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Moomba-Sydney Pipeline Access Arrangement

In EAPL's 5 November 2002 submission to the Commission concerning the impact of the Epic Decision on the Draft Decision on the MSP Access Arrangement EAPL provided sound reasoning as to what EAPL's reasonable expectations were under the prior regulatory regime. In particular the submission stated (section 3.1, page 11):

The reasonable expectations of EAPL under the prior regulatory regime formed part of the agreement negotiated between EAPL and the Commonwealth in privatizing the MSP. The circumstances of the purchase of the MSP (as set out in section 3.5) included the establishment of a regulatory regime specific to the MSP, which underpinned the reasonable expectations of EAPL at no less than \$768m (emphasis added).

EAPL has recently provided the Commission with the various agreements and documents which together with the Moomba-Sydney Pipeline System Sale Act were the package of agreements that effected the sale. It is relevant to the Commission's consideration of those documents to identify the specific elements of the sale package that confirm the position put in the 5 November submission.

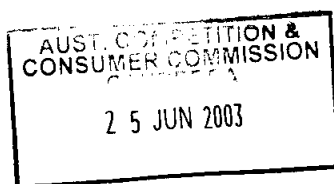
The agreement negotiated with the Commonwealth Government for the sale of the Moomba Sydney Pipeline comprised a suite of agreements (already provided to the Commission) and associated legislation (Moomba-Sydney Pipeline System Sale Act).

However, these arrangements were the result of the head agreement negotiated with AGL in 1993 called the Moomba-Sydney Pipeline 51% Sale Agreement. That agreement included two key elements related to EAPL's expectations under the regulatory regime prior to the introduction of the Code:

1. Arrangements about the ongoing foundation customer transportation agreement between AGL and EAPL that became the Gas Transportation Agreement (GTA); and
2. Agreement as to the regulatory regime that would apply following the sale. This agreement was contained in a condition precedent Clause 3.2(f) of the MSP 51% Sale Agreement, as follows:

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The coming into force of legislation of the Commonwealth Parliament substantially in the form of the Interstate Gas Pipelines Bill of 1993, a copy of which is attached as Schedule 6 with such modifications as the Purchaser reasonably approves.

The Interstate Gas Pipelines Bill referred to was, as agreed, substantially embodied in Part 6 of the Moomba-Sydney Pipeline System Sale Act 1994 (MSPSSA). Significantly for the purposes of determining EAPL's reasonable expectations was that the provisions of the MSPSSA:

- (i) did not affect the provisions of the GTA – that is, the prices which were determined under the GTA could not be changed under the MSPSSA and hence the prices specified in the GTA were a reasonable expectation for EAPL under that regime; and
- (ii) allowed EAPL to negotiate transportation prices for third parties.

The issue for the consideration of the Commission is whether the use of the published prices by EAPL in determining the ICB was reasonable. Under the MSPSSA, EAPL was under an obligation to provide transportation services to third parties, which it offered at the published prices. The MSPSSA provided that in the event of an access dispute as to the price or terms and conditions, the matter could be referred to the Trade Practices Commission as arbitrator. As there was no dispute referred to the Trade Practices Commission, it is clear that the published prices for volumes in excess of the GTA volumes represented a reasonable expectation of EAPL under this regulatory regime.

So significant was the impact of the proposed regulatory regime that it was incorporated into the agreements as a condition precedent – that is, failure of the Government to enact the proposed legislation would prevent the sale of the pipeline from ever proceeding. The fact that this provision was a condition precedent and not a term of the agreement demonstrates that compensation to EAPL would be totally inadequate, should the Government fail to perform on its obligation to enact the legislation. Rather than accept compensation, the agreement provided that only if the regulatory regime was enacted as agreed would EAPL pay the agreed purchase price.

It is important to note that there is no suggestion in the MSP 51% Sale Agreement that the purchase price established or limited the expected value of the MSP to EAPL. The value of the MSP to EAPL derives from the combination of the terms and conditions contained in the 51% Sale Agreement, which included among other things the purchase price and the regulatory regime described in the Interstate Pipelines Bill. Importantly the regulatory regime made no connection between tariffs to be charged and the purchase price.

As discussed in the submissions to the Commission of 14 March 2001 and 5 November 2002 the circumstances that led to the MSP 51% Sale Agreement and the purchase of the MSP by EAPL provide a reasonable basis for expectation of value accruing to EAPL from the regulatory regime substantially beyond the purchase price. The value inherent in the agreement between AGL and the Commonwealth (including the regulatory regime) which was in excess of the purchase price remains a reasonable expectation of EAPL.

Moreover, given the reasonableness of the assumptions used, it is clear that the 5 year plan and forecasts in the carrying value calculations undertaken in 1997 and 1998 best give expression to the reasonable expectations of EAPL under the regulatory regime that applied to the Pipeline prior to the commencement of the Code. Accordingly, it is these assumptions that have been applied by EAPL to calculate the range of valuations of between \$784m and \$998m for the MSP that represent its reasonable expectations under the prior regime.

In conclusion, to establish an ICB at a value less than \$784m would retrospectively confiscate the value to EAPL of its reasonable expectations under the MSPSSA regulatory regime, both of which (ie EAPL's reasonable expectations and the MSPSSA regulatory regime) were established by the deal to purchase the MSP. It would at the same time provide users with a windfall gain which was never contemplated by the MSPSSA regulatory regime.

Yours sincerely

A handwritten signature in black ink, appearing to read 'M. McCormack', with a stylized, flowing script.

Michael McCormack
General Manager Commercial

