

EAST AUSTRALIAN PIPELINE LIMITED v AUSTRALIAN COMPETITION AND CONSUMER COMMISSION & ANOR (S57/2007)

Court appealed from: Full Court of the Federal Court of Australia

Dates of judgment: 2 June 2006 & 18 August 2006

Date of grant of special leave: 9 February 2007

East Australian Pipeline Limited ("EAPL") owns the Moomba to Sydney Gas Pipeline ("the Pipeline"). That Pipeline is covered by the National Third Party Access Code for National Gas Pipeline Systems ("the Code"). That Code gives effect to a National Competition Policy and a National Pipeline Access Agreement made between the Commonwealth, State and Territory Governments in 1995 and 1997 respectively. Under it, EAPL was required to propose an Access Arrangement for use of the Pipeline by third parties and to propose a reference tariff of charges for such use. That Access Arrangement must then be approved by the Australian Competition and Consumer Commission ("ACCC") before it can become operative.

In this instance, the ACCC did not approve of EAPL's proposed Access Arrangement. Exercising its powers under the Code, it then substituted its own arrangement incorporating a tariff based upon a lower Initial Capital Base ("ICB") of \$559 million. That valuation was based on different assumptions on both the past and estimated future lifespan of the Pipeline. EAPL challenged the ACCC's decision in the Australian Competition Tribunal ("Tribunal"). On 19 May 2005 the Tribunal varied the ACCC's decision insofar as it related to the ICB. The Tribunal went on to find that the ACCC had misconstrued section 8.10(f) of the Code.

The ACCC instituted proceedings for the judicial review of the Tribunal's decision. It sought an order setting aside the Tribunal's decision and further orders for writs of certiorari and mandamus. The ACCC also sought declarations that its calculation of the ICB was in accordance with sections 8.10 and 8.11 of the Code and that the Tribunal had acted *ultra vires* section 44ZZOA of the *Trade Practices Act 1974* (Cth).

On 2 June 2006 the Full Federal Court (French, Goldberg and Finklestein JJ) held that the Tribunal had erred in its interpretation of the Code. Their Honours further found that Section 8.10 of the Code does not require the establishing of the ICB solely by reference to a known valuation method. Their Honours found that the ACCC could reject a value of the Pipeline so long as it had still taken the economic depreciation of it into account. The Full Federal Court found that none of the available grounds upon which the Tribunal could interfere with the ACCC's determination had been made out. There was also no error in the ACCC's findings of fact in relation to its determination of the ICB. Furthermore the exercise of the ACCC's discretion in reaching that determination was neither incorrect nor unreasonable having regard to all the circumstances.

On 18 August 2006 the Full Federal Court delivered supplementary reasons for judgment in this matter. On that date, their Honours agreed that

paragraph 1 of the order made on 2 June 2006 was expressed too widely. They otherwise dismissed EAPL's notice of motion as a challenge to the reasoning of their earlier judgment.

The grounds of appeal are:

- The Full Court misapprehended or exceeded its jurisdiction under the *Administrative Decisions (Judicial Review) Act 1977* or under section 39B of the *Judiciary Act 1903* in that it set aside the decision of the Second Respondent made on 19 May 2005 without identifying clearly, or at all, the ground which entitled it to so act.
- The Full Court erred in law in misconstruing the scope of the jurisdiction of the Second Respondent to review the decision of the First Respondent made on 8 December 2003 under section 39(2) of Schedule 1 of the *Gas Pipelines Access (South Australia) Act 1997*: see paragraphs 175, 187, 194 and 198 of the Full Court's reasons delivered on 2 June 2006.
- The Full Court failed to give any, or any adequate reasons, for concluding that the Second Respondent's findings at paragraphs 25 to 30 of the reasons of the Second Respondent delivered on 8 July 2004 were infected by any relevant error susceptible to judicial review.
- The Full Court at paragraph 196 of its reasons delivered on 2 June 2006 misapprehended the Second Respondent's reasons, and thereby disabled itself from performing its judicial review function.