AUSTRALIAN COMPETITION TRIBUNAL

Application by Alinta Sales Pty Ltd (No 2) [2012] ACompT 13

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| Citation: | Application by Alinta Sales Pty Ltd (No 2) [2012] ACompT 13 |
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| Review from: | Economic Regulation Authority of Western Australia |
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| Parties: | **ALINTA SALES PTY LTD**  |
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| File number: |  |
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| Tribunal: |  **(PRESIDENT)****MR R DAVEY (MEMBER)****PROFESSOR D ROUND (MEMBER)** |
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| Date of decision: | 8 June 2012 |
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| Catchwords: | **COMPETITION LAW** –review of determination by the Economic Regulation Authority of Western Australia (the ERA) – whether the ERA made reviewable error in determining tariff increases – whether the ERA required to consider impact of tariff increase on Applicant – whether the ERA considered impact of tariff increase on Applicant – whether the ERA considered appropriate range of possible impacts on Applicant – whether reference tariff path should have been smoothed  |
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| Legislation: | *National Gas Access (WA) Act 2009* (WA)*Energy Co-ordination Act 1994* (WA)*Gas Pipelines Access (Western Australia) Act 1998* (WA)*Energy Co-ordination (Gas Tariffs) Regulations 2000* (WA)*National Gas Access (WA) (Local Provisions) Regulations 2009* (WA)  |
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| Cases cited: | *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24*Bruce v Cole* (1998) 45 NSWLR 163*Application by WA Gas Networks Pty Ltd* [2012] ACompT 12  |
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| Dates of hearing: | 17, 18, 19 and 20 April 2012 |
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| IN THE AUSTRALIAN COMPETITION TRIBUNAL |  |
|  | ACT 2 of 2011 |

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| RE: | APPLICATION UNDER S 245 OF THE NATIONAL GAS (WESTERN AUSTRALIA) LAW FOR A REVIEW OF A REVIEWABLE REGULATORY DECISION MADE BY THE ECONOMIC REGULATION AUTHORITY OF WESTERN AUSTRALIA IN RELATION TO WA GAS NETWORKS GAS DISTRIBUTION SYSTEM PURSUANT TO RULE 64 OF THE NATIONAL GAS RULES |
| BY | ALINTA SALES PTY LTD (ABN 92 089 531 984)Applicant |

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| tribunal: | MANSFIELD J (PRESIDENT)MR R DAVEY (MEMBER)PROFESSOR D ROUND (MEMBER) |
| DATE OF ORDER: | 8 JUNE 2012 |
| WHERE MADE: | ADELAIde (VIA VIDEO LINK TO perth) |

THE TRIBUNAL ORDERS THAT:

1. The decision of the Economic Regulation Authority of Western Australia made on 28 April 2011 and titled the *Economic Regulation Authority’s revised access arrangement for the WA Gas Networks Pty Ltd Mid-West and South-West Gas Distribution Systems*, to the extent that it determined the B3 Reference Service tariffs and the B1 and B2 Reference Service tariffs to take effect on and from 1 July 2011 (and subject to any variation in those tariffs as a consequence of the decision of the Tribunal in matter ACT 3 of 2011: *Application by WA Gas Networks Pty Ltd* [2012] ACompT 12) is affirmed.

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| IN THE AUSTRALIAN COMPETITION TRIBUNAL |  |
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| re: | APPLICATION UNDER S 245 OF THE NATIONAL GAS (WESTERN AUSTRALIA) LAW FOR A REVIEW OF A REVIEWABLE REGULATORY DECISION MADE BY THE ECONOMIC REGULATION AUTHORITY OF WESTERN AUSTRALIA IN RELATION TO WA GAS NETWORKS GAS DISTRIBUTION SYSTEM PURSUANT TO RULE 64 OF THE NATIONAL GAS RULES |
| BY: | ALINTA SALES PTY LTD (ABN 92 089 531 984)Applicant |

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| tribunal: | JUSTICE MR R DAVEY (MEMBER)PROFESSOR D ROUND (MEMBER) |
| DATE: |  |
| PLACE: |  (VIA VIDEO LINK TO PERTH) |

**REASONS FOR DECISION**

1. This matter was heard by the Tribunal at the same time as the application by WA Gas Networks Pty Ltd (now known as ATCO Gas Australia Pty Ltd) (ATCO), matter ACT 3 of 2011 to review a reviewable regulatory decision of the Economic Regulation Authority of Western Australia (ERA) concerning access to the Gas Distribution System (GDS) of ATCO Gas Australia Pty Ltd (ATCO). The Tribunal has given its decision in the ATCO application at the same time as its decision in this matter is published: *Application by WA Gas Networks Pty Ltd (now known at ATCO Gas (Australia)* [2012] ACompT 12 (the ATCO decision).
2. The detailed nature of the GDS, the circumstances in which the ERA came to make its reviewable regulatory decision on 28 April 2011 and the broader legislative and regulatory framework are as set out in the ATCO decision. It is not necessary to repeat all of that matter in detail. To the extent necessary, this decision should be read with the ATCO decision.
3. However, it is helpful to record some of the same material.
4. The GDS comprises the majority of reticulated gas infrastructure in Western Australia, including serving the Perth greater metropolitan area as well as a number of regional centres. It comprises networks of about 12,000 kilometres of gas mains and associated infrastructure, and delivers gas to in excess of 600,000 delivery points. The GDS is a covered pipeline within the meaning of the National Gas Law (NGL) as defined in s 9 of the *National Gas Access (WA) Act 2009* (WA), (NGA WA Act) and given effect by s 7 of the NGA WA Act. ATCO is the “covered pipeline service provider” for purposes of the NGL. It provides five pipeline services offered as reference services to users of the GDS.
5. Alinta Sales Pty Ltd (Alinta) is the incumbent gas retailer in Western Australia and is the main user of GDS and the haulage services that are provided by ATCO, pursuant to contractual arrangements between Alinta and ATCO. The tariffs paid by Alinta to ATCO are the reference tariffs approved by the ERA from time to time under the access arrangement for the GDS.
6. An access arrangement for the GDS was first approved by the Independent Gas Pipelines Regulator on 18 July 2000 in accordance with the then legislative provisions. That arrangement covered the period from July 2000 to August 2005. On 10 August 2005, the now current regulator, the ERA, approved revisions to the GDS access arrangement operative from 25 August 2005 until 1 January 2010.
7. The present application before the Tribunal is a confined one. That is not to suggest in any way that it does not raise important issues. It is simply that its focus was quite restricted, to reflect the real and relevant interest of Alinta in the way in which the decision proposed that increased tariffs under the decision under review were to be implemented.
8. Under its gas trading licence, granted pursuant to the *Energy Co-ordination Act 1994* (WA) (the ECA), Alinta is licensed to sell gas transported through a distribution system to “small use” customers, that is, customers whose consumption of gas is less than 1TJ per year. Alinta supplies about 600,000 small use customers, who in turn constitute almost all of the small use customers in Western Australia and of whom 98.6% are residential customers. Its only competitor in the small use customer market is the government-owned electricity retail corporation trading as Synergy, which services about 100 small use customers only.
9. The B3 Reference Service (B3 Service) is a “Pipeline Service by which a user may take delivery of Gas at a Delivery Point on the Medium Pressure/Low Pressure System using Standard Delivery Facilities which include a Standard 8m3/hr”. Some 592,000 or 96.5% of small use customers were supplied by Alinta utilising the B3 Service. Their median gas usage is between 14 and 16 gigajoules per annum. ATCO’s expected revenue from reference tariffs for the B3 Service constitutes some 78% of its total revenue for all reference services for the access arrangement period.
10. This application seeks review of the way in which the proposed revised B3 Service tariffs were to be implemented as a consequence of the Final Decision of the ERA referred to below, and the *Economic Regulation Authority’s revised access arrangement for the WA Gas Networks Pty Ltd Mid-West and South-West Gas Distribution Systems* (the Reviewable Decision).

# the decision

1. The decision under review was the culmination of the process by which the ERA determined the revised terms of access and the access arrangements for the GDS under the NGA WA Act. Pursuant to s 7 of the NGA WA Act the NGL applies as a law of Western Australia and under s 294 of the NGL, the National Gas Rules (NGR) also come into operation.
2. Under the statutory regime, ATCO submitted to the ERA on 29 January 2010 its proposed revised access arrangement. Pursuant to rule 59 of the NGR, the ERA published the *Draft Decision on WA Gas Networks Revisions Proposal for the Mid-West and South-West Gas Distribution Systems – Submitted by WA Gas Networks Pty Ltd* on 17 August 2010 (the Draft Decision). It did not approve ATCO’s proposed revised access arrangement. ATCO then submitted a revised proposed access arrangement and other materials. On 28 February 2011, the ERA pursuant to rule 62 of the NGR published the *Final Decision on WA Gas Networks Pty Ltd proposed access arrangement for the Mid-West and South-West Gas Distribution Systems* (the Final Decision). Again the ERA refused to approve ATCO’s proposed revised access arrangement.
3. As required by rule 64(1) of the NGR, on 28 April 2011, the ERA published its proposed revisions to the access arrangement for the GDS and, at the same time, it published the Reviewable Decision giving effect to its proposed revisions to the access arrangement.
4. It is fair to say that the Reviewable Decision, whilst not acceding to ATCO’s proposed revisions, ultimately provided, inter alia, for a significant increase in the B3 Service tariffs. In these reasons for decision, the focus is on the B3 Service tariffs because that was the focus of the submissions. It is the service which, in general terms, Alinta uses to transport gas for small use customers. In the process referred to, Alinta had made submissions to the ERA pointing out that the proposed changes in the reference tariff would result in price shocks, in particular if there was a significant large up-front adjustment operative from 1 July 2011, with smaller increases in tariffs after that date. Alinta suggested that the same revenue outcome could be achieved through a “glide-path” approach, that is by way of uniform periodic percentage increases in the reference tariff. It had also pointed out to the ERA that the retail gas tariff prices it was able to charge were regulated by government: *Energy Co-ordination (Gas Tariffs) Regulations 2000* (WA) (the Gas Tariffs Regulations).
5. That is, not surprisingly, correct as a matter of law. It is clear that the prices that Alinta can charge to small use customers are capped under the Gas Tariffs Regulations. It is also correct, as was acknowledged by the ERA, that the caps fixed under the Gas Tariffs Regulations are not necessarily linked to the gas retailer’s costs, and may not provide for tariff adjustments in real terms, but are made on an ad hoc basis by the Western Australian Government.
6. There is no mechanism in the Gas Tariffs Regulations that link gas tariff price caps to costs, or that enables changes in the distribution charge under the determination of the ERA to be passed through to small use customers.
7. Consequently, Alinta submitted to the ERA, in the course of its review process, that an 11% annual increase in each year of the access arrangement period from 1 January 2011 might achieve the same revenue result in respect of B3 Service tariffs as a significant initial increment, and then lesser inflation increments over the period of the proposed revised tariff.
8. Alinta had proposed to the Western Australian Government a mechanism that allowed retail gas tariffs to be adjusted automatically for changes in distribution charges. There had been no clear commitment from Government to adopt that recommendation.
9. Indeed, in the course of the ERA’s consideration of a revised access arrangement for ATCO, the Office of Energy of Western Australia (OOE) on 12 April 2010 made a submission to the ERA in which it, too, asked the ERA to consider price shocks applicable to consumers, particularly small use customers, if there was to be significant movement in the relevant fixed and variable tariff components. It is said by Alinta that that submission supported a more gradual transition than ATCO had proposed for individual tariff components from the then current levels within the boundaries of the revenue requirement which the ERA was prepared to accept.
10. This application raises the correctness of the ERA’s decision in relation to the tariff transition path which it adopted in the Final Decision and the Reviewable Decision for the B3 Service tariffs.
11. The Draft Decision proposed B3 Service tariffs applicable from 1 July 2011 to 30 June 2014 (the proposed end of the access arrangement) at levels which, as modelled by Alinta, would have a relatively small impact upon the distribution costs per customer and were not then of immediate concern to Alinta. ATCO’s revised proposed access arrangement maintained claims to a significantly greater increment, including in relation to the B3 Service tariffs. In response, on 5 November 2010, Alinta made further submissions to the ERA on the potential impact on it of ATCO’s proposed tariff increases in the context of retail tariff caps under the Gas Tariffs Regulations. By reference to ATCO’s then revised proposed access arrangements, Alinta identified an increase of about 35% in the B3 Service tariff from 1 July 2011, and said that if those costs could not be passed through, there was a very significant potential detrimental impact upon it and other gas retailers, but particularly upon it as the supplier of almost 100% of price-regulated customers in Western Australia.
12. The Final Decision, which was reflected in the Reviewable Decision, proposed a different amended tariffs table which, relevant to the B3 Service tariffs, was as follows (in December 2009 dollars):

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| --- | --- | --- | --- | --- | --- | --- | --- |
|  |  | 1 Jan 2010 | 1 Jul 2010 | 1 Jan 2011 | 1 Jul 2011 | 1 Jul 2012 | 1 Jul 2013 |
| **Standing Charge 1** | $/year | 28.16 | 27.85 | 27.50 | 55.21 | 55.21 | 55.21 |
| **Usage Charge 2** | $/GJ | 9.36 | 9.25 | 9.14 | 11.74 | 11.74 | 11.74 |
| **Usage Charge 3** | $/GJ | 3.80 | 3.76 | 3.71 | - | - | - |

1. That indicated a significant increment in tariffs, implemented by higher tariffs through a substantial one-off increase on 1 July 2011 and then tariffs staying constant in real terms for the remainder of the access period (adjusted only for changes in the CPI). The ERA did not invite written submissions on the Final Decision. It is not obliged to do so: NGR rule 64(3). Notwithstanding that, Alinta sent a letter to the ERA of 22 March 2011 outlining its concerns with the Final Decision and the impact of the higher tariffs on it and on small use customers supplied using the B3 Service. It invited the ERA to consult with it in relation to the making of a revised access arrangement. The ERA, by letter of 19 April 2011, declined to consult further.
2. The Reviewable Decision of 28 April 2011 adopted the higher tariffs for the B3 Service tariffs that had previously been set out in Table 34 of the Final Decision, including the same one-off increase to apply from 1 July 2011. There is no dispute that its decision as to the means by which the tariff increase should be implemented is a reviewable regulatory decision.

# RETAIL GAS TARIFFS IN WESTERN AUSTRALIA

1. The Gas Tariffs Regulations are made under s 26 of the ECA. They cap the tariffs that may be offered by users/retailers (primarily Alinta) to small use customers in three geographic regions in Western Australia – the mid-west/south-west area, the Albany area and the Kalgoorlie/Boulder area.
2. The Gas Tariffs Regulations require users to supply gas to small use customers under a contract approved by the ERA and at tariffs set out from time to time in Sch 1 of the Gas Tariffs Regulations. When they were first introduced, initial tariffs were set and a mechanism was included to allow for tariff increases to be linked to the CPI each year. The capped tariffs do not have any express or direct link to changes in pipeline users’ costs. There is no mechanism under those regulations for tariffs to be adjusted due to any increase in the users’ distribution network charges that may be determined by the ERA from time to time. Changes to retail gas tariffs other than for inflation must be effected by way of amending regulations: ECA s 26(1).
3. On three occasions between 2008 and 2010, the capped tariffs were increased by amendment to Sch 1 of the Gas Tariffs Regulations to permit increments beyond the CPI, made on the recommendations of the OOE. In each instance, the reason for the increment was a significant gas commodity price increase faced by Alinta.
4. Since 2007, the setting of retail gas tariffs for small use customers under the Gas Tariff Regulations has been the subject of government review. It was noted by that review that tariff caps may have been acting as a barrier to new entrants to the gas retail market. On 31 December 2010, the OOE produced a draft report. Its first two findings are significant. First, it asserted that price control of retail gas tariffs was required until there was sufficient evidence of effective competition in the retail gas market in Western Australia. Its second finding, however, was that gas tariffs must reflect the costs of supply to ensure continued security of supply and the financial viability of existing and potential gas market participants. It therefore proposed a new regime for the setting of retail gas tariffs. It is not necessary to describe that proposed regime in detail.
5. The recommendations, the review draft report suggested, were designed to achieve tariff setting outcomes that were cost reflective, transparent, provided better price signals to consumers in a more competitive market, and avoided the inefficiencies of the then existing ad hoc arrangements. Hence, the proposal was to base retail gas tariffs more directly on the pipeline users’ network distribution charges. There would be a direct and automatic pass-through for any subsequent adjustments to certain charges including changes in distribution tariffs such as the B3 Service tariff charged by ATCO. However, at the time of the decision, that regime had not been accepted by the government, and still has not apparently been accepted. The last observation is made, recognising the issue as to whether its source is review-related material.
6. Alinta, in a submission to the ERA of 22 March 2011 pointed out that the Premier of Western Australia had been quoted in a Western Australian newspaper as saying that his Government would not adopt those recommendations, and more broadly would not move to cost reflectivity in tariff setting for utilities.

# THE GROUNDS OF REVIEW

1. The grounds of review are based upon the alleged failure of the ERA to make its decision in accordance with the requirements of the NGL and the NGR. More directly and relevantly, under s 21 of the NGA WA Act, the *National Gas Access (WA) (Local Provisions) Regulations 2009* (WA) (the Local Provisions) came into effect and applied to the access arrangement review process. Alinta says the ERA was obliged to, but did not, give effect to the Local Provisions.
2. On this application, Alinta alleges that there are two errors of a reviewable character made by the ERA which the Tribunal should correct. They are:
3. in the course of exercising its discretion to approve the revised access arrangement, the ERA erred in performing or failing to perform its functions under regulation 7 of the Local Provisions by failing to take into account the possible impact of proposed B3 Service tariffs on users to whom gas is or might be delivered by means of a small delivery service, such as Alinta; and
4. if the ERA so erred, so that it should have taken into account the impact of the proposed reference tariffs on users’ interests, or alternatively in any event, it failed to take that impact into account in a correct way; in particular it failed to properly consider the weight that it should have placed on the gradual introduction of higher B3 Service tariffs so that they would have less impact on users than a one-off real increase, in circumstances where the prices that Alinta can charge to small use customers are capped under the Gas Tariffs Regulations.
5. Regulation 7 of the Local Provisions provides as follows:
6. **Impact on small use customers and retailers to be taken into account**
7. When exercising a discretion in approving or making an access arrangement for a distribution pipeline the ERA must take into account the possible impact of the proposed reference tariffs, the method of determining the tariffs and the reference tariff variation mechanisms on –

(a) users to whom gas is or might be delivered by means of a small delivery service provided for in the access arrangement; and

* 1. small use customers to whom gas is or might be delivered by those users.
1. In sub regulation (1) a reference to the impact of something is not limited to the economic impact of that thing.
2. A requirement under this regulation to take a matter into account applies –

(a) despite anything in the National Gas Law or Rules that would otherwise prevent the matter being taken into account; and

* 1. in addition to any requirement under the National Gas Law or Rules –

(i) for any other matter to be taken into account; or

(ii) as to the content of the access arrangement.

1. For the avoidance of doubt, this regulation does not permit the ERA to approve or make an access arrangement that does not include a reference tariff variation mechanism that complies with rule 92 of the Rules.
2. For the purposes of regulation 7, a “small use customer” is defined in regulation 4 as an end user:

(a) to whom gas is delivered at a delivery point;

* 1. to whom less than 1 terajoule of gas is delivered at that delivery point in any year; and
	2. who is not a user.
1. For the purposes of regulations 6 and 7, a “small delivery service” is defined in regulation 4 as “a reference service to the extent that it is or may be used for the delivery of gas to a small delivery point:, and a “small delivery point” is defined as “a delivery point at which gas is delivered to a user for delivery by the user to a small use customer”.
2. The parties accepted that regulation 7 is a valid exercise of the regulation-making power under s 21(4) of the NGA WA Act, although the Tribunal notes that the power is confined to reference to a small use customer. That matter was not adverted to at all in the submissions. In any event, the ERA contention is that such matters, if not raised by the parties in the process leading to the reviewable regulatory decision, cannot be addressed by the Tribunal: see s 258 of the NGL.
3. Alinta asserts, and it is plain enough, that its use of the B3 Service to supply small use customers means that it is a user to whom gas is delivered by means of a small delivery service. Consequently, it contends, the ERA was obliged when exercising its discretion to approve the proposed revised access arrangement to take into account the possible impact of the proposed reference tariffs on it as one of the users to which regulation 7(1) applies.
4. As noted above, Alinta makes no complaint about the method of determining the tariffs or the reference tariff variation mechanisms in respect of the B3 Service tariffs. That is because, in themselves, they do not prejudice Alinta. It is the level of the initial tariff that took effect on 1 July 2011 which adversely affects its interests. It also said that the reference tariff variation mechanism that requires subsequent CPI increases does not prejudice Alinta, except to the extent that it preserves the initial tariff increase as at 1 July 2011. Consequently, its submissions focused only on the possible impact of reference tariffs and not on the method of determining the tariffs or on the reference tariff variation mechanisms.
5. Before turning to consideration of the issues, it is convenient to note a few other matters.
6. The effect of the significantly increased tariff at 1 July 2011 directly affects Alinta as a user to whom gas has been delivered under the B3 Service. It may also affect the small use customers who receive gas from Alinta (and whose gas prices are controlled by the Gas Tariff Regulations) depending upon whether the prices under those regulations are altered. In fact, in the case of the small use customers, there has been an amendment increasing gas prices by 10% from 1 August 2011 which, as the Minister said when that was announced, was due to “higher prices for wholesale gas combined with higher costs to deliver gas to households and businesses through the gas distribution network, as independently determined” by the ERA. (The Tribunal notes that there is an issue whether that information is review-related matter; that question is considered later in these reasons for decision.) It is of course not known whether the Gas Tariff Regulations might be varied again if the tariffs (on ATCO’s application) or the tariff revenue path (on Alinta’s application) were to be altered as a result of the Tribunal’s decision. Nor is it known whether the Gas Tariff Regulations may change gas prices for small use customers, either to accord with the annual increments to the B3 Service tariffs as adjusted in accordance with the Reviewable Decision or at some other time or times, or by some other amounts than those which directly reflect those further increments.
7. As noted, Alinta does not seek to reduce the total revenue to be received by ATCO over the access arrangement period of 2011 to 2014 in net present value terms. It accepts that the delayed receipt of revenue by its “tariff smoothing” proposal will mean that ultimately a greater sum in present value will have to be paid. Moreover, by reason of the present operation of the B3 Service tariffs under the Reviewable Decision, the “tariff smoothing” will now require a significant tariff and revenue reduction in the 2012/2013 year and then a significant tariff and revenue increase in the 2013/2014 year because of events which have occurred since 1 July 2011.
8. On this application, ATCO was given leave to intervene. It made the following points.
9. The application for review did not stay the operation of the Reviewable Decision: s 252 of the NGL. The tariffs applicable from 1 July 2011 have therefore been in effect from that date, and will remain so – subject to their further minor alteration annually in accordance with the Reviewable Decision – until 30 June 2014 or the commencement of the next access arrangement (whichever is the later), unless the Tribunal on this application makes some order for the matter to be remitted to the ERA to review the tariff revenue path or to itself makes some order to adjust the tariff revenue path.
10. If there were a significant tariff and revenue reduction to ATCO in 2012/2013, there will be an impact on its cash flow, and potentially its capacity to meet its covenants under its debt facilities and in other respects, as well as its working capital. Before any such order therefore be made, the Tribunal or (if the matter is remitted to the ERA) the ERA would need to fully understand the potential impact on the commercial interests of ATCO. Further modelling of those matters may be required. That is not, of course, to indicate that Alinta’s contentions for those reasons should be rejected. It is simply to indicate that, if Alinta succeeds on this application in satisfying the Tribunal that the Reviewable Decision involved error as defined in s 246(1), the consequential orders which might be made will require careful consideration.

# CONSIDERATION

1. There are several uncontentious points to note about regulation 7 of the Local Provisions.
2. It applies to two categories of persons: the gas retailers such as Alinta who use the GDS for delivery of gas under the B3 Service tariffs, and to the small use customers to whom the gas is delivered (in this case, by Alinta); the direction is to consider the impact on those classes of persons rather than the individual circumstances of a particular gas retailer or a particular small use customer.
3. It requires the ERA, when exercising its discretion in making the Reviewable Decision – relevantly the B3 Service tariff structure for the period 2011 to 2014 – to take into account the possible impact of the proposed reference tariffs and related issues on those two categories of persons, and the relevant impact is not limited to its economic impact; it will be a matter to be addressed in each decision of the ERA whether there are any possible non-economic impacts to be considered if they are raised for its consideration. Usually such impacts will emerge when they are identified by those representing the gas retailers or the small use customers (in this matter, the ERA had the benefit of detailed submissions from Alinta, the Western Australian Council of Social Services (WACOSS) and the OOE).
4. As Alinta makes no complaint about the method of determining the tariffs or the references tariff variation mechanisms for the B3 Service tariffs, as they do not “prejudice” it (the word used in its submission), its focus is on the initial tariff that took effect on 1 July 2011.
5. The ERA is required to take into account the *possible* impact of the reference tariffs on the two categories of persons, so that any relevant impact to be considered need not be shown to have been likely or probable.
6. The balancing exercise that the ERA may be required to undertake is a complex one – there may be a range of possible impacts, some more likely than others, to be put on the scales with a range of other considerations – so the exercise of the ERA’s discretion will ultimately be a matter of overall judgment on its part; there will not be one “right” outcome calculated by the application of a formula.
7. In this matter, there were (and are) a number of possible steps which may have been taken under the Gas Tariffs Regulations relevant to the consideration by the ERA of the matters referred to by regulation 7.
8. If the Gas Tariffs Regulations were amended to enable Alinta (and other users) to pass through the tariff increase determined upon from 1 July 2011, regulation 7 would not have required particular consideration of those pipeline users because the pass-through would have meant there was no impact on them. On the other hand, the pass-through would have produced a very considerable price increase to small use customers at 1 July 2011. In real terms, there would then be no further increase in price prompted by the Reviewable Decision over the balance of the time that decision applied except for inflation adjustments already prescribed anyhow under the Gas Tariffs Regulations.
9. At the other extreme, if the Gas Tariffs Regulations were not amended at all so the users such as Alinta would be unable to pass through any of the significantly increased tariffs at 1 July 2011, the financial impact on those users would be obvious but the small use customers would be unaffected. In between those extremes, there are a range of possibilities, including (as occurred) an almost contemporaneous amendment to the Gas Tariffs Regulations to enable a partial pass-through of the increased tariffs at 1 July 2011 affecting in different ways both the users and the small use customers. There was (and is) the possibility of the pass-through being allowed by an amendment to the Gas Tariffs Regulations in different amounts at different times, so that the full pass-through may be effected by the end of the regulatory period, or so that only a partial pass-through had been effected by that time. The range of permutations or combinations is very large. It is dependent on the policy of the Government.
10. Moreover, it may be arguable that regulation 7 of the Local Provisions directs attention to considerations which do not sit in a fully conformable way with the national gas objective and the revenue and pricing principles in ss 23 and 24 respectively of the NGL, in particular with their emphasis on securing for the service provider (in this case ATCO) a reasonable opportunity to recover at least the efficient costs it incurs in providing reference services (s 24(2)(a) of the NGL). It is not necessary to resolve that question. Alinta does not seek to go behind the Reviewable Decision, except in the phasing in of the efficient costs of ATCO and their possible impact on Alinta. Alinta also accepts that the delayed phasing in of those efficient costs by smoothing the tariff increase, which the efficient costs dictate, will require an additional cost to be allowed to ATCO to ensure those costs are ultimately recovered in current money value.
11. Alinta, in its submissions, referred at some length to the reference in the Explanatory Memorandum to s 38(2) of the *Gas Pipelines Access (Western Australia) Act 1998* (WA) – relevantly replaced by the NGA WA Act – and its direction to the then regulator to consider the fixing of tariffs as a means of extending effective competition in the supply of gas to small use consumers, that is, to develop competition in the retail market for small use consumers. It says that the Local Provisions therefore should be construed to reflect the national gas objective because it makes it:

… more likely that users will be able to recover their costs … because it will make it more likely that new gas retailers will enter that sector of the market to compete with the incumbents.

1. It might be observed that the power under the Gas Tariffs Regulations to fix gas prices that a user may charge to small use consumers at a level which does not enable the full pass-through of the prices fixed under a Reference Tariff would not encourage competition from other potential users to enter that market.
2. Alinta argues that, on the material before the Tribunal, it has made out three grounds of review:
3. that the ERA did not comply with regulation 7 of the Local Provisions because it did not consider the possible impact, or any impact, of the proposed reference tariff on users (that is, in essence, on Alinta);
4. alternatively, if that contention is rejected, that the ERA in considering the possible impact of the proposed reference tariff on users, failed to identify and take into account a suitable range of possibilities, giving appropriate weight to each for the purposes of its consideration; and
5. that the ERA failed to consider the impact that smoothing the reference tariff path would have on users.
6. In the oral submissions, issue (3) was not treated separately but as one of the potential variations to the decision which should have been considered when considering the position of Alinta in accordance with the Local Provisions.
7. It was not contended that the ERA had failed to consider the possible impact of the B3 Service tariffs upon small use consumers, as required by regulation 7.
8. As Alinta pointed out, it is necessary for the ERA to have considered separately the potential impact of the proposed tariff increases on the users, and on the small use customers, because their interests do not correspond. They have, in a sense, competing interests and differing interests, and there is no direct inverse proportionality between the potential impacts upon each of those two categories of persons by the proposed tariff increase at 1 July 2011 dependent upon any changes to the Gas Tariffs Regulations.
9. The ERA accepted that its task included the need to consider the ability of the users, relevantly Alinta given its market position as a supplier of gas to small use customers, to pass on to small use customers the proposed tariff from 1 July 2011.
10. The grounds of review are confined to those expressed in s 246(1) of the NGL.
11. It is the view of the Tribunal that the first contention must fail.
12. It is clear that in the Draft Decision the ERA referred to the impact of ATCO’s proposed revision of the then existing tariffs on both small use customers and retailers. The term “retailers” has been used in submissions interchangeably with “users”, as a reference to the category of persons referred to in regulation 7(1)(a) of the Local Provisions as “users”, and of course in essence refers to Alinta given its position as almost the sole supplier of gas to small use customers in the relevant area. There is a heading to that effect in the index to the Draft Decision.
13. The Draft Decision at [1108] to [1148] specifically then considered the relevant Local Provisions. It set out the relevant parts of regulation 7 and the relevant definitions in regulation 4. It noted that ATCO’s proposed revisions to the then existing reference tariffs did not contain reference tariffs which were specifically for users who deliver gas to small use customers, although it accepted that the proposed reference tariffs for the B1, B2 and B3 Services could be applied to users who supply small use customers: see the Draft Decision at [1117]-[1119].
14. The Draft Decision at [1120] to [1134] then summarised and commented upon the submissions of ATCO, the OOE, Alinta and from two small use customers. The ATCO submission identified how it had sought to comply with, or recognise and give effect to the Local Provisions including regulation 7, in its proposed tariff variations. It is fair to observe that its submission seemed to assume the full pass-through of any increased B3 Service tariffs to small use consumers, as part of its submission addressed the relative tariffs payable by small use and median use consumers under the then existing tariff structure.
15. The OOE submission addressed the “smoothing” of the tariff path in the interests of small use consumers; implicitly, it too appears to have assumed a full pass-through to small use customers of the revised B3 Service tariffs. That is, of course, consistent with what it had put forward in the OOE Draft Report.
16. Alinta’s submission, as noted by the ERA, identified the significant percentage increase in the B2 and B3 Service tariffs proposed by ATCO. It said the information provided by ATCO was not sufficient to understand the “issues relevant to small use customers and compliance” with regulation 7. It said the proposals of ATCO, involving a material adjustment on 1 January 2011 and smaller increases thereafter to achieve a revenue outcome, could have been achieved by a “glide-path” approach, and that this method would be preferable to avoid price shocks. Appropriately, and significantly, the ERA recorded Alinta’s submission that there was no basis for an automatic pass-through of tariff increases to small use customers under the Gas Tariff Regulations, so there was a potential financial impact on Alinta by any change in existing tariffs for the B2 and B3 Services. It provided an estimate of the total additional costs to be incurred by retailers over the new access arrangement period, and said that almost all would ultimately be required to be passed through to small use customers.
17. Alinta did not then present any further material to expand upon the impact on it of having to bear that cost without it being passed through to small use customers.
18. The ERA, after referring to the Local Provisions, said it had to consider the possible impact of the then proposed reference tariffs on small use customers and retailers. The balance of its reasons at this point assumes a full pass-through of the increased tariffs for the purpose of assessing the possible impact on small use customers. Although it concluded that the impact on small use customers was reasonable and consistent generally with the requirements of the NGL, the NGR and the Local Provisions, it was not satisfied that the proposed tariff structure had been determined with due regard to rule 94(4)(b)(iii) of the NGR as it applied to “small use customers and small users”.
19. In the context of considering the impact of the reference tariffs on small use customers, the ERA at [1140] said it assumed a full pass-through of the then proposed changes to the B2 and B3 Service tariffs. It added:

The [ERA] regards this as a reasonable assumption in the current retail commercial and regulatory environment.

1. Alinta’s submission of 19 April 2010 shows that in general terms it supported that assumption as a matter of practical commercial necessity. It said, after noting that there was no automatic pass-through of tariff increases:

Given distribution networks costs are entirely outside of Alinta’s control, Alinta has proposed to government that the Tariff Regulations be amended to include a mechanism that allows the gas tariff caps to be adjusted automatically for any changes in distribution charges that may be approved by the Authority or imposed by WAGN. However, at this time, the government has not indicated whether it intends to amend the Tariff Regulations as proposed by Alinta.

1. The same comment was made in its letter of that date accompanying that submission. It said there that the increased costs incurred by Alinta by the then proposed changes to the B2 Service and B3 Service tariffs “would ultimately be required to be passed through to customers”.
2. It is not correct to say, as Alinta contended, that it was not on notice of that assumption from the Draft Decision, or the views of the ERA as to the reasonableness of that assumption. It is also clear at this point that Alinta had itself considered whether there may or may not be a full pass-through of the proposed increased tariffs to small use customers under the Gas Tariffs Regulations, and had anticipated that a full pass-through would occur.
3. The Tribunal did not have its attention drawn to any further submission by Alinta on that matter, or any material put to the ERA by Alinta on that matter, before the Final Decision, other than Alinta’s submission of 5 November 2010.
4. That submission commented upon the Draft Decision, and on ATCO’s revised proposed access arrangement. Under the hearing “Reference Tariff Structure”, it noted that ATCO’s revised proposed B3 Service tariffs still resulted in a significant increase at 1 July 2011, and then smaller increases in the succeeding years. It said:

In the absence of a pass-through of the increases in distribution costs proposed by WAGN, the potential detrimental financial impact for gas retailers, and particular Alinta as the incumbent retailer supplying almost 100 per cent of price regulated customers, is significant.

1. It then estimated the additional cost which would be incurred by Alinta (an amount not much different from its previous estimate). It suggested that the Gas Tariff Regulations should be amended to allow automatic pass-through of those costs to small use customers, and repeated almost verbatim the conclusion in the quotation in [67] above.
2. Alinta did not discuss in any detail the possibility that the Gas Tariff Regulations might not be amended to allow the full pass-through of the additional costs to it. It did not address the consequences to it of less than the full pass-through, or no pass-through at all. It did not provide any modelling to indicate any such consequences. It did not suggest any spreading of the then proposed tariff increase, so as to alleviate any detriment to it (or indeed to the small use customers if the full pass-through was allowed). It did not present any picture of alternative smoothing of the proposed tariffs, or any measure of the potential consequences to ATCO, or to it, of any different tariff increase implementation structure.
3. In December 2010, the OOE Draft Report was produced. Alinta made no further submission in the light of it. That may be because it reflected Alinta’s view that the Gas Tariff Regulations should be amended to allow a full pass-through of the then proposed tariff increases. Nevertheless, in ATCO’s first proposal for a revised access arrangement, and in the revised proposal following the Draft Decision, its position clearly signified the potential for a significant tariff increase at 1 July 2011.
4. The Final Decision contains a lengthy discussion under the heading “Determination of Reference Tariffs”.
5. The ERA again recorded that its limited discretion under rule 94 of the NGL “is tempered” with its obligations under the Local Provisions to consider the impact of tariffs on small use customers and on retailers who supply small use customers: Final Decision at [848]. It then addressed in considerable detail the potential impact of a full pass-through of the revised proposed tariffs, with a significant one-off increase on 1 July 2011.
6. Under the subheading “Impact on small use customers” it referred to relevant submissions received since the OOE Draft Report. They included one from WACOSS (on behalf of small use customers) which referred to modelling it had undertaken to assess the impact of the proposed tariffs on small use customers, based on the same assumption of a full pass-through of the changes to the B2 and B3 Service tariffs. As noted by the ERA, that reflected recommendation 5 of the OOE Draft Report. It referred to submissions made before the OOE Draft Report, including that of Alinta, which proposed a more gradual transition of the tariff increases. On that topic, it concluded at [892]:

The Authority considered the option of a more gradual implementation of higher reference tariffs. The Authority considers the disadvantages to be too great to implement a more gradual change:

🞄 It would delay recovery of revenue which must be achieved in PV terms (rule 92). This would mean users in total would pay more as cost recovery delayed is effectively inflated by the cost of capital (WACC) over the period of delay. For example, a two year delay would equate to a cost increase of approximately 15 per cent.

🞄 The last years’ reference tariff revenue would be significantly higher than the corresponding total revenue (cost of service) for that year. Thus, if costs and volume assumptions for this year are accurate, the delayed recovery of costs could lead to a significant stepped change in tariffs in the subsequent (2014-2019) access arrangement period.

🞄 The impact on retail tariffs is affected by the Government’s policy in setting retail tariff caps. Any government policy requirements regarding the smoothing of changes may be achieved through this mechanism.

…

1. It concluded that the impact on small use customers of a full pass-through is reasonable and consistent with the requirements of the NGL, the NGR and the Local Provisions.
2. It was only after the Final Decision that Alinta made a slightly more detailed submission about the phasing in of the ERA’s proposed tariffs. It did so by letter of 22 March 2011.
3. Relevantly for the present application, the submission contended that the ERA in its Final Decision failed to take into account the possible impact of the proposed reference tariffs on Alinta and other retailers supplying small use customers. By then, as the submission pointed out, the Premier of Western Australia, in a media story of 8 January 2011, had been reported as saying that his Government would not accept the recommendations of the OOE. Alinta pointed out that the OOE had simply put forward recommendations. It provided an estimate of the total cost of distributing gas to its residential customers in 2011/2012 under the proposed tariffs.
4. Again, Alinta provided no further detail of the impact or potential impact on it if the pass-through was not allowed under the Gas Tariffs Regulations, either in whole or in part, or progressively and at different times during the reviewable regulatory period.
5. As to the submission of 22 March 2011, the question arises as to whether that submission is review related matter, so that the Tribunal may have regard to it in accordance with s 261(1) and (7) of the NGL.
6. It appears to have become a matter of increasing importance in reviews conducted by the Tribunal to determine the extent of “review related matter” under s 261(1) and (7) of the NGL. The issue arises in circumstances like the present, where the regulator has completed the process of a Draft Decision and a Final Decision as contemplated under Division 8 Part 8 of the NGR specifying the procedure for dealing with a full access arrangement proposal. Rule 62(7) and (8) of the NGR fix the time after receipt of the access arrangement proposal by which the final decision must be made. Then, if the regulator refuses to approve the access arrangement proposal (or its revision), it must under Division 9 propose the access arrangement itself within a further two months: rule 64(1) and (4); rule 64(3) provides that the regulator may (but is not obliged to) consult on its proposal. The decision of the regulator under rule 64 then becomes the “Reviewable Regulatory Decision” under Part 5 of Chapter 8 of the NGL.
7. Putting aside the discretion of the regulator under rule 64(3) of the NGR, the time constraint imposed by the rule 64(4) means that the regulator may have little or no time to consider or to consider carefully any material – whether submissions or information or expert opinion or otherwise – received by the regulator prior to the Reviewable Regulatory Decision. Such material may be extensive. It may be belated, even understandably so if it has required significant preparation time. It may invite a dramatically different approach to that expressed in the Final Decision.
8. In such circumstances, it does not appear to fulfil the purpose of the process prescribed in Divisions 8 and 9 of Part 8 of the NGR that the regulator’s Reviewable Regulatory Decision might be exposed to apparent error (as defined in the grounds of review in s 246(1) of the NGL) by reason of material it did not have any real opportunity to consider and take into account. That is especially so as rule 64(3) provides that it need not consult beyond the Final Decision point in relation to its Reviewable Regulatory Decision and its access arrangement proposal made by that decision. On the other hand, a party affected by a potential decision reasonably may not be aware of the potential adverse consequences to it until the Final Decision and then have little or no opportunity, and (if the ERA is right), no entitlement, to endeavour to have the ERA consider its concern. In an appropriate circumstance, that question will have to be considered by the Tribunal.
9. In this matter, the Tribunal does not need to go beyond the apparently clear words of s 261(7)(d): the submission of 23 March 2011 is apparently a “written submission made to the [ERA] before the reviewable regulatory decision was made”. It is not necessary to further explore that question because the submission does not really raise, except in more forceful terms, what had previously been put to the ERA, and to the extent that it conveys additional information (ie the media report of a statement by the Premier) that information does not persuade the Tribunal that the ERA committed reviewable error in terms of s 246(1) if the Tribunal were otherwise not persuaded of error on the part of the ERA.
10. The Tribunal is not persuaded, on the above analysis of the review related matter, that the ERA fell into reviewable error on any of the grounds specified in s 246(1).
11. It was required to take into account when deciding on the access arrangement for the reviewable regulatory period the possible impact of the reference tariffs on both the users of the B3 Service (the retailers including Alinta) and on the small use customers: regulation 7 of the Local Provisions. The contentions are that it did not consider the possible impact on the users, or alternatively it did not do so in a way which satisfied regulation 7, in setting out the tariff path for the implementation of the B3 Service tariffs, in particular that to take effect from 1 July 2011.
12. Clearly, the ERA understood that regulation 7 required a separate focus on the possible impact of the tariff path it set upon users and on small use customers. It recorded that view in both the Draft Decision and in the Final Decision.
13. It is true that its focus in both the Draft Decision and the Final Decision was on the impact or possible impact on small use customers. That is because it assumed, as it recorded, that the impact on users of the increased tariffs – and in particular the impact of the significantly increased tariff from 1 July 2011 – would be passed through to small use customers by amendment to the Gas Tariffs Regulations. That was, from the point of view of the small use customers, the biggest impact upon them that would possibly occur. Moreover, following the Draft Decision, the only substantial submission on the application of regulation 7 of the Local Provisions or the impact of the Draft Decision if it were implemented, apart from ATCO itself, was from WACOSS. Ultimately, there is no contention that the ERA committed reviewable error by its consideration of their position or by the terms for the B3 Service tariffs and their introduction.
14. The position of Alinta, and the users more generally, was not thereby overlooked. It was given independent and genuine consideration. The ERA recognised that the Gas Tariffs Regulations did not automatically provide for the pass-through of the costs of users under the B3 Service tariffs to small use customers. At the time of the Final Decision, it had the OOE recommendations to the Western Australian Government that automatic pass-through should be prescribed. It had information that in the three years to 2010 the Gas Tariffs Regulations had been amended to pass on to small use customers increased service costs incurred by users beyond the CPI. It had Alinta’s submission that, in effect as a matter of commercial necessity, the additional costs to be incurred by users under the new B3 Service tariffs would have to be passed through to small use customers. Alinta said that would have to occur to preserve users’ commercial viability and to support ongoing investment in the Western Australian energy industry. The ERA assumed that pass-through would occur for the reasons it recorded.
15. In the light of that material, the ERA cannot be shown to have failed to consider at all the possible impact on users of the B3 Service tariffs.
16. The alternative contention of Alinta is somewhat more refined. It is that the ERA did not consider a range of possible impacts upon it (and users generally) by the significant increase in B3 Service tariffs at 1 July 2011, even though the ERA might reasonably have reached the view that the Gas Tariffs Regulations would be amended to pass-through the users’ costs to small use customers. Consequently, it is said, the ERA should have considered, but did not consider, the option of smoothing the transition path of the B3 Service tariffs in some manner.
17. It is correct to say, as Alinta did, that at the time of the Final Decision and of the Reviewable Decision there was some prospect that the Gas Tariffs Regulations might not be amended to allow for the full and prompt pass-through of the increased costs to small use customers. That would leave the users with less funds, as the gas transport costs would not be fully recovered by gas sales, and it might require the users to increase capital or borrowing to ensure that they had the resources to enable that difference between expense and revenue to be managed. In the course of its submissions to the Tribunal, Alinta produced certain tables showing certain hypotheses and outcomes based on those hypotheses.
18. The scenarios assumed the B3 Service tariffs were implemented, and then considered a full pass-through to small use customers, a CPI adjustment only to small use customers for the whole of the reviewable regulatory period, and an “incremental increase” in the price paid by small use customers to users, and were presented in real (December 2009) and nominal figures. In either event, they indicated that less than a full pass-through would result in significantly less revenue to the users than the extra expense of paying the higher B3 Service tariffs. That material also demonstrated how a smoothed tariff path might not have such a dramatic short term consequence, although that is also dependent upon changes to the prices fixed under the Gas Tariffs Regulations. Of course, the alternative scenarios were necessarily illustrative only, except to the extent that they may to a degree have had the benefit of hindsight knowledge of the change made to the Gas Tariffs Regulations referred to above.
19. There is no reason to conclude that the ERA did not advert to the possibility that the tariffs under the B3 Service tariffs, including a significant “upfront” increase from 1 July 2011, may not be fully and promptly passed through to small use customers by amendment of the Gas Tariffs Regulations. It assumed a full pass-through would occur to assess the possible impact on small use customers. It decided that that was the most appropriate course to adopt to better align revenues of the service provider to costs on a consistent basis.
20. The fact that the ERA recognised that it was making that assumption necessarily indicates that the ERA was aware that the assumption might not come to pass. Alinta was aware it had made that assumption, and indeed its submissions supported the likelihood as a matter of commercial necessity that that would happen. The alternative scenarios – that there may be no or limited pass-through, and at times different from the increments under the B3 Service tariffs – are myriad. No one scenario was more probable or more possible than any other, except that it may be said on the basis of the submissions that the alignment of the tariff costs to users and the revenue to users by prices under the Gas Tariffs Regulations would occur for the reasons given by Alinta. It would be artificial in that circumstance, without more input from Alinta or other users, to require the ERA to construct and address any particular hypothetical scenario or scenarios. In the view of the Tribunal that was not required in this instance.
21. That is because Alinta, as the principal user, did not present to the ERA any material upon which the ERA was, in the exercise of its function and responsibility under regulation 7 of the Local Provisions, required to do more than it did. What it did do was to recognise that the full pass-through was not automatic or routine, to recognise that less than a full pass-through would produce discordance between revenue and cost on the part of the users, to consider the material which lead it to the view that the full pass-through was a “reasonable assumption in the current retail commercial and regulatory environment” (an assumption which was reasonably available to it and apparently supported by Alinta), and to proceed then to consider the impact of the tariff increment proposal on small use customers.
22. The Tribunal does not accept that, as a matter of construction of regulation 7 of the Local Provisions, the ERA is required to speculate about any number of possible scenarios. Regulation 7(1) requires particular interests to be considered and regulation 7(3) makes it clear that they must be considered, even if they may not otherwise fit easily with the NGL or the NGR. However, once those interests are considered, regulation 7 does not dictate that they be given particular weight greater than any other considerations. The weight is to be assessed by the ERA, and will obviously be informed by what is put by or on behalf of the users and the small use customers and the other material before it.
23. Alinta contends that the ERA should have somehow second-guessed the Government’s response to the OOE Draft Report. It fortifies that submission by reference to the media report of the Premier’s comments referred to above. Even if that media report is accurate, its terms are so general as to give it little weight. It does not present as a considered response to a real commercial circumstance confronting users, if the tariffs proposed in the Final Decision were implemented (as they were), especially if (as Alinta said) commercial reality would in effect require the full pass-through.
24. Both before and after the Final Decision, Alinta’s submissions were of a general nature only. They did not specifically address in any detail the possibilities of less than full pass-through or no pass-through, except for inflation. As noted above, they did not address the practical consequences to Alinta of any particular delay in pass-through, or of any particular limited pass-through. They did not suggest any actual funding difficulties to Alinta or the options to Alinta to manage them. They did not address other fee options (such as an administration fee) to restore any imbalance. They did not indicate at what level or levels profitability might be impaired or threatened. They did not indicate the existing profit margins to Alinta, or the direct impact on those profit margins of any particular partial or delayed pass-through. Alinta made no specific submissions about the content or reasoning of the OOE Draft Report to point to the prospects of its approach (based on a reasonable principle) of passing through to the ultimate users the efficient costs of the service they were receiving not being adopted.
25. A sensible application of regulation 7 of the Local Provisions requires the ERA to give proper, genuine and realistic consideration to the possible impact of the proposed tariff increments on the users of the B3 Service: see the discussion of Spigelman CJ in *Bruce v Cole* (1998) 45 NSWLR 163 at 185-186. It is a matter for the ERA then to determine the weight it gives to that possible impact: *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 41 per Mason J and 64 per Brennan J.
26. Inevitably, in circumstances such as the present where there is a well-resourced and well-informed user such as Alinta, whose interests will be affected by any particular decision, the ERA is entitled to expect that the user will put forward material which identifies the possible impact upon it of a particular determination (or, if appropriate, identifies a range of possible impacts) and explains the nature and extent of that possible impact or those possible impacts by reference to the sort of material referred to in the preceding paragraphs. Even in the submissions given after the Final Decision, Alinta did not do that. It, more than the ERA, would be in a position to identify the possible impact or impacts and to provide material to indicate their extent and significance.
27. In the present matter, the Tribunal does not consider that the ERA was required by regulation 7 to guess how the Western Australian Government might respond to the B3 Service tariffs proposed in the Final Decision beyond the assumption it made. That would have been, in the circumstances, purely speculative, unless a particular scenario was suggested by Alinta as apposite to its circumstances. Nor was there anything put forward by Alinta (or any other user) to suggest a particular scenario should be considered by the ERA which had possible (and relevant) potential impact upon Alinta or other users if a full pass-through was not promptly implemented. The position put forward by Alinta was that as a matter of commercial practicality, or even necessity, a full pass-through would occur and it did not suggest that any delay in that pass-through would have any particular impact upon it (other than the obvious greater disconformity between it incurring the tariff costs and receiving payments from small use customers by reason of the delay).
28. The Tribunal for those reasons does not consider that the ERA committed any error which falls within a ground of review relied upon by Alinta. That conclusion extends to the alleged failure of the ERA to consider smoothing the introduction of the proposed new tariff path because of its potential impact upon Alinta. The ERA did refer to the possibility of smoothing the tariff path in its Final Decision at [759] and [892], but not in the context of the possible impact upon Alinta. That is referred to above. That possible impact was not a concern raised by Alinta in its submissions in a way which suggested any relevant potential impact on it which required consideration.

# conclusion

1. For those reasons, the Tribunal affirms the decision of the ERA in its Reviewable Decision to the extent that it has been put in issue by this application.

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| I certify that the preceding one hundred and six (106) numbered paragraphs are a true copy of the Reasons for Decision herein of the Honourable Justice Mansfield (President), Mr R Davey (Member) and Professor D Round (Member). |

Associate:

Dated: 8 June 2012