

b) Receipt and delivery points (clauses 4 and 28)

Unless EAPL otherwise agrees, EAPL will own and operate all receipt point and delivery point equipment. Any receipt points owned and operated by the user are to be made available for use by EAPL at no cost and to other users of the pipeline under reasonable terms and conditions. Users may change existing receipt and delivery points if commercially and technically reasonable, including meeting reasonable criteria set out in the agreement for services.<sup>178</sup>

Upon request by a user in writing, EAPL may transfer all or part of a user's MDQ for a receipt or delivery point to another designated and pre-existing point. EAPL may grant its consent if the user: pays a reasonable charge for EAPL's costs for arranging the transfer; agrees to pay the charges applicable to the new transportation service which will not be less than the original charges; and that the user arranges and agrees with all or any other users of the relevant receipt or delivery point for sharing of the use of the facilities and charges at no extra cost to EAPL. In addition, the transfer should not affect EAPL's ability to operate the MSP properly.<sup>179</sup>

c) Overruns (clause 5 and Attachment 2 clause 4)

In the event that a user's withdrawals at a delivery point exceed the MDQ on any day, an overrun (either authorised or unauthorised) will occur.<sup>180</sup> Charges for overruns will apply on a distance basis as if the gas had been transported by EAPL from the furthestmost receipt point on the pipeline to the delivery point. EAPL's proposed overrun charges are 200 per cent of the capacity charge for authorised overruns and 350 per cent for unauthorised overruns.<sup>181</sup>

If EAPL is unable to comply with obligations to transport gas for other users, due to a user's unauthorised overrun, then the user will be liable for any loss, cost or damage EAPL may incur including consequential loss.<sup>182</sup>

d) Sharing arrangements (clause 6)

Where receipt or delivery points are shared, users will need to agree among themselves on appropriate arrangements for apportionment of daily nominations and unless EAPL has pre-appointed one, to appoint a person as the shared facility appointee. EAPL may establish procedures for the operation of the shared facility after consultation with users.

e) Gas pressures and temperatures (clause 10)

Gas pressures at receipt points are subject to minimum and maximum limits. Users must provide equipment for pressure relief and limitation at receipt points, meeting specifications reasonably required by EAPL. If the user exceeds the MHQ at a delivery point in any hour, EAPL will not be obliged to meet the minimum delivery pressure requirement for the subsequent period of 24 hours.

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<sup>178</sup> Access arrangement, Attachment 3, clause 4.

<sup>179</sup> Access arrangement, Attachment 3, clause 28.1.

<sup>180</sup> Not applicable to STP service.

<sup>181</sup> Access arrangement, Attachment 2, clause 4.4.

<sup>182</sup> Access arrangement, Attachment 3, clause 5.

EAPL will be entitled to terminate receipt of gas into the pipeline if the temperature of the gas exceeds specified limits for a period of time which in EAPL's opinion may affect the safety, operation or integrity of the pipeline.

f) Gas for pipeline operation (clause 11)

EAPL may, subject to reasonable notice, for the purpose of operating the pipeline take gas it requires from all users or arrange with any user or any other person to take and pay for the quantity of gas it requires. EAPL will adjust tariffs and charges accordingly.

g) Imbalances (clause 12)

Users are responsible for balancing input and withdrawals over a period as reasonably determined by EAPL. If an imbalance (defined by EAPL as the 'user inventory') falls outside a tolerance limit (to be established by EAPL) the user may be requested to rectify the imbalance within a reasonable time period. If it is not rectified within the period, EAPL may suspend the services and apply the applicable charges for imbalances.

The imbalance tolerance limits and time periods are defined in Attachment 4 (clause 2) as:

- 10 per cent of the user's MDQ for daily imbalance;
- 2 per cent of the user's MDQ for cumulative imbalance over a week; and
- 0.5 per cent of the user's MDQ for cumulative imbalance over a month.

The balancing charges are specified in clause 6 of Attachment 2 to the access arrangement. A user may be charged:

- 150 per cent of the cost of the quantity of gas used by EAPL to restore the user inventory to zero; and
- service fee of \$2 000 per occurrence in each month.

h) Interruptions and curtailments (clause 16)

EAPL is entitled to interrupt or reduce services for maintenance work on the pipeline, with an undertaking with respect to planned maintenance to take reasonable steps to reduce outages without the user's prior approval to less than a continuous period of 24 hours or less than an aggregate of two days per year. No notice is required in cases of emergency or unforeseen circumstances or where there is a risk of injury or damage to persons or property.

EAPL will not be liable to compensate users for any loss, injury or damage arising directly or indirectly as a result of an interruption or curtailment.

i) Priority of service (clause 17)

Clause 12 of the proposed access arrangement outlines the order of priority of service for pre existing agreements and new agreements. The priority of service established by EAPL is subject to any pre-existing contractual rights with a higher priority. Any

service may be curtailed or interrupted to allow EAPL to give effect to such pre-existing rights.<sup>183</sup>

Equivalent priority is afforded to:

- (i) the Gas Transportation Agreement with AGL Wholesale Gas Limited;<sup>184</sup> and
- (ii) contracts for class FT service, STP service or similar service entered under EAPL's previous service agreements and general terms and conditions;

The services IT-H and IT-L and similar offered under previous service agreements with EAPL have been allocated equal priority to the class IT service specified in the proposed access arrangement.

Clause 17 of Attachment 3 of the access arrangement sets out the priority services will be provided in circumstances where there is an interruption to services. Subject to any pre-existing contracts with a higher priority EAPL will service, to the extent practicable:

- firstly, class FT, STP, WFT and OFT services (or similar under pre-existing contracts or negotiated contracts);
- secondly, class IT services (or similar under pre-existing contracts).

If services must be interrupted EAPL will reduce services to users of **firm** services proportionally so that the ratio of the users' MDQ to aggregate MDQ remains. Users of IT services will be discontinued in sequence commencing with those users with the lowest priority.

Negotiable services will be interrupted and granted priority as set out in the user's agreement for services, but in any event the priority will be no higher than that of firm service.<sup>185</sup>

#### j) Liabilities and indemnities (clause 24)

Generally any liability of either party will be limited to direct loss only and does not extend to consequential losses except, for the user, in relation to receipt of non-specification gas, the user exceeding its MDQ or authorised overruns or any liability of EAPL arising out of the user's imbalances.

#### k) Amendment (clause 26)

EAPL will be entitled to amend operational clauses of an agreement for service unilaterally, subject to the changes not having a material adverse effect on the user. Other amendments will be notified to all users and referred to dispute resolution provisions if the matter cannot be resolved.

EAPL states that Attachment 4 summarises the requirements and supporting arrangements for nominations, allocations and balancing of the user's quantity of gas into and out of the pipeline. It states that full details are set out in EAPL's Nominating

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<sup>183</sup> Access arrangement, clause 12; Attachment 3, clause 17.

<sup>184</sup> This agreement has since been terminated.

<sup>185</sup> Access arrangement, Attachment 3 clause 17; Access arrangement, clause 10.2.

and Balancing Procedures as published and amended by EAPL from time to time, which do not form part of this access arrangement.

The summarised procedures are said by EAPL to be provisional only and subject to amendment as operational practices are improved and the pipeline is developed with additional users. EAPL also says it will establish a review process to consult with industry participants, users and the Commission prior to amending these procedures.

### *Gas quality specifications*

EAPL's gas quality specifications for the MSP are set out in Attachment 7 of the access arrangement. The specifications include heating value, Wobbe Index, sulphur content and reflect the existing specifications for receipt of gas at Moomba. EAPL is responsible for ensuring that gas delivery points meet these specifications. It is not obliged to accept gas that does not meet the specification and can, without liability, require a user to restrict or terminate gas received.

EAPL may vary the gas specification if it is required by law to do so or a common gas specification for NSW, ACT or Victoria is adopted.<sup>186</sup>

### *Prudential requirements*

There are a number of provisions throughout the access arrangement that relate to prudential and associated requirements. For example, prospective users must satisfy EAPL's reasonable prudential requirements, which may be in the form of the most recent audited financial statements of the user. If the requirements are not met, EAPL may reject the request for access.<sup>187</sup>

Elsewhere, the access arrangement states that prior to concluding a service agreement a prospective user must have reasonably demonstrated its financial ability to pay for the services.<sup>188</sup> Subject to its financial standing, if requested by EAPL, the prospective user must provide a satisfactory performance guarantee or other satisfactory security to EAPL guaranteeing the performance of its obligations under its service agreement.

In the context of transferring MDQ from an existing user to an intending user (trading policy), criteria listed with regard to EAPL's assessment of reasonable commercial and technical grounds include:

- the intending user satisfactorily demonstrates that it has made all necessary arrangements with producers of gas, purchasers of gas and any other **party** relating to the service, including all gas purchase, gas sale, operating and multi party receipt and delivery point arrangements (clause 27.2(6));
- the intending user provides a parent company guarantee where required and in a form satisfactory to EAPL (clause 27.2(10));
- the intending user pays or gives to EAPL a letter of credit or bank guarantee where required by and of an amount reasonably determined by EAPL (clause 27.2(11)); and

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<sup>186</sup> Access arrangement, Attachment 3, clause 7.

<sup>187</sup> Access arrangement, clause 7.1.

<sup>188</sup> Access arrangement, p. 8.

- EAPL is satisfied that the intending user is a responsible and solvent person with an appropriate level of experience within the industry (clause 27.2(12)).

### 3.2.3 Submissions by interested parties

#### *Receipt and delivery points*

Incitec suggested that the development of competitive markets for gas commodity and pipeline capacity requires that shippers have extremely flexible use of existing receipt and delivery points.<sup>189</sup> It stated that EAPL gives itself too much control over the use of receipt and delivery points by firm shippers and their assignees and that ~~firm~~ shippers should be given the flexibility to use alternative receipt and delivery points at no extra charge, so long as sufficient capacity is available. It stated that this flexibility is allowed in the US provided that capacity is available and the points are within the primary path of the firm receipt and delivery points specified in their contracts.

Incitec noted that, as with transfers of MDQ, EAPL's terms and conditions for transfers of receipt or delivery points specify that EAPL will have the power to refuse transfers for 'reasonable commercial or technical grounds' (clause 28.1 of Attachment 3 of the access arrangement). Incitec suggested the only appropriate commercial ground is the creditworthiness of the transferee and the only appropriate technical ground is whether or not sufficient capacity exists.

Incitec also expressed concern regarding the requirement for a new user to obtain the agreement of existing users as that would give existing users at a facility the ability to veto another shipper's use of that facility. An existing user could have incentives to obstruct entry at a point by another shipper.

In addition, Incitec also objected to clause 28.1(6) of Attachment 3 of the access arrangement which specifies that the transfer should not affect EAPL's ability to operate the pipeline properly stating that the word 'properly' gives EAPL an undesirable degree of discretion in accepting or rejecting transfers.

Incitec also suggested that the 'Request for Transportation Service Request Sheet' (Attachment 6 of the access arrangement) does not provide users with the desired level of flexibility.<sup>190</sup>

#### *Operational requirements and balancing provisions*

Boral noted that EAPL has chosen to exclude certain operational provisions, including its nominations and balancing procedures, ~~from~~ its access arrangement.<sup>191</sup> Boral acknowledged that EAPL should not be required to gain regulatory approval for every aspect of its pipeline operations. However, it questioned whether it is appropriate that EAPL has excluded from regulatory oversight items such as balancing provisions, which can have a significant impact on a user.

Boral objected to EAPL's method of measuring imbalances, which are expressed as a percentage of MDQ rather than a percentage of cumulative MDQ as Boral suggested.

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<sup>189</sup> Incitec submission prepared by NERA, 15 July 1999, p. 17.

<sup>190</sup> Incitec submission prepared by NERA, 15 July 1999, p. 17.

<sup>191</sup> Boral submission, 2 July 1999, p. 3.

Alternatively, Boral suggested that the imbalance tolerance limits be greater than the daily imbalance tolerance limit.

Boral identified a lack of clarity in the application of balancing charges. It called for a minimum grace period before charges would be applied and suggested that EAPL provide a mechanism for users to trade imbalances in this period.

#### *Gas quality specifications*

Esso stated that the proposed gas specification, which matches the existing specification for AGL's Sydney and ACT distribution systems and GSN's Wagga Wagga distribution system is the tightest of all south east Australian states and forms a barrier to entry to any Victorian gas moving into NSW via the Interconnect between the PTS and the MSP.<sup>192</sup>

Esso also referred to its 4 March 1999 submission to the Commission regarding the Central West Pipeline access arrangement. In that submission, Esso noted that the minimum allowed value proposed for the Wobbe Index (an important gas property used in the design of combustion appliances) applicable to gas shipped on the CWP (which has the same specification as for the MSP) is higher than the minimum allowable under regulations pursuant to the Victorian *Gas Industry Act 1994*. Esso submitted that there are no valid reasons for the higher specifications.

Esso noted that the NSW Ministry of Energy and Utilities working group is currently addressing the issue of gas specification and suggested that the Commission consider its consultation paper.

#### *Other terms and conditions*

The Commission did not receive any comments from interested parties in regard to any other terms and conditions of access to the MSP.

### **3.2.4 Commission's considerations**

#### *Overall terms and conditions*

The access arrangement contains many provisions relating to terms and conditions of access which are general in nature. Thus, while Attachment 3 of the access arrangement includes principles for terms and conditions of services, the proposed access arrangement does not include a standard service agreement, which sets out the terms and conditions on which EAPL will provide the reference service.

Attachment 4 contains a statement that the attachment provides a summary of operational requirements and provisions (including nominations, allocations and balancing requirements) and that these summarised procedures are provisional only. It further states that full details are to be found in EAPL's Nominations and Balancing Procedures and amended by EAPL from time to time, which 'do not form part of this access arrangement'.

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<sup>192</sup> Esso submission, 2 July 2000, p. 2.

While EAPL considers its approach may be reasonable, it may create a degree of uncertainty in the minds of prospective users and the wider industry.

The Commission is aware that EAPL cannot at this stage be confident that its service agreements and other documents yet to be finalised relating to terms and conditions are consistent with the terms and conditions which the Commission will approve as part of the access arrangement. The Commission expects that users may be primarily guided as to the terms and conditions on which they will gain access to the MSP by the content of the standard service agreements. However, such standard service agreements should not differ significantly from the relevant access arrangement in relation to the reference services.

Accordingly, the Commission proposes an amendment to the MSP access arrangement to make it clear that, in the event that any apparent inconsistency arises, the access arrangement prevails over the standard service agreements and other documents yet to be released.

### **Proposed amendment A3.2**

In order for EAPL's access arrangement for the MSP to be approved, the access arrangement must clearly specify that the access arrangement provisions in general, and specifically, attachments 3 and 4 of the access arrangement prevail over the term sheets, standard service agreements, EAPL's Nominations and Balancing Procedures and any other existing or future documents relating to the provision of access.

### ***Receipt and delivery points***

Submissions made by Incitec and outlined above related to the use of receipt and delivery points and the transfer of MDQ by a user from one receipt or delivery point to another. In the past, the Commission has encouraged provisions for flexibility in such arrangements. For example, in its determination on an application for authorisation by the North West Shelf Project it stated:

An issue of concern to the Commission in relation to reform of the gas industry is the delivery point of gas. The Commission considers that contractual supply arrangements with provision for alternate or additional delivery points have the potential to foster more flexible and efficient supply arrangements. However, if delivery point provisions are rigid and open to dispute and protracted renegotiation, gas reform initiatives may be frustrated. In the Commission's view, a pro-competitive delivery point provision in a gas supply contract would have options that:

- provide for the nomination of alternate or additional delivery points, subject to consent for such nominations not being unreasonably withheld where the change or addition would not result in significant additional cost to the parties; and
- provide for dispute resolution, according to a fair and efficient process specified in the agreement, by an independent party acceptable to the parties to the agreement, so as to deal with any issues that might arise.<sup>193</sup>

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<sup>193</sup> ACCC Authorisation No A90624, North West Shelf Project, 29 July 1998, p. vii.

While the circumstances of gas supply contracts may differ, similar issues apply in gas transportation contracts, but with the potential benefit of access dispute resolution measures available under the Code.

Aspects in relation to receipt and delivery points that may be a concern to the Commission include:

- the interpretation of ‘reasonable commercial and technical grounds’;
- the requirement that all other users at a receipt or delivery point must agree to sharing a facility;
- flexibility in the use of receipt and delivery points; and
- charges applicable to the new transportation agreement to not be less than the original charges.

The reasonable commercial and technical grounds set out in clause 28 of Attachment 3 to the access arrangement. The Commission shares the view put forward by Incitec that clause 28.1(6) of Attachment 3 to the proposed access arrangement gives EAPL an undesirable degree of discretion in accepting or rejecting transfers and is unnecessary given the earlier provision that the necessary capacity must be available. Accordingly, the Commission proposes that this clause be deleted. EAPL has indicated to the Commission that it is prepared to delete the clause.<sup>194</sup>

#### **Proposed amendment A3.3**

In order for EAPL’s access arrangement for the MSP to be approved, EAPL must delete clause 28.1(6) of Attachment 3 to the proposed access arrangement.

In addition, clause 28.1(5) of Attachment 3 includes a provision that EAPL may make its consent for a user to transfer a receipt or delivery point conditional on all users of the relevant facility agreeing to share the facility. The Commission is concerned that this provision may give an incumbent user who is a potential competitor of the transferee some commercial advantage by being forewarned of the proposed transfer. Moreover, it is difficult to envisage that users would have more knowledge than the service provider, who should be in the best position to judge whether the transfer is feasible (for example, in terms of available capacity). Accordingly, the Commission considers that clause 28.1(5) of Attachment 3 of EAPL’s proposed access arrangement is unreasonable and proposes that it be deleted.

#### **Proposed amendment A3.4**

In order for EAPL’s access arrangement for the MSP to be approved, EAPL must delete Clause 28.1(5) of Attachment 3.

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<sup>194</sup> EAPL response to submissions, 17 August 2000, p. 29.



EAPL has rejected Incitec's claim that EAPL has not provided sufficient flexibility in the use of receipt and delivery points. However, it is prepared to amend the identified form to clarify its position that multiple receipt and delivery points are available. An amendment to this effect is required by the Commission.

### Proposed amendment A3.5

In order for EAPL's access arrangement for the MSP to be approved, the *Request for Transportation Services – Request Sheet* must be amended to include the option of multiple receipt and delivery points.

The Commission has some concern with the requirement by EAPL for the charges applicable to the new transportation agreement to be not less than the original charges, particularly given the structure of EAPL's tariffs, which are distance related.

For example, a user who signed a contract for transportation of gas between Moomba and Wilton (a distance of 1 299 km) and who some time later wished to take delivery of some of that gas at the mainline delivery point at Marsden/West Wyalong (involving a transportation distance of 942 km) would be denied a reduction in costs related to the reduced transportation distance of more than 25 per cent.<sup>195</sup> However, one counter argument would be that such an outcome is a consequence of EAPL having provided a cost reflective tariff structure and that it should not have had to provide for, or reserve, the subject capacity between the original receipt and delivery points and then suffer loss of revenue as a result of a user's decision to seek a change to its contractual arrangements.<sup>196</sup>

Flexibility with regard to choice of receipt or delivery points could of course, be negotiated between the parties at the outset, possibly with some premium on the charges to the user. Such arrangements are potentially available by means of a negotiable service.

After considering the issues, the Commission does not propose to require a change to this provision during this initial access arrangement period. It will monitor its effect, if any, on access issues over this time and revisit the issue if necessary at the first scheduled review.

The Commission notes EAPL's intention to recover reasonable costs of such a transfer. To the extent EAPL incurs costs, it is not unreasonable for it to seek cost recovery. As such, the charges are also open to challenge by users if they are deemed excessive. The Commission believes this matter is best left to the parties to resolve at the time. Accordingly, the Commission does not propose to seek an amendment to the access arrangement on this issue.

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<sup>195</sup> An even greater reduction in transportation distance would potentially be involved if a user sought to redirect gas supplies destined for the NSW to the SA market using the interconnection between the MSP and MAPS immediately downstream of the gas inlet point at Moomba.

<sup>196</sup> The opportunity to trade capacity with another user might be limited in the absence of a receipt point at the new proposed delivery point.

### *Overruns*

EAPL is proposing overrun charges of 200 per cent of the capacity charge for authorised overruns and 350 per cent for unauthorised overruns. These charges appear excessive when compared with charges for other pipelines. For example, the charges applied to the Central West Pipeline, which branches off the MSP, are 120 per cent for authorised overruns and 200 per cent for unauthorised overruns.<sup>197</sup> The same charges have been proposed by NT Gas Pty Limited for the Amadeus Basin to Darwin Pipeline.<sup>198</sup> However, comparisons of this nature must be qualified because of factors such as different tariff structures for services (CWP, for example, is based on throughput, not capacity) and any conditions that might be attached to authorisation of overruns (such as a limited number in any one period).

While EAPL's charges appear excessive, the Commission considers that penalties may be warranted when spare capacity exists. This is to prevent misuse of overruns by users, who might use overruns as a form of interruptible service in the knowledge that interruption is unlikely to occur because of the existence of spare capacity. Such a situation might result in an undue revenue loss to EAPL. The Commission invites comments from interested parties on this issue, particularly on the level of overrun charges proposed by EAPL.

### *Operational requirements and balancing provisions*

The Commission shares concerns expressed by Boral on the need for greater certainty in relation to operational requirements and balancing provisions in Attachment 4 of the access arrangement. However, it is aware of difficulties in establishing procedures for the MSP to deal with receipt points at Moomba, Culcairn (on the Interconnect) and in Sydney with the advent of new supplies from Victoria. The Commission understands EAPL's current procedures are still under development and notes that EAPL has undertaken to establish a review process to consult with industry participants, users and the Commission prior to amending these procedures.

The Commission notes that EAPL has allowed for users to trade inventory on the pipeline for the purpose of maintaining balance,<sup>199</sup> although it has not offered any mechanism as proposed by Boral. Nevertheless, the Commission does not propose to require any change in this regard in this access arrangement period in recognition that such a mechanism may require development over time in line with market requirements.

As for the balancing charges, the Commission is aware of the importance to pipeline operation of ensuring balance between gas receipts and deliveries. It has taken account of EAPL's proposal that charges may be levied only if a user does not overcome an imbalance after due notice has been given by EAPL to that user and EAPL is unable to cease receipt from or delivery to the user to overcome the imbalance. It also notes that EAPL proposes to distribute the net proceeds of these charges among eligible users who remain in balance.

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<sup>197</sup> ACCC, *Final Decision, Access Arrangement by AGL Pipelines (NSW) Pty Ltd for the Central West Pipeline*, 30 June, 2000, p. 106.

<sup>198</sup> NT Gas Pty Limited, *Access Arrangement for the Amadeus Basin to Darwin Pipeline*, pp. 12-13.

<sup>199</sup> Access arrangement, Attachment 4, clause 2 (k).

Nevertheless, the Commission is concerned about the amount and discretionary nature of the balancing charges proposed and considers that the wording of the clause relating to the service fee may be confusing.<sup>200</sup> It also questions whether a mark up on the cost of purchase of gas is necessary, given the added imposition of the service fee.

To address these concerns, the Commission is seeking a definite commitment to the proposed review of the procedures with users, potential users and the Commission. During this review the application and quantum of balancing charges must also be considered.

Accordingly, the Commission proposes an amendment to the MSP access arrangement for EAPL to establish a definite time for a review of operational and balancing provisions and charges.

### **Proposed amendment A3.6**

In order for EAPL's access arrangement for the MSP to be approved, EAPL must include in the access arrangement a provision that the proposed review of operational and balancing provisions and charges will be conducted within six months of approval of the access arrangement by the Commission.

### ***Gas quality specifications***

The Commission notes Esso's concerns about the gas quality specifications proposed for the MSP. The proposed access arrangement states EAPL may vary the gas specification if it is required by law to do so or a common gas specification for NSW, ACT or Victoria is adopted.

The Commission also notes that the same gas quality specifications are identified for the NSW and ACT gas distribution networks. It understands that this issue has been debated extensively within the Australian natural gas industry.

The Commission is concerned that overly tight gas quality specifications may hinder the potential for inter-basin gas competition in NSW. However, it notes that changing the gas specification for the MSP in isolation would have little, if any, practical effect. In order for gas to reach customers in NSW and the ACT, it also must be acceptable on the distribution networks involved. The Commission is also aware that its role and expertise is as an economic rather than technical regulator, and that it has not conducted a full technical review of this issue.

The Commission notes that IPART has addressed this issue in relation to gas distribution by requiring amendments to two access arrangements which would have the effect of the respective service providers implementing revised gas specifications

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<sup>200</sup> Access arrangement, Attachment 2, clause 6.

once they are adopted in NSW.<sup>201</sup> The Commission adopted a similar approach for the Central West Pipeline access arrangement.<sup>202</sup>

The AGA's Gas Specification Working Group has reached an agreement on a proposed common specification for NSW and Victoria.<sup>203</sup> The Commission proposes that EAPL's access arrangement be amended to ensure that any new specification recommended by the Gas Specification Working Group and approved by the relevant jurisdictions is reflected in the access arrangement for the MSP. The Commission recognises that implementation of the revised specification will be subject to obligations under existing service agreements.

### **Proposed amendment A3.7**

In order for EAPL's access arrangement for the MSP to be approved, EAPL must amend the access arrangement to state that EAPL will, if recommendations by the AGA Gas Specification Working Group to adopt more flexible gas specifications in south-eastern Australia are approved, substitute that specification for the specification currently set out in Table 7.1A of Attachment 7 of the access arrangement, subject to obligations under existing service agreements.

### ***Prudential requirements***

The Commission considers that it is important for users and prospective users to be aware of all the conditions of use of the MSP including any prudential requirements and related conditions required to be satisfied by users or intending users prior to commencing a contract.

At present, prudential requirements in relation to different transactions are outlined in various locations in the access arrangement.

The Commission is concerned that this will result in different requirements being applied to different users and/or transactions. A more appropriate approach to prudential requirements is to set out the prudential requirements applicable across the entire access arrangement in a central location. For example, clause 1.3 of the CWP access arrangement states:

The "Prudential Requirements" applicable to Prospective Users of the Pipeline are:

- The Prospective User must be resident in, or have a permanent establishment in, Australia;
- The Prospective User must not be under external administration as defined in the Corporations Law or under any similar form of administration in any other jurisdiction;

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<sup>201</sup> IPART, Final Decision: Access arrangement proposed by Great Southern Energy Networks Pty Ltd, March 1999, p. 140 and Final Decision: Access arrangement for AGL Gas Networks Limited natural gas system in NSW, July 2000, p. 234.

<sup>202</sup> ACCC, Final Decision: Access arrangement by AGL Pipelines (NSW) Pty Ltd for the Central West Pipeline, June 2000, p. 111.

<sup>203</sup> VENCorp, *Victorian Energy Update*, December 1999, p. 2.

- The Prospective User may be required to provide reasonable security in the form of a parent company guarantee or a bank guarantee or similar security. The nature and extent of the security will be determined having regard to the nature and extent of the obligations of the Prospective User under the Service Agreement.

The Commission considers this approach and the requirements specified is beneficial to users and prospective users. Accordingly, the Commission proposes an amendment to the MSP access arrangement.

### **Proposed amendment A3.8**

In order for EAPL's access arrangement for the MSP to be approved, EAPL must clarify the prudential requirements for users and prospective users.

The Commission anticipates that EAPL's proposed terms and conditions may satisfy the requirements of the Code following incorporation of the amendments proposed above. Comments are invited from interested parties on the appropriateness of the above amendments and the terms and conditions in general.

## **3.3 Capacity management policy**

### **3.3.1 Code requirements**

Section 3.7 of the Code requires an access arrangement to include a statement that the covered pipeline is either a contract carriage pipeline or a market carriage pipeline.

### **3.3.2 EAPL's proposal**

EAPL has provided a statement that the MSP is a contract carriage pipeline.

### **3.3.3 Submissions by interested parties**

No comments were received on this issue.

### **3.3.4 Commission's considerations**

As the access arrangement includes a statement that the MSP is a contract carriage pipeline, it satisfies the requirements of section 3.7 of the Code.

## **3.4 Trading policy**

### **3.4.1 Code requirements**

Sections 3.9 to 3.11 of the Code set out the requirements for a trading policy. If a pipeline is a contract carriage pipeline, the access arrangement must include a trading policy that explains the rights of a user to trade its right to obtain a service to another person. The trading policy must, amongst other things, allow a user to transfer capacity:

- without the service provider’s consent, if the obligations and terms under the contract between the user and the service provider remain unaltered by the transfer; and
- with the service provider’s consent, in any other case. Consent may be withheld only on reasonable commercial or technical grounds and the trading policy must specify conditions under which consent will be granted and any conditions attaching to that consent.

### 3.4.2 EAPL’s proposal

EAPL’s proposed access arrangement states that users can trade rights in three circumstances.<sup>204</sup> These are:

- a user may make a ‘bare transfer’ without the consent of EAPL if, prior to utilising it, the transferee notifies EAPL of the portion and nature of contracted capacity subject to the bare transfer;
- a transfer or assignment of all or part of a user’s contracted capacity may occur by a way other than a bare transfer with the prior written consent of EAPL. EAPL may withhold its consent only on reasonable commercial or technical grounds consistent with the principles for terms and conditions of services;<sup>205</sup> and
- upon a request by a user in writing, EAPL may transfer all or part of a user’s MDQ for a receipt point or delivery point set out in a service agreement to another designated and pre-existing receipt or delivery point respectively. EAPL’s consent may only be withheld on reasonable commercial or technical grounds, and may be given subject to reasonable commercial or technical grounds consistent with the principles for terms and conditions of services.

EAPL’s principles for terms and conditions are set out in Attachment 3 to the proposed access arrangement. Of relevance to this issue, clause 27 of the principles for terms and conditions include a requirement for a user seeking to transfer MDQ to pay a reasonable charge determined and levied by EAPL. The level of the charge is for the cost of the transfer of the MDQ whether or not the transfer proceeds to completion. The charge is not specified (clause 27.2(11)). Users must also agree to pay any surcharge levied on the reference service (clause 27.2(5)).

As outlined in section 3.2 of this *Draft Decision* in relation to prudential requirements, EAPL may also require a parent company guarantee from the intending user and either a letter of credit or bank guarantee of an amount reasonably determined by EAPL (clause 27.2(11)). EAPL must also be satisfied that the intending user is a responsible and solvent person with an appropriate level of experience within the industry (clause 27.2(12)) as well as not being in default under the existing service agreement (27.2(9)).

In addition, the user must demonstrate to EAPL that it has made all necessary arrangement with producers, purchasers and other users in respect to purchasing, receiving and selling gas (clause 27.2(6)).

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<sup>204</sup> Access arrangement, clause 15.

<sup>205</sup> Access arrangement, Attachment 3 clause 27.

### 3.4.3 Submissions by interested parties

Incitec noted that in FERC has established a secondary market in pipeline capacity in the USA. This allows pipeline users with firm contracts to resell their rights. Incitec suggests that this secondary market has been a success and overcomes a pipeline operator's tendency to inhibit the development and operation of a secondary market.<sup>206</sup>

Incitec suggests that EAPL has demonstrated this tendency to hinder the pipeline capacity market through its proposed trading policy. As with similar provisions relating to receipt and delivery points, it questioned the use of 'reasonable commercial and technical grounds' which must be satisfied, stating that the creditworthiness of the transferee should be the only criterion. It suggested that the 'reasonable' charge for transfer should either be deleted or the amount stated and it believed EAPL has broad discretion to levy a surcharge on transferred capacity.

Incitec further stated that EAPL's requirement that intending users satisfy EAPL that they have secured a supply of gas is unreasonable in that it gives EAPL too much discretion to block transfers and the power to demand commercially sensitive information. It concluded that EAPL's requirement that an intending user demonstrate that they are a 'responsible and solvent person with an appropriate level of experience within the industry' is unreasonable and gives EAPL the power to block competitors of EAPL or its affiliates.

### 3.4.4 Commission's considerations

The Commission notes that the access arrangement for the MSP must include a trading policy to meet the minimum requirements of the Code as it is a contract carriage pipeline. The Commission considers that the trading policy in the access arrangement closely follows sections 3.9 to 3.11 of the Code.

However, Incitec has raised concerns in regard to the discretion that the policy provides to EAPL. In particular, the use of reasonable commercial and technical grounds in approving the transfer of capacity between users.

The Commission acknowledges Incitec's concern about the possibility of EAPL imposing excessive charges to users or intending users for the transfer of capacity through clause 27.2(1) of Attachment A to the access arrangement. However, the transfer of capacity may involve some costs, which may vary on a case-by-case basis, and it may be in the legitimate interests of the service provider to levy a reasonable charge.

Incitec also raised concerns that clause 27.2(5) (in relation to a user paying a surcharge for the reference service) would provide EAPL with a broad discretion to level a surcharge on transferred capacity. As noted by EAPL a surcharge may be applied to users pursuant to section 8.25 and 8.26 of the Code. As stated in the Code, a service provider is required to seek the approval of the regulator to levy a surcharge.

Clause 27.2(6) of the MSP access arrangement requires an intending user to demonstrate that it has made all the arrangement necessary for the receipt of gas.

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<sup>206</sup> Incitec submission prepared by NERA, 15 July 1999, pp. 13-15.

Incitec has suggested that the clause provides EAPL with an undesirable level of discretion and access to commercial information. As noted by EAPL the information sought from intending users is the same as that sought from prospective users seeking service from EAPL. In general, information of a general nature rather than detailed information is sufficient for EAPL to determine the intentions and requirements of the intending user. EAPL should not obtain, or use, commercially sensitive information gathered pursuant to this clause of the access arrangement beyond that necessary to meet these requirements.

### **Proposed amendment A3.9**

In order for EAPL's access arrangement for the MSP to be approved, clause 27.2(6) must be amended to state that written confirmation to EAPL's satisfaction is required from the intending user that the appropriate arrangements have been made. EAPL should not be able to obtain commercially sensitive information from intending users beyond the scope of this criterion.

Incitec also argued that clause 27.2(12) of the access arrangement, which requires a user to be 'a responsible and solvent person with an appropriate level of experience within the industry', should be deleted.

EAPL has argued that the key aspect of this clause is in regard to the financial solvency of the intended user. In response to Incitec's concerns, EAPL has suggested that clause 27.2(9) (requiring a user not be in default under the existing service agreement) and clause 27.2(12) be combined to a single criteria regarding financial solvency. The Commission agrees that this change is desirable. An amendment to the access arrangement is consequently required.

### **Proposed amendment A3.10**

In order for EAPL's access arrangement for the MSP to be approved, EAPL must delete clause 27.2(12) of Attachment A to the access arrangement and amend clause 27.2(9) of Attachment A to the access arrangement to read: 'The Intending User is able to demonstrate its creditworthiness to EAPL's reasonable satisfaction'.

## **3.5 Queuing policy**

### **3.5.1 Code requirements**

Sections 3.12 to 3.15 set out the Code's requirements for a queuing policy. **An** access arrangement must include a queuing policy for determining the priority given to users and prospective users for obtaining access to **a** covered pipeline and for seeking dispute resolution (under section 6 of the Code).

A queuing policy must be set out in sufficient detail to enable users and prospective users to understand in advance how it will operate. It must also, to the extent



reasonably possible, accommodate the legitimate business interests of the service provider and of users and prospective users and generate economically efficient outcomes.

### **3.5.2 EAPL's proposal**

Where there is insufficient capacity to satisfy a user's request to obtain a service from EAPL a queue will be established and maintained for the orderly allocation of capacity.<sup>207</sup> All registered applications for FT service, STP service and negotiable services will be placed in the queue.<sup>208</sup> The date and time order of a request is the date and time that it is registered by EAPL.

When a request is placed in the queue, EAPL will advise the prospective user:

- the available capacity at the requested receipt and delivery point; and
- the current position of the complying request in the queue.

EAPL will update these details at reasonable intervals and when the prospective user's queue position is elevated.

In responding to a request for service, EAPL will also advise the prospective user:

- whether spare capacity exists to satisfy the request; or
- that spare capacity does not exist and the prospective user has been registered on the queue. An explanation why spare capacity does not exist and indicating when the requirement might be satisfied must also be provided to the user; or
- that investigations are required to be undertaken to advise the user whether any spare capacity exists. The nature, time frame and cost of any such investigations must be included in this response.

In general, once EAPL determines that capacity can be made available, that capacity will be progressively offered to each prospective user in the queue in order of registration. A prospective user has 14 days to respond to EAPL's offer. Following a positive response EAPL will provide a service agreement to that user. The prospective user has 30 days to respond to this service agreement. The request for service from the user will lapse if a service agreement is not settled between the prospective user and EAPL. The capacity can then be offered to the next prospective user on the queue.

A request will not lapse in the event that there is a dispute. The request will retain its priority until the dispute is resolved in accordance with the Code.

### **3.5.3 Submissions by interested parties**

No submissions were received on this issue.

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<sup>207</sup> Access arrangement, clause 7.2.

<sup>208</sup> The queuing policy does not apply to WFT, OFT and class IT services.

### 3.5.4 Commission's considerations

The purpose of a queuing policy is to allocate spare capacity where there is insufficient capacity to satisfy the needs of all users and potential users who have requested capacity. The Commission notes that no comments have been raised about the proposed queuing policy for the MSP by interested parties.

The Commission considers that the proposed queuing policy in the main satisfies the requirements of the Code. However, the Commission has some concerns over clause 7.5(13)(b) which requires a prospective user to reasonably demonstrate that it has made appropriate arrangements for upstream and downstream transport and supply of gas.

This requirement is similar to condition (6) of clause 27.2 of the *Principles for Terms and Conditions of Services*, which was discussed above under the heading 'Trading Policy'. The Commission is concerned that this requirement, if enforced, would give EAPL an unnecessarily high level of access to the commercially sensitive information held by prospective users. EAPL should not be able to compel disclosure of commercially sensitive information.

#### Proposed amendment A3.11

In order for EAPL's access arrangement for the MSP to be approved, clause 7.5(13)(b) must be amended to state that written confirmation to EAPL's satisfaction is required from the prospective user that the appropriate arrangements have been made. EAPL should not be able to obtain commercially sensitive information from intending users beyond the scope of this criterion.

## 3.6 Extensions and expansions policy

### 3.6.1 Code requirements

The Code requires an access arrangement to have an extensions and expansions policy (section 3.16). The policy is to set out the methodology to assess whether any extension to, or expansion of, the capacity of the system will be treated as part of the covered pipeline. A service provider is also required to specify the impact on reference tariffs of including an extension or expansion with the covered pipeline.<sup>209</sup> In addition, an extensions and expansions policy must outline under what conditions the service provider will fund new facilities and provide a description of those new facilities.

The cost of an extension or expansion may be added to the capital base if certain criteria are met. A service provider is also able to recover the costs associated with a project by a surcharge and/or capital contribution. For example, a service provider may be able to recover an amount that would otherwise be included in the speculative investment fund (sections 8.25 and 8.26) by levying a surcharge to recover from incremental users an amount that meets the prudent investment test. Accordingly, the

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<sup>209</sup> For example, reference tariffs may remain unchanged, but a surcharge may be levied on incremental users.

service provider would be able to recover more than what would be available through reference tariffs. A service provider must seek the approval of the regulator to levy a surcharge. Further discussion on new facilities investment can be found in section 2.3 of this *Draft Decision*.

### 3.6.2 EAPL's proposal

EAPL's capital base is proposed to include the entire covered pipeline as described in the Code as well as nominated new facilities investments:

- the pipeline extension between Wagga Wagga and Culcairn.<sup>210</sup>
- looping of a section of the Canberra lateral; and
- the Uranquinty compressor.<sup>211</sup>

EAPL does not expect and other new facilities to be constructing during the initial access arrangement period. In the event that EAPL does further extend the pipeline geographically or expand its capacity it proposes to decide, with the consent of the Commission, whether any new augmentation will be part of the covered pipeline. EAPL states that it may require a surcharge or extension of the term requested by the prospective user in order to provide sufficient revenue to support the capital and operating cost of the new facilities. A surcharge will be required if the NPV for the proposed project at the reference tariff over the term is less than the NPV of the capital and operating costs of the new facilities plus a contribution for the use of existing facilities. The amount of the surcharge will be the amount required to equate the revenue and cost NPVs.<sup>212</sup>

EAPL's extensions and expansions policy also states that if the type or volume of services change so that any part of the speculative investment fund satisfies section 8.16 of the Code then that amount may be added to the capital base.

Although not anticipated, EAPL may undertake new facilities investment other than that presently identified. The extensions and expansions policy provides that EAPL will decide, with the consent of the Commission, whether to include that facility in the access arrangement.

The policy provides that a surcharge may be requested from the users of a new facility to assist in the recovery of the cost of that facility. A surcharge will be sought if the NPV of revenues for the proposed project at the reference tariff over the term (of the service agreement for that facility) is less than the NPV of the capital and operating costs of the new facility plus a contribution to the use of the existing MSP facilities. The amount of the surcharge will be the amount required for the NPV of revenues to equal the NPV of costs. A user would be able to negotiate a longer term for a service agreement of up to 20 years in order to reduce or eliminate a surcharge.

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<sup>210</sup> Access arrangement, clause 16.1. EAPL provides arguments for inclusion of these facilities in the capital base in the supplementary access arrangement information. Refer section 2.2 of this *Draft Decision*.

<sup>211</sup> Access arrangement information, clause 3.3.

<sup>212</sup> No formal statement is made as to the discount rate to be applied, although the supplementary access arrangement information assumes a discount rate of 8.0 per cent (pre-tax real rate) in the evaluation of the incremental revenue of the proposed Canberra looping.

In addition, clause 16.7 of the access arrangement provides that any amount in the speculative investment fund which in the future satisfies section 8.16 of the Code may be included in the capital base.

### **3.6.3 Submissions by interested parties**

NERA provided a number of comments on the extensions and expansions policy, including:

- that the NPV test with surcharges seems a sound policy but that clear standards and procedures are required for implementation;
- that clause 16.7 ‘appears to provide for the future rolling-in of projects originally constructed on an incrementally priced basis’ and that EAPL would ‘be able to justify rolling in the costs of virtually all projects on the basis of a simple assertion of “system-wide benefits”.’ Accordingly NERA proposes that this clause should be deleted; and
- that the access arrangement requires ‘further explanation, clarification and scrutiny going forward’ to ensure that existing customers do not cross-subsidise new customers.<sup>213</sup>

NERA has referred the Commission to the policy of FERC in relation to the treatment of new facilities. It is suggested that this policy provides a more transparent approach to new facilities investment in comparison to the proposed MSP access arrangement.<sup>214</sup>

### **3.6.4 Commission’s considerations**

EAPL has identified two forthcoming expansions of the MSP that it intends to carry out during the initial access arrangement period. The capital expenditure would be included in EAPL’s forecast costs and be included in the MSP access arrangement with the approval of the Commission.

For any new facilities investment that EAPL would wish to include in the access arrangement, proposed revisions to the access arrangement would be required. These revisions would include the impact of the expenditure on reference tariffs. The Commission would assess the revisions in accordance with the public consultation process set in the Code.

The Commission notes the concerns expressed by NERA in relation to transparency in the process of including new facility investment expenditure in the capital base. The proposed access arrangement in conjunction with the Code will require the Commission to assess the appropriateness of the proposed roll-in against various criteria. To date, the Commission has completed an assessment of revisions to an access arrangement for the purpose of rolling new facilities investment into the capital base. Another assessment is currently under way. This experience leads the Commission to conclude that the Code process involved provides for a suitable degree of transparency.

At present there is no mechanism in the access arrangement to provide for notification to the Commission of any expansions, or extensions, to the MSP that come into service.

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<sup>213</sup> Incitec submission prepared by NERA, 15 July 1999.

<sup>214</sup> Incitec submission prepared by NERA, 15 July 1999, p. 10.

The Commission considers that it should be alerted to the commissioning of extensions and expansions to aid in its role as transmission access regulator. Accordingly, the Commission requires an amendment to the MSP access arrangement.

#### **Proposed amendment A3.12**

In order for EAPL's access arrangement for the MSP to be approved, EAPL must specify in the access arrangement that it will notify the Commission of the Commencement of services provided through expansions and extensions to the MSP and that notification must be given prior to commencement of operation of the facility..

Incitec has raised some concerns in relation to surcharges. The Commission considers that some clarification is needed, in particular, that the discount rate used for the NPV analysis be specified. The Commission considers that the appropriate discount rate is the vanilla WACC. This is dealt with in the amendment below.

#### **Proposed amendment A3.13**

In order for EAPL's access arrangement for the MSP to be approved, EAPL must amend clause 16.6 to define the discount rate to be applied in the NPV analysis as the vanilla WACC determined in accordance with the Commission's *Final Decision*.

The policy can be clarified further by noting that in adding a recoverable portion to the capital base the Commission would be required to be satisfied that the recoverable portion meets the tests of section 8.16 of the Code.

The Commission notes Incitec's concern that any amounts recovered via a surcharge should not to be included in the speculative investment fund. The Commission understands that the Code (section 8.26(b)) does not permit this and that the surcharge determined by EAPL must be approved by the Commission.

#### **Proposed amendment A3.14**

In order for EAPL's access arrangement for the MSP to be approved, EAPL must amend clause 16.7 to include 'with the approval of the Commission' following the phrase 'to the Capital Base'.

### **3.7 Review and expiry of the access arrangement**

#### **3.7.1 Code requirements**

Section 3.17 of the Code requires an access arrangement to include a date upon **which** the service provider must submit to the regulator a revised access arrangement

(revisions submission date) and a date upon which the revisions are intended to commence (revisions commencement date).

The regulator's assessment of the appropriateness of the two dates set under section 3.17 must have regard to the objectives contained in section 8.1 of the Code. The regulator may require an amendment to the proposed access arrangement to include earlier or later dates and may also define a specific major event as a trigger that compels the service provider to submit revisions prior to the revisions submission date.

**An** access arrangement period accepted by the regulator may be of any duration. However, if the period is greater than five years, the regulator must consider whether mechanisms should be included in the access arrangement to address the potential risk that forecasts, on which terms of the proposed access arrangement are based, subsequently prove to be incorrect (section 3.18 of the Code). The Code provides the following examples of mechanisms for guidance: triggers for early submission of revisions based on the service provider's profitability or the value of services reserved in contracts, or changes to the type or mix of services provided (section 3.18(a)); and the return of some or all revenue or profits in excess of a certain amount to users (section 3.18(b)).

Finally, it should be noted that the revisions commencement date is not a fixed date but is determined by the regulator at the time at which it approves the revisions pursuant to section 2.48 of the Code. This section states that:

Subject to the Gas Pipelines Access Law, revisions to an Access Arrangement come into effect on the date specified by the Relevant Regulator in its decision to approve the revisions (which date must not be earlier than either a date **14** days after the day the decision was made or ... the Revisions Commencement Date).

### **3.7.2 EAPL's proposal**

EAPL proposed to submit revisions to the access arrangement on or before 1 January 2005, and that the revisions would commence either six months later, or on the date that the Commission's approval of the revisions to the access arrangement takes effect under the Code, whichever is later. Thus, with the commencement date of 1 July 2000 originally anticipated for the access arrangement,<sup>215</sup> the length of the initial access arrangement period would have been approximately five years.

### **3.7.3 Submissions by interested parties**

The Commission did not receive any submissions relating to this issue.

### **3.7.4 Commission's considerations**

EAPL's proposal for the revisions submission date is consistent with section 3.17 of the Code in that it includes a date upon which the service provider must submit revisions to the access arrangement and a date upon which those revisions are intended to commence.

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<sup>215</sup> Access arrangement, clause 5.