

Secondly, the fact that under the old Articles not only was there no provision authorising a share buy-back, but that the old Articles expressly prohibited the use of company funds for that purpose.

Thirdly, the well-publicised meeting of the members of Coopers who approved the alterations to the old Articles in 1995, against the background of the documents prepared for that meeting.

Fourthly, the small, closely held and relatively static membership of Coopers.

Weinberg J noted that if Article 38 was to be read in isolation then Lion Nathan's arguments may have some force. However, established authority indicated that the Articles could not be read in such a manner. Instead, they had to be read in conjunction with the remaining articles and when done so, it became tolerably clear that Article 38 did not encompass a share buy-back. Kenny and Lander JJ were of the same opinion.

Weinberg J indicated that Finn J was entitled to have regard to the surrounding circumstances present in the first, second and fourth points, however, he had serious misgivings about Finn J's use of the material referred to in the third point. His Honour submitted that a third party would hardly be likely to be aware of the background of the terms in those particular documents and disagreed with Finn J on that point.

Kenny and Lander JJ did not agree with Weinberg J on this issue. Lander J noted that in ordinary circumstances it would be impermissible to resort to an explanatory memorandum to explain changes to a company's articles of association or constitution. However in this case, Finn J was correct to do so because of the special features of Coopers. His Honour noted that Coopers was a very tightly held company and the pre-emptive rights regime placed serious limits on who could become a shareholder. Further, the dispute which had led to the amendment of the Articles was well known to the then current members of Coopers as well as those who held rights under the pre-emptive rights regime. This was a case where the information contained in the information memorandum was well known to the parties whose interests may have been affected and there was no reason why it could not be relied upon in these circumstances.

A SIGN OF THE REFORMED GAS MARKET – THE PROPOSED NATIONAL GAS BULLETIN BOARD*

In June 2007, the Bulletin Board Working Group (BBWG) of the Gas Market Leaders Group released its consultation paper on the proposed national gas bulletin board.¹ Closing date for public submissions was 6 July 2007 with the bulletin board to commence operation in May 2008.

The consultation paper sets out draft business and data requirements for the proposed bulletin board including key legal issues which must be addressed before the board is operational.

Key Features of the Proposed Bulletin Board

The bulletin board is proposed to be a website that covers all major gas production fields, major demand centres and transmission pipelines. The bulletin board will provide information on the following matters.

- Production capacities by producers. At this stage, it is proposed that maximum daily capacity will be provided by producers, including three-day capacity outlook for each production

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¹ Gas Market Leaders Group, *Bulletin Board Business and Data Requirements*, June 2007.

facility. There is currently no proposal for producers to provide daily ‘actual’ production figures.² However, comment is being sought on this issue.

- Storage capacity. This will include nameplate storage capacity and any constraints on that capacity. A three-day supply outlook will also be posted. As with production capacity, there is currently no proposed requirement for daily ‘actual’ storage figures. However, comment is being sought on this issue.
- Pipeline capacity. Total capacity for each pipeline will be provided. Planned outages would be advised and noted on the board.
- Reserves. The bulletin board will contain a section on the actual or expected ability of each pipeline to supply the forecast demand over the period. This will be represented by coloured ‘flags’ being:
 - green – business as usual;
 - amber – voluntary load shedding is likely or happening; and
 - red – involuntary load shedding is likely or happening.³
- Forecast gas demand. This will be calculated based on nominations provided to pipeline owners by shippers. It is proposed that the information will be aggregated across each jurisdiction rather than individually presented for each pipeline. However, the BBWG is seeking comment on this issue. The BBWG is also seeking comment on whether actual demand (being the previous day’s actual aggregated delivery of gas) should be published.

The bulletin board is also proposed to have a section which will allow a person to offer spare pipeline capacity to the market. Details of the offer and the details of the offeree are proposed to be shown on the board. Similarly, a listing of gas supply offers will be provided to allow an avenue for parties to buy or sell gas in the market.

Exemptions

It is proposed that natural gas transmission pipelines in all jurisdictions will be included in the bulletin board with some exemptions. The exemptions mooted by the BBWG are:

- a pipeline or a facility with a capacity of less than 20TJ per day;
- dedicated laterals and spurs; and
- gathering lines.

Legal Issues

There are a number of legal issues that are to be resolved. The BBWG considered that a statutory framework (rather than a voluntary obligation) should be adopted. The statutory framework is expected to be part of the New National Gas Law.

There remain issues of liability, in particular:

- liability for misleading or deceptive conduct under the *Trade Practices Act 1974* (Cth) (TPA) and State Acts; and

² In this case the proposed ‘actual’ figures will be the previous day’s production rather than real time production.

³ The proposed flag system will work slightly differently in Victoria and will be based on LNG scheduling.

- liability for breach of confidentiality obligations in contracts.

Misleading and deceptive conduct

The BBWG noted that information providers could be exposed to liability if information supplied and published is misleading or deceptive. This is particularly the case where the information provider has modified the raw data such as aggregating it. It also relevant for forecast information as the TPA places the onus on the person making the forecast (or in this case aggregating and publishing it) to prove it is reasonable.

To limit this potential liability, the BBWG has suggested that the information providers obtain mutual waivers between themselves and require all users of the bulletin board to accept terms and conditions excluding liability when accessing the bulletin board. This will alleviate most of the risk. However, there remains risk to information providers as waivers and exclusions do not provide a complete defence to liability under the TPA.

Therefore, to eliminate the risk it is proposed that a statutory exemption be introduced; exempting liability where the information provider can demonstrate they acted bone fide exercising a reasonable level of care and due diligence.

Confidentiality

The second legal issue is that of liability for the disclosure of confidential information. This may not be an issue where the information is aggregated. However, there remains a risk that such information may be 'reverse engineered'.

To protect information providers and the bulletin board operator the BBWG is proposing a statutory immunity against breach of confidentiality obligations.

It is also worth noting that many confidentiality agreements exempt liability for disclosures that are required or compelled by law. In such a case, the proposed amendments to the National Gas Law to implement the bulletin board may alleviate this issue for the information provider.

A National Board?

At this stage, all States have indicated that they will implement the bulletin board. For some States, particularly interconnected States such as Victoria, South Australia, New South Wales and Tasmania the bulletin board will provide immediate benefits.

For other States, such as Western Australia, there may be less immediate advantages due to the features of the local market. In particular, the limited transportation of gas through distribution systems, largely obviating the need for a wholesale gas market to trade imbalances, and the relatively low transaction costs to identify a potential buyer or seller of gas supply or transmission capacity due to small number of market participants.⁴ Certainly, this view has been somewhat stated by at least one pipeline operator in Western Australia.⁵ However, given the recent reports of future tightening of the gas market in Western Australia,⁶ it is likely that any measure which may provide additional capacity to the market (even if only through efficient use of capacity) would be welcome.

⁴ The Allen Consulting Group, *Options for the development of the Australian wholesale gas market*, Final Report, June 2005, pp 8-9.

⁵ DBNGP (WA) Transmission Pty Limited, *Dampier Bunbury Pipeline response to the Bulletin Board Business and Data Requirements consultation paper*, 29 June 2007.

⁶ See for example, Economic Regulation Authority, *Discussion Paper: Gas Issues in Western Australia*, June 2007.