

In the matter of the decision of the Honourable Eric Stephen Ripper MLA Minister for Energy, made on 2 July 2003 that Coverage of the Goldfields Gas Pipeline System under the *Gas Pipelines Access Law* is not revoked

And in the matter of an application under section 38(1) of Schedule 1 to the *Gas Pipelines Access (Western Australia) Act 1998* for review of that decision.

Application by:

SOUTHERN CROSS PIPELINES AUSTRALIA PTY LTD
(ACN 084 521 997)

SOUTHERN CROSS PIPELINES (NPL) AUSTRALIA PTY LTD
(ACN 085 991 948)

ALINTA DEWAP PTY LTD (ACN 058 070 689)

Applicants

and

WMC RESOURCES LTD

First Respondent

and

NEWMONT AUSTRALIA LTD

Second Respondent

and

NATIONAL COMPETITION COUNCIL

Third Respondent

**REASONS FOR DECISION REGARDING PAYMENT OF THE GAS
REVIEW BOARDS OWN COSTS**

Member: Mr C P Stevenson (Presiding Member)

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Where made: Perth

Counsel:

Mr A.G. Castledine (instructed by Minter Ellison) appeared on behalf of the applicants

Mr J.A. Thomson (instructed by Clayton Utz) appeared on behalf of WMC Resources Ltd

Mr C.W. Lockhart (instructed by Maxim Litigation Consultants) appeared on behalf of Newmont Australia

Mr M.G. Pendlebury (instructed by Phillips Fox) appeared on behalf of the National Competition Council

Introduction

1 On 22 February 2006 as Presiding Member of the Gas Review Board I made an order that there be no order requiring all or any of the parties to pay or contribute to the costs incurred by the Board as a result of the commencement of these proceedings.

2 At the time of making the order I indicated I would provide short reasons for my decision. These are the reasons.

3 In my view the subject matter of the order concerns a procedural question which must be determined by the presiding member as opposed to the Board: s 57 (3) *Gas Pipelines Access (Western Australia) Act* 1998. For this reason the decision to make the order and these reasons are mine alone and are not attributable to my fellow Board members, Mr Edward (Ted) Woodley and Mr Francis (Frank) Oliver.

Background

4 Section 38 (1) of Schedule 1 of the *Gas Pipelines Access (Western Australia) Act* 1998 (**the Act**) provides that a person adversely affected by a decision to which the section applies may apply, in this case to the

Board, for a review of the decision in accordance with Part 6 of the Schedule and any applicable law governing the practice and procedure of the Board. Pursuant to s 38 (13) (a) of Schedule 1 the decision which is the subject of this application is a relevant decision to which the section applies.

- 5 These proceedings were instituted by the applicants on 21 July 2004 pursuant to s 38(1) of Schedule 1 of the Act. The applicants applied as of right to the Western Australian Gas Review Board (**the Board**) for review of the decision of the Honourable Eric Stephen Ripper MLA, Minister for Energy made on 2 July 2004 that Coverage of the Goldfields Gas Pipeline System under the *Gas Pipelines Access Law* should not be revoked.
- 6 On 20 December 2004 programming directions were made for various interlocutory matters. The directions included a direction that the application be provisionally listed for hearing commencing on 17 October 2005 for a period of 4 weeks. The directions also included directions for the joinder of WMC Resources Ltd and Newmont Australia Ltd as first and second respondents, respectively. The applications by WMC and Newmont for leave to be a respondent and to be heard in these proceedings, both dated 1 November 2004, were not opposed by the applicants. The National Competition Council was joined as third respondent pursuant to an order made by the Board on 31 January 2005 after initial concerns raised by the applicants.
- 7 Without setting out the full history of the matter detailed programming directions were made at various directions hearings to ensure the issues were properly defined for the hearing and that all necessary documents and statements of facts and contentions were exchanged between the parties. It is noteworthy that directions were made on 6 April 2005 listing the matter for a 4 week hearing commencing on 31 October 2005.
- 8 However in or about July 2005 the parties appear to have reached an agreement between themselves as to the terms and conditions upon

which the applicants would discontinue the application. The Board is not privy to the agreement between the parties. It is not known to the Board whether the parties contemplated at the time that there was a possibility that the Board might make an adverse costs order against one or more of them with respect to the Board's own costs.

- 9 On 8 July 2005 the Board made an order discontinuing the application with the consent of all parties on the basis that there be no order as to costs as between the parties.
- 10 At the same time, after hearing oral submissions from counsel on behalf of the parties, the Board made directions requiring the applicants, and any respondent if they chose to, to file written submissions on the issue of whether the Board (1) has power to fix an amount that represents its costs and expenses incurred in connection with the hearing and determination of these proceedings, (2) has power to order any or all of the parties to pay some or all of such costs; and (3) should exercise any such power in these proceedings (**the Issue**).
- 11 Directions were also made allowing any interested party who wished to be heard by the Board in relation to the Issue to give written notice to the Registrar of the Board and each party setting out:
- (a) how that person's interests are said to be affected by the Issue; and
 - (b) the grounds relied upon to give rise to a right to be heard by the Board in relation to the Issue.
- 12 The Board received written submissions on the Issue from the applicants dated August 2005, the first respondent dated 26 August 2005, the second respondent dated 26 August 2005 and from the third respondent dated 9 September 2005. No other person sought leave to be heard on the Issue. Counsel for the applicants, Mr Castledine, at the directions hearing on 8 July informed the Board that he understood from all the

parties that none of them contended that any other party should be ordered to pay or contribute to the Boards costs.

- 13 It needs to be understood that the directions made on 8 July 2005 were made on the basis that all parties would be given an opportunity to make further submissions if the Board was satisfied that there was an arguable or reasonable basis open to the Board to make an order against one or more of the parties to pay or contribute to the Boards costs.

Legislative provisions

- 14 Regulation 9 of the *Gas Pipelines Access (Western Australia) (Funding) Regulations 1999* (**the Funding Regulations**) provides:

9. Board’s power in relation to cost and expenses of proceedings

(1) In this regulation —

“**proceedings**” includes proceedings that are commenced but discontinued or otherwise not brought to finality.

(2) The Board may fix an amount that represents the cost and expenses incurred by the Board in connection with the hearing and determination of particular proceedings before it.

(3) The Board may determine —

- (a) which of the parties to the proceedings is liable for payment of the whole or any part of an amount fixed under subregulation (2); and
- (b) the manner in which, and time within which, payment is to be made.

- 15 It is agreed by all parties in the written submissions that the Board does have power to fix an amount that represents its costs and expenses incurred in connection with the hearing and final determination of the application. The parties also accept that the Board has the power to order all or any of them to pay some or all of the costs and expenses fixed by the Board in respect of its costs. The question then arises in what circumstances should the Board exercise the power and relevantly, is this an appropriate case for the Board to exercise its discretion to make such an order, and if so what is the appropriate order.

16 Section 38(10) of Schedule 1 to the Act also provides:

“(10) The relevant appeals body may make such orders (if any) as to costs in respect of a proceeding as it thinks fit.”

17 On the face of it this power might also enable the Board to make costs orders against the parties in respect of the Boards own costs. But it is obviously not expressly stated as such. At first glance the power is more likely to be understood as the normal power conferred on courts and tribunals to make costs orders in favour of a successful litigant or party in the proceedings. I note the Presiding Member of the Board in *Re Epic Energy (WA) Nominees and others*, WA Gas Review Board, Numbers 1, 2, 3 and 4 of 2004, reasons for decision delivered 20 April 2005 (**Epic Decision on costs**) expressed the opinion that s 38(10) would enable the Board to make an order against a party in relation to the Boards own costs. It appears this issue was the subject of detailed submissions to the Board in that matter. It is not necessary for me to form a concluded view because it is common ground between the parties that Regulation 9 of the Funding Regulations contains the relevant power. Also I am of the opinion that the discretion should not be exercised in the circumstances of this case in any event. It is sufficient for me to say that in my view the proper construction of s 38(10) is far from clear and is obviously arguable. No issue was raised on the submissions as to whether the Funding Regulations might be *ultra vires* or beyond power.

Discussion

18 I agree with the applicants submissions based on *Duke Eastern Gas Pipeline Pty Ltd* [2001] A CompT 3 and the Epic Decision on costs that some of the factors relevant to the Board when determining whether to exercise its discretion to order the parties to pay the Boards costs where the proceedings have been discontinued include:

- (a) the reasonableness of the conduct of the parties;
- (b) the outcome of the proceedings before the Board;
- (c) the need to ensure there are no barriers to the resolution of proceedings before the Board;
- (d) the extent to which the determination would be consistent with an approach whereby those for whose benefit the regulatory scheme exists should bear the costs;
- (e) the extent to which there were any authorities capable of providing guidance to the parties on the issues arising in the proceedings; and
- (f) the importance of the proceedings in the public interest generally.

19 I comment briefly on these factors. Nothing of substance occurred in the course of the proceedings that would give rise to a reasonable basis for any concern that any of the parties was acting otherwise than reasonably in the protection of its legitimate interests. In my view the role played by the third respondent was entirely consistent with the legislation and in accordance with its charter. I have no doubt the third respondents participation in the proceedings added significantly to the efficiency of the pre-hearing procedures and is also likely to have contributed to the early resolution of the matter. I make these comments because part of the third respondent's submission is concerned with the possibility that it should be visited with costs given its joinder in its regulatory capacity.

20 In my view parties should be encouraged to consider the early resolution of their disputes. Pre-hearing procedures often define the real issues and enable parties to properly understand (sometimes for the first time) the other party's positions and underlying interests. This is perhaps even more so the case when the dispute is concerned with administrative decision-making processes.

- 21 In this case a lengthy hearing was avoided by the discontinuance of the application. The hearing would have involved complex issues of significant public interest. The material before the Board does not indicate an obvious basis for any contention that the merits of the application were unarguable or that the proceedings were frivolous or commenced for some ulterior purpose. As already noted the Board does not know on what basis the applicants agreed to discontinue the proceedings and it is not appropriate for the Board to ask (on this occasion). It may be a relevant factor that the applicants have not provided any reason to the Board for discontinuance, but this is a matter for them to weigh up in the face of the risk of an adverse costs order that they should pay the Board's costs.
- 22 From the materials filed with the Board it is clear there were numerous submissions to the third respondent from interested parties in response to the applicant's application for revocation of coverage. There are other decisions which parties might have relied upon to guide the Board in its determinative function but there are no existing decisions on the specific issues raised by the proceedings. The proceedings constitute the first application to review a Ministers decision on coverage under the Act and it was apparent from submissions made by the parties and material filed on their behalf in the course of the proceedings that some novel and complex legal issues concerning the declaration provisions of the national access regime for essential services would have required determination. The Board understands all parties engaged appropriately qualified experts on the various issues which in itself confirms the seriousness of the contest between them and the scope for different viewpoints.

Decision

- 23 For these reasons the Board is not satisfied that there is any proper basis upon which it can or should exercise its discretion to make an order that one or all the parties should pay or contribute to the Board's own costs.

- 24 Regulation 9 of the Funding Regulations clearly gives the Board an unfettered discretion to make such an order. However in my opinion there must be some good basis for invoking the power. The Board in the circumstances of this matter is of the view that there is not sufficient reason to make an order, notwithstanding the substantial costs incurred by the Board in facilitating the conduct of the proceedings.
- 25 However parties should not consider they can conduct proceedings before the Board with out a real risk of such a costs order being made. It is a live issue which must be considered in any settlement negotiations between parties. If proceedings are delayed unreasonably by a party or parties, or the matter is not prosecuted diligently, circumstances will arise when the Board will exercise its power to make an appropriate costs order to recover its wasted costs or that part of it costs incurred because of the inefficient conduct of the matter by parties.
- 26 The order of the Board therefore is that there be no order requiring all or any of the parties to this application to pay or contribute towards the Gas Review Board's own costs.

C P Stevenson

C P Stevenson
Presiding Member
Western Australian Gas Review Board
Appeal No. 5 of 2004