HIGH COURT OF AUSTRALIA

GLEESON CJ
GUMMOW, HAYNE, HEYDON AND CRENNAN JJ

EAST AUSTRALIAN PIPELINE PTY LIMITED APPELLANT

AND

AUSTRALIAN COMPETITION AND CONSUMER COMMISSION & ANOR RESPONDENTS

East Australian Pipeline Pty Limited v Australian Competition and Consumer Commission
[2007] HCA 44
27 September 2007
S57/2007

ORDER

1. *Appeal allowed.*

2. *Set aside order 4 of the orders of the Full Court of the Federal Court of Australia made on 2 June 2006 and orders 2, 3, 4 and 5 of the orders of that Court made on 18 August 2006.*

3. *The first respondent to pay the costs of the appellant of the appeal to this Court and its costs incurred to date in the Federal Court of Australia.*

4. *The balance of the application to the Federal Court of Australia by the first respondent for judicial review be stood over for further directions before the Full Court of that Court.*

On appeal from the Federal Court of Australia

Representation

J T Gleeson SC with N Manousaridis for the appellant (instructed by Middletons Lawyers)

J B R Beach QC with S B Lloyd for the first respondent (instructed by Deacons Lawyers)

Submitting appearance for the second respondent

CATCHWORDS

East Australian Pipeline Pty Limited v Australian Competition and Consumer Commission

Trade Practices – Third party access regime for natural gas pipelines – East Australian Pipeline Pty Limited ("EAPL") owned a natural gas pipeline which was a Covered Pipeline under the *National Third Party Access Code for Natural Gas Pipeline Systems* ("the Code") – EAPL was required to submit to the Australian Competition and Consumer Commission ("the ACCC") an Access Arrangement for use of the pipeline by third parties – ACCC rejected EAPL's proposed Access Arrangement and adopted its own Access Arrangement incorporating a Reference Tariff based on a lower initial Capital Base ("ICB") than that proposed by EAPL – ACCC arrived at an ICB in a novel fashion – Section 8.10 of the Code sets out a number of factors which are to be considered in establishing the ICB for an existing pipeline – Proper construction of s 8.10 of the Code – Whether s 8.10 of the Code permits a novel asset valuation methodology.

Administrative Law – Administrative review of a regulatory decision – Australian Competition Tribunal ("the Tribunal") varied the determination by the ACCC substituting a new ICB – Grounds for review included a ground that "the exercise of the relevant Regulator's discretion was incorrect or unreasonable having regard to all the circumstances" – Nature and scope of the Tribunal's jurisdiction to review decision of the ACCC.

Administrative Law – Judicial review of the outcome of an administrative review – Full Court of the Federal Court set side the Tribunal's determination of the ICB –Whether error of law within the meaning of s 5(1)(f) of the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) established – Whether there was jurisdictional error attracting the Federal Court's jurisdiction under s 39B(1) of the *Judiciary Act* 1903 (Cth).

Gas Pipelines Access (South Australia) Act 1997 (SA), s 39 of Sched 1, s 8.10 of Sched 2.
Administrative Decisions (Judicial Review) Act 1977 (Cth), s 5(1)(f).
Judiciary Act 1903 (Cth), s 39B.

1 GLEESON CJ, HEYDON AND CRENNAN JJ. This is an appeal from orders of the Full Court of the Federal Court of Australia[1] (French, Goldberg and Finkelstein JJ) ("the Full Court"). The Full Court set aside a determination of the second respondent, the Australian Competition Tribunal[2] (Gyles J (Deputy President), Mr R C Davey and Ms M M Starrs) ("the Tribunal") (a submitting party), concerning and applying the methodology used to calculate the initial capital base of a particular natural gas pipeline, in the context of the regulation of an access arrangement in the gas supply industry.

2 Some background concerning the natural gas industry in Australia, and the structures created for its regulation, is set out in the reasons of the Full Court below[3]. For the purposes of this appeal, the relevant background may be summarised as follows.

3 Recognising that "certain gas transmission pipeline systems are natural monopolies and require regulation in relation to the granting and terms of access"[4], on 7 November 1997 the Commonwealth, State and Territory Governments signed the Natural Gas Pipelines Access Agreement. The *Gas Pipelines Access (South Australia) Act* 1997 (SA) ("the SA Act"), which contains two important schedules, was then enacted by the South Australian Parliament[5].

4 Schedule 2 sets out the *National Third Party Access Code for Natural Gas Pipeline Systems* ("the Code") which establishes a national access regime for

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1 *Australian Competition and Consumer Commission v Australian Competition Tribunal* (2006) 152 FCR 33; *Australian Competition and Consumer Commission v Australian Competition Tribunal (No 2)* (2006) 152 FCR 83.

2 *Application by East Australian Pipeline Limited* (2004) ATPR ¶42-006; *Application by East Australian Pipeline Limited* (2005) ATPR ¶42-047.

3 *Australian Competition and Consumer Commission v Australian Competition Tribunal* (2006) 152 FCR 33.

4 *Australian Competition and Consumer Commission v Australian Competition Tribunal* (2006) 152 FCR 33 at 37 [9].

5 Other legislation relevant to the dispute includes the *Gas Pipelines Access (Commonwealth) Act* 1998 (Cth), the *Gas Pipelines Access (New South Wales) Act* 1998 (NSW) and the *Gas Pipelines Access Act* 1998 (ACT).

natural gas pipeline systems within the framework of a national competition policy. The objectives of the Code are to establish a framework for third party access to gas pipelines which[6]:

> "(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
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> (d) provides rights of access to natural gas pipelines on conditions that are fair and reasonable for both Service Providers and Users; and
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> (e) provides for resolution of disputes."

5 Schedule 1 to the SA Act ("Schedule 1"), entitled "Third party access to natural gas pipelines", establishes among other things a specific system of administrative review for decisions made under the Code. The schedules together comprise the *Gas Pipeline Access Law* ("the Access Law"). It can be noted that cl 7 of the Appendix to Schedule 1 mandates a purposive approach to interpreting the Access Law[7].

6 The appellant, Eastern Australian Pipeline Pty Limited ("EAPL") purchased the Moomba to Sydney Pipeline System ("the Pipeline") from the Commonwealth government on 30 June 1994 for $534.3 million[8]. It had been in operation since the latter half of the 1970s. Under the Access Law, the first

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6 Introduction to the Code; see also the Preamble to the SA Act.

7 "Clause 7:

> (1) In the interpretation of a provision of this Law, the interpretation that will best achieve the purpose or object of this Law is to be preferred to any other interpretation.
>
> (2) Subclause (1) applies whether or not the purpose is expressly stated in this Law."

8 *Moomba-Sydney Pipeline System Sale Act* 1994 (Cth); *Australian Competition and Consumer Commission v Australian Competition Tribunal* (2006) 152 FCR 33 at 37 [8].

respondent in this appeal, the Australian Competition and Consumer Commission ("the ACCC") is the "relevant Regulator" for the Pipeline[9].

7 The Code required EAPL to submit to the ACCC for approval, an "Access Arrangement", which would set out the policies and basic terms and conditions upon which third parties could have access to and use the Pipeline[10]. The introduction to the Code[11] states that the Access Arrangement is:

> "… similar in many respects to an undertaking under Part IIIA of the Trade Practices Act and is designed to allow the owner or operator of the Covered Pipeline to develop its own Tariffs and other terms and conditions under which access will be made available, subject to the requirements of the Code."

A Covered Pipeline is one which is subject to the Code[12].

8 The Code also sets out procedures to be followed for public consultation and the making of revisions and amendments to proposed Access Arrangements, as well as the circumstances in which the ACCC can draft and impose its own Access Arrangement[13].

9 Under an Access Arrangement, a "Reference Tariff" is the charge to the third party for the provision of that access or service. In describing Reference Tariffs, the Code states that[14]:

> "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."

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9 Section 2 of Schedule 1.

10 Section 2.2 of the Code; see also s 3 of the Code.

11 While the introduction does not form part of the Code (s 10.4), consideration may be given to it in certain circumstances specified in s 10.5 of the Code.

12 Section 10.8 of the Code; see also Sched A to the Code.

13 Section 2 of the Code.

14 Section 8 of the Code.

10 Section 8 of the Code sets out the objectives to be considered by the ACCC in determining whether to approve a Reference Tariff in an Access Arrangement. An important objective is the replication of the outcome of a competitive market[15]. The calculations upon which a Reference Tariff is based utilise a number of accounting and economic concepts, some of which are defined.

11 Together with familiar concepts such as "Total Revenue", "Internal Rate of Return", "Depreciation" and "Net Present Value"[16], one integer to be used in calculating a Reference Tariff is the value of the capital assets of the Pipeline, and more particularly, the initial Capital Base ("the ICB"). It is the provision which deals with the methodology for establishing the ICB for existing pipelines which is the subject of controversy in this appeal. Simply stated, the ultimate purpose of setting an ICB is to calculate a Reference Tariff (reflecting economic efficiency) in respect of an investment. A Reference Tariff requires consideration of a rate of return on the value of the capital assets. A rate of return which is properly determined should not distort future investment decisions.

12 Under s 39 of Schedule 1, if the ACCC makes a decision to approve its own Access Arrangement, the service provider can apply to the relevant appeals body, the Tribunal[17], for a review of that decision, but only on certain express grounds.

13 The nature and scope of the Tribunal's specific powers of administrative review under s 39 of Schedule 1 are issues which have been dealt with by Gummow and Hayne JJ in their reasons for judgment, which we have read in draft. We agree with what their Honours have said about those issues and have nothing further to add[18].

14 In this case, after a number of proposed revisions and exchanges between the ACCC and EAPL (which are summarised by the Full Court[19]), the ACCC

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15 Section 8.1(b) of the Code.

16 Section 8.4 of the Code.

17 Section 2 of Schedule 1.

18 Reasons of Gummow and Hayne JJ at [75]-[80].

19 *Australian Competition and Consumer Commission v Australian Competition Tribunal* (2006) 152 FCR 33 at 38-40 [15]-[28].

ultimately rejected EAPL's proposal and substituted its own Access Arrangement, using a methodology for calculating the ICB of the Pipeline which was conceded by the ACCC to be "idiosyncratic". EAPL then sought review of that decision in the Tribunal.

15 The Tribunal made a number of findings, including a finding that the ACCC had erred in exercising its discretion by substituting its own Access Arrangement. The ACCC then sought judicial review of the decision of the Tribunal in the Full Court of the Federal Court under ss 5 and 6 of the *Administrative Decisions (Judicial Review) Act* 1977 (Cth), as well as under s 39B of the *Judiciary Act* 1903 (Cth). It was contended by the ACCC that the Tribunal had erred in its approach to its review function, and that its findings were tainted by jurisdictional error.

16 After determining that it had jurisdiction to conduct judicial review[20] the Full Court 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. The Full Court also found that the Tribunal had erred in interpreting and applying ss 8.10 and 8.11 of the Code and in concluding that the ACCC had miscarried in the exercise of its discretion[21].

17 EAPL now appeals to this Court in respect of the orders made by the Full Court, contending that the Full Court exceeded its judicial review jurisdiction by setting aside the Tribunal's orders. The essential question to be determined is: what is the correct construction and application of s 8.10 of the Code when establishing the ICB of an existing pipeline? The question arises in a setting which also raises for consideration the scope of the Tribunal's jurisdiction to review a decision of the ACCC under s 39 of Schedule 1.

The relevant legislation

18 The context and purpose of the Code is well understood, not least because the objectives of the legislation are articulated in the legislation itself in considerable detail. The Code as a whole provides for a regulatory regime of a kind which is "a surrogate for the rewards and disciplines normally provided by a

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20 *Australian Competition and Consumer Commission v Australian Competition Tribunal* (2006) 152 FCR 33 at 70-71 [161]-[162].

21 *Australian Competition and Consumer Commission v Australian Competition Tribunal* (2006) 152 FCR 33 at 77 [184].

competitive market"[22]. Competitive pressures in a market stimulate efficiency of production and resource allocation, they stimulate efficient investment decisions and they minimise costs[23]. No party disputed the fact that the regulatory process set out in the legislation was directed to eliminating monopoly pricing whilst nevertheless providing a rate of return to pipeline owners, commensurate with a competitive market. There was nothing controversial about the Tribunal's observation that[24]:

> "The setting of a tariff for a monopoly service provider, whether for gas, electricity or other services, is a difficult matter that has vexed regulators, service providers, producers and consumers in various parts of the world. … [A] corpus of economic theory has developed and, as will be seen, its existence is taken for granted by the form of the Code."

19 Nor was it disputed that setting an ICB for existing infrastructure within the regulatory framework was a task requiring consideration of a number of factors. The Code was agreed by the Council of Australian Governments on 7 November 1997 and has been amended by seven amending agreements. All amendments were operative prior to the ACCC approving its own Access Arrangement on 8 December 2003. None of the amendments affects the issue in this appeal.

20 Section 2 of the Code deals with Access Arrangements generally and the processes, including public consultation, associated with approval of such an arrangement. Relevant provisions are as follows:

> "**Submission of Access Arrangements**
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> …
>
> 2.2 If a Pipeline is Covered, the Service Provider must submit a proposed Access Arrangement together with the applicable Access

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22 ACCC's Draft Statement of Principles for the Regulation of Transmission Revenues, 27 May 1999, 1.1. Although the Draft Statement of Principles was produced in the context of the electricity industry, the same approach applies *mutatis mutandis* to the gas industry.

23 ACCC's Draft Statement of Principles for the Regulation of Transmission Revenues, 27 May 1999, Overview.

24 *Application by East Australian Pipeline Limited* (2004) ATPR ¶42-006 at 48,801 [8].

Arrangement Information for the Covered Pipeline to the Relevant Regulator:

(a) within 90 days after the Pipeline becomes Covered under section 1.19 or 1.21 if the Covered Pipeline is not described in Schedule A; or

(b) within 90 days after the commencement of the Code if the Covered Pipeline is described in Schedule A."

21 Section 2.20 provides for the ACCC, in certain circumstances, to draft and approve its own Access Arrangement instead of the Access Arrangement proposed by the Service Provider.

22 Sections 3.3, 3.4 and 3.5 provide:

"**Reference Tariffs and Reference Tariff Policy**

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."

23 Section 8.1 provides:

"**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."

24 The "General Principles" are directed to balancing competing considerations relevant to a Reference Tariff. It is important to note that these include "not distorting investment decisions" in the industry. There was no suggestion in this case that the Regulator's own Access Arrangement was the result of resolving a conflict of the kind referred to in s 8.1. Whilst the statement of General Principles is not determinative, it gives "practical content"[25] to various terms used in the legislation, including economic terms and processes. What would constitute the establishing of an ICB under the Code is to be considered in the light of the legislative explanations of objectives.

25 Section 8.10 of the Code provides:

"**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

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25 *Russo v Aiello* (2003) 215 CLR 643 at 645 [5] per Gleeson CJ.

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."

26 It is useful to note here that pars (a), (b) and (c) of s 8.10 each describe a "value", as a "factor" which "should be considered" in establishing the ICB. It was not in dispute that the opening words were mandatory, rather than merely exhortatory[26].

27 The value described in s 8.10(a) was noted by the Tribunal to refer to the "depreciated actual cost" (abbreviated to "DAC")[27]. This is a value which looks backwards and which would be difficult to apply when the ownership of a pipeline has changed. The value in s 8.10(b) is the depreciated optimised replacement cost of a pipeline, referred to throughout these proceedings as "DORC". It involves an assessment of what it would cost to replace a pipeline, and then a depreciation of that figure having regard to the remaining life of the pipeline. The Tribunal made the following observation concerning DORC as identified in s 8.10(b) as a factor to be considered in determining the ICB of a covered pipeline[28]:

> "DORC arrives at a hypothetical value and looks forward. The starting point to ascertain DORC is to arrive at the ORC [Optimised Replacement Cost] (which costs the hypothetical optimised replacement of the pipeline) and then depreciates that amount to what might be called a second hand value, principally because the optimised pipeline would last longer than the existing pipeline."

28 Section 8.11 of the Code provides for the normal range of values:

> "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."

29 It is also illustrative to consider the means by which the ICB for a new pipeline is calculated:

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26 See cl 12(2) of the Appendix to Schedule 1: "In this Law, the word 'must', or a similar word or expression, used in relation to a power indicates that the power is required to be exercised." See also s 10.9 of the Code.

27 *Application by East Australian Pipeline Limited* (2004) ATPR ¶42-006 at 48,803 [12].

28 *Application by East Australian Pipeline Limited* (2004) ATPR ¶42-006 at 48,804 [18].

"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(a).

8.13 If the period between the time the Covered Pipeline first enters service and the time the Reference Tariff is proposed is such as reasonably to warrant adjustment to the actual capital cost in establishing the initial Capital Base, then that cost should be adjusted to account for New Facilities Investment or the Recoverable Portion (whichever is relevant), Depreciation and Redundant Capital incurred or identified during that period (as described in section 8.9).

…

Rate of Return

8.30 The Rate of Return used in determining a Reference Tariff should provide a return which is commensurate with prevailing conditions in the market for funds and the risk involved in delivering the Reference Service …"

The approval process and the decision of the ACCC

30 On 5 May 1999, EAPL proposed an Access Arrangement for the Pipeline with a value for the ICB of $666.7 million based on the DORC methodology. The proposed arrangement assumed a total economic life of certain parts of the Pipeline of 60 years, and for other parts, an economic life of 80 years. The ORC was assessed as being $1,058.6 million, based on a report by Venton & Associates Pty Ltd. Straight line depreciation was used. A contingency of 10 per cent was factored into the estimated ORC.

31 On 11 August 2000, the Australian Pipeline Trust, which had become the owner of EAPL, advised the ACCC that EAPL would be revising the Access Arrangement it submitted in May 1999. Following this, EAPL wrote to the ACCC on 21 September 2000 and indicated that the Pipeline could be expected to have a life of 80 years, rather than the previously estimated 60 years, given the likelihood of upgrades and recoating.

32 On 19 December 2000, the ACCC released a Draft Decision concerning EAPL's proposed Access Arrangement, with an ICB of $502.081 million, based on a DORC of $539.1 million (adjusted to take into account accumulated deferred tax liabilities).

33 On 30 April 2002, EAPL submitted a revised Access Arrangement. Then EAPL made further submissions to the ACCC on 5 November 2002, submitting an estimated value for DORC of between $768 million and $972 million. On 4 December 2002 EAPL again revised its estimate for the ICB to a range between $784 million and $998 million.

34 On 2 October 2003, the ACCC released its Final Decision. It did not approve the revised Access Arrangement proposed by EAPL. The ACCC determined, instead, that the DORC value for the Pipeline was $715 million and that the ICB should be assessed as $559 million. On 23 October 2003, EAPL submitted a final revised Access Arrangement to the ACCC; and following this also made a number of other written submissions to the ACCC. On 19 November 2003, the relevant Minister determined that a certain section of the Pipeline should no longer be covered, that is, no longer be subject to the provisions of the Code, with effect from 11 December 2003. On 8 December 2003, the ACCC released its Final Approval, in which EAPL's final revised Access Arrangement was rejected, and the ACCC's own Access Arrangement was approved pursuant to s 2.20(a) of the Code.

35 The ACCC's Access Arrangement set an ICB of $545.4 million which figure was commensurate with the ICB calculated in the ACCC's Final Decision, minus an amount for a certain section of the Pipeline which EAPL had subsequently decided not to include in its Access Arrangement. It was not disputed that the ACCC rejected the DORC methodology. Rather, the ACCC started with ORC, an element implied in s 8.10(b), then adjusted it in a manner which was "novel"[29] or "idiosyncratic"[30]. The ACCC supported its valuation, it said, by giving considerable weight to s 8.10(f), which it regarded as requiring it to take into account the basis on which tariffs had been set, or appear to have been set, in the past, the economic depreciation of the Pipeline and historical returns to the service provider.

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29 *Application by East Australian Pipeline Limited* (2004) ATPR ¶42-006 at 48,805 [25].

30 The ACCC volunteered that description of its approach.

36 Of its use of ORC as the basis of the valuation of the ICB the ACCC said in its Final Decision:

> "Use of ORC is preferred to some historical measure of costs as ORC reflects the current costs of the assets and eliminates any redundant assets."

Of its rejection of DORC as the basis of the valuation the ACCC also stated:

> "… the Commission does not consider that a value equal to DORC of $715 million and based on an 80 year life is appropriate, since a 50 year life has been assumed in the past."

In essence, the ACCC took into account the amounts EAPL had used for depreciation in the past in adjusting ORC under s 8.10(f). The ACCC considered its value for the ICB best allowed EAPL to recover the efficient costs over the expected life of the Pipeline and best replicated the operation of a competitive market.

37 EAPL applied to the Tribunal for a review of the ACCC's Final Approval under s 39(1) of Schedule 1 on 19 December 2003.

Decision of the Tribunal

38 The Tribunal found that it was incorrect and unreasonable for the ACCC to put aside known valuation methodologies and devise a methodology of its own which adjusted the ORC in a "novel fashion"[31] after misconstruing s 8.10 of the Code, particularly par (f). The Tribunal observed[32]:

> "The ICB is entirely a creature of the Code and what it is and what it does is defined by the Code. It is one integer in a complex of integers used to arrive at an appropriate Reference Tariff. Whilst there is a considerable amount of discretion built into the system for both the operator and the ACCC, each of them, and the Tribunal, is bound by the Code."

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31 *Application by East Australian Pipeline Limited* (2004) ATPR ¶42-006 at 48,805 [25].

32 *Application by East Australian Pipeline Limited* (2004) ATPR ¶42-006 at 48,803 [13].

39 The Tribunal construed s 8.10 of the Code as setting out factors to be considered *seriatim*, and concluded that the sequential process mandated by the section was important to the integrity of any determination of an ICB. The Tribunal considered that the values deriving from the methodologies referred to in each of pars (a), (b) and (c) were to be considered first, and then, by virtue of par (d) the merits and disadvantages of utilising each of those methodologies were to be considered next. As to the balance of factors to be considered the Tribunal said[33]:

> "Those other subparagraphs are considered in the light of the analysis of recognised valuation methods which the section assumes already to have taken place. The factors to which those other subparagraphs direct attention could assist in the choice between methods, or lead to some adjustment of the result of the chosen method. Those factors would not normally (and perhaps would never) permit recognised valuation methods to be put to one side. In particular, those factors do not warrant departing from a quest for value and entering upon a quest for some form of justice or equity."

40 Of s 8.10(f), the Tribunal said that when the factors referred to in the section were considered together[34]:

> "… they point to a set of circumstances in which the combined effect of past history is such as to require a modification of normal valuation methods which may have thrown up an unreasonably high ICB that would cause an unreasonably high tariff."

It is reasonably clear that factors listed in pars (g) and (j), like par (f), also look backwards. Consideration of those factors ensures that capital investment is not recovered on some abnormal or excessive basis.

41 The Tribunal concluded that the ICB "should accord with DORC calculated upon ORC which includes a 7.5 per cent contingency for omissions" and that depreciation "should assume a life for the [Pipeline] as it stands and be based upon [Net Present Value] calculated in relation to cost"[35].

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33 *Application by East Australian Pipeline Limited* (2004) ATPR ¶42-006 at 48,804 [19].

34 *Application by East Australian Pipeline Limited* (2002) ATPR ¶42-006 at 48,806 [29].

35 *Application by East Australian Pipeline Limited* (2004) ATPR ¶42-006 at 48,815 [68].

42 The Tribunal ultimately made orders on 19 May 2005 varying the ACCC's decision and substituting an ICB of $834.66 million (July 2003 dollars).

43 On 26 May 2005 the ACCC filed an amended application for review in the Federal Court, to which reference has already been made[36].

Decision of the Full Court

44 On 2 June 2006 the Full Court set aside the orders of the Tribunal which resulted in variation of the ICB. While the Full Court recognised that the ACCC did not adopt known valuation methods in determining the ICB, it concluded that the ACCC considered all the factors set out in pars (a)-(k) of s 8.10. It considered that the ACCC's approach was a permissible two stage method of determining the appropriate amount of depreciation and that blending of elements implied in s 8.10(b) and referred to in par (f) was not precluded by the structure or terms of s 8.10. It stated[37]:

> "Although DORC is a forward-looking concept, that is not to say that the ORC, from which is derived the DORC, cannot be 'tweaked' or adjusted or varied by reference, for example, to the factors set out in subpara (f) of s 8.10 of the Code before reaching a final figure for the ICB".

Submissions on appeal

45 On the issue of the correct construction and application of s 8.10 it was emphasised for the ACCC that the exercise being undertaken under s 8.10 was setting a capital base, not valuing the Pipeline; setting the ICB was not an exercise in commercial or market valuation but the ascribing of a regulatory amount. The ACCC did not criticise the DORC methodology. This was not surprising given the ACCC's support for the methodology in materials mentioned by the Tribunal, indicating that the ACCC considered the DORC methodology of asset valuation was particularly apt when economic efficiency was relevant[38]. It was not submitted by the ACCC that ORC was a well recognised asset valuation methodology as referred to in s 8.10(c).

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36 See above at [15].

37 *Australian Competition and Consumer Commission v Australian Competition Tribunal* (2006) 152 FCR 33 at 80 [193].

38 ACCC's Draft Statement of Principles for the Regulation of Transmission Revenues, 27 May 1999, 3.4 and 4.3.

46 It was contended that the Tribunal erred in giving what was called in argument "primacy" to the valuation factors in s 8.10(a)-(d) and in construing s 8.10 as a whole as laying down a sequential process. The ACCC sought to maintain the Full Court's finding of error of law in the Tribunal's construction of s 8.10 and the Full Court's alternative construction of s 8.10, namely that the elements of pars (b) and (f) could be blended to arrive at an ICB for the Pipeline. As an alternative to reliance on s 8.10(f), the ACCC relied on s 8.10(k).

47 EAPL sought to reinstate the Tribunal's construction and application of s 8.10, as being consistent with the language and structure of s 8.10. It was contended that the Full Court misapprehended the nature of the Tribunal's jurisdiction under s 39 of Schedule 1.

Proper construction of s 8.10 of the Code

48 The differing constructions given to s 8.10 by the Tribunal and the Full Court are irreconcilable. For the reasons which follow, the construction to which the Tribunal gave effect in varying the ICB is correct. That construction takes into account the natural meaning of the words used and it best attains the purpose or objectives of the legislation as mandated by cl 7 of the Appendix to Schedule 1.

49 The framework for third party access to natural gas pipelines set out above directs attention to the multiple objectives of an approved access regime. Stripped to essentials, such a regime is at least intended to allow efficient costs recovery to a service provider and at the same time ensure pricing arrangements for the consuming public which reflect the benefits of competition, despite the provision of such services by monopolies. The balancing of those objectives properly has a natural flow-on effect for future investment in infrastructure in Australia.

50 The greater the degree of uncertainty and unpredictability in the regulatory process, the greater will be the perceived risk of investment. The greater the perceived risk of investment, the higher will be the returns sought. Various methodologies referred to in the Code must at least not be inconsistent with the principles stated by the legislature, which are directed to economic efficiency. Service providers, the ACCC and the consuming public (through public consultation processes)[39] may have occasion to refer to and rely on s 8.10 of the Code. For example, on first submitting a proposed Access Arrangement under s 2.2 of the Code, a service provider, such as EAPL, will need to address s 8.10 and related requirements.

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39 See, for example, ss 2.9-2.13 of the Code.

51 Section 8.4 of the Code, as amended, refers to the "Capital Base" as "the value of the capital assets that form the Covered Pipeline or are otherwise used to provide Services". The ACCC referred to s 8.10(f) as supporting its "valuation" of the ICB. The primary and natural significance of the words used in, and the structure of, s 8.10(a)-(d) mandates consideration of values derived from "well recognised asset valuation methodologies" followed by a comparative weighing up of these approaches to valuation. It is clear that a range of well recognised asset valuation methodologies can be considered and within that range a choice of value may be made. The discretion permitted is wide but limited. The reference to well recognised asset valuation methodologies emphasises that valuation, in this context, is a practical exercise. Idiosyncrasy in valuing an initial capital base is capable of distorting the proper calculation of a rate of return "commensurate with prevailing conditions in the market"[40] for funds and the risk involved, as provided in s 8.30. Specific factors mentioned in s 8.10 at pars (e) and (j), and "any other factors" referred to in par (k), are all factors which may bear on the range of values deriving from different, but well recognised valuation methodologies. They are to be referred to only after the range of values has been considered, and a provisional value has been established, following the process described in pars (a)-(d).

52 There is nothing in the overall structure of the section which indicates that factors listed in pars (e) to (j) or indeed par (k) would allow the person considering all of the s 8.10 factors to jettison or ignore the factors covered by pars (a) to (d) or to give them cursory consideration only in order to put them to one side. Those first four factors are fundamental to the practical exercise which is being undertaken.

53 The Tribunal recognised correctly that the other factors in pars (e) to (k) "could assist in the choice between methods, or lead to some adjustment of the result of the chosen method"[41].

54 The importance of pars (a) and (b) is emphasised by s 8.11 providing for the "normal range" of values. It was contended by the ACCC that the ICB established by it fell within the range referred to in s 8.11. However, the construction of s 8.10 (which sets out a process) does not depend on the arithmetical results, which may be obtained by any novel or idiosyncratic use of the factors set out in pars (a)-(k).

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40 Section 8.30 of the Code.

41 *Application by East Australian Pipeline Limited* (2004) ATPR ¶42-006 at 48,804 [19]. Section 8.10(f) operates in that way.

55 Whilst it is true that in its entirety, s 8.10 does not mandate the establishment of an ICB by reference only to a value established by reference to well recognised asset valuation methodologies, it does, however, mandate reference to known valuation methodologies as the starting point for setting an ICB. Commencing the process of setting an ICB by reference to values derived from well recognised asset valuation methodologies is entirely consistent with the reasons for setting an ICB in the first place, namely establishing a fair rate of return on the value of the capital base commensurate with prevailing conditions in the market for funds and the risk involved. Thus is the ICB a key factor in setting a Reference Tariff.

56 When the express terms and the logical structure of s 8.10 are construed, particularly in the context of the Code, it is clear that the factors which should be considered are to be dealt with in a particular manner. The context of the Code, considered widely[42], includes the objectives to be achieved in setting a Reference Tariff and the purposive relationship between an ICB and a rate of return, commensurate with prevailing market conditions for funds and the risk involved.

57 Section 8.10 mandates a process for setting an ICB in which there are essentially three steps. First, a value for the asset base needs to be chosen by reference to well recognised asset valuation methodologies (pars (a)-(c)). Secondly, the advantages and disadvantages of each of the possible well recognised valuation methodologies is to be assessed (par (d)). Thirdly, the factors set out in pars (e) to (k) must be considered as they may bear on the choice of methodology and/or oblige an adjustment of value derived from the chosen methodology. No factor is an independent factor. Further, it is not unusual for any asset valuation methodology to require the taking of sequential steps. The DORC methodology itself requires steps to be taken, such as the establishment of ORC, as a preliminary to establishing DORC. Just as no factor in s 8.10 is independent of the others, no step on the way to establishing a factor is independent of the process laid down by s 8.10.

58 There is nothing in the primary and natural significance of the words used to describe the individual factors set out in pars (a) to (k), or in the structure of s 8.10, which supports the conclusion that an implied step or element of s 8.10(b), namely ORC (the starting point for establishing the DORC) can be blended with a factor referred to in s 8.10(f) to set an ICB.

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42 *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408 per Brennan CJ, Dawson, Toohey and Gummow JJ.

59 A construction of s 8.10 which permitted the process set out in s 8.10 to be put aside would render it difficult, if not impossible, for either service providers or the consuming public (through the consultation processes) to treat s 8.10 as a certain list of factors to be taken into account in a particular manner in setting an ICB. This would complicate the task of any service provider in preparing a proposed Access Arrangement of an established pipeline, as required by s 2.2 of the Code. The complicated nature of that process can be gleaned from the chronology of the approval process in this case, set out above. Further, the task of establishing a rate of return on investment, for regulatory purposes, commensurate with prevailing market conditions for funds and the risk involved would be rendered a much less certain process than it is already. Such a result could distort future investment decisions about essential infrastructure.

Conclusions and orders

60 EAPL has succeeded on the grounds of appeal dealing with s 8.10 of the Code, as well as succeeding in respect of the grounds concerning the nature and scope of the Tribunal's powers of administrative review. The appeal should be allowed with costs.

61 The orders of the Full Court setting aside the Tribunal's determination of the ICB should be set aside. Accordingly order 4 of the Full Court's orders of 2 June 2006 should be set aside. Orders 2, 3, 4 and 5 of the Full Court's orders of 18 August 2006 should also be set aside. The balance of the ACCC's application for judicial review being grounds (A)(2)(1)-(7) (inclusive) and any subsequent ground referring back to those grounds should be stood over for further directions before the Full Court to which the matter should be remitted. The ACCC must pay EAPL's costs of the appeal and the costs incurred to date of the application below.

62 GUMMOW AND HAYNE JJ. The term "review" is used in various senses in public law and takes its content from the particular statutory or constitutional setting in which it appears. In the present case the term is used in several legislative schemes for administrative review and for judicial review. The one dispute attracted administrative review of a regulatory decision and then judicial review of the outcome of that administrative review.

63 This appeal is brought from the Full Court of the Federal Court (French, Goldberg and Finkelstein JJ)[43] which was exercising original jurisdiction conferred by either or both of s 8 of the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) ("the ADJR Act") and s 39B of the *Judiciary Act* 1903 (Cth) ("the Judiciary Act"). The subject of the exercise of that jurisdiction was a decision of the Australian Competition Tribunal ("the Tribunal") which is the second respondent in this Court and a submitting party. The appellant ("EAPL") contended in this Court that the Federal Court wrongly concluded that there was error, judicially reviewable under the ADJR Act or s 39B of the Judiciary Act, by the Tribunal in the discharge of its powers of administrative review of rulings by the first respondent ("the ACCC") under a statutory regime for third party access to gas pipeline systems.

64 EAPL is the owner of the Moomba-Sydney Pipeline System ("the Pipeline") which it purchased in 1994 for $534.3 million, pursuant to the *Moomba-Sydney Pipeline System Sale Act* 1994 (Cth) ("the 1994 Act"). The main component of the Pipeline was constructed between 1974 and 1976 by the Pipeline Authority ("the PA"), a body established by the *Pipeline Authority Act* 1973 (Cth). Various lateral pipelines were constructed by the PA in 1981, 1987 and 1993. The PA failed to earn commercial returns from the Pipeline or to recover its costs.

65 The present regulatory regime, to be discussed further in these reasons, required EAPL to establish a system, approved by the ACCC, for third party access to the Pipeline. In default of approval by it, the ACCC was empowered to draft and approve its own access arrangement. That is what happened here. The litigation arises from a dispute between EAPL and the ACCC concerning the basis in the final determination by the ACCC for the calculation of charges to third parties for use of the Pipeline.

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43 *Australian Competition and Consumer Commission v Australian Competition Tribunal* (2006) 152 FCR 33.

Systems of administrative and judicial review

66 The subject of the judicial review by the Federal Court was a "review" by the Tribunal of the final determination by the ACCC made on 8 December 2003[44]. The Tribunal comprised Gyles J (Deputy President), Mr R C Davey and Miss M M Starrs. It acted as the "relevant appeals body" under a State access regime law for the regulation of third party access to gas pipelines, including the Pipeline. This regime is set up by the *Gas Pipelines Access (South Australia) Act* 1997 (SA) ("the SA Act")[45].

67 On the application of EAPL, the Tribunal varied the determination of the ACCC in important respects. Thereafter, upon the judicial review application by the ACCC, the Federal Court, to a substantial extent, set aside or modified the various orders of the Tribunal, and remitted the matter for reconsideration by the Tribunal. In this Court, EAPL seeks the restoration of its success in the Tribunal.

68 The Tribunal is established by Pt III of the *Trade Practices Act* 1974 (Cth) ("the TP Act"). The ACCC is another federal body, established by Pt II of the TP Act. Thus, neither body owes its existence to State legislation. However, the effect of ss 44ZZM-44ZZMB of the TP Act[46] is that a State access regime law, such as the SA Act, may confer functions or powers, or impose duties, on the ACCC or the Tribunal. In the present case, there has been no challenge to the possession by the ACCC and the Tribunal of the necessary authority under federal law[47]. In that regard the Full Court observed that the powers of the Tribunal and the ACCC were supportable "at least" by the interstate trade and commerce power conferred upon the Parliament by s 51(i) of the Constitution[48].

69 The Tribunal is empowered by Pt IX of the TP Act (ss 101-110) to review certain determinations made under the TP Act by the ACCC. However, the term "review" when used in Pt IX involves a re-hearing by the Tribunal of the whole matter so that it decides for itself, and on the material before it, whether the determination of the ACCC should be affirmed, varied or set aside. This was established by *Re Herald & Weekly Times Ltd*[49]. As will appear, Pt IX provides

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44 [2004] A Comp T 8.

45 Schedules 1 and 2.

46 Added by the *Trade Practices Legislation Amendment Act* 2003 (Cth).

47 Cf *R v Hughes* (2000) 202 CLR 535.

48 (2006) 152 FCR 33 at 69.

49 *Re Herald & Weekly Times Ltd* (1978) 17 ALR 281 at 295.

for a much broader measure of "review" by the Tribunal than that which is found in the special regime established by the SA Act and pursuant to which the Tribunal acted in the present case.

70 Further, both these systems for administrative review by the Tribunal are marked off from the two avenues for judicial review which are provided for the Federal Court by the ADJR Act and by s 39B of the Judiciary Act. One of the grounds of the appeal by EAPL to this Court is that the Federal Court misapprehended or exceeded its judicial review jurisdiction in setting aside the decision of the Tribunal upon its administrative review of the final determination by the ACCC.

71 A distinction should immediately be made here. Section 39B(1) of the Judiciary Act draws upon s 75(v) of the Constitution and thus upon principles respecting jurisdictional error. Not all errors of law go to jurisdiction and if they do not go to jurisdiction the constitutional writs do not lie. Certiorari is not a constitutional writ but does lie for error of law on the face of the record. The complexities which ensue in federal jurisdiction based upon s 75(v) are discussed by Hayne J in *Re McBain; Ex parte Australian Catholic Bishops Conference*[50]. The ADJR Act, on the other hand, does provide as a ground of judicial review (s 5(1)(f)) "that the decision involved an error of law, whether or not the error appears on the record of the decision". However, the Court in *Australian Broadcasting Tribunal v Bond*[51] took from the word "involved" a stipulation that the error be material in contributing to the decision so that but for the error the decision, at least, might have been different.

72 In supporting in this Court the judgment of the Federal Court, the ACCC recognised the difficulty in establishing jurisdictional error by the Tribunal and identified as the "primary basis" for the Full Court decision the exercise of its jurisdiction under the ADJR Act, rather than under s 39B of the Judiciary Act. The Tribunal was said by the ACCC to have erred in the discharge of its review function because it had misconstrued what was identified as "the Code". However, as will appear later in these reasons, there was no such error and it was the Full Court which erred in its treatment of the decision of the Tribunal.

The Code

73 Schedule 2 to the SA Act sets out the *National Third Party Access Code for Natural Gas Pipeline Systems* ("the Code"). The Code, as amended from

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50 (2002) 209 CLR 372 at 467-472 [267]-[280].

51 (1990) 170 CLR 321 at 353-354.

time to time, gives effect, for South Australia, to a national competition policy and national pipeline access agreement made between the Commonwealth, State and Territory Governments. The Pipeline was a "Covered Pipeline" to which the Code applied. EAPL was classified as a "Service Provider" and required by the Code to propose an "Access Arrangement" for use of the Pipeline by third parties and a "Reference Tariff" of charges for such use.

74 The ACCC was designated as a "Relevant Regulator" under the Code. The ACCC did not approve of the access arrangement proposed by EAPL under s 2.2 of the Code. Exercising its powers under s 2.20 of the Code, the ACCC substituted its own arrangement incorporating a tariff based upon a lower Initial Capital Base ("ICB") than that adopted by EAPL. The ACCC did so by the final determination made on 8 December 2003. The ACCC fixed the ICB at $545.4 million, while EAPL had submitted that the ICB should be established at $756.9 million.

Review by the Tribunal

75 Schedule 1 to the SA Act specifies the Tribunal as a "relevant appeals body". Part 6 (ss 38-39) is headed "Administrative appeals". It sets up two systems of review. First, s 38 empowers the relevant appeals body to exercise the same powers in dealing with the subject matter of the decision as may be exercised with respect to the subject matter by the decision maker (s 38(9)). However, the classes of decisions to which s 38 applies do not include the determination made by the ACCC on 8 December 2003 which EAPL disputes.

76 The relevant regime for review of the ACCC determination is established by s 39 of Sched 1 to the SA Act. The chapeau of that section reads "Limited review of certain decisions of Regulator". Section 39(1) provides for an application to the appropriate appeals body (ie the Tribunal) by the service provider (ie EAPL) for "review" of a decision by the relevant Regulator under the Code (ie the ACCC) to approve the Regulator's own access arrangement in place of an Access Arrangement submitted for approval by the service provider.

77 Section 39(2) states:

"An application under this section –

(a) may be made only on the grounds, to be established by the applicant –

(i) of an error in the relevant Regulator's finding of facts; or

(ii) *that the exercise of the relevant Regulator's discretion was incorrect or was unreasonable having regard to all the circumstances;* or

(iii) that the occasion for exercising the discretion did not arise; and

(b) in the case of an application under subsection (1), may not raise any matter that was not raised in submissions to the relevant Regulator before the decision was made." (emphasis added)

Section 39(5) limits the range of materials which may be considered by the Tribunal as the "relevant appeals body" in a fashion which indicates that what is involved is a review on the record which was before the ACCC as the relevant Regulator, rather than a full "merits" review of the type considered in *Re Herald & Weekly Times Ltd*[52]. It is common ground that the phrase "the exercise of the relevant Regulator's discretion" in sub-par (a)(ii) of s 39(2), encompassed the fixing by the ACCC of the ICB in its final determination[53]. However, the effect of s 39(6) and s 38(9) was to empower the Tribunal to make an order affirming, setting aside or varying the decision under review and it was this power which the Tribunal used to replace the ICB of $545.4 million fixed by the ACCC with an ICB of $834.66 million.

78 Paragraph (a) of s 39(2) limits to three the grounds upon which it was open to EAPL to challenge before the Tribunal the ACCC determination. The focus of the complaints by EAPL was not upon an alleged error of the ACCC in its findings of fact (sub-par (i)), nor was it said that the occasion for the ACCC to fix the ICB in its final determination had not arisen (sub-par (iii)).

79 Rather, attention was given to sub-par (ii). This distinguishes between, first, an exercise of the "discretion" of the ACCC which is "incorrect" and, secondly, an outcome which "was unreasonable having regard to all the circumstances". In understanding this distinction assistance is provided by the well known passage in the joint judgment of Dixon, Evatt and McTiernan JJ in *House v The King*[54]. The first branch of sub-par (ii) should be understood as encompassing the words in *House*, "[i]f the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him … if he does not

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52 (1978) 17 ALR 281.

53 Cf *BHP Petroleum Pty Ltd v Balfour* (1987) 180 CLR 474 at 480-481.

54 (1936) 55 CLR 499 at 505.

take into account some material consideration … ." The second branch of sub-par (ii) covers the case where failure properly to exercise the discretion may be inferred from the character of the result, again in the words of *House*, as "unreasonable or plainly unjust". This is the approach to sub-par (ii) of s 39(2)(a) which was taken by the Tribunal (Cooper J presiding) in *Application by Epic Energy South Australia Pty Ltd*[55].

80 When seen in this light, the term "unreasonable" provides the basis for inferring the presence of one or more of the well established grounds which render a decision "incorrect" in the sense of the first branch of sub-par (ii). This understanding of the notion of "unreasonableness" as founding an inference (rather than itself providing a ground of review) was developed by Dixon J in *Avon Downs Pty Ltd v Federal Commissioner of Taxation*[56]. The additional use of the term "unreasonable", in the sense of being "so unreasonable that no reasonable person could have so exercised the power", has been developed in the case law over the last 60 years as an independent ground of judicial review and is embodied in the ADJR Act[57]. Some account of that development was given by McHugh and Gummow JJ in *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002*[58]. The better view is that the limited administrative review system established by s 39 of Sched 1 to the SA Act does not include this judicial review ground by use of the word "unreasonable". In any event, the decision of the ACCC was not treated by the Tribunal as vitiated simply on *Wednesbury* unreasonableness grounds.

Section 8 of the Code

81 The principal area of dispute before the Tribunal had concerned application of the review provision of s 39(2) of Sched 1 to the SA Act to the treatment by the ACCC in its final determination respecting the ICB, of the criteria for existing pipelines specified in s 8.10 of the Code.

82 Section 8.1 sets out certain "General Principles" with which Reference Tariffs included in an Access Arrangement must comply. To the extent possible, service providers are to be given a "market-based incentive to improve efficiency and to promote efficient growth of the gas market". Further, service providers

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55 (2004) ATPR ¶41-977 at 48,442.

56 (1949) 78 CLR 353 at 360. See, further, Aronson, Dyer and Groves, *Judicial Review of Administrative Action*, 3rd ed (2004) at 334-336.

57 Sections 5(1)(e), 5(2)(g).

58 (2003) 77 ALJR 1165 at 1177-1178 [66]-[69]; 198 ALR 59 at 74-76.

should be provided with "the opportunity to earn a stream of revenue that recovers the costs of delivering the Reference Service over the expected life of the assets used in delivering that Service, to replicate the outcome of a competitive market, and to be efficient in level and structure". These concerns with market-based incentives and the replication of the outcome of a competitive market would be shared with service providers by their financiers who are lending or providing other accommodation on the strength of such matters.

83 The General Principles are important when construing the more detailed provisions respecting approval by the ACCC of a Reference Tariff. There was no immediately competitive structure to the Pipeline owned by EAPL and what was called for was a Reference Tariff which would replicate approximately a tariff in a competitive market.

84 The effect of s 8.2 of the Code was that the ACCC had to be satisfied when determining approval of a Reference Tariff that the revenue to be generated from the sale or forecast sales of all services over the Pipeline during the Access Arrangement period (called the "Total Revenue") was established consistently with the principles and according to one of the methodologies contained in s 8 of the Code. Section 8.4 set out three methodologies for the calculation of Total Revenue. Each of these had as a component "the value of the capital assets that form the Covered Pipeline or are otherwise used to provide Services" (called the "Capital Base").

85 Section 8.10 should be read with s 8.11. The text of these provisions is as follows:

> "***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." (emphasis added)

86 The phrase "should be considered" is to be understood in a mandatory rather than a directory or exhortational sense. The ACCC accepts this and says that it complied. EAPL says the ACCC did not comply and the Tribunal rightly intervened.

87 From the internal structure of s 8.10 several relevant considerations appear. First, pars (a)-(d) are directed to "the value" which would result from the "well recognised asset valuation methodologies" specifically identified in pars

(a), (b) or any other valuation methodology which is "well recognised" (par (c)). Then, as required by par (d), it is the advantages and disadvantages of each of the methodologies identified in pars (a), (b) and (c), and of no other valuation methodology, which are to be considered in establishing the ICB for the pipeline in question. In particular, and contrary to oral submissions by the ACCC in this Court, par (k) cannot be relied upon by the regulator to sidestep the dictates of pars (a)-(d) by introducing a novel asset valuation methodology.

88 Paragraphs (e)-(j) are not addressed specifically to any valuation methodology. Rather they are expressed as factors to be considered in establishing the ICB and so might bear upon the subject of par (d), namely advantages and disadvantages of the various well recognised asset valuation methodologies identified in pars (a)-(c).

89 It should be added, that it was common ground that par (a) was of no direct significance in this case. This was because "the actual capital cost" was read by the parties as referring to the costs of the original construction of the Pipeline by the PA before its purchase in 1994 by EAPL and the "accumulated depreciation" spoken of in par (a) is that charged to users before the Code commenced.

90 The asset valuation methodology identified in par (b) of s 8.10 was identified as "DORC" and was described by the Tribunal as follows[59]:

> "DORC arrives at an hypothetical value and looks forward. The starting point to ascertain DORC is to arrive at the ORC [ie *Optimised Replacement Cost*] (which costs the hypothetical optimised replacement of the pipeline) and then depreciates that amount to what might be called a second hand value, principally because the optimised pipeline would last longer than the existing pipeline."

The determination by the ACCC

91 EAPL's submissions to the ACCC had proposed an ICB based upon the DORC method. The value which the ACCC fixed for the ICB, however, was calculated by the application of a method it described as a "valuation", being

> "[t]he basis of the valuation is ORC, which the [ACCC] has depreciated on the assumption of a 50 year asset life to 2000, consistent with the useful asset life previously assumed by EAPL. From 2000

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59 *Application by East Australian Pipeline Ltd* (2004) ATPR ¶42-006 at 48,804.

> onwards, the [ACCC] has used an 80 year [life], the life which EAPL has submitted is the current useful life and which the [ACCC] has accepted."

The ACCC added that

> "[t]o support this valuation the [ACCC] has given considerable weight to section 8.10(f) of the Code."

92 In this Court, counsel for the ACCC accepted that it had put aside any well recognised asset valuation methodologies and had been idiosyncratic. The ACCC started with ORC, but rather than depreciating it in accordance with DORC methodology, the ACCC discounted it. Counsel for the ACCC submitted that it was enough that the result could be "fitted" into s 8.10, looking at the elements of s 8.10, "collectively" and that, in any event, par (k) was sufficient support. Those submissions should be rejected.

The reasoning of the Tribunal

93 The Tribunal accepted the submission by EAPL that it had been a fundamental error for the ACCC to put aside known valuation methodologies and to devise a methodology which adjusted ORC in a novel fashion. It follows from what has been said earlier in these reasons that this error was the result of a misconstruction of s 8.10 of the Code. The result was that for this reason alone the Tribunal had been empowered in accordance with s 39 of Sched 1 to the SA Act to act as it did and to set aside the ICB determined by the ACCC.

94 The Tribunal saw "some substance"[60] in an additional submission by EAPL but did not rule upon it. This submission was that the ACCC had sought to fix the ICB at a level that would reflect the price paid by EAPL in 1994 for the Pipeline on the basis that to allow an ICB in a greater sum (as sought by EAPL) would be to give EAPL a "windfall"[61] as purchaser of the privatised asset. The Tribunal observed that it was "not stretching things too far"[62] to see that concern as an explanation for depreciating ORC to DORC.

95 The Tribunal noted that the purchase price paid by EAPL in 1994 was an unreliable guide to the true value of the Pipeline at that time, saying that EAPL

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60 *Application by East Australian Pipeline Ltd* (2004) ATPR ¶42-006 at 48,807.

61 (2004) ATPR ¶42-006 at 48,807.

62 (2004) ATPR ¶42-006 at 48,807.

may be seen as having received "a bargain or a windfall"[63] in the absence of an open and unconditional tender. However, the Tribunal added[64]:

> "as our earlier discussion of the Code shows, the primary quest is for a proper contemporaneous value from which to deduce a tariff that will replicate a hypothetical competitive market. It is not to provide subsidies to customers. Pricing below a tariff based upon true value would not replicate a competitive market."

96 The Tribunal said the following with respect to the reliance by the ACCC upon ORC[65]:

> "The ACCC received a number of expert opinions as to the appropriate methodology to be used – some commissioned by EAPL and some by the ACCC. These in turn referred to other expert sources and to ACCC decisions in other cases. On 27 May 1999 the ACCC had issued a Draft Statement of Principles for the Regulation of Transmission Revenues (Draft Statement of Principles) which had canvassed appropriate methodologies. The ACCC did not cite any of that material in support of the reasoning behind its decision as to the ICB. That is not surprising. ORC is only utilised in this field as the starting point from which to deduce DORC. These are forward looking concepts and the 'depreciation' concerned is economic depreciation. There is no support for ORC to be adjusted to take account of past events particularly based upon accounting concepts of depreciation, and to do so is wrong in principle."

In this Court the ACCC relied upon par (b) of s 8.10 as authorising the treatment of ORC as an independent consideration or factor, to be "blended" with other factors. The text of the paragraph denies that submission. The ACCC was required to consider as a factor "the value" that would result "from applying" DORC, not from applying an integer of DORC or an amount from which DORC is deduced.

97 The Tribunal also considered the reliance placed by the ACCC upon par (f) of s 8.10. With respect to those submissions the Tribunal correctly said that they involved a misunderstanding of that provision. It said that when the factors in s 8.10[66]:

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63 (2004) ATPR ¶42-006 at 48,807.

64 (2004) ATPR ¶42-006 at 48,807.

65 (2004) ATPR ¶42-006 at 48,805-48,806.

66 (2004) ATPR ¶42-006 at 48,806.

> "are considered together, they point to a set of circumstances in which the combined effect of past history is such as to require a modification of normal valuation methods which may have thrown up an unreasonably high ICB that would cause an unreasonably high tariff. The ACCC did not apply that reasoning in the present case. There appears to be no proper basis for doing so. When the past history of the operation of the [Pipeline] is considered as a whole, it is plain that the operation has been, and remains, seriously in debit which will never be recovered. Thus the users of the [Pipeline] have been subsidised at the expense of the operator of the [Pipeline]. The tariff that was set following acquisition of the [Pipeline] by EAPL can be assumed to be set at a more realistic level and is indeed at a level in excess of that proposed by the ACCC. Thus there would be no tariff 'shock' if the EAPL proposal were accepted. It is not possible to draw the conclusion that the few years of operation of the [Pipeline] by EAPL has caused such a gross over-recovery of depreciation as to require offset in setting the ICB under the regulatory regime."

It should be added immediately that, in its rejection of the decision of the Tribunal, the Full Court did not consider this important part of its reasoning.

98 There having been disclosed to the Tribunal error of the description in par (a)(ii) of s 39(2) of Sched 1 to the SA Act, the Tribunal's powers under s 39(6) and s 38(9) were enlivened. Several steps then followed. On 18 March 2005 the Tribunal delivered supplementary reasons[67] and on 3 May 2005 it directed that EAPL submit a revised Access Arrangement. On 19 May 2005 the Tribunal made its final order whereby, with effect 1 July 2005, it varied the ACCC Access Arrangement of 8 December 2003, in particular by stipulating an ICB of $834.66 million.

The Full Court

99 The Full Court set aside that part of the Tribunal's order respecting the ICB. However, the effect of the order of the Full Court was not to reinstate fully the decision of the ACCC. This was because, in addition to the submissions which now failed in the Full Court, EAPL had submitted an argument in the Tribunal which remained outstanding. This was that par (g) of s 8.10 of the Code (which concerns the reasonable expectations of persons under the pre-Code regulatory regime for the Pipeline) would justify a finding of a potential ICB of at least $784 million. The Full Court remitted the matter to the Tribunal for consideration.

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67 *Application by East Australian Pipeline Ltd* (2005) ATPR ¶42-047.

100 In this Court, EAPL submits that in making its orders with respect to the Tribunal's decision, the Full Court itself erred in several respects. First, it did not find, nor even upon the reasoning by which it criticised the Tribunal's decision, could it have found, jurisdictional error required to attract relief under s 39B of the Judiciary Act. Secondly, within its jurisdiction the Tribunal had made no error of law to attract relief under the ADJR Act.

101 The Full Court said that it was "implicit" in the reasons of the Tribunal that it gave[68]:

> "a primacy to the valuation methodologies set out in subparas (a), (b) and (c) and then allowing reference to the factors in subparas (e) to (k) to enable a [f]inal [d]ecision to be made as to the particular valuation method identified in subparas (a), (b) and (c) to be selected as the ICB, albeit with some adjustment".

The Full Court continued[69]:

> "Put shortly, the factors in subparas (e) to (k) are not in every case subordinate to, or of lesser significance than, the factors in subparas (a), (b) and (c), although they only arise for consideration, as a matter of logical analysis after the values in subparas (a), (b) and (c) and their advantages and disadvantages have been considered in accordance with subpara (d)."

102 There are difficulties with these passages. First, as the Full Court seems to agree in the second of the above extracts, as a matter of proper construction sub-pars (e)-(k) can only arise for consideration after consideration of established valuation methodologies in accordance with pars (a)-(d). In that sense, at least, pars (a)-(d) come first. Secondly, no such consideration was given by the ACCC. It was not enough for the ACCC to say in its final determination that it had considered those matters in the sense of having looked at but discarded them. Thirdly, there was error by the Full Court itself when it said of the ACCC[70]:

> "However, we do not agree that it is correct to say as the Tribunal did 'those factors would not normally (and perhaps would never) permit recognised valuation methods to be put to one side'. Of course, s 8.11 of the Code must be taken into account, but *that is not to say that the figures*

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68 (2006) 152 FCR 33 at 77.

69 (2006) 152 FCR 33 at 77.

70 (2006) 152 FCR 33 at 78.

> *derived by reference to any of the methodologies referred to in subparas (a), (b) and (c) cannot be varied or altered depending upon the extent and weight of the consideration of the factors referred to in subparas (e) to (k).*" (emphasis added)

The ACCC had not acted in the manner so described. It did not derive a figure from the methodology in par (b); it extracted ORC from that methodology.

103 The Full Court criticised the Tribunal for having distinguished a quest under s 8.10 for value from entry upon a quest for some form of justice or equity[71]. But this distinction served merely, and properly, to emphasise that what was to be established was an ICB for the Pipeline, notwithstanding its history and the circumstances of its purchase by EAPL in 1994.

104 The Full Court said[72]:

> "At the end of the day the ICB established by the ACCC was not a valuation in accordance with the valuation methodology referred to in subpara (a) or (b) or another well recognised valuation methodology referred to in subpara (c) of s 8.10. *Rather it was the determination or establishment of the ICB after having considered all the factors set out in subparas (a) to (k) of s 8.10.*" (emphasis added)

EAPL correctly submits that the difficulty lies in the second sentence. The Full Court disclosed no provision in s 8.10 which authorised the treatment by the ACCC of ORC as an independent and determinative factor in establishing the ICB.

Conclusions

105 The Tribunal discharged its functions as the "relevant appeals body" under s 39 of Sched 1 to the SA Act in a fashion which did not involve the commission of any errors of law within the meaning of s 5(1)(f) of the ADJR Act. The Tribunal committed no jurisdictional error to attract the exercise of jurisdiction conferred on the Federal Court by s 39B(1) of the Judiciary Act. To the contrary, the Tribunal correctly found that the ACCC had misconstrued, and as a result misapplied, the Code. The orders of the Tribunal made on 19 May 2005 should not have been varied or set aside by the Full Court.

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71 (2006) 152 FCR 33 at 77.

72 (2006) 152 FCR 33 at 81.

Orders

106 The appeal to this Court should be allowed with the costs of EAPL against the ACCC. Order 4 of the Full Court's orders made on 2 June 2006 should be set aside. Orders 2, 3, 4 and 5 of the Full Court's orders made on 18 August 2006 should be set aside. The ACCC should pay the costs of EAPL incurred to date in the Federal Court. The balance of the application by the ACCC to that Court for judicial review should be stood over for further directions before the Full Court of that Court.