

Submission to the NCC regarding Coverage of the EGP
Prepared for EAPL by NECG

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Introduction

This submission responds to the Council's May 2000 Draft Recommendation on the Application for Coverage of Eastern Gas Pipeline (EGP).

EAPL is interested in the result of the application for coverage of the EGP and in the application for revocation of coverage for the Moomba – Sydney Pipeline (MSP). EAPL believes that when the two applications are resolved, it is imperative that a level playing field result between the EGP and its direct competitor, the MSP. The particular outcome on each of these applications is less important than the symmetry between the outcomes.

In its Draft Recommendation, the Council has acknowledged the importance of symmetry, but has done so in a qualified and somewhat ambiguous manner. EAPL's concerns about these qualifications and ambiguities have motivated this submission.

Symmetry of regulatory treatment of the two pipelines

Whatever the Council recommends on the question of coverage of the EGP, symmetrical regulatory treatment of the MSP and EGP must be assured. On page 12 of its Draft Recommendations, the Council quite properly recognised the importance of regulatory symmetry:

“The Council also recognises that there is a public interest case for regulatory symmetry: that is, the equal treatment of participants, or businesses with interests, in the same market or markets.”

However, in a later paragraph on the same page, the Council noted that:

“it might be argued that, in some circumstances, no coverage under the National Code with the possibility (or threat) of coverage in the future is consistent with the principle of regulatory symmetry.”

The Council's meaning appears somewhat ambiguous, and the more detailed discussion at page 68 does not remove the ambiguity.

If the circumstances to which the Council referred were that both the EGP and the MSP were uncovered, then certainly the principle of regulatory symmetry would be served.

However, if the circumstances were that the EGP alone was uncovered (over all or any part of its route) with the mere threat of future coverage while the MSP remained subject to all the requirements of the Gas Code, then regulatory symmetry would most certainly not be achieved.

Even if the EGP were later to become covered, the existence of a period of time in which one pipeline were covered while the other was not covered would create a window of opportunity during which the uncovered pipeline could exploit commercial information which the covered pipeline was obliged to place in the public arena, while facing no reciprocal obligations.

During such a window the pipelines would not be competing on a level playing field and therefore a great deal of harm could be inflicted on the business interests of the covered pipeline.

Consumers would not benefit from this asymmetry because it does not produce competitive outcomes. Additionally, there is a likelihood that the difference of treatment would distort the allocation of demand, and ultimately of resources, as between the competing pipelines. Such a distortion would increase the resource cost to the Australian economy of the services provided by the systems, and hence would be directly contrary to the efficiency objectives underpinning the National Competition Policy.

Criterion 1.9 (a) regarding coverage of the EGP

The Draft Recommendation considers the possibility that the precondition for coverage contained in section 1.9 (a) of the Gas Code may not be met for the entire EGP. Paraphrasing this section, the Council is unable to recommend coverage if it is not satisfied of one or more of the following matters, which include in subsection (a):

“that access (or increased access) to Services provided by means of the Pipeline would promote competition in at least one market (whether or not in Australia), other than the market for the Services provided by means of the Pipeline”

Having come to the view that the relevant other market for this test is the market for the sale of natural gas in south-east Australia¹, the Council concludes:

“The Council considers that it is difficult, on the information available, to determine whether access (or increased access) to the whole Eastern Gas Pipeline would promote competition in the market for the sale of gas in south east Australia.”²

¹ “Draft Recommendation: Application for Coverage of Eastern Gas Pipeline (Longford to Sydney)”, National Competition Council, May 2000, p.10.

² Ibid. p.11.

It is reasonable to infer from these statements that the Council is contemplating a recommendation not to cover the EGP, at least for the part of the EGP route to the north of the ACT offtake.

EAPL notes that any decision to partially cover the EGP would be inconsistent with the Council's definition of the relevant market. The argument for partial coverage places disproportionate emphasis on individual elements of the south-east Australian gas market. These elements, non-metropolitan communities along the trunk route which are directly served by only one of the pipelines, could still benefit from competitive supply through backhaul from the ACT point of interconnection between the EGP and the MSP.

If the Council's final recommendation is indeed not to cover, then the implications for EAPL are profound.

More specifically, EAPL entirely agrees that competition would not be promoted were both systems covered as compared to the situation in which neither system is covered. However, if the MSP were covered, competition would be harmed were the EGP provided with preferential treatment.

As EAPL has noted in its previous submissions, and as appears to be accepted, coverage has a direct and substantial effect on the competitive options open to a pipeline operator. If the EGP is not subject to these restrictions, and the MSP is, the usage of and return on the two systems will inevitably be affected, with outcomes bearing little resemblance to those that would occur in a genuinely competitive market. As a result, it is submitted that in any scenario in which the MSP remains covered, a decision not to cover the EGP could not be considered to be consistent with a competition test.

Criterion 1.9 (a) regarding the revocation of coverage for the MSP

Recognising the relatedness of the application for coverage of the EGP and the application for revocation for the MSP, the Council has properly sought to bring the public comment and information gathering stages of these two investigations into alignment.

EAPL believes that the Council's findings with respect to the EGP, namely:

- That the relevant market is the market for sale of natural gas in south-east Australia; and
- That there is no compelling evidence that access to the Pipeline would promote competition in that market,

should be mirrored in its findings with respect to the MSP.

In light of this, EAPL considers that the proper method of resolving both applications would be to leave both pipelines uncovered. This will create an environment where the pipelines are given the opportunity to compete which is after all the intent of the Code. If third parties are unable to obtain access on reasonable terms and conditions in this circumstance then an application for coverage can be made. EAPL believes the best outcome is to create an environment where the two pipelines can compete rather than pre-empting the outcome and imposing coverage at this very early stage.

On the other hand, if the MSP revocation application were to be rejected by the Council for any reason, then a decision by the Council not to cover the EGP (even for a trial period) would be contrary to EAPL's legitimate business interests. It would also be contrary to the public interest in the competitive supply of natural gas in south-east Australia.

Conclusion

The Draft Recommendation for the EGP implies that the Council does not consider access would necessarily promote competition in the market for sale of natural gas in south-east Australia. Consequently criterion 1.9 (a) appears not to be met, which should result in a decision not to cover the EGP.

EAPL's primary concern in this process and the revocation application for the MSP is to ensure a symmetrical regulatory outcome. The Council has acknowledged the importance of symmetry, but has done so in a qualified and somewhat ambiguous manner.

If the Council's final recommendation is not to cover the entire EGP, then regulatory symmetry and the competitive intent of the gas Code will only be served if coverage of the MSP is revoked.

Conversely, if for any reason the MSP revocation application is unsuccessful, then symmetry would only be served by coverage of the EGP.