

Jemena Gas Networks (NSW) Ltd

2015-20 Access Arrangement

Response to the AER's draft decision and revised proposal

Appendix 6.1 - Legal advice on WACC clawback

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giving effect to its proposal.¹ It is expected that the AER's final decision will be made in around June 2015.

JGN's access arrangement proposal includes (amongst other things) a proposed value for the opening capital base, to be used in the calculation of reference tariffs. In making its decision on JGN's proposal, the AER will need to consider whether JGN's proposed value for the opening capital base is consistent with the relevant NGR provisions, in particular rule 77.

Rule 77 of the NGR, which relates to the opening capital base, was amended on 2 October 2014. The amendment was made by the Australian Energy Markets Commission (AEMC) in response to a proposal from the AER. The amendment took effect from that date.

In this context, a question has arisen as to whether the current version of rule 77 (as amended) can be applied by the AER in making its decision on JGN's proposal, or whether it should apply rule 77 as in force at the time JGN submitted its proposal.

The AER has contended that clause 43(1)(b) of Schedule 2 of the NGL applies to the effect that the AER must continue to apply the former provision.

Relevant legal principles

General Law principles

A change to a law or regulations (which includes the NGR) will take effect on the day of commencement of the amending law or regulations or such other date as is specified.

In general, anything required to be done under the relevant law or regulations is to be done in accordance with the law as in force at the time the thing is to be done. Anything done following amendment to particular law or regulations is to be done in accordance with the amended form. It follows that in making a decision to give effect to a legal provision, the decision maker is required to apply the law in force at that time (in the absence of any other provision).

The general presumption may be displaced where application of the current law or regulations would amount to retrospective application. The relevant common law principle was stated by the High Court in *Maxwell v Murphy*, as follows:²

"the statute changing the law ought not, unless the intention appears with reasonable certainty, to be understood as applying to facts or events that have already occurred in such a way as to confer or impose or otherwise affect rights and liabilities which the law had defined by reference to past events."

This principle has been expressed alternatively as:³

"There can be no doubt that the general rule is that an amending enactment — or, for that matter, any enactment — is prima facie to be construed as having a prospective operation only."

¹ NGR, rule 64.

² *Maxwell v Murphy* (1957) 96 CLR 261, at 267.

³ *Fisher v Hebburn Ltd* (1960) 105 CLR 188, 194. Both of the statements in this case and in *Maxwell v Murphy* were endorsed by the High Court in *Geraldton Building Co Pty Ltd v May* (1977) 136 CLR 379.

That is to say, it is prima facie to be construed as not attaching new legal consequences to facts, or events which occurred before its commencement."

The present case involves an amendment to the rules (the NGR) governing a decision to be made by a regulatory authority (the AER). The relevant rule has been amended after submission of the original proposal to the regulatory authority, but before submission of any revisions under rule 60 of the NGR, and before any decision was to be made by the regulator on the proposal.

In this context the relevant question is: would application of the amended law to something submitted before the amendment took effect impair or affect some right which was enjoyed in consequence of it being submitted under the law as it stood, or affect some obligation or liability arising at that time?

This question was considered by the Supreme Court of Victoria in *Robertson v City of Nunawading* [1973] VR 819. In that case there was a change to local planning laws after a subdivision plan was submitted, but before the council made their decision. The Court found that the council was able to apply the amended law, because to do so would not impair or affect any right which was enjoyed in consequence of the plans being submitted under the previous law (as it stood at the time of submission of the plan). The Court found that "*the mere taking of procedural steps under a statute in the expectation of achieving a benefit from an administrative authority does not create a right to the continuance of the proceedings after the repeal of the statute*" and that, similarly, "*the mere taking of such procedural steps does not create a right to the continuance of proceedings unaffected by the amendment of the statute*".⁴

The decision in *Robertson* indicates that the mere commencement of an administrative process through submission of an application or proposal to a regulatory authority will not give rise to a "right" to have the application or proposal assessed under the law as it stood at the time the process was commenced. Accordingly, in the situation where an administrative process is commenced but no decision has been made, the application of an amended form of the law by the regulatory authority in making the decision will generally not amount to retrospective application.

Therefore in our opinion, the application of the amended rule to JGN's proposal, submitted before the amendment took effect, does not impair or affect any right which was enjoyed by JGN in consequence of the proposal being submitted under the law and rules as at that time, or affect some obligation or liability arising at that time.

Transitional provisions in Schedule 2 of the National Gas Law

We note that there was no provision in the amending rule that delays the coming into force or operation of the amended rule 77. The amended rule 77 came into operation on 2 October 2014.

In the case of amendments to the NGL or NGR, the general interpretation provisions in Schedule 2 to the NGL do operate to limit the application of amendments.

The relevant interpretation provision states:⁵

"The repeal, amendment or expiry of a provision of this Law, the Regulations or the Rules does not—

⁴ *Robertson v City of Nunawading* [1973] VR 819, 826.

⁵ NGL, Schedule 2, cl 43(1).

- (a) revive anything not in force or existing at the time the repeal, amendment or expiry takes effect; or
- (b) affect the previous operation of the provision or anything suffered, done or begun under the provision; or
- (c) affect a right, privilege or liability acquired, accrued or incurred under the provision; or
- (d) affect a penalty incurred in relation to an offence arising under the provision; or
- (e) affect an investigation, proceeding or remedy in relation to such a right, privilege, liability or penalty."

On its face, this interpretation provision is directed at preserving the operation of previous versions of the law in respect of things done prior to amendment. In particular, it provides that amendment to a provision cannot affect anything "done" or "begun [to be done]" under a previous version of that provision (e.g. decisions made under previous versions are not affected by the amendment).

The secondary materials indicate that this interpretation provision (and the others in Schedule 2 of the NGL) was modelled on provisions "usually contained in the Interpretation Act of a State or Territory".⁶ The wording of the NGL interpretation provision is similar to, but not the same as, the wording of similar provisions in the South Australian and Commonwealth Interpretation Acts – these statutes refer to things previously "done" or "suffered" being unaffected, but does not refer to things "begun". However the reference to things "begun" does appear in the Queensland Interpretation Act (section 20 of the *Acts Interpretation Act 1954* (Qld)).

Cases decided under s 20 of the Queensland Interpretation Act have concluded that the mere commencement of an administrative process (e.g. an approval or licencing process) will not amount to something "begun" for the purposes of that provision. The fact that an applicant may have held some hope or expectation of gaining the approval for which he had applied is not sufficient to attract the protection of that provision.⁷

In *Kentlee P/L v Prince Consort P/L* [1996] QCA 87 the Queensland Court of Appeal considered the application of s 20 of the Queensland Interpretation Act to a case in which rules relating to subletting of premises had been amended after an application for subletting had been submitted. The Court found that nothing had "begun" under the previous provision, and therefore the regulatory authority was entitled to apply the amended provision in assessing the application. The Court concluded:⁸

"I cannot identify anything which can be reasonably described as "begun" in this case. The word implies the commencement of a process which remains incomplete. It is possible to describe an application for an approval as the beginning of the process of obtaining that approval, but such is not a common usage. It is more common to say that one has made an application for approval than that one has begun a process which may lead to the obtaining of approval. The word "begun" is more appropriately used in connection with proceedings such as legal

⁶ Second reading speech to the Gas Pipelines Access (South Australia) Bill 1997 (South Australia, Parliamentary Debates, House of Assembly, 2 December 1997 (R G Kerin)). See also the second reading speech to the National Electricity (South Australia) Bill 1996, which contained an equivalent provision (South Australia, Parliamentary Debates, House of Assembly, 29 May 1996 (J W Olsen)).

⁷ *Durrisdeer P/L v Nordale Management P/L & Anor* [1996] QCA 558.

⁸ *Kentlee P/L v Prince Consort P/L* [1996] QCA 87.

proceedings which have a recognisable continuity over a period of time. Applications involving a series of prescribed sequential steps might also be described as "begun". There may be other examples. The present application had to be either granted or refused. It cannot be comfortably described as "begun" simply because it had not been decided. Even assuming that the application began some process, that process was not begun under the repealed provision which said nothing about such an application. Although it is likely that in order to obtain an approval under the former s.153, some sort of application would have been made, such a step was not expressly contemplated by s.153. The application cannot be accurately described as "begun" under the repealed provision."

The decision in *Kentlee* suggests that the mere commencement of an administrative process by lodgement of an application or proposal will not amount to something "begun" for the purposes of the interpretation provision in the Queensland Interpretation Act (which is equivalent to the provision in Schedule 2 of the NGL).

Further, there is a second element, that is the thing that has "begun" must be begun under the relevant amended or repealed rule (i.e. the version of the rule in operation prior to the relevant amendment). In the extracted decision in *Kentlee*, the Court relevantly noted that: "*even assuming that the application began some process, that process was not begun under the repealed provision which said nothing about such an application*". That is, the relevant question as to whether rule 77 as in force at the time of the AER final decision is to be applied in making that decision is whether anything had "begun" under the previous version of that rule.

Application

Presumption that current version of rule 77 should apply

Rule 77 of the NGR was amended by the AEMC in October 2014, following a rule change request lodged by the AER. The amending rule has a commencement date of 2 October 2014.⁹ There is no transitional provision which limits the application of the amending rule from the commencement date.

In the absence of transitional provisions, the NGR are amended from the date of commencement of the amending rule and, in general terms, any determination made by the AER from that date would need to be in accordance with the amended rules.

Is this presumption displaced by common law or NGL transitional provisions?

The general presumption that the current rules should be applied by the AER in making determinations may be displaced by:

- common law rules against retrospective application; or
- the express interpretation provisions in the NGL which may limit the application of amendments in some circumstances.

⁹ National Gas Amendment (Setting the Opening Capital Base) Rule 2014 No. 5.

Application of common law principles

As noted above, the relevant common law principle is that changes to legislation should not apply to facts or events that have already occurred in such a way as to confer or impose or otherwise affect rights and liabilities which the law had defined by reference to past events.

Therefore the critical question is: had any right or liability accrued under the previous operation of rule 77 which would be affected by the immediate application of this amended form of this provision in JGN's access arrangement review?

In our opinion, the mere fact that JGN submitted its access arrangement proposal prior to the amendment does not give rise to any right or liability which would be affected by application of the amended provision in the AER's decision on that proposal. At best, it may have given rise to an expectation (but not a legally enforceable expectation) that the proposal would have been assessed under the then operative version of rule 77, if otherwise not amended. We note that in any event, at the time JGN submitted its proposal the rule change process was well underway, and so JGN may not have had such an expectation. Moreover, we understand that JGN's proposal was submitted on the understanding that there was no practical difference between how the AER would apply the previous version of rule 77 and the amended version.

In any event, we consider that the mere expectation that its proposal would be assessed under a particular form of rule 77, if not otherwise amended, does not give rise to any right or liability which would be affected by application of the amended provision. This is consistent with the decision of the Supreme Court of Victoria in *Robertson v City of Nunawading*, referred to above.

Accordingly, we consider that the common law rule against retrospectivity would not prevent the AER from applying the current version of rule 77 in its decision on JGN's access arrangement proposal, because no right or liability had been created prior to the amendment of rule 77 that would be affected by the application of the amended rule.

Application of NGL interpretation provisions

The relevant interpretation provision states that amendment to a provision does not "*affect the previous operation of the provision or anything suffered, done or begun under the provision*".

The interpretation provision does not freeze in time a particular version of the NGR, each time a review process is commenced. The interpretation provision does not say that any amendment to the NGR which takes effect after a process has commenced cannot apply in that process, or that the unamended (old) version must apply. Rather, it says that amendment to a provision cannot affect anything "*done*" or "*begun [to be done]*" under a previous version of that provision. The provision is directed at preventing reopening or revisiting of things done previously, rather than freezing in time a particular version of the NGR.

The relevant question is whether anything has been "*done*" or "*begun [to be done]*" under rule 77 which would be affected by the application of the amended version of this rule in the AER's decision on JGN access arrangement proposal.

Plainly, having regard to the provisions of rule 77 in the context of JGN's submission of its access arrangement proposal, nothing had begun under the previous version of rule 77 and nothing had begun under another rule that was affected by the amendment. JGN had submitted its access arrangement revisions proposal under rule 52 of the NGR, which was not affected by the amendment

to rule 77. For example, JGN's access arrangement proposal was not rendered invalid by the amendment of rule 77. At the time rule 77 was amended, nothing had yet been "done" or "begun" under that provision in JGN's access arrangement review – i.e. no decision had been made as to the opening capital base.

The AER's approach, as we understand it, is that any amendment to the rules relating to access arrangements or price and revenue regulation is in effect stayed during the period of any access arrangement review process which has "begun". This is simply a misapplication, or at best an overly broad application, of clause 43(1)(b) of Schedule 2 of the NGL.

The appropriate process under clause 43(1)(b) of Schedule 2 of the NGL is for the AER to apply at the time it makes its decision the new and operative provision rule 77, unless it would affect (relevantly) anything begun under that provision. At the time the AER comes to make its final decision, nothing will have been begun under that rule 77 and the rule change will not have affected anything begun under that rule.

Therefore in our opinion, the interpretation provisions in Schedule 2 of the NGL do not prevent the AER from applying the current version of rule 77 in making its decision on JGN's access arrangement proposal and the AER is required to apply the rule as in force at that time.

Yours sincerely



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