

Schedule 5 - Mark up of proposed variations to Consortium Undertakings

TRADE PRACTICES ACT 1974  
UNDERTAKING TO THE AUSTRALIAN  
COMPETITION & CONSUMER COMMISSION  
GIVEN UNDER SECTION 87B

by

WestNet Infrastructure Group Limited ~~Alinta Limited~~

~~Alinta Network Services Pty Ltd~~

Alcoa of Australia Limited

AMPCI Macquarie Infrastructure Management No. 1 Limited in its capacity  
as the responsible entity of the Diversified Utility and Energy Trust No 1

AMPCI Macquarie Infrastructure Management No. 2 Limited in its capacity  
as the responsible entity of the Diversified Utility and Energy Trust No 2

DBNGP Holdings Pty Limited

22 October 2004 as varied on [ ]

# 1. Definitions

## 1.1 Defined Terms

**Access Act** means the Gas Pipelines Access (Western Australia) Act 1998 (WA) (as amended, re-enacted or replaced from time to time).

~~**Access Arrangement** means the access arrangement for the DBNGP that is approved under the Gas Access Code from time to time.~~

**Acquisition** means the acquisition of the shares in EEWAT, the shares in EEWAN and the units in EEPT by the Consortium through DBNGP Holdings on 27 October 2004.

**Act** means the Trade Practices Act 1974 (Cth).

**Alcoa** means Alcoa of Australia Limited (ABN 93 004 879 298), trading as Alcoa World Alumina Australia.

~~**Alinta** means Alinta Limited (ABN 40 087 857 001).~~

~~**ANS** means Alinta Network Services Pty Ltd (ACN 104 352 650).~~

**Business Day** means a day other than a Sunday, Saturday or a public holiday in Western Australia.

~~**Capacity** means the measure, expressed in TJ/day, of the potential of the DBNGP (or part of it) as currently configured to deliver natural gas transportation services.~~

~~**Capacity Expansion Rights** means rights to require EEWAT to expand Capacity.~~

**Commission** means the Australian Competition & Consumer Commission.

~~**Confidential Information** means the terms and conditions of any Shipper Contract, and all information specifically relating to or provided pursuant to or in accordance with a Shipper Contract or in the negotiations leading to the execution of a Shipper Contract.~~

**Consortium** means the consortium formed by the Consortium Members for the purposes of the Proposed Acquisition.

**Consortium Members** means the Unitholders and Shareholders.

**Contracted Shipper** means a person who is entitled to use one or more DBNGP Services under the terms of a Shipper Contract.

**Corporations Act** means the Corporations Act 2001 (Cth).

**Coverage** means in relation to the DBNGP, that the DBNGP is subject to the provisions of the Gas Access Code pursuant to clause 1.1 in accordance with the Gas Access Law.

~~**CS10** means compressor station 20 on the DBNGP.~~

**DBNGP** means the Dampier to Bunbury Natural Gas Pipeline in Western Australia.

~~**DBNGP Business** means the business of providing DBNGP Services.~~

**DBNGP Services** means natural gas transportation services provided by means of the DBNGP but does not include any such services which are the subject of, or contemplated by, the Exempt Alcoa Contract.

**DBNGP Holdings** means the trustee of the Trust, being DBNGP Holdings Pty Limited (ACN 110 721 081).

**DBNGP WA Pipeline Trust** means the DBNGP WA Pipeline Trust, formerly known as EEPT.

**DBP Nominees** means DBNGP (WA) Nominees Pty Limited (ABN 78 081 609 289), formerly known as EEWAN.

**DBP Transmission** means DBNGP (WA) Transmission Pty Ltd (ABN 69 081 609 190), formerly known as EEWAT.

**~~Director~~** means ~~a director of DBNGP Holdings appointed by one or more of the Consortium Members in accordance with the Unitholders Agreement~~

**~~DOMGAS Dampier Plant Inlet Point~~** means ~~the inlet point on the DBNGP known by that name and designated as Inlet Point 11-01.~~

**DUET** means DUET 1 and DUET 2.

**DUET 1** means the AMPCI Macquarie Infrastructure Management No 1 Limited in its capacity as the responsible entity of the Diversified Utility and Energy Trust No 1 (ABN 99 108 013 672).

**DUET 2** means AMPCI Macquarie Infrastructure Management No 2 Limited in its capacity as the responsible entity of the Diversified Utility and Energy Trust No 2 (ABN 15 108 014 062).

**EEPT** means Epic Energy (WA) Pipeline Trust, now known as DBNGP WA Pipeline Trust.

**EEWAN** means Epic Energy (WA) Nominees Pty Ltd (ACN 081 609 289), now known as DBP Nominees.

**EEWAT** means Epic Energy (WA) Transmission Pty Ltd (ABN 69 081 609 190), now known as DBP Transmission.

**~~Epic Application~~** means ~~the application for review of the Regulator's Decision filed with the Gas Review Board by EEWAN and EEWAT on 14 January 2004.~~

**~~Epic Proceedings~~** means ~~the proceedings before the Gas Review Board (No. 1 of 2004) in connection with the Epic Application.~~

**Exempt Alcoa Contract** means the contract originally between the State Energy Commission of Western Australia and Alcoa and now between EEWAT/DBP Transmission, DBP Nominees and Alcoa dated 7 February 1983~~8~~ as amended from time to time.

**Force Majeure** means any event or circumstance not within the control of ~~Alinta~~WNG, Alcoa, DUET or DBNGP Holdings and which each of them, by the exercise of the standards of a reasonable and prudent person, is not able to prevent or overcome, including without limitation:

- (a) acts of God, including without limitation epidemics, land slides, lightning, earthquakes, fires, storms, floods, wash outs and cyclones;
- (b) strikes, lockouts, stoppages, restraints of labour and other industrial disturbances;
- (c) acts of the enemy including without limitation wars, blockades and insurrection;
- (d) acts of terror, terrorism or terrorists;
- (e) riots and civil disturbances;
- (f) laws of the Commonwealth or any Commonwealth statutory authority;
- (g) laws of the State of Western Australia or a local government or any State statutory authority of Western Australia;

- (h) refusal or delay in obtaining any necessary consent or approval from any Commonwealth or local government or a Commonwealth or Western Australian statutory authority;
- (i) accidents involving, or break down of or loss or damage to, any plant, equipment, materials or facilities necessary for the Consortium Member's operations;
- (j) any pipeline shutdown or interruption which is required or directed by any Commonwealth, Western Australian or local government agency or any Commonwealth or Western Australian statutory authority having authority to so require or direct;
- (k) any pipeline shutdown or interruption required to conform with design or regulatory limits on pipeline facilities, whether arising due to environmental conditions or circumstances or otherwise;
- (l) pipeline ruptures;
- (m) collisions or accidents; and
- (n) any other matter reasonably beyond the control of AlintaWNG, Alcoa, DUET and DBNGP Holdings.

**Gas Access Code** means the National Third Party Access Code for Natural Gas Pipeline Systems as applied as a law of Western Australia by the Access Act (as amended, re-enacted or replaced from time to time).

**Gas Access Law** means the Gas Access Code and the Access Act.

~~**Gas Review Board** means the Western Australian Gas Review Board.~~

~~**Marketing Staff** means servants, consultants, independent contractors or agents directly involved in sales, sale provision or advertising (whether or not they are also involved in other functions) but does not include servants, consultants, independent contractors or agents involved only in:~~

~~(a) strategic decision making, including the executive officer or officers to whom Marketing Staff report either directly or indirectly;~~

~~(b) technical, administrative, accounting or service functions;~~

~~**NCC** means the National Competition Council.~~

~~**Proposed Acquisition** means the proposed acquisition of the shares in EEWAT, the shares in EEWAN and the units in EEPT by the Consortium through DBNGP Holdings.~~

**Prospective Shipper** means a person who has a bona fide intention to obtain a right to use one or more DBNGP Services by entering into a Shipper Contract.

~~**Regulator** means the Western Australian Independent Gas Pipelines Access Regulator.~~

~~**Regulator's Decision** means the decision by the Regulator made on 30 December 2003 under the Gas Access Code to draft and approve its own Access Arrangement for the DBNGP.~~

**Related Body Corporate** has the meaning given to it by the Corporations Act.

**Revocation Application** means an application to the National Competition Council NCC under section 1.25 of the Gas Access Code requesting that Coverage of the DBNGP be revoked.

~~Ring Fenced Information~~ means confidential information:

- ~~(a) that ANS obtains in the course of providing services (if any) to EEWAT under any service agreement with EEWAT; and~~
- ~~(b) in respect of which EEWAT is, in its capacity as the Service Provider in connection with the DBNGP, subject to ring-fencing obligations under sections 4, 1(f) and (g) of the Gas Access Code.~~

~~Service Provider~~ has the meaning given to that term in the Gas Access Law.

~~Shareholders~~ means AlintaWNG, Alcoa and DUET as the shareholders in DBNGP Holdings.

~~Shipper~~ means a Contracted Shipper or Prospective Shipper.

~~Shipper Contract~~ means a contract with EEWATDBP Transmission for the provision of one or more DBNGP Services.

~~Standard Shipper Contract~~ means the Shipper Contract that will be offered by DBNGP Holdings and, or, EEWATDBP Transmission to all Contracted Shippers and Prospective Shippers and which:

- ~~(a)~~ contains the terms and conditions on which a T1 Service and other loss firm DBNGP services will be provided by means of the DBNGP; and
- ~~(b)~~ will be the same for all Shippers that request a T1 Service except to the extent that it is necessary or desirable to vary the terms and conditions to deal with:
  - ~~(i)~~ the particular requirements of Shippers;
  - ~~(ii)~~ the grandfathering of certain existing rights; and
  - ~~(iii)~~ the Exempt Alcoa Contract.

~~TJ~~ means terajoule.

~~TJ/d~~ means TJ per day.

~~Trust~~ means the trust being established by the Unitholders of which DBNGP Holdings is to be the trustee and which will hold the:

- ~~(c)~~ shares in EEWATDBP Transmission (the current operator of the DBNGP);
- ~~(d)~~ the shares in EEWANDBP Nominees; and
- ~~(e)~~ the units in HEFT-DBNGP WA Pipeline Trust (the current owner of the DBNGP).

~~T1 Service~~ means the most firm DBNGP Service under the Standard Shipper Contract, being the type of DBNGP Service held by all significant current Contracted Shippers (other than Alcoa under the Exempt Alcoa Contract).

~~Undertakings~~ means the undertakings provided by the Consortium Members, ANS and DBNGP Holdings in this document.

~~Unitholders~~ means AlintaWNG, Alcoa and DUET, and any special purpose vehicles established by them or any of them, as the unitholders in the Trust.

~~Unitholders Agreement~~ means the agreement between the Unitholders which governs the relationship between them relating to DBNGP Holdings and the Trust.

WNG means WestNet Infrastructure Group Limited (ABN 40 087 857 001), formerly known as Alinta Limited.

~~Western Power means Western Power Corporation, being the body corporate established and continued under the Electricity Corporation Act 1994 (WA).~~

~~Western Power Application means the application for review of the Regulator's Decision filed with the Gas Review Board by Western Power on 14 January 2004.~~

~~Western Power Proceedings means the proceedings before the Gas Review Board (No. 3 of 2004) in connection with the Western Power Application.~~

## 1.2 Other Rules of Interpretation

- (a) In this document, the singular includes the plural and vice versa, unless the context requires otherwise.
- (b) References to clauses and paragraphs are references to clauses and paragraphs of this document.

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## 2. Background

2.1 ~~On 27 October 2004, the Consortium proposes to acquire~~acquired, through DBNGP Holdings and the Trust, the:

- (a) shares in EEWAT (the ~~current~~then operator of the DBNGP);
- (b) the shares in EEWAN; and
- (c) the units in EEPT (the ~~current~~then owner of the DBNGP).

2.2 On 9 August 2004, the Consortium ~~had~~advised the Commission of the ~~Proposed~~proposed Acquisition. The Commission expressed concerns about the ~~Proposed~~proposed Acquisition.

2.3 On 27 August 2004:

- (a) the Consortium ~~had~~offered to give certain undertakings under section 87B of the Act to allay the concerns of the Commission; and
- (b) the Commission ~~had~~informed the Consortium that it ~~agrees~~agreed in principle to the Consortium's proposed undertaking terms and therefore ~~does~~did not propose to intervene in the matter pursuant to section 50 of the Act, subject to the Commission's acceptance of appropriate undertakings under section 87B of the Act.

2.4 On 25 October 2004, the Commission accepted undertakings offered to it by the Consortium Members, Alinta Network Services Pty Ltd and DBNGP Holdings under section 87B of the Act.

2.5 Accordingly, the Consortium Members, ANS and DBNGP Holdings offer these Undertakings for acceptance by the Commission. As a result of changed circumstances relating to the ownership of the DBNGP, the Consortium Members and DBNGP Holdings offered these undertakings for acceptance by the Commission, which replace the previous undertakings dated 25 October 2004 in their entirety.

2.6 On [insert date of variations], the Commission agreed to the variations to the undertakings.

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### 3. Commencement and termination of the Undertakings

3.1 The Undertakings come into effect when all of the following conditions are satisfied:

- (a) the Undertakings are executed by the Consortium Members, and DBNGP Holdings and ANS; and
- (b) the Commission accepts the Undertakings so executed; and
- (c) ~~the Consortium completes the Proposed Acquisition.~~

3.2 The Undertakings will terminate on the date on which the earliest of the following events occurs:

- (a) all of Alinta WNG, DUET, and Alcoa (and their related bodies corporate) cease to have a material interest in the DBNGP;
- (b) the Commission consents to the withdrawal of the Undertakings in accordance with section 87B of the Act; or
- (c) a natural gas transmission pipeline that is not yet in existence and is able to provide natural gas transportation services from the Carnarvon Basin to the most northerly point of the Parmelia Pipeline or Perth in competition with the DBNGP is constructed and which is owned and operated by entities which are not related bodies corporate of any of the Consortium Members or DBNGP Holdings.

3.3 The Undertakings cease to apply to a Consortium Member if it ceases to be a Unitholder in the Trust.

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### 4. No limitation of the application of the Gas Access Law

The Undertakings do not limit any of the obligations of the Consortium Members, DBNGP Holdings, EEWAT DBP Transmission, EEWAN DBP Nominees and EEPT DBNGP WA Pipeline Trust under the Gas Access Law.

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### 5. Undertakings

#### 5.1 EEWAT

~~The Consortium Members and DBNGP Holdings undertake to procure EEWAT to offer, within 10 Business Days of the completion of the Proposed Acquisition, an undertaking under section 87B of the Act to comply with the terms of the Undertakings that are relevant for EEWAT.~~

#### 5.25.1 Coverage

The Consortium Members and DBNGP Holdings will not, for a period of 20 years from the date that the Undertakings come into effect, make or support a Revocation Application.

#### 5.3 Settlement of Proceedings

- (a) ~~The Consortium Members and DBNGP Holdings undertake to ensure that EEWAT, EEWAN and EEPT formally end the Epic Proceedings and withdraw the Epic Application within 5 Business Days of the completion of the Proposed Acquisition.~~

~~(b) For avoidance of doubt, nothing in clause 5.3(a) prevents the Consortium Members, DBNGP Holdings, EEWAT, EEWAN or HEFT from contesting any submissions in the Western Power proceedings that the Initial Capital Base for the DBNGP should be lower than the figure determined by the Regulator.~~

~~(c) The Consortium Members, DBNGP Holdings and ANS each undertake that, in the event that the Epic Proceedings are not formally ended within 5 Business Days of the completion of the Proposed Acquisition, each shall apply to the Commission pursuant to section 87B(2) to withdraw these Undertakings.~~

#### **5.4 Alinta's involvement in shipper negotiations**

~~(a) Subject to clause 5.4(b), Alinta undertakes that no person who is a director or secretary or a member of the staff of Alinta or of its Related Bodies Corporate (other than ANS) will be involved commercial negotiations between DBNGP Holdings (and, or, EEWAT) with other Shippers relating to gas transportation on the DBNGP.~~

~~(b) Nothing in clause 5.4(a) prevents a person to whom that clause applies from being involved in commercial negotiations between DBNGP Holdings (and, or, EEWAT) with a particular Shipper if the Shipper consents in writing to that person being involved in the negotiations.~~

~~(c) EEWAT and DBNGP Holdings undertake to give the ACCC written notice of all Shipper consents referred to in clause 5.4(b).~~

#### **5.55.2 Ring fencing**

~~(a) Alinta undertakes to ring fence its activities in relation to ANS so that no member of the Marketing Staff of Alinta or its Related Bodies Corporate has access to Ring Fenced Information.~~

~~(b) ANS undertakes not to discriminate between Shippers in performing its functions as service provide to EEWAT.~~

~~(c) The Consortium Members and DBNGP Holdings undertake to ensure that any of their Related Bodies Corporate which become a service provider to EEWAT will provide an Undertaking under section 87B of the Act in substantially the same forth as clauses 5.5(a), 5.5(b) and 5.5(f).~~

~~(d) EEWAT DBP Transmission and DBNGP Holdings undertake to:~~

~~(i)(a) ensure that the Standard Shipper Contract includes confidentiality and non-discrimination obligations which are no less favourable to the Shipper than those contained in Schedule 1; and~~

~~(i)(b) comply with the confidentiality and non-discrimination obligations imposed by the Standard Shipper Contract.~~

~~(d) EEWAT undertakes to comply with the ring fencing obligations imposed on EEWAT by section 4 of the Gas Access Code as if Alinta and its Related Bodies Corporate (other than ANS) are Associates of EEWAT for the purposes of the Gas Access Code and also undertakes to comply with each of the other provisions of the Gas Access Code so far as they relate to section 4 of the Gas Access Code and are necessary to facilitate the assumption of these obligations by EEWAT.~~



~~(e) ANS undertakes to comply with the ring-fencing obligations in section 4 of the Gas Access Code, other than the obligations in sections 4.1(c), (d) or (e), as if it were a Service Provider and as if Alinta and its other Related Bodies Corporate were its Associates for the purposes of the Gas Access Code and also undertakes to comply with each of the other provisions of the Gas Access Code so far as they relate to section 4 of the Gas Access Code and are necessary to facilitate the assumption of those obligations by ANS.~~

~~(f) Without derogating in any way from clause 5.5(a), nothing in clause 5.5(f) prevents ANS from disclosing information to Alinta solely for the purpose of enabling Alinta to provide services, support and facilities to assist ANS in, performing its obligations as service Provider to EEWAT provided that Alinta undertakes to use any information thus provided solely for the purpose for which it is provided and no other purpose.~~

### **5.6 Capacity Expansion Rights for Prospective Shippers**

~~(a) Subject to clause 5.6(b), DBNGP Holdings undertakes to ensure that EEWAT offers to all Prospective Shippers who require a T1 Service, a Standard Shipper Contract that contains Capacity Expansion Rights that are not materially less favourable than the Capacity Expansion Rights contained in any other Shipper Contract for a T1 Service.~~

~~(b) To avoid doubt, nothing in clause 5.6(a):~~

~~(i) requires DBNGP Holdings or EEWAT to enter into a Shipper Contract with a Prospective Shipper if it would not be required to do so under the Gas Access Law and the Access Arrangement;~~

~~(ii) prevents DBNGP Holdings or EEWAT from requiring a Prospective Shipper to enter into a Standard Shipper Contract for a T1 Service, which contains particular Capacity Expansion Rights, on terms and conditions that are equivalent to other Standard Shipper Contracts that contain equivalent Capacity Expansion Rights; nor~~

~~(iii) requires DBNGP Holdings or EEWAT to offer to any Shipper Capacity Expansion Rights that are the same as the Capacity Expansion Rights in the Exempt Alcoa Contract~~

### **5.7 Obligation to Expand Capacity**

#### **(a) Obligation to Expand**

~~Subject to this clause 5.7, DBNGP Holdings undertakes to expand the Capacity of the DBNGP between the DOMGAS Dampier Plant Inlet Point and CS10 by not less than 100 TJ/d, in aggregate, to meet the known Capacity requirements of Contracted Shippers or Prospective Shippers who enter into Standard Shipper Contracts that comply with clause 5.6 under and in accordance with the terms of that contract.~~

#### **(b) Timeframe**

~~DBNGP Holdings undertakes to complete the expansion of Capacity under clause 5.7(a) no later than 5 years following completion of the Proposed Acquisition.~~

#### **(c) Obligation to Invest in the Capacity Expansion**

~~DBNGP Holdings undertakes to invest up to \$400 million in connection with the expansion of Capacity under clause 5.7(a) provided that Shippers that require the expanded Capacity have entered into Standard Shipper Contracts as contemplated by clause 5.7(a).~~

~~(d) Feasibility, Safety and Reliability~~

~~DBNGP Holdings is not required to carry out the expansion of Capacity under clause 5.7(a) if it reasonably determines that the expansion is not:~~

~~(i) technically or economically feasible; or~~

~~(ii) consistent with the safe and reliable provision of DBNGP Services.~~

**5.8 No discriminatory treatment of Shippers**

~~EEWAT undertakes to, and the Consortium Members and DBNGP Holdings undertake to do everything necessary to ensure that EEWAT manages and operates the DBNGP according to policies and procedures which deal with all Shippers on a fair and non-discriminatory basis.~~

**5.95.3 Independent Audit**

- (a) The Consortium Members or DBNGP Holdings (as the case may be) will appoint an independent auditor to prepare an annual report on the compliance with the Undertakings and provide a copy of that report to the Commission for each of the following periods:
- (i) For the first five years after completion of the Proposed Acquisition, each year (that is, a report for each of years 1 to 5);
  - (ii) For the following six years, each two year period (that is, a report for each of:
    - A. years 6 and 7;
    - B. years 8 and 9; and
    - C. years 10 and 11; and
  - (iii) For the nine years following (ii) above, each three year period (that is, a report for each of:
    - A. years 12, 13 and 14;
    - B. years 15, 16 and 17; and
    - C. years 18, 19 and 20).
- (b) The Consortium Members, DBNGP and EEWATDBP Transmission and ANS (the Parties) shall, for the purpose of ensuring that the Parties comply with the Undertakings, cause audits of the Undertakings (the Audits) to be carried out, for each of the periods in clause 5.3(a), in accordance with each of the following requirements.
- (i) The Parties shall ensure that the Audits are carried out by an appropriately qualified and experienced professional (the Auditor)
  - (ii) The Auditor will not qualify as independent unless he or she:

- A. is not a present or past staff member or director of any of the Parties;
  - B. has not acted or does not act for any of the Parties;
  - C. is not retained by any of the Parties in any other capacity, either currently or in the past;
  - D. has not and does not provide consultancy or other services for any of the Parties; and
  - E. has no shareholding or other interests in any of the Parties.
- (iii) The Parties shall use best endeavours to ensure that the Auditor:
- A. conducts a review as to whether the Undertaking has been complied with; and
  - B. makes such recommendations as he/she considers necessary to ensure that the Parties comply with the Undertakings.
- (iv) Each of the Parties shall ensure that the Audits are able to be conducted by the Auditor on the basis of any relevant information in the Parties' possession or control, including without limitation any of the following sources of information:
- A. investigations of any officers, employees, representatives and agents of the Parties to find out how the Undertakings are implemented and understood;
  - B. enquiries of customers about their experience of the Parties and its services; and
  - C. the records of the Parties.
- (v) The Parties shall authorise the Auditor to engage any technical expertise that the Auditor reasonably requires to conduct the Audits.
- (vi) The Parties shall use best endeavours to ensure that the findings in relation to each of the Audits are set out in a written confidential report (the **Confidential Audit Reports**) and provided to the Parties within 14 days of the completion of each of the Audits.
- (vii) The Parties shall, at their own expense, cause to be produced and provided to the Commission copies of each of the Confidential Audit Reports within 14 days of the Parties receiving them.
- (viii) The Confidential Audit Reports are not to be provided to third parties without the written consent of the Parties.

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## **6. Limitation of Duet 1 Trustee's liability**

- 6.1** The DUET 1 Trustee enters into this document solely in its capacity as responsible entity of DUET 1.
- 6.2** Any liability of the DUET 1 Trustee arising in connection with this document is limited to the extent that the DUET 1 Trustee is able to be indemnified for that liability out of the assets of DUET 1 under the DUET 1 Constitution.
- 6.3** Each other party acknowledges and agrees that it may enforce its rights against the DUET 1 Trustee with respect to the non-observance of the DUET 1 Trustee's obligations under this document only to the extent necessary to enforce the other party's rights, powers and remedies against the DUET 1 Trustee in respect of the assets of DUET 1 by subrogation or otherwise.
- 6.4** However, despite anything in clause 6.3, the DUET 1 Trustee is liable to the extent that a liability under this document arises out of the DUET 1 Trustee's own fraud; negligence, breach of trust or breach of duty which disentitles it from an indemnity out of the assets of DUET 1 in relation to the relevant liability.

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## **7. Limitation of Duet 2 Trustee's liability**

- 7.1** The DUET 2 Trustee enters into this document solely in its capacity as responsible entity of DUET 2.
- 7.2** Any liability of the DUET 2 Trustee arising in connection with this document is limited to the extent that the DUET 2 Trustee is able to be indemnified for that liability out of the assets of DUET 2 under the DUET 2 Constitution.
- 7.3** Each other party acknowledges and agrees that it may enforce its rights against the DUET 2 Trustee with respect to the non-observance of the DUET 2 Trustee's obligations under this document only to the extent necessary to enforce the other party's rights, powers and remedies against the DUET 2 Trustee in respect of the assets of DUET 2 by subrogation or otherwise.
- 7.4** However, despite anything in clause 7.3, the DUET 2 Trustee is liable to the extent that a liability under this document arises out of the DUET 2 Trustee's own fraud, negligence, breach of trust or breach of duty which disentitles it from an indemnity out of the assets of DUET 2 in relation to the relevant liability.

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## **8. Review of Undertaking**

If:

- (a) the Consortium Members or DBNGP Holdings are unable to comply with their obligations under the Undertakings; or
- (b) the Consortium Members, DBNGP Holdings or the Commission believe that it is necessary to seek some variation due to changed circumstances (including any material change in the Western Australian gas or electricity industries),

then the Consortium Members, DBNGP Holdings and the Commission agree that they will review the Undertakings and negotiate in good faith the variation or withdrawal of all or any of the terms of the Undertakings in light of such circumstances having regard to the need to avoid any substantial lessening of competition in any relevant market for the purposes of section 50 of the Act.

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## **9. Confidentiality**

The Consortium Members and DBNGP Holdings acknowledge that the Commission will make the Undertakings available for public inspection.

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## **10. Force Majeure**

### **10.1 No Liability**

The Consortium Members and DBNGP Holdings will not be liable for any non-performance of any obligation under the Undertakings if the non-performance is due to Force Majeure.

### **10.2 Notice to Commission**

If the Consortium Members or DBNGP Holdings (as the case may be) are by reason of Force Majeure unable to perform an obligation under the Undertakings, they will:

- (a) notify the Commission as soon as practicable (and in any event within 10 Business Days) of the cause and extent of non-performance and the date of commencement of Force Majeure;
  - (b) use their best endeavours to remove or overcome the Force Majeure; and
  - (c) if the Force Majeure event continues beyond a reasonable period, negotiate in good faith with the Commission a means to satisfy the relevant obligation under the Undertakings.
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## **11. Obligations to procure and notify**

### **11.1 Related Bodies Corporate**

Where the performance of an obligation under the Undertakings requires a Related Body Corporate of a Consortium Member or DBNGP Holdings to take some action or refrain from taking some action, the Consortium Member or DBNGP Holdings (as the case may be) will use best endeavours to procure that Related Body Corporate to take that action or refrain from taking that action.

### **11.2 Provision of Information**

- (a) The Consortium Members ~~and~~ DBNGP Holdings ~~an ANS~~ undertake to provide the Commission with all information and documents that the Commission reasonably requires for the purpose of monitoring compliance with the Undertakings. The Consortium Members, ~~ANS~~ or DBNGP Holdings (as the case may be) will comply within 10 Business Days of receipt or such other period of time as may be agreed by the Commission.
- (b) The Consortium Members, ~~ANS~~ and DBNGP Holdings undertake to ensure that any of their Related Bodies Corporate which become a service provider to EEWATDBP Transmission or any other service provider that may provide relevant services to EEWATDBP Transmission over time will provide the Commission with all information and documents that the Commission reasonably requires for the purpose of monitoring compliance with the Undertakings.

### 11.3 Termination Date

The Consortium Members and DBNGP Holdings must notify the Commission of any event that results in the termination of the Undertakings pursuant to clause 3.2 or 3.3 of this document.

### 11.4 Enforcement action

For the avoidance of doubt, the Commission may take enforcement action at any time during any relevant limitation period in respect of any breach by the Consortium Members or DBNGP Holdings of a term of the Undertakings or the Act.

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## 12. Service of Notices

12.1 Any notice or other communication to the Commission pursuant to the Undertakings must be sent to:

General Manager, Mergers & Asset Sales  
Australian Competition & Consumer Commission  
470 Northbourne Avenue  
Dickson ACT 2602.

**[Commission to advise of updated address for service of notices]**

or in whatever manner the Commission subsequently notifies the Consortium Members and DBNGP Holdings.

12.2 Any notice or other communication from the Commission pursuant to the Undertakings must be sent to (as the case may be):

~~Alinta Limited  
Level 7  
The Quadrant  
1 William Street  
PERTH WA 6000  
Attention: Company Secretary  
Alinta Network Services Pty Ltd  
Level 7  
The Quadrant  
1 William Street  
PERTH WA 6000~~

~~Attention: Company Secretary  
AMPCI Macquarie Infrastructure Management No 1 Limited  
in its capacity of the responsible entity of the Diversified Utility and Energy  
Trust No 1  
Level 17  
50 Bridge Street  
SYDNEY NSW 2000  
Attention: Company Secretary~~

~~cc: Level 11  
1 Martin Place  
SYDNEY NSW 2000~~

~~AMPCI Macquarie Infrastructure Management No 2 Limited in its capacity of  
the responsible entity of the diversified utility and Energy Trust No 2  
Level 17  
50 Bridge Street~~

SYDNEY NSW 2000  
Attention: Company Secretary

cc: Level 11  
1 Martin Place  
SYDNEY NSW 2000

Alcoa of Australia Limited  
Corner Davy and Marmion Streets  
BOORAGOON WA 6154  
Attention: ~~Tom Trempus~~ Energy Services Manager

DBNGP Holdings Pty Limited  
~~C/- Aliens Arthur Robinson~~  
~~Level 8, Wesfarmers House~~  
Level 6, 12 -14 The Esplanade  
PERTH WA 6000  
Attention: Company Secretary

Attention: Andrew Pascoe  
DBNGP (WA) Nominees Pty Ltd  
Level 6, 12 -14 The Esplanade  
PERTH WA 6000  
Attention: Company Secretary

DBNGP (WA) Transmission Pty Ltd  
Level 6, 12 -14 The Esplanade  
PERTH WA 6000  
Attention: Company Secretary

WestNet Infrastructure Group Limited  
12 -14 The Esplanade  
PERTH WA 6000  
Attention: Company Secretary

12.3 The Consortium Members and DBP Holdings may, as required from time to time during the course of the Undertakings, update their addresses.

**Executed by Alinta Limited WestNet  
Infrastructure Group Limited ABN 40 087  
857 001** in accordance with section 127 of  
the Corporations Act by or in the presence  
of:

\_\_\_\_\_  
Signature of Secretary/other Director

\_\_\_\_\_  
Name of Secretary/other Director in full

~~**Executed by Alinta Network Services Pty  
Ltd** in accordance with section 127 of the  
Corporations Act by or in the presence of:~~

\_\_\_\_\_  
~~Signature of Secretary/other Director~~

\_\_\_\_\_  
~~Name of Secretary/other Director in full~~

**Executed by AMPCI Macquarie  
Infrastructure Management No. 1 Limited  
ABN 99 108 013 672** in its capacity as the  
**responsible entity of the Diversified  
Utility and Energy Trust No. 1** in  
accordance with section 127 of the  
Corporations Act by or in the presence of:

\_\_\_\_\_  
Signature of Secretary/other Director

\_\_\_\_\_  
Name of Secretary/other Director in full

\_\_\_\_\_  
Signature of Director or sole Director and sole  
Secretary

\_\_\_\_\_  
Name of Director or sole Director and sole  
Secretary in full

\_\_\_\_\_  
~~Signature of Director or sole Director and sole  
Secretary~~

\_\_\_\_\_  
~~Name of Director or sole Director and sole  
Secretary in full~~

\_\_\_\_\_  
Signature of Director or sole Director and sole  
Secretary

\_\_\_\_\_  
Name of Director or sole Director and sole  
Secretary in full



**Executed by AMPCI Macquarie Infrastructure Management No. 2 Limited**  
**ABN 15 108 014 062 in its capacity as the responsible entity of the Diversified Utility and Energy Trust No. 2** in accordance with section 127 of the Corporations Act by or in the presence of:

\_\_\_\_\_  
Signature of Secretary/other Director

\_\_\_\_\_  
Name of Secretary/other Director in full

**Executed by Alcoa of Australia Limited**  
**ABN 93 004 879 298 in accordance with section 127 of the Corporations Act by or in the presence of:**

\_\_\_\_\_  
Signature of Secretary/other Director

\_\_\_\_\_  
Name of Secretary/other Director in full

**Executed by DBNGP Holdings Pty Limited**  
**ACN 110 721 081 in accordance with section 127 of the Corporations Act by or in the presence of:**

\_\_\_\_\_  
Signature of Secretary/other Director

\_\_\_\_\_  
Name of Secretary/other Director in full

\_\_\_\_\_  
Signature of Director or sole Director and sole Secretary

\_\_\_\_\_  
Name of Director or sole Director and sole Secretary in full

\_\_\_\_\_  
Signature of Director or sole Director and sole Secretary

\_\_\_\_\_  
Name of Director or sole Director and sole Secretary in full

\_\_\_\_\_  
Signature of Director or sole Director and sole Secretary

\_\_\_\_\_  
Name of Director or sole Director and sole Secretary in full

**ACCEPTED BY THE AUSTRALIAN COMPETITION & CONSUMER COMMISSION**

.....  
Graeme Julian Samuel  
Chairman, Australian Competition & Consumer Commission

Dated:

## Schedule 1

### 28. Confidentiality

#### 28.1 Confidential Information

- (a) Subject to clauses 28.2 and 28.3, each Party shall keep the terms and conditions of this Contract, and all information specifically relating to or provided pursuant to or in accordance with this Contract or in the negotiations leading to the execution of this Contract (**Confidential Information**), confidential.
- (b) To avoid doubt Confidential Information includes all information received by Operator in the Operation and Expansion of the DBNGP which relates to Shipper, the disclosure or misuse of which might reasonably be expected to materially affect Shipper's commercial interests, including information relating to Shipper's gas flows and flow rates, billing and Shipper's maintenance schedules and plant availability.
- (c) A reference in this clause 28 to information being **disclosed** to or **received** by a Party, includes information being communicated to or created, ascertained, discovered or derived by it or on its behalf.

#### 28.2 Exceptions to Confidentiality

Either Party may disclose Confidential Information which:

- (a) at the time when it is disclosed to the Party, is publicly known;
- (b) subject to clauses 28.4 and 28.5, at the time when it is disclosed to the Party, is already known to the Party through some independent means not involving breach of any confidentiality undertaking owed pursuant to clause 28.1, and which the Party can prove by prior or contemporaneous written documentation was already known to it at the time of disclosure (unless such knowledge arose from disclosure of information in breach of an obligation of confidentiality);
- (c) after the time when it is disclosed to the Party, comes into the public domain otherwise, than as a result of any breach of the confidentiality undertaking owed pursuant to clause 28.1;
- (d) subject to clauses 28.4 and 28.5, the other Party acquires from a source other than that Party or any Related Body Corporate or representative of that Party where such source is entitled to disclose it and such disclosure is not subject to confidentiality restrictions under this Contract;
- (e) that Party is required by the ASX, court order, Law, the Regulator, or requested by the ACCC to disclose, and in such cases, the disclosing Party shall promptly notify the other Party of that requirement or request (as the case may be);
- (f) is necessary in relation to any discovery of documents, or any proceedings before a court, tribunal, ACCC, other governmental agency or stock exchange, and in such cases, the disclosing Party shall promptly notify the other Party of that requirement;

- (g) with the consent of the other Party and subject to any conditions of that consent;
- (h) it is necessary or convenient in relation to any notification by the Shipper to ACCC or ERA under clause 28.7;
- (i) is required by Law or any governmental agency or stock exchange to be disclosed in connection with the issue of securities or financial products by a Party, a Related Body Corporate of a Party, the Diversified Utility and Energy Trust No 1 and No 2 or the POWERS Trust, or any funding vehicle of any of those parties; or
- (j) comprises the terms of Operator's Standard Shipper Contract.

### 28.3 Permitted Disclosure

(a) Either Party may disclose Confidential Information to:

(i) subject to clause 28.4 and 28.5, its, and its Related Bodies Corporate's, employees, officers, agents, contractors, consultants, lawyers, bankers, financiers, financial and technical advisers (and for the purpose of this clause 28.3(a) Alcoa, Alinta Limited (ACN 304 286 095) WestNet Infrastructure Group Limited (ABN 40 087 857 001) (WNG) and System Operator are to be considered Related Bodies Corporate of Operator);

(ii) subject to clause 28.4 and 28.5, a bona fide proposed or prospective transferee (and their employees, officers, agents, contractors, consultants, lawyers, bankers, financiers, financial advisers, Related Entities, co-bidders or bid consortium members and actual or proposed joint venturers) of:

- A. a 20% or more legal or equitable interest in a relevant part or the whole of a Party's business;
- B. a 20% or more legal or equitable interest in any property to which the information relates;
- C. 20% or more of the shares in a Party; or
- D. 20% or more (by value) of the shares or units (or both) in a company or trust (or both) which, directly or indirectly, controls (as that term is defined in the Corporations Act) a Party; and

~~(iii) if the disclosing party is Shipper and until there is a Change of Status, to the Minister of Energy or his officers or nominees,~~

to the extent those persons have a need to know the Confidential Information.

(b) Nothing in this clause 28.3 permits disclosure by Operator or System, or by a person or persons to whom Confidential Information from Operator or System Operator has been disclosed under this clause 28, to:

- (i) any person who is directly involved in:

- A. the distribution of Gas to customers through the Western Australia - Natural Gas Distribution System as that term is used in the National Third Party Access Code for Natural Gas Pipeline Systems (as amended from time to time);
  - B. the retailing of Gas within Western Australia;
  - C. the generation or sale of electricity in Western Australia;
  - D. contracting for Capacity on the DBNGP; or
  - E. the management of the activities referred to in the preceding paragraphs (A) to (D); or
- (ii) such person's employees, officers, agents, contractors, consultants, and technical advisers who are themselves directly involved in any of the activities described in clause 28.3(b)(i),

except to the extent that such person is:

- (iii) the System Operator and requires the disclosure of information to it by Operator or by it to enable it to perform its obligations to Operator under the relevant operating and maintenance services contract (provided that at no time may the System Operator or its employees, officers, agents, contractors, consultants and technical advisers (which, without limiting clauses 28.4 and 28.5, does not include ~~Alinta Limited~~WNG to the extent it provides corporate and other head office services to the System Operator) be directly or indirectly involved in anything listed in clauses 28.3(b)(i)(B), (C) or (D) or clause 28.3(b)(i)(E) to the extent it relates to clauses 28.3(b)(i)(B), (C) or (D);
- (iv) a director or senior manager of Alcoa or ~~Alinta Limited~~WNG, or any of their Related Bodies Corporate through which they have a direct or indirect equity interest in the DBNGP, and requires the disclosure of information directly and solely in connection with the management of their respective equity interests in the DBNGP, and the information is reasonably necessary for that purpose; or
- (v) a senior manager of Alcoa or ~~Alinta Limited~~WNG, or any of their Related Bodies Corporate, who:
  - A. is a director of Operator or its Related Bodies Corporate, or of System Operator; or
  - B. by virtue of his or her duties as a senior manager is required to assist a director under clause 28.3(b)(iv),

which disclosure under paragraphs 28.3(b)(iii), (iv) or (v) is, subject to clause 28.4 and 28.5, permitted in accordance with the provisions of this clause 28.3.

- (c) Any Party seeking to disclose information under clause 28.3(a)(ii) must:
- (i) seek the consent of the other Party as to the protocols, arrangements and agreements which will govern the disclosure of the information and the prevention of further disclosure of the

information, which consent is not to be unreasonably withheld or unreasonably delayed; and

- (ii) consult with the other Party to ascertain whether there is any commercially sensitive information which may not be disclosed at all or may only be disclosed on terms and conditions agreed between the Parties, and must give effect to the reasonable requirements of the other Party in these respects.

#### **28.4 Disclosure by recipient of Confidential Information**

- (a) Any Party disclosing information under clause 28.2 or 28.3 must ensure that persons receiving Confidential Information from it, or from any person or persons to whom the Confidential Information has been disclosed, do not:
  - (i) disclose the information except in circumstances permitted in clause 28.2 or 28.3 (as the case may be); and
  - (ii) use the information except in the circumstances permitted by clause 28.5.
- (b) If Operator and System Operator disclose information to a person under clause 28.3(b)(iii), (iv) or (v), then Operator must ensure that (unless in the circumstances of a particular case it is not possible to do so) the information is disclosed in a manner which minimises the disclosure of the Confidential Information referred to in clause 28.1(b) including by one or more of aggregating the information with like information from other shippers, presenting it in summary form, or presenting it (so far as is practicable) in a form which does not identify it as relating to Shipper.

#### **28.5 Use of Confidential Information**

A Party who has received Confidential Information from another under this Contract must not use it, and a Party who has disclosed Confidential Information to a person under clause 28.3 must procure that that person, and any person or persons to whom Confidential Information is subsequently disclosed, does not use it, except for the purpose of exercising the Party's rights or performing the Party's obligations under this Contract or as otherwise contemplated under this Contract, with the exception of those persons set out in clause 28.3(a)(ii), who must not use the Confidential Information received from another under this Contract except for and in relation to assessing the value of, and preparing a bid for, the relevant interest under clause 28.3(a)(ii) that is proposed to be acquired and who must comply with the protocols, arrangements and agreements agreed under clause 28.3(c)(i).

#### **28.6 Information received by Operator**

- (a) Operator must develop, prior to March 2006, and thereafter implement and enforce, policies and procedures to:
  - (i) give effect to its obligations under
    - A. clauses 28.3(a)(i), 28.3(b), 28.6(a), 28.6(b) or 28.6(c); and
    - B. clauses 28.4 and 28.5 to the extent related to disclosure under clauses 28.3(a)(i), 28.3(b) or 28.6(b); and

- (ii) subject to clause 45, ensure that all shippers are treated equally and fairly,

- and must procure that its direct and indirect shareholders, service providers (including the System Operator) and all Related Bodies Corporate of these entities comply with those policies and procedures and with the Law.
- (b) Operator recognises that information received by its personnel or by System Operator's personnel (which expression includes Operator's and System Operator's employees, officers, agents, contractors, consultants, lawyers, bankers, financiers, financial and technical advisers), including general operational and gas flow information, is commercially sensitive and Operator undertakes that, in addition to the obligations under clause 28.1 and 28.5, such Confidential Information will only be distributed by the control room personnel of Operator or System Operator, as the case may be, to other individuals within Operator, or System Operator, to the extent that those other individuals have a bona fide need to receive that Confidential Information for the purposes of Operating or Expansion of the DBNGP. Operator must procure that any Confidential Information distributed under this clause 28.6 is only used for the purpose for which it was distributed.
  - (c) Operator must make available to Shipper upon request a copy of the policies and procedures developed and implemented under clause 28.6(a). Despite this clause 28, Shipper may in any submissions to the ERA or the ACCC disclose this clause 28 and the policies and procedures developed and implemented under clause 28.6(a).
  - (d) Nothing in clause 28.6(c) requires Operator to consult with Shipper regarding, or to seek Shipper's agreement with, any policies and procedures developed and implemented under clause 28.6(a).

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## **45. Non-Discrimination Clause**

### **45.1 T1 Service to shippers**

Operator represents and warrants to Shipper that where Operator provides a T1 Service to any other shipper ~~which is a Relevant Company~~ whether under a contract which has been amended by a deed of amendment with similar affect to the Deed of Amendment and Restatement (Shipper Contract) at or around the Contract Commencement Date, or under a contract entered into between Operator and the other shipper after the Contract Commencement Date (not being an access contract provided pursuant to the Access Arrangement), Operator will do so on terms and conditions which are:

- (a) the same as those in this Contract relating to the tariffs and rates of Charges payable under this Contract, the adjustment of those tariffs and rates, and the giving of rebates (if any) with respect to Charges;
- (b) similar to those in this Contract relating to the allocation between Shipper and Operator of commercial risks associated with a long term capacity reservation gas transport contract; and
- (c) the same as those in clause 16 of this Contract relating to Operator's obligation to provide additional Contracted Capacity for T1 Service,

other than differences arising from:

- (d) any shipper specific arrangements which derive from, or were authorised under, the *Gas Transmission Regulations 1994 (WA)* (repealed) including arrangements for the transport of LPGs to the W LPG Plant and the pricing of that transport, the preservation of existing gas specifications, and curtailment priority;
- (e) differences in terms and conditions (but not differences in the tariffs and rate of Charges payable under this Contract) as a consequence of bona fide differences between the shippers' respective requirements, and the times and the circumstances under which the respective contracts were concluded; and
- (f) the Alcoa Exempt Contract.

#### 45.2 Access to DBNGP information

If Operator, System Operator or any of their contractors or agents, or any person or persons to whom information from Operator or System Operator has been disclosed, provides any information to any shipper or a Related Body Corporate or officer of a shipper (acting in their respective capacity as shippers) about availability of Capacity, including:

- (a) information relating to planned and unplanned maintenance;
- (b) policies and procedures under which the market for Spot Capacity and Curtailment is administered; or
- (c) DBNGP flow data between each compressor station and each other significant point,

then, other than to the extent that such information relates to an inlet point, outlet point or gate station which is specific to an individual shipper, Operator must ensure that Shipper receives that information at substantially the same time and in the same format.

Nothing in this clause 45.2 limits Operator's obligations under clause 28.

#### Definitions

Defined terms used in this Schedule have the definitions set out at section 1 of the Standard Shipper Contract unless defined otherwise below:

**Operator** means ~~Epic Energy (WA) Transmission Pty Ltd~~ DBNGP (WA) Transmission Pty Ltd (ABN 69 081 609 190) and includes its successors and permitted assigns.

**Party** means Operator or Shipper (as the case may be) and if Shipper comprises more than one person, includes each such person.

**Related Body Corporate** has the meaning given to that expression in the Corporations Act.

**Shipper** means a person who, from time to time, has a contract with Operator for access to gas transmission capacity on the DBNGP, which includes Shipper.

**System Operator** a contractor who is entitled to exercise, on behalf of Operator, all such rights and powers conferred on Operator.