

MEMORANDUM OF ADVICE

SUBJECT: *The Gas Pipelines Access (Queensland) Act 1998* and certain powers asserted by the Australian Competition and Consumer Commission.

We have been asked to address the question of whether the Australian Competition and Consumer Commission ('ACCC') has power to require Duke Australia Operations Pty Ltd ('Duke Operations') to amend the revised Access Arrangement lodged by it with the ACCC for the Wallumbilla to Gladstone (via Rockhampton) pipeline system, to incorporate a list of 'specific major events' that, upon the event occurring, will trigger a review of the 'non-tariff elements' of the Access Arrangement.

The ACCC on 1 August 2001 issued a final decision pursuant to section 2.16(b) of the *National Third Party Access Code for Natural Gas Pipeline Systems* ('the Code') by which it required such an amendment as a condition of approval of the revised Access Agreement dated 28 June 2001.

The ACCC says it has the power to require the amendment under section 2.16(b) of the Code and the amendment is within the scope of a power conferred on the ACCC by section 3.17(ii) of the Code. Section 2.16(b) does not, of itself, confer a power to require amendments that are not otherwise within power. The question then is whether, as the ACCC contends, section 3.17(ii) confers a power on the Commission to require the incorporation of a list of specific major events in the Access Arrangement which would trigger a review of the non-tariff elements of the Access Arrangement, should one of the events occur.

In support of that view, the ACCC has provided Duke Operations with the opinion of Mr Stephen Gageler QC. Mr Gageler takes the view that section 3.17(ii) does confer such a power. With respect, we disagree with Mr Gageler. Section 3.17(ii) does not confer such a power for the following reasons which we think clearly lead to that result. The reasons are these:

1. Section 3.17 needs, importantly, to be put in context having regard to the structure and objectives of the Code. It is part of a section of the Code which sets out the requirements for the *content* of an access arrangement. An access arrangement is, as the Code makes clear, a statement of the policies and basic terms and conditions which apply to third party access for a Covered pipeline.
2. Section 2.5 requires an Access Arrangement to include the elements described in the content section of the Code from Section 3.1 to section 3.20.

3. Section 2 of the Code sets out the process for submission and approval of an Access Arrangement and section 2.28 requires the Service Provider to submit revisions of the Access Arrangement to the ACCC by a Revisions Submissions Date (RSD) or as otherwise required by an Access Arrangement (together with Access Arrangement Information).
4. Section 3 deals with the content of an Access Arrangement and the matters first addressed by section 3.1 through to section 3.5 [and therefore reflecting the priority and importance of pricing] deal with the Services Policy and the Reference Tariffs. In order to make access effective, the Service Provider must describe clearly one or more services that are likely to be sought by a significant part of the market and then include a Reference Tariff for that service and a Reference Tariff for any other service that a significant part of the market may require.
5. The 'General Principles' to be applied and the 'objectives' to be achieved in determining the Reference Tariffs [particularly having regard to the 'overarching requirement that Reference Tariffs should be based on the efficient cost of providing the Reference Services'] are contained in section 8.1A of the Code forming part of the *Gas Pipelines Access (Queensland) Act 1998* [8.1 of the Code adopted in other jurisdictions].
6. An Access Arrangement must necessarily endure for a certain period which may be of any length as sections 3.18 and 3.19 make clear, but should the Access Arrangement Period be more than five years, the ACCC must consider whether mechanisms should be included in the Access Arrangement to address the risk of forecasts forming the basis of the arrangement, proving incorrect. Sections 3.18(a) and (b) address some of the mechanisms to be considered.
7. Since an Access Arrangement has a period, it must necessarily contain a date by which the Service Provider must submit revisions and a date for the commencement of the new revised terms. Section 3.17 falls into the content section and simply stipulates that the Access Arrangement must include a Revisions Submissions Date ('RSD') and a Revisions Commencement Date ('RCD').
8. Section 3.17 then goes on to condition the *approval* by the ACCC of the proposed RSD and RCD by saying that the ACCC *must* have regard to the objectives in 8.1A. The reference to the objectives in section 8.1A imports into the approval of the RSD and RCD as part of the Access Arrangement, an assessment of whether the Reference Tariffs and Reference Tariff Policy:

- (a) provide the Service Provider with the opportunity to derive a stream of revenue that recovers the efficient cost of providing the Reference Services over the expected life of the assets used in delivering that service;
 - (b) replicate the outcome of a competitive market;
 - (c) allow sufficient maintenance and operations costs to be included in the calculation of the tariffs such that the pipeline is operated in a safe and reliable way;
 - (d) provide Reference Tariffs that do not distort investment decisions in pipeline transmission services or investment decisions in industries upstream or downstream of transmission;
 - (e) reflect 'efficiency' in the level and structure of the Reference Tariffs; and
 - (f) provide an incentive for the Service Provider to reduce costs and to develop the market for Reference Services and other Services [that might become Services demanded by a significant part of the market and therefore become Reference Services].
9. All of those factors must be considered by the ACCC when 'approving the RSD and RCD'. Those 'objectives in section 8.1A' are objectives necessarily connected with factors influencing the formulation of Reference Tariffs and particularly the elements of the 'overarching requirement' of the 'efficient cost' methodology for the calculation of the Reference Tariffs. The section 8.1A considerations are described in the Code as the 'key principles' for the evaluation of the Reference Tariffs. Each of the factors recited at 8.1A(a) to (f) speak specifically about principles or objectives that go to the setting and efficacy of Reference Tariffs forming part of the Access Arrangement. It is impossible to divorce those considerations, key principles, objectives from the topic they specifically address.
10. The effect of the mandatory direction to the ACCC to have regard to the objectives in section 8.1A is a direction to consider Reference Tariffs, Reference Tariff Policy and the key principles and objectives influencing the determination of those tariffs and policies. That makes sense, of course, because the point of setting and approving an RSD and a date for the commencement of revisions is the nomination of a sufficient period over which to assess whether the tariff and tariff policies are bringing about the

objectives for tariffs and tariff policies reflected in section 8.1A and the key principles and objectives described in the preamble to section 8.1A at section 8.

11. Section 3.17(ii) is then further conditioned by a discretion which also goes to the *approval* of the RSD and the RCD. Section 3.17(ii) says the ACCC *must* consider the section 8.1A factors in approving the RSD and RCD and *may* in making its decision on an Access Arrangement, on the question of the proposed RSD and RCD, require an earlier or later date than that proposed by the Service Provider or require that specific major events be defined that trigger an obligation on the Service Provider to submit revisions prior to the approved RSD.
12. That discretion which is a function of the approval of the RSD *must* be exercised 'having regard to the section 8.1A objectives'. In other words, the ACCC is directed to consider the objectives of Reference Tariff setting and Reference Tariff Policy and the extent to which those tariffs and policies are facilitative of the objectives and key principles recited in the Code for their operation, when deciding whether it is appropriate to approve a proposed RSD and RCD with a requirement that specific major events be defined.
13. In summary then, section 3.17 operates in this way:

First, it requires an Access Arrangement to contain an RSD and RCD.

Secondly, it directs the ACCC in approving the proposed RSD and RCD to consider the objectives of section 8.1A which imports into the ACCC's thinking on the approval issue, an assessment of the Reference Tariffs and Reference Tariff Policy and whether the Reference Tariffs and Reference Tariff Policy are achieving [or likely to achieve] those objectives.

Thirdly, it empowers the ACCC to approve a proposed RSD and RCD with a requirement that specific major events be defined that trigger an obligation on the service provider to submit revisions earlier than the RSD, if that is 'necessary' having regard an assessment of the Reference Tariffs and Reference Tariff Policy and whether the objectives for Reference Tariffs and Reference Tariff Policy are likely to be achieved.

14. Section 3.17(ii), on a proper construction, does not confer an independent discretion in the ACCC to impose a requirement for the adoption of specific major events which would trigger a review of non-tariff matters. The entire thrust of 3.17 is to set boundaries for the submission of revisions and a date for the commencement of those revisions expressly having regard to the way in which Reference Tariffs and Reference Tariff Policy has or is likely to operate. The fundamental element of access is the price a third party pays for the service. That is why the approval of the boundaries of an RSD and an RCD is expressly conditioned by a consideration of the pricing objectives and that is why any discretion to require specific major events to be incorporated is itself conditioned by a consideration of the pricing objectives. To divorce section 3.17 and its constituent elements from any relationship with an assessment of Reference Tariffs and Reference Tariff Policy in the approval process for the RSD and the RCD is simply unsustainable. It denies the entire operation of the elements of section 3.17.
15. Since section 3.17 is addressing the factors influencing the *approval* of the RSD and the RCD and since the discretion to require specific major events as a trigger for the earlier submission of revisions is itself a factor influencing whether the proposed RSD and RCD are approved [with or without the nomination of the relevant events], any purported exercise of a power to approve the RSD or RCD with or without specific major events conflicts with section 58(4) of the *Gas Pipelines Access (Queensland) Act 1998* as there is no role for an approval process by the ACCC since the RSD and the RCD are 'taken to be the revisions submissions date and revisions commencement date for the access arrangement'.
16. Since 3.17 imports a consideration of reference tariffs and reference tariff policy into the ACCC's assessment of whether and RSD and RCD ought to be approved [with or without specific major events], any purported exercise of power under section 3.17 which goes to an assessment of reference tariffs or reference tariff policy expressly conflicts and is inconsistent with section 58(3) of the *Gas Pipelines Access (Queensland) Act 1998* which provides that the tariff arrangement approved by the Minister 'is taken to be approved under the Gas Pipelines Access Law as the Reference Tariff and Reference Tariff Policy for the Access Arrangement until the revisions commencement date for the access arrangement'.
17. Section 3.17 does not confer a power to impose specific major events in relation to non-tariff matters that would oblige the Service Provider to submit revisions prior to the

Revisions Submissions Date as determined in accordance with the tariff arrangement approved by the Minister.

18. The tariff arrangement, approved by the Minister, contains within it *an approval* of the Revisions Submissions Date and Revisions Commencement Date which does not contain within it any discretion in the ACCC, as part of an approval process, to require specific major events to be defined within the Access Arrangement which would trigger an obligation on a Service Provider to submit revisions going to any of the factors influencing the formulation of Reference Tariffs or Reference Tariff Policy. Any attempt by the ACCC to condition an approval of the Access Arrangement on the adoption of specific major events must necessarily fail.
19. The reference tariffs and reference tariff policies approved within the approved tariff arrangement endure until the approved Revisions Commencement Date in 2016.

The ACCC upon receipt of the further revised Access Arrangement will consider the document and determine whether it contains the amendments sought. Since it will not contain the second amendment, the ACCC must draft and approve its own Access Arrangement. That arrangement may or may not contain a set of specific major events as contemplated by the requested amendment. Since the incorporation of specific major events is beyond power, Duke Operations will need to address the mechanisms by which it secures the position that the ACCC acts according to law and we are formulating a further advice on those matters.

Dated Monday, 27 August 2001.

MINTER ELLISON
Andrew Greenwood