



HIGH COURT OF AUSTRALIA

Public Information Officer

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EAST AUSTRALIAN PIPELINE PTY LIMITED v AUSTRALIAN COMPETITION AND CONSUMER COMMISSION AND AUSTRALIAN COMPETITION TRIBUNAL

The Competition Tribunal had been correct in overruling a decision of the ACCC concerning charges to be fixed for third-party access to a natural gas pipeline, the High Court of Australia held today.

East Australian Pipeline (EAPL) purchased the natural gas pipeline running from Moomba in South Australia to Sydney from the Commonwealth in 1994 for \$534.3 million. The regulatory regime required EAPL to establish a system for third-party access to the pipeline within the framework of national competition policy. If the ACCC withheld approval it could approve its own access arrangement. Section 8 of the National Third-Party Access Code for Natural Gas Pipeline Systems sets out the objectives to be considered by the ACCC in determining whether to approve tariffs charged to third parties. The charges are calculated by reference to the capital assets of the pipeline, in particular the initial capital base (ICB). In 1999, EAPL proposed an access arrangement with an ICB value of \$666.7 million based on the depreciated optimised replacement cost of the pipeline. In 2003, after various exchanges and revisions, the ACCC ultimately rejected EAPL's proposed access arrangement and substituted its own, which set an ICB of \$545.4 million.

EAPL then applied to the Competition Tribunal for a review of the ACCC's decision. The Tribunal found that the ACCC had wrongly exercised its discretion by substituting its own access arrangement. It was incorrect and unreasonable for the ACCC to put aside known valuation methods and devise a method which adjusted the optimised replacement cost in a novel fashion after misconstruing section 8.10 of the Code. Section 8.10 deals with the methodology for establishing the ICB for existing pipelines. The Tribunal construed section 8.10 as setting out the 11 factors to be considered in order and that the sequential process mandated by the section was important to the integrity of any determination of an ICB. It varied the ACCC's decision and substituted an ICB of \$834.66 million. The ACCC sought judicial review in the Full Court of the Federal Court which concluded that the ACCC had not erred in exercising its discretion in substituting its own access arrangement and utilising a novel method for calculating the ICB. While the Full Court recognised that the ACCC did not use known valuation methods in determining the ICB, it concluded that the ACCC had considered all the factors set out in section 8.10. EAPL appealed to the High Court.

The Court unanimously allowed the appeal and held that the Tribunal was correct in its construction and in its application of section 8.10.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*