NEWMONT AUSTRALIA LIMITED
SUBMISSION TO
PRODUCTIVITY COMMISSION REVIEW
OF NATIONAL GAS CODE
17 SEPTEMBER 2003

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Executive Summary

1. Newmont submits that the Gas Code should be retained but be modified to ensure efficient access to third parties on reasonable terms. The modifications also need to provide a mechanism for a straightforward and transparent determination of tariffs which can then be fixed for an appropriate period thereby enabling confident budgeting and planning and the avoidance of price shocks. Consideration should also be given to modifying the dispute resolutions procedures to avoid complex legal issues which are not directly relevant to the fundamental principles of the Gas Code.

Introduction and Background

2. In 2002, Newmont Mining Corporation, a major US gold mining company, acquired Normandy Mining Limited (Normandy). Normandy was subsequently renamed Newmont Australia Limited. Newmont is Australia's largest gold producer, with interests in mining operations in Queensland, Northern Territory and Western Australia. In WA, Newmont has four mining operations close to the Goldfields Gas Pipeline (GGP): Jundee and Wiluna (both close to the town of Wiluna and utilising GGP transported gas for electricity generation), Bronzewing (near Leinster, with diesel generation) and KCGM's superpit (a Joint Venture of which Newmont is a 50% owner) which is adjacent to Kalgoorlie and also utilising GGP transported gas for electricity supply.[1]

3. Newmont and its predecessors have had a long association with energy supply to the Kalgoorlie region. In the early 1980s, Gold Mines of Kalgoorlie Ltd was one of the two mining companies which joined with the then State Energy Commission of Western Australia in a Joint Venture to construct and finance the 700km Muja to Kalgoorlie 220kV transmission line, which was commissioned in 1984.

4. However, by the mid-1990s, power prices in Kalgoorlie were again approaching those of diesel plants. The transmission line was so heavily loaded, with losses exceeding 35%, that a costly augmentation was required.

5. Normandy Mining was one of the three companies (with WMC and BHP) who conceived of, and implemented, the Goldfields Gas Pipeline (GGP), initially proposing the idea to a skeptical Government, having to tender against 16 other companies to win the right to build the pipeline, negotiating the Goldfields Gas Pipeline Agreement ("State Agreement"), and then proceeding with construction and commissioning. Normandy ,as a 25% Joint Venturer played a part in the negotiations of the State Agreement, including the setting of the initial third party tariffs.

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[1] Further details regarding Newmont can be found at their website http://www.newmont.com.au.

6. Normandy's aim was to secure power for its operations around Kalgoorlie at prices akin to those promised by the transmission line (but not delivered), in a way that would be sustainable over time. In 1999 Newmont sold its interests in the GGP to the present GGP Owners, with appropriate long term contracts in place.

7. The State Agreement contemplates that the GGP will be regulated by the Gas Code. Newmont has a keen interest in the continued application of the Gas Code to the GGP because of:

    - its historical involvement,
    - the fact that Newmont's Kalgoorlie operations represent one of the largest transportation contracts on the GGP;
    - the existing gas transport contracts to Jundee and Wiluna;
    - gas supply to possible future mine developments, and
    - possible consequences to its existing contracts arising from changes to the prevailing third party prices and other access terms set by regulation.

8. Notwithstanding its historical interest in the GGP as an owner, Newmont considers that its main interest in gas pipelines in the future will be as a shipper of gas. Newmont has diverse mining interests around Australia including interests in existing mines which may be expanded in the short to medium term; and interests in prospective mineral deposits which may be developed into functioning mines in the medium to long term. These existing mines and prospective developments may require access to existing or proposed gas pipelines and because of this Newmont has an interest in the continued operation of an access regime applicable to gas pipelines. Newmont considers that such an access regime must provide access to third parties on reasonable terms and provide a mechanism for a straightforward and transparent determination of tariffs which can then be fixed for an appropriate period thereby enabling confident budgeting and planning and the avoidance of price shocks.

9. Newmont's present position is that it supports the continued operation of the Gas Code, which is effective in providing access and reasonable tariffs, but could be improved in certain respects. Newmont accepts that an owner of a pipeline is entitled to a reasonable return on its investment, and in particular appropriate compensation for risk where the pipeline is a greenfields development. Indeed, Newmont recognizes that a reasonable return on investment is essential in order to attract investment in gas pipelines, particularly greenfields pipelines, and has no objection to pipeline owners being rewarded with such a reasonable return. However, the reference tariff objectives should allow for modification of the risk premium once the period of maximum risk (the repayment of the initial cost of construction) has passed, and should not allow the re-introduction of a risk premium for an incoming purchaser of an established pipeline; as such a situation in effect requires the shipper to pay a tariff to the original owner of the greenfields development for the risk of construction and repayment

of the cost of construction; and then the payment of another premium for risk to the incoming owner for the incoming owner's perceived risk and the need for the incoming owner to repay its cost of purchase.

10. The scope of this submission is therefore limited to those issues identified in the Issues Paper which are directly relevant to Newmont's interests as outlined above. No attempt will be made to address those other issues which are not relevant to Newmont's interests, but in relation to those other issues Newmont's position is that it supports the continued operation of the Gas Code, but certain improvements could be made which will better achieve Newmont's goals of access for third parties on reasonable terms and a mechanism for a straightforward and transparent determination of tariffs which can then be fixed for an appropriate period.

ISSUES FOR CONSIDERATION

How has the Gas Access Regime affected upstream and downstream industries? To what extent has the Regime promoted competition in these markets?

What has been the impact of the Regime on end-user gas consumers? What is the evidence that the Regime leads to lowers prices and/or improved quality and range of service for gas and energy consumers?

11. Newmont's experience with the Gas Access Regime relates principally to the Goldfields Gas Pipeline in Western Australia. The GGP is currently a covered pipeline. The pipeline is owned by an unincorporated joint venture and operated by Goldfields Gas Transmission Pty Ltd for and on behalf of the joint venture. In March 2003, GGT filed an application with the National Competition Council for revocation of coverage. In September 2003, the NCC released its draft recommendation not to revoke coverage of the GGP.

12. Newmont made a detailed submission to the NCC as to why coverage should not be revoked. As a major user of the GGP, the regulatory regime governing that pipeline has a significant and direct impact Newmont's business operations. As such, Newmont has given careful consideration to the effect of the Gas Access Regime and other forms of regulatory regime such as the "State Agreement" which applies the GGP.

13. GGT has stated that, as there is no approved access undertaking for the GGP in place yet, the Gas Access Regime has made no contribution to the terms of access for current users of the GGP. However, as discussed below, Newmont believes that the Gas Access Regime has already had an effect in terms of price discovery and as a factor in forward planning for existing business operations and future mine developments.

Newmont's background as a user of the GGP

14. Newmont is Australia's largest gold producer with interests in mining operations in Queensland, Northern Territory and Western Australia. In Western Australia, it has four mining operations close to the GGP:

- Jundee and Wiluna (both close to the town of Wiluna) – which use electricity generated using GGP transported gas;

- Bronzewing (near Leinster) – which uses diesel generation (as conversion to gas is not economic due to the short remaining life of the mine); and

- KCGM's superpit adjacent to Kalgoorlie (a joint venture in which Newmont holds 50%) – which uses electricity generated using GGP transported gas.

15. For mining operations in remote areas, the traditional source of power has been diesel generation, which is relatively expensive. To obtain more competitively priced power, it is necessary either to build an electricity transmission line so that electricity already generated elsewhere can be transported to the region or to build a gas pipeline so that gas fired generation can be produced in the region. Newmont has had direct experience of the commercial, economic and investment factors relevant to each of these options.

16. Newmont acquired Normandy Mining in 2002. Normandy originally had a 25% interest in the joint venture which developed the GGP (which it sold in 1999). Normandy's involvement in developing the GGP stemmed from its desire to secure competitively priced electricity in the Kalgoorlie region. Prior to Normandy's involvement in the GGP, it was one of two mining companies that had been involved with the State Electricity Commission of WA in the development of the Muja to Kalgoorlie 220kV electricity transmission line which was commissioned in 1984. The mining companies' aim was to obtain electricity in the Kalgoorlie region at a price similar to that obtained by major companies around Perth plus the actual cost of transmission to Kalgoorlie. This did not eventuate, hence Normandy's subsequent involvement in the GGP, where Normandy's aim was to secure delivered gas at a price which would enable electricity to be generated in the Kalgoorlie region at prices comparable to those originally promised from the Muja to Kalgoorlie line and in a way that would be sustainable. There are currently 10 users of the GGP – of which three (WMC, BHP and Newmont) account for 75% of usage.

Newmont's perspective as user of a covered pipeline

17. Newmont can offer the Productivity Commission an insight into the perspective of a major user of a gas pipeline. In this instance, the pipeline is the GGP which Newmont uses as a shipper of gas to remote locations where its mining operations are based. However, much of what Newmont has to say applies more broadly to the general issues being considered by the Productivity Commission. Further, given its historical role in developing the GGP, Newmont as a user also understands the investment risks and drivers for pipeline owners. As a major user, Newmont wants:

- access on reasonable terms;
- tariffs that are transparent with no price shocks; and
- sufficient certainty to enable long term business planning.

18. The key issue for Newmont is the impact of the terms of access and the tariff for using the GGP on the commercial feasibility of using gas fired electricity generation in its mining operations. Commercial feasibility covers cost, reliability and sustainability. There is ample evidence that producing electricity for mining operations in the Kalgoorlie region using competitively priced delivered gas via the GGP is more efficient than transmitting electricity over a long distance to the Kalgoorlie region because of the high level of transmission losses (up to 20%).

Certainty

19. The time horizon for business planning and decision making require a measure of certainty as to supply inputs. It is not just the initial availability but also the subsequent sustainable long term position that counts. Small elements of uncertainty can often have substantial consequences, particularly where there are multiplier effects. This is the case with gas fired electricity generation. Small changes in gas transmission cost can have a big impact on the resulting electricity cost. The cost of gas fired electricity is primarily driven by two factors:

- the delivered price of gas purchased as fuel; and

- the heat efficiency factor of the generating plant.

20. While efficiency will vary according to the age and size of the plant, an average efficiency factor of around 36% (a Heat Rate of 10,000 kj/kWh which would be a reasonable average to use Australia wide) means that each $1/GJ in the cost of gas translates to a $10/MWh fuel cost component of the electricity cost. Capital charges and operations and maintenance will add some $20/MWh in remote areas of interest to Newmont. Given that (again, in the areas of interest to Newmont) transmission can account for around 50% of the delivered gas price, this means that a 10% increase in transmission tariff results in an increased electricity cost of 5%.

21. Newmont's submission to the NCC set out some general information about the relative total costs of different forms of electricity generation in regional Western Australia. That information illustrated two important matters:

- that gas is clearly cheaper than diesel for a new start up mine with a choice – however, the issue for existing mines is substitution cost and the life of the mine; and

- that, although fuel costs dominate, for a small short lived mine (which could be only 5 years) located some distance away from the pipeline, the capital component of the total cost (primarily the cost of the infrastructure to bring the gas to the plant) is so significant that it makes the case for using gas marginal. Such mines will be greatly affected by even small unexpected changes in the transmission tariff for the gas used.

22. Newmont believes that the Gas Access Regime plays an important role in providing a more certain environment for business, with the additional benefit of consistency nationwide. The need for nationwide consistency is particularly important:

- for investment (domestic but also critically foreign investors); and

- to avoid regional distortions.

Efficient pricing

23. Efficient pricing requires an effective price discovery mechanism. One of the most important impacts of the Gas Access Regime for users is that it allows price discovery on an on-going basis while preserving the ability of users to contract and secure firm rights. Coverage enables effective price discovery via the tariff setting process undertaken by the Regulator. A covered pipeline should result in tariffs which represent sustainable efficient pricing. In relation to the GGP, Newmont notes that even though there is as yet no approved access undertaking, coverage has had an impact in terms of price discovery. For example, based on the OffGAR draft determination of 10 April 2001, it is possible to calculate an "average tariff" of $1.91 per GJ and to estimate the incremental cost of supplying additional throughput if the pipeline were fully compressed. One of the critical differences between coverage and the "State Agreement" which applies to the GGP is the lack of a Regulator to facilitate price discovery under the latter, which effectively allows GGT to unilaterally set, maintain and re-determine tariffs.

24. Prior to operation of the GGP, an "open season" tariff was offered which comprised a 7.5% discount to the eventual tariff to attract foundation customers. In the second half of 1999 the eventual tariff was introduced and more discounts were offered (up to 25%). Then in 2001 GGT unexpectedly and without explanation announced the removal of all discount tariffs, the result being effectively a 30% increase. For the reasons explained above, a change of this magnitude can have a substantial flow on effect for users, particularly small mines that have decided to use gas and are now effectively locked in as a consequence of significant sunk costs.

25. A pipeline tariff is largely determined by two factors:

- the capital expenditure involved in building the pipeline; and

- the volume of usage.

The tariff should be sufficient to provide the owner with a reasonable rate of return. However, having established a tariff that does that, in the absence of the need for any further capital expenditure and assuming that the expected volume of usage occurs, it would be reasonable for users to expect that tariffs should not increase.

26. Newmont (and presumably, users generally) would be prepared to pay a reasonable price to compensate the owner for the risk of constructing a new pipeline to a remote location. However, once compensated for that risk, the tariff should be adjusted. Newmont believes that without the price discovery that necessarily flows from the operation of the Gas Access Regime, users are at a significant disadvantage in tariff negotiations. The best a user can do is to attempt to second guess what an efficient tariff might be, based on pipelines elsewhere.

Investment

27. The Gas Access Regime provides a workable framework for balancing the following in a flexible and fair manner:

- the legitimate interests of the owner and its investment;
- the interests of users;
- efficiency; and
- public interest in promoting competition.

28. It enables discovery of an efficient price which provides a reasonable return to the owner and facilitates the operation of competitive markets upstream and downstream. As such, Newmont believes that it provides an appropriately balanced investment environment for infrastructure developers and businesses who use that infrastructure.

29. Although, in remote locations such as this, transmitted electricity may not be a constraint on delivered gas price, the price of delivered gas can be a constraint on electricity pricing due to the high proportion of total generation costs that depend on it. Thus, a regime that maximises the ability to secure efficiently priced delivered gas anywhere where there is significant load is critical to making competition work in Australian electricity market reforms. This is an important argument for the coverage mechanism under the Gas Code. If we assume that the true wellhead price nationally is around $1.50 to $2.00 at most, then the difference between coal and gas fired generation comes down to the margin charged by gas producers (producer competition should bring this down) and gas transmission tariffs. Actually, if you compare the cost of gas fired generation at the wellhead from a new efficient plant, to the cost of generating from coal at the coal pit, then gas fired electricity is actually about the same cost as NSW black coal-fired electricity. If we assume that gas fired generation can locate closer to load (unlike coal) and take both gas and electricity transmission costs (and line losses) into account, then the delivered cost of gas fired electricity can be quite competitive with that from most coal-fired plants.

30. What this means is that the Gas Access Regime and a network of covered pipelines may make a critical difference in terms of ensuring long term sustainable competitive electricity pricing. Therefore all major electricity users have an interest in the Gas Access Regime.

To what extent, if at all, has the Regime led to unmet demand, where consumers would be willing to pay more to increase supply but service providers are unwilling to make the necessary investment?

31. Newmont considers the Gas Code has not led to unmet demand but notes that a situation of unmet demand appears to have arisen in relation to the DBNGP where the pipeline owner has refused to consider any expansion

to capacity until the process of tariff determination under the Code had been completed. Newmont considers this to be a rare circumstance. However Newmont considers that the provisions regarding the obligation to develop capacity should be re-considered, particularly the prohibition on funding any expansion. Any expansion to a pipeline is an asset which benefits the pipeline owner and such expansions also benefit other shippers by enabling increased throughput in the common sections of the pipeline, thereby reducing unit costs and tariffs. It is unfair that only the shipper requesting the expansion should pay for any expansion given these benefits to other parties and given that the shipper is being required to pay for an asset which it will not then own.

What are the compliance costs for businesses? Are these costs likely to be significantly greater than the costs associated with unregulated commercial negotiations between pipeline owners/operators and users? Do compliance costs differ significantly between proposed and existing pipelines and between transmissions pipelines and distribution networks?

32. Newmont notes that in its submission to the NCC on the application for revocation of coverage of the GGP, GGT (on behalf of the GGP owners) claimed significant costs of compliance with the Code, citing $2.3million (not including legal costs) and an ongoing cost of $300,000 per annum in complying with the Code. No detail is shown for these calculations of cost. Newmont contends that GGT's cost of $2.3million to date is not a cost of complying with the Code, but a cost of attempting to avoid the application of the Code. Since the Independent Gas Regulator Western Australia handed down his draft decision of 10 April 2001 proposing a Reference Tariff significantly below that sought by GGT, GGT has pursued an aggressive strategy in relation to the application of the Code. These include an application to the Supreme Court of Western Australia attacking the Regulator's draft decision, and an application for revocation of coverage. These actions have led interested parties to incur significant legal costs.

33. If the initial compliance cost is ignored and attention is directed to the ongoing cost of $300,000 per annum in complying with the Code, Newmont submits that this cost is reasonable relative to the benefits being obtained, and insignificant in the context of the GGP. For this cost the parties interested in the GGP obtain the benefit of an independent and expert Regulator whose decisions are transparent and in accordance with the Code, a law approved by the Parliaments of both Western Australia and Australia. This structure has significant advantages over the State Agreement regime, which is a relatively private process in which the Minister has a significant role and users have few rights. In Newmont's submission, the annual cost is a small price to pay for the additional certainties and confidence provided by Code coverage.

34. In any event, a cost of $300,000 per annum is insignificant and GGT's own figures illustrate the point. GGT's Access Arrangement Information dated 15 December 1999 disclose that in Year 2000 GGT's projected Pipeline Operating and Maintenance Cost was $6,635,000; and its projected

Management Cost (described as communications lease and maintenance, pipeline operations management charge, commercial operations management charge, including marketing and overhead cost) was $4,669,000. Against other operating costs of this magnitude, an annual cost of $300,000 for appropriate regulation is insignificant and well worth the advantages obtained from that regulation.

35. In Newmont's submission the cost of regulation is reasonable having regard to the benefits obtained and insignificant compared to all other costs. Although Newmont has no experience in negotiating access arrangements for a gas pipeline, Newmont has considerable experience in negotiating access arrangements for electricity distribution networks and based on this experience Newmont considers that the costs of compliance with the Gas Code are unlikely to be significantly greater than unregulated commercial negotiations with pipeline owners.

Are there costs that arise from strategic behaviour by pipeline owners or access seekers?

36. Newmont considers there has been considerable strategic behaviour by pipeline owners in relation to the Gas Code, some of which has caused unnecessary costs to Newmont. Since the Independent Gas Regulator Western Australia handed down his draft decision of 10 April 2001 proposing a Reference Tariff significantly below that sought by GGT, GGT has gone to extraordinary lengths to avoid the application of the Code to the GGP. These include an application to the Supreme Court of Western Australia attacking the Regulator's draft decision, and an application to the NCC for revocation of coverage of the GGP. Newmont notes that the costs incurred from this strategic behaviour are significant.

To what extent does the Regime balance the interests of different parties, such as pipeline owners, end-users and gas producers?

37. Apart from the modifications suggested in this submission, Newmont considers that in general the Gas Code strikes an appropriate balance between the relevant competing interests. Further Newmont contends that no major changes should be made to the Gas Code until the transitional issues that have arisen with the Code's application to date, particularly in Western Australia, have been resolved.

Is the current coverage test and its application appropriate? If not, why and how could the coverage test be improved?

38. The GGP has been covered by the Gas Code since the Gas Code's inception, so Newmont's only experience in relation to the coverage test is in the context of the application for revocation of coverage of the GGP which was made to the NCC by the GGP Owners in March 2003. The revocation test in effect applies the coverage test. The NCC has recently issued a draft recommendation to the effect that coverage of the GGP not

be revoked, which is supported by Newmont. In light of this experience, Newmont's view of the coverage test is that it has, to date, delivered a satisfactory outcome.

To what extent has the option to revoke coverage been utilised? Are any improvements required?

39. Newmont is involved in opposing the application for revocation of coverage of the GGP, which was commenced by the GGP owners in March 2003. The NCC has recently issued a draft recommendation to the effect that coverage of the GGP not be revoked, which is supported by Newmont. In light of this experience, Newmont's view of the revocation process is that it has, to date, delivered a satisfactory outcome.

40. Although the GGP was one of the pipelines covered by the Gas Code since its inception, Newmont notes that a third party shipper or user could be seriously disadvantage if it entered into a medium to long term commitment (such as the development of a new mine or expansion of an existing mine) partly in reliance upon the fact that an adjacent pipeline was covered by the Gas Code, only to find a short time later that the coverage of the adjacent pipeline was revoked. For that reason, Newmont considers that the test for revocation of coverage ought to be modified to take account of the prejudice to a third party shipper or user in that situation. This could be done by modifying the test for revocation of coverage to specifically take account of such prejudice; alternatively to allow the NCC to recommend revocation of coverage but only upon the imposition of binding obligations on the pipeline owner which take account of that prejudice.

Do the dispute resolution procedures of the Code, combined with the prescription required in access arrangements - particularly with respect to reference tariffs - facilitate or hinder commercially negotiated outcomes?

41. Newmont's experience of the dispute resolution procedures of the Code is limited to the actions commenced as a result of the Western Australian Gas Regulator's ('Regulator's') draft determination of April 2001, and his notice of November 2002. Those acts of the Regulator have resulted in separate proceedings in the Supreme Court of Western Australia commenced by the GGP Owners (2904 of 2001), which has now been discontinued, and by WMC Resources Ltd 1584 of 2003), which is listed for hearing in October 2003. Both of those proceedings involved the application of complex administrative law principles to the interpretation and application of the Gas Code and Newmont has, and is, participating in those proceedings in order to ensure that its interests are protected. As a result, it has incurred legal costs in relation to issues which are incidental to the main issues of access and competition which form the basis of the Gas Code (and, indirectly, Part IIIA of the Trade Practices Act). Newmont considers that it would be beneficial to all parties if the dispute resolution procedures of the Gas Code could be modified such that the relevant disputes are limited to access and competition issues, thereby avoiding

complex legal issues which are not directly relevant to the fundamental principles of the Gas Code. Newmont expects that the cost and time involved in dispute resolution to date will diminish as regulatory and legal precedents are established and notes also that it has no experience of the dispute resolution procedures in the Gas Code since the Gas Code is only of recent and limited application to the GGP.

Does the Code create an incentive to delay investment and/or build smaller pipelines than optimal so as to minimise the possibility of pipeline investment being subject to access regulation? Again, it is important to provide concrete examples to support such a view.

42. To Newmont's observation, the Code does not create such incentives. Incremental capacity comes at such a low cost that the provision of such incremental capacity with a view to gaining third party sales (even under regulated access arrangements) is warranted because it greatly enhances the economics of a gas pipeline. In Newmont's view, Code coverage enhances or encourages the sale of spare capacity to third parties because the determination of an acceptable access arrangement by an independent party avoids the usual distrust inherent in negotiations between a pipeline owner and shipper or user.

What would be the advantages and disadvantages of providing investors in a proposed transmission pipeline with the option of a 15 year (or some other fixed term) access holiday? What are the pros and cons of limiting access holidays to transmission pipelines?

43. Newmont strongly opposes any proposal for a fixed term exclusion or holiday from the Gas Code for any proposed transmission pipeline. The interests of an owner of a greenfields pipeline development can be adequately compensated by provision in the reference tariff objectives for an appropriate risk premium reflecting the risks of a Greenfield development. Such a provision would adequately protect the owners' interests while at the same time allowing for third party access on reasonable terms. As has been mentioned above, however, the reference tariff objectives should allow for modification of the risk premium once the period of maximum risk (the repayment of the initial cost of construction) has passed, and should not allow the re-introduction of a risk premium for an incoming purchaser of an established pipeline; as such a situation in effect requires the shipper to pay a tariff to the original owner of the greenfields development for the risk of construction and repayment of the cost of construction; and then the payment of another premium for risk to the incoming owner for the incoming owner's perceived risk and the need for the incoming owner to repay its cost of purchase.

Are further changes required to address the issues of regulatory truncation of potential returns from new investment? If so, what are they and why are they necessary?

44. In Newmont's view, regulatory truncation of potential returns is not a detrimental outcome of the Gas Code. To the extent that the Gas Code results in regulatory truncation of potential returns, that truncation merely reflects the diminution of the returns that are otherwise attainable in an unconstrained market; which in turn reflects the principles of Part IIIA of the Trade Practices Act that certain assets within Australia are of such national significance that the owners of those assets should not be entitled to operate in an unconstrained market. In other words, regulatory truncation is appropriate where the relevant asset is of national significance and, but for the Gas Code, the owner of that asset would otherwise operate in a manner designed to maximize its profits regardless of any other consideration. Regulatory truncation, to the extent that it exists, is appropriate in relation to those pipelines which satisfy the tests applicable to coverage since those assets are of such national significance as to justify regulation of an otherwise unconstrained market.

To what extent have sections 6.22 and 6.23 of the Code (Obligation to Develop Capacity) been used? Could improvements be made to the operation of this part of the Code? If so, how?

45. In Newmont's experience of the GGP, these provisions of the Code have not been used. Newmont notes, however, that two new compressor stations have been built in the GGP which is subject to the Gas Code, with little dispute or negotiation, which is consistent with Newmont's observation that the addition of capacity in a gas pipeline is relatively simple (technically) since pipelines are generally built with significant spare capacity available from the start (or able to be added at low cost by compression). However Newmont is equally aware that the operator of the Dampier to Bunbury Natural Gas Pipeline has refused to consider expansions to that pipeline until the process of tariff determination under the Code had been completed. Newmont considers this to be a rare circumstance. However Newmont considers that the provisions regarding the obligation to develop capacity should be re-considered, particularly the prohibition on funding any expansion. Any expansion to a pipeline is an asset which benefits the pipeline owner and such expansions also benefit other shippers by enabling increased throughput in the common sections of the pipeline, thereby reducing unit costs and tariffs. It is unfair that only the shipper requesting the expansion should pay for any expansion given these benefits to other parties and given that the shipper is being required to pay for an asset which it will not then own.

Do the provisions for pipeline extensions and expansions hinder or facilitate investment? Please provide examples

46. Newmont considers that the provisions for pipeline extension and expansion are neutral in that they neither hinder nor facilitate investment, though are unfair to the shipper requesting expansion for the reasons mentioned in the paragraph above.

Does the possibility that service providers fund pipeline expansions create an asymmetry between access providers and users, such that risk is transferred from users to providers?

47. Newmont notes that the additional capacity created by a pipeline expansion is an asset owned by the pipeline owner and that asset is available for exploitation by the pipeline owner. Provided that the reference tariff objectives provide for a reasonable return on investment, including appropriate compensation for risk then the burden of risk can be adequately compensated in the tariff. As mentioned previously, Newmont considers that the provisions regarding the obligation to develop capacity should be re-considered, particularly the prohibition on funding any expansion. Any expansion to a pipeline is an asset which benefits the pipeline owner and such expansions also benefit other shippers by enabling increased throughput in the common sections of the pipeline, thereby reducing unit costs and tariffs. It is unfair that only the shipper requesting the expansion should pay for any expansion given these benefits to other parties and given that the shipper is being required to pay for an asset which it will not then own.

Are the reference tariff objectives specified in the Code appropriate? If not, what improvements could be made?

Do the multiple objectives assigned to reference tariffs, and the discretion regulators have to make tradeoffs between them, lead to any problems? For example, has there been unnecessary uncertainty or inconsistency?

Do the current arrangements for determining reference tariffs lead to inconsistencies and create an unnecessary level of uncertainty for pipeline owners/operators, particularly given the discretion provided to regulators? Do you think that the creation of a national energy regulator would address these problems?

Is the level of prescription provided in the Code on reference tariffs appropriate? If not, should it be increased or decreased and why?

What, if any, improvements should be made in determining reference tariffs? Are clearer reference tariff principles required in the Code?

48. Newmont notes that it has limited experience of the operation of the Gas Code regarding these issues and based on its experience further time is required to assess the operation of the Gas Code. However there is cause

for concern in the delay and cost incurred so far in attempting to establish a reference tariff for the GGP, though it is to be hoped that the cost and time involved in tariff determinations to date will diminish as regulatory and legal precedents are established. Newmont is concerned at judicial comments in Re Michael; Ex parte Epic Energy (WA) Nominees Pty Ltd [2002] WASCA 231 which suggest that extracting monopoly profits is a legitimate business interest of a monopoly owner and Newmont submits that it is appropriate to modify the reference tariff objectives to specifically reject this notion. It may also be appropriate to review the reference tariff objectives in the light of the Epic Energy decision to clarify the use of the objectives of the Gas Code and to ensure internal consistency of applicable principles of the Gas Code. Newmont recognises that a reasonable return on investment is essential in order to attract investment in gas pipelines, particularly greenfields pipelines, and has no objection to pipeline owners being rewarded with such a reasonable return. However, it objects to any determination of tariffs which provides for a risk premium to the owner where the period of risk (the repayment of the initial cost of construction) has already passed such as in the situation where an established pipeline is on-sold to a new owner. This in effect requires the shipper to pay a tariff to the original owner of the greenfields development for the risk of construction and repayment of the cost of construction; and then the payment of another premium for risk to the incoming owner for the incoming owner's perceived risk and the need for the incoming owner to repay its cost of purchase.

Do reference tariffs set an upper bound on prices for access seekers in negotiations with a pipeline owner/operator? Is it feasible for access suppliers to negotiate lower prices than the reference tariff, if the reference tariff is set so as to recover no more than the efficient costs of providing a service?

49. Newmont considers that reference tariffs do set an upper bound on prices for access seekers. Since the incremental costs of adding capacity to a pipeline are so low, it is a simple matter for a pipeline owner to add that capacity and make sales of that additional capacity at low prices. This adds significantly to the economics of a pipeline. The requirements of an individual user may be different from the requirements of a general user and even the efficient costs of providing services to different customers can vary, and be lower than the average.

Should changes be made to the review procedures available for reference tariff decisions?

50. Newmont considers that the existing review procedures are adequate but considers that it would be beneficial to all parties if the dispute resolution procedures of the Gas Code could be modified such that the relevant disputes are limited to access and competition issues, thereby avoiding complex legal issues which are not directly relevant to the fundamental principles of the Gas Code.

How timely are decisions made under the Gas Code? Do you think the process is unnecessarily protracted? If so, what has caused this and what do you think could be done to improve it?

51. Newmont considers that there is cause for concern in the cost and time incurred so far in determining a reference tariff for the GGP. Part of the cost and delay arises from the necessity for determining an appropriate weighted average cost of capital ('wacc') and suggests that one solution may be to have a standard wacc, possibly set by the ACCC and subject to regular review, which applies unless good reason is shown otherwise.

Are there other necessary changes to the Gas Access Regime, its objectives and its application, to ensure uniform third party access arrangements are implemented and applied on a consistent, national basis?

52. Newmont considers that the Gas Code has produced good outcomes, though in many respects there is little experience of its practical operation and it would be appropriate to allow further time to observe that practical operation before recommending any changes. However, in general terms, the Code needs a better Objectives Clause and one which requires good consumer and public policy outcomes, and the control of market power by monopolies or oligopolies, rather than the weak "promotion of competition" objective, as this is too vague and does not necessarily produce consumer benefits. This is perhaps illustrated by the decision of the Tribunal in the EGP pipeline case, which accepted the argument that "a little competition is better than none" which is in accordance with the Code, rather than have to seek "effective and workable" competition, which is the thing which brings benefits to the public.

Are current arrangements for reviewing decisions by regulators appropriate? If not, what changes could be made and why would they be an improvement?

53. Newmont considers that the existing review procedures are adequate but considers that it would be beneficial to all parties if the dispute resolution procedures of the Gas Code could be modified such that the relevant disputes are limited to access and competition issues, thereby avoiding complex legal issues which are not directly relevant to the fundamental principles of the Gas Code.