IN THE WESTERN AUSTRALIAN GAS REVIEW BOARD

No. 1 of 2004

Re application for review of the decision by the Western Australia Independent Gas Pipelines Access Regulator published on 30 December 2003 to approve its own Access Arrangement for the Dampier to Bunbury National Gas Pipeline owned and operated by the Applicants for review

Application by:

EPIC ENERGY (WA) NOMINEES PTY LTD (ACN 081 609 289) and EPIC ENERGY (WA) TRANSMISSION PTY LTD (ACN 081 609 190) Applicants

No. 2 of 2004

Re application for Merits Review of the Independent Gas Pipeline Access Regulator's decision of 30 December 2003 to approve his own Access Arrangement for the Dampier to Bunbury National Gas Pipeline

Application by:

NORTH WEST SHELF GAS PTY LTD (ACN 063 763 342) Applicant

No. 3 of 2004

Re Application for review of the decision by the Western Australia Independent Gas Pipeline Access Regulator dated 30 December 2003 to approve the Regulator's own Access Arrangement for the Dampier to Bunbury Natural Gas Pipeline.

Application by:

WESTERN POWER CORPORATION (WA 0124360E) Applicant

REASONS FOR DECISION ON PRELIMINARY ISSUES

Members: Mr R M Edel, Presiding Member
Dr F J Harman, Expert Member
Mr M J Kimber, Expert Member

Heard: 1 April 2004

Delivered: 16 April 2004

Representation:

Counsel:	Applicants in Appeal No 1:	Mr G H Murphy SC and Mr J A Thompson
	Applicants in Appeals No 2 & 4:	Mr D J Martino
	Applicant in Appeal No 3:	Mr N P Gentilli with Mr P K Walton
	Economic Regulation Authority:	Mr C G Colvin SC
Solicitors:	Applicants in Appeal No 1:	Mallesons Stephen Jaques
	Applicants in Appeals No 2 & 4:	Allens Arthur Robinson
	Applicant in Appeal No 3:	Jackson McDonald
	Economic Regulation Authority:	Corrs Chambers Westgarth

Cases referred to in Judgement:

Application by Epic Energy South Australia Pty Ltd [2002] ACompT 4
Duke and Eastern Gas Pipeline Pty Ltd [2001] ACompT 2
Epic Energy South Australia Pty Ltd [2002] ACompT 5
Kioa v. West (1985) 159 CLR 550
Australian Securities Commission v. Marlborough Gold Mines Ltd (1992-93) 177 CLR 485
Application by GasNet Australia (Operations) Pty Ltd [2003] ACompT 6
Application by DEI Queensland Pipeline Pty Ltd v. The Australian Competition and Consumer Commission [2002] ACompT 2
Strange-Muir v. Correct Services Commission [1986] 5 NSWLR 234
Coldham ex parte Brideson [No 2]
Coal & Allied Operations Pty Ltd v. Australian Industrial Relations Commission [2000] 203 CLR 194
Taylor v National Union of Seamen [1967] 1 WLR 532
Dovade Pty Ltd & Others v Westpac Banking Group & Another [1999] 46 NSWLR 168

Cases also cited:

R v. Australian Broadcasting Tribunal; ex parte Hardiman (1980) 144 CLR 13
Michael; ex parte Epic Energy (WA) Nominees Pty Ltd [2002] WASCA 241(s)
TXU Electricity v. Office of the Regulator General [2001] VCS 4 (30 January 2001)
National Competition Council v. Hamersley Iron Pty Ltd (1999) 167 ALR 109
Fagan v. The Crimes Compensation Tribunal (1982) 150 CLR 666
BTR plc v. Westinghouse Brake and Signal Company (Australia) Ltd (1992) 106 ALR 35
Boyce v. Munro & Ors [1998] 4 VR 773 per Batt JA
Corporate Affairs Commission v. Bradley [1974] 1 NSWLR 391
Reg v. Cook; ex parte Twigg
Commissioner of Police v. Tanos (1958) 98 CLR 383
State of Western Australia v. Minister for Aboriginal & Torres Strait Islander Affairs (1995) 37 ALD 633
Vakauta v. Kelly (1989) 167 CLR 568
Application by Orica IC Assets Ltd [2004] ACompT 2
Commissioner for Australia Capital Territory Revenue v. Alphaone Pty Ltd (1994) 49 FCR 576
Queensland Co-operative Milling Association Ltd; Re Defiance Holdings Ltd [1976] 25 FLR 169
Geographical Indications Committee v. O'Connor (2000) 32 AAR 169
Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme (2003) 201 ALR 327
Temsign v. Biscem (1998) 20 WAR 47
Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Miah (2001) 179 ALR 238
Aronson & Franklin *Review of Administrative Action* 1987
deSmith, Woolf & Jowell *Judicial Review of Administration Act* 5th edn 1995

Re Pochi & Minister for Immigration & Ethnic Affairs (1979) 26 ALR 247
Webb v. R (1994) 181 CLR 41
Ebner v. Official Trustee in Bankruptcy (2001) 205 CLR 337
WAEJ v. Minister for Immigration and Multicultural and Indigenous Affairs [2003] FCAFC 188

BACKGROUND

1. On 30 December 2003 the Western Australian Independent Gas Pipelines Access Regulator, Dr Ken Michael, under the *Gas Pipelines Access (Western Australia) 1998 Act* ("**the Act**") published his further final decision to approve his own access arrangement for the Dampier to Bunbury Natural Gas Pipelines (DBNGP) owned by Epic Energy (WA) Nominees Pty Ltd and Epic Energy (WA) Transmission Pty Ltd (collectively referred to as "**Epic**").

2. Following correspondence with Epic or its representatives, on 12 January 2004 Dr Michael issued corrigenda amending his decision of 30 December 2003. His amended decision, incorporating the corrigenda, was placed on the Code Register on 14 January 2004.

3. As of 1 January 2004, the Office of the Independent Gas Pipeline Access Regulator ceased to exist and the Economic Regulation Authority (established by the *Economic Regulation Authority Act (WA) 2003* and referred to as the ERA) became the Regulator for the purpose of the Gas Pipelines Access (Western Australia) Law, which consists of:

   (a) Schedule 1 to the Act ("**the Law**"); and

   (b) the National Third Party Access Code for Natural Gas Pipeline Systems as set out in Schedule 2 to the Act ("**the Code**").

4. On 14 January 2004 each of Epic, Western Power Corporation ("**Western Power**") and Northwest Shelf Gas Pty Ltd ("**NWS**") lodged an application for review of the Regulator's decision pursuant to Section 39(1) of the Law with the Western Australian Gas Review Board ("**the Board**"). On 28 January 2004 NWS lodged a further application for review of the Regulator's decision in case a determination were to be made to the effect that the Regulator's decision of 30 December 2003 was superseded by the decision of 12 January 2004. The four applications for review of the Regulator's decision are collectively referred in these Reasons for Decision as the Appeals.

5. Subsequently, I was appointed the Presiding Member of the Board. I appointed Dr Frank Harman and Mr Max Kimber as Expert Members of the Board.

6. On 11 March 2004 I wrote to the solicitors for the three Applicants setting out my preliminary views on a number of procedural matters, including the following:

   (a) whether the Regulator should be invited to participate in the appeals as a Respondent;

   (b) whether any other party should be made a Respondent to any of the Appeals and if so, who. In particular, an issue arose as to whether each of the Applicants had an interest in the outcome of appeals lodged by the other Applicants;

   (c) whether all four Appeals should be heard together or separately;

   (d) inspection of documents held by the Regulator and issues relating to confidentiality.

7. On further consideration, it appeared to me that some of those preliminary views might not be correct in the light of section 39(5)(a) of the Law which provides that:

   > "The relevant appeals body, in reviewing a decision under this section must not consider any matter other than:
   >
   > (a) the application for review and submissions in support of the application (other than, in the case of an application under sub-section (1), any matter raised in submissions to the relevant Regulator before the decision was made);"

8. A directions hearing in each of the Appeals was convened on 17 March 2004. At the beginning of the directions hearing I made some preliminary remarks setting out my revised preliminary opinions on the procedural issues referred to above and invited submissions in response. In essence, my remarks raised the issue whether section 39(5)(a) of the Law prevented the Board from taking any submissions in opposition to the Appeals into account. If submissions in opposition to an Appeal cannot be heard by the Board because of the operation of section 39(5)(a) then the question arises as to whether there is any point in making any other party a Respondent to any of the Appeals. Further, I raised an issue as to whether the Applicants and any other parties to the Appeals would be entitled to inspection of the documents that the Board would have access to pursuant to section 39(5)(a) given the restriction on the scope of the Appeal and the submissions that can be made in respect of an Appeal set out in section 39(5)(a). If the Board was not able to take into account submissions in relation to documents falling within the scope of section 39(5)(a) that parties had not previously seen and were therefore not the subject of

submissions to the Regulator before he made his decision there seemed to be little point in giving the parties inspection of those documents.

9. It was agreed that the parties, after reviewing the transcript of my remarks, would file submissions in relation to those preliminary views, and that oral submissions would be heard on 1 April 2004. Written submissions were filed by the parties on 24 and 25 March 2004 and oral submissions presented on 1 April 2004.

ISSUES

10. The written and oral submissions presented by the parties were directed at the following issues:

(a) whether each of the Applicants are entitled to be heard in relation to each other's Appeals;

(b) whether the Regulator should be made a respondent, contradictor, amicus curiae or participate in the Appeals in some other way;

(c) whether the Applicants are entitled to inspection of documents:

(i) held by the Regulator; and

(ii) which the Board reviews or inspects itself;

(d) whether the Appeals ought to be held together or separately; and

(e) disclosure by members of the Board of any matters that could give rise to a reasonable apprehension of bias.

SUBMISSIONS OF THE PARTIES

Submissions of Epic Energy

11. <u>Entitlement of Applicants to be heard in relation to each other's Appeals</u>

Epic filed a written Outline of Submissions dated 26 March 2004, annexing a Minute of Proposed Orders and Directions. Those submissions were supplemented by oral submissions at the hearing on 1 April 2004. Epic submitted, inter alia, that:

(a) The Act and the Law are part of a national scheme. The legislative provisions applying to the determination of Epic's application for review are identical to those which apply in other States and which govern the Australian Competition Tribunal.

(b) The interpretations of the Code and the Law set out in Epic's submissions are based on the decisions of the Australian Competition Tribunal (which in other States of Australia plays an equivalent role to the Board in Western Australia) and should be accorded particular weight as they involve a scheme of National legislation. There is no peculiar circumstance setting Western Australia apart from the rest of Australia in relation to the proper construction of the relevant provisions.

(c) The procedures of the Board are subject to the requirements of procedural fairness and there is no intention to exclude those requirements and no purpose would be advanced by interpreting the legislation in that way. The Board was obliged to act according to equity, good conscience and substantial merits of the case and also obliged to allow a party a reasonable opportunity to appear and make submissions pursuant to sections 57 and 59 of the Act (see paragraphs 9 to 15 of Epic's Outline of Submissions).

(d) For the purposes of section 39(2)(b) of the Law, an Applicant may only raise a matter in the application for review which was raised in submissions to the Regulator before the decision under review was made. The "matter" in section 39(2)(b) includes the subject matters raised with the Regulator, the issues raised with the Regulator and the material (including expert opinion) relied upon in support of the propositions and proposals put to the Regulator in submissions.

(e) The word "matter" in the opening lines of section 39(5) is synonymous with and means "materials" or "documents". Each of the sub-paragraphs of section 39(5) deals with specified materials or documents.

(f) The Applicant seeking review may therefore not advance evidence arguments or evidentiary material in the cause of the review process unless it can be "identified as broadly arising out of a matter fairly raised in the submissions to the relevant Regulator for the decision under review was made. That is not to say that a reformulation of an argument or contention previously put to the relevant Regulator on material which was before it before the decision was made should be [excluded]": Application by Epic Energy Australia Pty Ltd [2002] ACompT 4 ("**Epic No 1**").

(g) The words in section 39(5)(a) referring to submissions in support of the application for review and the words in parentheses in that sub-section signify that the Applicant's submissions in support of the application are to be confined to matters raised in submissions with the Regulator before the decision under review was

made. They reflect and accord with the limitation expressed in section 39(2)(b). They do not address the question whether other parties may be heard on the application, nor the nature of the submissions which other parties might wish to make.

(h) The Australian Competition Tribunal has:

(i) allowed the ACCC to intervene and put submissions in opposition to applications for review;

(ii) allowed interveners to appear before it and make submissions;

(iii) made orders requiring the relevant Regulator to disclose material of the type described in section 39(5) of the Law.

(i) Section 39(5) only limits the matters which may be raised before the Board not the parties who may make submissions or the nature of their submissions.

(j) Three implications follow from this interpretation of section 39(5):

(i) The Board ought to allow a person who has made a submission to the Regulator and whose interests are adversely affected by the decision under review to become a party in each application.

(ii) Each party is entitled to make submissions either for or against the grounds of review so long as these submissions are based on material before the Board in accordance with section 39(5). Section 39(5) does not purport to deal with the nature of submissions which may be made. Procedural fairness includes the right to comment by way of submission upon adverse material from other sources which has been put before the decision maker.

(iii) Each party is entitled to have access to the material before the Board in accordance with section 39(5) so that it can make appropriate submissions. Section 39(5) does not purport to limit the material upon which a particular party's submission may be based.

(k) In oral submissions, Senior Counsel for Epic emphasised that:

(i) There is a relationship between section 39(2)(b) and 39(5)(a) in that 39(2)(b) places a limitation on the matters that the Board can take into account, namely that an application for review pursuant to section 39(1)

"may not raise any matter that was not raised in submissions to the relevant Regulator before the decision was made". Section 39(5)(a) contains a similar restriction on submissions that the Board can take into account in relation to applications for review.

(ii) The material in parentheses in section 39(5)(a) does not exclude the possibility of other parties appearing and putting in submissions and drawing attention to matters that are inconsistent with matters advanced by the applicant. In Epic's submission, section 39(5)(a) has a more limited application – it simply limits the materials that the Board can take into account when considering an application for review. It does not prevent the Board from taking into account submissions in opposition to an application that might be made by a contradictor, respondent or intervener.

(iii) The effect of sections 57 and 59 of the Act is to mandate the application of the principles of natural justice. Section 39(5) must be read in the light of that imperative. It is not a matter of working out whether the language of the statute excludes natural justice. The language of the statute tells the reader that natural justice must be implied and that imperative informs the proper construction of section 39(5). There is a significant difference between the Board being confined to considering materials on the one hand and the Board being told that it cannot hear submissions with respect to those materials which it is entitled to consider.

(iv) Epic also submitted that the word "submissions" in section 39(2)(b) and in the material that appears in parentheses in section 39(5)(a) should be interpreted as referring to any party's submissions, not simply the submissions lodged by the applicant with the Regulator before the Regulator's decision was made.

12. Inspection of Documents

(a) Epic, in its written outline of submission, submitted (in addition to the matters set out above) that the terms "matter" and "submissions" have been considered by the Australian Competition Tribunal in Epic No 1. Epic submitted that the term "matter" included the subject matters raised with the Regulator, the issues raised with the Regulator and the materials (including the expert opinion) relied upon in support of the propositions and proposals put to the Regulator in submissions.

(b) The Applicant seeking review may not advance evidence in arguments or evidentiary material in the cause of the review process unless it can be identified as broadly arising out of a matter fairly raised in the submissions to the relevant Regulator before the decision under review was made.

(c) Procedural fairness includes the right to comment by way of submission upon adverse material from other sources which has been put before the decision maker.

(d) The Australian Competition Tribunal has, in previous decisions, made orders requiring the relevant Regulator to disclose material of the type described in section 39(5) of the Law.

13. Whether the Appeals should be held separately or together

Epic's submission is that Appeals 1 and 3 should be heard together. Epic wishes to be heard in relation to Appeals 2 and 4 and submits that those appeals be heard together immediately after the completion of the hearing in Appeals 1 and 3.

Submissions of Western Power

14. Western Power filed a written outline of submissions containing submissions similar in substance to Epic. At the hearing on 1 April, Counsel for Western Power expressly adopted the submissions made on behalf of Epic.

15. Western Power submitted that:

(a) The legislation the subject of these proceedings is uniform national legislation and the Board should not depart from an interpretation placed on such legislation by the Board's equivalent in other States, namely the Australian Competition Tribunal.

(b) In various decisions of the Australian Competition Tribunal, the Tribunal has made the following orders:

(i) the Regulator was required to provide access to the section 39(5) documents to the Applicant and any other named parties;

(ii) the Applicant was required to file and serve a Statement of Facts, Issues and Contentions;

(iii) the Regulator and any other named respondent was required to file and serve a Statement of Facts, Issues and Contentions in reply;

(iv) the Applicant was required to file and serve a written outline of its submissions on the Regulator and any other named respondent;

(v) the Regulator and any other named respondent were required to file and serve a written outline of their submissions in reply (if any).

(c) In Epic No 1, the Australian Competition Tribunal ruled that:

(i) the power to review under section 39(1) of the Law involves a re-hearing on the merits but ought to be construed as a power to be exercised for the correction of error;

(ii) the word "submissions" in section 39(2)(b) has its ordinary natural meaning and includes anything referred or submitted to the relevant Regulator for consideration;

(iii) the matters to which recourse may be had upon review include the subject matters raised, the issues raised and the materials raised and relied upon in support of the positional proposal put forward in the submissions that were made prior to the Regulator's decision;

(iv) whether or not "any matter" can be said to arise out of a matter fairly raised in the submissions to the Regulator before the decision was made is to be determined broadly;

(v) the term "submissions" in section 39(5) has the same meaning as in section 39(2)(b);

(vi) the reference to "submissions" in section 39(2)(b) and in section 39(5)(a) and 39(5)(d) and the reference to "written submissions" in section 39(5)(ad) are references to submissions made by any person made to the relevant Regulator and not just submissions by the Applicant for review.

(d) The Australian Competition Tribunal has previously (in Re Duke and Eastern Gas Pipeline Pty Ltd [2001] ACompT 2) noted the benefit to the process from the presence of a contradictor. In Epic Energy South Australia and in Re Epic Energy South Australia Pty Ltd [2002] ACompT 5 ("**Epic No 2**"), the Regulator was a named respondent to the application and was in a position to act as a contradictor to the Applicant's claim. The Australian Competition Tribunal has also allowed interested third parties to intervene in proceedings.

(e) Where a statute confers on a public official the power to do something which affects a person's rights, interests or expectations, the rules of natural justice regulate the exercise of that power unless they are excluded by plain words of necessary intendment.

(f) An intention on the part of the legislature to exclude the rules of natural justice is not to be assumed nor spelt out from indirect references, uncertain inferences or equivocal considerations, nor is such an intention to be inferred by the presence of a statute of rights which are commensurate with some of the rules of natural justice.

(g) The rules of natural justice are not excluded by the operation of section 59(4) of the Act which makes provision for certain rights which are commensurate with some of the rules of natural justice.

(h) In the absence of any special features of the process, the rules of natural justice prohibit a decision maker from acting on undisclosed documentary material, as to do so not only effectively deprives a person of a hearing but also reduces accountability, acceptability and informed decision making. Decision makers cannot use undisclosed reports.

(i) If relevant evidential material is not disclosed at all to a party who is potentially prejudiced by it, there is prima facie unfairness irrespective of whether the material in question arose before, during or after the hearing.

Submissions of NWS

16. NWS filed a written outline of submissions dated 26 March 2004. NWS did not take exception to the procedure proposed by the Board save that it submitted that:

(a) An Applicant is entitled to raise any matter, whether by way of argument or evidentiary material which broadly arises out of a matter fairly raised in the submissions made to the Regulator; and

(b) The Board must disclose all material considered by it and offer the Applicant an opportunity to comment on it.

Submissions of the ERA

17. The ERA ("**the Regulator**") also filed a written outline of submissions and made oral submissions at the hearing on 1 April 2004.

18. The Regulator submitted that for the reasons set out in its outline of submissions it had formed the view that it should seek to be joined as a party in each of the Appeals. This view was guided by four considerations set out in its outline of submissions and two additional reasons:

    (a) the applications raise important questions of construction of the Code that may have significance for the ongoing administration of the Code; and

    (b) although on many issues the position of Epic and Western Power are opposed, there are some issues raised by Epic for which no party may advance material that may support a contrary position to that amended by Epic. The implication appears to be that the Regulator could play a useful role as contradictor in such a circumstance.

19. Accordingly, the Regulator seeks orders for it to be joined as a party to the proceedings so that it may attend at any hearings and receive submissions filed in the proceedings to determine whether it would be appropriate for the Regulator to make submissions as the matter unfolds before the Board.

20. The Regulator submitted that the Act does not establish a procedure whereby only the applicant may make submissions to the Board. It submitted that the provisions of the Act that confine the matters to be considered by the Board are directed at confining the jurisdiction of the Board. It cited seven matters leading to that conclusion:

    (a) The provisions in sections 38 and 39 of the Law draw a clear distinction between the Applicant and "parties" to the proceedings before the Board.

    (b) The use of the term "proceedings" in sections 38 and 39 indicates an intention that there will be various parties participating in the process in which their interests are to be represented.

    (c) There is an express power to give directions that would be otiose if there were to be no submissions or participation from parties other than the applicant. In oral submissions it was submitted that the express power referred to is contained in section 39(4) of the Law and section 57(3) of the Act.

    (d) The power to award costs indicates that there will be participation by parties with opposing interests.

(e) If the Board is unable to make directions to provide for submissions by all interested parties it will have to conduct each application separately instead of making directions for a single consolidated proceeding.

(f) A procedure whereby interested parties were prevented from making submissions would deprive them of natural justice and the Courts require that the clearest language be used before adopting a construction that excludes the principles of natural justice.

(g) The Australian Competition Tribunal has adopted an approach in relation to appeals under section 39(5) of the Law that allows for submissions by interested parties including the ACCC which stands in the same position as the Regulator.

Are the Applicants for Review entitled to be heard in relation to each other's Appeals?

21. It is clear that there is a common law duty on the Board to accord procedural fairness in the making of administrative decisions which affect a person's rights, interests or legitimate expectations, subject only to a clear manifestation of a contrary statutory intent: Kioa v. West (1985) 159 CLR 550.

22. The right to be accorded natural justice includes the right to be afforded the opportunity to be heard before a decision is made in relation to the matter in question: Kioa v. West (supra).

23. It appears to be common ground between the parties (based on these submissions made and the minutes of orders filed) that Epic and Western Power each have an interest in the appeals lodged by the other sufficient to attract the rules of natural justice and thus have a common law right to be heard in relation to each other's appeals. Similarly, it appears to be common ground that Epic has a sufficient interest in the outcome of the appeal lodged by NWS to attract the right to be heard in relation to that appeal.

24. The rules of natural justice can be excluded by legislation either expressly or by implication. However, any implied intention to exclude natural justice must be clear and unequivocal: Kioa v. West (supra).

25. In Kioa v. West, His Honour Justice Brennan stated at page 614 that:

> "To ascertain what must be done to comply with the principles of natural justice in a particular case, the starting point is the statute creating the power. By construing the statute, one ascertains not only whether the power is conditioned on observance of the principles of natural justice, but also whether there are any special

procedural steps which, being prescribed by statute, extend or restrict all the principles of natural justice would otherwise require".

26. In light of the language contained in section 39(5)(a) of the Law, it is therefore necessary to consider in some detail the relevant provisions of the legislation bearing on the powers, duties and functions of the Board in order to determine whether the rights of the Applicants to be heard in relation to all other Appeals has been excluded by that section.

27. Section 57 of the Act provides that subject to the Law and any determination of the Board:

"(1) Proceedings before the Board are to be conducted by way of a fresh hearing and for that purpose the Board may receive evidence given orally or, if the Board determines, by affidavit.

(2) The Board:

(a) is not bound by the rules of evidence and may inform itself has it thinks fit; and

(b) must act according to equity, good conscience and the substantial merits of the case and without regards to technicalities and forms.

(3) Questions of law or procedure arising before the Board are to be determined by the presiding member and other questions by unanimous or majority decision of the members."

28. Section 59 of the Act deals with the practice and procedures of the Board. It provides that:

"(1) The Board may:

(a) sit at any time or place;

(b) adjourn proceedings from time to time and from place to place;

(c) refer a matter for an expert for report and accept the expert's report in evidence.

(2) The Board must give the parties to proceedings reasonable notice of the time and place of the proceedings.

(3) A party is entitled to appear before the Board personally or by counsel or other representative.

(4) Subject to the Gas Pipelines Access (Western Australia) Law, a party must be allowed a reasonable opportunity to call or give evidence, to examine or cross examine witnesses and to make submissions to the Board.

(5) The Board may make a determination in any proceedings in the absence of a party to the proceedings if satisfied that the party was given reasonable opportunity to appear but failed to do so.

(6) At the conclusion of proceedings, the Board must give to each party a written statement of the reasons for its decision."

29. It is to be noted that pursuant to section 57(2) of the Act, the Board is not bound by the rules of evidence and may inform itself as it thinks fit. Further, the Board is bound to act according to equity, good conscience and the substantial merits of the case and without regards to technicalities and forms. It should be noted that these obligations and powers are not made subject to the operation of the Law, unlike some other provisions relating to the Board's practice and procedures set out in the Act.

30. It is also significant to note that section 59 of the Act repeatedly refers to "parties" or "a party to proceedings" (see section 59(2), (5) and (6)) and that these sub-sections are not subject to the Law.

31. Similarly, sections 38 and 39 of the Law also refer to "a party" – see section 38(7), and "parties" – see section 39(4).

32. The use of such language tends to suggest that the legislature contemplated parties other than applicants being involved and participating in applications for review brought pursuant to section 39(1). It is difficult to understand the use of such language if the legislature did not intend parties other than applicants to be involved in such appeals.

33. Section 38(10) of the Law also gives the Board the power to make such orders (if any) as to costs in respect of the proceeding as it thinks fit. Ordinarily, the existence of a power to award costs suggests a process that involves parties with opposing interests and with some parties bearing the costs of others. This is not to say, however, that this is a conclusive indication. It is possible to envisage a situation where a review application under section 39(1) simply involves an applicant and the applicant is ordered to pay the costs of the Board.

34. The use of the word "proceedings" in section 59 of the Act and section 38 of the Law do not particularly point in any direction, in my opinion. Such a term would appear to

encompass a review in which the applicant for review alone participates as well as a review in which there is an applicant and one or more respondents or intervenors.

35. Similarly, the express power of the Board to give directions in section 39(4) of the Law and the implied power contained in section 57 of the Act does not, in my view, particularly suggest that an application for review under section 39(1) will involve parties additional to the applicant. The power could be used to make directions to the applicant and would appear to work equally well in either scenario.

36. It is significant that the provisions of the Law are part of a national scheme for the regulation of pipelines used to transport natural gas. Each State of Australia has enacted the Law in that State, thus creating a scheme of uniform national legislation.

37. Uniformity of decisions in the interpretation of uniform national legislation is a sufficiently important consideration to require that an intermediate appellant court or a single Judge should not depart from an interpretation placed on such legislation by another Australian intermediate appellant court unless convinced that that interpretation is plainly wrong: Australian Securities Commission v. Marlborough Gold Mines Ltd (1992-93) 177 CLR 485 at 492. Such reasoning would also apply to tribunals such as the Board.

38. As noted above, both Epic and Western Power pointed to a number of decisions of the Australian Competition Tribunal (which performs an equivalent function in other states of Australia to the Western Australian Gas Review Board) in which orders were made that:

(a) the Regulator file and serve a statement of contentions in response to a statement of facts and contentions filed by an applicant, admitting, denying or otherwise responding to material points;

(b) the applicant and the Regulator, by reference to an index of documents provided by the Regulator to the parties, identify the documents that they wanted the Australian Competition Tribunal to consider for the purposes of the review;

(c) the Regulator assemble and provide to the Tribunal and serve on the applicant copies of all documents so identified;

(d) the Regulator file written submission in reply to the written submissions filed by the applicant in support of its application for review;

(e) an intervenor (a not for profit incorporated association representing the interests of domestic utility consumers in Victoria) have leave to make submissions in relation to particular issues.

(See Epic No 1; Re GasNet Australia (Operations) Pty Ltd [2003] ACompT 6 and DEI Queensland Pipeline Pty Ltd v. The Australian Competition and Consumer Commission [2002] ACompT 2.)

39. In Epic No 1, the Australian Competition Tribunal gave specific consideration to the nature and extent of the review under section 39 of the Law. The Australian Competition Tribunal observed at paragraph 20 that:

> "The only matters, other than Epic's application for review and submissions in support of, to which this Tribunal may refer are the matters specified in section 39(5)(a) to (f) inclusive which were available to the ACCC at the time of, or before, the decision under review was made. It is apparent that the power given to the Tribunal is exercisable only if there is a reviewable ground. In the absence of a [contrary] legislative indication, the conferring of a right of appeal or review to an administrative tribunal against an administrative decision is not a grant of jurisdiction to make a fresh or original decision. There is authority for the proposition that in such a case there a presumptive rule that the issue is whether the decision was correct when made: Strange-Muir v. Correct Services Commission [1986] 5 NSWLR 234 at 250; re Coldham ex parte Brideson [No 2] at 272. There are no such indications in the GPA Law. Rather, the indications are the other way and the jurisdiction is dependent upon demonstrable error by reference to matters which were before the relevant Regulator before the decision, or which review is sought, was made. Accordingly, the power to review under section 39(1), although involving a re-hearing on the merits, ought to be construed as one to be exercised for the correction of error: Coal & Allied Operations Pty Ltd v. Australian Industrial Relations Commission [2000] 203 CLR 194 at 203-204; there being no relevant difference in this respect between an appeal to an administrative tribunal or a court: Re Coldham ex parte Brideson [No 2] at 273-274. If a reviewable ground is established, then section 38(9) applies so as to enable this tribunal, on the basis of the matters specified in section 39(5), to set aside or vary the decision under review."

40. The Australian Competition Tribunal went on to say at paragraph 22 – 25:

"22 The ordinary meaning of the word "submission" in the context in which it appears in the Code and GPA Law, is the act of referring to something: a proposal, argument, document or like, for consideration by someone else: see *Collins Dictionary of the English Language* (Australian Ed 1979): *Short Oxford English Dictionary* (Vol 2 p 2169). In a legal context, it may mean the act of submitting a matter to a person for decision or consideration. Or, it may mean "the theory of a case put forward by an advocate".

23 There is nothing in the Code or the GPA Law to indicate that the word "submission" is to have other than its ordinary meaning in the context of its use in those provisions.

24 The meaning of "submissions" in section 39(2)(b) and section 39(5)(a) takes its colour from the prohibition on recourse to "any matter" that was not raised in submissions to the relevant Regulator before the decision was made. Section 39(2)(b) limits the matters to which recourse may be had to those that may be identified in the submissions which, in fact, were made prior to decision. The matters include the subject matters raised, the issues raised and the materials relied upon in support of the position or proposal put forward in the submission as being relevant to the decision being made. Thus, if any matter, whether by way of argument or evidentiary material, cannot be identified as broadly arising out of a matter fairly raised in the submissions to the relevant Regulator before the decision under review was made, it will not be permitted to be raised in the review. This is not to say that a reformulation of an argument or contention previously put to the relevant Regulator on material which was before it before the decision was made would be excluded.

25 The use of the term "submissions" in section 39(5) including section 39(5)(a) has the same meaning. The word "submissions" does not include or permit recourse to matters, including evidentiary material, which were neither before the relevant Regulator nor relied upon by the applicant for review in support of any contention advanced by it to the relevant Regulator as relevant to the decision to be made. In any event, the submissions of the applicant for review in support of an application under section 39(1) are to demonstrate a ground for review in terms of section 39(2)(a). That ground is to be demonstrated by reference to matters raised

in submissions to the relevant Regulator and consideration of the limited category of matters specified in section 39(5). The subject matter of the submissions in support of the application for review are the matters which were in existence at the time the decision under review was made".

41. The observations of the Australian Competition Tribunal on the nature and extent of the review available under section 39 of the Law, whilst helpful, do not specifically address the question of whether the Tribunal (and therefore the Western Australian Gas Review Board) can take into account submissions in opposition to an application for review. That was not one of the issues that the Australian Competition Tribunal was required to decide in that case, or in the other cases cited by the parties.

42. Apart from the provisions described above, there are no other provisions in the Act or the Law that expressly deal with the procedure to be followed by the Board or deal with the question of who may be a respondent. Parties wishing to oppose an application for review are not expressly given any right or ability to be heard or lodge submissions. Nor is there any express prohibition on parties wishing to oppose an application for review becoming a respondent to the proceedings.

43. Against the considerations militating in favour of a construction of section 39(5)(a) that would allow the Board to take into account submissions in opposition to an application for review must be considered the language of section 39 and in particular section 39(5)(a) itself.

44. Section 39 of the Law provides:

"(1) If the relevant regulator makes a decision under the Code to approve the Regulator's own access arrangement or the Regulator's own revisions of an access arrangement:

(a) in place of an access arrangement or revisions submitted for approval by a service provider; or

(b) because a service provider fails to submit an access arrangement or revisions as required by the Code;

the following persons may apply to the relevant appeals body for a review of the decision:

(c) the service provider;

(d) a person who made a submission to the relevant Regulator on the access arrangement or revisions submitted by the service provider or drafted by the Regulator and whose interests are adversely affected by the decision.

(1a) …

(2) 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 sub-section (1), may not raise any matter that was not raised in submissions to the relevant regulator before the decision was made.

(3) …

(4) In a review of a decision under this section, the relevant appeals body may give directions to the parties excluding from the review specified facts, findings, matters or actions that the relevant appeals body considers should be excluded having regard to:

(a) the likelihood of the decision being varied or set aside on account of those facts, findings, matters or actions;

(b) the significance to the parties of those facts, findings, matters or actions;

(c) the amount of money involved;

(d) any other matters that the relevant appeals body considers relevant.

(5) The relevant appeals body, in reviewing a decision under this section must not consider any matter other than:

(a) the application for review and submissions in support of the application (other than, in the case of an application under sub-section (1), any matter not raised in submissions to the relevant Regulator before the decision was made);

(ab) the relevant access arrangement or proposed access arrangement or revision or proposed revision of an access arrangement, together with any related access arrangement, information or proposed access arrangement information;

(ac) in the case of an application under sub-section (1)(a) - any notice of a proposed variation of Reference Term within an Access Arrangement Period given by the service provider to the relevant Regulator under the Code;

(ad) any written submissions made to the relevant Regulator before the decision was made;

(b) deleted

(c) any reports relied on by the relevant Regulator before the decision was made;

(d) any draft decision, and submissions on any draft decision made to the relevant Regulator;

(e) the decision of the relevant Regulator and the written record of it and any written reasons for it;

(f) the transcript (if any) of any hearing conducted by the relevant Regulator;

(6) Except as otherwise provided in this section 38 (except sub-sections (1) and (13)) applies to an application under this section.

(7) …"

45. Section 38 of the Law provides, inter alia, that:

"(8) The relevant appeals body may require the relevant Regulator to give information and other assistance, and to make reports, as specified by the appeals body.

(9) In proceedings under this section, the relevant appeals body may make an order affirming, or setting aside or varying immediately or as from a specified future date, the decision under the review and, for the purposes of the review, may exercise the same powers with respect to the subject matter of the decision as may be exercised with respect to the subject by the person who made the decision.

(10) The relevant appeal body may made such orders (if any) as to costs in respect of a proceeding as it thinks fit.

(11) The relevant appeals body may refuse to review a decision if it considers that the application for review is trivial and vexatious.

(12) A determination by the relevant appeals body on the review of a decision has the same effect as if it were made by the person who made the decision."

46. It can be seen that the language of section 39(5)(a) would on its face appear to prevent the Board from taking into account any written submissions, other than submissions in support of the application for review (as qualified by the material in parentheses in section 39(5)(a)).

47. There is clearly some tension between the clear language of section 39(5)(a) purporting to prohibit the Board from taking into account submissions in opposition to an application for review and the fundamental principle of natural justice that entitles a party with a sufficient interest to be heard before a decision is made in relation to the matter in question.

48. On balance, having considered the matters set out above, I have come to the conclusion that the provision set out in section 39(5)(a) is not sufficient, in the context of the legislation and considerations set out above, to warrant a conclusion that the section was intended to abrogate the common law right of parties with a sufficient interest to be heard.

49. It should be emphasised, however, that section 39(2) and section 39(5)(a) contain clear restrictions on the scope of the application for review that can be made under section 39(1) and on the nature and extent of submissions in support of the grounds of appeal. Pursuant

to section 39(2)(b) an application for review under section 39(1) may not raise any matter that was not raised in submissions to the relevant regulator before the decision was made.

50. The same qualification is to be found in section 39(5)(a) in connection with the scope of submissions that may be considered by the Board in support of the application for review. I consider that any submissions in opposition to the application for review must be similarly constrained. That is to say, such submissions may not raise any matters, as that term is described in Epic No 1, that were not raised in submissions to the relevant regulator before the decision was made.

51. There is also an issue as to the meaning of the term "submissions" in section 39(2)(b) and section 39(5)(a). It is clear that the terms "matter" and "submissions" in section 39(2)(b) and section 39(5)(a) must have the same meaning. Otherwise, the scope of an appeal and the scope of any submissions in support of that appeal could be different.

52. In my view, the term "submissions" in section 39(2)(b) should be construed as meaning the submissions filed by the applicant (only) with the Regulator before the decision was made. The term "submissions" in section 39(2)(b) and section 39(5)(a) does not refer to the submissions of any party that made submissions to the Regulator before his decision was made.

53. Were the position otherwise, it would not be possible for an applicant to properly frame his application for review because there may well be submissions filed by other parties that he has not seen and is not aware of. If the term "submissions" meant the submissions of any party to the Regulator before its decision was made, an applicant for review would need to lodge his application for review, seek inspection of documents held by the Regulator, including submissions lodged by other parties, and then seek to amend the grounds of appeal. It is unlikely, in my view, that the legislature would have intended such a result.

54. It is also noteworthy that section 39(5)(ad) provides that the Board may take into account "any written submissions made to the relevant Regulator before the decision was made". Had the legislature intended that the word "submissions" in section 39(2)(b) and section 39(5)(a) include written submissions lodged by any party, it could easily have used similar language to that found in section 39(5)(ad). It did not do so.

The position of the ERA

55. The position of the ERA in the appeals is different to that of the applicants. The ERA does not have an interest in the outcome of any of the applications in the sense that Epic or Western Power have in each other's appeals. The Regulator does not, in my opinion, have

an interest in any of the appeals sufficient to attract the operation of the rules of natural justice. In any event, the ERA, as I understand in its submissions, has not sought to ground its application to become a respondent in those appeals on that basis.

56. Rather, the ERA submits that, for the various reasons set out in its submissions, it would be desirable and of benefit to the Board for it to play the role of contradictor in the appeals and there is nothing in the Act or the Law that would prevent it becoming a respondent.

57. The Board would certainly agree that as a matter of general principle it would be helpful for the ERA to appear as a respondent and play the role of contradictor in the appeals.

58. Since I have come to the view that section 39(5)(a) does not prevent the Board from considering submissions in opposition to an appeal, I consider that the Regulator should become a Respondent in each of the Appeals.

Inspection of Documents

59. As stated above, there can be no doubt that the rules of natural justice will apply to the hearing of the appeals unless there is some clear legislative intent to the contrary.

60. The rules of natural justice prohibit a decision maker from acting on undisclosed documentary material: Taylor v National Union of Seamen [1967] 1 WLR 532.

61. It follows that absent some clear legislative intent to the contrary, each of the applicants should have access to the material that the Board will consider pursuant to section 39(5) of the Law.

62. In my view, there is nothing in the Act or the Law that would displace the operation of the rules of procedural fairness in connection with an inspection of the documents that the Board will have regard to during the course of the appeals.

63. As it was established in Epic No 1 (supra) the term "matter" in section 39(2)(b) includes the subject matters raised, the issues raised and the materials relied upon in support of the position or proposal put forward in the submission as being relevant to the decision being made. As pointed out above, the terms "matter" and "submission" in sections 39(2)(b) and 39(5)(a) must have the same meaning.

64. Given the relatively broad definition of the terms "matter" and "submission" in section 39(2)(b) and section 39(5)(a), it seems clear that the legislature was not intending to restrict an applicant to simply referring to precisely the same materials in the application for

review that were referred to in the original submissions to the Regulator before the Regulator's decision was made.

65. If a matter, whether by way of argument or evidentiary material cannot be identified as broadly arising out of a matter fairly raised in submissions to the relevant Regulator before the decision under review was made it will not be permitted to be raised in the Appeal: Epic No 1 at paragraph 24.

66. Thus, if there are documents falling within the scope of section 39(5) that the Board will consider during its deliberations, the applicants are entitled to inspect them and make submissions to the Board in relation to those documents, provided that such matters can be identified as broadly arising out of a matter fairly raised in the applicant's submissions to the Regulator before the decision under review was made.

67. The only other proviso to the right of inspection arises out of the potential confidentiality of the documents that the Board will have regard to. Although the Board has not yet inspected the documents falling within the scope of section 39(5) that were considered by the Regulator before he made his decision, it is not unreasonable to expect that some of them will contain highly sensitive commercial information and be confidential. Clearly, such documents ought not be disclosed unless they are the subject of an appropriate confidentiality regime.

Application for Disclosure of Issues Giving Rise to Apprehension of Bias

68. The Regulator also submitted that the members of the Board should formally state whether there are any matters that are known to them that might give rise to an apprehension of bias to a fair minded observer in order to give the parties an opportunity to deal with those matters at the outset of proceedings.

69. The Regulator, in its written outline of submissions, referred to the decision of the New South Wales Court of Appeal in Dovade Pty Ltd & Others v Westpac Banking Group & Another [1999] 46 NSWLR 168 in which it was said that:

> "We would not see it as controversial to assert that every judicial officer should feel obliged, if he or she does not decide to withdraw of his or her own accord, to bring to the attention of the parties as soon as practicable any fact or circumstance which could lead to disqualification for apprehended bias … It is common sense to require such disclosure if only because ordinarily the facts are not available to the parties and it is ordinarily desirable to bring to their attention any grounds for disqualification, in order to determine if the disqualifying facts would be waived,

> before the parties have expended time or if preparing for a dispute before a Tribunal which must otherwise be reconstituted … The disclosure should emphasis that it is not the parties consent that is being sought but assistance on the question of whether the grounds exist for disqualification (absent waiver)."

70. Western Power supported the Regulator's request for disclosure by members of the Board, but went further and asked that the members of the Board disclose to the parties:

    (a) Any relationship between themselves and any of those parties or other shippers; and

    (b) Any views expressed by them relating to the matters in issues in the Appeals.

71. The Board accepts that there should be disclosure of any matters that might give rise to a reasonable apprehension of bias. Western Power's request that members of the Board disclose to the parties "any relationship between themselves and any of those parties or other shippers" seems, with respect, to go beyond what is required. It is not any relationship that needs to be disclosed, but rather any relationship that might give rise to a reasonable apprehension of bias. The Board will consider those matters and write to the parties separately in relation to those issues.

Ruling

72. The Board is able, in considering the Appeals, to consider submissions in opposition to the Appeals. Each of Epic and Western Power is entitled to become a respondent in the other's Appeals and be heard in opposition to those Appeals. Epic is entitled to become a respondent in Appeals 2 and 4 of 2004 filed by NWS and be heard in opposition to those Appeals.

73. Each of the Applicants and Respondents in any Appeal is entitled to inspect the materials falling within the scope of section 39(5) of the Law that the Board considers in relation to a particular Appeal and may make submissions to the Board in relation to that material provided that:

    (a) Each of the parties inspecting such material first entering into an appropriate confidentiality regime; and

    (b) Any submissions made on the material inspected complies with the limitation set out in section 39(5)(a) of the Law.

74. The Board accepts that there should be disclosure of any matters that might give rise to a reasonable apprehension of bias. The Board will consider such issues and advise the parties in due course whether there are any issues affecting any member of the Board that might give rise to a reasonable apprehension of bias.

Directions – General Remarks

75. Draft orders and directions in relation to all four Appeals are annexed hereto. Changes to the orders proposed by the parties have been tracked on the draft orders.

76. By way of general comment, the Board is obliged to ensure that the grounds of the Appeal and submissions in support of the Appeal do not exceed the limitation expressed in section 39(2)(b) as section 395(a) of the Law. Accordingly, amendments to the orders have been made requiring copies of submissions made by the applicants to the Regulator prior to his decision to be filed (in triplicate) with the Board at the same time as they are served on the other parties. I have also added an order requiring the parties to provide an annotated version of the grounds of Appeal demonstrating how the grounds fall within the scope of the submissions made by the applicant to the Regulator before he made his decision.

Directions in Appeals 1 and 3 of 2004

77. The order dealing with the hearing dates has been left blank. The Board would be available to sit for the fifteen days of hearing required between 4 and 22 October 2004. It would be helpful if Epic, Western Power and the ERA could confirm availability for a hearing at that time. Naturally, if there is any slippage in compliance with the directions, the hearing dates may need to be rescheduled. The Board notes that on the current timetable the bundle of trial documents is due to be filed by 13 September 2004. The Board considers that it is important that it has an adequate opportunity to read and consider these documents prior to the commencement of any hearing.

78. Hopefully, the proposed orders can be made in these Appeals without the need for further directions hearing. I ask that Epic, Western Power and the ERA provide any response to the minute of proposed orders and advise whether the proposed hearing dates are suitable by 9.00am Wednesday 21 April 2004. If no further amendments are required I will simply make the orders as they currently stand, save that the hearing dates will be fixed for three (3) weeks from 4 October 2004. If straightforward amendments are required, the draft orders will be adjusted and issued as amended. If a further directions hearing is required, an application for a further directions hearing ought to be made by 9.00am Wednesday 21 April 2004.

Directions in Appeals 2 and 4 of 2004

79. As stated above, it is my view that it would be helpful for the Regulator to be a respondent in Appeals 2 and 4 of 2004, notwithstanding that Epic will also be a respondent in those appeals. The Regulator is possessed of detailed knowledge of the documents and other material before him when he made his decision and the reasoning behind his decision. The Regulator is therefore in a unique position to assist the Board.

80. I have therefore amended the orders proposed by NWS to include the Regulator as a respondent and require it to file a notice of statements, facts and contentions.

81. The draft orders in relation to Appeals 2 and 4 of 2004 proposed by NWS and Epic do not go as far as the orders that have been proposed in relation to Appeals 1 and 3 of 2004. The reason for this is not clear to me. It would be preferable for the matter to be programmed through to hearing now and include directions as to the exchange of submissions and the preparation of a bundle of documents to be referred to at the hearing.

82. Accordingly, I ask that NWS, Epic and the ERA either file a fresh minute of proposed orders based on the minute annexed hereto and providing for directions programming the matter through to a hearing (assuming that a hearing is proposed) or alternatively seeking to have the matter relisted for directions. If the matter needs to be relisted for further directions, such application should be made by 9.00am, Wednesday, 21 April 2004. It would also be helpful to have an indication of the parties' available dates for a hearing by that time.

ROBERT EDEL
PRESIDING MEMBER
WESTERN AUSTRALIAN GAS REVIEW BOARD
APPEALS 1, 2, 3 AND 4 OF 2004

ISSUED ON THE 16th DAY OF APRIL 2004