



6 December 2017

Ben Gerritsen  
GM Commercial and Regulation  
First Gas Limited  
By email

Dear Ben,

### RE: GTAC Action Item D – Liability Provisions

The proposal fails to adequately address the issues with these provisions.

#### High-level

- Section 16.1 of the amended GTAC illustrates the problem created by simply copying and pasting from the VTC without reference to the MPOC. Equivalent MPOC provisions explicitly allow claims by Welded Parties (or Interconnected Parties), whereas the GTAC does not. That provision for these may sit outside the Code is not helpful because the GIC cannot strictly assess it, the ICA consultation process is not advanced, and there is no certainty in the GTAC as to the form required of an ICA.
- Section 16.1 also contains the requirement that Loss has to be caused by the failure of a Party to act as an RPO. The MPOC Incentives Pool test does not have this requirement. The MPOC approach is favourable and more efficient because it puts the onus on establishing fact, not on arguing whether or not a party has been an RPO. Further, Loss can still arise even if a Party is acting as an RPO in which case there would be no relief under the GTAC in this situation.
- Further to the point above, the proposal does nothing to address claims for Loss relating to TTP, which is a major issue for industry. GGNZ, like other gas producers, struggles to produce our desired quantity of oil and gas the more TTP exceeds its upper limits, and GGNZ's customers, presumably like other gas users, sometimes struggle to import their desired quantity of gas the more TTP exceeds its lower limits. At least ½ the idea about supply chain liability arrangements relates to pressure management yet the proposal appears ineffective at addressing this problem.
- For gas quality, the proposal does provide a basic supply chain liability structure, but it does not have proper consideration for related items. To elaborate:

- The proposal fails to require gas chromatograph measurements at key Delivery Points. Any claims are unlikely to be substantiated without evidence of the particulars of Loss stemming from the open-access asset. If industry is to progress a wide non-liquidated damages regime for supply chain liability claims, then this should be progressed commensurate with adequate reporting on various items such as delivered gas quality at Delivery Points (gas quality events at Receipt Points do not necessary cause, nor do they prove, gas quality events with the delivered comingled blend).
  - Sections 12.9 to 12.11 of the GTAC appear too weighted in First Gas' favour – e.g. only dust and compressor oil need to be measured at Delivery Points and First Gas has no liability unless it can be showed that it caused it. The latter clause should be removed as liability is the outcome of a process and First Gas liability could still arise if it contributed to an event or if a court deems so.
- Section 16.12 introduces a mirror provision to section 16.11. That is, section 16.11 allows defending parties to defend in First Gas' name and section 16.12 allows claimants to claim in First Gas' name. There is no provision to prevent both being invoked in the same proceedings, or to determine which takes priority if both claimant and defendant seek to invoke. This could result in First Gas issuing proceedings against itself which would not be workable.
  - Part of the intent outlined in the memorandum is puzzling because First Gas cannot identify a party at fault ahead of a party being found to be at fault. In addition, this would make First Gas the judge and prosecutor which is not a principle of natural justice. Further, the party that finds a party to be at fault will not be First Gas, but a court or other body.
  - The proposal is incomplete because the memorandum cites changes required in section 7, yet there are no mark-ups on section 7 to consider.
  - The MPOC provides a limited simple mechanism for squaring up loss in certain circumstances. The GTAC is at the other extreme, i.e. a court process. Compared to the former, the latter will be expensive and its structure is likely to block small or medium issues from being progressed. A properly scoped liquidated damages regime would solve all of this, as would a new independent 'small claims' compliance function within industry. First Gas appears to have proposed the easiest option to draft, but it is also the most complex and the least likely to work well in practice.

## Detail

- The first new 'to' in the last paragraph of section 16.6 should be 'or' – i.e. "caused *or* contributed to".
- The use of Defending Party in paragraph one of section 16.12 is problematic. A Defending Party is one that has an alleged breach raised against it. However, section 16.12 requires there to be an act or omission by a Defending Party which is not possible until or unless this is proven. We suggest that the word 'purported' be added before the words 'act' and 'omission', and / or the words 'may arise' replaces the word 'arises'.

- The last paragraph of section 16.12(a) does not make sense because it carves out reputational considerations apart from lodging a claim in First Gas' name (which would be the biggest source of potential reputational impairment). If a Claiming Party can lodge a claim in First Gas' name, then any further assistance (which should all be recoverable) should be provided and shouldn't be subject to reputational considerations as First Gas has effectively waived this consideration by allowing parties to pursue claims in its name.
- Section 16.13 only applies retrospectively to actual breaches or negligence. We suggest adding words like 'purported breach' or 'purported negligence'.
- Section 16.14 should not presuppose liability by using the previously defined term "Liable Third Parties". Just "any third party or parties" (i.e. lower case) would suffice here.
- For consistency, section 16.16 should add the words 'or in relation to' after the first 'under'.

## Conclusions

Now that there is a replacement proposed to the MPOC Incentives Pool, that replacement appears to be a rearrangement of mixed messages and incomplete.

Liability Provisions is an issue that should require proper consideration, full subject matter expert legal review, and be workshopped with industry. This is being rushed. It should not be rushed.

Yours sincerely



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