1 September, 2000

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BY OVERNIGHT COURIER

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Gas Access Regulator
Office of Gas Access Regulation
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Dear Sir

Tubridgi Pipeline – Draft Decision on Ring Fencing Obligations

We act for Origin Energy Resources Limited, the company that applied to you for waiver of the ring fencing obligations applicable to SAGASCO South East Inc and the other Tubridgi Joint Venture Parties.

We have been asked to write this submission to you in response to the Draft Decision dated 22 May 2000.

There is one aspect of the Draft Decision which we believe is wrong as a matter of law and on which we wish to make submission. This aspect of the Draft Decision concerns section 4.15(a)(i) of the National Third Party Access Code for National Gas Pipeline Systems ("**the Code**").

The First Test of Section 4.15(a)(i)

The Regulator's Draft Decision identifies what the Regulator calls the "first test" in section 4.15(a)(i). This test requires the Regulator to be satisfied that:

> "the Covered Pipeline is not a significant part of the Pipeline system in any State or Territory in which it is located."

In the Regulator's consideration of this part of section 4.15(a)(i), the Regulator discusses the strategic importance of the Tubridgi Pipeline System because of the possibility that future

new discoveries of natural gas will seek to use the pipeline and that the pipeline could be connected directly to the Goldfields Gas Pipeline. The Regulator states:

> "In these circumstances, it would be unwise to assume that what is the case at present will continue indefinitely into the future." (Emphasis added.)

The Regulator's finding was that the Tubridgi Pipeline System is a significant pipeline because of its potential capacity to transport gas and because of its interconnection into the DBNGP.

It is clear from the Regulator's Draft Decision that the Regulator accepts that the Tubridgi Pipeline System is currently insignificant. It is also clear that the Regulator found the first test not satisfied because of the possibility that the pipeline might become significant in the future.

Submission

In our view, the approach the Regulator has taken is clearly wrong as a matter of law. If the Regulator accepts that the Tubridgi Pipeline System is currently not a significant part of the pipeline system in Western Australia, then the first test is satisfied. It is not open to the Regulator to have regard to "possibilities" that may or may not eventuate. This follows as a matter of statutory interpretation.

Legal Authority

Case law and commentary on statutory interpretation makes it clear that the first step in interpreting words is to consider their literal and grammatical meaning.[1] If general words are used, they will be given their plain and ordinary meaning. Reading words into legislation is "the wrong thing to do".[2]

The New Shorter Oxford English Dictionary defines the word *is* as "that which exists; that which is", and confirms that *is* indicates present tense, the past derivative being "was" and the future derivative being "will be". It is submitted that in view of this and the authorities on the issue discussed below, the literal meaning of the phrase '*is not* significant' can only be interpreted as '*is not* significant at the present time' or at the time of the Regulator's decision.

The case law suggests that where the intention of the legislature is clear on the face of the enactment, the inevitable conclusion to be drawn is that had legislature some other intentions it would have stated so.

In *Board of Trustees of the Maradana Mosque v Badiuddin Mahmud & Anor* [1967] AC 13 the Privy Council dealt with the meaning of the word "is" in the context of legislative

[1] Pearce DC & Geddes RS *Statutory Interpretation in Australia* (Butterworths, 4th Ed, 1996) at 22, 33-34; *Maunsell v Olins* [1975] AC 373 at 382 per Lord Reid
[2] *Thompson v Goold & Co* [1910] AC 409 at 420 per Mersey LJ; see also *Dallikavak v Minister for Immigration and Ethnic Affairs* (1985) 61 ALR 471 at 475-6 per Northrop and Pincus JJ.

requirement that the Minister must consider whether the school "is being administered in contravention of any of the provisions of this Act". The Privy Council affirmed the decision of the Court of Appeal which stated that when considering the meaning of *is being*,

> "…the present tense is clear. It would have been easy to say 'has been administered' or 'in the administration of the school any breach of any of the provisions of this Act has been committed', if such was the intention of the legislature. But for reasons which common sense may easily supply, it was enacted that the Minister should concern himself with the present conduct of the school."

The Minister was found to lack jurisdiction in considering factors other than "whether the school was at the time of his order being carried on in contravention of any of the provisions of the Act".[3]

Similarly, in *In re D (A Minor)*[1987] 1 AC 317 the House of Lords had to consider the proper interpretation of the phrase "*is being* avoidably prevented or neglected". It was held that the point of time at which the court had to consider whether a continuing situation existed was *the moment immediately before* the process of protection was first put into motion.[4] In considering whether any such continuing situation existed the court had to look at the situation both as it was at that point of time and as it had been in the past, how far back it should look depending on the facts of the case.

Although Woolf LJ at first instance of the appeal conceded that "is being" is not temporal in the sense that it means 'now' or, 'this minute', he stressed that the phrase "is being" involves a consideration of the current state of events. His Lordship stated that "if the words used had been different then different considerations would apply. 'Has been' would indicate some time in the past; 'will be' would indicate some time in the future; 'is being' would indicate a situation over a period, not now at this precise moment but over a period of time sufficiently proximate to the date of the inquiry to indicate that it is the present, not history and not the days to come."[5]

The House of Lords agreed, and asked "Should the court look at the future as well?"[6] Lord Brandon of Oakbrook answered it by saying: "I would not think it right for the court to look at the future alone: only at the hypothetical future in conjunction with the actual present and the actual past." The decision maker can only do so by "looking back at that earlier time".[7] Lord Goff of Chieveley also agreed that the relevant assessment has to occur "at the date when they are asked to make their order".[8]

In view of these authorities, it is our submission that the Regulator is required to assess whether the Tubridgi pipeline system satisfies the criteria outlined in section 4.15(a), including the significance of the pipeline, at or around the time when he makes his decision.

[3] *Maradana Mosque Trustees v Mahmud* [1967] AC 13 at 25.
[4] *In re D (A Minor)* [1987] 1AC 317 at 346.
[5] *In re D (A Minor)* [1987] 1AC 317 at 328.
[6] *In re D (A Minor)* [1987] 1AC 317 at 346 per Brandon LJ.
[7] *In re D (A Minor)* at 347.
[8] *In re D (A Minor)* at 350E.

Consideration of factors and circumstances that fall outside of the relevant period, in our submission, can be regarded as an irrelevant consideration, will infringe the fundamental principles of administrative law and will render the Regulator's decision *ultra vires*.[9]

As Aaronson and Dyer put it, "the process of statutory interpretation must be one's starting point" when determining the agenda for relevant considerations.[10] Paraphrasing the High Court in *Craig v South Australia*, the decision maker will exceed his authority and fall into jurisdictional error if he or she misconstrues the statute and thereby misconceives the nature of the function which he or she is performing or the extent of his powers in the circumstances of the particular case. [11]

In our view, it is also unreasonable for the Regulator to decide that the Tubridgi Pipeline System is significant based on possible events that may or may not eventuate. No one, including the Regulator, can know whether there will be development of future new discoveries, when and how this development will occur or whether the Tubridgi Pipeline System will be important to the development. These are all matters of high speculation. It is impossible to say today that the Tubridgi Pipeline System will be important to the development and it would be unreasonable to deny a waiver, and impose ring-fencing obligations, because of circumstances that might never eventuate.

Our view of section 4.15 is that the Regulator has power to retract or revoke a waiver given today if, in the future, the tests in section 4.15 cease to be satisfied. In other words, if the Tubridgi Pipeline System becomes significant, any waiver that was given could be revoked at the appropriate time. In our submission, this ability to revoke a waiver in the future makes it more unreasonable for the Regulator to treat the Tubridgi Pipeline System as significant today based on mere possibilities that could be years away, assuming they ever come to fruition.

Conclusion

The Regulator's Draft Decision indicates that the Regulator believes the Tubridgi Pipeline System is insignificant today. In our submission, the Regulator must, therefore, find the first test in section 4.15(a)(i) to have been satisfied. The Regulator will have the right to revoke or retract a waiver in the future if that test ceases to be satisfied.

Yours faithfully,

[9] Galligan DJ *Discretionary Powers* (at 320-321 Clarendon Press, Oxford, 1990).
[10] Aaronson M & Dyer B *Judicial Review in Administrative Action* at 292 (LBC Services, 1996).
[11] *Craig v South Australia* (1995) 131 ALR 595 at 601.