

IN THE WESTERN AUSTRALIAN ELECTRICITY REVIEW BOARD (IN ITS CAPACITY AS THE LOCAL APPEALS BOARD PURSUANT TO THE NATIONAL GAS ACCESS (WA) ACT 2009, THE NATIONAL GAS ACCESS (WA) (PART 2) REGULATIONS 2009 AND THE ENERGY ARBITRATION AND REVIEW ACT (WA) 1998)

No 1 of 2010

Re Application for review of the decision by the Western Australian Economic Regulation Authority dated 5 August 2010 to draft and approve its own revised Access Arrangement to apply to the Goldfields Gas Pipeline

Application by:

BHP BILLITON NICKEL WEST PTY LTD

Applicant

No 2 of 2010

Re Application for review of the decision by the Western Australian Economic Regulation Authority dated 5 August 2010 to draft and approve its own revised Access Arrangement to apply to the Goldfields Gas Pipeline

Application by:

**SOUTHERN CROSS PIPELINES AUSTRALIA PTY LTD
SOUTHERN CROSS PIPELINES (NPL) AUSTRALIA PTY LTD
ALINTA DEWAP PTY LTD
GOLDFIELDS GAS TRANSMISSION PTY LTD**

Applicant

**BHP BILLITON NICKEL WEST PTY LTD
OUTLINE OF REPLY SUBMISSIONS IN NO 2 OF 2010**

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Capitalised terms used in this document utilise the definitions contained in the National Third Party Access Code for Natural Gas Pipeline Systems contained in Schedule 2 of the Gas Pipelines Access (Western Australia) Act 1998 (WA) (Code), and the defined terms in the applicant's submissions, unless otherwise defined in this document.

BHPB's SUBMISSIONS IN RESPONSE

Introduction – GGT's position

- 1 GGT's application and submissions depend on establishing the following propositions.
- 2 GGT's first proposition concerns the rights and obligations of the Service Provider and the Regulator in the 14 day period¹ after the Regulator has issued a Final Decision, which does not approve the Service Provider's revisions to the Access Arrangement, and states the amendments that would be required in order for the Regulator to approve the revisions (**FFD Period**).² GGT asserts that, so long as a Service Provider submits amended revisions during the FFD Period which comply with the Code, the Regulator has no discretion or right to reject those amended revisions, but instead must approve them and cannot draft and approve its own amended revisions in their place.
- 3 GGT's second proposition is that the amended revisions submitted by GGT during the FFD Period concerning the Extensions and Expansions Policy (**EEP**) complied with the Code, and that the Regulator was accordingly obliged to accept and approve GGT's EEP.
- 4 GGT's third proposition is that the EEP drafted and approved by the Regulator is not Code compliant, so the Regulator's decision to draft and approve it was incorrect and/or unreasonable.
- 5 GGT's fourth proposition is that its proposed rate of return is consistent with the Code, so the Regulator was obliged to accept and approve it.
- 6 GGT's fifth proposition is that the Regulator was obliged to consider, and take account of, confidential submissions made by GGT during the FFD Period (**4 June Confidential Submission**).

¹ See s 2.43(c) of the Code.

² See ss 2.38(b)(ii) and 2.41 of the Code.

7 GGT cannot make good those propositions for the reasons which follow.

The Access Arrangement revision approval process

8 GGT's submissions do not reflect the overall structure and component elements of the revisions approval process for an existing Access Arrangement.

9 The first step in the revision of an existing Access Arrangement is dealt with in s 2.28 of the Code, which relevantly provides that by the date provided for in the Access Arrangement (**Revisions Submission Date**), the Service Provider must submit to the Relevant Regulator proposed revisions to the Access Arrangement and relevant Access Arrangement Information.

10 The Code then provides that:

- (a) the Regulator must request and consider submissions from interested parties in respect of the proposed revisions to the Access Arrangement;³
- (b) after considering the submissions, the Regulator must issue a draft decision approving or not approving the revisions to the Access Arrangement - and if the decision is not to approve, giving reasons why not and stating the amendments that would need to be made for approval to be given;⁴
- (c) the Regulator must then request and consider submissions from interested parties in respect of the Draft Decision;⁵
- (d) at this point, the Service Provider may also resubmit revisions to the Access Arrangement so as to incorporate or substantially incorporate the amendments specified by the Regulator in the draft decision or otherwise address the matters the Regulator identified in the Draft Decision as being the reasons for requiring the amendments;⁶
- (e) after considering the submissions, the Regulator must then issue a final decision approving or not approving the revisions to the Access Arrangement - and if the decision is not to approve, stating the amendments that would need to be made

³ s 2.31 and 2.34 of the Code.

⁴ s 2.35 of the Code.

⁵ s 2.36 and s 2.37 of the Code.

⁶ s 2.37A of the Code.

for approval to be given and by when the amended revisions must be resubmitted by the Service Provider;⁷

- (f) at this point, the Service Provider must also submit amended revisions to the Access Arrangement.⁸ Contrary to the requirements of the Code in relation to proposed revisions to an Access Arrangement and the Draft Decision, the Code makes no provision for requesting or considering any further submissions at or beyond this point.

11 Section 2.41 of the Code then provides that if a Service Provider submits amended revisions to the Access Arrangement by the date required, the Regulator must issue a further final decision that:

- (a) if the Regulator is satisfied that the amended revisions to the Access Arrangement incorporate the amendments specified in the final decision, *approves* the amended revisions to the Access Arrangement; or
- (b) if the Regulator is satisfied that the amended revisions to the Access Arrangement either substantially incorporate the amendments specified in the final decision, or otherwise address to the Regulator's satisfaction those matters identified in the final decision as requiring amendment, approves the amended revisions to the Access Arrangement; or
- (c) in any other case does not approve the amended revisions to the Access Arrangement.

12 Section 2.42 of the Code then provides that if the Regulator does not approve the amended revisions to the Access Arrangement under s 2.41, the Regulator must draft and approve its own amended revisions to the Access Arrangement. The Code makes no provision for further submissions in either section.

GGT Access Arrangement revision process

13 The previous Access Arrangement for the GGP as revised in December 2008 provided for a Revisions Submissions Date of 1 April 2009.

⁷ s 2.38 of the Code.

⁸ s 2.40 of the Code.

- 14 On 23 March 2009, GGT submitted its proposed revisions to the Access Arrangement and the Access Arrangement Information (**Proposed Revisions**).
- 15 On 9 October 2009 the Regulator published the Draft Decision in respect of GGT's Proposed Revisions. The Regulator confirmed that it had considered and weighed the factors in s 2.24 of the Code as fundamental elements in making the overall decision whether to approve GGT's Proposed Revisions.⁹
- 16 The Regulator's Draft Decision was to not approve GGT's Proposed Revisions, on the basis that the revisions did not, in its view, satisfy the requirements in ss 3.1 to 3.20 of the Code or the principles in s 8 of the Code.¹⁰
- 17 In the Draft Decision, the Regulator set out 45 amendments which it required GGT to make before it would approve the revisions.
- 18 On 22 April 2010, GGT submitted an amended version of the Proposed Revisions (**Amended Proposed Revisions**) to the Regulator.
- 19 On 13 May 2010, the Regulator issued its Final Decision in respect of GGT's Amended Proposed Revisions. The Regulator's Final Decision was to not approve GGT's Amended Proposed Revisions. In the Final Decision, the Regulator set out 10 amendments to the Access Arrangement and a further 11 amendments to the Access Arrangement Information, which it required GGT to make before it would approve the Amended Proposed Revisions.
- 20 On 4 June 2010, GGT submitted a further amended version of its Proposed Revisions (**Further Amended Proposed Revisions**), and submitted the 4 June Confidential Submission.
- 21 On 5 August 2010, the Regulator issued its Further Final Decision under which it rejected GGT's proposed Access Arrangement and drafted and approved its own Access Arrangement pursuant to ss 2.41(c) and 2.42 of the Code. The Regulator's own Access Arrangement was set out in Appendix 2 to the Further Final Decision.
- 22 Importantly, as the Regulator noted, GGT's Further Amended Proposed Revisions failed to incorporate the amendments required by the Final Decision, or otherwise

⁹ Draft Decision paragraph 3.

¹⁰ Draft Decision paragraph 5.

address all of the matters identified in the Final Decision.¹¹ The outstanding issues in the Further Amended Proposed Revisions as articulated by the Regulator in the Further Final Decision were:

- (a) Required Amendment 4 - amendments to Table 7 in GGT's Access Arrangement Information in relation to Working Capital;¹²
- (b) Required Amendment 7 - amendments adopting a nominal pre-tax Rate of Return of 10.48% in GGT's Access Arrangement Information;¹³
- (c) Required Amendment 8 - amendments to Table 10 in GGT's Access Arrangement Information in relation to Non Capital Costs;¹⁴
- (d) Required Amendment 9 - amendments to Table 1 and Table 14 in GGT's Access Arrangement Information in relation to Total Revenue;¹⁵
- (e) Required Amendment 10 - amendments to Table 12 in GGT's Access Arrangement Information in relation to volume forecasts;¹⁶
- (f) Required Amendment 11 - amendments to Table 15 in GGT's Access Arrangement Information in relation to Annual Reference Service;¹⁷
- (g) Required Amendment 12 - amendments to the references to Reference Service Revenue in GGT's Access Arrangement Information (from \$15.11 million to \$321.0 million);¹⁸
- (h) Required Amendment 13 - amendments to the Reference Tariff charges in GGT's Further Amended Proposed Revisions to the Access Arrangement;¹⁹
- (i) Required Amendment 18 - amendments to the EEP in GGT's Further Amended Proposed Revisions to the Access Arrangement;²⁰ and

¹¹ Further Final Decision paragraph 29.

¹² Further Final Decision paragraphs 88-91 (Required Amendment 4).

¹³ Further Final Decision paragraphs 98-102 (Required Amendment 7).

¹⁴ Further Final Decision paragraphs 103-107 (Required Amendment 8).

¹⁵ Further Final Decision paragraphs 108-112 (Required Amendment 9).

¹⁶ Further Final Decision paragraphs 113-117 (Required Amendment 10).

¹⁷ Further Final Decision paragraphs 118-121 (Required Amendment 11).

¹⁸ Further Final Decision paragraphs 122-125 (Required Amendment 12).

¹⁹ Further Final Decision paragraphs 41-46 (Required Amendment 13).

²⁰ Further Final Decision paragraphs 65-68 (Required Amendment 18).

- (j) Required Amendment 19 - amendments to s 3.4 in GGT's Further Amended Proposed Revisions to the Access Arrangement in relation to trigger event.²¹

23 A number of those required amendments have not been made or otherwise addressed by GGT and are not the subject of GGT's Application for Review. The required amendments listed above which are not the subject of GGT's Application for Review, and which have not been made, include:

- (a) Required Amendment 4 - amendments to Table 7 in GGT's Access Arrangement Information in relation to Working Capital,²²
- (b) Required Amendment 8 - amendments to Table 10 in GGT's Access Arrangement Information in relation to Non Capital Costs,²³ and
- (c) Required Amendment 19 - amendments to s 3.4 in GGT's Further Amended Proposed Revisions to the Access Arrangement in relation to trigger event.²⁴

24 Accordingly, whatever the position in relation to the EEP and the Rate of Return, GGT has clearly failed to make, or otherwise address the reasons for, all of the amendments required by the Regulator in the Final Decision, leaving unresolved those in relation to non-capital costs, reference service revenue and the trigger event.

Proposition 1 - Regulator's discretion

25 GGT incorrectly asserts that in drafting and approving its own Access Arrangement under s 2.42 of the Code:

- (a) the Code limits the Regulator's discretion to determining whether a Service Provider has proposed an Access Arrangement that complies with the Code;²⁵ and
- (b) if a Service Provider proposes an Access Arrangement that complies then there is no discretion for the Regulator to reject that arrangement - in other words "*it is a fundamental principle of the system of regulation which [the Code] enacts*

²¹ Further Final Decision paragraphs 113-117 (Required Amendment 19).

²² Further Final Decision paragraphs 88-91 (Required Amendment 4).

²³ Further Final Decision paragraphs 108-107 (Required Amendment 8).

²⁴ Further Final Decision paragraphs 113-117 (Required Amendment 19).

²⁵ GGT Outline of Submissions paragraphs 6.1 to 7.64.

*that it is for a Service Provider to determine the manner in which it will comply with the Code”.*²⁶

- 26 GGT’s submission is superficially attractive, but presupposes that the Service Provider complies with the Code. Compliance with the Code requires compliance with the procedures specified in it. The revision process following the Final Decision is premised on the Service Provider resubmitting revisions which incorporate or substantially incorporate the amendments required or otherwise address the reasons for them.²⁷ If the Service Provider does not do so it is not complying with the Code.
- 27 GGT’s assertions ignore the actual effect of sections 2.41 and 2.42 of the Code and give no effect to the final stage of the Access Arrangement revision process. As set out in paragraphs 10 to 12 above, if the Regulator in its further final decision does anything short of accepting all of the amended revisions to the Access Arrangement put forward by a Service Provider, it must draft and approve its own revisions to the Access Arrangement.
- 28 Here the Regulator found that GGT’s Further Amended Proposed Revisions failed to address all of the required amendments in the Final Decision. Paragraphs 35 to 125 of the Further Final Decision identify those amendments to the Access Arrangement and Access Arrangement Information that GGT failed to address to the Regulator’s satisfaction.
- 29 As highlighted in GGT’s Submissions at paragraph 6.6(e), Justices French, Goldberg and Finkelstein in *ACCC v ACT*²⁸ summarised the Regulator’s role in these circumstances and relevantly held:

...“if [the Relevant Regulator is] of the opinion that a proposed access arrangement or revised access arrangement does not comply with the Code, the Relevant Regulator is empowered to formulate and approve its own access arrangement and is, subject to the Code, at large with respect to the terms of that Access Arrangement.”(emphasis added)

- 30 The Court emphasised the point elsewhere, holding as follows:

[at para 14] Where the relevant regulator is not satisfied that the requirements of the Code are met, it must give the Service Provider the opportunity to submit a revised version. Where the relevant regulator is dissatisfied with a revision, it must draft and approve an access arrangement that, in its view, satisfies the requirements of the Code. [emphasis added]

²⁶ GGT Outline of Submissions paragraph 6.4.

²⁷ s 237A of the Code.

²⁸ (2006) 152 FCR 33 at 168.

[at para 165] *In assessing an Access Arrangement proposal and deciding whether to approve it or not, the ACCC is not at large simply to substitute its own preferred Access Arrangement. In Re Application by GasNet Australia (Operations) Pty Ltd [2004] ATPR 41-978 the Tribunal, on which Cooper J presided, held that it was beyond the power of the ACCC as Relevant Regulator not to approve a proposed Access Arrangement simply because it preferred a different Access Arrangement which it thought could better achieve the statutory objectives (at [30]):*

This follows because the power of the Relevant Regulator to require amendments, or to itself draft and approve its own AA, does not arise until it is of the opinion that the AA proposed by the Service Provider does not comply with the Code, and in determining the question of compliance, it must act in accordance with s 2.24 of the Code...

This conclusion follows from the language of the Code. But once the threshold of non-approval is properly crossed, the ACCC is at large in the content of its own Access Arrangement albeit it must be within the framework provided by the Code. [emphasis added]

- 31 Hence, once s 2.42 is triggered, which is clearly the case here, the Regulator has power to draft its own revisions to the Access Arrangement as it sees fit, limited only by the provisions of the Code and not by the Service Provider’s previously expressed preferred outcomes.
- 32 The Regulator was therefore required to draft and approve its own revisions to the Access Arrangement, including to determine and use its own EEP Policy and Reference Tariff in its discretion without being bound or limited by any previous submissions or proposed revisions made by GGT.
- 33 GGT’s contention that a Service Provider is allowed to determine the manner in which it will comply with the Code begs the critical question as to whether it has complied with the Code. The Regulator decided that it had not, and “*once the threshold of non-approval is properly crossed*”, that contention has no application to the discretion being exercised by the Regulator under s 2.42 of the Code.
- 34 GGT is required to do more than show that a different decision would be preferable.²⁹ GGT is required, and has failed, to establish either:
- (a) that power under s 2.42 did not arise at all - which is not open to GGT as it has not sought review on that basis, nor is such a proposition contended for in its statement of facts and contentions or its submissions;³⁰ or

²⁹ *Envestra Limited v Essential Services Commission of South Australia (No 2)* [2007] SADC 90, per the Court at [37]; *Australian Competition & Consumer Commission v Australian Competition Tribunal (No 2)* [2006] FCAFC 127, per the Court at [7]; *House v The King* (1936) 55 CLR 499 (**House**), per Dixon, Evatt and McTiernan JJ at 505.

³⁰ GGT makes submissions at para 7.55 of its Outline of Submissions, in relation to the EEP, that the occasion for the Regulator to draft and approve its own access arrangement did not arise, because the EEP submitted by GGT complied with the Code. This misconceives the issue in that s 2.42 is not a

(b) that, in exercising that discretion, in drafting and approving its own Access Arrangement, the Regulator did not comply with the Code in that:

- (i) there was an error made in exercising the discretion in that the Regulator acted upon a wrong principle, allowed extraneous or irrelevant matters to guide or affect it, mistook the facts and/or did not take into account a material consideration;³¹ and/or
- (ii) the decision of the Regulator was so “unreasonable or plainly unjust” in all the circumstances that failure properly to exercise the discretion will be inferred from the character of the result.³²

35 Additionally, ss 2.40 and 2.41 of the Code do not permit consideration of revisions to the Access Arrangement other than those revisions which either:

- (a) incorporate or substantially incorporate the amendments proposed by the Regulator in the Final Decision; or
- (b) otherwise address to the Regulator’s satisfaction those matters identified in the Final Decision as requiring amendment.

36 Where, as was the case here, the Service Provider does not submit such complying revisions, the Regulator is required not to approve what is submitted. That is of course consistent with the purpose of s 2.41 to provide a Service Provider with a limited final opportunity to address the Regulator’s specific concerns in a confined manner. The purpose is not to allow a Service Provider another unfettered opportunity to propose new amendments and make new submissions to support them. Put another way, the Final Decision is not a further Draft Decision enabling the Service Provider to have an unconstrained ‘third bite at the cherry’. So much is obvious from the fact that the Code makes no provision for submissions or any further public consultation process during the FFD Period. If the position were otherwise, the approval process would never be finalised.

³¹ series of independent discretions (eg one for each amendment), but is a single discretion which is triggered by *any* failure by GGT to make a required amendment or otherwise address the reasons for it. *East Australia Pipeline Pty Ltd v ACCC* [2007] HCA 44; 223 CLR 299 (*EAPL*) per Gummow and Hayne JJ at [79]-[80]; *Application by Epic Energy South Australia Pty Ltd* [2003] ACompT 5 (*Epic 2003*) per the Tribunal, Cooper J presiding, at [11] [2004] ATPR 41-977 at 48,442; *House* per Dixon, Evatt and McTiernan JJ at 505.

37 If the Regulator does not approve the proposed Access Arrangement in the Final Decision, options available to the Service Provider are considerably narrowed. It must submit revisions which do one of the things identified in s 2.41 referred to in paragraph 35 above. As to this:

- (a) it can make the amendments specified, either in their precise terms or in terms which are substantially the same - whether it does so is a question of fact; or
- (b) it can attempt to make an amendment which genuinely ‘otherwise addresses’ the matters which the Regulator has specified in its reasons for the required amendments - but whether it is successful in doing so is a matter for the Regulator to determine to its *own satisfaction*.

38 GGT’s Further Amended Proposed Revisions go far beyond what is permitted by s 2.41. The Further Amended Proposed Revisions:

- (a) in respect of the EEP, propose a substantially modified version of section 10 of the proposed Access Arrangement, do not substantially incorporate Required Amendment 18, and do not otherwise address the reasons for it;³³ and
- (b) in respect of Rate of Return, incorporate a pre-tax rate of return of 11.3% instead of the expressly identified 10.48% - and hence did not substantially incorporate Required Amendment 7, nor otherwise address the reasons for it to the Regulator’s satisfaction.³⁴

39 As GGT’s Further Amended Proposed Revisions went beyond the scope outlined in para 35 above, the Regulator was required pursuant to s 2.41 of the Code to resolve not to approve the amended revisions.

Proposition 2 - Compliance of GGT’s EEP

40 Given that the Regulator was required to draft and approve its own revisions under s 2.42, the asserted compliance of the GGT’s EEP with the Code is irrelevant.

³² *EAPL* per Gummow and Hayne JJ at [79]-[80]; *Application by Epic Energy South Australia Pty Ltd* [2002] ACompT 4 (*Epic 2002*), per the Tribunal, Cooper J presiding at [30]; *Epic 2003* per the Tribunal, Cooper J presiding, at [11]; *House* per Dixon, Evatt and McTiernan JJ at 505.

³³ Further Final Decision paragraphs 67-68.

³⁴ Further Final Decision paragraphs 99-101.

41 Additionally, however, BHPB submits that for the reasons set out below the Regulator was, in any event, correct to reject the proposed revisions to the EEP proposed by GGT in the FFD Period (**GGT's Revised EEP**) as they did not comply with the Code.

The Code Requirements – EEP

42 Pursuant to s 2.46 of the Code, a Regulator:

- (a) may approve proposed revisions to an Access Arrangement only if it is satisfied the Access Arrangement, as revised, would contain the elements and satisfy the principles in ss 3.1 to 3.20;
- (b) must not refuse to approve the proposed revisions solely for the reason that they would not address a matter that ss 3.1 to 3.20 of the Code do not require an Access Arrangement to address;
- (c) must take into account the factors described in s 2.24; and
- (d) must take account of the provisions of the Access Arrangement.

43 It is clear that the Code requires consideration of the factors in s 2.24 when a Regulator is considering and approving an EEP under s 3.16 of the Code. As outlined in the *Epic Decision*³⁵ at para 55:

“In s 2.24 the phrase “must take the following into account” is apt to convey as an ordinary matter of language that the Regulator must not fail to take into account each of the six matters stipulated in (a) - (f), and by (g) any other matter the Regulator considers relevant... the matters specified in (a) - (f) appear, by their nature, to be highly material to the task of assessing a proposed Access Arrangement, given the legislative purpose and objects of the Act and the Code in this regard... In my view, in the context of the Act and the Code, the Regulator is required by s 2.24 to take the stipulated factors into account and to give them weight as fundamental elements in assessing a proposed Access Arrangement with a view to reaching a decision whether or not to approve it...”

44 Section 3.16 of the Code requires that an Access Arrangement must include an EEP which sets out:

- (a) the method to be applied to determine whether any extension to, or expansion of, the Capacity of the pipeline should be treated as part of the Covered Pipeline for all purposes under the Code;

³⁵ *Re Michael; Ex Parte Epic Energy (WA)* (2002) 25 WAR 511

- (b) how any extension or expansion which is to be treated as part of the Covered Pipeline will affect Reference Tariffs; and
- (c) if the Service Provider agrees to fund New Facilities (if certain conditions are met), a description of those New Facilities and the conditions on which the Service Provider will fund the New Facilities.

45 Under s 2.46 of the Code, in considering Proposed Revisions to an Access Arrangement, the Regulator must take into account the factors described in s 2.24 of the Access Arrangement which include:³⁶

- (a) the Service Provider's legitimate business interests and investment in the Covered Pipeline;
- (b) the economically efficient operation of the Covered Pipeline;
- (c) the public interest, including the public interest in having competition in markets (whether or not in Australia);
- (d) the interests of Users and Prospective Users; and
- (e) any other matters that the Relevant Regulator considers are relevant.

46 Further, as noted by GGT at paragraph 7.25 of its Outline of Submissions, it is also relevant in the context of considering an EEP for the Regulator to consider the coverage criteria in s 1.9 of the Code.

GGT's EEP

47 As a part of GGT's Proposed Revisions, GGT proposed an EEP consistent with the EEP in the previous Access Arrangement, subject only to renumbering s 10.2 (by reason of the proposed deletion of s 10.2 in the current Access Arrangement) and amending the language of the clause to clarify that the clause refers to expansions to the Covered Pipeline.³⁷

48 In respect of the EEP in the Proposed Revisions, the Regulator in its Draft Decision formed the view that the EEP proposed by GGT did not comply with the Code

³⁶ Draft Decision paragraph 1200.

³⁷ GGT Proposed Revisions dated 23 March 2009 at 10.2; Draft Decision paragraph 1198.

requirements of ss 2.24 and 3.16, finding that it was not appropriate for GGT to continue (as was also the case under the previous Access Arrangement) to have an unfettered discretion to elect whether or not future expansions of capacity (as opposed to extensions) are or are not to be treated as part of the Covered Pipeline.³⁸ This was because it:

- (a) found that the GGP was operating at or near capacity and was likely to continue operating at or near capacity throughout the forthcoming Access Arrangement Period;³⁹
- (b) noted and endorsed the general approach of the ACCC that expansions should be covered where a pipeline is operating at or near capacity;⁴⁰
- (c) found that factors supporting the conclusions contained in the Minister for Energy's decision not to revoke Coverage of the GGP dated 2 July 2004, remained relevant to the structure of, and degree of market power exercisable by GGT in relevant markets;⁴¹
- (d) correctly concluded that this was a case where the pipeline was operating at or near capacity, and the service provider may, in the absence of regulation and competition, extract monopoly rents by pricing expansion just below the point where it would no longer be commercially viable for a user or prospective user to continue with its proposal.⁴²

49 The factors and conclusions of the Minister (and the NCC with which he agreed) which were correctly relied by the Regulator included that:

- (a) access (or increased access) to Services provided by means of the Pipeline would promote competition in at least one market other than the market of the Services provided by means of the Pipeline, particularly because due to the absence of effective competition to GGT in dependent markets, pricing will not be constrained to the competitive level, absent coverage GGT had the ability and incentive to engage in monopoly pricing in the downstream gas sales

³⁸ Draft Decision paragraphs 1192-1210.

³⁹ Draft Decision paragraph 1207.

⁴⁰ Draft Decision paragraph 1206.

⁴¹ Draft Decision paragraphs 1208-1209.

⁴² Draft Decision paragraph 1209.

market, and monopoly pricing would likely adversely affect competition in the dependent markets;⁴³

- (b) it would be uneconomic for anyone to develop another Pipeline to provide the Services provided by means of the Pipeline;⁴⁴ and
- (c) access (or increased access) to the services provided by means of the Pipeline would not be contrary to the public interest.⁴⁵

50 The Regulator accordingly concluded that the EEP in GGT's Proposed Revisions should be amended, in order to comply with the requirements of section 3.16(a) of the Code, to provide in relation to any expansion of the capacity of the Covered Pipeline during the Access Arrangement Period, the expansion will be treated as part of the Covered Pipeline for all purposes under the Code (with the effect that Services provided by means of the Expansions of Capacity must be made available by GGT to Users in accordance with the terms of the Access Arrangement).⁴⁶

51 GGT chose not to adopt that Required Amendment 44 or to make changes to its EEP Policy dealing with expansions as required by the Regulator in its Amended Proposed Revisions. The EEP Policy in the Amended Proposed Revisions remained the same as that submitted to the Regulator in the Proposed Revisions.

52 In its Final Decision, the Regulator maintained its position on the EEP for the reasons articulated in paragraphs 1192 to 1213 of the Draft Decision, that GGT's proposed EEP is not appropriate, having regard to the section 2.24 factors and, that a method whereby all expansions during the forthcoming Access Arrangement Period are Covered would be appropriate.⁴⁷

53 The Regulator required GGT to amend the EEP in accordance with Amendment 18 of the Final Decision, which was in the same terms as Amendment 44 in the Draft Decision.

GGT's Revised EEP

⁴³ pages 3-6 of the Minister's Decision dated 2 July 2004, particularly page 4.

⁴⁴ page 6 of the Minister's Decision dated 2 July 2004.

⁴⁵ page 7 of the Minister's Decision dated 2 July 2004.

⁴⁶ Draft Decision paragraph 1214 and Amendment 44 at pages 206-207.

⁴⁷ Final Decision paragraph 632.

54 In the FFD Period, GGT proposed the GGT's Revised EEP which relevantly provided:

10.1 Coverage of extensions and expansions

- (a) *GGT will notify the Regulator if it undertakes an extension or expansion of the Pipeline , prior to that extension or expansion coming into operation.*
- (b) *That extension or expansion will be part of the Covered Pipeline unless:*
 - (1) *The Regulator does not consent to it being covered. The Regulator will be deemed to have given its consent if it does not make a decision within 30 days from the date the notice referred to in clause 10.1(a) is given; or*
 - (2) *GGT notifies the Regulator in writing that it has reached agreement with Proposed User/s of a majority of the incremental services as to the terms on which the incremental service will be provided and that such terms include a term recognising that the extension or expansion will not be treated as part of the Covered Pipeline. A "Proposed User" is any user which is negotiating to use the incremental services or has contracted to use the incremental services should the extension or expansion be undertaken. "Incremental services" means the services which can be provided by means of the extension or expansion.*
- (c) *Other than as required under the Code or the GGP Agreement, GGT will not incur capital to expand the Capacity of the Covered Pipeline unless a User:*
 - (1) *satisfies GGT of the existence of reserves and demand for the economic life of the expansion;*
 - (2) *demonstrates to GGT that the User has the financial capability to pay the costs of the provision of Services provided through expanded Capacity; and*
 - (3) *commits to a Negotiated Services Agreement sufficient to ensure the payment to GGT of all costs (including an acceptable rate of return on capital) incurred by GGT in expanding the capacity and providing of Services through that expanded capacity.*

10.2 Treatment of extensions or expansions forming part of the Covered Pipeline

Where an extension or expansion is to be treated as part of the Covered Pipeline pursuant to clause 10.1(b) above, GGT must make an election under either clause 10.2(a) or 10.2(b) as follows:

- (a) *Election for Negotiated Service - GGT may elect that access to the incremental services will be offered as a Negotiated Service at a negotiated tariff. Where GGT elects to provide the incremental services as a Negotiated Service:*
 - (1) *the incremental costs and forecast usage derived from that extension or expansion and the revenue derived from the incremental services will not be taken into account in determining the Reference Tariffs;*
 - (2) *the provisions of the Access Arrangement will apply to the extension or expansion other than those terms solely relating to the Reference Service; and*
 - (3) *the incremental services may be the subject of an access dispute under the Code or Chapter 6 of the National Gas Law as applicable.*
- (b) *Election for Reference Service - GGT may elect that access to the incremental services will be offered as a Reference Service in which case GGT must elect that there be either:*
 - (1) *a single Reference Service for the whole of the Covered Pipeline, for which a single Reference Tariff applies. The Reference Tariff will reflect the costs and forecast usage of the whole of the Covered Pipeline; or*
 - (2) *a separate Reference Service for the incremental services, for which a separate Reference tariff applies. The separate Reference Tariff will reflect the costs and forecast usage of the extension or expansion, together with the risks associated*

with the provision of the incremental service and the extent of risk sharing between GGT and Users.

55 Whilst GGT substantially changed the EEP in the Access Arrangement in its Further Amended Proposed Revisions, it did not substantially incorporate or otherwise address the reasons for Amendment 18,⁴⁸ as the Regulator correctly found.

GGT's Revised EEP was not consistent with the Code

56 Just as the Regulator correctly determined in the Draft Decision that the original EEP proposed by GGT was inconsistent with the Code, so was the Revised EEP given:

- (a) the potential for and likelihood of GGT using its monopoly power to extract monopoly profits from unregulated users on the GGP; and that
- (b) any policy which provides GGT, either directly or indirectly, with the ability to selectively cover expansions was highly susceptible to abuse, particularly in light of the differential costs of compression as opposed to looping expansion.

57 It is accepted by GGT and its experts⁴⁹ that expansion of the GGP could be undertaken either by looping or compression. Importantly, there is a differential cost of expanding by compression and by looping (the former likely to reduce average unit prices while the latter could increase prices).⁵⁰

58 [PARAGRAPH REMOVED FOR CONFIDENTIALITY PURPOSES].

59 [PARAGRAPH REMOVED FOR CONFIDENTIALITY PURPOSES].

60 In order to ascertain the extent to which GGT is able to make monopoly rents from the use of this expansion, BHPB has calculated the cost-based tariff that would be determined for the uncovered capacity alone if the Regulator's method was employed precisely (the cost-based tariff is assumed to commence from 1 January 2010 to compare it to the Reference Tariff that the Regulator determined). The information for this calculation was drawn from the Regulator's Draft Decision financial model (information on the capital base, depreciation, operating costs and sales quantities associated with the uncovered capacity) and the Further Final Decision financial model

⁴⁸ Further Final Decision paragraph 66-68.

⁴⁹ GGT Outline of Submissions paragraph 7.8.

⁵⁰ GGT Outline of Submissions paragraph 7.12.

(the WACC). The cost-based tariffs calculated for the uncovered capacity are set out in the second column of Table 1, with the third and fourth columns showing a comparison with the Reference Tariffs determined by the Regulator.

Table 1: Uncovered Capacity Tariff

	Cost-based tariff for Uncovered Capacity (1)	ERA Reference Tariff (Covered Capacity) (2)	Mark-up over Cost-based tariff [(2)/(1)-1]
Toll charge	0.1030	0.2433	136.3%
Reservation charge	0.0011	0.0014	25.8%
Throughput charge	0.0003	0.0004	18.2%

- 61 The calculation confirms that, if GGT charged the Reference Tariff for the use of uncovered capacity, it would recover revenue for that capacity that is substantially in excess of cost and hence earn monopoly rents. In particular, the three components of the Reference Tariff (the toll, reservation and throughput charges) would be between 18 per cent and 136 per cent higher than the tariff required to recover the incremental costs of the uncovered capacity. In terms of revenue, charging for the use of uncovered capacity at the Reference Tariff would deliver \$84.4 million (in net present value terms), compared to a cost of service of \$61.6 million (also in net present value terms), a monopoly rent over just the five year access arrangement period of more than \$20 million. This represents a mark-up of more than 37 per cent over the full economic cost, that is, a cost that already includes a commercial return on capital (being the rate of return approved by the Regulator).
- 62 GGT's ability to extract monopoly rents under its Revised EEP is real, not hypothetical.
- (a) The Revised EEP continued to present a large risk that GGT would exercise monopoly power as there was nothing to prevent it from reaching agreement with users to opt capacity out as a condition to GGT agreeing to expand capacity; and
- (b) The Revised EEP continued to present the risk that lower incremental cost expansions would be opted out of the Covered Pipeline and higher cost expansions opted in, thereby inflating the Reference Tariff and permitting GGT unfettered to recover monopoly rent for use of opted out expansions.
- 63 GGT's Revised EEP was accordingly both inconsistent with the Code and failed to address the concerns raised by the Regulator in the Draft Decision and Final Decision

so that, even assuming GGT's first proposition is correct, the Regulator was correct to reject GGT's Revised EEP.

Proposition 3 - Compliance of the Regulator's EEP

64 BHPB submits that the EEP proposed by the Regulator was reasonable in the circumstances and so not capable of challenge pursuant to s 39(2)(a) of the GPA Law.

65 As noted above at paragraphs [48]-[50], a primary concern of the Regulator with GGT's EEP contained in its Proposed Revisions to the Access Arrangement was essentially that it provided a mechanism for GGT to exercise monopolistic behaviour and extract monopoly rents from users or prospective users.

66 Given the objective of the Code to "prevent the abuse of monopoly power"⁵¹ and also the express factors in s 2.24, the Regulator clearly had discretion to draft and approve an EEP which was designed to curtail this behaviour.

67 The Regulator's EEP Policy contained in the Further Final Decision and adopted in the Access Arrangement was reasonable as:

- (a) it was consistent with ss 3.16 and 2.42 of the Code and also the Code objectives;
- (b) it did not deviate from Amendment 44 as contained in the Draft Decision; and
- (c) the Regulator carefully considered this issue and information before it at the time.⁵²

68 If, however, the Board determines that, pursuant to s 39(2)(a) of the GPA Law, the Regulator's EEP was unreasonable, BHPB submits that, for the reasons outlined above, adopting the GGT's Revised EEP is not appropriate and the Board should, in those circumstances, adopt an EEP in line with the formulated example in s 3.16 of the Code which provides:

⁵¹ Paragraph (b) of the Code Objectives set out in the Introduction to the Code.

⁵² Draft Decision paragraphs 1192-1215 (specifically paragraphs 1206, 1208 and 1209); Final Decision paragraphs 631-634, Further Final Decision paragraphs 65-68

“The Service Provider may, with the Relevant Regulator’s consent, elect at some point in time whether or not an extension or expansion will be part of the Covered Pipeline or will not be part of the Covered Pipeline”.

- 69 That example would address the concerns of the Regulator in the Draft Decision and Final Decision and balances the Code requirements in that:
- (a) it provides a suitable method for determining whether or not an extension or expansion is to be treated as part of the Covered Pipeline;⁵³
 - (b) it provides flexibility in that the Regulator can consider and determine individual extensions or expansions with regard to the circumstances at the relevant time;⁵⁴ and
 - (c) it removes the potential for monopolistic behaviour and the extraction of monopoly rents by conferring the discretion to approve or reject the extension or expansion on the Regulator.⁵⁵

Proposition 4 - Compliance of GGT’s Rate of Return

- 70 Given that the Regulator was required to draft and approve its own revisions under s 2.42, GGT’s assertion that its Rate of Return complies with the Code is irrelevant.
- 71 However, BHPB submits additionally that, for the reasons set out below, the Regulator was, in any event, correct to reject the proposed revision to the Rate of Return proposed by GGT in the FFD Period (**GGT’s Rate of Return**) as it did not comply with the Code.

Relevant Code Provisions

- 72 The Regulator may approve a proposed Access Arrangement only if it is satisfied the proposed Access Arrangement contains the elements and satisfies the principles set out in sections 3.1 to 3.20.⁵⁶
- 73 Section 3.5 of the Code requires an Access Arrangement to include a policy describing the principles that are to be used to determine a Reference Tariff (a **Reference Tariff**

⁵³ s 3.16 of the Code.

⁵⁴ This allows flexibility to consider the Code Objectives, Coverage Criteria as set out in s 1.9 of the Code.

⁵⁵ Paragraph (b) of the Code Objectives set out in the Introduction to the Code.

⁵⁶ s 2.24 of the Code.

Policy). A Reference Tariff Policy must, in the Regulator’s opinion, comply with the Reference Tariff Principles described in section 8 of the Code.

- 74 Under section 8.2 of the Code, in determining to approve a Reference Tariff and Reference Tariff Policy, the Relevant Regulator must be satisfied that the revenue to be generated from the sales (or forecast sales) of all Services over the Access Arrangement Period (the **Total Revenue**) should be established consistently with the principles and according to one of the methodologies contained in section 8 of the Code.
- 75 For the purposes of determining the Total Revenue of the GGP for the current access arrangement, GGT adopted a Cost of Service methodology.
- 76 Under the Cost of Service methodology, the Total Revenue is equal to the cost of providing all Services, with this cost to be calculated on the basis of, amongst other things, a return on the value of the capital assets that form the Covered Pipeline or are otherwise used to provide Services: s 8.4(a) of the Code.
- 77 Section 8.30 of the Code states that the Rate of Return should provide a return which is commensurate with prevailing conditions in the market for funds and the risk involved in delivering the Reference Service.
- 78 In order to determine the Rate of Return, GGT used a weighted average cost of capital (**WACC**) approach based on the capital asset pricing model.

GGT’s proposed rates of return

- 79 The pre-tax rate of return used in the 2005 Access Arrangement was 10.6%.⁵⁷
- 80 In its Proposed Revisions,⁵⁸ GGT proposed a range for the rate of return of 11% - 13.5%, and adopted the highest point on that range, being 13.5%, for its proposed rate of return. This represented an increase of 27% from the rate of return used in the 2005 Access Arrangement.
- 81 In preparing its Draft Decision, the Regulator considered various documents and submissions from:
- (a) GGT;

⁵⁷ 2005 Access Arrangement Information.

⁵⁸ Proposed Revisions [Table 8, Access Arrangement Information].

- (b) 6 users of the GGP (including submissions from BHPB);
- (c) Frontier Economics (independent financial expert), engaged by the Regulator;
and
- (d) Synergies Economic Consulting (financial expert), engaged by GGT.

82 Based on its consideration of the information referred to in paragraph 81 above, in its Draft Decision the Regulator found that the appropriate range for the Rate of Return was 9.11% to 11.46%, and on this basis required GGT to amend its Proposed Revisions to adopt a Rate of Return of 10.28%,⁵⁹ which was the mid-point of the appropriate range determined by the Regulator.

83 In response to the Draft Decision, GGT submitted its Amended Proposed Revisions which not only failed to make the amendments to the rate of return required by the Draft Decision, but proposed a range for the rate of return of 11.9% to 15.1% and a rate of return of 14.3%⁶⁰, which was even greater than the rate of return originally proposed by GGT in its Proposed Revisions.

84 The various parameter values proposed by GGT in the Amended Proposed Revisions, which were inconsistent with the Regulator's required amendments in the Draft Decision, are set out in Table 2 below.

85 In preparing its Final Decision the Regulator considered various further submissions from GGT and users of the GGP (including BHPB), a report from Frontier Economics⁶¹ and a report from Parsons Brinkerhoff.⁶²

86 Based on its consideration of the materials referred to in paragraph 85 above, in its Final Decision the Regulator "considered that a reasonable range of values for the nominal pre-tax Rate of Return is 9.62 to 11.34 per cent".⁶³ However, it then went on to find that 10.48% was the appropriate rate of return, it (and not the range earlier referred to) being "commensurate with the prevailing conditions in the market for funds

⁵⁹ Draft Decision paragraphs 383-547 (Amendment 9).

⁶⁰ Final Decision paragraph 326.

⁶¹ Final Decision paragraphs 36-37; Frontier Economics - "*Review of Weighted Average Cost of Capital estimate proposed by Goldfields Gas Transmission*" dated 17 February 2010.

⁶² Final Decision paragraphs 36 and 38; Parsons Brinkerhoff, "*Goldfields Gas Pipeline Access Arrangement Final Report*" dated March 2010.

⁶³ Final Decision paragraph 328.

and the risk involved in delivering the reference service”.⁶⁴ Having reviewed all the available evidence and submissions the finding was clearly that the rate of 10.48% complied with the Code, not any other figure or range of figures.

87 The Regulator accordingly correctly required GGT to amend its Rate of Return to be 10.48% (Required Amendment 7) and consequently amend various parameter values for determination of the Rate of Return (Required Amendment 6), which are set out in Table 2 below.

Table 2 - GGT WACC Parameters

Parameter	Final Decision Ranges		GGT's Amended Proposed Revisions Ranges	
	Low	High	Low	High
Cost of Debt; Debt Risk Premium (BBB+)	2.83%	2.83%	4.38%	4.58%
Cost of Debt; Debt Issuing Cost (Disc)	0.125%	0.125%	0.75%	0.75%
Australia Market Risk Premium (Rp)	5.00%	7.00%	6.00%	7.00%
Equity Beta (Be)	0.80	1.00	1.00	1.40
Franking Credit (g)	0.81	0.37	0.40	0

88 In its Further Amended Proposed Revisions, GGT made the amendments to the various parameter values for the determination of the rate of return specified in Required Amendment 6 of the Final Decision (producing a range for the rate of return consistent with the Final Decision). However, GGT did not incorporate Required Amendment 7 required by the Regulator in its Final Decision in respect of the rate of return, instead proposing a new rate of return of 11.3%.

89 In its Further Final Decision the Regulator rejected GGT's proposed rate of return of 11.3% as it failed to incorporate Required Amendment 7 of the Final Decision and “did not comply with the value required in the Final Decision”.⁶⁵ Consistent with Required Amendment 7, in the Further Final Decision the Regulator applied a rate of return of 10.48%.

⁶⁴ Final Decision paragraph 329.

⁶⁵ Further Final Decision paragraph 20.

Rate of Return of 10.48% is reasonable and consistent with the Code

90 BHPB submits that the Regulator’s determination and use of a rate of return of 10.48% was reasonable and was certainly not “unreasonable or plainly unjust” in all the circumstances.⁶⁶

91 As set out in Table 3 below, the Regulator received a range of submissions in relation to the parameters and components for rate of return.

Table 3 - WACC Parameters

Parameter	BHPB Proposed Ranges (First Submission)		BHPB Proposed Ranges (Second Submission)		GGT’s Amended Proposed Revisions Ranges		Final Decision Ranges	
			Low	High	Low	High	Low	High
Cost of Debt; Debt Risk Premium (BBB+)	2.83%	2.83%	-	-	4.38%	4.58%	2.83%	2.83%
Cost of Debt; Debt Issuing Cost (Disc)	0	0	-	-	0.75%	0.75%	0.125%	0.125%
Australia Market Risk Premium (Rp)	5.75%	5.75%	5.00%	6.00%	6.00%	7.00%	5.00%	7.00%
Equity Beta (Be)	0.7	0.7	0.5	0.8	1.00	1.40	0.80	1.00
Franking Credit (g)	0.65	0.5	-	-	0.40	0	0.81	0.37

92 In essence, the Regulator determined a Rate of Return on the basis of all of the submissions made. As highlighted by Table 3 above, for the most part the Regulator made determinations in respect of the relevant parameters and components within the ranges proposed by GGT and BHPB.

93 Importantly, the Regulator received and considered multiple submissions and reports on the setting of the Rate of Return and, on the basis of the voluminous material received, made a balanced and reasoned determination. The Regulator’s detailed consideration of the relevant issues is set out in:

- (a) paragraphs 383 to 547 of the Draft Decision; and
- (b) paragraphs 175 to 329 of the Final Decision.

⁶⁶

East Australia Pipeline Pty Ltd v ACCC [2007] HCA 44; 223 CLR 299

- 94 In its current submissions GGT appears to be suggesting that the selection of a higher Rate of Return is appropriate due to:
- (a) asymmetric risk;
 - (b) the Regulator adopting a lower value for equity beta than proposed by GGT;
 - (c) the Regulator adopting a lower value for market risk premium than proposed by GGT; and
 - (d) the Regulator adopting a higher value for gamma than proposed by GGT.
- 95 BHPB's submissions were relevantly contained in Part C of its submissions on the Proposed Revisions and Part D of its submissions on the Draft Decision. Detailed submissions were made on each of the areas now re-agitated by GGT as follows.
- (a) In section 13 of BHPB's 30 June 2009 Submission, BHPB submitted that a number of the asymmetric risks GGT claims it faces have already been mitigated and shown to be negligible, rendering GGT's risk profile approximately symmetric;
 - (b) In section 10 of BHPB's 30 June 2009 Submission and section 11 of BHPB's December 2009 Submission, BHPB submitted that in proposing its equity beta, GGT inappropriately considered the equity beta of mining companies, overstated the risks associated with insolvency, the availability of economic substitutes for gas in the region and the volatility of consumption and also submitted that GGT's proposed equity beta was inconsistent with the equity betas of GGT's parent company and the equity betas adopted in previous regulatory decisions;
 - (c) In section 11 of BHPB's 30 June 2009 Submission and section 12 of BHPB's December 2009 Submission, BHPB submitted that the market risk premium proposed by GGT was inconsistent with historical data, future expectations and previous relevant regulatory decisions in respect of market risk premium; and
 - (d) In section 14.1 of BHPB's 30 June 2009 Submission, BHPB submitted that the gamma proposed by GGT was inconsistent with previous relevant regulatory decisions in respect of gamma.

96 Further, it is clear that it is incumbent on GGT to put forward evidence (rather than mere assertion) that the circumstances (such as asymmetric risk) identified by GGT in fact existed in relation to the GGP.⁶⁷ It did not do so before the Regulator and cannot and has not done so now.

97 BHPB supports the findings of the Regulator in relation to these parameters and components of the Rate of Return.

Proposition 5 - Obligation to consider the 4 June Confidential Submissions

98 Contrary to what GGT assert in paragraph 7.69 of its submissions, the Code does not require, and properly construed does not permit, the Regulator to call for, or consider, submissions in respect of the Final Decision: see paragraphs 10 to 12 above.

99 Correctly the Regulator in making its Further Final Decision resolved not to consider the 4 June Confidential Submission.⁶⁸

“The Authority has considered the extent to which it may be or ought to have regard to GGT’s Confidential Response. It is noted that the Code explicitly obliges the Authority to invite and consider submissions prior to both the draft and final decisions but does not contain an equivalent obligation to invite and consider submissions prior to a further final decision. After appropriate consideration the Authority has resolved not to consider the Confidential Response before making this Further Final Decision or for the purpose of the drafting and approval by the Authority of a revised Access Arrangement for the GGP”.

100 Pursuant to s 2.41, GGT is limited to, either:

- (a) Incorporating or substantially incorporating the amendments required by the Final Decision by the Regulator; or
- (b) “otherwise addressing” to the Regulator’s satisfaction the reasons for requiring those amendments.

101 It is not otherwise open to GGT, or any other interested party to make any new submissions during the FFD Period.

102 Alternatively, if submissions are permitted by the Code, they must only be allowed to the extent that they go to establishing that the amendments have been incorporated or

⁶⁷ *Telstra Corporation Ltd (No 3)* [2007] ACompT 3 at 449 and 457.

⁶⁸ Further Final Decision paragraph 8.

substantially incorporated or otherwise addressing the Regulator's reasons for requiring those amendments. The Code does not permit the Regulator to consider anything beyond those matters.

- 103 In the 4 June Confidential Submissions, GGT:
- (a) made further new submissions;
 - (b) re-argued GGT's position from previous submissions; and
 - (c) provided further information and new independent expert evidence including the further NERA Report attached to the 4 June Confidential Submission.
- 104 On any view the Regulator was plainly correct in resolving not to consider the 4 June Confidential Submission.
- 105 If, however, the Board determines that, pursuant to the Code, the Regulator was bound to consider the 4 June Confidential Submissions, BHPB submits that, for the reasons set out above, the Regulator was correct in finding under s 2.41 of the Code that the Further Amended Proposed Revisions did not:
- (a) incorporate or substantially incorporate the amendments required by the Final Decision by the Regulator; or
 - (b) "otherwise address" to the Regulator's satisfaction the reasons for requiring those amendments.

AJ MEAGHER

I S WYLIE

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22 March 2011