



L A W Y E R S

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Dear Mr Price

GASNET ACCESS ARRANGEMENT - REFERENCE SERVICES

We are asked to consider certain elements of GasNet's proposed revised Access Arrangement. Capitalised terms not otherwise defined shall bear the meanings ascribed to them in the National Third Party Access Code for Natural Gas Pipeline Systems ("**Access Code**").

As you will see, we conclude that the Access Code definition of Service is expansive enough to encompass the provision of a Pipeline's Capacity by one Service Provider to another who, in turn, will operate the Pipeline. The Access Code contemplates the split of such responsibilities. The definition of Service in the Access Code is limited only by what it expressly excludes, which is the production, sale, or purchase of Natural Gas. Thus, to comply with the Access Code, the GasNet Access Arrangement must not only detail its Reference Tariff, but also the Reference Service to which it relates.

The Access Code Contemplates Division of Responsibilities

Section 10.2(b) of the Access Code contemplates a division of obligations as between an owner and an operator of a Pipeline. GasNet owns and maintains the GasNet System (being the gas transmission system in Victoria commonly known as the "Principal Transmission System"), but VENCorp operates it. Section 10.2(c) requires responsibility for Access Code compliance to be split as between the two in their respective Access Arrangements.

It is noteworthy that, whilst section 10.1(b) permits the lodging of one Access Arrangement by GasNet or VENCorp on behalf of both GasNet and VENCorp, this is not an option that has been pursued.

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GasNet's Services Policy

In its Access Arrangement, GasNet has described the Reference Service as “comprising the transportation of gas through the [GasNet System] via the Market Carriage system under the MSO Rules” and that VENCorp, as operator of the system under the MSO Rules, “is responsible for the provision of the Reference Service”.¹

We have considered previously matters raised by GasNet's lawyers in their correspondence with VENCorp on the issue of the Reference Service (“**the GasNet view**”) and note that the Victorian Department of Natural Resources and Environment has also sought independent advice on this issue (“**the DNRE view**”). We have had the benefit of considering this opinion, as well. (As an aside, we consider the DNRE should revisit the issues raised in this correspondence in light of the content of GasNet's proposed Access Arrangement).

It would appear that the GasNet Access Arrangement is drafted on a very limited interpretation of the terms “Service” and “Significant part of the market”. It might be that the ACCC will regard this limited interpretation as inconsistent with the terms of the Access Code.

Meaning of Service

In its Access Arrangement, GasNet states that it does not “provide any aspect of the Reference Service directly to Users” (see clause 3.2); the reason for this is stated in the GasNet View, namely a Service does not include “use” of the pipeline. In support of this proposition, GasNet compares the Access Code's definition of Service with the definition of “service” in section 44B of the *Trade Practices Act 1974* (Cth) (“**TPA**”).

The Access Code definition of Service (which is contained in section 10.8) is an inclusive definition. It states:

‘Service’ means a service provided by means of a Covered Pipeline (or when used in section 1 a service provided by means of a Pipeline) including (without limitation):

- (a) *haulage services (such as firm haulage, interruptible haulage, spot haulage and backhaul);*

¹ See clause 3.2 of GasNet's proposed Access Arrangement.

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- (b) *the right to interconnect with the Covered Pipeline; and*
- (c) *services ancillary to the provisions of such services,*

but does not include the production, sale or purchasing of Natural Gas.

The definition is limited only to the extent that it does not include production, sale, or purchasing of Natural Gas. This means that it can include any other type of service associated with a Pipeline.

By way of contrast, the definition of “service” in section 44B of the TPA is also drafted as an inclusive definition with some clear exclusions, but it also has one major difference. It omits the qualifier “without limitation” at the conclusion of its opening phrase. It states:

“service” means a service provided by means of a facility and includes:

- (a) *the use of an infrastructure facility such as a road or railway line;*
- (b) *handling or transporting things such as goods or people;*
- (c) *a communications service or similar service;*

but does not include:

- (d) *the supply of goods;*
- (e) *the use of intellectual property; or*
- (f) *the use of a production process.”*

The omission of “without limitation” in the opening phrase of Section 44B is an important distinction between the respective definitions that the DNRE View emphasises (and such emphasis is justified in our view). The omission of the expression “use of a pipeline” in the Access Code definition does not mean that this concept was intended to be excluded.

Moreover, we think that there is another reason why the GasNet view is not sustainable.

The gas industry has traditionally considered the transportation of gas by means of a pipeline as a *service*, not use of a pipeline. The transportation of gas is made possible by a combination of a number of services that includes use of compressors, regulators and other equipment equipment, and it is common to refer

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to the haulage of gas as the provision of a service. The Access Code itself acknowledges this by referring to Pipeline owners and operators as “service providers”. Moreover, we think that there is no inconsistency between the two definitions; “haulage” under the Access Code definition equates to “use” under the TPA definition.

Therefore, we think that the only limitation on the definition of Service in the Access Code is the stated exclusion, namely, the production, sale or purchase of Natural Gas.

Significant Part of the Market

Section 3.2(a) of the Access Code requires an Access Arrangement to include a description of the Service(s) that a Service Provider will make available to Users, or Prospective Users. These Services might include any that are likely to be sought by a significant part of the market.

The GasNet View is that VENCorp cannot constitute a “significant part of the market” but does not detail its view of the market.

In our view, the market must be constituted by the pool of potential buyers and sellers of services of the type under review, which is consistent with the view of the Australian Competition Tribunal in the *Eastern Gas Pipeline* decision. The reasons for the Tribunal decision lead us to conclude that VENCorp is part of the market, and, being the wholesale gas market operator in Victoria, is a significant market participant in the market for transmission services. VENCorp manages all Pipeline Capacity and trading and, as between GasNet and VENCorp, VENCorp *is a User* of the Reference Service provided by GasNet, which is essentially the provision of access to the GasNet System in order for VENCorp to operate the System.

Even if this criterion were not met, the ACCC has a discretion pursuant to section 3.2(a)(ii) to require GasNet to include any Service in its Services Policy. It would seem to us that the ACCC may apply this Section to give regulatory certainty to the availability of the GasNet System to enable VENCorp to operate it in accordance with the MSO Rules.

Inconsistency with Service Envelope Agreement

The relationship between the Service Envelope Agreement (“SEA”) and the Access Arrangement has also been the subject of comment. The GasNet View is that clause 11.2 of the SEA is inconsistent with the current Access Arrangements, and this must be remedied.

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From our point of view, the primary purpose of the SEA is to describe the Service GasNet makes available to VENCORP², which is the capacity of the “Principal Transmission System” in Victoria, and which, in turn, enables VENCORP to exercise its statutory operational function³. Schedule 3 of the SEA describes certain services that GasNet provides to VENCORP, but these are really ancillary to the main purpose of the document.

We agree with the DNRE View, in that we fail to see the relevance of clause 11.2 of the SEA in the context of GasNet and VENCORP obligations to define their respective Access Arrangements. The fact that clause 11.2 authorises GasNet to collect the Transmission Tariff does not diminish in any way the argument that GasNet is providing a Service. There would be no need for the SEA if that were true.

The real question that the SEA gives rise to is: if a Pipeline’s Capacity is fully booked, or contracted, must a Service Provider still detail a Reference Service in its Access Arrangement? For the reasons we detail below, we think that the answer is in the affirmative until the Pipeline ceases to be Covered.

What a Revised Access Arrangement must Include

If an Access Arrangement is being revised, section 2.29 of the Access Code requires that it contain, *as a minimum*, the elements described in sections 3.1 to 3.20.

The elements that are relevant to the issue of a Reference Service are detailed in sections 3.1, 3.2, 3.3 and 3.6. We will deal with each in turn.

1 Sections 3.1 & 3.2 - Services Policy

An Access Arrangement must include a policy on the Service(s) to be offered (section 3.1) and this policy must comply with certain principles, which are detailed in section 3.2.

We considered the meaning of Service earlier, and concluded that it is broad enough to include the provision of a Pipeline by one Service Provider to another, to enable the latter to operate it.

² See clause 4(1) of the SEA.

³ See section 160 of the *Gas Industry Act 2001*.

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2 Section 3.3 – Reference Tariffs and Reference Tariff Policy

This section states that an Access Arrangement *must* include a Reference Tariff for, inter alia, “at least one Service that is likely to be sought by a significant part of the market”.

In other words, section 3.3 requires a revised Access Arrangement to include a Reference Tariff *for a Service*.

The definition of Reference Tariff is a “Tariff specified in an Access Arrangement as corresponding to a Reference Service”⁴. One need only consider Chapter 8 of the Access Code that details the Reference Tariff Principles to conclude that the concepts of a Reference Tariff and a Reference Service in the Access Code are inextricably linked, and that the omission of the word “Reference” in section 3.3 is accidental.

For example, section 8.1(a) requires a Reference Tariff to be designed to achieve the objective of providing the Service Provider with the opportunity to earn an income stream that recovers the efficient costs of *delivering the Reference Service*. Not only does this link a Reference Service to its Reference Tariff, but it also requires the Service Provider to actually deliver the Reference Service itself.

In its Access Arrangement, GasNet is detailing a Transmission Tariff, which is stated as being “the portion of the Reference Tariff applicable to the Tariffed Transmission Service.”⁵

Furthermore, in clause 3.2 of its proposed Access Arrangement, GasNet describes the Reference Service as having two components:

- (a) the VENCorp Services; and
- (b) the Tariffed Transmission Service.

This is where we think that GasNet’s view trips over itself. How can it be that the Reference Service (that GasNet argues is being provided entirely by VENCorp) include a Service, the Tariffed Transmission

⁴ Section 10.8 of the Access Code.

⁵ See clause 3.2 of GasNet’s Proposed Access Arrangement.

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Service, in respect of which GasNet is seeking approval of a Reference Tariff?

Is it not the case, then, that GasNet's Reference Service is GasNet's Tariffed Transmission Service in respect of which it is seeking the approval of a Reference Tariff, ie the Transmission Tariff?

It is our view that, in order for GasNet's proposed Access Arrangement to comply with the Access Code, it must state that the Tariffed Transmission Service is GasNet's Reference Service.⁶

3 Section 3.6 – Terms and Conditions

It is also mandatory that an Access Arrangement include the terms and conditions upon which the Service Provider will supply *each Reference Service*.

Therefore, unless GasNet's Access Arrangement includes a Reference Service (along with its terms and conditions of supply), it has not complied with section 2.29 of the Access Code.

Moreover, we think that it is acceptable for GasNet to adopt the MSO Rules as the terms and conditions on which the Reference Service will be supplied, however, we cannot comment on their adequacy.

Consequences of Failure to Include Mandatory Elements

Section 2.46 of the Access Code states that the ACCC:

*...may approve proposed revisions to an Access Arrangement **only if it is satisfied** the Access Arrangement as revised would contain the elements and satisfy the principles set out in sections 3.1 to 3.20.*

Therefore, the ACCC might not approve GasNet's proposed revised Access Arrangement if it believes that GasNet has not delineated its Reference Services and linked them to each of their Reference Tariffs. The Access Code provides that the ACCC may require amendments to the GasNet proposed revised Access Arrangement or make appropriate changes itself in certain circumstances, but we have not been asked to review these powers in detail.

⁶ Once this point is reached, it is then necessary to ensure that both VENCorp's and GasNet's Reference Services adequately describe the terms of access to the GasNet System.

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If you have any queries, please contact Evy Papadopoulos on (03) 9672 3395.

Yours faithfully

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