta and Professor P L Williams called by Epic. The whole of this body of evidence was adduced, however, subject to objection by Epic as to its admissibility and relevance. The Court received the evidence subject to

this objection and it is necessary now to deal with the issue of admissibility.

101 It is submitted by Epic that the words used in the relevant provisions of the Code, especially "efficient" and "efficiency", "competition", "monopoly", "market" and "economically" are all words in ordinary usage with accepted meanings so that expert evidence is not required for their understanding. It submits that where a word has a meaning which is commonly used or understood, evidence as to a special meaning is ordinarily inadmissible; ***Burger King Corporation v Registrar of Trademarks*** (1973) 128 CLR 417 at 428. It was stressed that the construction of a statute, including the meaning to be attributed to individual words or phrases used, and the question whether the statute uses an expression in any sense other than that which it has in ordinary speech, are questions of law; ***Collector of Customs v Agfa-Gevaert Ltd*** (1996) 186 CLR 389 at 396, 397. Epic emphasised the importance of reading the Code as a whole instrument and not divorcing individual passages from context; ***Metropolitan Gas Co v Federated Gas Employees Industrial Union*** (1925) 35 CLR 449 at 455, ***K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd*** (1985) 157 CLR 309 at 315. It was further submitted that evidence should not be admitted to explain how the words of a statute would be expected to be applied to the circumstances of the case: ***Royal Insurance Australia Ltd v Government Insurance Office of NSW*** (1994) 1 VR 123 at 133 – 134. And that a party should not enlist a witness as an advocate under the guise of calling him to give "expert" evidence: ***ULV Pty Ltd v Scott*** (1990) 19 NSWLR 190 at 205; ***Clark v Ryan*** (1960) 103 CLR 486 at 507.

102 It was further submitted that any claimed commercial or specialist designation of a term must be of general acceptance and uniformly understood among those engaged in the relevant trade or business, and definite in its signification: ***Australian Lighting and Hardware Pty Ltd v (Falkner) Brightlight Nominees Pty Ltd*** (1994) 1 VR 553 at 557, 563. It was contended that proof of a particular usage requires the strongest evidence: ***Bowes v Shand*** (1877) 2 App Cas 455 at 473. And that the usage must be notorious, uniform and certain: ***Homestake Australia Ltd v Metana Minerals NL*** (1994) 11 WAR 435 at 446 – 451.

103 For the Regulator, however, it is submitted that it is important to identify the subject matter and the "audience" of the Act and the Code and to interpret the language in that context: ***Collector of Customs v Agfa-Gavaert*** at 398 – 399; ***Marine Power Australia Pty Ltd v Comptroller-General of Customs*** (1989) 89 ALR 561 at 572. It is submitted that the

Act and Code is directed at a narrow audience which might be expected to know and understand the principles of competition policy upon which the Code is evidently based. That being so, it is submitted, where words or phrases used would have a technical meaning to such an audience then it would "ordinarily make sense" for the court to take notice of that meaning, even if the words or phrases are used in a composite expression which itself does not have a technical meaning: ***Agfa-Gavaert*** at 401. Further, knowledge of the technical meaning may also assist in providing the context, background or surrounding circumstances necessary for the construction of the words used in the statute: ***Pepsi 7-Up Bottlers Perth Pty Ltd v Federal Commissioner of Taxation*** (1995) 62 FCR 289 at 297 – 298. The Regulator further submitted that the technical meaning of words or phrases is a question of fact: ***Collector of Customs v Pozzolanic Enterprises Pty Ltd*** (1993) 43 FCR 280 at 287. Evidence is admissible in order to determine that factual question, although it remains a question of law whether the technical meaning was intended by the legislature. Of course, in the context of statutory interpretation the "ordinary meaning" of a provision is not limited to its literal or grammatical meaning: ***Saraswati v The Queen*** (1991) 172 CLR 1 at 21.

104 For Alinta reference was also made to the decision of the Privy Council in ***General Accident Fire and Life Assurance Corporation Ltd v Commissioner of Pay-Roll Tax (NSW)*** (1982) 42 ALR 365 where, in deciding that evidence was admissible as to the methods of insurance company representatives and as to the general understanding in the insurance industry of the meaning of the expressions "insurance canvasser" and "insurance collector", their Lordships said at 368:

> "It is not possible to construe any statute entirely in the air. Like any written document, it must be viewed against a background of surrounding circumstances, and this commonly emerges upon proof of the factual situation to which the statute is sought to be applied. Part of this situation emerges in the present case from the evidence about the activities of the agents whose commissions the respondent is seeking to draw into the tax net. … It is another question whether it was right to go further and admit evidence of the general understanding in the insurance industry about the meaning of the expression 'insurance canvasser or collector'. Their Lordships would answer this question in the affirmative. The expression to be construed is not one of general application. It is confined to the insurance industry and its practices. It is a composite expression whose meaning cannot necessarily be correctly

gathered from looking up in the dictionary the words 'insurance', 'canvasser' and 'collector'."

105 It was further submitted on the authority of cases, including ***R v Bonython*** (1984) 38 SASR 45 at 46 – 47 and ***R v Perry*** (1990) 49 A Crim R 243 at 249, that the court would be assisted by expert evidence as to the economic objectives which might underlie the Code and as to the nature and meaning of the economic terms used in it.

106 The three witnesses whose evidence is being considered are clearly of expertise and experience, particularly in the field of competition policy, including the regulation of essential infrastructure such as the DBNGP and other significant gas pipelines. Notwithstanding this, their evidence differed in many relevant respects. With respect to the question of economic usage as at 18 December 1997, even in that specialised field of economics, the evidence falls short in my view of establishing that there was any uniform, accepted and certain meaning of critical terms in issue, such as "abuse of monopoly power", "economically efficient operation", "efficient costs", "efficiency in the level and structure" of a tariff or, the "economically efficient utilisation" of resources, as used in the preamble to the Act and s 2.24, s 8.1 and s 8.10 of the Code.

107 Nevertheless, having regard to the principles identified in a number of the cases upon which the Regulator and Alinta rely, it appears to me that much of the evidence of the experts is relevant and admissible. While the evidence does not establish that particular terms in issue had uniform, accepted and certain meanings, it does establish that some words or phrases used in the Act and the Code are in common use in that field of economics which is concerned with competition policy, or more particularly with the regulation of essential infrastructure. In this context the words or phrases convey a meaning to those familiar with this field of economics which differs from that which the words themselves suggest in ordinary everyday usage. As the subject matter is by nature conceptual there is no uniform, accepted and certain meaning, but there is a principle or theory, the essential tenets of which are widely understood, though there need not be uniform acceptance of them. In my view, expert evidence may relevantly and usefully inform the Court as to this specialised usage, of which the Court would otherwise be unaware, so that the Court can determine whether the Act and Code is using particular words or phrases in their ordinary everyday usage, or in the specialised usage among those versed in this field of economics. Further, the expert evidence provides an appreciation of the nature and objectives of competition policy in the field of economics, and, in particular, of the

regulation of essential infrastructure, so that the policy and objectives of the Act can be discerned with a greater and more reliable appreciation of the possibilities. In addition, the potential relevance of some concepts and provisions in the Act and Code can be more readily understood.

108 Unfortunately, the affidavits contain material which goes beyond these bounds. The Regulator only seeks to rely on a limited number of the paragraphs in the evidence of Mr Houston. I confine my consideration to those paragraphs. Much of the content of par 1 to par 61 is open to the general criticism that, in many passages, it appears to treat the regulation of infrastructure as solely a matter of the application of economic theory and ignores the material relevance of the precise form of the legislation under which the regulation is applied. If the passages are received and read *only* for the purpose of understanding Mr Houston's view of the underlying economic theory and understanding, in my view, this difficulty can be overlooked. It does have an adverse effect, however, on the weight that may be attributed to some passages of the affidavit. To the extent that the Regulator seeks to rely on the affidavit of Mr Houston, to and including par 61, I would take the view, therefore, that it should be admitted into evidence only on the basis identified. Paragraph 62 to par 76 are not pressed by the Regulator. Paragraph 77 and following deal with an hypothetical example. In my view, the general tenor of these paragraphs reveals an attempt to argue a case for the construction of the Code. I would not admit them into evidence, nor the material in the appendices to which they refer.

109 The brief affidavit of Mr Ergas annexes his statement to which these comments are addressed. Alinta does not press all paragraphs of the statement. To and including par 134 the observation may be made that in many passages the statement is not necessarily confined to expressing an opinion from the viewpoint of an economist. In my view, these paragraphs, so far as their admission is pressed, should be received and read *only* on the basis and to the extent that they are expressing an expert opinion from the viewpoint of an economist. Paragraphs 135 to 146 are advanced under a heading of "abuse of monopoly power". They do not, however, propound any received or accepted economic meaning or usage of that concept. Indeed, what is advanced in par 137 to par 139 is a view of the phrase "use of monopoly power". In general these paragraphs appear to be an attempt to develop and argue a case as to what abuse of monopoly power could or should mean. I would not receive those paragraphs into evidence. Paragraphs 154 to 167 involve the response of Mr Ergas to an issue posed by those instructing him, ie whether there are economic rationales for adopting as the initial capital base a purchase

price for an asset which is greater than both Depreciated Optimised Replacement Cost ("DORC") and Depreciated Actual Cost ("DAC") valuations. That issue is posed and answered "having regard to the objectives set out in s 8.1 of the Code and in the introduction to the Code". To deal with such a question it is necessary for Mr Ergas to form views as to the meanings of s 8.1 and the introduction to the Code, and to apply those views the issue posed. It appears to me that what follows is not merely an indication of objective economic theory and concepts, but amounts to an attempt to interpret and apply the Code. It is not possible with any confidence to discern objective theory and opinion from what is influenced by views as to the meaning of the Code. I would not admit these paragraphs. I would also not admit subpars 174(k), (l), (m), (o) or (p) which appear to reflect earlier paragraphs not admitted.

110 The affidavit of Professor Williams annexes a statement. I would receive the whole of the affidavit and the statement of Professor Williams.

Interpretation of the Code – Meanings of Particular Words or Phrases

111 I turn now to consider the meaning of particular words or phrases used in the Code and which are of importance to the issues in this application.

112 The word "efficient" has well established meanings in ordinary English usage. It involves producing a desired result with the minimum wasted effort; being effective (New Shorter Oxford Dictionary); or not wasteful of time, effort, resources (Collins Dictionary). "Efficiency" is a directly related concept, it being the quality of being efficient.

113 In the field of economics, an authoritative reference "The New Palgrave Dictionary of Economics" says of "efficiency" that there are few concepts more widely used within economics, it usually meaning not wasteful, or doing the "best" one can with available resources. Palgrave notes, however, that there are specialised usages within the discipline of economics, and that not all meanings have a common provenance.

114 The expert evidence does establish, in my finding, that in that field of the discipline of economics that is concerned with competition policy, and in particular with the regulation of essential infrastructure in the public interest, though not confined to that field, there is a well established principle or theory typically referred to as "economic efficiency". The evidence indicates that the theory owes much in its origins to the work of an Italian economist, Pareto, over half a century ago, but it has been

greatly developed since then. The evidence establishes that there is a widespread awareness and understanding of this concept among economists familiar with the economic review of public policy, including competition policy. Not unnaturally, there are differences between economists in shades and depths of understanding of the concept, and ongoing research and development is constantly refining or reshaping its full dimensions. Nevertheless, its fundamental tenets appear to have general acceptance and understanding among economists in this field. Hence, in the particular context of the regulation of essential infrastructure in the public interest, as an aspect of competition policy, a reference to efficiency may well be a reference to economic efficiency.

115 The evidence establishes, notwithstanding some differences of detail, that according to the theory of economic efficiency, the concept of efficiency has at least three well recognised dimensions. These are, productive efficiency, allocative efficiency and dynamic efficiency, as to which all the experts seemed in the end to agree, although Professor Williams would add that there are other relevant dimensions of efficiency, in particular what he describe as the "to whom" question (how or to whom the benefits of efficiency are distributed within society). While the precise explanations of the three expert economists of the concepts of productive, allocative and dynamic efficiency differed in their expression, the underlying meanings appeared to be generally consistent. They were also generally consistent with the expression of these same three dimensions of efficiency in p 3 – p 4 of Chapter 1 of the Hilmer Report, under the heading "Economic Efficiency", as quoted earlier in these reasons. I reach this view having taken into account in particular the differences perceived by Professor Williams in the discussions of dynamic efficiency by Mr Houston and Mr Ergas. As Mr Houston summarised it, efficiency in this sense is central to the discipline of economics which concerns itself with the study of how limited resources may be used to produce the goods and services that will best meet the needs of society as a whole. Professor Williams regarded efficiency as the usual benchmark used by economists in undertaking economic analysis of public policy in Australia. He used the analogy of maximising the size of the pie; the pie representing the total value (in dollars) that is created by means of economic activity.

116 The three experts each also recognised there was an accepted interrelationship in the discipline of economics between efficiency in this economic sense, ie "economic efficiency", and competition in a market. As Mr Houston summarised it, from the viewpoint of economic theory a universal goal for economic regulation is, as far as possible, to replicate

the efficiency outcomes that could otherwise be expected from the existence of effective competition. In Mr Ergas' words economists generally consider that competitive markets lead to conditions of economic efficiency. Professor Williams, however, advanced the view that competition in a market and competitive pricing is a sufficient, but not necessary, condition for efficiency. Research he had undertaken with another economist led him to advance the view that even in the absence of competition (ie in a monopoly situation) efficiency may well be attained in given circumstances. Even so, as Professor Williams recognised, what he described as the first fundamental law of regulatory economics, that competitive markets in equilibrium will be efficient, a view which he accepted undergirds competition policy in economic theory.

117 It is also the effect of the expert evidence that the notion of monopoly and of monopoly power is directly relevant to this area of economic discourse. The well defined and settled meaning of monopoly power, in the view of Professor Williams, a notion which he regarded as synonymous with market power, is the extent to which there is freedom from constraints that would be imposed by competitors (incumbents) or potential entrants to a market. In essence, a monopoly is the absence of competition. There is also acceptance that Covered Pipelines, the subject of the Code and the Act, are natural monopolies.

118 On the expert evidence these notions were widely established and accepted, though not necessarily universally so, in the field of economic analysis of public policy, particularly with respect to infrastructure regulation, in each case well before December 1997, and indeed before the Hilmer Report.

119 As has been discussed, the subject matter of the Act and Code is the regulation in the public interest of access to some major gas pipeline systems. The need for regulation arises in the context of competition policy reform in Australia. This reform includes the development of a national and competitive market for natural gas, and the prevention of abuse of monopoly power. This subject matter and the intergovernmental and legislative history of the Act and Code, which commenced with the Hilmer Report, provides a compelling reason to regard the Act and Code as deriving from, and being directed towards, national economic reform, especially in the field of competition policy, and its application to infrastructure regulation. This persuasively indicates, in my view, that the concepts and objectives of the legislation have their basis in the particular field of the discipline of economists to which I have referred. The purpose of the legislation is to guide and regulate the affairs of a quite

narrow and specialised section of the community versed in economic theories of infrastructure regulation and the practical application of those theories. To the extent, therefore, that words or phrases used in the Act and Code reflected, at the relevant time, generally established and accepted concepts in this specialised field of economics, albeit not necessarily universally held or expressed with precise uniformity, there is strong reason to favour the view that the words were intended to refer to such generally established and accepted economic concepts.

120 From what has been discussed already the conclusion commends itself that the phrase "economically efficient", used in s 2.24(d) and 8.10(h) of the Code for example, was intended to reflect the concept of economic efficiency discussed above. In this case there is every reason to conclude that this reflected or incorporated at least the three dimensions of economic efficiency as set out in the Hilmer Report in the passage quoted earlier in these reasons. This is not to suggest that economic efficiency had an entirely settled and uniformly defined meaning. The evidence indicates, however, that it was an established economic concept generally well recognised and understood in this field of economics. Nevertheless, experts might differ in detail as to its precise signification and how it should be achieved in a particular case.

121 While "monopoly power" has been shown to have a sufficiently clear and established meaning in the relevant field of economics, a meaning that was no doubt comprehended in the preamble to the Act and the introduction to the Code, and which is reflected in Chapter 12 of the Hilmer Report, the evidence falls well short of establishing that at the relevant time, or even now, there was or is an established or settled meaning in the field of economics of the concept of an "abuse of monopoly power". In particular, despite some views expressed in the evidence, it has not been shown that "abuse" in this sense had a settled or accepted meaning of pricing by a monopolist, which either exceeded prices that would be achieved in a competitive market, or exceeded prices set to reflect the theories of economic efficiency.

122 The phrase "competitive market" appears in the preamble and the introduction to the Code and in s 8.1(b) of the Code. Taken separately the two words "competitive" and "market" are words in wide current use with accepted ordinary meanings. In the preamble and the introduction to the Code the context is the promotion of a competitive market for natural gas and in that context it is clear that the competitive market in question is not that, or not only that, of the transport of gas whether by pipeline or otherwise. It appears to extend from competition among producers to

competition for ultimate customers or consumers. It is readily apparent, of course, that how gas can be conveyed from production fields to the point of wholesale or retail distribution and eventual consumption, and by whom, and on what terms and conditions including cost, may all have a bearing on competition, however that notion is precisely understood, among producers, wholesale distributors, traders and retailers of natural gas. In this context, however, there is an apparent intention to reorder ordinary commercial forces, as they might be operating at those various levels of the market for natural gas in Australia with a view to the promotion of competition. This is clearly indicative of economic regulation as a matter of public policy. Its scope reaches far wider than the mere operation of gas pipelines and the determination of who might use them. The notion of competition in the market, so identified, suggests an emphasis on the economic role of a market as a means of controlling the disposition of society's resources in the field of natural gas. This appears consistent with the general tenor of the COAG agreement of February 1994 and the preceding Hilmer Report.

123 "Competition" in a "market" is a subject matter that had received consideration and was the subject of judicial decision before the November 1997 COAG agreement reflected by the Code. In the particular context of an application for the authorisation of a merger proposal pursuant to the *Trade Practices Act*, the Trade Practices Tribunal considered and discussed the concepts of competition and market in ***Re Queensland Co-operative Milling Association Ltd; Re Defiance Holdings Ltd*** (1976) 25 FLR 169 particularly at 187 – 189. The Tribunal did not attempt any final definition of either concept but offered a useful analysis. At 187 the Tribunal said:

> "Competition may be valued for many reasons as serving economic, social and political goals. But in identifying the existence of competition in particular industries or markets, we must focus upon its economic role as a device for controlling the disposition of society's resources. Thus we think of competition as a mechanism for discovery of market information and for enforcement of business decisions in the light of this information. It is a mechanism, first, for firms discovering the kinds of goods and services the community wants and the manner in which these may be supplied in the cheapest possible way. Prices and profits are the signals which register the play of these forces of demand and supply. At the same time, competition is a mechanism of enforcement: firms disregard these signals at their peril, being fully aware that there

> are other firms, either currently in existence or as yet unborn, which would be only too willing to encroach upon their market share and ultimately supplant them.
>
> … Competition is a dynamic process; but that process is generated by market pressure from alternative sources of supply and the desire to keep ahead.
>
> As was said by the US. Attorney General's National Committee to study the anti-trust laws in its report of 1955 (at p. 320):
>
> > 'The basic characteristic of effective competition in the economic sense is that no one seller, and no group of sellers acting in concert, has the power to choose its level of profits by giving less and charging more. Where there is workable competition, rival sellers, whether existing competitors or new potential entrants into the field, would keep this power in check by offering or threatening to offer effective inducements …'
>
> Or again, as is often said in US antitrust cases, the antithesis of competition is undue market power, in the sense of the power to raise price and exclude entry. …
>
> Competition expresses itself as rivalrous market behaviour."

At 189 the Tribunal noted that competition is a process rather than a situation. At 190 the Tribunal said:

> "We take the concept of a market to be basically a very simple idea. A market is the area of close competition between firms or, putting it a little differently, the field of rivalry between them. (If there is no close competition there is of course a monopolistic market.) Within the bounds of a market there is substitution – substitution between one product and another, and between one source of supply and another, in response to changing prices. So a market is the field of actual and potential transactions between buyers and sellers amongst whom there can be strong substitution, at least in the long run, if given a sufficient price incentive. … As well, on the supply side, sellers can adjust their production plans, substituting one product for another in their output mix, or substituting one geographic source of supply for another. Whether such

> substitution is feasible or likely depends ultimately on customer attitudes, technology, distance, and cost and price incentives.
>
> It is the possibilities of such substitution which set the limits upon a firm's ability to 'give less and charge more'. Accordingly, in determining the outer boundaries of the market we ask a quite simple but fundamental question: If the firm were to 'give less and charge more' would there be, to put the matter colloquially, much of a reaction? And if so, from whom? In the language of economics the question is this: From which products and which activities could we expect a relatively high demand or supply response to price change, ie a relatively high cross-elasticity of demand or cross-elasticity of supply?"

124 The expert evidence before the Court identified four distinct notions or usages of competition - free competition, perfect competition, contestability and workable competition. Of these, only perfect competition and workable competition are said to be in current economic usage. Perfect competition is a concept said to be still used in economic analysis, but it is a theoretical concept which is not met in the actual conditions of competition in any industry. Workable competition is said originally to have been developed over half a century ago by anti-trust economists. In simple terms it indicates a market in which no firm has a substantial degree of market power. While the evidence of the three witnesses differed in some respects, I am left with the clear impression that in the field of competition policy, especially market regulation, the prevailing view and usage among economists is that a reference to a competitive market is to a workably competitive market. In the particular context of the promotion of a competitive market for natural gas it would be surprising if what was contemplated was a theoretical concept of perfect competition, as the subject matter involves very real-life commercial situations. Workable competition seems far more obviously to be what is contemplated. This is clearly consistent with the approach of the Hilmer Report and is the notion of competition that was explored in the ***Queensland Cooperative Milling Association Ltd*** case quoted above.

125 As Mr Ergas explained, a workably competitive market would increase efficiency over a non-competitive market, but not necessarily fulfil the ideal efficiency standard of textbook models. Nevertheless, it is his evidence that economists generally consider that competitive markets lead to conditions of economic efficiency. In the result, while the concept of a competitive market is one well known in the relevant field of

economics, the basic concept, in the economic sense of a workably competitive market, ie a market where no firm has a substantial degree of market power, is one in substantial harmony with what would be understood as a matter of ordinary language by combination of the words "competitive" and "market".

126 It is my conclusion that in the preamble to the Act and the introduction to the Code the concept of a "competitive market" is that which economists in this field would understand to be a workably competitive market. That having being said, however, it is clear from the evidence that there is division among economists as to how the concept is promoted where it does not exist, and how its outcomes can be artificially created in a monopolistic situation. A fundamental reason for this is that a workably competitive market is itself a variable and varying state of things – or rather it is a process. The evidence and the many supporting documents placed before us suggest this is a field of very active endeavour by economists, with older views being constantly further developed and new views emerging. The clear impression from the evidence is that there has been noticeable development in the prevailing economic understanding of these things in the period since December 1997.

127 In s 8.1(b) of the Code the stated objective is replicating the outcome of a competitive market in the context of the determination of a reference tariff or the development of a reference tariff policy for a natural gas pipeline. While the underlying notion of a competitive market would appear to be the same in this context as in the preamble to the Act and the introduction to the Code, the precise focus of s 8.1(b) is quite different from the context of the preamble and the introduction. What is in contemplation in s 8.1(b) is a competitive market in the field of gas transportation. The objective is to replicate what would be the outcome if there was competition for the transportation of gas by the pipeline in question, even though it is the premise of the Act and the Code that the pipeline is in a monopoly situation and it would be uneconomic to construct another. The objective seems to necessitate the application of economic methods and theory, albeit to replicate the outcome of a workably competitive market, because the achievement of competition in fact is not possible.

128 It is not necessary for the purpose of this decision to attempt to explore fully the implications of this in the full understanding and application of s 8.1(b). That is primarily the task of the Regulator within the bounds of the intended meaning of the provision. It is of some

relevance to notice, however, that as a competitive market, in this sense of an economist's understanding of a workably competitive market, is not a fixed and immutable condition with any absolute or precise qualities, but a process which involves rivalrous market behaviour: ***Re Queensland Cooperative Milling Association Limited***. As such, a workably competitive market will react over time and according to the nature and degree of various forces that are happening within the market. There may well be a degree of tolerance of changing pressures or unusual circumstances before there is a market reaction. The expert evidence and writings tendered in evidence suggest that a workably competitive market may well tolerate a degree of market power, even over a prolonged period. The underlying theory and expectation of economists, however, is that with workable competition market forces will increase efficiency beyond that which could be achieved in a non-competitive market, although not necessarily achieving theoretically ideal efficiency.

Interpretation of the Code - Section 2.24 Factors

129 I turn now to examine the factors identified in s 2.24(a) to (g). It is immediately apparent that they are diverse and reflect different aspects of the objects of the Act as revealed by the preamble. It may fairly be said that the factors in s 2.24(a) to (g) reflect in a more precise context, and for the particular purposes of s 2.24, the general objectives of the Act and the Code as set out in the preamble to the Act.

130 The service provider's legitimate business interests and investment in the pipeline (s 2.24(a)) would appear directly relevant to the objective that access rights by third parties be on conditions that are fair and reasonable for the owners and operators of a pipeline. The investment in this case is relevantly the full purchase price of $2.407 billion, (some other items are also relied on). Within the meaning of s 2.24(a) both that investment and the legitimate business interests of Epic might properly extend to the recovery of that $2.407 billion, at least over the expected life or operation of the pipeline, together with an appropriate return on investment. (In the Regulator's unquestioned finding the expected life of the DBNGP is 70 years). The business interests of Epic might well extend much further than this, but it is unnecessary to explore those matters. There was a submission from Alinta that in the context of this Code the recovery of monopoly prices or tariffs, above the level of economically efficient prices, should not be seen as "legitimate". I find no support in the Act or the Code for such a view. While some expressions of economic theory and passages in the Hilmer Report would suggest that it is against the

interests of society as a whole, at least in some situations, for a monopolist to be able to recover monopoly prices or exercise monopoly power in the market, that does not make the enjoyment by a monopolist of a monopoly an illegitimate business interest. On the other hand there may be much scope for the notion of illegitimate, as opposed to legitimate, business interests in the context of arrangements which, for example, constitute a contravention of the *Trade Practices Act* or involve manipulations of the prices paid for assets with a view to the avoidance of revenue charges. There is no basis shown, however, upon which the interests of Epic in recovering the actual investment it made in the DBNGP when it acquired it from the State, together with a reasonable return on that investment, should be categorised as other than a legitimate business interest for the purposes of s 2.24(a).

131 In this case, no issue is raised as to the firm and binding contractual obligations of the service provider (s 2.24(b)), but it is instructive to notice that prices that have been contractually agreed by a service provider, even if they include monopolist rents or returns, may continue to be charged by the service provider by virtue of s 2.25 and, by s 2.24(b), they are matters the Regulator must take into account.

132 It is clear from s 2.24(c) that the ongoing safe and reliable operation of the pipeline must be taken into account. Expenditure necessary for this purpose must be taken into account whether or not that would occur in a competitive market or according to theories of economic efficiency.

133 Section 2.24(d) directs attention to the "economically efficient" operation of a pipeline. For reasons already indicated this appears to be intended to refer to the concept as generally understood by economists in this field. Epic saw significance in the word "operation", which it submitted indicated that ownership was to be distinguished. It was its submission that the cost of ownership fell to be considered under s 2.24(a). I find this a less than persuasive view having regard to the notion of economic efficiency, which involves specific views about costs such as capital investment. These, however, are viewed from the perspective of society. It seems to me that s 2.24(d) is reflecting that view, whereas s 2.24(a) is reflecting a different viewpoint, that of the owner and operator. It is for the Regulator to consider both, having regard to the scope and objects of the Act. In this respect, s 2.24(d) most naturally relates to the objective in the preamble of the promotion of a competitive market and, perhaps, also to the prevention of the abuse of monopoly power.

134 The notion of public interest in s 2.24(e) is expressed first in its generality, and then more narrowly as the public interest in having competition in markets. In the latter and limited aspect, s 2.24(e) is clearly reflecting the objective of the promotion of a competitive market stated in the preamble. The public interest at large, however, would have regard to wider considerations. These may extend to embracing the protection of the interests of the owners of pipelines and the assurance of fair and reasonable conditions being provided where their private rights are overborne by the statutory scheme, as submitted by Epic, but it is not necessary to explore this exhaustively.

135 In s 2.24(f) the interests of users and prospective users are likely to be counterpoised to the service provider's legitimate business interests and investment. Even so, maximising the use of the capacity of the pipeline by virtue of its use by third parties could well be to the benefit of users and prospective users, as well as the owner and operator, so there is at least some scope for those respective interests to find mutual accommodation.

Interpretation of the Code – Section 8.1

136 In s 8.1 it is to be noted that par (a) to par (f) are not stated as finite or absolute criteria. They are objectives which a reference tariff and a reference tariff policy should be "designed with a view to achieving". Further, and importantly, s 8.1, in its concluding paragraph, expressly recognises that those objectives may be in conflict in their application to a particular reference tariff determination. The provision expressly recognises, what analysis of the objectives reveals, that the different objectives may well be in tension in a particular case. The process of reconciliation by the Regulator for which the concluding paragraph provides, necessarily accepts that the achievement of one objective may be impaired to satisfy another. Further, as the last words of s 8.1 expressly recognise, it may be necessary in a particular case for the Regulator to determine that one or more of those objectives should prevail over others. In other words, in a particular case, not all of the objectives may be achievable even in a moderated form. The necessarily discretionary power of the Regulator to determine how best to reconcile conflicting objectives, or which of them should prevail, is critical, in my view, to an understanding of the intended operation of s 8.1 with its potentially disparate objectives. As has been mentioned briefly earlier in these reasons it is not possible for the Regulator, in exercising these significant discretionary powers, to be guided only by s 8.1 itself. Of

necessity, guidance in the exercise of discretion to resolve conflict within s 8.1 must be provided from outside that provision. As indicated earlier in these reasons the intended operation and interpretation of the Code appears to require that in the exercise of the discretionary powers provided by the concluding paragraph of s 8.1, the Regulator should be guided by the factors in s 2.24(a) to (g).

137 Section 8.1(a) introduces the notion of "efficient costs". While Mr Houston and Mr Ergas saw that the notion of "efficient costs" in the context of delivering services would be understood today, at least by most economists, there was imprecision as to when that level of understanding was achieved. This is in the context that, at least in the view of Mr Ergas, the expression "efficient costs" was relatively new in the early and mid nineties, but has since grown in understanding. He described December 1997 as a time of flux in which economists used different terms which *he* understood as generally having *more or less* the same meaning. What has since developed, in his opinion, is a relatively greater understanding and wider acceptance of the concept, although even now he accepted there was no generally accepted or certain meaning. While Mr Houston advanced the view that the phrase "efficient costs of delivering services", means that the services are being provided in an efficient manner, a concept which he sought to further develop, he accepted that even today there may be uncertainty as to the time horizon against which that has to be determined. Professor Williams, on the other hand, did not agree that the phrase had a technical economic meaning.

138 The expert evidence before the Court does not demonstrate that in December 1997 there was a generally accepted usage and meaning of the phrase "efficient costs" even among economists familiar with the relevant economic field. There had been occasional uses of the phrase but without any necessarily uniform understanding. Since December 1997 the evidence would suggest that usage of the phrase has increased. Whether or not that had also involved uniform usage remains unclear and is the subject of different expert evidence. In any event the present concern is with usage as at December 1997.

139 Epic argues that both the word "efficient" and the word "costs" are words in everyday English usage and there is no justification for giving to them any specialised economic meaning. "Efficient", on this view, would mean no more than without waste. Indeed, as has been indicated that is also an accepted usage of the word "efficient" in many contexts in the field of economics. On the other hand, the word "efficient" in a code dealing with the regulation of infrastructure in the context of competition

policy reform, and in which the concept of "economic efficiency" has been expressly incorporated, strongly suggests a usage which comprehends and reflects that notion in its accepted senses of technical or productive, allocative and dynamic efficiency. This not only finds support in the general context of the Code, but also in the more expansive reference to "efficiency in the level and structure of a tariff" in s 8.1(e), which more clearly reflects the principles of "economic efficiency". This view is also encouraged by the association of s 8.1(a) with s 8.1(b) and its objective, which is to replicate the outcome of a competitive market, in view of the association accepted by economists between economic efficiency and competition in a market, as discussed earlier. This view that the word "efficient" in s 8.1(a) is being used in an economic sense, rather than its ordinary English meaning, and to import the concept of economic efficiency to costs in the context of infrastructure regulation, is the view which appears most persuasive and most consistent with the subject and context of the Code. On this view, "efficient costs" is a construct of the relevant economic concept of efficient, together with the ordinary notion of costs. This approach is consistent with that taken in ***Collector of Customs v Agfa-Gevaert Ltd*** (1996) 186 CLR 389 to the composite phrase considered in that case, particularly at 398 – 402.

140 In this context the submissions also gave attention to other phrases in the Code used with reference to costs. Except to agree with the submission that the Code has used notions such as "efficient costs", "actual costs", "costs incurred" and "prudent … costs", as notions that are apparently distinct from each other, the review of those other usages is not particularly useful.

141 Both the Regulator and Alinta, in their submissions, regard the notion of economic efficiency as allowing only capital costs calculated on a "forward looking" basis, ie not with regard to past actual investment, to be taken into account in the determination of "the efficient costs of delivering the reference service". On this view a past purchase price, especially if it included a monopoly profit component, would not be included for the purposes of s 8.1(a). While the evidence indicates that such a view has some support in economic theory, the application of "efficient costs" to the circumstances of this case is, of course, a matter for the Regulator. It is to be observed, however, that s 8.1(a) is concerned with the efficient costs of delivering the reference service over the expected life of the pipeline. That is, it is concerned with the transportation of gas by pipeline from and to various locations. It is not dealing with the economically efficient functioning of the Australian market in natural gas. Thus in s 8.1(a) the focus is much narrower. This

may affect how efficiency in each of its three dimensions is evaluated. It is also to be noted that s 8.1(a) does not provide that the service provider should recover the efficient cost of delivering the reference service; the objective is that the service provider should be provided with the "opportunity" to earn a "stream of revenue" (NOT the defined term Total Revenue as in s 8.2(a) and s 8.4) that recovers the efficient costs over the expected life of the assets used. Further, the provision is not stipulating that the stream of revenue must be designed to be constant over the expected life of the assets. A reference tariff may well be designed to meet many objectives. In the pursuit of some of these objectives revenues may be higher initially, or at some other period, and lower at other periods (although note s 8.33).

142 In their submissions the Regulator and Alinta seemed to regard s 8.1(a) as fixing a ceiling on the revenue stream that might be earned. In my view, it would distort the words used to engraft the sense of "*no more* than the efficient costs" into s 8.1(a). Similarly, there would be a misconception to engraft "*at least* the efficient costs" into the provision. Each of these would add an emphasis not contemplated by the language of s 8.1(a). This may have particular relevance in a case where the Regulator is called on to exercise the discretions contemplated by the last paragraph of s 8.1.

143 Section 8.1(b) provides that a reference tariff should be designed with a view to replicating the outcome of a competitive market, ie as indicated earlier, a workably competitive market. The discussion of the concept of a competitive market earlier in these reasons, especially the close interrelationship recognised by economists between the role of a competitive market and the achievement of economic efficiency, suggests that s 8.1(b) and s 8.1(a) are more complementary that antithetical, although they need not always be in harmony. As far as the expert evidence discloses, a competitive market in the sense of a workably competitive market appears to be viewed by the general body of economic opinion as likely, over time, to lead to economic efficiency or at least to greater economic efficiency. As the Hilmer Report puts it, the promotion of effective competition is generally consistent with maximising economic efficiency. This would suggest that, over time, the revenue earned by a service provider from a reference service, if that service was provided in a workably competitive market, would approximate the efficient costs of delivering the service. That also helps to confirm that the concept of efficient costs, like the outcome of a workably competitive market, is not capable of precise or certain calculation and at best, can only be approximated. Both are based on many assumptions. How best

to determine the efficient level of costs or the outcome of a competitive market are matters of economic theory and practice which, on the evidence, are in the course of constant revision, development and refinement.

144 In particular, at the time of the Hilmer Report, it was recognised that economic theory offered no clear answer to how best to resolve many competing considerations, including how to achieve the most appropriate balance between the interests of consumers in obtaining low prices and the service provider in receiving higher prices, including monopoly rents, that might otherwise be obtainable (Hilmer p 253). It was noted, however, (Hilmer p 269) that where the conditions for workable competition are absent, firms may be able to charge prices above the efficient level for periods "beyond those justified by past investments and risks taken", it being a primary goal of competition policy to increase competitive pressures in such situations. It appears to be inherent in this that in a workably competitive market past investments and risks taken may provide some justification for prices above the efficient level.

145 The evidence before this Court does not establish that by December 1997, or even today, economic theory had resolved these competing considerations, or has come to a settled view as to the most appropriate balance. Indeed the expert evidence, including the supportive expert writings, suggested a growing awareness of the long term disadvantages of striking the balance with too great an emphasis on the interest of consumers in securing lower prices, and without due regard to the interest of the service provider in recovering both higher prices and its investment.

146 Section 8.1(c) specifies as a distinct objective the insurance of the safe and reliable operation of the pipeline. It is clear that ongoing safety and reliability was seen to be important, independently of and, in appropriate circumstances, notwithstanding what efficient costs or a competitive market might warrant. The economic evidence would suggest that it is increasingly understood in economic theory and practice, at least today, that efficiency in costs should accommodate the need to make provision for proper maintenance and technical improvement in the longer term, even though this might detract from the lowest level of pricing. Whatever may have been the level of acceptance of this view in December 1997, s 8.1(c) mandates attention to the safe and reliable operation of the pipeline. It can be anticipated, therefore, that in the design and assessment of every reference tariff consideration will have been given to the need to ensure that the revenue stream will be sufficient to meet safety and reliability needs as and when that is necessary.

147 Section 8.1(d) is of particular significance in the present case. It separately stipulates as an objective of a reference tariff and a reference tariff policy that each should be designed so as not to distort investment decisions in pipeline transportation systems or in upstream and downstream industries. For present purposes the discussion will focus on the first limb of this, as did the submissions, without overlooking the consequences in upstream and downstream industries and the need for that to be considered by the Regulator as well.

148 In respect of the distortion of investment decisions in pipeline transportation systems, the submissions of the Regulator and Alinta seem to regard this objective as being adequately reflected by the provision of a revenue stream in accordance with s 8.1(a). In their submission, at least in economic theory, that should enable the recovery of the replacement cost of the pipeline over the expected life of the pipeline. In support of this there was reliance on the expert evidence which suggests that the theory of economic efficiency, albeit described simplistically, is "forward looking", essentially treating past investment as sunken, ie forever bygone. On this view, an asset such as a pipeline would not be regarded as having a capital value greater than the cost of replacing the service capacity which it provides.

149 The language of s 8.1(d), however, provides no reason to confine this objective in this way. To do so, fails to recognise that a reference tariff which is based only on a cheaper present replacement value, and which has no regard to the actual unrecovered capital investment in the pipeline, may well undermine the viability of the earlier investment decision. If future investment in significant infrastructure, such as a natural gas pipeline, is to be maintained and encouraged, as the public interest requires, regard seems to be required to the need for both existing and potential investors to have confidence that the very substantial long term investment decisions which are required, and which were sound when judged by the commercial circumstances existing at the time of the investment, are not rendered loss-making, or do not result in liquidation, by virtue of future governmental intervention. As the Hilmer Report noted at p 251:

> " … the public interest would need to place special emphasis on the need to ensure access rights did not undermine the viability of long-term investment decisions, and hence risk deterring future investment in important infrastructure projects."

150 The expert evidence and writings in this respect appear to reveal an unresolved tension. There was general acceptance of the view that, as a matter of theory, economic efficiency required that actual past investment decisions be ignored. This appeared to be the case because, among other reasons, they may have been based on an expectation of recovering monopoly profits. The economists seemed to accept that, as a matter of economic theory, where a significant infrastructure asset, such as a pipeline, became the subject of regulation, the price of obtaining improved economic efficiency might be that the owner would be forced "to vacate the market". In such a case, the view in economic theory was that another party would no doubt enter the market to acquire the right to operate the asset, so that the "services" provided by the asset would continue. Failing that, economic forces would lead to a replacement of the services by some other means, at least if there was a sufficient demand for them.

151 As against that view some of the expert evidence and the writings tendered to the Court revealed a growing awareness that such an outcome, although offering the advantage of lower prices for consumers in the short term, could be contrary to public interest in the long term, because of the adverse effect on necessary future investment in such assets of any adverse outcomes of past investments.

152 The extent to which this growing concern has been or will come to be accommodated into economic theory and practice is one issue. In my view, however, s 8.1(d) has dealt with the issue expressly, and has done so by not denying the potential relevance of past investment decisions to the design of a reference tariff or a reference tariff policy.

153 In this respect, in my view, s 8.1(d) can be seen to reflect a public interest broader than the mere understanding and application of economic theory, by taking account of wider political and social considerations. Past investment in a Covered Pipeline has not been rendered necessarily irrelevant, as the application of economic theory might suggest. In particular, there may be seen in s 8.1(d) a reflection of the general scope and policy of the Act, in so far as this sought to provide for third party access to pipelines on terms and conditions that were fair and reasonable to owners and operators. In this respect there is some underlying consistency of objective between s 8.1(d) and provisions such as s 2.24(a), and s 8.10(c), (d), (f), (g) and (j).

154 So understood, it would be consistent with the objective reflected in s 8.1(d) if the Regulator, in an appropriate case, were to accept or to take

into account the actual investment of the owner in a Covered Pipeline which existed at the time the Act and Code came into force, when establishing the initial Capital Base. This is not to suggest that reckless, mistaken or highly speculative investment decisions should be accepted for this purpose. Such decisions, of course, would be likely to be recognised as such by other investors. However, by virtue of s 8.1(d), it would appear that the outcome under the Code of an investment decision in a pipeline made before the introduction of the Code, even though that decision anticipated some "monopoly" profits, would not be irrelevant to the Regulator's deliberations, under s 8, including the establishment of the initial Capital Base.

155 The reasons of the Regulator in the draft decision reveal that he was well alert to another relevant aspect of the operation of the first limb of s 8.1(d). Future investment decisions in pipelines might well be distorted were it the case that *any* price paid by a service provider to acquire a pipeline, no matter how uncommercial, mistaken or reckless, should automatically be recognised as the initial Capital Base or value of the pipeline for the purposes of the Code. This would encourage the payment of excessive and unrealistic prices to acquire a pipeline in the expectation that the purchase price would be able to be recovered over the life of the pipeline under the Code. It follows that a price paid for a pipeline before the Code applied to it, will need to be carefully evaluated by the Regulator for the purposes of s 8.1(d).

156 For present purposes the arguments do not place any emphasis on either s 8.1(e) or (f) so that I will not deal with them specifically except to note, as has been mentioned earlier, that "efficiency" in s 8.1(e) appears in this context to reflect the concept of economic efficiency.

Interpretation of the Code - Overview to Section 8

157 A further and significant consideration concerning s 8.1 which must be considered arises from the overview in italics at the beginning of s 8. Under the heading of "General Principles" the first paragraph of this overview contains the statement that the "overarching requirement is that when reference tariffs are determined and reviewed, they should be based on the efficient cost (or anticipated efficient cost) of providing the reference services". There is no provision in s 8 to this effect. Section 8.1(a) comes nearest to the suggested overarching requirement. It does not provide, however, that it is to be overarching. Further, s 8.1(a) is but one of several objectives some of which may well conflict with each other, in which event the last paragraph of s 8.1 enables other objectives

to prevail over s 8.1(a). There are other differences between what is stated to be the overarching requirement in the overview and what is provided by s 8.1(a), but there is no present need to examine the detailed differences.

158 With respect to this issue, s 10.4 and s 10.5 make provision for the interpretation of the Code and the relevance of the overviews in italics. By s 10.4 the overview in italics at the commencement of each section of the Code does not form part of the Code. Hence, the overview in italics at the commencement of s 8 can never be given legislative effect contrary to, or in addition to, the provisions of s 8, other than as s 10.5 contemplates. Section 10.5 provides:

> "In interpreting a provision of this Code consideration should be given to the introduction to this Code and the overview in italics at the beginning of the relevant section of this Code:
>
> (a) to confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision; or
>
> (b) to determine the meaning of the provision when:
>
> (i) the provision is ambiguous or obscure; or
>
> (ii) the ordinary meaning conveyed by the text of the provision leads to a result that is manifestly absurd or unreasonable."

159 Nothing in the overview in italics at the beginning of s 8, insofar as it suggests that s 8 provides for the overarching requirement, either confirms the ordinary meaning of s 8.1, or in particular s 8.1(a), within the meaning of s 10.5(a). Nor does anything in the overview assist in the determination of the meaning of s 8.1, or in particular s 8.1(a), within the meaning of s 10.5(b). Indeed, the last paragraph of s 8.1, as well as the objectives in s 8.1(a) to (f), cf s 8.1(b), (c) and (d), require the conclusion that s 8, and in particular s 8.1, does *not* provide for the overarching requirement indicated in the overview in italics.

160 There is, of course, the possibility of ambiguity or obscurity in s 8.1(a), especially as to the meaning of "efficient costs". Nothing, however, in the statement in the overview about an overarching requirement, or in any other part of the overview to s 8, provides assistance with the resolution of that ambiguity or obscurity. Hence, it is

not possible to give effect to what is provided in the overview about an overarching requirement. It follows that the submissions, particularly of Alinta, insofar as they advanced the view that s 8.1(a) had an overarching effect, must be rejected.

161 While dealing with s 10.4 and s 10.5 it is to be noted that, in other parts of the overview in italics at the commencement of s 8, there is a reference to the three methodologies for determining the Total Revenue in terms that essentially repeat the provision of s 8.4. Further, when dealing with the establishment of the Capital Base the overview refers to "principles for valuing pipelines in existence at the commencement of the Code". There is nothing, in the overview in italics, however, to suggest that the value of the pipeline so contemplated is to be determined only according to "efficient capital costs", or "forward looking methods of valuation", or to exclude the effects of monopoly pricing from the calculation of value. Thus, little indeed is to be gained from the discussion in the overview in italics for present purposes, other than to note what is not indicated.

162 It follows from the rejection of the "over-arching requirement" concept, and the view that has been expressed in particular about s 8.1(d), that there is no inherent conflict between s 8.10 and s 8.11, on the one hand, and the objectives of s 8.1 on the other, as was submitted by the Regulator and Alinta.

Interpretation of the Code - Section 8.10 and 8.11 Factors

163 Sections 8.10 and 8.11 specify the principles for establishing the initial Capital Base when a reference tariff is first proposed for a reference service provided by a Covered Pipeline that was in existence at the commencement of the Code. That is the present case. The first factor that should be considered in establishing the initial Capital Base is the value determined according to the asset valuation methodology which is described in s 8.10(a). On the expert evidence, this may be conveniently referred to as the Depreciated Actual Cost ("DAC") method. Under this method the actual capital cost of the pipeline is taken as the starting point. From this there is subtracted accumulated depreciation which has been charged to users prior to the commencement of the Code. Expert evidence would suggest that it is usual to take the net book value and to depreciate this in line with accounting standards. The method requires that allowance be made for inflation. While this can be done by indexation of the asset base, more commonly, it seems, this is dealt with

by allowing for inflation in the Rate of Return which is a separate element in the Cost of Service methodology contemplated by s 8.4.

164 By s 8.10(b) the second factor to be considered by the Regulator is the value that would result from applying the "depreciated optimised replacement cost" ("DORC") methodology. The expert evidence indicates that the DORC methodology is one of a number of methodologies which are described as "forward looking". Under DORC methodology, assets are valued at the cost of replacing them or, more accurately, at the cost of replacing the remaining service potential of the asset, not the cost of replacing the asset itself. The word "optimised" indicates that it is replacement cost which is valued, and the word "depreciated" indicates that it is the remaining service potential which is replaced. As the remaining service potential is to be theoretically replaced, alternative and cheaper methods of replacing that service potential will be applied so that, more accurately, it may be described as a reproduction cost rather than a replacement cost. The expert evidence indicates that a DORC valuation will *usually* provide a good *proxy* for the price that a pipeline would realise had the owner faced workable competition at the time of its sale. Under the DORC methodology the actual or historic capital investment of the pipeline owner has no relevance.

165 The expert evidence does indicate that almost universally for gas transmission pipelines the DORC methodology will produce a higher value than the DAC methodology. This is because pipeline replacement costs increase over time, there is limited scope for optimisation of the service they provide, and technological obsolescence is a relatively minor factor.

166 By s 8.10(c) the value that would result from applying other well-recognised asset valuation methodologies should be considered. The expert evidence confirms there are other methodologies. The regulator considered an Optimised Deprival Value and an Imputed Value methodology, as well as a Purchase Price Valuation. The last of these is that for which Epic argues, ie, in essence a value determined according to the present value of anticipated net revenue from the future operation of the pipeline. It was not the case that the Regulator rejected a Purchase Price Valuation as not an appropriate methodology. The Regulator was not persuaded, however, that this was an appropriate methodology to apply in the present case. I will return to that later in these reasons.

167 By s 8.10(d) the advantages and disadvantages of each valuation methodology applied under pars (a), (b) and (c) are to be considered. By

s 8.10(e) international best practice of pipelines in comparable situations is to be considered, as well as the impact on the international competitiveness of energy-consuming industries. The Regulator dealt with the first limb of this on the basis that it required consideration of the international best practice in pipeline valuation. No submission is made that this involves any error.

168 By s 8.10(f) consideration is required to the basis upon which tariffs have been set in the past, the economic depreciation of the pipeline and the historical returns to the service provider from the pipeline. Without attempting an exhaustive consideration of the potential relevance of each of these considerations to the establishment of the initial Capital Base for a pipeline which existed at the commencement of the Code, it is to be observed that each of these considerations has a potential relevance to past investment decisions in respect of the pipeline, particularly in a case where there has been a sale of the pipeline before the commencement of the Code.

169 By s 8.10(g) regard is to be had to the reasonable expectations of persons under the regulatory regime that applied to the pipeline prior to the commencement of the Code. The persons identified would appear to include users as well as the service provider. Insofar as it deals with the reasonable expectations of the service provider, it is the expectations under the regime that applied before the commencement of the Code that are material. Obviously, if that regime was more favourable for present purposes than the Code, the reasonable expectations of the service provider would be, relevantly, for a more favourable return on the investment of the service provider in the pipeline. Section 8.10 (f) and (g), therefore, reflect the relevance of the historical returns and tariffs and depreciation, as well as the reasonable expectations of the service provider before the commencement of the Code, in the establishment of the initial Capital Base for the purposes of the Code. In a particular case one or more of those considerations might suggest a lower or a higher Capital Base than would be established were it not for (f) and (g), but in a case where those considerations would suggest a higher Capital Base, it is necessarily the effect of these provisions that this must be considered in the establishment of the initial Capital Base under the Code. Thus, these provisions, and particularly s 8.10(g), may be seen to reflect that part of the general objective of the Act and Code that rights of access to third parties would be on conditions that are fair and reasonable for the owners and operators of pipelines, and are consistent with the more precise expression of that general objective to be found in s 2.24(a). The existence of s 8.10(f) and (g) appear to preclude the view that the Code is

concerned only with forward-looking considerations in respect of the establishment of the initial Capital Base.

170 By s 8.10(h) regard is to be had to the impact on the economically efficient utilisation of gas resources. For the reasons given elsewhere, this contemplates the principles of economic efficiency and does so in the broader context of the utilisation of gas resources, rather than the more limited focus of the operation of a natural gas pipeline. Section 8.10(i) considers the cost structure of potentially competitive pipelines. No issue concerning this is raised in the present case except that this has some consistency with the theory of economic efficiency.

171 Section 8.10(j) requires consideration of the price paid for any asset "recently purchased" by the service provider and the circumstances of that purchase. Given the precise context of the operation of s 8.10, which is the establishment of the initial Capital Base for a pipeline that was in existence at the commencement of the Code, and the time-lines appropriate to the service life of natural gas pipelines, it was, in my view, open to the Regulator to regard (as he did) the purchase of the DBNGP in March 1998 as one which was made "recently", within the meaning of this provision. It was further submitted for Alinta that this provision should not be construed to apply to the purchase of a complete pipeline but merely to some particular component of a pipeline system. For the purposes of the Gas Pipelines Access Law, which includes the Code (see the Act, s 3(1)), "asset" is defined to mean "any legal or equitable estate or interest" in property of any description. This would extend to the ownership of a complete pipeline. There is no reason apparent from the language, or the context, for limiting the scope of s 8.10(j) in the way contended. The Regulator did not regard it as so limited and considered the purchase of the DBNGP by Epic under this provision. I am not persuaded that there was any error in law in this respect.

172 What must be considered is the price paid, ie, in this case \$2.407 billion, and also, and significantly, the circumstances of this purchase. The latter consideration is amply wide enough, in my view, to allow an examination of the price paid according to the standards of reasonable commercial judgement as to value, the examination of the extent to which that price might have been influenced by considerations such as the prospect of monopoly profits and, although it is not the present case, the careful scrutiny of transactions between related entities or transactions which may involve motivations unrelated to value which might affect the price paid. With respect to the present case, clearly the nature and conditions of the tender process by which the State sold and

Epic purchased the DBNGP would be circumstances which might properly be considered under 8.10(j). I should make it clear that I am not intending by these comments to make any exhaustive analysis of potentially relevant circumstances.

173 It is to be observed, however, that in a case such as the present where the purchase price is also advanced as reflecting the market valuation of the pipeline for the purposes of s 8.10(c), factors of the type that have been identified as relevant to the circumstances of purchase for the purposes of (j), would equally be relevant to the application of (c) and (d) to that market valuation.

174 Section 8.10(k) requires the Regulator also to consider any other factors which are considered relevant. In the present case the Regulator did not identify any other factors for this purpose.

175 Section 8.11 provides that in a case such as the present the initial capital base "normally should not fall outside the range of values" determined by the DAC or DORC methodologies for which s 8.10(a) and (b) provide. The submissions, particularly of Alinta, tended to regard s 8.11 as an overriding limit or kerb on the operation of s 8.10. This in turn, it was submitted, reflected an overriding intention of the Code to achieve an outcome for the initial Capital Base that was consistent with the principles of economic efficiency and a competitive market. In further support of this, there was reference to the "over-arching requirement" in the *overview* at the commencement of s 8, which has been discussed earlier. Reference was also made to some of the expert evidence which suggested that, "highly unusual and more theoretical than observable cases aside", as a matter of economic theory, an asset value higher than both the DAC and DORC values could not normally be justified as this would usually result in consumers paying monopoly rents.

176 This approach pays little or no regard to the word "normally" in s 8.11 and can gain no support from the "over-arching requirement" consideration for the reasons indicated earlier. Economic efficiency is but one of the factors identified in s 8.10 and there is no sufficient justification in that provision for regarding it as in any way a dominant consideration. While the DAC and the DORC methodologies have an acceptability for the purposes of the concept of economic efficiency, it is clear from s 8.10(c) that other well-recognised asset valuation methodologies are to be considered, and by (d) the advantages and disadvantages of each are to be weighed. It is not provided that they are to be weighed only according to the economic theory of economic

efficiency; they are to be considered and evaluated on their merits. There is no reason, implicit or explicit, why a valuation methodology which had regard to the present value of anticipated net returns, including monopoly returns, should necessarily be excluded for these purposes. Nor should there be excluded the expectations of service providers of monopoly returns where those expectations were reasonable under the regulatory regime that applied to the pipeline before the commencement of the Code, s 8.10(g). Similar observations can be made in respect of a purchase price for the purposes of s 8.10(j).

177 These provisions tell with some force against the acceptance of the interpretation of s 8.11 that is being considered, and the view that investment decisions made before the commencement of the Code can have no relevance to the establishment of the initial Capital Base pursuant to s 8.10 and s 8.11. The presence of these provisions in s 8.10, and their relevance to the establishment of the initial Capital Base of a pipeline which existed at the commencement of the Code is, of course, consistent with s 2.24(a) and the general policy objective of the Act for providing access rights to third parties on conditions that are fair and reasonable for service providers, as well as s 8.1(d) for reasons that have been given.

178 In my view, s 8.11 is to be accepted for what it says, rather than seeking by implication to read much more into it. The expert evidence indicates that when the nature of the DAC and DORC valuation methodologies is understood, it can be accepted that, normally, the value of an existing pipeline would fall within that range of values. In a case, however, where there has been an acquisition of a pipeline on the open market before the commencement of the Code, that circumstance may take the application of s 8.10 outside of what is normal within the meaning of s 8.11, because a sale at market value may well involve the capitalisation of some monopoly returns. These will have been paid to the original owner by the new purchaser. While economic theory would turn its face against such a market value, a sale in these circumstances introduces, as an additional factor, the legitimate investment and business interests of the new purchaser which, at the time of the commencement of the Code, is the service provider. Economic theory aside, this investment has social, political and public interest dimensions and it is not a surprising circumstance that the Act and the Code should seek to accommodate them.

179 At least in cases where an investment in a pipeline before the Code applied is made in the course of an arm's-length commercial transaction, and is based on a sound commercial assessment of the value of the

pipeline in the circumstances then prevailing and anticipated, it is not apparent from the terms of the Act and the Code that the intention is, automatically and necessarily, to preclude consideration of the investment, or the interests of the service provider in recovering it together with a reasonable return, or the reasonable expectations under the preceding regulatory regime of such a service provider. The interests of such a service provider may well be in tension with other considerations, but it is not apparent that their exclusion is intended by the Act and the Code. Were that the intention, some much clearer expression of it would be expected. In some cases, at least, to exclude such interests would infringe seriously on established and legitimate rights, interests and expectations. In my view, that result should not be arrived at by strained implication and in the face of many clear indications of a contrary intention.

Interpretation of the Code – Other Provisions

180 It is convenient and relevant at this stage to consider further submissions for the Regulator and Alinta in support of their contentions to the effect that it was the scheme of the Code that a service provider might only recover efficient costs, which would not include any monopoly returns or rents brought into in the determination of a reference tariff by their capitalized value being included in a sale price before the Code applied to the pipeline.

181 Section 8.16, together with s 8.15, enables the Capital Base of a pipeline to be increased from the commencement of a new Access Arrangement period to recognize additional capital costs incurred in constructing new facilities for the purpose of providing services. This is subject to the proviso, however, in s 8.16(a) that the amount of the increase:

> " … does not exceed the amount that would be invested by a prudent Service Provider acting efficiently, in accordance with accepted good industry practice, and to achieve the lowest sustainable cost of delivering Services …."

This provision quite strongly reflects aspects of the principles of economic efficiency although, at least on the expert evidence before this Court, it is both more comprehensive and more restrictive than those principles in some respects. While s 8.16(a) would be consistent with only efficient investment costs (in a sense reflecting the principles of economic efficiency) being reflected in the initial Capital Base of a pipeline, it is significant that there is not a statement in similar terms to s 8.16(a) applicable to the establishment of an initial Capital Base. That is so whether regard is had to s 8.10 and s 8.11 in the case of a pipeline that was in existence at the commencement of the Code, or to s 8.12 in the case of a new pipeline that has come into existence after the commencement of the Code. Indeed, in the case of a new pipeline, s 8.12 expressly provides that the initial Capital Base is "the actual capital cost of those assets" and that a "new Pipeline does not need to pass the tests described in section 8.16".

182 These matters suggest that s 8.16(a) is providing for a specific and different policy which is applicable only to investment in new facilities made after the pipeline is subject to an Access Arrangement, rather than reflecting the policy applied to the establishment of the initial Capital Base. Such new investment decisions are made in knowledge of the limitations imposed by s .16(a), whereas investment decisions made before the Code applied to the pipeline are not.

183 Section 8.37 is concerned with non-capital costs, ie by s 8.4(c) operating, maintenance and other non-capital costs incurred in providing all services. All non-capital costs may be recovered pursuant to a reference tariff except for costs that would:

> " … not be incurred by a prudent Service Provider, acting efficiently, in accordance with accepted and good industry practice, and to achieve the lowest sustainable cost of delivering the Reference Service."

The similarity to s 8.16(a) is obvious. Section 8.37, however, is concerned with ongoing operating costs incurred during the Access Arrangement period, not with initial capital costs. Hence, s 8.37 is dealing with controllable future costs. This is in marked contrast to the nature of the initial Capital Base of a pipeline, especially a pipeline constructed before the Code commenced. Section 8.37, like s 8.16(a), appears to make provision for a specific and different policy applicable to non-capital costs, rather than reflecting the policy applied to the establishment of an initial Capital Base.

184 Hence, neither s 8.16(a) nor s 8.37 offer support for the submission of the Regulator and Alinta that only efficient costs (in a sense reflecting the principles of economic efficiency) might properly be reflected in the establishment of the initial Capital Base for the DBNGP pursuant to s 8.1, s 8.10 and s 8.11.

Interpretation of the Code - Summary

185 Viewed in the way which has commended itself for the reasons outlined, there is, for relevant purposes, an underlying harmony and consistency in the general policy objectives of the Act stated in the preamble, and s 2.24, s 8.1, s 8.10 and s 8.11 of the Code. At every one of these points, however, there is also the tension of potentially conflicting considerations or objectives. The nature of that potential for conflict remains generally consistent, although given more particular and precise expression in the differing contexts of those provisions. In my view, the scheme of the Act and the Code is to leave this potential conflict which, in part, is between the interests of a service provider in achieving a return on its investment in the pipeline and the interests of users or consumers in achieving a lower price and indeed, perhaps, in the achievement in the public interest of greater competitiveness or the effects of competition, to be resolved by the Regulator in accordance with the Act and the Code and the circumstances of each particular case.

186 This view which I prefer involves the rejection, of course, of submissions for the Regulator and Alinta that there is an inherent inconsistency between the objectives of s 8.1 and some of the factors in s 8.10, an inconsistency which each saw to be resolved by s 8.1 prevailing. Variously it was submitted s 8.1 prevailed by virtue of s 8.11, or because s 8.1 set the objectives for s 8.10, or because of the "overarching" requirement suggested by the overview. For the reasons given in my view each of these submissions must fail.

187 The submissions of the parties have provided reason for some more extensive observations than might otherwise have been relevant with respect to the interpretation of the factors in s 2.24, s 8.10 and s 8.11, and the objectives in s 8.1. It must be remembered, however, that once the basic issues of interpretation are clarified it is for the Regulator, not this Court, to consider and weigh those factors and objectives. It is for the Regulator to assess the relevance and weight of each of these factors and objectives and to exercise the discretions that are committed by the Code to him.

Epic's Purchase Price

188 There is a further and different question whether the price paid by Epic for the DBNGP represented a sound commercial assessment of the value of the pipeline in the circumstances that prevailed at the time of the purchase and which were then reasonably anticipated, or reflected the

reasonable expectations of Epic under the regulatory regime that applied to the DBNGP prior to the commencement of the Code.

189 The mere fact that it was a price paid at public tender is not necessarily determinative of any of these issues. Quite obviously, Epic may have erred in its assessment of value or had unreasonable expectations. It may have had reason to pay higher than true market value. Despite what has been urged on us, these are not matters for this Court to attempt to evaluate or to decide. It is for Epic to seek to justify to the Regulator that the price it paid represented market value at the relevant time and to establish its reasonable expectations under the previous regulatory regime. In this regard it is fair to say that the manner in which Epic sought to demonstrate that it paid market value for the DBNGP has shown itself, in the course of these proceedings, and in the Regulator's draft decision, to be well capable of being misunderstood in more than one material respect, namely the financial provision for future expansion of the capacity of the pipeline, and the period over which it proposed it should recover its capital investment. That will be for Epic to seek to remedy, if it is so minded.

190 It should also be said that the Regulator's further consideration of the price paid by Epic for the DBNGP will no doubt be undertaken with a different appreciation from that revealed in the draft decision of the meaning and effect of s 2.24 and the scope of its potential operation in s 8.1, and of the meaning and operation of s 8.1, s 8.10 and s 8.11, and their interrelationship. This will enable the purchase price paid by Epic to be viewed in a fresh light. Whether this will lead to any different outcome is a matter for Epic's further submission, if any, and the Regulator's re-assessment and decision.

191 A further issue is the effect on the price paid by Epic of the terms and conditions set for the public tender process. It is clear enough from the material before us that the terms and conditions would affect the price offered by all tenderers, and Epic's understanding of those terms and conditions did affect Epic's tender price.

192 As I understand Epic's submissions, in the end at least, Epic sought to advance the view that it had tendered on an understanding, induced by the tender terms and conditions and, in particular, the sale information memorandum and accompanying and other information, *inter alia* that, under the Code after January 2000, the public interest would be served by a future gas tariff in the order of $1 per GJ for the primary Dampier to Perth transmission service. Further, the State required and Epic gave

undertakings *inter alia* that capital works would be carried out to expand the capacity of the pipeline, as demand required, at an estimated cost of some $875 million, without seeking tariff increases on that account. Those undertakings were given, in Epic's submission, on the basis that the tariff under the Code for the primary transmission service from Dampier to Perth would be in the order of $1 per GJ (with adjustments annually of 67 per cent of the CPI increase).

193 The submission made by Epic to the Regulator, and the proposed Access Arrangement submitted for approval, proposed a reference tariff for the primary Dampier to Perth service of $1 per GJ, and $1.08 per GJ for the transmission of gas from Dampier to south of Perth (each adjusted by 67 per cent of the CPI increase each year). Epic justified adoption of these tariffs *inter alia* on the basis of an initial Capital Base of $2.407 billion, plus the value of some other capital costs.

194 The draft decision, however, would provide a reference tariff of only $0.74 per GJ for transmission from Dampier to Kwinana, which is south of Perth and includes Perth, and $0.85 per GJ for delivery points south of Kwinana. This is on the basis *inter alia* of an initial Capital Base of $1.234 billion.

195 Epic had stressed to the Regulator, and stresses to this Court, its understanding from the sale information memorandum that tariffs after January 2000 would be in the order of $1 per GJ for the main Dampier to Perth transmission service. This is the figure Epic also stipulated as its proposed tariff rate in Schedule 39 to the DBNGP purchase agreement with the State. It was in this understanding and expectation, Epic contends, that it was able to offer to the State the purchase price of $2.407 billion for the DBNGP and give the required undertaking as to meeting the cost of expanding the DBNGP capacity without seeking tariff increases. It says the State has had the benefit of the $2.407 billion for the public benefit. These factors would warrant the Regulator, in Epic's submission, accepting the purchase price paid by Epic as representing its fair market value and for the purpose of establishing the initial Capital Base under the Code. Contrary to Alinta's submissions, I do not understand Epic to have fundamentally changed its position in these respects. While it did use the phrase 'regulatory compact' in its initial submission to the Regulator, and its position has not always been clear, it appears that Epic did not intend by this to suggest that there was a legally binding force to the $1 per GJ tariff figure which the Regulator was bound to accept. Epic's submission, as I understand it, is that for the reasons outlined the Regulator might properly have regard to the price paid by

Epic, and in the circumstances he ought to have reflected it in his establishment of the initial Capital Base.

196 There is more than one difficulty with this line of submission. A principal difficulty is that the tender process, including the information memorandum, on examination, appears to fall short of providing an adequate factual foundation for the submission. The State by its Committee responsible for the sale of the DBNGP did indicate in 1997 that future tariff reductions were desirable and should be anticipated. This appears to have been in connection with the then existing regulatory regime over which the State had direct control. Progressive reductions in tariff levels were forecast or indicated. This seems to have been on Treasury advice. It was also expressly anticipated, although not then certain, that from January 2000 regulation would be under the Code, if that had come to be enacted by that time and if it took the form then reflected in what was a draft which had not been enacted. Of course, this did occur. A tariff level for the basic service of transportation from Dampier to Perth in the order of $1 per GJ by 1 January 2000 was foreseen by the Committee. On a fair reading, however, the information memorandum appears to have been directed, in this respect, to alerting tenderers that the existing tariff levels in 1997 could not be expected to be maintained and, by January 2000 when the introduction of the Code regime was expected, could well be down to $1 per GJ. It is not apparent that this was a reference to what would occur under the Code, rather than by the anticipated time of the Code's advent.

197 More fundamentally, it was made clear that a feature of the anticipated Code was that tariff levels were to be fixed by an independent regulator. The fixing of tariff levels would then be out of the government's control.

198 The Sale Steering Committee had also retained Price Waterhouse in 1997 to provide *inter alia* an opinion as to the valuation of the DBNGP on either (what was essentially though differently described) the DAC and DORC methodologies, and on the assumed basis that the Code had come into force. Price Waterhouse gave its opinion of a DORC equivalent value as at 31 December 1997 on this basis of $1.124 billion, expressing its opinion that a valuation on that basis "would be supportable" to an independent regulator. Having reached that opinion, Price Waterhouse went on also to express its opinion that a gas transmission charge of around $1 per GJ, commencing from 1 January 2000, "was reasonable and a supportable tariff", but added that its analysis "suggested that the tariff could lie anywhere within the broad range of $0.71/GJ to $1.12/GJ … and

that values between $0.88/GJ to $0.98/GJ could be argued". There were clear and express disclaimers in respect of all of this information by the Sale Steering Committee, and given the anticipated role of an independent regulator it is not apparent that information of the nature indicated as to tariffs at or from 1 January 2000 had either any level of assurance or provided a reasonable basis for expectation. Indeed, the range indicated by Price Waterhouse ought have made evident that there was uncertainty as to what might be expected under the Code, even were the independent regulator to apply a DORC type valuation.

199 In Schedule 30 to the sale contract Epic identified $1.00 per GJ as its proposed tariff rate for the primary Dampier to Perth service. This had no contractual force, however, for purposes relevant to the determination of a tariff under the Code. Nor was the State in any way even committed to supporting such a tariff before the Regulator. In essence, it was a statement by Epic of what it hoped to achieve under the Code, the risk lying with Epic whether it did so.

200 It was open to the Regulator, as he did, to consider these matters under s 8.10(j), and also in considering whether the sale price represented the market value, or "Purchase Price Value" as he described it, of the DBNGP. It may also have been open to the Regulator to regard these matters as a factor having some relevance to the general public interest under s 2.24(e), in that the State accepted the sale price of $2.407 billion, which no doubt reflected potential future tariff earnings in this order, and applied the proceeds to the public benefit. Nevertheless, having regard to what is before this Court, the material before the Regulator appears to fall short of establishing the proposition that the State and Epic contracted on the basis, or in the expectation, that the primary Dampier to Perth tariff under the Code would be in the order of $1 per GJ from 1 January 2000. It has not been shown that the Regulator erred in law in failing to accept and act on Epic's submissions in this respect or in failing to give to them the relevance and weight for which Epic contended.

The Draft Decision

201 The draft decision of the Regulator is an extensive and detailed document. It is unnecessary to consider the general scope of the draft decision for the purposes of this application. Nevertheless, some brief references to particular views expressed in the draft decision, or to its general effect in particular respects, is necessary.

202 In the draft decision, Part A: p 16 the Regulator said in respect of s 2.24:

> "However, should an Access Arrangement address matters in addition to the requirements of sections 3.1 to 3.20 of the Code, then the Regulator has broad discretion to refuse to accept the proposed Access Arrangement if the additional matters are considered not reasonable. In assessing any additional matters included in a proposed Access Arrangement, the Regulator may take into account the factors listed in s 2.24 of the Code."

The apparent effect of these observations, which is confirmed by the way in which the Regulator approached the task in the draft decision, is that the factors listed in s 2.24(a) to (g) are relevant only to matters included in a proposed Access Arrangement which are additional to the requirements of s 3.1 to s 3.20. In short, the Regulator appears to have perceived the factors listed in s 2.24(a) to (g) as having no application at all to his assessment of the requirements of s 3.1 to s 3.20. Further, the Regulator by the word "may" has revealed a material misunderstanding of the relevant requirement of the third sentence s 2.24. As has been indicated earlier in the reasons, in assessing a proposed Access Arrangement the Regulator is required to take the factors listed into account and give weight to them as fundamental elements. In these two material respects the Regulator appears to have erred in law in his perception of his role in performing the relevant statutory function. In the circumstances, having regard to the legal principles considered earlier, this constitutes jurisdictional error.

203 While the submissions for the Regulator accepted that in these respects the Regulator had too narrowly appreciated the application of s 2.24, it was submitted that this was not relevant to the decision reached by the Regulator in the draft decision as to the initial Capital Base. This submission depended upon the view that while the s 2.24 factors had possible application to some elements within s 3.1 to s 3.20 there was no scope for the factors to have application to s 3.4 and s 3.5. For reasons already fully canvassed I am not persuaded by this submission. In particular, as indicated earlier, in my view, the factors in s 2.24(a) to (g) have application to s 3.4 and s 3.5 and through them should guide the Regulator in the exercise of the discretions contemplated by the last paragraph of s 8.1. For this reason, it is not possible to accept that the Regulator's draft decision has not been affected by the errors of law identified in the passage from the draft decision quoted above. This,

alone, is sufficient to warrant relief being granted in the present application.

204 A little later in these reasons I will quote a passage from Part B: p 137 of the Regulator's reasons which reveals an error of law material to the primary reason of the Regulator for his rejection of the sale price paid by Epic. A further reason is apparent, however, from the draft decision. At Part B: p 144 the Regulator observed:

> "Previous Australian experience with the sale of gas pipeline assets does, however, indicate that sale prices for such assets may be established well in excess of *regulatory assets values* …" (emphasis added)

Having noted that the ACCC had identified three reasons for this he went on to observe:

> "The Regulator is of the view that Epic Energy has not demonstrated that the sale price is consistent with a reasonable market valuation based on *potential regulated revenue streams*, and hence factors such as those mentioned by the ACCC may apply and limit the appropriateness of the purchase price as a valuation methodology." (emphasis added)

Shortly after this at p 145 the Regulator said:

> "The merit of valuation of the DBNGP at a purchase price is difficult to determine as this price may have been affected by many factors other than a reasonable market value of the assets *that is consistent with future regulated revenues and efficient capital investment*. Epic Energy has not demonstrated to the satisfaction of the Regulator that the purchase price of the assets represented a reasonable valuation by any conventional valuation methodology." (emphasis added)

These observations were made in the course of the Regulator's assessment of the advantages and disadvantages of each valuation methodology for the purposes of s 8.10(d). Essentially the same view was repeated at Part B: p 152 when the Regulator dealt with the price paid by Epic for the DBNGP for the purposes of s 8.10(j).

205 An error of law appears to be inherent in these passages. They disclose that the Regulator is assessing the value of the DBNGP on the basis that it should represent a value "that is consistent with future regulated revenues and efficient capital investment". In effect, the

Regulator appears to have understood that his function was to establish the value of the DBNGP on the assumption that it was subject to the Code and that a feature of the regulatory regime of the Code was that only "efficient" capital investment should weigh and only "regulated revenues" could be recovered.

206 At the time of the determination of an initial Capital Base it is necessarily the case that the Code will have been applied to a Covered Pipeline. Nevertheless, the objective of s 8.4, s 8.8 and s 8.10 is to establish an initial Capital Base for the purpose of the application of the Code to the Covered Pipeline. The Regulator appears to be allowing an assumed narrow outcome of the statutory scheme to affect the relevance and weight to be attached to factors which the statutory scheme requires to be considered as part of the process of reaching an outcome.

207 This error of law involves a significant misapprehension of the Regulator's statutory function, ie it is jurisdictional. It would also justify relief being granted on this application.

208 I would also note three further matters. First, at Part B: p 137 of the draft decision the Regulator said:

> "The Regulator is of the view that Epic Energy has not demonstrated that the purchase price is consistent with a net present value of cash flows from the assets, or consistent with a recovery of invested capital over the physical life of the assets. The primary reason for this view is that the calculations presented by Epic Energy were based on forecasts of throughput quantities that are substantially in excess of the current capacity of the pipeline system, and no allowance has been made in the calculations for the capital expenditure necessary to accommodate these quantities. As such, the Regulator does not consider Epic Energy to have substantiated the view that the purchase price for the DBNGP represents a reasonable market valuation of the assets, nor for there to be any reason to consider a reasonable market valuation to be in excess of a DORC valuation."

209 The factual basis as identified by the Regulator appears to be without foundation. So far as has been demonstrated to this Court, nothing before the Regulator was capable of supporting the view that Epic had made no allowance for the capital expenditure necessary to increase the capacity of the pipeline to accommodate the throughput quantities on which its

forecasts were based. Indeed the opposite appears to have been demonstrated.

210 The Regulator apparently relied on Epic's submitted materials for the views expressed. In the formal submission of Epic to the Regulator, at p 30, Epic expressly said that it had determined at the time of the sale that the revenue stream it should raise from the tariffs it proposed in Schedule 39 would support *inter alia* both a purchase price of approximately $2.4 billion and "(nominal) capital expenditure over 10 years from the date of acquisition totalling $875 million." The $875 million represented the anticipated cost of expanding the capacity of the DBNGP to handle the forecast additional volume. No other factual position was advanced. In short, it was Epic's express position that it had in fact anticipated and incorporated in its calculations of the purchase price the need to incur the capital expenditure necessary to effect the expanded pipeline capacity to accommodate the forecast quantities on which it relied. It is not suggested before this Court that this was not the case or that the position was not properly presented to the Regulator. Unfortunately, the only material before the Regulator on the point appears to have been overlooked. The only explanation suggested for this error is that the Regulator may have understood wrongly that illustrative asset valuation sheets, prepared by KPMG Consulting and submitted by Epic, recorded actual figures, whereas very explicitly they were merely "very simple versions" of financial models and were offered to illustrate methodology. Expressly, it was stated in respect of them that "The figures used … have no direct relationship with the figures used in the actual models …".

211 Thus it appears there was no basis on the materials before the Regulator on which it could properly be concluded that while Epic anticipated revenue from transmitting gas volumes that exceeded the existing capacity of DBNGP, it had failed to provide for the capital cost of increasing the capacity of the pipeline. This factual finding was not open to the Regulator on the materials before him. The error is thus one of law. This error is the "primary reason" given by the Regulator for the critical decision not to accept that the price paid by Epic for the DBNGP represented a reasonable market valuation of the pipeline. A further direct consequence was that the Regulator was unpersuaded that a reasonable market valuation for DBNGP was in excess of a DORC valuation. These are material to the Regulator's evaluation of s 8.10(c), (d) and (j) and to s 8.11.

212 Secondly, it is not apparent from the draft decision that in respect of s 8.1(d) the Regulator gave any consideration to the outcome of the

investment decision of Epic in its acquisition of the DBNGP, which decision was made of course before the Code came into operation.

213 Thirdly, in addition to his conclusion noted above that there was no reason to consider a reasonable market valuation to be in excess of a DORC value for the unsupported reason discussed, at Part B: p 154 the Regulator gave two other reasons for concluding that there was no reason to value the initial Capital Base in excess of a DORC value. This was in the context of his consideration of s 8.11. The first reason was what the Regulator described as "the economic arguments". The second reason was that the sale process for the DBNGP, as evidenced by the information memorandum, "would have led to the reasonable expectation that the asset valuation for the DBNGP under the Code would not be in excess of a DORC value." The second of these other reasons is apparently founded on a factual conclusion as to the effect of the information memorandum that was part of the sale process. Earlier, I have dealt with what appears to be the only relevant part of that information memorandum. This is the inclusion by the Sale Steering Committee of an indicative valuation prepared by Price Waterhouse which was based upon a DORC valuation. As already noted Price Waterhouse had been briefed to prepare either a DAC type or a DORC type valuation. Price Waterhouse went on to express the view that a DORC type valuation would be supportable under the Code. I will not repeat what has been said earlier about this. However, at Part B: p 154 of the draft decision the Regulator suggests that this "would have led to the reasonable expectation" that the asset valuation would not be in excess of a DORC value. In Part A: p 18 - p 19 the Regulator deals with the same subject matter. There the Regulator expresses that view and, a few lines later, the different view that "this may have led to reasonable expectations" of a DORC valuation under the Code being likely. There is a significant difference between these two expressions of view, if they are to be relied on to support the conclusion that Epic had that expectation.

214 Attention having been drawn to these three further matters, they are each properly and adequately left in this decision for such further submissions with respect to them as Epic might choose to put to the Regulator, and for the Regulator's further consideration of them.

Grounds of the Application

215 These reasons have not given express consideration to the grounds of this application. It has been more convenient and satisfactory to look at the fundamental issues, which concern the interpretation of the Code, on

which all but one of the grounds of the application turn. While the grounds of the application are set out at a length and in a detail which provided a useful reference to the nature and breadth of Epic's objections to the draft decision, in a number of respects they, or the submissions in support of them, appeared to invite this Court to consider aspects of the factual merits of Epic's case. Save to the limited extent, and for the purposes, identified in these reasons it is not appropriate to enter into a consideration of the factual merits of Epic's position.

216 Ground 7 raises an issue of procedural fairness. Section 2 of the Code contains detailed provisions, which have been identified, for the procedures to be followed by the Regulator, including provisions for a series of decisions, commencing with the draft decision and the opportunities for submissions to the Regulator by the service provider both before and after a draft decision is given. Given the nature and extent of these, I have not been persuaded that the failure of the Regulator, before reaching and publishing his draft decision, to act as the ground suggests to notify Epic and provide them with an opportunity to supply further information and to exercise the Regulator's own powers to obtain further information, constitutes a failure to accord procedural fairness.

217 The essential point to which the ground is directed is the question whether the price paid for the DBNGP represented the then market value of the pipeline. That was a matter quite central to the case which Epic put to the Regulator in support of its proposed Access Arrangement. Epic could not reasonably have failed to foresee that, for its purposes, it was necessary to satisfy the Regulator that the price paid represented the then market value. Indeed, its case sought to do so *inter alia* on the basis that the price was paid in a competitive public tender sale process, and by identifying the basis upon which it had calculated the present value of estimated future returns during the anticipated life of the pipeline. In this last regard, however, Epic stopped well short of providing its actual calculations to the Regulator and sought to satisfy the Regulator by illustrating the nature of the methodology which it had applied. Rather than this being a case where Epic failed to anticipate the relevance of the issue the situation is more that the Regulator was not satisfied by the case which Epic put forward.

Relief

218 For the reasons indicated in my view Epic has made good a case which in law could support the grant of the prerogative relief claimed and, in the alternative, declaratory relief.

219 Epic submits that the draft decision should be quashed and the Regulator should commence afresh his assessment of the proposed Access Arrangement. This would afford to Epic the maximum opportunity to reinforce its case to the Regulator and the full measure of the procedural stages provided by the Code. This process would, however, extend the time necessary for the Regulator's assessment and ultimate decision in respect of the proposed Access Arrangement and thereby extend the period during which Epic would enjoy the continued advantage of the tariffs established under the former regime.

220 Given the unusual nature of the assessment and approval process established under s 2 of the Code and, in particular, the provision for further submissions following a draft decision and the further stages of the decision making process thereafter, the interests of Epic, as well as the other affected parties, would appear to be sufficiently protected by limited declaratory relief, which together with this decision will further guide the Regulator and the parties, and otherwise by allowing the process for which s 2 makes provision to continue. In these circumstances, as a matter of discretion, it is my view that a grant of prerogative relief is unnecessary.

221 This view is reached in the particular circumstances of this case and especially having regard to the public statutory function of the Regulator and the unequivocal indication by counsel for the Regulator that he would act, in his ongoing assessment of the proposed Access Arrangement, in accordance with the decision of this Court in this application.

222 In this respect I proceed on the basis that, following the delivery of this decision, the Regulator will no doubt allow the applicants and other affected parties a reasonable time to prepare and provide to the Regulator submissions, which have regard to these reasons for decision and their effects on the matters identified in the draft decision as being the reasons for requiring amendments to the proposed Access Arrangement. While the procedural outcome might not in every respect be ideal, it should enable the interests of the applicants and other affected parties to be adequately protected, without undue interference with the course of the assessment and approval process for which s 2 makes provision.

223 Without attempting a final or precise formulation of declaratory relief at this stage, in my view, it would be appropriate for declarations to be made that:-

- The Regulator's determinations of Reference Tariffs and of the initial Capital Base of the DBNGP in his draft decision are affected by errors of law and require reconsideration.

- The factors in s 2.24(a) to (g) of the Code are relevant to, and are to be given weight as fundamental elements in, the Regulator's assessment of the proposed Access Arrangement, including the issue whether the Regulator is satisfied that the proposed Access Arrangement contains the elements and satisfies the principles set out in s 3.1 to s 3.20.

- The factors in s 2.24(a) to (g) should guide the Regulator, in determining, if necessary, the manner in which the objectives in s 8.1(a) to (f) can best be reconciled or which of them should prevail.

- It is open to the Regulator, pursuant to the objective provided by s 8.1(d), to take into account the actual investment of Epic in the DBNGP when designing a Reference Tariff and a Reference Tariff Policy, including in that context the establishment of the initial Capital Base of the DBNGP.

- The purchase of the DBNGP by Epic on 25 March 1998, the circumstances of that purchase including the price paid, and any value according to a recognised asset valuation methodology which may be revealed by the price paid in those circumstances, are matters which the Regulator may properly take into account in determining, for the purposes of s 8.11, whether the initial Capital Base for the DBNGP should fall outside the range of values determined under s 10(a) and (b).

- For the purposes of s 8.10 and s 8.11, and in particular s 8.10(c), (d) and (j), it is not the meaning and effect of the Code that only "efficient" capital investment, or that only "regulated revenues", are to be taken into account; nor that the initial Capital Base should represent a value "that is consistent with future regulated revenues and efficient capital investment".

224 There may be one or more further matters which the parties consider to be so critical to the interpretation of the Code in this case as to warrant a specific declaration.

Decision

225 For these reasons, in my view, the applicants should be granted declaratory, but not prerogative, relief.

226 I would grant leave to apply, on notice, as to the precise terms of the declaratory relief and as to any other matter thought to warrant a declaration.