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Dear Mr McCormack

East Australia Pipeline Limited ("EAPL") and Australian Competition and Consumer Commission ("ACCC")

Impact of the Epic Decision on the Draft Decision by the ACCC on the Access Arrangement by EAPL for the Moomba to Sydney Pipeline System

You have asked for our views on whether, in light of the *Epic Decision*, there are errors of law in the Draft Decision of the Australian Competition and Consumer Commission ('ACCC') dated 19 December 2000 relating to the Access Arrangement for the Moomba to Sydney pipeline system.

1 Introduction

Since the ACCC issued its Draft Decision, the Full Court of the Supreme Court of Western Australia has considered, in *Re Dr Ken Michael AM; ex parte Epic Energy (WA) Nominees Pty Ltd and Anor*[1] *('Epic Decision')*, an application for relief in respect of a draft decision by the Western Australian Regulator on a proposed access arrangement for the Dampier to Bunbury natural gas pipeline. In the course of its judgment the Court had to decide the correct interpretation and application of the National Third Party Access Code for Natural Gas Pipeline Systems 1997 (the 'Code'). The judgment establishes principles and approaches for the application of the Code to all access arrangements including the access arrangement proposed by East Australian Pipeline Limited for the Moomba to Sydney pipeline system.

This letter summarises some of the relevant principles established by the *Epic Decision* and examines whether, in light of those principles, the ACCC's Draft Decision relating to the Access Arrangement for the Moomba to Sydney pipeline system involves errors of law. The discussion is not comprehensive but rather focuses on what we consider to be some of the key aspects of the *Epic Decision* and the ACCC's Draft Decision.

[1] [2002] WASCA 231

2 Principles established by the Epic Decision

The Court noted[2] that when interpreting terms or phrases used in the Code, and determining whether they are intended by the legislature to be interpreted and applied in special technical senses used in the field of economics, it is usual to have regard to usage at the date of enactment of the legislation. In this case, the relevant date appears to be 18 December 1997, being the date on which the first of the implementing Acts, the South Australian Act, was enacted.

The Court was particularly concerned with the correct interpretation and application of the provisions of sections 2.24, 2.25, 3 and 8 of the Code and the inter-relationship of those provisions. The Court's conclusions included the following:

2.1 The Regulator is required by s2.24 to take into account the factors stipulated in s22.24 (a) to (f) and give them weight as fundamental elements in assessing a proposed Access Arrangement with a view to reaching a decision whether or not to approve it.[3]

2.2 In establishing the initial Capital Base for a pipeline in existence at the commencement of the Code, the Regulator is required to take into account the factors specified in s8.10(a) to (k) and give weight to them as fundamental elements in his decision.[4]

2.3 Section 2.24 deals with a single process to be undertaken by the Regulator to decide whether or not to approve a proposed Access Arrangement. The process appears to be naturally and sensibly described as an "assessment" as indicated by the third sentence. In carrying out that assessment process the Regulator may only approve if certain matters are satisfied (first sentence), may not refuse approval solely because of other matters (second sentence), and must take into account factors (a) to (g) (third sentence). No obvious difficulty is presented by such a construction.[5]

As the court states[6]:

> "…….the legislative intention appears to be clear that in assessing a proposed Access Arrangement, which includes the consideration of s3.1 to s3.20 for the purposes of the first sentence of s2.24, the Regulator is required to take into account, in the sense indicated earlier, the factors set out in s2.24(a) to (g).
>
> It does not follow from this, however, that those factors are intended to be, or are capable of being, applied to every issued presented by s3.1 to s3.20. The precise nature of the elements and principles set out in s3.1 to s3.20 will determine whether

[2] Para 17
[3] Para 55
[4] Para 56
[5] Para 58
[6] Paras 61-62

> there is scope for the application of s2.24(a) to (g) factors to guide the exercise of discretion by the Regulator in his assessment."

2.4 The Reference Tariff Principles in s8 are expressly the subject of both s3.4 and s3.5. The effect of s3.4 and s3.5 is as though the s8 principles were set out fully in each of those sub-sections.[7]

2.5 Section 8.1 contains principles which are a statement of the objectives to guide the design of a Reference Tariff and a Reference Tariff policy.[8] There are many points at which the principles enunciated in s8 call for evaluation, the exercise of judgement, the formation of opinion and other exercises of discretion by the Regulator. The establishment of the initial Capital Base for a covered pipeline in existence at the commencement of the Code, provides a ready example of this.[9]

2.6 While s8.10 (a) and (b) specify two valuation methodologies, s8.10 (c) requires the Regulator to consider other well recognised valuation methodologies and s8.10 (d) requires the Regulator to weigh the advantages and disadvantages of each methodology. The court notes[10]:

> "Even were the task of the Regulator simply to strike a value for the pipeline, the evidence discloses that each of the s8.10 (a) and (b) methodologies is considerably influenced by subjective and discretionary factors, s8.10 (c) involves potentially a selection from a range of methodologies, each of which influenced by further subjective and discretionary factors, and s8.10(d) clearly calls for evaluation and judgement."

2.7 The task of the Regulator under s8.10 is not simply one of valuation despite the reference to value in s8.4(a). The factors identified in s8.10 (e) to (j) require the Regulator to consider a variety of other considerations, including the basis on which past tariffs have been set; the historical returns to the service provider from the pipeline; the reasonable expectations of persons under the regulator regime that apply to the pipeline prior to the commencement of the Code; and the price paid for any asset recently purchased. These various factors bring into account a number of matters which are not directly related to the value of the pipeline in the ordinary sense, and which by their nature require the consideration of disparate issues which may well tend in different directions. There is a discretionary evaluation of what weight should be attached to each of these factors in the ultimate establishment of a capital base. Factor (k) enables the Regulator to take into account any other factor which the Regulator considers relevant, which in itself requires further evaluation and discretionary judgement by the Regulator.[11]

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[7] Para 66
[8] Para 72
[9] Para 73
[10] Para 73
[11] Para 74

2.8 There is obvious tension between the requirement of s8.10 to consider factors (c) to (k) in establishing the Capital Base and the provision in s8.11 that, normally, the resulting capital base should not fall outside the range determined under factors (a) and (b). The process clearly involves the exercise of discretion in the weighing of divergent considerations.

2.9 The last paragraph of s8.1 recognises that the objectives (a) to (f) in s8.1 may conflict in their application to a particular reference tariff determination, in which event the Regulator may determine the manner in which they can best be reconciled or which of them should prevail. The discretionary task of seeking to reconcile conflicting objectives within s8.1, and even more significantly of determining which of them should prevail, cannot be decided by reference to s8.1 itself. Of necessity the Regulator must have guidance outside s8.1 in exercising those discretions:

> "In this regard it appears from the structure and provisions of the Code that have been canvassed that s2.24(a) to (g) would most naturally guide the Regulator in the exercise of those discretions, and was intended to do so."[12]

The factors in s2.24(a) to (g) reflect in a more precise context, and for the particular purposes of s2.24, the general objectives of the Act and the Code as set out in the preamble to the Act."[13]

2.10 A reference to "efficiency" may well be a reference to "economic efficiency".[14] Notwithstanding some differences of detail, the concept of economic efficiency has at least three well recognised dimensions, being those referred to in Chapter 1 of the Hilmer Report:

> "… the phrase "economically efficient", used in s2.24(d) and s8.10(h) of the Code for example, was intended to reflect the concept of economic efficiency discussed above and incorporates at least the three dimensions of economic efficiency as set out in the Hilmer Report."[15]

2.11 The concept of a "competitive market" in the preamble to the Act and the introduction to the Code is that which economists in this field would understand to be a workably competitive market. That having been said, however, it is clear from the evidence that there is division among economists as to how the concept is promoted where it does not exist and how its outcome can be artificially created in a monopolistic situation.[16]

2.12 Within the meaning of s2.24 both the investment (including the full purchase price of the pipeline and other items) and the legitimate interests of the owner might properly extend to the recovery of the purchase price, at least over the expected life or operation of the pipeline,

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[12] Para 85
[13] Para 129
[14] Para 114
[15] Para 120
[16] Para 126

together with an appropriate return on capital. The business interests of the owner might well extend much further than this but in the *Epic case* it was unnecessary to explore those matters.[17]

2.13 The enjoyment by a monopolist of a monopoly is not necessarily an illegitimate business interest. There may be much scope for the notion of illegitimate, as opposed to legitimate, business interests in the context, for example, of arrangements constituting a contravention of the Trade Practices Act or involve manipulations of the price paid for assets with a view to the avoidance of revenue charges. The Court states[18]:

> "There is no basis shown, however, upon which the interests of Epic in recovering the actual investment it made in the DBNGP when it acquired it from the State, together with a reasonable return on that investment, should be categorised as other than a legitimate business interest for the purposes of s2.24(a)."

2.14 Prices that have been contractually agreed by a service provider, even if they include monopolist rents or returns, may continue to be charged by the service provider by virtue of s2.25 and, by s2.24(b), they are matters the regulator must take into account.[19]

2.15 Section 8.1(a) uses the notion of "efficient costs". The Court observes[20] that s8.1(a) is concerned with the efficient cost of delivering the reference service over the expected life of the pipeline. That is, it is concerned with the transportation of gas by pipeline from and to various locations. It is not dealing with the economically efficient functioning of the Australian market in natural gas. The focus is much narrower.

2.16 In response to submissions that s8.1(a) fixes a ceiling on the revenue stream that might be earned, the Court stated[21]:

> "…it would distort the words used to engraft the sense of "no more than the efficient cost" into s8.1(a). Similarly, there would be a misconception to engraft "at least the efficient costs" into the provision."

In a workably competitive market past investments and risks taken may provide some justification for prices above the efficient level.[22]

2.17 Section 8.1(d) stipulates as an objective of a Reference Tariff and a Reference Tariff Policy that each should be designed so as not to distort investment decisions in pipeline transportation systems or in upstream and downstream industries.[23] The court noted[24] that a Reference Tariff

[17] Para 130
[18] Para 130
[19] Para 131
[20] Para 141
[21] Para 142
[22] Para 144
[23] Para 147

based only on a cheaper present replacement value, and which has no regard to the actual unrecovered cost of investment in the pipeline, may well undermine the viability of the earlier investment decision". The Court went on to say[25]:

> "….. s8.1(d) can be seen to reflect a public interest broader than the mere understanding and application of economic theory, by taking account of wider political and social considerations. Past investment in a covered pipeline has not been rendered necessarily irrelevant, as the application of economic theory might suggest."

2.18 Section 8.10(f) and (g) reflect the relevance of the historical returns and tariffs and depreciation, as well as the reasonable expectations of the service provider before the commencement of the Code, in the establishment of the initial capital base for the purposes of the Code.[26]

2.19 The Court rejected the suggestion that an asset value higher than both the DAC and DORC values could not normally be justified as this would usually result in consumers paying monopoly rents[27]. The Court commented[28]:

> "This approach pays little or no regard to the word "normally" in s8.11 and can gain no support from the "over arching requirement" consideration for the reasons indicated earlier. Economic efficiency is but one of the factors identified in s8.10 and there is no sufficient justification in that provision for regarding it as in any way a dominant consideration. While the DAC and the DORC methodologies have an acceptability for the purposes of the concept of economic efficiency, it is clear from s8.10(c) that other well recognised asset valuation methodologies are to be considered, and by (d) the advantages and disadvantages of each are to be weighed. It is not provided that they are to be weighed only according to the economic theory of economic efficiency; they are to be considered and evaluated on their merits. There is no reason, implicit or explicit, why a valuation methodology which had regard to the present value of anticipated net returns, including monopoly returns, should necessarily be excluded for these purposes. Nor should there be excluded the expectations of service providers of monopoly returns where these expectations were reasonable under the regulatory regime that applied to the pipeline before the commencement of the Code (s8.10(g)). Similar observations can be made in respect of a purchase price for the purposes of s8.10(j)."

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[24] Para 149
[25] Para 153
[26] Para 169
[27] Para 175
[28] Para 176

3 Discussion of the Draft Decision of the ACCC dated 19 December 2000

3.1 DORC as a maximum in determining the ICB

The Draft Decision clearly proceeds on the basis that an initial cost base ('ICB') determined according to the DORC methodology represents the upper limit for an acceptable ICB under the Code. For example, the Draft Decision states:

> "The valuation of the pipeline system is calculated in accordance with the DORC methodology which represents the upper limit acceptable under the Code."[29]
>
> "EAPL states that, however calculated, the optimised deprival value is likely to be greater than DORC as calculated above, and is therefore irrelevant in this instance."[30]
>
> "This line of reasoning supports the use of DAC and DORC respectively as the lower and upper bounds of the value of the initial capital base to be established by the regulator."[31]
>
> "In these cases the DORC upper limit in the Code provides a useful safety net valuation for those cases where the sale price valuation of the initial capital base would inadequately recognise the contribution to capital return already made by users. In general, the lesser of the DORC and the privatisation sale price would seem to offer the best basis for setting the initial capital base."[32]
>
> "EAPL has stated that the NPV of the cash flows inherent in its current long term contractual arrangements would yield an asset valuation in excess of the upper limit of DORC imposed by the Code. Accordingly, it may seem reasonable for EAPL to expect that the value of the initial capital base would be equivalent to DORC rather than some lower valuation."[33]
>
> "The residual economic value would only be preferred over the DORC for the initial capital base under the Code guidelines if it was less than DORC and there was no reason to believe that the Government's cost of capital was greater than that indicated by the CAPM benchmarks."[34]

Contrary to the views expressed in the Draft Decision, the passages from the *Epic Decision* quoted in section 2 of this letter (particularly at 2.8 and 2.19) show that DAC and DORC do not

[29] Draft Decision at 2.2.2
[30] DD at 2.2.2
[31] DD at 2.2.4
[32] DD at 2.2.4
[33] DD at 2.2.4
[34] DD at 2.2.4, p49

represent upper or lower limits under the Code. Although the DAC and DORC methodologies have an acceptability for the purposes of the concept of economic efficiency, other well recognised asset valuation methodologies are to be considered and their advantages and disadvantages weighed. Economic efficiency is but one of the factors to be considered when carrying out this weighing exercise. The other methodologies are to be evaluated on their merits. Valuation methods having regard to the present value of anticipated net returns including monopoly returns should not necessarily be excluded merely because they produce values in excess of DORC. Moreover, the expectations of the service provider under the regulatory regime applying before the commencement of the Code and the purchase price should also be considered. In short, a proper consideration of the factors specified by the Code is not to be constrained by presumed limits set according to DAC or DORC.

In our view the Draft Decision makes an error of law in treating DORC as a maximum.

3.2 Approach to Monopoly Returns

The approach taken in the Draft Decision to monopoly returns or returns that might be described as 'excessive' by some measure, is also flawed. For example, the Draft Decision states:

> "The natural monopoly position of many of the operations means that contractual arrangements can be established to support a privatisation valuation above the DORC which is difficult to sustain over the longer term. In these cases the DORC upper limit in the Code provides a useful safety net valuation for those cases where the sale price valuation of the initial capital base would inadequately recognise the contribution to capital return already made by users. In general, the lesser of the DORC and the privatisation sale price would seem to offer the best basis for setting the initial capital base."[35]

There is an assumption that considerations of economic efficiency dictate that the Code should be applied so as to eliminate any monopoly or 'excessive' returns. The *Epic Decision* establishes this is not so. As noted at 2.13 and 2.14 above, the Court was clearly of the view that the enjoyment by a monopolist of a monopoly is not necessarily an illegitimate business interest. Further, the Court stated that "prices that have been contractually agreed by a service provider, even if they include monopolist rents or returns, may continue to be charged by the service provider by virtue of s2.25 and, by s2.24(b), they are matters the regulator must take into account".

The *Epic Decision* establishes that the proper application of the criteria specified in s8 could result in an ICB based on a valuation that includes monopoly returns. The Regulator must not approach the application of the Code with a presumption this could not or should not be the case.

The approach taken in the Draft Decision constitutes, in our view, an error of law.

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[35] DD at 2.2.4

3.3 Fairness as a Code test

The Draft Decision employs a notion of 'fairness'. Indeed it appears that 'fairness' is treated as on overriding consideration. For example, the Draft Decision states:

> "A significant conclusion drawn from the Commission's interpretation of the Code is that the value assigned to the initial capital base should be a fair value to both the service provider and users of the pipeline system."[36]
>
> "For the initial capital base value of the existing assets to be fair to both the service provider and users it needs to reflect a residual value based on the historic depreciation which has been recovered by the owners."[37]
>
> "This is because such a value would not recognise the payments users have already made to compensate the service provider for depreciation of its assets. This 'fairness' based proposition holds true even where the assets have not been previously regulated and the past depreciation needs to be imputed from the level of previous tariffs and any other evidence the regulator may have available."[38]
>
> "…(Agility's proposed methodology for calculating the DORC)…loses its relevance for the setting of an initial capital base which needs to comply with fairness requirements of the Code, (sections 8.10(f) and (g) in particular);"[39]
>
> "The fair value for the initial capital base, as far as the owner is concerned, is the sale price. Similarly, the sale price is the fair value from the public perspective since it achieves a use of public funds commensurate with the opportunity cost of those funds."[40]

The obvious objection to such a 'fairness' test is that it is not specified in the Code. It places an unwarranted and unjustified gloss on the provisions of the Code. It is also subjective and ambiguous. If the legislature had intended to apply a 'fairness' test it could have used the term. Instead the Code requires consideration of specific and detailed factors. For example, the Draft Decision suggests sections 8.10(f) and (g) impose 'fairness requirements' (see above). In fact, the sections refer to "economic depreciation", "historical returns" and "reasonable expectations". There is no reference to fairness. The provisions should be applied according to their terms rather than according to a superimposed 'fairness' test.

As indicated in 2 above (particularly 2.1 to 2.9) the Court in *Epic* has explained at length how the provisions of sections 2.24, 2.25, 3 and 8 should be interpreted and applied and the conflicts

[36] DD at 2.2.4
[37] DD at 2.2.4
[38] DD at 2.2.4, p29
[39] DD at 2.2.4, p30
[40] DD at 2.2.4

between them resolved. There is no support for, or even reference to, an alternative or additional standard of 'fairness'.

The application of the 'fairness' standard permeates the Draft Decision. This is particularly noticeable in the way fairness is linked firstly to the determination of the ICB, and then to depreciation and the application of the DORC methodology.

The Commission has applied the 'fairness' test as an over-arching standard in applying sections 8.10, 8.1 and 2.24 to the determination of an ICB. For example, the Draft Decision states:

> "For the initial capital base value of the existing assets to be fair to both the service provider and users it needs to reflect a residual value based on the historic depreciation which has been recovered by the owners."[41]

The following statements illustrate the approach taken in the Draft Decision to the issue of depreciation and the DORC methodology:

> "For a valuation methodology to give a value which is fair to both users and owners, account must be taken of the way depreciation has been used in the past as a basis for setting tariffs."[42]

> "Nevertheless, a DORC based estimate of the value of assets to be regulated can be fair to owners in that it doesn't systematically impose a capital gain or loss. For the same reason it is also fair to users. The only requirement in calculating the DORC from the ORC is that the depreciation methodology matches that used as the basis for developing the tariffs prior to the setting of the asset valuation."[43]

> "All elements of the Code appear to be satisfied, in particular the fairness related issues. Once again the DORC valuation has proved appropriate, but with the requirement that the depreciation of the ORC be strongly linked with historic depreciation, not only in methodology (for example, straight line), but also in terms of assumed economic life (that is, 50 years)."[44]

The application of a 'fairness' test in this way is inconsistent with the correct approach to applying the Code as explained in the *Epic Decision*. In our view it constitutes an error of law.

3.4 DORC methodology

As illustrated above, the Draft Decision treats historical depreciation as a key element in the appropriate application of the DORC methodology. In this respect the approach taken is

[41] DD at 2.2.4
[42] DD at 2.2.4, p35
[43] DD at 2.2.4, p36
[44] DD 2.2.4, p43

"backward looking". Leaving aside the possible relevance of historical depreciation in other respects, its use as a key element in applying the DORC methodology appears inconsistent with the "forward looking" nature of that methodology. In the *Epic Decision* the Court determined that concepts in the Code such as DORC should be interpreted[45] in accordance with generally established and accepted concepts in the specialised field of economics:

> "To the extent, therefore, that words or phrases used in the Act and Code reflected, at the relevant time, generally established and accepted concepts in this specialised field of economics, albeit not necessarily universally held or expressed with precise uniformity, there is strong reason to favour the view that the words were intended to refer to such generally established and accepted economic concepts."[46]

Applying this approach the Court explained the DORC methodology as follows:

> "The expert evidence indicates that the DORC methodology is one of a number of methodologies which are described as "forward looking". Under DORC methodology, assets are valued at the cost of replacing them or, more accurately, at the cost of replacing the remaining service potential of the asset, not the cost of replacing the asset itself. The word "optimised" indicates that it is replacement cost which is valued, and the word "depreciated" indicates that it is the remaining service potential which is replaced. As the remaining service potential is to be theoretically replaced, alternative and cheaper methods of replacing that service potential will be applied so that, more accurately, it may be described as a reproduction cost rather than a replacement cost. The expert evidence indicates that a DORC valuation will usually provide a good proxy for the price that a pipeline would realise had the owner faced workable competition at the time of its sale. Under the DORC methodology the actual or historic capital investment of the pipeline owner has no relevance."[47] (italics added)

While we are not qualified to express a view on the proper application of DORC, and so our conclusion is subject to contrary expert opinion, we conclude that the approach taken in the Draft Decision is contrary to the *Epic Decision*. As the passages from the Draft Decision quoted earlier indicate, the approach taken appears to result from superimposing the 'fairness' standard on the clear words of s8.10(c). While the Code envisages that other considerations may cause the Regulator to accept or reject a valuation based on DORC, the *Epic Decision* would require the Regulator to apply the DORC methodology in a manner generally accepted in the specialised field of economics. It seems to us the Draft Decision does not do this and so makes an error of law.

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[45] If it makes any difference to the interpretation of the DORC methodology, the intention of the legislature is to be determined as at the date of first enactment of the legislation, 18 December 1997, as noted at the commencement of section 2 of this letter.

[46] *Epic Decision*, para 119

[47] *Epic Decision*, para 164

3.5 Reasonable Expectations of the Service Provider

The Draft Decision appears to give little weight to the reasonable expectations of the service provider. This also seems to result from the assumption that DORC sets a limit on the initial cost base and that the concept of 'fairness' should be treated as an overriding standard.

The Draft Decision deals with this aspect quite briefly. For example it states:

> "EAPL has stated that the NPV of the cash flows inherent in its current long term contractual arrangements would yield an asset valuation in excess of the upper limit of DORC imposed by the Code."[48]

As the Court said in the passage quoted at 2.19 above:

> "Nor should there be excluded the expectations of service providers of monopoly returns where these expectations were reasonable under the regulatory regime that applied to the pipeline before the commencement of the Code (s8.10(g))."

In our view the approach taken in the Draft Decision involves an error of law.

3.6 Application of section 2.24 – legitimate interests of the service provider

The legitimate business interests of the service provider also appear to have been given no weight or insufficient weight. As the passage quoted at 2.9 indicates, the Court ruled that the factors specified in s2.24, including the legitimate business interests of the service provider, need to be taken into account as fundamental factors in applying s8.1. The interest of the service provider in recovering the actual investment and a reasonable return on that investment is a legitimate business interest and the enjoyment by a monopolist of a monopoly is not necessarily an illegitimate business interest (see 2.13 above). As the Court pointed out (see 2.14 above), prices that have been contractually agreed by a service provider, even if they include monopolist rents or returns, may continue to be charged by the service provider by virtue of s2.25 and, by s2.24(b), they are matters the regulator must take into account.

In our view the Draft Decision does not take into account or adequately take into account these factors. This constitutes an error of law.

4 Conclusion

In our view the Draft Decision makes errors of law in that:

- It wrongly proceeds on the basis that an initial capital base ('ICB') determined according to the DORC methodology represents the upper limit for an acceptable ICB under the Code.

[48] DD at 2.2.4, p47

- It does not take into account, or adequately take into account, the possibility that monopoly returns should be included when valuing the pipeline system in order to establish the ICB.
- It wrongly applies an overriding 'fairness' standard in interpreting and applying the provisions of the Code and in particular in determining the ICB and applying the DORC methodology.
- It incorrectly applies the DORC methodology by incorporating "backward looking" historical depreciation.
- It fails to take into account, or to adequately take into account, the reasonable expectations of the service provider and the legitimate business interests of the service provider as required by s8.10(g) and s2.24 of the Code respectively.

As indicated earlier, our conclusion as to the application of the DORC methodology is subject to any expert economic opinion to the contrary.

We have not attempted a comprehensive review of all aspects of the Draft Decision to determine whether it contains additional errors but rather have focused on certain key aspects. It seems to us, however, that the errors we have discussed are sufficiently fundamental to undermine the conclusions reached in the Draft Decision. As a consequence, in order to discharge properly its functions under the Code, the Regulator will need to apply the Code and exercise its discretions afresh in accordance with the *Epic Decision.*

We have not been asked to advise in this letter on the appropriate procedure to be followed by the Commission in its ongoing assessment of the proposed Access Arrangement. It seems to us, however, that, in accordance with the Code processes, interested parties should be allowed adequate opportunity to make submissions to the Commission on its proposed application of the principles established by the *Epic Decision* and its proposed conclusions.

Yours sincerely

Geoff Taperell
Partner