



## **SUBMISSION**

# **MINISTERIAL COUNCIL ON ENERGY EXPERT PANEL DRAFT REPORT ON THE REVIEW OF REVENUE AND NETWORKS PRICING ACROSS THE ENERGY MARKET**

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## **1. INTRODUCTION**

- 1.1. DBNGP (WA) Transmission Pty Ltd is the operator of the Dampier to Bunbury Natural Gas Pipeline (“DBNGP”), which is owned by DBNGP (WA) Nominees Pty Ltd as trustee for the DBNGP WA Pipeline Trust. The DBNGP group of companies trades under the name Dampier to Bunbury Pipeline (“DBP”).
- 1.2. The DBNGP links major gas producers operating in the Carnarvon Basin with gas users in the south west of Western Australia. It is one of the largest gas transmission pipelines in Australia.
- 1.3. The DBNGP was constructed in the early 1980s and, two years ago, might have been considered a mature pipeline system. However, DBP is now close to completing the Stage 4 expansion of the DBNGP’s gas transportation capacity, which involves the addition of over 100TJ/day of firm capacity at a capital cost in excess of \$400m. Moreover, DBP has recently announced its intention to commence a fifth stage of pipeline expansion. These two stages of expansion will approximately double the transportation capacity of the pipeline constructed in the early 1980s.
- 1.4. DBP’s business is built on a growing and increasingly competitive energy market in the south west of Western Australia. DBP expects that its business will continue to grow with further growth in the State’s economy requiring gas for mining and minerals processing, for electricity generation, and for a wide range of commercial and residential uses.
- 1.5. Presently, capacity on the DBNGP is contracted by less than 15 customers, 3 of whom have contracted more than 80% of the pipeline’s capacity. In addition, less than 10% of the pipeline’s capacity is used to supply gas for residential uses.
- 1.6. Given the importance that the resources sector plays in the prosperity of the State’s economy, any delay in a customer’s access to new pipeline capacity (through expansions to the DBNGP) is likely to have a significant and immediate impact on State productivity.
- 1.7. With the above in mind, this submission sets out DBP’s views on the draft report of the Expert Panel appointed by the Ministerial Council on Energy (“MCE”) to develop a common set of arrangements for the economic regulation of access to electricity and gas transmission and distribution networks.
- 1.8. In section 2 to 7 of the submission, DBP sets out its views on each of the recommendations made by the Expert Panel. DBP’s conclusions then are summarized in section 8.
- 1.9. DBP is of the view that the Expert Panel has been selective in the material it has considered, giving greater attention to correcting what it perceives to be defects in the current regulatory arrangements, and focusing less on its terms of reference requiring the provision of high level policy guidance and recommendations on policy principles and methodologies.
- 1.10. DBP is concerned that, in departing from its brief to provide high level policy guidance for the development of a common approach to access regulation across electricity and gas, the Expert Panel is unnecessarily creating uncertainty in regulatory arrangements which will make the financing of energy supply infrastructure more difficult.
- 1.11. As DBP notes later in this submission, its Stage 5 expansion of the DBNGP is expected to require investment of up to \$1.5 billion. This investment should facilitate downstream

investment in mining and minerals processing, and in electricity generation which, provided it takes place, should make a significant contribution to the further growth of the Western Australian economy.

- 1.12. However, DBP's owners, and the banks expected to provide the debt, have advised that financing will be difficult to secure without relative certainty that the investment can be recovered via regulated tariffs.
- 1.13. In creating further uncertainty in the regulatory arrangements, the Expert Panel is placing at risk the expansion of the DBNGP, and major downstream investment in Western Australia. DBP expects that other major pipeline expansions are similarly being put at risk.

## 2. LEGAL AND REGULATORY FRAMEWORK

### **Recommendation**

*The NEL and the NGL should establish a common legislative framework with respect to access pricing which addresses the following matters:*

- (a) Objectives – the objectives for the regimes;*
- (b) Scope of regulation – the scope of regulation, by reference to the transmission and distribution facilities that are subject to the regime (but maintaining the current distinction under which, in the electricity model, the scope is defined on the basis of a statutory description of the relevant facilities and, under the gas model, scope is determined on the basis of the coverage test);*
- (c) Form of regulation – the forms of regulation that are to be provided for in the Rules, and the principles or criteria to be applied in selecting between the available forms in respect of particular services;*
- (d) Regulatory procedures – the procedural requirements that are to apply to access pricing determinations, with detailed procedures to be specified by the AEMC in the Rules;*
- (e) Pricing principles – high level pricing principles to guide the AEMC in making Rules with respect to access pricing, with sufficient flexibility to allow divergent application of the principles between sectors at a detailed level in the Rules;*
- (f) Information disclosure – statutory information gathering powers of the AER and principles for the inclusion in the Rules of specific accounting and other disclosure requirements;*
- (g) Review of decision making – appeal and review mechanisms, as determined by the MCE.*

### **DBP submission**

- 2.1. DBP questions the value of a common legislative framework, but acknowledges the process of decision making which has led the MCE to develop such a framework.
- 2.2. DBP would expect a common legislative framework to establish objectives, the scope of regulation, the form of regulation, regulatory procedures, pricing principles, information disclosure, and review of decision making.
- 2.3. There are, however, differences in the services provided by electricity and gas transmission and distribution businesses, in the technologies used to provide those services, and in the markets in which those services are provided. DBP is concerned that, in making its recommendations, the Expert Panel has sought to impose the regime of the NEL on the gas industry without giving adequate consideration to these differences. The Expert Panel's common framework is the framework of the NEL, and not a framework developed from "first principles" for both electricity and gas, recognizing the fundamental differences between them, and recognizing the differences between transmission and distribution in both electricity and gas.

**Recommendation**

*Guidance to the AER in the NEL and the NGL should be limited to the objects clause, with more detailed guidance to be provided in the Rules.*

**DBP submission**

- 2.4. Regulation is an attenuation of the rights of the owners of certain types of assets, or of service providers who use certain types of assets to provide service. Any attenuation of these rights should be the subject of debate and decision making by Parliament.
- 2.5. The recommendation that guidance to the AER be limited to the objects clause of the NEL and the NGL effectively leaves the right to attenuate service provider rights with an unaccountable administrative body – the AEMC.
- 2.6. This is of particular concern given the Expert Panel's "subsidiary recommendation" (in the text of Chapter 2, but not in section of the chapter headed Findings and Recommendations) that direction to the AER be given through the Rules, and without the AER having a direct accountability to give effect to the high level principles in the Law. In effect, the regulator which, through its decisions, will directly impact on the rights of service providers, will be subject only to direction by the AEMC. This is not appropriate.
- 2.7. If the service, technology and market differences between electricity transmission and distribution, and gas transmission and distribution, preclude the inclusion of more than high level common principles in the NEL and the NGL, and require that other elements of regulation which attenuate service provider rights be left to the Rules, the pursuit of commonality in the legislative frameworks must be limited. The legislative frameworks must establish the legal bases for the attenuation of service provider rights, even if this requires different principles in the NEL and the NGL to accommodate rights which are different as a consequence of service, technology and market differences between electricity transmission and distribution, and gas transmission and distribution.
- 2.8. The reasons given for a common legislative framework are weak. According to the Expert Panel, they are greater certainty, administrative convenience, and governmental agreement to a common framework in the Australian Energy Markets Agreement. A common framework does nothing to provide greater certainty if it leaves critical issues to the discretion of the AEMC and the AER. Furthermore, administrative convenience cannot be a reason for change. The change from what is currently in place is a major inconvenience to those who have had to work with it over the last decade.
- 2.9. DBP is of the view that the NGL should establish the framework of the gas access regime which is to replace the regime of the Gas Pipelines Access Law ("GPAL") and the National Third Party Access Code for Natural Gas Pipeline Systems ("Code"), and should comprehensively establish the rights and obligations of the businesses to which that regime is to be applied. DBP would expect that these rights and obligations are, in a number of respects, different from those for electricity businesses, and that there are differences in the rights and obligations of gas transmission and distribution service providers. The differences would reflect differences in the services provided, in the technologies for service provision, and in the markets in which the services are provided.

**Recommendation**

*The NGL should include a requirement for the AEMC to review and revise Chapter 8 of the National Gas Rules within 12 months following the enactment of the NGL.*

**DBP submission**

- 2.10. Chapter 2 of the Expert Panel's Draft Report provides no reasons for this recommendation.
- 2.11. Its inclusion would seem to be necessary only to authorize a change to the Rules by the AEMC once a number of the very "low level" pricing principles which the Expert Panel is seeking to impose through the MCE process have been accepted.
- 2.12. The approach taken by the Expert Panel – to use the MCE process to impose principles which regulators have argued for, but not secured within the arrangements of the existing regimes – will only exacerbate the uncertainty surrounding regulatory arrangements in the energy sector. Those arrangements have been under scrutiny since they were introduced in the late 1990s. There can be no regulatory certainty in conditions of continuous regulatory change. Despite its professed concern with reducing uncertainty, the Expert Panel is ensuring its continuance.

### 3. OBJECTIVES FOR THE ENERGY ACCESS REGIMES

#### **Recommendation**

*The objects clause in the NGL should read as follows:*

*The object of this law is to promote efficient investment in, and efficient operation and use of, natural gas services for the long term interests of consumers of natural gas with respect to price, quality, safety, reliability and security of supply of natural gas.*

#### **DBP submission**

- 3.1. The reference to the long term interests of consumers of natural gas is inconsistent with efficiency if, as the next recommendation requires, efficiency is to be interpreted in economic terms.
- 3.2. This seems to have been recognized, at least implicitly by the Productivity Commission, and by the MCE.
- 3.3. The Productivity Commission, in the recommendations from its review of the gas access regime, framed its proposed objects clause in terms of economic efficiency without reference to the long term interests of consumers.
- 3.4. The MCE's proposed objects clause for the NGL (which has been drafted but not made available to interested parties) refers to the promotion of the long term interests of consumers, but does not make specific reference to economic efficiency. It does, however, refer to efficient competition, efficient investment and efficient use of natural gas services.
- 3.5. The term "efficient competition" is, as the Expert Panel correctly finds, without accepted meaning.
- 3.6. Although it notes that reference to the long term interests of consumers is questionable on a (presumably, "economic") first principles analysis, the Expert Panel supports its retention: ". . . the interests of consumers is already a feature of the NEL objective, and has been identified by First Ministers as a particular focus of the energy market reform program" (Expert Panel Draft Report, page 31).
- 3.7. This allows the Expert Panel to then introduce its preferred view of the NGL objects clause, one which makes explicit reference to economic efficiency, without questioning what the MCE actually meant. In doing so, it risks introducing inconsistency into the NGL objects clause which will become a point of contention in future regulatory debate. It will increase regulatory uncertainty rather than reduce it.
- 3.8. If the reference to the long term interests of consumers is to be retained, it must be accompanied by recognition of the long term interests of other parties in the gas supply chain. This is, in effect, the approach of the Code: the objectives of the preamble to the Code, sections 2.24 and 2.46, and section 8.1 require a balancing of the interests of the service provider and of pipeline users, and of the public interest, in regulator decision making.
- 3.9. Although an objective expressed in terms of economic efficiency appears to have wide acceptance, it is difficult to see how such an abstract and theoretical notion will be applied

in the real world where efficiency is unattainable and inefficient states are not comparable. Inevitably, resort will be had to the imprecise notions of “allocative efficiency”, “productive efficiency”, and “dynamic efficiency”, and to the view that regulation will somehow “promote economic efficiency”.

- 3.10. DBP is of the view that the better approach is the pragmatic one of the Code which requires a balancing of interests.

**Recommendation**

*The Explanatory Memorandum and Second Readings speech for the Bill in which this clause (the objects clause set out in the preceding recommendation) is introduced should contain an explanatory statement which:*

- *explains the reference to efficiency in economic terms;*
- *emphasizes that a long term perspective is to be taken with respect to consumer interests, and that a critical factor in such a long term perspective is the impact of decisions on investment in gas infrastructure services; and*
- *that the achievement of efficiency in an economic sense will maximize the long term interest of consumers.*

**DBP submission**

- 3.11. The explanations which the Expert Panel calls for in the Explanatory Memorandum and the Second Readings speech will be critical to the interpretation of the regulatory regimes of the NEL and the NGL. It is difficult to see how they can be drafted with sufficient precision, particularly in view of the qualifications concerning long term perspective, the interests of consumers, and investment in infrastructure, to guide regulatory decision making.
- 3.12. In DBP’s view, the proposed objects clause will increase regulatory uncertainty rather than reduce it.

**Recommendation**

*The NEL should be amended in due course so that the national electricity market objective is made a statement of the object of the NEL, as follows:*

*The object of this law is to promote efficient investment in, and efficient operation and use of, electricity services for the long term interests of consumers of electricity with respect to price, quality, safety, reliability and security of supply of electricity and the reliability, safety and security of the national electricity system.*

**DBP submission**

- 3.13. DBP accepts consistency between the NEL and the NGL at the level of the objects clause.

## 4. SELECTION OF THE FORM OF REGULATION

### **Recommendation**

*The NEL and the NGL should contain common provisions that authorise the making of Rules for the regulation of access pricing for transmission and distribution facilities by any one, or combination of, measures regulating:*

*Control – the revenues earned or that may be earned by owners, controllers or operators of transmission and distribution facilities from the provision by them of services that are the subject of a networks pricing determination; and the prices charged or that may be charged by owners, controllers or operators of transmission and distribution facilities for the provision by them of services that are the subject of a network pricing determination, and the methodology for the determination of those prices;*

*Negotiate/arbitrate – the commercial negotiation between owners, controllers or operators of transmission and distribution systems and persons wishing to use services provided by those facilities of the terms and conditions (including price) for the provision of such services and the resolution of disputes concerning such terms and conditions; and*

*Price Monitoring – the monitoring and reporting of prices charged by owners, controllers or operators of transmission and distribution systems for the provision by them of services by means of those transmission and distribution systems.*

### **DBP submission**

- 4.1. DBP accepts that the NEL and the NGL should contain provisions that permit the making of Rules for the regulation of access pricing by Control. The making of those Rules, which will attenuate the rights of service providers must, however, be subject to strict statutory control.
- 4.2. The extent to which Rule-making powers should be extended to Negotiate/arbitrate regimes is not clear. Certainly some procedural guidelines are required to ensure the effectiveness of the arrangements in which a service provider can withdraw from negotiations, leaving the buyer of its services with few alternatives. If, however, these guidelines are extensive (which is likely to be the case if they are to be imposed by an administrative body with limited experience of commercial negotiation), they will limit the freedom to negotiate, and will impair the effectiveness of a Negotiate/arbitrate regime.
- 4.3. DBP is of the view that the institutions for, and the procedures governing, Negotiate/arbitrate regulation should be specified in the NEL and the NGL, without provision for further Rule-making.
- 4.4. Similarly, the procedures governing Price Monitoring should be specified in the NEL and the NGL, without provision for further Rule-making. Price-monitoring is intended to be a “light-handed” form of regulation in which the threat of more intrusive regulation is available in the event of a review of prices indicating the exercise of substantial market power. Allowing Rule-making by an administrative body will ensure a proliferation of rules concerning the provision of information to the regulator which the rule making body and the regulator believe to be necessary for effective monitoring. Price Monitoring will quickly become intrusive and costly. If Price Monitoring without Rule-making is considered infeasible, Price Monitoring is not a viable form of regulation.

### **Recommendation**

*The NEL and the NGL should contain common provisions that require the AEMC, in making Rules that apply the available forms of regulation to network services, have regard to the presence and extent of market power possessed, and the likelihood of its use, by the owners, operators or controllers of the transmission and distribution facilities by which services to be subject to regulation are provided, having regard to the following factors:*

- (a) barriers to entry – the presence and extent of barriers to entry in the market in which the services to be subject to regulation are provided;*
- (b) network externalities – the presence and extent of interdependencies (or ‘network externalities’) between the services to be provided by each owner, operator or controller of the transmission or distribution facilities by which services to be subject to regulation are provided;*
- (c) countervailing market power – the extent to which market power possessed by the owners, operators or controllers of the transmission or distribution facilities by which services to be subject to regulation are provided is likely to be mitigated by countervailing market power possessed by the users of those services;*
- (d) substitution possibilities – the presence and extent of substitutes, and the elasticity of demand, for electricity or gas, as applicable, in the markets served by the services to be subject to regulation;*
- (e) information asymmetry – the extent to which users and prospective users of the services to be subject to regulation are likely to have adequate information as a basis for negotiation with the owners, operators or controllers of the facilities by which the services to be subject to regulation are provided; and*
- (f) Other factors – any other factor that the AEMC considers relevant.*

*The Rules made by the AEMC may either specify the form of regulation by reference to defined services or categories of service, or authorize the AER to determine the form of regulation in respect of specific services applying provisions in the Rules that are consistent with these criteria.*

### **DBP submission**

- 4.5. DBP agrees that the NEL and the NGL should contain common provisions that require the AEMC, in making Rules that apply the available forms of regulation, to have regard to the presence and extent of market power.
- 4.6. The application of these Rules will significantly impact on the rights of transmission and distribution businesses. Only Rules which are specifically authorized by legislation should be permitted, and the arbitrariness admitted by provisions allowing “any other factor that the AEMC considers relevant” should be avoided. Such provisions serve only to increase regulatory uncertainty.
- 4.7. The common provisions in the NEL and the NGL should also mandate a requirement that Rules concerning the presence and extent of market power be applied only with reference to the barriers to entry, network externalities, countervailing market power, substitution possibilities and information asymmetry in the markets in which transmission and distribution businesses actually operate. Australian regulatory decisions – in particular, decisions pertaining to coverage – which have used competition arguments, have been deficient in their reasoning. That reasoning has been about competition in hypothetical markets, and not in the markets in which regulated businesses actually provide services.

- 4.8. If Rules are to be made by the AEMC, they should be clear instructions as to what is required of both regulated businesses and the regulator. Rules which create further uncertainty by authorizing regulator discretion should not be permitted.

**Recommendation**

*The NEL and NGL should contain common provisions that require the AEMC to make Rules that provide for the forms of regulation in paragraphs (a) (control) and (b) (negotiate/arbitrate). Rules with respect to the option in paragraph (c) (price monitoring) should be an option for which provision may be made in the Rules, but not a mandatory requirement.*

**DBP submission**

- 4.9. Either price monitoring is part of the regime, or it is not. If it is not, no reference need be made to it in the NEL, the NGL or the Rules.
- 4.10. If price monitoring is part of the regime, it should, as DBP has noted in paragraph 4.4, be established through the NEL and the NGL, without provision for further specification in the form of Rules.

**Recommendation**

*The MCE should direct the AEMC to undertake a review of the price monitoring option with a view to developing a draft Rule, having regard to:*

- *the Productivity Commission's recommendation for the development of a price monitoring option for the gas regime; and*
- *the COAG agreement in clause 2.3 of the Competition and Infrastructure Reform Agreement that the introduction of price monitoring for service provided by means of significant infrastructure facilities should be considered, where this would improve the level of price transparency, as a first step where price regulation may be required, or where scaling back from more intrusive regulation.*

**DBP submission**

- 4.11. There is sufficient information available from the Productivity Commission's report on its review of the gas access regime to draft the necessary provisions of the NEL and NGL.
- 4.12. Detailed Rule-making is not required, and there is no reason for the MCE to direct the AEMC to undertake a review of the price monitoring option.

## 5. FRAMEWORK FOR REGULATORY DECISION MAKING

### **Recommendation**

*The NEL and the NGL should contain common provisions that require the AEMC to make Rules with respect to the procedures for making network pricing determinations that include inter alia:*

- (a) the entitlement of the regulated entity to make a proposal within the Rules determined by the AEMC in relation to revenue/pricing;*
- (b) the time within which any such proposal must be made;*
- (c) publication of the proposal and related information;*
- (d) an opportunity for stakeholder submissions in relation to the proposal and related information;*
- (e) publication of a draft decision and the giving of reasons by the regulator;*
- (f) the entitlement of the regulated entity to make submissions in relation to the draft determination which may include a revised proposal;*
- (g) an opportunity for stakeholder submissions in relation to the draft determination and any revised proposal; and*
- (h) the holding of pre-determination conferences.*

### **DBP submission**

- 5.1. This recommendation from the Expert Panel appears reasonable in the way it proposes that the NEL and NGL give the AEMC the power to make procedural rules.
- 5.2. The recommendation is, however, entirely unreasonable in that it opens the way to an unjustified change in the model of regulation applying under the Code. That change is the focus of the Expert Panel's views on the framework for regulatory decision making presented in the Draft Report.
- 5.3. Through debate (which began well before the Code was incorporated into legislation), and a number of important Australian Competition Tribunal decisions, the scheme of the Code is now interpreted as a propose-respond model of regulation. As the Expert Panel notes, this model has the following features:
  - (a) there is a legal right for a regulated business to make a formal proposal on access prices and terms and conditions to the regulator at the commencement of a review period;
  - (b) the regulator is required to assess this proposal against the relevant principles and factors set out in the Code;
  - (c) the task of the regulator is to assess whether the proposal is within the range that reasonable people may consider meets the requirements of the Code;
  - (d) if the regulator finds that the proposal is within the range that reasonable people may consider meets the requirements of the Code, it must accept the proposal;

- (e) if the if the regulator finds that the proposal is not within the range that reasonable people may consider meets the requirements of the Code, it must reject the proposal and draft its own access terms and conditions including prices;
  - (f) the regulator's decision is subject to a merits review.
- 5.4. Consistent with interpretation of the scheme of the Code as one in which the service provider makes a formal proposal which is to be assessed against the relevant principles and factors set out in the Code, Competition Tribunal review has clearly established that where a choice of methods exists, the choice is a matter for the service provider and not the regulator. An important instance is the choice of method for determining the rate of return to be used in access price determination.
- 5.5. The Expert Panel rejects the propose-respond model, and rejects the view that choice among available methods for price determination is a matter for the service provider rather than the regulator. It is of the view that there is little evidence from the time the Gas Code was developed that careful thought was given to the propose-respond model. Furthermore, according to the Expert Panel, in the first six years after its introduction, the Code was interpreted as supporting a "conventional" consider-determine regulatory approach. The propose-respond model is, in the Expert Panel's view, the result of subsequent legal interpretation of the provisions of the Gas Code and the rights and obligations it establishes, rather than a policy based analysis of the most appropriate regulatory approach.
- 5.6. In putting forward this view, the Expert Panel:
  - (a) is unjustifiably demeaning of those involved in the long process of development of the Code;
  - (b) ignores the consultative process which took place involving policy makers, pipeline owners and operators, and pipeline users; and
  - (c) has failed to understand the nature of the regulatory process (or, perhaps, chooses not to understand the nature of that process because it is not in accord with its preconceptions).
- 5.7. The Expert Panel finds that the policy arguments which have been advanced in support of the propose-respond model do not lead to the conclusion that it is superior to the "conventional" consider-decide regulatory approach, and the proposed-respond model is not capable of practical implementation.
- 5.8. The second of these findings is clearly not supported by recently regulatory decisions which have been made from the perspective that the Code is to be interpreted as a propose-respond model.
- 5.9. The Expert Panel finds the propose-respond model to be deficient against an alternative – the consider-decide model – which is to be regarded as "conventional". In the absence of any clear statement of the consider-decide model, or of any support for the view that consider-decide is in some way "conventional", the first finding has little basis beyond the opinion of the Expert Panel.
- 5.10. The policy analysis provided by the Expert Panel, and the conclusions drawn from it, overlook the central issue which has led to the confirmation of the model of the Code being a propose-respond model. That issue is uncertainty. Both service providers and

regulators have accepted that the regulatory process of the Code is forward-looking and, by its very nature, involves consequences which are uncertain.

- 5.11. Regulators have sought to deal with this uncertainty by using their positions in the scheme of the Code to effectively ignore it. Despite inherent uncertainty in respect of many of the issues to which they must give consideration, regulators have advanced themselves as the only party in the regulatory process which can provide the “right” or “best” answer.
- 5.12. The recent reinstatement of the propose-respond model through decisions of the Australian Competition Tribunal has corrected the misperception which regulators have had of what they were capable of achieving, and of their role under the Code. The scheme of the Code implicitly recognized the conditions of uncertainty in which regulatory decision making must take place, and the fact that there could be no “right” or “best” outcome. What was required was scheme whereby the proposal of an informed party – the regulated business – could be carefully tested and scrutinized and, if necessary modified, not because it was “wrong” – there can be no “right” answer – but because it was unreasonable. The Code provided that scheme.
- 5.13. Were the Expert Panel’s recommendations on the framework for regulatory decision making to be accepted, the way would be open to the AEMC to abandon a framework – that of the Code – which provided a mechanism for dealing with the inherent uncertainties in the regulatory process. That scheme would be replaced by one in which uncertainty is resolved by the arbitrary decisions of the regulator.
- 5.14. This may, as the Expert Panel indicates, remove a major source of variability in regulatory decision making. It will, however, introduce another, as either service providers or pipeline users have recourse to the courts to overturn decisions which they find are uninformed.
- 5.15. The fundamental issue for DBP as a pipeline service provider is not the form of the recommendation made by the Expert Panel, but the direction it clearly indicates should be followed once the recommendation is implemented. To follow that direction would see the abandonment of the propose-respond model of the Code, and the unjustified removal of the – albeit limited – rights which that model of regulation gives to pipeline service providers.
- 5.16. Although broadly accepting of the form of the Expert Panel’s recommendation (but not its implications), DBP is skeptical about the efficacy of one specific aspect of that recommendation: the requirement for the holding of pre-determination conferences.
- 5.17. Ultimately, it is the regulator who must assess the proposals and information put before it by a service provider, and the submissions on those proposals and that information made by interested parties. Given the nature of the proposals made by service providers and the information from service providers and interested parties, it is unlikely that formal conferences will provide a venue within which regulators can satisfactorily test any of the material provided. The ineffectiveness of the public forums held by regulators, and their disappearance from the regulatory process, clearly points in this direction.
- 5.18. DBP is of the view that, were formal pre-determination conferences to be introduced, they would serve only to prolong already excessively long regulatory decision making processes.

**Recommendation**

*Recommendations 7.6 (less public consultation about a roll in of a capital project under section 8.21 of the existing Code) and 11.2 (removal of additional processes after the release of the Final Decision) of the Productivity Commission's report be accepted.*

**DBP submission**

- 5.19. On 21 February 2006, DBP submitted a request under section 8.21 of the Code for the Western Australian regulator's agreement that forecast new facilities investment for the Stage 5 expansion of the DBNGP, amounting to up to \$1.5 billion, be included in the capital base for subsequent recovery via the regulated tariff. (The public version of DBP's request is available on the web site of the Western Australian Economic Regulation Authority.)
- 5.20. DBP made this request in the following circumstances:
- (a) prospective users of the capacity to be created by Stage 5 require that capacity by specific dates in accordance with their own planned completions of major investments, and in accordance with their existing contractual obligations; and
  - (b) banks which are expected to provide the debt finance for the project, and whose commitment is required before Stage 5 can proceed, require, in addition to long term contracts with the prospective users, the relative certainty provided by agreement under section 8.21 that the large investment they will finance can be recovered via the regulated tariff.
- 5.21. In these circumstances – circumstances which DBP believes are typical of major pipeline expansions – timely agreement by the regulator under section 8.21 is essential.
- 5.22. DBP is fully supportive of the Productivity Commission's recommendation 7.6 for less public consultation, which should allow an earlier conclusion to the process to be followed under section 8.21, and longer time for engineering design, materials procurement and pipeline construction.
- 5.23. DBP does not, however, agree with the Productivity Commission's recommendation 11.2 which would have the effect of removing the 'further final decision' from the approval process for access arrangements.
- 5.24. In DBP's experience, new issues arise during the process of public consultation on the draft decision which the regulator must issue under Code procedures for the approval of access arrangements and revisions to access arrangements. These issues, and their implications for an access arrangement, are communicated to the service provider in the regulator's final decision. The service provider must then accept the final decision and incorporate the required amendments in the access arrangement, or otherwise address the amendments in the access arrangement, or submit an access arrangement which does not comply with the regulator's requirements for amendments. Which ever of these outcomes occurs, the further final decision, and not the final decision, provides regulatory closure. It cannot be removed as the Productivity Commission recommends.

## 6. GUIDANCE ON THE APPLICATION OF PRICE CONTROL

### **Recommendation**

*The framework for the provision of guidance on the application of price control should be common across electricity and gas distribution and transmission services. The frameworks should be based on items 15 to 23 of Schedule 1 to the NEL, but modified to facilitate the use of TFP approach where the AEMC considers this to be appropriate. The framework should require the AEMC to make Rules that address:*

1. *The mechanisms or methodologies for the derivation of the maximum allowable revenue or prices to be applied by the AER in making a network pricing determination, which may include –
  - (a) *the use of a building blocks approach; or*
  - (b) *the use of a total factor productivity approach.**
2. *The principles to be applied, and procedures to be followed, by the AER in exercising or performing and economic regulatory function or power.*
3. *The valuation, for the purposes of making a network pricing determination, of assets forming part of a transmission or distribution system, and of proposed new assets to form part of a transmission or distribution system, that are, or are to be, used in the provision of services that are the subject of a network pricing determination.*
4. *Where the building blocks form of control applies, the determination by the AER, for the purpose of making a network pricing determination with respect to services that are the subject of such a determination, of –
  - (a) *a depreciation allowance; and*
  - (b) *operating costs;*
  - (c) *corporation taxes; and*
  - (d) *an allowable rate of return on assets.**
5. *Where the total factor productivity form of control applies, the methodology to be applied by the AER to allow increases in the prices charged by the distribution or transmission system operator by reference to the rate of change of inflation adjusted for a historically-based estimate of industry-wide total factor productivity.*
6. *The assessment, or treatment, by the AER, of investment in transmission and distribution systems for the purposes of making a network pricing determination and the economic framework and methodologies to be applied by the AER for those purposes.*
7. *Incentives for owners, controllers or operators of transmission and distribution systems to make efficient operating and investment decisions.*
8. *The length of the regulatory period (if any) to apply between regulatory reviews or the circumstances in which either the AER or a distribution or transmission system operator may initiate a redetermination.*

### **DBP submission**

- 6.1. This recommendation, and the two which follow, are in DBP's view, untenable.

- 6.2. DBP makes submissions in respect of all three recommendations following its restatement of the third of them below.

**Recommendation**

*The NEL and NGL should include common network pricing principles based on section 35 of the NEL but varied to:*

- (a) provide incentives for the efficient use of assets; and*
- (b) require consideration of the risks and costs of over-investment and under-investment in relevant assets and of under-utilisation and over-utilisation of existing infrastructure.*

**Recommendation**

*The AEMC be required to make and maintain Rules that:*

- (a) provide a reasonable opportunity for a network operator to recover the efficient costs of providing services that are the subject of the network pricing determination and complying with a regulatory obligation; and*
- (b) provide effective incentives to a network operator to promote economic efficiency in the provision by it of services that are the subject of a network pricing determination, including:
  - (i) the making of efficient investments in the network owned, controlled or operated by it and used to provide services that are the subject of a network pricing determination;*
  - (ii) the efficient provision by it of services that are the subject of a network pricing determination; and*
  - (iii) the making of efficient use of existing assets and proposed new assets that are, or are to be, used to provide services that are the subject of a network pricing determination;**
- (c) require the AER, in making a network pricing determination, to make allowance for the value of assets forming part of a network owned, controlled or operated by a network operator, and the value of proposed new assets to form part of that network, that are, or are to be, used to provide services that are the subject of a network pricing determination;*
- (d) require the AER to have regard to any valuation of assets forming part of a transmission or distribution system owned, controlled or operated by a network operator applied in any relevant determination or decision; and*
- (e) require the AER, in making a network pricing determination, to have regard to the economic costs and risks of:
  - (i) the potential for under-investment and over-investment in assets by the network operator; and*
  - (ii) the potential for under-utilisation and over-utilisation of the capacity of assets forming part of a distribution or transmission system, and the capacity of proposed new assets.**

### **DBP submission**

- 6.3. Section 35 of the NEL sets out sets out pricing principles which are not the same as those to which the Code gives effect through the reference tariff principles of section 8. Although there are similarities between the principles of the NEL and the reference tariff principles of the Code, there are also significant differences.
- 6.4. There are, in consequence, differences between the matters listed in items 15 to 23 of Schedule 1 to the NEL, in respect of which the AEMC must make rules in accordance with section 35(1) of the NEL, and the reference tariff principles of the Code.
- 6.5. The Expert Panel has not considered these differences or their implications for both pipeline service providers and pipeline users. It is, in effect, proposing an arbitrary change to the cost recovery principles which have guided the financing of pipeline investments, and the commercial operation of pipeline systems, since 1997.
- 6.6. In DBP's view, the NGL should not arbitrarily impose the pricing principles of the NEL as the Expert Panel is recommending. There has been no consideration of, or consultation on, this issue. The networks pricing principles of the NGL must be that set of principles which is necessary to give effect to the reference tariff principles of the Code. The AEMC should then be instructed, through provision in the NGL, to make Rules which have the effect of doing no more, and no less, than implementing the reference tariff principles of the Code (as amended by the recommendations of the Productivity Commission's review of the gas access regime) via the NGL.
- 6.7. DBP does not see any reason why the networks pricing principles of the NGL should not provide incentives for the efficient use of assets, and require consideration of the risks and costs of over-investment and under-investment in relevant assets and of under-utilisation and over-utilisation of existing infrastructure.
- 6.8. The third of the Expert Panel's recommendations for guidance on the application of price control appears, to DBP, to provide unnecessary and potentially confusing duplication. It should be rejected. Once the pricing principles are established, the NEL and the NGL need only direct the AEMC to make and maintain Rules to give effect to those principles.
- 6.9. In the case of the NGL, the AEMC must be directed to initially make Rules which give effect to the reference tariff principles of the Code.
- 6.10. DBP notes that the wording of the three recommendations indicates, in a number of places, that the AER's role is one of determining access prices, consistent with the consider-decide model of regulation which the Expert Panel is seeking to impose on gas pipeline businesses. As DBP has stated earlier in this submission, the Expert Panel has not established any basis for change from the propose-respond model of the Code. Any of the recommendations made by the Expert Panel, including the recommendations providing guidance on the application of price control, which have the effect of imposing the consider-decide model should be rejected.

**Recommendation**

*The NEL and the NGL should provide a direction to the AEMC to review and develop Rules that permit the economic regulation of distribution and transmission services through the application of a control setting methodology based on a total factor productivity approach, including the circumstances in which such a methodology would apply, by 31 December 2007.*

**DBP submission**

- 6.11. Subject to the comments below, the NEL and the NGL should permit the economic regulation of distribution and transmission services through the application of a control setting methodology based on a total factor productivity approach.
- 6.12. There is, however, no requirement for Rule-making by the AEMC by 31 December 2007.
- 6.13. In DBP's view, one of the major failures of regulatory policy in Australia has been the speed with which regulators across jurisdictions have sought to impose a uniform set of regulatory principles and methods. There has been an unjustified presumption on the part of regulators that there is a single "best" method of regulation applicable irrespective of the nature of the service provided, the technology used to provide that service, and the market conditions in which service provision takes place. Rapid convergence to a uniform view of the purported "best" form of regulation has precluded exploitation of the unique opportunity made possible by Australia's multiple regulatory jurisdictions, for the testing of different forms of regulation and different regulatory methods with a view to ascertaining those which best serve the community.
- 6.14. In the case of price control based on a total factor productivity approach, there is, once again, an opportunity to generate and test possible alternatives with a view to establishing methods which work for both regulated businesses and their regulators. That opportunity will be lost if Rule-making, and a requirement to make Rules, in respect of total factor productivity methods are immediately handed to the AEMC. The AEMC does not have a monopoly on the expertise, and all of the knowledge, required to develop such methods.
- 6.15. If a total factor productivity approach to regulatory price control is appropriate in the energy sector, that will be best ascertained by providing regulated businesses with the opportunity to propose such methods to the AER, and by requiring the AER to carefully assess and respond to those proposals.

## 7. INFORMATION REQUIREMENTS

### **Recommendation**

*The framework for information gathering powers should be common across the energy sector. It should comprise:*

- (a) statutory powers for the AER to obtain information that is relevant to the performance of its economic regulatory functions from any person;*
- (b) statutory guidance to the AEMC concerning the scope and content of Rules prescribing regular regulatory reporting requirements;*
- (c) Rules promulgated by the AEMC specifying the scope and content of regular reporting requirements;*
- (d) guidelines issued by the AER, in accordance with the Rules, specifying the format requirements and timelines for regular reports.*

### **DBP submission**

- 7.1. DBP acknowledges that the regulator should have the power to obtain information that is relevant to the performance of its regulatory function. This power is already provided under the NEL and the Gas Pipelines Access Law.
- 7.2. In a regulatory regime which has economic efficiency as its primary objective, information of relevance to the performance of the regulatory function is “forward looking”. That is, the information required for regulation comprises, mainly, forecasts for the period during which the scheme of regulation is applied.
- 7.3. The Code currently provides for the provision of these forecasts through the access arrangement information to be submitted with a proposed access arrangement, and with proposed revisions to an access arrangement. Further information is typically provided by service providers in submissions made to regulators, and in models supporting tariff calculations.
- 7.4. Regulator requirements for additional information depend on what has already been provided, and on the particular circumstances of the service provider. A broad power, such as that already in the Gas Pipelines Access Law, should enable the regulator to obtain whatever information it considers is relevant to the performance of its functions.
- 7.5. Since the AEMC is an administrative agency with no role to play in regulatory decision making, there is no requirement for the promulgation of Rules by the AEMC specifying the scope and content of regular reporting requirements, and therefore, no requirements for it to be given statutory guidance concerning the scope and content of such Rules, and for the format of, and timelines for, regular reporting.
- 7.6. In a regulatory regime in which the primary requirement is for information for decision making which achieves economic efficiency, regular reporting in the way the Expert Panel seems to intend would add significantly to the costs of regulation without improving regulatory decisions.
- 7.7. Moreover, the Code currently affords the Regulator with significant information gathering powers and the power to issue guidelines having regard to the intent of the Code. DBP’s

experience to date has been that regulators have issued guidelines which seek to extend the intention of the Code. Accordingly, leaving this power to the AEMC or the AER risks this problem being perpetuated. DBP endorses the submissions made by the Australian Pipeline Industry in this regard.

**Recommendation**

*The AER's statutory powers be modeled on section 28 of the NEL.*

**DBP response**

- 7.8. Section 41 of the Gas Pipelines Access Law provides the necessary statutory power. No case is made for modeling the regulator's powers to obtain information and documents on section 28 of the NEL.
- 7.9. The main objection to retaining section 41 appears to be that the "service provider may not keep accounts in usable form for regulatory purposes". This will always be an issue where the information required for regulation is primarily in the nature of forecasts. It will not be resolved by historical record keeping, even if the rules for such record keeping are highly articulated and service providers make substantial investments in supporting information systems.

**Recommendation**

*The statutory guidance to the AEMC for the development of Rules dealing with the AER's information gathering powers should specify that the Rules may:*

- (a) provide for annual reports of regulatory accounting information relevant to the economic regulatory functions of the AER;*
- (b) provide for periodic reports of non-financial information relevant to the AER's economic regulatory functions;*
- (c) provide for the manner in which such information is to be attested by the service provider and be independently audited;*
- (d) provide for the provision of equivalent information by contractors to the service provider where such information is relevant to the AER's economic regulatory functions;*
- (e) provide for the disclosure and protection of such information, subject to its presentation in a manner that is not materially detrimental to the business or the financial interest of the service provider;*
- (f) require the AER to have regard to the relevance of the information it requires to be reported, and to the costs incurred by the information provider, and the efficiency and effectiveness of the regulatory process and its objectives.*

**DBP submission**

- 7.10. Providing the statutory guidance recommended by the Expert Panel would open the way for the AEMC to develop Rules which would have the effect of massively increasing the cost of regulation. The benefits from such action, in the context of a regulatory regime which has the objective of economic efficiency, and requirements for information in the nature of forecasts, are entirely unclear.

- 7.11. With the exception of the recommendation concerning the provision of equivalent information by contractors to the service provider, none of the Expert Panel's recommendations on information requirements should be given further consideration unless the approach proposed can be justified by formal cost-benefit analysis.
- 7.12. The Expert Panel's recommendation that the AEMC should make Rules to require the provision of equivalent information by contractors to the service provider where such information is relevant to the AER's economic regulatory functions should be rejected.
- 7.13. DBP would expect that rules made by the AEMC under the NGL would have the same status as Rules made by the AEMC under the current NEL. They would have the force of law. Were the AEMC to be able to make Rules to require the provision of equivalent information by contractors to the service provider it would, in effect, be regulating those contractors. The power to attenuate contractor rights would be with an unaccountable administrative body. In DBP's view, this is not appropriate. Contractors to regulated businesses would become subject to regulation without the attenuation of rights that that entails being subject of debate and decision making by Parliament.
- 7.14. Furthermore, there appears to be little in the way of reasoning to support either de facto regulation by the AEMC, or extended regulation through legislative intervention by Parliament.
- 7.15. In making its recommendation, the Expert Panel does not formulate its own view but, instead, concurs with the views of the Productivity Commission in the report of its review of the gas access regime. Unfortunately, in this matter, the Commission's reasoning is deficient.
- 7.16. What is at issue, as the Productivity Commission recognizes, is the pricing of services provided by a contractor to a service provider where those services have not been sourced through a process in which explicit reference is made to alternatives available in the market. In considering this issue, the Commission makes a leap in its reasoning from prices to the costs of the business activities of the contractor. These costs are not, however, immediately relevant. The services provided by the contractors in question are typically asset management services which can be provided by many suppliers, and different suppliers operating with different business models will incur different costs. In these circumstances, the question the Productivity Commission should have asked is whether the service provider could have obtained the services provided by the contractor at a lower price if it had sourced those services from another supplier. It failed to do so.
- 7.17. After failing to ask the right question, the Productivity Commission proposed that regulators might use section 41 of Schedule 1 of the GPAL to obtain the cost information they supposedly required. This was, however, rejected because:
- (a) it was too heavy handed, any party failing to provide the required information being exposed to criminal sanctions; and
  - (b) it only enabled a regulator to obtain information that a regulator believes to exist and that has been kept by a contractor.
- 7.18. It was better, the Commission reasoned, to extend section 4.1 of the Code to require an associated contractor to establish and maintain accounts in relation to services provided to a service provider, and to require that those accounts be provide to the regulator at the time of the service provider's access arrangement review. Furthermore, the regulator should be able to issue guidelines in relation to the accounts of the associated contractor to ensure that the maintained information was suitable for its (the regulator's) purposes.

- 7.19. Not only did the Productivity Commission fail to ask the right question. It rejected a mechanism that might have been available under the GPAL because it was too heavy handed, and then proceeded to propose an even more heavy handed scheme. That scheme would not, however, provide the information on prices that is required. It would not provide a regulator with any assurance that a regulated service provider could have obtained the services provided by associated contractor at a lower price if it had sourced those services from another supplier.
- 7.20. There is, in these circumstances, no case for the Productivity Commission's recommendation on information from associated contractors to be imported into the regulatory scheme of the NEL and NGL via the Expert Panel's recommendation concerning statutory guidance to be given to the AEMC for the making of Rules for information gathering by the AER.

## **8. DBP'S CONCLUSIONS ON THE DRAFT REPORT**

- 8.1. DBP regards the Expert Panel's Draft Report as an unsatisfactory basis for the MCE's development of a common approach to transmission and distribution revenue and network pricing across electricity and gas.
- 8.2. Were the Expert Panel's recommendations to be implemented, they would have the effect of imposing on gas transmission and distribution businesses the scheme of regulation applying in the electricity sector, without adequate consideration having been given to differences in the services provided by electricity and gas transmission and distribution businesses, in the technologies used to provide those services, and in the markets in which those services are provided. They would also be likely to result in changes to the rights and obligations which service providers have under the Code, which have been clarified through judicial review, and which have been the basis on which major investments in pipeline infrastructure have been made.
- 8.3. DBP is concerned that the recommendations of the Expert Panel provide minimal statutory protections for the rights of service providers. Much of the substance of regulation is to be left to Rule making by the AEMC, which is to have only limited statutory guidance. Furthermore, the AEMC is likely to be only weakly accountable to the MCE. (Under the current NEL, the AEMC is required only to "have regard" to any relevant MCE statement of policy principles in its making of Rules.
- 8.4. Leaving Rule making to the AEMC, without the necessary statutory guidance will serve only to increase regulatory uncertainty. The costs of dealing with that uncertainty will be borne by regulated service providers and users of the services they provide.
- 8.5. The Expert Panel's proposed objects clause for the NGL, and its recommendation that efficiency be explained in terms of economic efficiency in the Explanatory Memorandum and Second Readings speech for the Bill in which the objects clause is introduced, risk introducing inconsistency which will become a point of contention in future regulatory debate. Regulatory uncertainty will be increased rather than reduced.
- 8.6. DBP is doubtful that an objective expressed in terms of economic efficiency can be applied in the real world, and expects that resort will be had to various imprecise notions of what economic efficiency actually means. DBP is of the view that a better approach to the issue of objectives is the pragmatic one of the Code: a balancing of the interests of the service provider, the interests of users of the services it provides, and the public interest.
- 8.7. DBP is of the view that the NEL and the NGL should provide for the making of Rules for the regulation of access pricing by control. It is concerned that extensive Rules will limit the freedom to negotiate and impair the effectiveness of a negotiate/arbitrate regime. The NEL and the NGL should provide for price monitoring, but not for rule-making by the AEMC in respect of such monitoring. Extensive Rule making will make price monitoring intrusive and costly.
- 8.8. Detailed Rule making for price monitoring is not required, and there is no reason for the MCE to direct the AEMC to undertake a review of the price monitoring option.

- 8.9. DBP agrees that the NEL and the NGL should contain common provisions for the making of Rules concerning the application of available forms of regulation which have regard to the presence and extent of market power. These common provision should mandate that any assessment of market power should be by reference to the markets in which transmission and distribution businesses actually operate, and not to hypothetical markets (as has often been the case in regulatory decision making).
- 8.10. Were the Expert Panel's recommendations on the framework for regulatory decision making to be accepted, the way would be open to the AEMC to abandon a framework – the propose-respond model of the Code – which provided a mechanism for dealing with the inherent uncertainties in the regulatory process. That scheme would be replaced by one in which uncertainty is resolved by the arbitrary decisions of the regulator.
- 8.11. This may, as the Expert Panel indicates, remove a major source of variability in regulatory decision making. It will, however, introduce another, as either service providers or pipeline users have recourse to the courts to overturn decisions which they find are uninformed.
- 8.12. The fundamental issue for DBP as a pipeline service provider is not the form of the Expert Panel's recommendation on the framework for regulatory decision making, but the direction the Panel clearly indicates should be followed once the recommendation is implemented. To follow that direction would see the abandonment of the propose-respond model of the Code, and the unjustified removal of the – albeit limited – rights which that model of regulation gives to pipeline service providers.
- 8.13. DBP is skeptical about the efficacy of one specific aspect of that recommendation: the requirement for the holding of pre-determination conferences.
- 8.14. DBP is fully supportive of the Productivity Commission's recommendation 7.6 for less public consultation, which should allow an earlier conclusion to the process to be followed under section 8.21, and agrees with the Expert Panel's recommendation that the Productivity Commission recommendation be implemented.
- 8.15. DBP does not, however, agree with the Productivity Commission's recommendation 11.2 which would have the effect of removing the 'further final decision' from the approval process for access arrangements. The further final decision is required for regulatory closure and should not be removed as the Expert Panel is now recommending.
- 8.16. DBP is of the view that the Expert Panel's recommendations concerning guidance on the application of price control are untenable. In making these recommendations the Expert Panel has failed to give consideration the differences that exist between the pricing principles of the current NEL, and the principles given effect through the reference tariff principles of the Code. The Expert Panel is, in effect, proposing an arbitrary change to the cost recovery principles which have guided the financing of pipeline investments, and the commercial operation of pipeline systems, since 1997.
- 8.17. In DBP's view, the networks pricing principles of the NGL must be that set of principles which is necessary to give effect to the reference tariff principles of the Code. The AEMC should be instructed, through provision in the NGL, to make Rules which have the effect of doing no more, and no less, than implementing the reference tariff principles of the Code via the NGL.

- 8.18. The NEL and the NGL should permit the economic regulation of distribution and transmission services through the application of a control setting methodology based on a total factor productivity approach. There is, however, no requirement for Rule-making by the AEMC by 31 December 2007.
- 8.19. If a total factor productivity approach to regulatory price control is appropriate in the energy sector, that will be best ascertained by providing regulated businesses with the opportunity to propose methods for such an approach to the AER, and by requiring the AER to carefully assess and respond to those proposals.
- 8.20. DBP acknowledges that the regulator should have the power to obtain information that is relevant to the performance of its regulatory function, and is of the view the necessary power should be that which is currently available to regulators through section 41 of the GPAL.
- 8.21. Providing the statutory guidance recommended by the Expert Panel in respect of the AER's information gathering powers would open the way for the AEMC to develop Rules which would have the effect of massively increasing the cost of regulation. The benefits from such action, in the context of a regulatory regime which has the objective of economic efficiency, and requirements for information in the nature of forecasts, are entirely unclear.
- 8.22. There is, DBP argues, no case for the Productivity Commission's recommendation on information from associated contractors to be imported into the regulatory scheme of the NEL and NGL via the Expert Panel's recommendation concerning statutory guidance to be given to the AEMC for the making of Rules for information gathering by the AER.
- 8.23. In DBP's view, the Expert Panel has been selective in the material it has considered, giving greater attention to correcting what it perceives to be defects in the current regulatory arrangements, and focusing less on its terms of reference requiring the provision of high level policy guidance and recommendations on policy principles and methodologies.