

Determinating the ‘but for’ Baseline: Additionality

To be eligible for either type of abatement credit, abatement projects must have actually occurred, and be:

- additional ie beyond ‘business as usual’;
- permanent;
- measurable; and
- verifiable.

The requirement for ‘additionality’ raises a number of novel legal issues. Firstly, establishing a baseline level of emissions to allow meaningful abatement to occur before 2011 will be difficult, as the verified data collation process will take some time. As a corollary, one of the key proposals of the paper is to give the regulator power to obtain various sources of data, including:

- verified emissions data submitted under the National Greenhouse and Energy Reporting System for the year 2008-09;
- verified abatement data from 2007-08 if firms have such records; and
- other sources of data (eg information from environmental approval processes for greenhouse or energy use programmes such as Energy Efficiency Projects).

A second complication associated with proving additionality is whether a particular abatement project would have been undertaken in any event to mitigate impending ETS liability.

For example, take the case of a manufacturing firm that, in preparation for the start of the ETS in 2011, proposes to carry out an abatement project in its production process to generate abatement for the start of the ETS. It is now considering accelerating the start of the project to get the benefit of the early abatement incentives. Carrying out the abatement should not affect the allocation of permits to the firm, given the Climate Change Group’s assurance that firms which undertake abatement between 3 June 2007 and 2011 will not be disadvantaged upon permit allocation. However, if the manufacturing firm brought the project forward, say 18 months, could additionality only be demonstrated in respect of those 18 months (because the project would have gone ahead anyway)? Presumably credits for the 18 months of additional abatement would be awarded. As such, and as the paper itself concedes, it is unlikely many credits will be generated in the interim period from 3 June 2007 to 2011 because of long lead times for project start ups.

HIGH COURT ENDORSES NEED FOR CERTAINTY IN ACCESS REGULATION*

East Australian Pipeline Pty Ltd v Australian Competition and Consumer Commission [2007] HCA 44 High Court of Australia (unreported, 27 September 2007, S57/2007)

Facts

On 27 September 2007 the High Court of Australia handed down its decision in *East Australian Pipeline Pty Ltd v Australian Competition and Consumer Commission*.¹ This case was an appeal from a decision of the full Federal Court.

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The decision turned primarily on the interpretation of s 8.10 of the *National Third Party Access Code for Natural Gas Pipeline Systems* (Gas Code). However, the decision has implications in the context of regulated access to infrastructure more generally:

- The court emphasised the importance of regulatory certainty and predictability of outcomes for any access regime. Specifically, a greater degree of uncertainty or unpredictability in the regulatory process will increase investment risk. As such, any decrease in regulatory certainty would distort investment decisions and thus be contrary to the objectives of the Gas Code.
- Where a regulator is required to balance a number of factors in making a decision, it will have a wide discretion. However, this does not mean the exercise of its discretion is unlimited or immune from challenge.
- It is not enough for a regulator to simply state that it has considered each of a set of mandatory statutory criteria in the sense of having looked at them but discarded them. A regulator is required to actively consider and weigh up each criterion.
- A catch all statutory criterion such as ‘any other relevant factor’ will not enable a regulator to sidestep other statutory criteria that fall for consideration.

Background

EAPL owns the Moomba to Sydney gas pipeline (Pipeline) which is, in part, covered by the Gas Code.

At issue was the calculation of the initial capital base (ICB), an important component in determining the regulated tariff.

Legislative framework

In 1997, recognising that certain gas transmission pipelines systems are natural monopolies and require regulated access, the Commonwealth and State governments signed the Natural Gas Pipelines Access Agreement. South Australia subsequently enacted the *Gas Pipelines Access (South Australia) Act 1997* to give effect to that agreement. The Gas Code is Schedule 2 to that Act.

Amongst other things, the Gas Code sets out a process for the submission and review by the ACCC of access arrangements relating to pipelines in existence prior to the commencement of the Gas Code.

Section 8.10 of the Gas Code sets out a list of factors to be considered by the ACCC in establishing the ICB of an existing pipeline including values derived from a number of recognised asset valuation methodologies (sub-paragraphs (a) to (c)) and their comparative advantages and disadvantages (sub-paragraph (d)). Section 8.10 also mandates consideration of a range of other factors (sub-paragraphs (e) to (k)).

Procedural history

On 5 May 1999, EAPL submitted a proposed access arrangement to the ACCC. EAPL proposed a value for the ICB based on a known valuation methodology identified in s 8.10 of the Gas Code, namely the depreciated optimised replacement cost (DORC) methodology. The proposed access arrangement was subsequently revised by EAPL on two occasions.

¹ [2007] HCA 44 (*EAPL v ACCC*).

On 8 December 2003, the ACCC rejected EAPL's further revised access arrangement and substituted its own. The final ICB adopted by the ACCC was derived by taking the optimised replacement cost (ORC), an integer used in calculating the DORC, and adjusting it in what was acknowledged to be a 'novel' or 'idiosyncratic' way.

EAPL applied to the Australian Competition Tribunal (Tribunal) for review of the ACCC decision. The Tribunal varied the ACCC's decision replacing the ICB determined by the ACCC with its own higher one. The Tribunal's orders were substantially set aside by the full Federal Court and then ultimately reinstated by the High Court.

The matter has now been remitted to the full Federal Court to consider grounds of judicial review raised by the ACCC but not yet considered by that Court.

Reasoning of the High Court

The High Court unanimously upheld the finding of the Tribunal that it was incorrect and unreasonable for the ACCC to put aside recognised valuation methodologies in establishing the ICB and substitute its own novel approach.

Importance of regulatory certainty in access regimes

This finding was in essence based on the natural meaning of the words used in s 8.10 of the Gas Code and the objects of the access regime.

The court placed particular emphasis on the objective of not distorting investment decisions in Pipeline transportation systems or in upstream and downstream industries.

Gleeson CJ, Heydon and Crennan JJ summarised the objects of an access regime as follows:

'Stripped to essentials, such a regime is at least intended to allow efficient costs recovery to a service provider and at the same time to 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.'

Their Honours went on to emphasise the importance of regulatory certainty and predictability in this context. Specifically, it was held that a greater degree of uncertainty or unpredictability in the regulatory process will increase investment risk. This in turn results in investors seeking a higher return on investments in infrastructure. As such, the court considered departures from recognised valuation methodologies identified under s 8.10 and the associated increase in uncertainty regarding regulatory outcomes as contrary to the objects of the Gas Code.

This is significant because other access regimes such as those set out in Part IIIA and Part XIC of the *Trade Practices Act 1974* contain objects clauses with similar provisions regarding the efficient use of and investment in infrastructure.

It is also significant for infrastructure operators that, in the quote set out above, their Honours identified the capacity of a service provider to recover its efficient costs as an essential element of an access regime.

Consideration of statutory criteria by the ACCC

Consistent with the Tribunal's reasoning, the High Court held s 8.10 mandates a sequential decision making process in determining an ICB. The starting point in this process is consideration

of the values derived from ‘well recognised asset valuation methodologies’ (sub-paragraphs (a) to (c)), which must then be weighed comparatively (sub-paragraph (d)). The balance of the additional factors falling for consideration under s 8.10 (sub-paragraphs (e) to (k)), may lead to some adjustment of the final ICB figure, but are only to be considered after the range of values has been established following the process described in sub-paragraphs (a) to (d).

The court’s decision regarding the manner in which an ICB is to be determined largely turns on the specific language of s 8.10 of the Gas Code. That is, the court found that there was nothing in the natural meaning of the words used in the provision or its structure that would permit recognised valuation methods to be put to one side. The court therefore found that using an input from a recognised asset valuation methodology, such as an ORC, and adjusting it in a novel way was not permissible under s 8.10.

The Commission’s submissions that it’s novel methodology for calculating the ICB could be ‘fitted’ into the statutory criteria set out in s 8.10 when these criteria were viewed ‘collectively’ was rejected by the court. The joint judgment of Gummow and Hayne JJ in particular suggests that the objects and words of the relevant statutory regime must be the guide for the manner in which a decision maker evaluates statutory criteria, and that to seek to fit a decision into a set of statutory criteria is to approach the decision making process back to front.

Conclusions

This decision emphasises the importance of regulatory certainty in preventing distortion of infrastructure investment decisions in the context of regulated access.

A further lesson to be drawn from this case is that it is of fundamental importance for a decision maker to give careful consideration, by reference to the relevant statute, to: the nature of the task he or she must perform; the objects that are to be achieved through the decision; and the powers and discretions accorded to him or her in order to make the decision.

NEW SOUTH WALES

ENVIRONMENTAL PLANNING AND ASSESSMENT ACT OVERRIDES MINING ACT LANDHOLDER PROTECTION*

Ulan Coal Mines Ltd v Minister for Mineral Resources & Moolarben Coal Mines Pty Ltd [2007] NSWSC 1299 (Smart AJ)

Mining lease appeal – Major projects– Substantial and valuable improvement

Background

This case considers the interaction between the provisions of the *Mining Act 1992* (NSW) (Mining Act) and the *Environmental Planning and Assessment Act 1979* (NSW) (EP&A Act).

In 2005 and 2006, Moolarben Coal Mines (Moolarben) lodged two separate mining lease applications over land owned by an adjoining mine owner, Ulan Coal Mines Limited (UCML).

Under s 62 of the Mining Act, a mining lease cannot be granted over the surface of any land if there are substantial and valuable improvements on the land. An objection from a landholder

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