

If this proposal is adopted, prospective generators will have the benefit of securing accreditation prior to incurring the cost of constructing the power station. This would be particularly valuable to those proponents of projects that would not have been commercially viable in the absence of MRET eligibility.

Conclusion

The Panel's review of the Act and the MRET Scheme has proposed numerous reforms. It remains to be seen if, and how, the government will seek to implement these recommendations. An announcement regarding the Panel's recommendations is expected sometime after March 2004 as part of a major "election year" energy policy statement to be made by Prime Minister John Howard.

GAS ACCESS REGIME REVIEW – INITIAL FINDINGS OF THE PRODUCTIVITY COMMISSION*

Introduction

On 15 December 2003, the Productivity Commission¹ (Commission) released a draft report on its review of the "Gas Access Regime".²

The Commission has invited written submissions on its draft report and intends to hold a series of public hearings commencing in mid March 2004. It is anticipated the final report will be released in June 2004.

What is the "Gas Access Regime"?

The "Gas Access Regime" subject to the review is the *National Third Party Access Regime for Natural Gas Pipelines*.³ This regime was established in 1997 by agreement between the Commonwealth and each State and Territory government.

The objectives of the legislation underlying the Gas Access Regime was to establish a national regime that allowed third parties to access certain gas transmission and distribution pipeline systems where access would otherwise be constrained due to the misuse of market power by the pipeline owner. In this way, it was intended that the regime would promote competitive markets for gas.

Purpose of the Review

The primary purpose of the Commission's review was to:

"examine the extent to which current gas access arrangements balance the interests of relevant parties, provide a framework that enables efficient investment in new pipeline and network infrastructure and can assist in facilitating a competitive market for natural gas".⁴

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¹ The Commission is an independent agency established under legislation which is used by the Commonwealth government as its principle review and advisory body on matters concerning microeconomic policy and regulation. It conducts public inquiries and undertakes research into a broad range of economic and social issues, including competition policy and economic infrastructure.

² The report is entitled "Review of the Gas Access Regime" and is available on the Commission's Internet site at <http://www.pc.gov.au/inquiry/gas/index.html>.

³ Which is enacted in Queensland by way of the *Gas Pipelines Access (Queensland) Act 1998*.

⁴ Page IV of the Draft Report, point III of the Terms of Reference for the review.

The Commission's Findings

The Need for a Gas Access Regime

The first task of the review was to determine if an industry specific regime governing third party access was still justified and therefore should be maintained.

In this respect, the Commission found that although pipelines do generally have natural monopoly characteristics, the market power of pipeline owners is normally constrained by a number of factors such as the availability of competing pipelines to provide the services or the availability of alternative fuels for the consumers to use. Other factors considered included the size and concentration of the typical users of pipeline services and consumers of gas.

The Commission noted that when the Gas Access Regime was first developed, generally a market was supplied by only one gas field as there was limited interconnectivity between gas fields and the consumers. However, it found that over the last six years there had been significant and rapid change in the gas industry resulting in increased interconnectivity thus giving rise to emerging competition.

However, the Commission felt that the gas markets were still in transition so there was still a need for a Gas Access Regime. The Commission's preference was for an industry specific regime rather than to rely on the access regimes contained in the *Trade Practices Act 1974* (Cth).

The Effectiveness of the Gas Access Regime

The Commission found that the industry needs a Gas Access Regime that accommodates and supports the emergence of competition and which only imposes regulatory intervention where that is likely to generate major improvements in economic efficiency. In this respect, the Commission felt that the current regime (being a form of price regulation based on a cost-of-service model) has significant drawbacks, including an adverse impact on investment.

The following sorts of issues were found to contribute to these adverse impacts:

- In practice the Gas Access Regime has become a price regulation of the services available to third parties in that access to the pipeline services is based on regulator approved cost related reference tariffs. The Commission felt this gave rise to a level of risk that potentially leads to a distortion in investment, for example, by prospective pipeline proponents only choosing low risk pipelines or by delaying their development.
- The Gas Access Regime has too many objectives and some of these conflict. This impacts on the exercise of regulatory discretion.
- There are a range of methodologies which can be applied to determine the form of price regulation imposed by the regulators and therefore there exists widely different expectations about the regulatory outcomes achievable by coverage under the regime. This creates uncertainty and a high probability of inconsistency in the regulation of pipelines.
- Regulators generally have wide discretionary powers in approving access arrangements which gives rise to regulatory uncertainty.
- There is a large amount of information and research required by regulators in performing their roles which involves the incurring of significant costs.
- There are too many regulatory and appeal bodies giving rise to the potential for inconsistent outcomes nationally and therefore an increase in the regulatory risk.

Recommendations

The Commission's draft Report found that the current Gas Access Regime requires modification to ensure that access regulation is only used where it is likely to generate improvements in economic efficiency. With this view, the Commission's recommendations included the following.

Clarifying the Objectives of the Regime

The Commission recommended including an objects clause that focuses on economic efficiency. This would guide regulators, tribunals and courts thereby promoting national consistency in regulation, increase accountability and provide greater certainty for owners of pipelines and pipeline access seekers. The objective the Commission recommends is:

“to promote the economically efficient use of, and investment in, the services of transmission pipelines and distribution networks, thereby promoting competition in upstream and downstream markets.”

Changing the Coverage Thresholds

The Commission proposes raising the threshold for coverage under the Gas Access Regime from the current concept of looking at whether competition would be promoted to where access is likely to have the effect of increasing competition to a *material degree*.

The threshold for applying full coverage and the current cost-based price regulation approach of the Gas Access Regime would be even higher. It would only apply where access is likely to have the effect of increasing competition to a *substantial degree*.

Providing for an Alternative to Full Coverage

For those situations where the criteria for coverage has been met but not the threshold for applying the full price regulation regime, the Commission has recommended that the Gas Access Regime include a “light-handed” monitoring option as an alternative to full coverage. This option would apply for a minimum period of five years and while it applied, full coverage with price regulation would be precluded.

This approach would involve the pipeline owner complying with various requirements of the Gas Access Regime such as ring fencing and the disclosure of information.

Providing Regulatory Guidance

The Commission feels that it would be beneficial to increase the legislative guidance given to regulators when approving access arrangements and reference tariffs. The Commission proposes including a list of factors to be taken into account by the regulator in determining whether an increase in competition would result from access being granted under the regime.

Enabling Advance Rulings

The Commission has recommended including a mechanism by which owners of prospective new pipelines can, before the pipeline is constructed, obtain from the regulator a binding ruling of no regulation for up to 15 years. It is felt that this would help clarify the regulatory risks of third party access prior to investment being committed to the proposed pipeline.

Conclusion

The Commission's draft findings and recommendations, although not proposing dramatic reform to the current Gas Access Regime, do seek to incorporate a number of significant improvements in the practical application of the regime thereby eliminating some regulatory risk and uncertainty and hopefully reducing the associated regulatory costs and detriment to pipeline investment.

It remains to be seen the extent to which the final report of the Commission diverges from these draft findings and recommendations. It will then be a question of whether the participating States and Territories agree to amend the Gas Access Regime as recommended in the final report. This is significant as this is but one component in the wider issue of the reform of the energy markets currently being considered by the Ministerial Council on Energy on behalf of the Council of Australian Governments.

NEW SOUTH WALES

JUST AND EQUITABLE COAL COMPENSATION*

NSW Coal Compensation Board v Nardell Colliery Pty Ltd and Coal Compensation Review Tribunal ([2004] NSWCA 35)

Just and equitable compensation – Super royalty and front end payments in compensation calculation – Coal Acquisition Act 1981 – Coal Acquisition (Re-Acquisition Arrangements) Order 1997

First Instance Decision

The decision of the trial judge, Sperling J, has been reported in this Journal.¹ That report should be read in conjunction with this note.

The trial judge concluded that super royalty and front end payments should be included in the compensation calculation and that a dividend implementation factor of 0.5 should be included in determining factor "r" in the compensation formula.

The Appeal Grounds

The Board appealed against the trial judge's decision on the ground that:

1. it was not just and equitable for the super royalty and front end payments to be included in the compensation calculation; and
2. having found a mismatch between the methodology used by the Tribunal to determine the base rate component of factor "e" and the methodology used by the Tribunal to determine factor "r" the trial judge should not have corrected factor r but rather should have permitted the Tribunal in its discretion to reconsider the methodology used to determine factor "e" as well as or in the alternative to reconsider the methodology used to determine factor "r".

Decision

The Court of Appeal confirmed that the trial judge's reasoning in respect of the super royalty and front end payment was correct and that it was just and equitable to include the super royalty and front end payment in the compensation calculation. Hodgson JA also looked at the compensation calculation on the basis of a *Malec*² approach by assessing the degrees of probabilities of various possible outcomes and came to the same conclusion.

In respect of the mismatching, the Court of Appeal confirmed the mismatch but found that the trial judge could not correct the error of mismatching in the way he did because that required him to

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¹ (2003) 22 ARELJ 125-127.

² *Malec v JC Hutton Pty Ltd* (1990) 169 CLR 638.