

Draft Pipeline Access Dispute Guide

September 2023

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Inquiries about this publication should be addressed to:

Australian Energy Regulator
GPO Box 3131
Canberra ACT 2601
Tel: 1300 585 165

AER reference: 15658303

Amendment record

Version	Date	Pages
1	28 September 2023	62

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1 Introduction

The Pipeline Access Dispute Guide (the Guide) is published under rule 113ZO of the National Gas Rules (NGR).

The National Gas Law (NGL) and NGR set out the framework for users or prospective users and the service providers of gas pipeline services to negotiate access to pipeline services.¹ If parties are not able to negotiate access to such a service, an access dispute may arise. A party can then seek to resolve the dispute under the access dispute framework set out in the NGL and NGR.²

The purpose of the Guide is to provide arbitrators and mediators of pipeline access disputes, and any person who may become party to an access dispute, with guidance about the pipeline access dispute resolution processes under the NGL and the NGR.³ It covers disputes relating to access to scheme and non-scheme pipelines. Key issues covered include:

- the pathways to resolve an access dispute under the NGR and NGL
- the procedures for starting an access dispute and the hearing of access disputes
- matters that the AER, arbitrator or mediator must consider in deciding how to resolve the dispute, and the effect of their decision
- procedural issues involved in the dispute resolution process.

The Guide is not binding, and does not place any obligations on any party, including arbitrators or mediators. It also explains how we will approach our role in the access dispute process.

1.1 Structure of the guide

The Guide is structured as follows:

- **Chapter 2 – Access dispute legislative framework:** provides an overview of the access negotiation framework for gas pipelines, what an access dispute is, and the pathways for resolving an access dispute. Each pathway is then discussed in detail in Chapters 4 to 6.
- **Chapter 3 – Procedural issues for all access disputes:** provides an overview of the procedural issues which are common across all access disputes and outlines steps that parties should consider taking before they formally raise an access dispute.
- **Chapter 4 – Resolution of scheme pipeline access disputes by the AER:** provides a detailed discussion how disputes relating to access to a **scheme pipeline** can be resolved by the AER. It explains when the AER will be the dispute resolution body, and the procedures for raising, hearing and then determining the access dispute.

¹ See, Chapter 4 of the NGL and Part 11 of the NGR.

² See Chapter 5 of the NGL and Part 12 of the NGR.

³ NGR, r 113.

- **Chapter 5 – Arbitration of non-scheme pipeline access disputes:** discusses in detail how disputes relating to access to a **non-scheme pipeline** can be resolved by arbitration. It sets out the types of disputes that can be resolved by arbitration, the steps in the arbitration process, and the matters an arbitrator must consider in resolving a dispute.
- **Chapter 6 – Mediation of access disputes involving small shippers:** discusses in detail how small shippers may seek to resolve disputes by mediation.⁴ It covers when and how a party can elect to resolve a dispute via mediation, the process for the mediation, and how a mediation can be resolved.

⁴ NGL, s 8AB. A small shipper is a user or prospective user who is, or seeks to be, a party to a contract with a service provider for pipeline services and its total daily pipeline capacity right (under 1 or more contracts with the same service provider and by means of the same pipeline) does not exceed 5 terajoules per day or 20% of the pipeline's nameplate capacity. A small shipper excludes corporations with a market capitalisation of more than \$500 million or a related body corporate of the corporation.

2 Access dispute legislative framework

Chapter 5 of the NGL and Part 12 of the NGR set out the framework for the resolution of disputes about access to a pipeline service (the Access Dispute Framework). This chapter provides an overview of how the Access Dispute Framework operates, including the AER's role, and the pathways to resolve a dispute.

2.1 Overview of the access negotiation and dispute framework

The gas pipeline access regime under the NGR and NGL is a negotiate-arbitrate model. Under this model, parties must attempt to negotiate for access to a pipeline service, and if they are unable to, they can raise an access dispute under the Access Dispute Framework. This Guide focuses on the resolution of disputes.

2.1.1 Negotiation of access

The NGL requires a user or prospective user and a service provider to negotiate in good faith about access to a pipeline service provided on both scheme and non-scheme pipelines.⁵ This includes negotiations about:

- whether access to a pipeline service can be granted, and if so
- the terms and conditions for the provision of access to the service.⁶

The framework for these negotiations is set out in Part 11 of the NGR, which covers the process for making enquiries about access, how a user may request access and how a service provider must respond to such a request, the information that must be exchanged during the negotiations, and the timeframes for these negotiations.

While the terms and conditions of a service are open to negotiation, a service provider must provide access to a service on a scheme or non-scheme pipeline unless:

- it is not technically feasible to do so
- it is not consistent with the safe and reliable operation of the pipeline
- providing the service would require an extension of the pipeline.⁷

2.1.2 Access disputes

An access dispute arises if a user or prospective user and the service provider are unable to negotiate access for a service because they disagree on one or more aspects of access to the service. If an access dispute exists, either party can elect to resolve the dispute under the Access Dispute Framework. However, parties can also seek to resolve the dispute in other

⁵ NGL, s 148D. A scheme pipeline is a pipeline that is subject to full regulation under the NGL and NGR, a non-scheme pipeline is a pipeline that is subject to a lighter.

⁶ NGL, s 148D.

⁷ NGR, r 105E.

ways, such as further commercial negotiations, or through a contractual dispute resolution mechanism if there is an existing contract in place.

The Access Dispute Framework sets out the steps that parties should take to raise an access dispute, who will resolve the dispute and how the dispute resolution process will operate.

2.1.3 The AER's role in access disputes

The AER fulfills two key roles under the Access Dispute Framework. We are the dispute resolution body for disputes relating to access to a scheme pipeline and make access determinations resolving such disputes.

We also fulfill an administrative and oversight role for access disputes that are arbitrated (i.e. non-scheme pipeline access disputes) or mediated (i.e. disputes involving small shippers, if they elect to use mediation to resolve an access dispute). This includes publishing access dispute notices, making decisions on parties to access disputes, maintaining arbitrator and mediator pools, and, when required, appointing arbitrators and mediators to resolve access disputes.

2.2 Dispute resolution pathways

Under the Access Dispute Framework, there are three main ways that access disputes can be resolved (referred to as 'dispute resolution pathways' in this Guide). The pathways that can be used will depend on whether the dispute is for access to a scheme or non-scheme pipeline and whether a small shipper is a party to the dispute.

The pathways are:

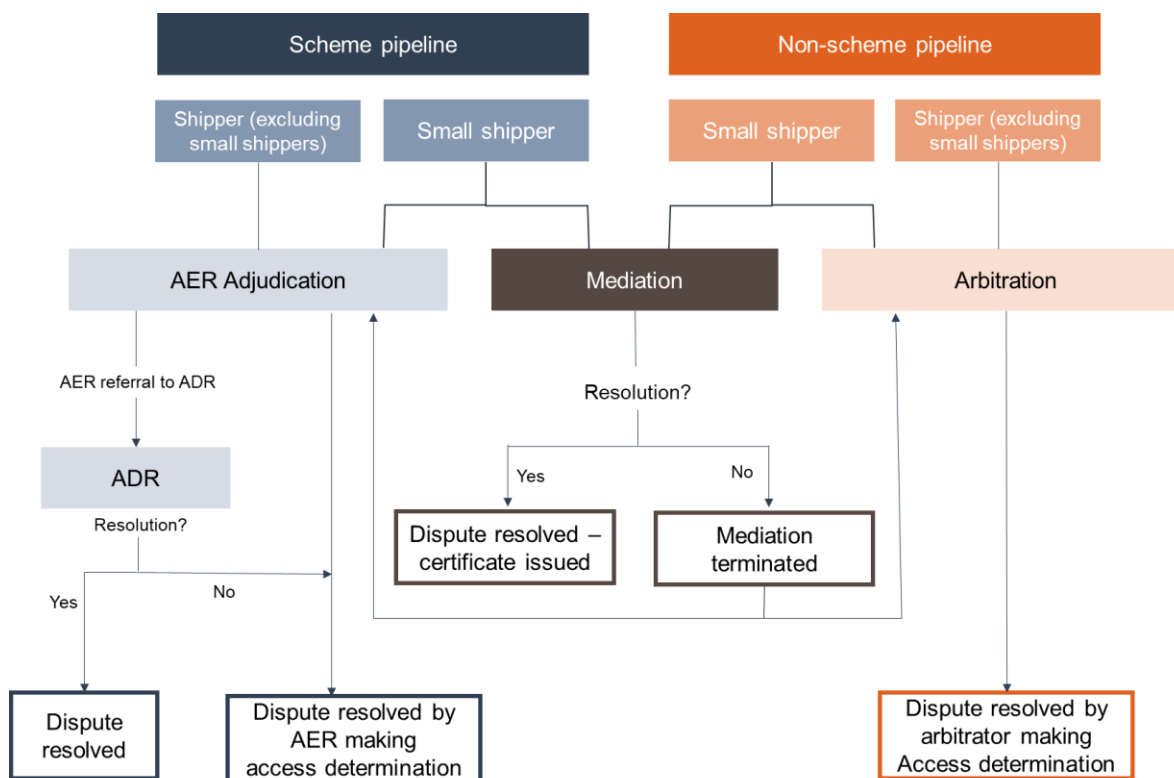
- **Pathway 1 – AER resolution of scheme pipeline disputes:** For a dispute about access to a scheme pipeline, the AER is the dispute resolution body (or adjudicator) and will resolve the dispute by making an access determination.
- **Pathway 2 – Arbitration of non-scheme pipeline disputes:** For a dispute about access to a non-scheme pipeline, the dispute can be resolved by arbitration using a 'pool arbitrator' (i.e. an arbitrator that has been appointed to an [arbitrator pool](#) by the AER). The arbitrator resolves the dispute by making an access determination.
- **Pathway 3 – Mediation of disputes involving small shippers:** Small shippers (users or prospective users who are use or are seeking to use less than 5 TJ per day, or 20% of the pipeline's capacity) may elect to have disputes about access to scheme and non-scheme pipelines resolved by mediation.⁸ Small shippers do not have to use mediation, and can use Pathway 1 for scheme pipeline disputes, and Pathway 2 for non-scheme pipeline disputes. If mediation is unsuccessful, the dispute can be resolved under Pathway 1 or 2.

⁸ See NGL, s 8AB. A small shipper as a user or prospective user who is, or seeks to be, a party to a contract with a service provider for pipeline services and its total daily pipeline capacity right (under 1 or more contracts with the same service provider and by means of the same pipeline) does not exceed 5 terajoules per day or 20% of the pipeline's nameplate capacity. A small shipper excludes corporations with a market capitalisation of more than \$500 million or a related body corporate of the corporation.

Under Pathway 1, the AER may also refer the matter to alternative dispute resolution (ADR) such as mediation or conciliation rather than proceeding directly to making an access determination. However, if the parties do not resolve the dispute using ADR, the dispute can return to the AER to be resolved.

Figure 2.1 below illustrates the various ways that a dispute can be resolved.

Figure 2.1 – Overview of the access dispute resolution pathways



The following sections provide further detail about each of these pathways.

2.2.1 Pathway 1 – AER resolution of scheme pipeline disputes

Under the first dispute resolution pathway, the AER is the dispute resolution body for access disputes relating to scheme pipelines (scheme pipeline disputes). This is the only pathway available for such disputes to users and prospective users who are not small shippers under the NGL. In summary, the pathway generally involves the following steps:

- **Notification of the dispute:** A user or prospective user provides us (and the other party or parties to the dispute) a notice of the dispute. The notice must outline the issues that are in dispute.⁹
- **Potential referral to ADR:** We may require the parties to engage in an ADR process to attempt to resolve the dispute before proceeding to a hearing.¹⁰ If successful, the parties can terminate the dispute, and if not, the AER will proceed to resolve the dispute.

⁹ NGL, s 152(3).

¹⁰ Sections 172 to 184 of the NGL deal with issues relating to the hearing of an access dispute.

- **Hearing:** If the AER does not refer the matter to an ADR process (or if ADR does not resolve the dispute), we will hold a hearing where the parties will be provided with an opportunity to present arguments and evidence relevant to the resolution of the dispute.¹¹ Generally, these hearings are private unless the parties agree for the hearing or part of the hearing to be conducted in public.¹²
- **Access determination:** The final step in the process is for us to make an access determination, which is a decision resolving the dispute. The access determination may require a service provider to provide access to a pipeline service and specify the terms and conditions of access. It may also determine that access does not need to be provided. The access determination must give effect to the relevant access arrangement (i.e. an arrangement approved by the AER that applies to the pipeline).¹³

Where the AER decides that a service provider should provide access to the service, the service provider must provide access on the terms set out in the determination if the user or prospective user requests such access.¹⁴

There are also two types of AER scheme pipeline disputes: 'standard' and 'fast-track' disputes, which have different timing requirements:

- **Standard disputes:** For a 'standard' dispute, the AER must make the final access determination **within 8 months** of receiving the access dispute notice.¹⁵
- **Fast-track disputes:** Parties can request that the AER fast-track a dispute.¹⁶ For fast-track access disputes, the AER must make an access determination **within 30 business days** of receiving all requested and required information from parties about the dispute.¹⁷

AER scheme pipeline disputes are discussed in detail in Chapter 4.

2.2.2 Pathway 2 – Non-scheme pipeline arbitration

The second pathway is for the resolution of disputes relating to non-scheme pipelines (non-scheme access disputes) by a pool arbitrator. A pool arbitrator is an arbitrator who is a member of the pool of arbitrators that the AER has established. The steps in the arbitration pathway are generally:

- **Notification of the dispute, and appointment of an arbitrator:** A user or prospective user provides us (and the other party to the dispute) of notice of the dispute, which outlines the issues that are in dispute.¹⁸ The parties to the dispute must then agree to a pool arbitrator to arbitrate the dispute, or we will appoint one.¹⁹

¹¹ Sections 172 to 184 of the NGL deal with issues relating to the hearing of an access dispute.

¹² NGL, s 174.

¹³ NGL, s 165.

¹⁴ NGL, s 170.

¹⁵ NGR, r 113X(1)(a).

¹⁶ NGR, 113ZF.

¹⁷ NGR, r 113ZF(8).

¹⁸ NGL, s 152.

¹⁹ NGL, s 160.

- **Arbitration Hearing:** The arbitrator will hold a hearing to obtain information and evidence to enable them to determine how to resolve the access dispute.
- **Access Determination:** The arbitrator will then make an access determination resolving the dispute. Where the determination sets out that the service provider must provide access to the service, the service provider must provide access on the terms set out in the determination if the user or prospective user requests such access.

The arbitration pathway is discussed in detail in Chapter 5.

2.2.3 Pathway 3 – Small shipper mediation

The mediation pathway is available to small shippers seeking to resolve access disputes for both scheme and non-scheme pipelines.²⁰ It is intended to provide small shippers with a potentially quicker, less formal, and lower-cost avenue to resolve access disputes.²¹ Small shippers do not have to elect to use the mediation pathway and can still elect to use Pathways 1 or 2 for scheme-pipeline disputes and non-scheme pipeline disputes respectively.

If a small shipper elects to use the mediation pathway, it will generally involve:

- **Notification of the dispute, election to mediate and appointment of the mediator:** A party to the dispute provides the AER (and the other party to the dispute) of notice of the dispute, which outlines the issues that are in dispute. If a small shipper wished to mediate, they must elect to have the dispute mediated.²² The parties to the dispute will then either agree to appoint a mediator, or the AER will appoint one from the [AER's mediator pool](#) (i.e. the pool of mediators that the AER has established).²³
- **Mediation:** The mediator will determine the procedures and timetable for the mediation and conduct the mediation between the parties.²⁴ Parties or their representatives must attend the mediation and take steps necessary for the proper and expeditious conduct of the mediation.²⁵
- **Resolution or termination of the mediation:** If the dispute is resolved by mediation, the mediator must issue a certificate outlining the outcomes achieved in the dispute resolution.²⁶ If the dispute has not been resolved after 30 days and the mediator considers the mediation has no reasonable prospect of resolving the dispute, they will bring the mediation to an end.²⁷ This does not end the dispute, which can then be

²⁰ See s. 8AB of the NGL.

²¹ Department of Industry, Science, Energy, and Resources, [Information Paper: Improving Gas Pipeline Regulation](#), April 2022.

²² The small shipper must elect to use mediation at the time of providing the access dispute notice or if the service provider is providing the dispute notice, within 5 business days of receiving the dispute notice. See, s 152 of the NGL and r 113E of the NGR.

²³ NGR, r 113E(5).

²⁴ NGR, r 113F.

²⁵ NGR, r 113F.

²⁶ NGR, r 113E(5).

²⁷ NGR, r 113J.

resolved through Pathways 1 or 2, depending on whether the pipeline is a scheme or non-scheme pipeline or withdrawn by the initiating party.

The mediation pathway is discussed in detail in Chapter 6.

3 Common access dispute issues

Some procedural issues involved in raising and resolving an access dispute are the same, or similar, for all three of the access dispute pathways. This chapter explains some of these common issues and procedures. Specifically, it covers:

- what an access dispute is
- who the parties to an access dispute can be
- steps that parties should consider before commencing an access dispute resolution process
- information that is to be confidential in mediations and non-scheme pipeline arbitrations
- procedural matters relating to witnesses in hearings
- the withdrawal or termination of an access dispute

3.1 What is an access dispute?

An access dispute is a dispute between a user or a prospective user and a pipeline service provider (i.e. a person providing access to a pipeline service) about one or more aspects of access to a pipeline service provided on a pipeline.²⁸ Aspects of access could include both price and non-price terms and conditions, such as capacity, allocation, technical and operational matters, expansions or upgrades, and other terms and conditions related to accessing the pipeline service.

Matters that an access dispute can relate to include, but are not limited to:

- a request for access to a pipeline service under a new access contract
- a request to add a new pipeline service to an existing access contract
- a request for a new access contract to take effect on the expiry of an existing access contract
- a request for a pipeline service commencing after the expiry of the service term for the same service under an existing access contract.²⁹

In addition to the above, there are specific circumstances that are deemed to give rise to an access dispute under the NGR.³⁰ These are:

- **Disagreement about an access request response:** where a user or prospective user disagrees with any of the responses provided by the service provider in response to a request to provide access to a pipeline service (an access request).³¹

²⁸ NGL, s 2.

²⁹ NGR, r 113A.

³⁰ NGR, r 105H.

³¹ Rule 105D of the NGR defines an access request.

- **Inability to agree on a timetable for negotiations:** parties must agree to a timetable for negotiations after a user or prospective users has made an access request or has received an offer following a preliminary enquiry relating to access, and they wish to negotiate with the service provider. This timetable must seek to accommodate the reasonable requirements of both parties. An access agreement will be deemed to exist if agreement about a timetable cannot be reached.³²
- **Inability to reach agreement following negotiations:** parties cannot reach agreement within the negotiated timetable.³³

These three scenarios are not exhaustive and there may be other scenarios from which an access dispute may arise.

3.1.1 Excluded disputes

The following matters are also explicitly excluded from the Access Dispute Framework:

- disputes about pipeline services provided under existing access contracts
- requests to change the terms and conditions of access to pipeline services provided under an existing access contract for any part of the current service term for that contract
- access requests that would require a pipeline to be extended
- standard terms and conditions for the secondary trading of capacity.³⁴

3.1.2 Other ways to resolve disputes

The NGL and NGR do not limit how access disputes can be resolved.³⁵ If an access dispute arises, parties can resolve the dispute outside of the Access Dispute Framework, that is, parties are not required to use the three dispute resolution pathways that are set out under the framework. Parties can choose to resolve a dispute using other processes or methods which are not outlined in this Guide or may choose not to resolve the dispute.

3.2 Parties to an access dispute

The parties to an access dispute will always include the user or prospective user and the service provider (i.e. the parties to any negotiations that gave rise to the access dispute).³⁶ However, in some cases, there may be other parties to the dispute. These are:

- **Other parties that are required to resolve a scheme pipeline access dispute:** For a scheme pipeline access dispute, if the AER considers that the resolution of a dispute will

³² See rr 105F(1) and (4), and 105H of the NGR.

³³ NGR, r 105H.

³⁴ NGR, r 113B.

³⁵ NGL, s 151.

³⁶ NGL, s 154(1)(a).

require a person who was not involved in the negotiations that gave rise to the dispute to do something, that person will become a party to the dispute.^{37,38}

- **Other parties with an interest in the scheme pipeline dispute:** For a scheme pipeline dispute, a person can apply in writing to become a party to the dispute. If we consider they have a sufficient interest in the dispute, they will become a party to the dispute.³⁹
- **Small shipper disputes:** A small shipper can elect for a user association to be joined as a party to an access dispute.^{40,41}

Details about how people who are not a party to the negotiations can become a party to a dispute are discussed in Chapters 4 to 6.

3.3 Before commencing an access dispute

As noted above, parties can seek to resolve access disputes outside of the dispute resolution framework set out in the NGR and the NGL. We encourage parties to explore such avenues before they formally commence a dispute. If parties come to commercial agreements for pipeline access, it will likely be less costly, and more flexible than the formal dispute resolution process. Steps that parties may consider before commencing a dispute are outlined below.

3.3.1 Before seeking access

We encourage users and prospective users to consider the information published by service providers under Part 10 of the NGR before entering access negotiations.⁴²

Under Part 10 of the NGR, information that service providers must publish includes:

- **Service and access information:** information about the pipeline and the services available, such as usage, pipeline capacity, routes and delivery and receipt points.⁴³
- **Standing terms:** these are a set of standard terms and conditions for pipeline services.⁴⁴

³⁷ NGR, r 154(1)(b).

³⁸ A party is likely to have a 'sufficient interest' in the dispute if they can demonstrate they will have a sufficient interest in the outcome of the dispute. For example, they may have a sufficient interest if the party is contractually bound to take a price that would be determined in the access dispute, or the party has agreed to acquire a controlling interest in one of the parties to the access dispute. However, we note that we will determine whether a party has 'sufficient interest' on a case-by-case basis.

³⁹ NGR, r 154(d).

⁴⁰ NGL, s 154(1)(c).

⁴¹ For the purposes of being joined to an access dispute, a user association is an association of body (whether incorporated or not) whose members include more than one user or prospective user, and that represents and promotes the interests of those members in relation to the provision of pipeline services.

⁴² Prior to March 2023, this information was published under Part 23 or Part 7 of the NGR, depending on how the pipeline was regulated.

⁴³ NGR, r 101A(1)(a).

⁴⁴ NGR, r 101A(1)(b).

- **Financial information:** this includes information about assets, revenue, costs and the pipeline's asset valuation and historical demand information.⁴⁵
- **Actual price information:** information about the actual prices that users of the pipeline pay for pipeline services.⁴⁶

The AER will also publish a template (or a calculator) that will allow users or prospective users to calculate cost-based price benchmarks for pipeline services. The benchmarks will provide users and prospective users with indicative prices for each pipeline service.

This information, and the pricing template, are intended to assist users or prospective users to assess how reasonable a service provider's offer may be, and thereby help in access negotiations.⁴⁷

However, the information is not binding on an arbitrator of a non-scheme pipeline access dispute or the AER in a scheme-pipeline access dispute.

3.3.2 Before commencing an access dispute

We also encourage parties to consider taking the following steps before they formally raise an access dispute resolution process:

- raise the access issues with the other party in the first instance and attempt to resolve areas of disagreement through negotiations or existing commercial agreements and contracts.
- where there is an existing agreement between the parties, that parties use any dispute resolution clauses in such agreements.

If parties cannot resolve disputes through negotiation or existing commercial arrangements, we recommend that parties contact us to seek preliminary guidance on an informal basis. When this occurs, we will help parties to understand the options available to resolve the dispute, the outcomes that may be available, and may be able to assist parties to reach agreement without a formal process. Issues that we may be able to assist with include:

- providing guidance in relation to publicly available information on how similar disputes have been resolved
- providing information about the access dispute process.

Any preliminary guidance provided will represent the views of AER staff and will not represent, or be binding on, the AER.

Finally, parties should consider the information outlined in this Guide to ensure that they understand the process involved in the relevant access dispute pathway before commencing an access dispute.

⁴⁵ NGR, r 101A(1)(c).

⁴⁶ NGR, r 101A(1)(d).

⁴⁷ Prior to March 2023, this information was published under Part 23 or Part 7 of the NGR, depending on how the pipeline was regulated.

3.4 Confidentiality of information

There are confidentiality provisions that apply to mediations of small shipper disputes (discussed in Chapter 6) and non-scheme pipeline arbitrations (discussed in Chapter 5). Specifically, for mediation and non-scheme pipeline arbitrations under Part 12 of the NGR, confidential information means information about an access dispute, the mediation or arbitration or an access determination made in an arbitration, and includes:

- statements provided to an arbitrator under r 113P of the NGR, and other statements in the nature of pleadings or submissions, and other information supplied to the mediator or arbitrator by a party to the access dispute
- any information supplied by a party to another party on account of a request or direction of the mediator or arbitrator
- any evidence (whether documentary or otherwise) supplied to the mediator or arbitrator
- any notes made by the mediator or arbitrator of oral evidence or submissions given before the mediator or arbitrator
- any transcript of oral evidence or submissions given before the mediator or arbitrator
- any rulings of the mediator or arbitrator, and
- in the case of an arbitration – any access determination of the arbitrator.⁴⁸

3.5 Witnesses at hearings

A key aspect of the process for both non-scheme pipeline arbitrations, and AER resolution of scheme pipeline disputes, is the hearing of the dispute. For these disputes, the AER or the arbitrator is able to call witnesses to appear at the hearing. The following outlines the common requirements that apply to the witnesses attending a hearing.

3.5.1 Witnesses

In an access dispute hearing, the AER or an arbitrator can summon a person to appear to:

- give evidence, and/or
- produce documents referred to in the summons.⁴⁹

Penalties apply if a person who has a summons to appear as a witness does not attend a hearing or if a witness does not answer questions.⁵⁰

3.5.2 Failing to attend as a witness

A person who is served with a summons to appear as a witness at a dispute hearing for an access dispute cannot, without giving a reasonable excuse:

- fail to attend as required by the summons, or

⁴⁸ NGR, r 113(1).

⁴⁹ NGL, s 180.

⁵⁰ NGL, ss 181 and 182.

- fail to appear and report from day to day unless excused, or released from further attendance, by the relevant adjudicator.⁵¹

The maximum penalty for failing to attend as a witness is \$6 300.⁵²

3.5.3 Failing to answer questions

A witness at an access dispute hearing has statutory obligations to answer questions during the hearing.⁵³ A witness must not, without giving a reasonable excuse, refuse or fail to:

- be sworn or make an affirmation
- answer a question that the person is required to answer by the relevant adjudicator, or
- produce a document that the person is required to produce by a summons under Chapter 5 of the NGL served on the person as prescribed by the Regulations.⁵⁴

3.5.4 Intimidation

A person must not intimidate a witness at an access dispute hearing or intimidate a person that has appeared as a witness or provided documents at an access dispute hearing.

Intimidating a witness is:

- making threats, intimidating or coercing the witness, or
- causing or procuring damage, loss or disadvantage to the witness.⁵⁵

The maximum penalty for engaging in such conduct is \$6 300.⁵⁶

3.6 Withdrawal and termination of access disputes

An access dispute may not go through all steps in the dispute resolution pathway and can be withdrawn or terminated before it is finalised.

3.6.1 Terminating an access dispute

In relation to an AER scheme pipeline dispute, or a non-scheme pipeline arbitration, the AER or the arbitrator respectively may terminate the dispute if it considers:⁵⁷

- the matter in dispute is dealt with under a contract between the user and service provider (either expressly or impliedly)
- the pipeline service could be provided on a competitive basis by a person other than the service provider (or their associate)
- the notice of the access dispute was vexatious

⁵¹ NGL, s 181.

⁵² NGL, s 181. Schedule 2, clause 47B of the National Gas (South Australia) Regulations provides that criminal penalty amounts will be adjusted every 3 years to reflect movements in the consumer price index, which will be published on the AER's website.

⁵³ NGL, s 182.

⁵⁴ NGL, s 181.

⁵⁵ NGL, s 183.

⁵⁶ NGL, s 183.

⁵⁷ NGL, s 169.

- the subject matter of the dispute is trivial, misconceived or lacking in substance
- the party who notified the access dispute did not negotiate in good faith
- there is some other good reason why the dispute should be terminated.

The AER or arbitrator can also terminate an access dispute if the parties to the dispute agree to the termination.⁵⁸ A decision of the AER or arbitrator to terminate an access dispute must:

- be made in writing and signed by the relevant adjudicator
- include a statement of reasons for the termination of the relevant proceedings
- be communicated to the parties via email and post and the AER (if it is a non-scheme pipeline dispute).⁵⁹

The termination of the dispute will take effect on the date the termination is communicated to the parties.⁶⁰

A mediator may end a mediation, if at least 30 days have elapsed since the mediation began, the dispute has not been resolved, and the mediator considers there is no reasonable prospect of resolution.⁶¹ However, this does not terminate the access dispute, and the dispute can then be resolved by the AER or an arbitrator, depending on whether the dispute relates to a scheme or non-scheme pipeline.⁶² The initiating party may also withdraw the dispute.

3.6.2 Withdrawing an access dispute

The party which initiated the dispute (i.e. gave the dispute notice), may withdraw the dispute notice at any time before a final access determination is made in relation to the dispute (i.e. before the AER or the arbitrator makes a final decision).⁶³ To withdraw an access dispute notice, the initiating party must give written notice to the AER, the arbitrator or the mediator if the dispute has gone to arbitration or mediation, and the other party (or parties) to the access dispute.⁶⁴

⁵⁸ See NGL, s 169 and NGR, r 113ZL(2).

⁵⁹ NGR, r 113ZL(3).

⁶⁰ NGR, r 113ZL(4).

⁶¹ NGR, r 113J.

⁶² NGR, r 113J.

⁶³ NGL, s 153.

⁶⁴ NGR, r 113C.

4 AER resolution of scheme pipeline dispute

This chapter details the processes for the AER resolution of scheme pipeline disputes (i.e. Pathway 1). It covers the process for initiating a dispute, access dispute hearings, how the dispute may be resolved and steps that may follow the final determination. It also covers the fast-track process that users or prospective users can use to expedite the resolution of a scheme pipeline dispute.

4.1 Overview of AER scheme pipeline dispute resolution

The AER is the dispute resolution body for scheme pipeline access disputes, except for disputes that a small shipper elects to mediate (discussed in Chapter 6).

The exact steps in an AER resolved access dispute will vary from case to case, but generally involve 3 stages:

Stage 1: Initial steps

- **Commencing a dispute:** if an access dispute exists, a party can commence the dispute resolution process with us by providing us with a notice of the dispute.
- **Referral to ADR:** in some circumstances, we may decide to refer a dispute to ADR. If agreement between the parties can be reached, this will end the dispute. If they cannot reach agreement, the AER will continue with the following steps.

Stage 2: Hearing the dispute

- **Interim access determination:** in some cases, the AER *may* make an interim access determination under which a user or prospective user must be provided with access to a pipeline service while the access dispute resolution process continues.
- **Hearing:** during the hearing, parties will have the opportunity to make submissions and provide evidence to us. We will use the information presented during the hearing to decide how the dispute will be resolved (called an access determination). Hearings will generally be conducted in writing but can be conducted in person.

Stage 3: Finalisation of the dispute

- **Final access determination:** after considering the information presented at the hearing, we make a final access determination and provide it to parties along with a statement of reasons.

4.2 Initial steps

4.2.1 Commencing the dispute resolution process

If a scheme pipeline dispute exists a party to the dispute may initiate the AER dispute resolution process under Pathway 1, by providing an access dispute notice to us.⁶⁵ The kinds of disputes that constitute an access dispute and the types of disputes and matters that are excluded from being an access dispute are discussed in Chapter 2.⁶⁶

Content of the access dispute notice

An access dispute notice must be accompanied by the fee prescribed in the National Gas Regulations and must include the following information:

- the pipeline service to which the access dispute notice relates
- the access request and corresponding access offer made (where applicable)
- the name and address of the person giving the notice, plus the names and addresses of each other party to the access dispute
- whether a party to the access dispute is a small shipper⁶⁷
- information on the matters that are in dispute, and
- any matters that have been agreed upon.⁶⁸

Publication of information about the dispute

Within 5 business days after receiving an access dispute notice, we will publish:

- a copy of the notice; and
- information about how a person may apply to be made a party to the access dispute.⁶⁹

⁶⁵ NGL, s 152.

⁶⁶ In summary, an access dispute, which is defined in Chapter 1 of the NGL, is a dispute between a pipeline user (or prospective user) and the pipeline service provider on matters in relation to access to the pipeline service.

⁶⁷ A small shipper is a user or prospective user, which has (or is seeking) a total daily pipeline capacity right which is no more than the lesser of, 5TJ per day or 20% of the pipeline's nameplate rating. A small shipper excludes corporations with a market capitalisation of more than \$500 million or a related body corporate of the corporation.

⁶⁸ NGL, s 152 and NGR, r 113A(2).

⁶⁹ NGR, r 113A(3).

4.2.2 Joining a dispute

After we publish the access dispute notice, other parties may apply to join the access dispute.⁷⁰ As noted in Chapter 3, a party can join a scheme pipeline access dispute if we determine that they have a ‘sufficient interest’ in the dispute.⁷¹

The application to join a dispute must be made in writing and within 5 business days of the AER publishing the access dispute notice.⁷² We must then decide whether to accept or reject the application to join the dispute and notify the applicant within 5 business days of receiving the application.⁷³

4.2.3 Direction to alternative dispute resolution

Once the steps to initiate a dispute are completed, we will generally move to hearing the dispute. However, in some cases, we may decide that the dispute should be referred to an ADR process (such as mediation or conciliation).⁷⁴

We may refer a dispute to ADR if we consider that it will result in a quicker and less costly resolution of the dispute, and we will consult with parties before we refer any dispute to ADR. Where the issues in dispute are complex, and it seems unlikely that parties will be able to reach an agreement using an ADR process (for example where parties have already engaged in detailed negotiations or discussions about access), we will usually not refer the dispute to ADR.

When we refer a dispute to ADR, we will set a timeframe for the process to be completed. If the dispute is not resolved through ADR within the time set, the access dispute will proceed to the hearing and determination stages of the dispute resolution process. If the dispute is resolved through the ADR process, we request that the party initiating the dispute inform the AER of the outcome and withdraw the access dispute.⁷⁵

4.3 The access dispute hearing

An access dispute hearing is the process where parties can put forward their positions relating to the access dispute through presenting submissions and providing evidence. The hearing allows the AER to obtain information necessary to decide an access dispute.

Hearings can be held using a variety of methods including via written submissions (i.e. ‘on the papers’), via telephone or videoconference, or a combination of methods.⁷⁶ A party can also elect to be represented by another person during a hearing.⁷⁷

⁷⁰ NGL, s 154(d).

⁷¹ NGR, r 113D(2).

⁷² NGR, r 113D(2).

⁷³ NGR, r 113D(4).

⁷⁴ NGL, s 155.

⁷⁵ Pursuant to s 153 of the NGL and r 113C of the NGR.

⁷⁶ NGL, ss 176 and 177.

⁷⁷ See s 175 of the NGL.

4.3.1 The AER's powers and responsibilities during the hearing

We must conduct a hearing for an access dispute as quickly as possible, having regard to the need to carefully and quickly inquire into, and investigate, the access dispute.⁷⁸

We will determine the process for the hearing of an access dispute. This includes determining:

- how the hearing will be conducted (e.g. in person, via phone, or in writing)
- the time parties will have to present their case
- how evidence of arguments should be presented (e.g. in writing or orally)
- any other ways we will obtain information relevant to the access dispute.⁷⁹

How we will generally approach these matters is discussed below.

We also have several powers during the hearing, including:

- making directions
- hearing the access dispute in the absence of a party
- adjourning the hearing
- referring a matter to an independent expert.⁸⁰

4.3.2 Evidence and arguments will generally be presented in writing

Generally, we will require evidence and arguments to be presented in writing. This ensures all issues raised during the dispute are documented. Hearings in writing may also be quicker and less resource intensive for parties than conducting the hearing in person.

However, we may also decide that some hearings should be conducted via oral submissions and evidence (either in person, by phone, videoconference or a combination). Whether we decide to hold a hearing in person will depend on the circumstances of the dispute, such as the complexity and nature of issues in dispute, and the preferences of the parties. For example, it is likely that detailed written hearings will be most suitable for disputes involving:

- complex issues
- issues about the methodology used to calculate costs or charges
- analysis of detailed or extensive information, or
- resolution of apparent or actual conflicts in the evidence on which an argument is based or facts about the case (e.g. evidence about the availability of capacity).

⁷⁸ NGL, s 176(1).

⁷⁹ NGL, s 176.

⁸⁰ NGL, s 177.

If a party would like a dispute hearing to be conducted in person, we ask that they raise this with us early in the dispute resolution process.

4.3.3 Privacy and confidentiality of hearings

The access dispute hearings will be held in private unless parties agree to the dispute (or part of the dispute) being conducted in public.⁸¹ During a private hearing, only parties and their representatives, and AER Board members and staff, will be present at, or have access to documents relating to, the access dispute.

We may make directions about other persons who can be present during a hearing (or have access to documents). In doing so, we may have regard to the wishes of the parties and the need for commercial confidentiality.⁸² Further, to ensure that the information in a hearing remains private and confidential, we can also make orders that a person not divulge or communicate any specified information that was given to the person during the hearing unless we grant them permission to do so.⁸³

4.3.4 Use of independent experts

During a hearing we may refer one or more matters in dispute to an independent expert.⁸⁴ An expert will generally provide us with a report on the issue, and we may then accept the expert's report as evidence.^{85,86} We may only appoint an expert that:

- has the requisite knowledge and experience relevant to the matter; and
- is free of associations and interests which may compromise their ability to provide impartial evidence and advice.⁸⁷

When appointed an expert must disclose any material or indirect interest, or association, that may compromise, or reasonably be seen to compromise, their impartiality.⁸⁸

Process for referring a matter to an expert

If we are considering referring a matter to an expert, we will notify the parties of our intention before doing so. We will also:

- provide the name and credentials of the independent expert and the amount that the expert will charge (or alternatively how the charges will be determined)⁸⁹
- seek the consent of parties to the maximum amount that the expert may charge.⁹⁰

⁸¹ NGL, s 174.

⁸² NGL, s 174.

⁸³ If a person refuses or fails to comply with such an order, they may be penalised (see s 179(2) of the NGL).

⁸⁴ NGL, s 177.

⁸⁵ NGL, s 177(1)(e).

⁸⁶ When we refer a matter to an expert, we will determine the terms and conditions of the appointment (see NGL, s 177(2)).

⁸⁷ NGL, s 178(4).

⁸⁸ NGL, s 178(4).

⁸⁹ NGR, r 113ZH(3)(a).

⁹⁰ NGR, r 113ZH(3)(b).

A party must not unreasonably withhold consent to the maximum amount charged.

Provision of information to an expert

Once a matter in the access dispute has been referred to an expert, we may require the parties to provide the independent expert with, or with access to, any relevant documents or places.⁹¹ However, parties may otherwise agree to limit the information provided to the adjudicator.⁹² As an expert will often be dealing with sensitive information, we will usually require an expert to keep information relating to the dispute confidential.

Participation in the hearing

After an expert delivers their report, we, or a party, may require that the expert participates in a hearing.⁹³ However, parties may otherwise agree that the expert does not participate.⁹⁴ This hearing is an opportunity for parties to put questions to the expert, and ask their own experts to provide evidence on any points at issue.⁹⁵

4.3.5 Joint access dispute hearings

If we are conducting two or more scheme pipeline access dispute hearings at the same time, we *may* decide to hold a joint hearing rather than hold multiple hearings.⁹⁶

The same processes and procedures for the conduct of access dispute hearings outlined in part 9 of chapter 5 of the NGL apply equally to joint hearings as they do to hearings of a single dispute.

When we will join hearings

We will generally only join the hearings of two access disputes if:

- one or more matters are common to the access disputes, and
- we consider that a joint hearing is likely to result in the access disputes being resolved in a more efficient and timely manner.⁹⁷

For example, we may consider it appropriate to hold a joint hearing where the two disputes are for access to the same pipeline service (and therefore there are common parties involved). We may also join hearings where there are common issues in dispute for different

⁹¹ NGR, r 113ZH(1).

⁹² NGR, r 113ZH(1).

⁹³ NGR, r 113ZH(2).

⁹⁴ NGR, 113ZH(2).

⁹⁵ NGR, r 113ZH(2).

⁹⁶ The same processes and procedures for the conduct of access dispute hearings outlined in Part 9 of Chapter 5 of the NGL apply equally to joint hearings as they do to hearings of a single dispute.

⁹⁷ NGL, s 194.

pipeline services, although we are less likely to do this if the service provider is a different party.⁹⁸

If we are considering joining hearings, we will consult parties about the proposal as early as possible, and will:

- notify each party to the relevant disputes in writing,
- invite parties to make written submissions on the proposal within 10 business days.⁹⁹

We will consider parties' submissions and other relevant matters in deciding whether to join dispute hearings.

Other joint hearing process issues

When we join hearings from one or more access disputes, we may consider any materials that have already been provided in one of the individual disputes as part of the joint dispute hearing.

If we hold a joint dispute hearing, we may still issue separate final access determinations for each of the access disputes that was part of the hearing. For the purposes of making these access determinations, we may have regard to any record of the proceedings of the joint dispute hearing and adopt any findings of fact made as part of the joint dispute hearing.¹⁰⁰ However, if appropriate, we may issue a single statement of reasons applying to all the access disputes subject to the joint dispute hearing.

4.4 Finalisation and outcomes of the dispute resolution process

This section discusses how an access dispute can be finalised and the possible outcomes of the dispute resolution. It covers the process for making an access determination, the effect of an access determination, and other ways that the dispute resolution process could be finalised, such as by termination or withdrawal.

4.4.1 Access determinations

After the hearing of an access dispute, we will make a decision resolving the dispute, called an 'access determination'. An access determination is a decision about whether the user or prospective user should be granted access to a pipeline service, and if so, the terms and conditions of access. For a scheme pipeline dispute, the access determination must give effect to the access arrangement the AER has approved for the relevant pipeline.¹⁰¹ A user

⁹⁸ For example, the dispute involves either the same service provider and different users or prospective users; or different service providers (different but common controlled entities) and the same user or prospective user.

⁹⁹ NGL, s 192.

¹⁰⁰ NGL, s 194(2).

¹⁰¹ NGL, s 165.

or prospective user is then able to seek access on the terms and conditions set out in the access determination.¹⁰²

There are two types of access determinations that we can make. The first is an interim access determination, which is a temporary determination that provides for a user or prospective user to gain access to the pipeline service while the access dispute is being resolved. The second is a final access determination, which is a final decision on the access dispute.

This section is most relevant to how the AER will approach making a final access determination. Interim determinations are discussed in Section 4.4.4 below.

Matters the AER must consider in making an access determination

There are a range of matters we must consider when making an access determination, including:

- the National Gas Objective;
- the revenue and pricing principles relating to scheme pipelines (set out in s 24 of the NGL);
- the relevant applicable access arrangement for the pipeline;
- any previous access arrangements or access determinations for the pipeline (where relevant);
- the operational and technical requirements necessary for the safe and reliable operation of the pipeline; and
- where applicable, the prohibition against increasing charges to an existing user for a pipeline service to subsidise the development of an extension or expansion of pipeline capacity.¹⁰³

In making our assessment of these matters, we will have regard to the material put forward by parties to the access dispute, including evidence and submissions, as well as any expert reports. Finally, if relevant, we must consider the value of any past capital contribution to fund new facilities made by a party to the dispute and the extent the party has recouped any such past capital contribution.

Matters covered in an access determination

The access determination may include a decision in relation to any matter that is the subject of the access dispute, as necessary to resolve the dispute between the parties.¹⁰⁴ This includes requiring a service provider to:

- provide access to a pipeline service;
- provide access on specified price or other terms or conditions; and

¹⁰² See s 170 of the NGL, and r 113ZE of the NGR.

¹⁰³ NGR, r 113Y.

¹⁰⁴ NGR, r 113V.

- permit a facility to be connected to the pipeline.¹⁰⁵

The access determination may also specify conditions that must be satisfied by either party to the dispute before access to a pipeline commences.¹⁰⁶

We may also determine that access to the relevant pipeline service does not need to be provided.¹⁰⁷

In addition to the above, an access determination can require a service provider to make changes to the pipeline in some circumstances.¹⁰⁸ For example, it can require the expansion of capacity, conversion of a pipeline to a bi-directional pipeline, the development and expansion of receipt or delivery points, or interconnection with other pipelines and facilities. However, we cannot include such requirements in an access determination unless:

- it is technically feasible and consistent with the safe and reliable operation of the pipeline; and
- the user or prospective user funds these activities (or the service provider agrees to fund all or part of the activities).¹⁰⁹

Finally, an access determination for a scheme pipeline access dispute must give effect to the relevant pipeline access arrangement.¹¹⁰ That is, in determining how the access dispute may be resolved and outlining any of the requirements that a service provider must meet, the AER must make sure that it gives effect to the access arrangement for the pipeline.

Access determinations that require installation of a new facility

The content of an access determination will differ slightly from what is outlined above, if the access determination requires the capacity of a pipeline to be expanded through the installation of a new facility.¹¹¹ That is, if we make an access determination when the access determination requires:

- the access determination requires the installation or construction of a new facility to expand capacity of the pipeline; and
- the user or prospective user who is a party to the dispute to contribute to fund the costs the expansion,¹¹²

the access determination does not need to give effect to the access arrangement but must vary the access arrangement for the pipeline to account for the new capacity.¹¹³ Such an access determination:

¹⁰⁵ NGR, r 113V.

¹⁰⁶ NGR, r 113V(2).

¹⁰⁷ NGR, r 113V(4).

¹⁰⁸ NGR, rr 113V(2)(c) and (d).

¹⁰⁹ NGR, r 113V(5).

¹¹⁰ That is, the access dispute that applies to the pipeline to which the dispute relates. See s 165 of the NGL.

¹¹¹ See s 166 of the NGL and r 113ZB of the NGR.

¹¹² NGL, s 166(1); NGR, rr 113V(5) and 113V(6).

¹¹³ NGL, s 166.

- must set out the terms and conditions of access to the new capacity for a user or prospective user of the new capacity who will contribute the costs of the capacity expansion;
- must vary the relevant access arrangement so that it also includes these terms and conditions; and
- may vary the applicable access arrangement to provide for one or more of the following:
 - a mechanism to roll some or all the capital costs of the expansion into the capital base;
 - consequential adjustments to reference tariffs;
 - a surcharge to be levied on users of incremental services; and
 - the establishment of a speculative capital expenditure account and regulation of its operation.¹¹⁴

Limitations on access determinations

An access determination cannot:

- require a service provider to extend the geographic range of a pipeline, or, unless the service provider agrees, provide for a user to acquire an interest in a pipeline through funding an expansion of that pipeline's capacity; or
- have the effect of depriving or preventing a user or prospective user from obtaining a service they have contracted for or have under an in-force access determination or depriving a person of a right under a contract that was in force before the dispute notice was made.¹¹⁵

4.4.2 Timing of final access determinations

We can make two types of access determinations: interim access determinations and final access determinations. This section only discusses timing for making a **final access determination** for disputes which are not heard under the fast-track pathway. The procedure for making an interim determination is discussed below in Section 4.4.4 and fast-track disputes discussed in Section 4.5.

Final access determination

We must make the final access determination within **8 months** of receiving the access dispute notice.¹¹⁶ When we make a final access determination, we will also provide parties with a written statement of reasons explaining our decision.¹¹⁷ The statement of reasons will provide information about how we considered the matters set out in Section 4.4 of this Guide.

¹¹⁴ NGR, r 113ZB.

¹¹⁵ NGR, r 113V(6); NGL, s 163. It does not include any contractual exclusivity right (i.e. a right contractual right that prevents or limits the service provider from supply supplying a service to other users).

¹¹⁶ NGR, r 113X(1). This is subject to any processes which stop the clock.

¹¹⁷ NGR, r 113X(4).

Once we make a final access determination, we will email a copy of the determination and the statement of reasons to the parties.¹¹⁸ We will also provide a hard copy in the post within 5 business days.¹¹⁹

4.4.3 Effect of the final access determination

A final access determination takes effect from the later of the time specified in the access determination or the time it is communicated by us to the parties to the access dispute.¹²⁰

A final access determination is given effect by the parties entering into a contract for access to relevant pipeline service (i.e. the service that was the subject of the dispute) in accordance with the final access determination.¹²¹

To do this, the user or prospective user must notify us and the other parties to the dispute of its intention to enter into an access contract to give effect to the final access determination within 10 business days of the making of the final access determination. The parties must then enter into such a contract.¹²²

If a user or prospective user does not give such notice within 10 business days, they cannot raise an access dispute about the same, or substantially similar, pipeline service for one year.¹²³

4.4.4 Interim access determinations

In some cases, before making a final access determination, we may make an interim access determination.¹²⁴ An interim access determination is a determination that allows a user or prospective user to obtain access to a pipeline service on a temporary basis while the dispute resolution process is finalised. It is generally only appropriate where there is an urgent need for a user or prospective user to obtain access.

Before requesting that we make an interim access determination, we encourage parties to attempt to negotiate their own interim arrangements for access while the dispute resolution process takes place. Further, we note that if we do make an interim access determination, it should not discourage parties from reaching an access agreement outside of the formal dispute resolution process.

When we may make an interim access determination

We are not required to make an interim access determination and have discretion over when we will issue one. As we will usually have limited information to base an interim access determination on, we will only make one in limited circumstances.

¹¹⁸ The AER will usually provide the statement of reasons at the same time as the access determination. However, we may provide it after the access determination, up to a maximum of 20 business days later.

¹¹⁹ NGR, r 113X(3).

¹²⁰ NGR, r 113ZE.

¹²¹ NGR, r 113ZE.

¹²² NGR, r 113ZE.

¹²³ NGR, r 113ZE.

¹²⁴ NGL, s 177(2).

Generally, we will consider making an interim access determination when:

- we receive a request from a party to do so;
- a user or prospective user requires access to the service urgently, or before the final access determination can be made; and
- parties have been unable to reach their own interim arrangements for access.

We will consider the following issues when deciding whether to make an interim access determination:

- whether we have sufficient information on which to make an interim access determination;
- the nature of existing contractual arrangements between the parties;
- whether the subject of the dispute will be resolved by giving effect to an applicable access arrangement;
- timing issues, including the potential impact on the timely making of the final access determination; and
- any other issues we consider relevant.

Effect of an interim access determination

An interim access determination will specify the terms and conditions on which the user or prospective user must be given access to the pipeline service, including reasonable payment terms. A service provider must then provide the user or prospective user with access on the specified terms and conditions.

The interim access determination will also set out how differences between the interim and the final access determinations must be dealt with.¹²⁵ That is, the interim access determination must provide for how adjustments will be made to reflect any differences between the interim and final access determinations for the period the interim determination was in place. For example, it could provide for how any difference between the interim access determination price and the final access determination price will be paid for or refunded.

Timing of interim access determinations

We can make an interim access determination at any point during the access dispute resolution process. However, given that the purpose of these determinations is to ensure users or potential users have timely access to pipeline services, we will usually consider these early in an access dispute process.

An interim access determination will be made in writing and will take effect from the later of the time specified in the access determination or the time we communicate it to the parties to

¹²⁵ NGR, r 113W.

the access dispute.¹²⁶ We will provide the interim access determination to the parties by email and post.¹²⁷

An interim access determination does not terminate the access dispute. If we make an interim determination in an access dispute, we will still proceed to hear and make a final access determination in relation to the dispute.¹²⁸ An interim access determination will cease when:

- the interim access determination expires;
- a final access determination is made and takes effect;
- we repeal the interim access determination;
- we terminate the access dispute; or
- the dispute is withdrawn.¹²⁹

4.4.5 Termination and withdrawal of access disputes

We will not make a final determination for an access dispute if we terminate the dispute or the party who initiated the dispute withdraws it. Termination and withdrawal of disputes is discussed in Chapter 3.

4.5 Fast-track resolution for scheme pipelines

A fast-track option is available to resolve scheme pipeline access disputes. Under this option we will usually make a final access determination for the dispute within 50 business days of deciding to fast-track the access dispute.¹³⁰ In some cases it may take longer depending on when we receive information from the parties (discussed below).

The fast-track process is intended to allow disputes to be resolved quickly where this is possible. However, in practice the circumstances where the fast-track option can be used are likely to be limited, and the process will generally not be suitable for disputes that involve complex issues.¹³¹

4.5.1 Electing to fast-track a dispute

A user or prospective user must elect to have a dispute fast-tracked. How they do this will depend on who initiated the dispute (i.e. who provided the AER with notice of the dispute):

- **if a user, or prospective user initiated the dispute:** the user or prospective user must elect for the access dispute to be fast-tracked; or

¹²⁶ NGR, r 113Q(4).

¹²⁷ NGR, r 113W.

¹²⁸ Unless it is terminated or withdrawn.

¹²⁹ See, NGR, rr 113W, 113ZL and 113ZE(5)(b).

¹³⁰ See, r 113ZF of the NGR. A final determination may take longer if a matter in dispute is referred to an expert or if we refer the dispute to ADR.

¹³¹ See for example, Department of Industry, Science, Energy, and Resources, [Options to improve gas pipeline regulation: Regulation Impact Statement for Decision](#), May 2021, pp. 102-3.

- **if the service provider initiated the dispute:** the user or prospective user may still elect the dispute be fast-tracked and may do so by notifying the AER and the service provider in writing within 10 business days of receiving a copy of the access dispute notice.¹³²

We must decide whether to allow the use of the fast-track resolution process within 10 businesses days of receiving an election.¹³³

4.5.2 AER decision on whether to use the fast-track process

We must take the following into account when we consider whether to fast-track a dispute:

- Whether the pipeline service to which the access dispute relates is the same as (or similar to) a reference service under the access arrangements for the relevant pipeline.¹³⁴ Where this is the case, the dispute is more likely to be simple to resolve and the fast-track process may be appropriate.
- Whether the requested access can be provided without any extension to the pipeline. If an extension is required, it is unlikely the dispute can be resolved using the fast-track process.
- Whether another party objects to the use of the fast-track resolution process and the reason for their objection(s).
- Any other factor that we consider will affect the appropriate and effective use of the fast-track process. These could include matters such as the complexity of issues in dispute or issues that may otherwise impact the time required for the dispute to be properly heard and considered.¹³⁵

As noted above, we anticipate that we will only allow a dispute to be fast-tracked in limited circumstances where it is possible to satisfactorily examine and resolve the matters in dispute in a short timeframe. This could include where the dispute relates to access to a reference service, or about non-price terms and conditions.¹³⁶

4.5.3 Fast-track procedures

The fast-track process has shorter timeframes than the standard AER scheme pipeline dispute resolution process. A key difference between the standard and fast-track process is that there is no hearing for a fast-track dispute. Instead, parties must provide us with the information necessary for us to make an access determination, within **10 business days** of

¹³² NGR, r 113ZF(1).

¹³³ NGR, r 113ZF(4).

¹³⁴ 'Reference service' is defined in s 2 of the NGL as a pipeline service that the AER has determined or approved as a reference service. An access arrangement will include a reference tariff for a reference service.

¹³⁵ NGR, r 113ZF(3).

¹³⁶ See for example, Department of Industry, Science, Energy, and Resources, [Options to improve gas pipeline regulation: Regulation Impact Statement for Decision](#), May 2021, pp. 102-3

the AER notifying parties about our decision to fast-track the dispute.¹³⁷ The information provided to us and the other parties to the dispute must include:¹³⁸

- the party's proposed access determination
- a list of the supporting access negotiation information that was exchanged between the parties before the access dispute notice was given (access negotiation information includes information about how the price offered was calculated, and the costs associated with providing the service), and
- any other information in support of its proposed access determination.¹³⁹

If a party does not provide us with the above information within 10 business days, we *may* provide a short extension of time for the party to provide the information. However, if parties delay further, or if they do not have a reasonable excuse for not providing the information in the time provided, we may make an access determination on the basis of the information available to us.

Use of independent experts

Like other scheme pipeline access disputes, we may refer matters in dispute to independent experts under the fast-track process. If the AER decides to refer a matter to an expert in a fast-track dispute, we must do so within 5 business days after receiving all the required or requested information from the parties to the dispute.

Where an independent expert is used, it will likely affect the time taken to resolve the dispute. If a fast-tracked matter is referred to an independent expert, the period between the date of the referral and receipt of the independent expert's report will not count towards the 30-business day timeframe for us to make the final access determination.

There are no restrictions on how long independent experts have to consider matters subject to an access dispute and hand down their reports. The time required for expert consideration of the disputed matters will depend on the complexity of the matters in question. As a guide, we consider that for disputes that are suitable to be fast-tracked, an expert report should usually be provided within 15 business days of receiving the referral.

4.6 Steps after the final access determination is made

After we have made the final access determination and informed parties of the decision, there are additional steps involved to finalise the dispute.

¹³⁷ NGR, rr 113ZF(4) and 113ZF(6).

¹³⁸ NGR, r 113ZF.

¹³⁹ Rule 3 of the NGR defines 'access negotiation information' and may include information about the method used to determine the price in an access offer and the inputs used in the calculation of the price and information regarding the costs associated with the provision of a pipeline service sought by a user or prospective user.

4.6.1 Publishing information about the dispute

Within a reasonable time of making a final access determination (usually 10 business days), we must publish the following information, subject to the regime applying to the handling of confidential information in the NGL, about the final access determination on our website:¹⁴⁰

- the final access determination;
- financial calculations applied in making the final access determination;
- the statement of reasons for the final access determination;
- information provided to us by the parties to; and
- information provided to us by any independent experts appointed to assist in the access dispute.

Parties to a scheme pipeline access dispute can make a claim for confidentiality over any information they provide to us.¹⁴¹

In making a claim for confidentiality, a party must identify the information relevant to the claim and provide supporting reasons. The reasons given in support of the confidentiality claim must include:

- information about the potential detriment caused if we disclosed the information; and
- information which may be relevant to our consideration as to whether the public benefit in disclosing the information outweighs the detriment (where that information is within the knowledge and capacity of the person making the claim).¹⁴²

Any such information must be of a genuinely confidential nature and not otherwise publicly available.

We may disclose confidential information:

- in prescribed circumstances;¹⁴³ and
- where we are of the opinion that the disclosure:¹⁴⁴
 - would not cause detriment; or
 - where the disclosure would cause detriment, the public benefit in disclosing it outweighs that detriment.

We consider factors such as how current or relevant the information is to commercial operations, the importance of the information to the dispute, if the confidential information is about competing operations of the parties and whether information can be disclosed to a limited number of staff or external advisors or both. These considerations are weighed up

¹⁴⁰ NGR, r 113ZC; Chapter 10, Part 2 of the NGL outlines how the AER must manage confidential information and when it may be disclosed.

¹⁴¹ NGL, s 30S.

¹⁴² NGL, s 30S.

¹⁴³ NGL, ss 324 to 328B.

¹⁴⁴ NGL, s 329. The AER must, among other requirements, provide written notice to the affected parties in these circumstances.

against the private nature of a dispute hearing and the need to resolve access disputes in a timely manner.¹⁴⁵

Further details on how service providers should make confidentiality claims on information they submit to us is set out in the [AER's Confidentiality Guideline](#). Further guidance on how we collect, use and disclose confidential information is available in the [ACCC/AER's Information Policy](#).

4.6.2 Costs

Each party to an AER scheme pipeline access dispute must bear their own costs which arise during the dispute process. However, in some circumstances, we may order a party (except if that party is a small shipper) to pay all or some of the dispute hearing costs of another party.¹⁴⁶ If such an order is made, the party must comply with the order.¹⁴⁷

We will only require a party to pay another party's costs if we consider that it would be fair to do so. In deciding this we will have regard to:¹⁴⁸

- whether a party conducted the dispute hearing in a way that unnecessarily disadvantaged another party by conduct such as:
 - failing to comply with an order or direction of the dispute resolution body without reasonable excuse;
 - failing to comply with the NGL, NGR or National Gas Regulations;
 - asking for an adjournment due to one of the above failures;
 - causing an adjournment;
 - attempting to deceive another party or the dispute resolution body;
 - vexatiously conducting an access dispute;
- whether the party was responsible for unreasonably prolonging the time taken to complete the dispute hearing;
- the relative strengths of the claims made by each of the parties, including whether a party has made a claim that has no tenable basis in fact or law;
- the nature and complexity of the access dispute; and
- any other matter we consider relevant.¹⁴⁹

The AER may make orders for costs before the completion of the access dispute process. In such circumstances, and where we think it necessary, we may require the costs to be paid before the access dispute process continues.¹⁵⁰ For example, we may require the timely

¹⁴⁵ NGL, s. 174.

¹⁴⁶ NGL, s 185(2).

¹⁴⁷ NGL, s 185(4).

¹⁴⁸ NGL, s 185(3).

¹⁴⁹ NGL, s 185(3).

¹⁵⁰ NGL, s 185(8).

compensation of a party's legal fees if we are satisfied that another party's conduct has, or will, unnecessarily disadvantage the other party.

We may make orders for costs even if the access dispute notice is withdrawn.¹⁵¹

4.6.3 Variation of access determination

A final access determination can be varied at any time after we have made it with the consent of all parties to the dispute. The process for making a variation is as follows:

1. Any party to the access dispute for which a final access determination was made may apply to us for a variation of the determination.¹⁵²
2. When we receive such an application, we will notify and seek the consent of all other parties to the access dispute to make the variation.
3. If the parties consent, we will vary the determination.
4. If any party objects to the proposed variation, we will not vary the final access determination. In this circumstance, the party seeking a variation can seek to resolve the issue through a new access dispute resolution process.

The restrictions that apply to the AER making an access determination discussed in Section 5.4.6 of this Guide also apply to making a variation to an access determination.

We are also able to correct clerical errors, miscalculations or defects in form in a final access determination. The process for doing this is set out in section 195 of the NGL.

¹⁵¹ NGL, s 185(10).

¹⁵² NGL, s 167.

5 Arbitration of non-scheme pipeline access disputes

This chapter outlines the process for the arbitration of disputes for non-scheme pipelines. It covers how a dispute can be initiated, the arbitration process and how the dispute can be resolved.

5.1 Overview of non-scheme pipeline arbitration

Where users or potential users cannot negotiate for access to a non-scheme pipeline service (i.e. there is a non-scheme pipeline dispute), parties can resolve the dispute via arbitration.¹⁵³ In summary, the arbitration process will generally involve the following steps:

Stage 1: Initial steps

- **Commencing the dispute and appointment of the arbitrator:** Where there is an access dispute, a party can elect to resolve the dispute by arbitration. The process is initiated by providing us with written notice. We will then refer the access dispute to arbitration, and parties will agree to appoint an arbitrator from the list of pool arbitrators maintained by us. If parties cannot agree on an arbitrator, we will select an arbitrator for the dispute.

Stage 2: Arbitration process

- The arbitrator will conduct the arbitration, including holding a hearing, where parties can present their case to the arbitrator.

Stage 3: Finalising the arbitration

- **Final access determination:** After conducting the arbitration, the arbitrator will make a final access determination, which will set out the arbitrator's decision in relation to whether access to the pipeline service is granted, and if so, what the terms of access will be.

Not all access disputes will go through all the above steps, and there may be additional steps in some proceedings.

5.2 Initial steps

Arbitration can be used where there is an access dispute relating to access to a non-scheme pipeline (a non-scheme access dispute). What will and will not constitute an access dispute is discussed in Chapter 2.

¹⁵³ As provided for in section 151 of the NGL, Part 12 does not limit how a dispute about access to a pipeline service can be raised or dealt with.

Commencing a non-scheme pipeline access dispute arbitration

If a non-scheme dispute exists a user, prospective user or a service provider can seek to commence a non-scheme pipeline arbitration. To do so, the user or prospective user must provide us with notice of the dispute.¹⁵⁴

Content of access dispute notice

An access dispute notice must be in writing, accompanied by any fee we have specified and published on our website, and must include the following:

- the pipeline service to which the access dispute notice relates;
- if applicable, the access request and the access offer made in response to the request;
- the name and address of the person giving the notice, and the name and address of each other party to the access dispute;
- whether a party involved in the access dispute is a small shipper;¹⁵⁵
- information about the matters that are in dispute; and
- any matters that have been agreed upon.¹⁵⁶

Notice to other parties and publishing information

The party raising the dispute must send a copy of the notice to the other parties to the dispute as soon as practicable after providing us with notice.¹⁵⁷ Once we have determined all parties to the access dispute, we will provide a notice to all parties to the dispute that sets out:

- the pipeline service to which the access dispute notice relates;
- the access request and corresponding access offer made (where applicable);
- the name and address of the person giving the notice, plus the names and addresses of each other party to the access dispute;
- whether a party to the access dispute is a small shipper;¹⁵⁸
- information on the matters that are in dispute; and
- any matters that have been agreed upon.¹⁵⁹

¹⁵⁴ NGL, ss 152 and 159.

¹⁵⁵ This is only required if it is known.

¹⁵⁶ See, s 152 of the NGL and r 113A of the NGR.

¹⁵⁷ NGL, s 152(3)(c).

¹⁵⁸ A small shipper is a user or prospective user, which has (or is seeking) a total daily pipeline capacity right which is no more than the lesser of, 5TJ per day or 20% of the pipeline's nameplate rating. A small shipper excludes corporations with a market capitalisation of more than \$500 million or a related body corporate of the corporation.

¹⁵⁹ NGL, s 152 and NGR, r 113A(2).

5.2.1 Reference to arbitration and selection of the arbitrator

Once we receive a non-scheme pipeline access dispute notice we must refer the dispute to arbitration.¹⁶⁰ When we refer a dispute to arbitration, we must issue both parties with a notice of the referral.¹⁶¹ This notice will identify the parties to the dispute, and the steps that must be taken to appoint an arbitrator (discussed below).¹⁶²

The exception to this is where the dispute involves a small shipper, and they elect for that dispute to be resolved by mediation (see Chapter 6).¹⁶³

Appointing an arbitrator

The arbitrator must be chosen from the pool of arbitrators that we appoint and maintain under the NGR.¹⁶⁴ We publish the names, contact details and professional profiles (including Curriculum Vitae) of all pool arbitrators on the AER website.¹⁶⁵ We do not publish the fee schedules of pool arbitrators on our website, but we can provide a party with an indicative schedule of fees of one or more pool arbitrators.¹⁶⁶

An arbitrator of a dispute must be independent of the parties to the dispute, have no direct or indirect interest in the dispute outcome, and be properly qualified to act in the resolution of the dispute.¹⁶⁷

To appoint an arbitrator, the parties must first attempt to agree on an arbitrator for the dispute, through the following steps:

1. Each party to an access dispute must, as soon as practicable after an access dispute notice is given, notify the other parties to the access dispute of at least two pool arbitrators that they nominate.
2. Parties to the dispute must negotiate in good faith to agree to an arbitrator from the pool of arbitrators that have been nominated.
3. Parties to the access dispute must notify us if an agreement was reached, including confirmation that the pool arbitrator is available to undertake the arbitration.¹⁶⁸

If parties do not agree and notify us of an arbitrator within 10 business days of the access dispute notice being given, we will select the arbitrator from the arbitrator pool. We will consult with both parties of the access dispute in deciding on the arbitrator.¹⁶⁹

Once an arbitrator has been selected, we will refer the dispute to arbitration.

¹⁶⁰ NGL, s 159.

¹⁶¹ NGL, s 159.

¹⁶² NGR, r 113M.

¹⁶³ NGL, s 156.

¹⁶⁴ The AER must establish and maintain the pool of arbitrators who may be appointed to arbitrate access disputes. See NGR r 113U(1). When we appoint arbitrators to the pool, we will consider their qualifications.

¹⁶⁵ NGR, r 113U(3).

¹⁶⁶ NGR, r 113U(8). Note that the fees are confidential information and should only be disclosed in limited circumstances.

¹⁶⁷ See s 160(4) of the NGL and r 113S of the NGR.

¹⁶⁸ NGL, s 156; NGR, r 113N.

¹⁶⁹ NGL, s 160(3).

Conflicts of interest and challenging the appointment of an arbitrator

As noted above, an arbitrator of a dispute must be free from any justifiable doubts as to impartiality.¹⁷⁰ To help ensure this, an arbitrator must disclose any circumstances likely to give rise to a 'real danger of bias', when they are approached about arbitrating the dispute.¹⁷¹

It is also possible that circumstances may arise after the arbitration has commenced which could lead to the arbitrator having a 'real danger of bias'. When this occurs, the arbitrator must disclose this to the parties (unless they have already been informed of these circumstances) without delay.¹⁷²

If a party considers that there are justifiable doubts about the arbitrator's impartiality or independence, then they can challenge the arbitrator appointment.¹⁷³ If a party decides to challenge the arbitrator's appointment, they must send a written statement of reasons for the challenge to the arbitrator and the other parties to the dispute.¹⁷⁴ This must be sent within 15 business days after the party becomes aware of any circumstance which raises a justifiable doubt about the arbitrator's impartiality or independence.¹⁷⁵

On receiving the challenge, the arbitrator must decide on the challenge to their appointment unless they decide to withdraw from their role as arbitrator, or the other parties to the access dispute agree to the challenge. If parties agree to the challenge, another arbitrator must be appointed.¹⁷⁶ If the challenge to the appointment is unsuccessful, the challenging party can request a court to decide on the challenge within 30 days after receiving notice of the decision rejecting the challenge.¹⁷⁷ A decision made by a court on a request to challenge the arbitrator is final.¹⁷⁸

Replacing an arbitrator

If an arbitrator does not complete an arbitration, the parties to the dispute may agree to appoint a replacement arbitrator.¹⁷⁹ This may be due to a perceived conflict of interest, illness, or any other reason. If no agreement is reached, we will appoint a replacement arbitrator.¹⁸⁰

A party seeking to appoint an alternative arbitrator must provide written notice to the other party or parties to the dispute and seek their agreement to appoint an alternative arbitrator.¹⁸¹ The notice must propose a pool arbitrator to be the alternative arbitrator, although this is

¹⁷⁰ NGR, r 113S.

¹⁷¹ NGR, r 113S(2).

¹⁷² NGR, r 113S(3).

¹⁷³ Justifiable doubts about the impartiality or independence of an arbitrator mean a real danger of bias on the part of the arbitrator; NGR, rr 113S(1) and 113S(5).

¹⁷⁴ NGR, r 113S(6).

¹⁷⁵ NGR, r 113S(6).

¹⁷⁶ NGR, r 113S(7).

¹⁷⁷ NGR, r 113S(8).

¹⁷⁸ NGR, r 113S(9).

¹⁷⁹ NGL, s 160(5).

¹⁸⁰ NGL, s 160(6).

¹⁸¹ NGR, r 113T(1).

subject to agreement between the parties.¹⁸² The notice must be given to us at the same time it is given to the other party or parties to the dispute.¹⁸³

The other party to the dispute can also nominate an alternative arbitrator from the pool.¹⁸⁴ Once the parties agree on an alternative arbitrator, they must advise us.¹⁸⁵ The parties must agree on the appointment of an alternative arbitrator within 20 business days of the termination of the earlier arbitration.¹⁸⁶ If the parties cannot agree on the appointment of an alternative arbitrator within this period, we will appoint an appropriate arbitrator from the arbitrator pool after consulting with the parties.¹⁸⁷

Once the parties agree on the alternative arbitrator, we will then refer the access dispute to the alternative arbitrator.¹⁸⁸

Liability of arbitrator

An arbitrator is not liable for anything done or omitted to be done in good faith in their capacity as an arbitrator.¹⁸⁹ Further, the arbitrator chosen may require each party to the access dispute (or any individual party) to execute a release and indemnity in favour of the arbitrator in relation to any loss, damage or liability that party (or parties) may suffer or incur as a consequence of anything done or omitted to be done in good faith.¹⁹⁰

5.3 The arbitration process

The next step is for the arbitrator to conduct an arbitration process to resolve the dispute. This section outlines the steps in the arbitration process. The arbitrator has discretion to decide many aspects of the arbitration and how it will proceed, and this section outlines how an arbitrator *may* decide to approach some of these issues.

5.3.1 Preliminary matters

Arbitrator must provide parties with procedure and timetable for the arbitration

The arbitrator may determine the procedure to be adopted for the arbitration (subject to any requirements in the rules) and is able to conduct the arbitration in the manner they consider appropriate.¹⁹¹

However, the arbitrator must:

¹⁸² NGR, r 113T(2).

¹⁸³ NGR, r 113T(3).

¹⁸⁴ NGR, r 113T(4).

¹⁸⁵ NGR, r 113T(5).

¹⁸⁶ NGR, r 113T(6).

¹⁸⁷ NGL, s 160(6).

¹⁸⁸ NGR, r 113T(5).

¹⁸⁹ NGR, r 113N(5).

¹⁹⁰ NGR, r 113N(6).

¹⁹¹ Specifically, subject to Part 9 of Chapter 5 of the NGL, and Part 12 of the NGR. See r 113ZG(2) of the NGR.

- consult with parties on the procedure and timetable it proposes to use for the arbitration; and
- notify the parties about the procedure and timetable that will apply to the arbitration, as soon as practical after their appointment.¹⁹²

We expect that this would usually cover the timetable to provide information to the arbitrator, the processes for any hearing of the dispute, and an indication of timing for a final access determination for the arbitration.

The arbitrator may amend the procedure for the arbitration at any time.¹⁹³

General obligations on parties during the arbitration

There is a general obligation on parties to the arbitration to conduct themselves properly during the arbitration. This includes:

- doing all things necessary for the proper and expeditious conduct of the arbitration;
- complying without undue delay to any order or direction of the arbitrator; and
- not wilfully doing anything to delay or prevent a final access determination being made.¹⁹⁴

Further, if an access dispute is with a user, the service provider must not, without the user's consent, alter the rights of the user to use the capacity of the pipeline during the dispute.¹⁹⁵

The arbitrator can terminate the arbitration if they consider that the party who initiated the access dispute did not negotiate in good faith prior to starting the access dispute.¹⁹⁶

Information which can be relied upon in an arbitration

Parties can only rely on 'access negotiation information' in the arbitration. Access negotiation information is:

- information about the method used to determine the price in an access offer and the inputs used in the calculation of the price;
- information about the costs associated with the provision of a pipeline service sought by the user (or prospective user); and/or
- any other information that a party may seek to rely on for the determination of the access dispute.¹⁹⁷

¹⁹² NGR, r 113ZG(3).

¹⁹³ NGR, r 113ZG(4).

¹⁹⁴ NGR, r 113O.

¹⁹⁵ NGL, s 196.

¹⁹⁶ NGL, s 169(1)(b)(iv).

¹⁹⁷ NGR, r 3.

Parties can only rely on access negotiation information that is provided to the other parties to the dispute during access negotiations (i.e. before the access dispute commenced), unless they are given leave by the arbitrator (discussed below).¹⁹⁸

Information not provided before the dispute

If a party wishes to submit and rely on any access negotiation information it did not provide to the other party before the dispute, it must seek leave of the arbitrator to do so.¹⁹⁹ In deciding whether to grant leave, the arbitrator must:

- seek to give effect to the obligations in rule 105G of the NGR, which sets out requirements of parties to exchange information during negotiations, insofar as doing so is consistent with the proper consideration of the access dispute,²⁰⁰ and
- have regard to whether the party seeking leave was given a reasonable opportunity to provide the information prior to the access dispute notice being given.²⁰¹

Further, where a party did not provide access negotiation information to the other party to the dispute before the access dispute notice was given to the AER, the arbitrator can direct that party to provide that information. If directed, the party must comply without undue delay.²⁰²

Where a party does not provide access negotiation information

If the arbitrator is satisfied that there has been an inordinate and inexcusable failure by a party to provide access negotiation information or if a party fails to do any other thing necessary for the proper and expeditious conduct of the arbitration, the arbitrator may do any one or more of the following:

- direct that the party cannot rely on any specified information or materials;
- draw such adverse inferences from the failure to comply as the circumstances justify; and
- proceed to make an access determination based solely on information which has been provided by, and relied on, a party in negotiations.²⁰³

5.3.2 Providing the arbitrator with information

Once the arbitrator has been appointed, parties must provide the arbitrator and the other parties to the access dispute, about the information they wish to rely on in the dispute, the access determination they consider should be made, and responses to the other parties' claims. The information that must be provided and the timeframes for providing it, are in Table 5.1.

¹⁹⁸ NGR, r 113P.

¹⁹⁹ NGR, r 113Q(1).

²⁰⁰ Rule 105G of the NGR obligates each party to the negotiation to: a. request or provide access negotiation information in a manner and time consistent with the duty of the party to negotiate in good faith; and b. comply with a request to provide access offer information within 15 business days of the notice, or any longer period agreed by the user or prospective user.

²⁰¹ NGR, r 113Q(2).

²⁰² NGR, r 113Q(3).

²⁰³ NGR, r 113Q(4).

Table 5.1 Information that a party must provide to the arbitrator for a non-scheme pipeline dispute²⁰⁴

No	Timing	Information
1	Within 10 business days after the AER refers the access dispute to the arbitrator	<p>A statement:</p> <ul style="list-style-type: none"> • Listing the access negotiation information of the party that it provided to other parties to the negotiations before the access dispute notice was given; and • identifying with reasonable particularity any other access negotiation information: <ul style="list-style-type: none"> – not provided by the party to the other parties to the negotiations before the access dispute notice was given and that the party seeks leave to submit and rely on in the arbitration; and – that the party requested from another party to the negotiations, and that has not been provided by that other party.
2	Within 15 business days the AER refers the access dispute to the arbitrator	A statement of the final access determination the party claims the arbitrator should make and the matters supporting the party's claim.
3	Within the time determined by the arbitrator	<p>A statement in response to the information listed under item 1 which:</p> <ul style="list-style-type: none"> • identifies with reasonable particularity any areas of disagreement. • states whether the party consents to the provision of any of the access negotiation information in respect of which leave is sought. <p>A statement responding to another party's statement provided under item 2.</p>

5.3.3 Hearings

In addition to receiving the information outlined in Table 5.1 above, an arbitrator can hold a hearing to obtain information necessary to come to a decision resolving the dispute.²⁰⁵

During a hearing, a party may appear themselves or be represented by another person.²⁰⁶

²⁰⁴ NGR, r 113P.

²⁰⁵ NGL, s 176(1)(c).

²⁰⁶ NGL, s 175.

Arbitrator's powers and role in the hearing

When holding a hearing, the arbitrator must act as speedily as proper consideration of the access dispute allows. To do this the arbitrator will need to balance:

- resolving the dispute in a timely manner, with
- the need to inquire into and investigate the issues in dispute, and all matters affecting its merits and its fair settlement (including arguments, technical details, and evidentiary matters).²⁰⁷

Overall, this means the length of the arbitration will depend on its complexity.

The arbitrator has discretion to determine several aspects during the hearing, including:

- the length of time the arbitrator considers is reasonably necessary for the fair and adequate presentation of the parties' respective cases,
- how the arbitration will be conducted (e.g. in writing, in person, by telephone or another means of communication),
- whether evidence or arguments must be made in writing, and
- any matters on which the arbitrator will hear oral evidence or argument.²⁰⁸

The arbitrator is also not bound by technical, legal forms or rules of evidence, and may inform themselves about any matters relevant to the dispute in any way they think appropriate.²⁰⁹

Further, the arbitrator has a range of powers during the hearing. These include the power to give a direction, make an interim access determination, hear, and determine the access dispute in the absence of a party to the arbitration (provided they were given notice of the arbitration), adjourn the arbitration, choose the place of arbitration, and refer any matter to an independent expert and accept their report as evidence.²¹⁰

Timing of the hearing

While the appropriate timeframe for an arbitration proceeding is both at the discretion of the arbitrator and will depend on the circumstances of the case,²¹¹ there is a requirement for the arbitration to be completed within 50 to 90 business days after we refer the dispute to the arbitrator.²¹² This effectively sets a limit on the length of arbitration proceedings, as sufficient time will be needed to develop the access determination following hearings.

²⁰⁷ NGL, s 176(1)(c).

²⁰⁸ NGL, ss 176(2), 176(3) and 176(4).

²⁰⁹ NGL, ss 176(1)(a) and 176(1)(c).

²¹⁰ NGL, s 177(1).

²¹¹ Circumstances of the case include complexity of issues, evidentiary issues, and/or the nature of the dispute.

²¹² The arbitrator must make a final determination within 50 business days, which may be extended to within 90 business days if agreed to by the parties of the access dispute. See NGR, r 113X(1)(b).

Privacy and confidentiality of the hearing

The same requirements around confidentiality and privacy that apply to hearings we conduct, also apply to arbitration hearings.

Any arbitration hearing must be held in private unless parties agree to the arbitration (or part of the arbitration) being conducted in public.²¹³ This means that where the hearing is conducted in person, only the parties, their representatives and the arbitrator will be present.

In addition, the arbitrator may:

- make directions about other persons who may be present during a hearing (or have access to documents), and in doing so may have regard to the wishes of the parties and the need for commercial confidentiality;
- make orders that a person not divulge or communicate any specified information that was given to the person during the hearing unless the arbitrator grants them permission to do so.²¹⁴

There are also specific confidentiality provisions that apply to arbitrations. Parties to the arbitration and the arbitrator must not disclose confidential information during an arbitration unless they meet one or more of the specific requirements in Table 5.2 below:²¹⁵

Table 5.2 Conditions where confidential information about an arbitration may be disclosed

Rule	Condition
113R(3)(a)	All parties consent to the disclosure.
113R(3)(b)	A party is disclosing confidential information to a professional or other adviser of the parties who has agreed to maintain the confidentiality of the confidential information.
113R(3)(c)	The arbitrator is disclosing information to an independent expert they have appointed, and the expert has agreed to maintain the confidentiality of the information.
113R(3)(d)	It is necessary to disclose confidential information to ensure a party has reasonable opportunity to present the party's case, and the disclosure is no more than reasonable for that purpose.
113R(3)(e)	It is necessary for the establishment or protection of a party's legal rights in relation to a third party and the disclosure is no more than reasonable for that purpose.
113R(3)(f)	It is necessary for the purpose of enforcing an access determination the disclosure is no more than reasonable for that purpose.

²¹³ NGL, s 174.

²¹⁴ NGL, s 174; if a person refuses or fails to comply with such an order, they may be penalised (see s 179(2) of the NGL).

²¹⁵ NGR, rr 113R(1) and 113R(2).

Rule	Condition
113R(3)(g)	It is required by the NGR or NGL or is necessary for the purposes of the NGR or NGL.
113R(3)(h)	The disclosure is in accordance with an order made or subpoena issued by a court of competent jurisdiction.
113R(3)(i)	<p>The disclosure is authorised or required by a law of a participating jurisdiction or required by a competent regulatory body, and the person making the disclosure gives written details of the disclosure (including an explanation of the reason of the disclosure) to:</p> <ul style="list-style-type: none"> • all parties and the arbitrator (if the person disclosing is a party to the access dispute), or • all parties (if the person disclosing is the arbitrator).

Independent experts

An arbitrator may refer a matter that has arisen in a dispute to an independent expert to consider and report on.²¹⁶ If an arbitrator decides to refer a matter to an independent expert, the arbitrator must set the terms and conditions of the appointment, and what the expert will report on.²¹⁷ The arbitrator can also require a party to give that expert any relevant information, documents or places for the independent expert's inspection.²¹⁸

However, before appointing an independent expert the arbitrator must obtain the consent of the parties in relation to the costs associated with using the expert.²¹⁹ A party to an access dispute must not unreasonably withhold its consent in relation to how the costs of using an expert will be dealt with.²²⁰

The independent expert must:

- have relevant knowledge and experience to the matter;
- report to the adjudicator in accordance the terms of their appointment;
- not have any material direct or indirect interests or associations that compromises (or is likely to compromise) their impartiality; and
- disclose to the adjudicator any material or indirect interest or association that compromises, or would reasonably be seen to compromise, their impartiality.²²¹

²¹⁶ NGL, s 177.

²¹⁷ NGL, s 178(2).

²¹⁸ NGR, r 113ZH(1).

²¹⁹ NGR, r 113ZH(3).

²²⁰ NGR, r 113ZH(4).

²²¹ NGL, s 178(4).

5.4 Finalisation and outcomes of the arbitration

This section discusses how the arbitration can be finalised, and what the outcomes of the arbitration may be. It covers processes for the arbitrator to make an access determination, the effect of the access determination, other ways the arbitration can be finalised, and matters relating to the costs of the arbitration.

5.4.1 Overview of access determinations

After the arbitration proceedings or hearing, the arbitrator will make an access determination. The access determination will set out whether the user or prospective user will have access to the pipeline service, and if so the terms and conditions that access should be granted on. A user or prospective user is then able to seek access, and a service provider must provide access, on the terms and conditions outlined in the access determination.²²²

There are two types of access determinations that an arbitrator can make. The first is an interim access determination and the second is a final access determination, which is a final decision on the access dispute. The arbitrator must make a final access determination within either 50 to 90 business days from the date the dispute was referred to the arbitrator.²²³

5.4.2 Interim access determinations

Before making a final access determination, an arbitrator can make an interim access determination. An interim access determination will provide a user or prospective user with access to a pipeline service before the final access determination is made. While it is at the discretion of the arbitrator as to whether to make an interim access determination, they will generally only be made where there is a need for access to the service to be provided urgently, and parties are unable to agree to interim access.

If the arbitrator makes an interim access determination, the interim determination must:

- specify the terms and conditions on which the user (or prospective user) is to be given access to the pipeline service (including reasonable payment terms);
- be in writing and dated and signed by the relevant arbitrator;
- identify the parties to the interim access determination and the place the determination is made;
- be communicated to the parties and the AER by email and post.²²⁴

If an interim access determination is made, the subsequent final access determination must provide for adjustments to reflect any differences between the interim and final access determinations (e.g. to account for differences in any price terms).^{225,226}

²²² NGL, s 161, and NGR, r 113Z.

²²³ NGR, r 113X(1)(b).

²²⁴ NGR, r 113W.

²²⁵ These adjustments will be made either concerning the period prior to the user gaining access on the terms of the final access determination, or prior to access ceasing under the terms of the interim access determination as required under rule 113ZE(5)(b) of the NGR.

²²⁶ NGR, r 113W(2).

5.4.3 Final access determinations

The final access determination will outline the arbitrator's final decision in the arbitration. The final access determination must be accompanied by the arbitrator's statement of reasons.²²⁷

Final access determination

The arbitrator must make the final access determination within:

- 50 business days of us referring the dispute to the arbitrator; or
- if agreed to by the parties, up to a maximum of 90 business days of the dispute being referred to the arbitrator.²²⁸

The final access determination must be:

- made in writing and signed by the arbitrator;
- identify the parties;
- set out the matters in dispute and the matters agreed by the parties;
- be communicated by email and post to the parties, and the AER; and
- accompanied by a statement of reasons explaining the arbitrator's decision, and their consideration of the matters outlined in Section 5.4.4 below.²²⁹

The statement of reasons must be provided within 20 business days of the final access determination being made.²³⁰

5.4.4 Matters the arbitrator must consider in an access determination

The arbitrator must consider several matters in making a final determination of a non-scheme pipeline dispute. The principles that the arbitrator *must* consider in making the access determination are outlined in Table 5.3 below.

Table 5.3 Matters the arbitrator must consider when making an access determination for a non-scheme pipeline²³¹

Principle	Description
Access determination should reflect a workably competitive market	
Terms and conditions should reflect the outcome	Pipeline services must be set at price and non-price terms that, as far as practicable, reflect the outcomes of a workably competitive market. ²³²

²²⁷ NGR, r 113X(5).

²²⁸ NGR, r 113X(1)(b).

²²⁹ NGR, r 113X.

²³⁰ NGR, r 113X(5).

²³¹ Set out in r 113Z(3) of the NGR.

²³² NGR, r 113Z(2)(a).

Principle	Description
of a workably competitive market	
Pricing principles	
Pricing principles	The arbitrator must take the pricing principles into account. ²³³ There are two parts to the pricing principles which we have called Principle 1 and Principle 2.
Principle 1	The prices for pipeline services should reflect: <ul style="list-style-type: none"> • the cost of providing that service; • a commercial rate of return commensurate with the prevailing conditions in the market for funding; and • the risks that the service provider faces in providing the pipeline services.²³⁴
Principle 2	When applying Principle 1 to services that are at a premium or discount to the price for firm haulage, the price should: <ul style="list-style-type: none"> • consider the opportunity cost or benefit to the service provider; and • be consistent with a price that would provide a reasonable contribution to joint and common costs.²³⁵
Asset valuation methodology	There are also specific asset valuation requirements that must be adopted in applying Principle 1. In applying Principle 1, the value of any assets used when providing pipeline services must be determined using asset valuation techniques consistent with facilitating access to a pipeline on reasonable terms. This is taken to mean a valuation based on prices and non-price terms which reflect the outcomes of a workably competitive market (as far as practicable); and unless inconsistent with a workably competitive market, the value of any assets used in the provision of the pipeline service is to be calculated using the recovered capital methodology. ²³⁶
Recovered capital methodology	The recovered capital methodology requires the value of any asset used in the provision of a pipeline service to be calculated as: <ul style="list-style-type: none"> • the cost of construction of the pipeline and pipeline assets before commissioning of the pipeline <p>plus</p>

²³³ NGR, r 113Z(2)(b).

²³⁴ NGR, r 113Z(4)(a).

²³⁵ NGR, r 113Z(4)(b).

²³⁶ NGR, r 113Z(5).

Principle	Description
	<ul style="list-style-type: none"> the amount of capital expenditure since the commissioning of the pipeline less <ul style="list-style-type: none"> the return of capital recovered since commissioning of the pipeline, and the value of pipeline assets disposed of since commissioning the pipeline.²³⁷
Other matters	
Operational and technical requirements	The arbitrator must take into account the operational and technical requirements necessary for the safe and reliable operation of the pipeline. ²³⁸
Prohibition against cross-subsidisation	If applicable, the arbitrator must take into account the prohibition against subsidising a pipeline development through existing charges (as outlined in section 136A of the NGL). ²³⁹
Past capital contributions	Where relevant, the arbitrator must also consider the value of past capital contributions to the pipeline that is the subject of the access dispute, and the extent to which the party has recouped any capital contributions. ²⁴⁰

In addition to the above requirements above, the arbitrator *may* also consider the principles outlined in Table 5.4, provided they do not derogate from the principles outlined in Table 5.3.

Table 5.4 Matters the arbitrator may consider when making an access determination²⁴¹

Rule	Principles
Business interests	The legitimate business interests of the service provider. ²⁴²
Other users	The interests of all persons who have rights to use the pipeline. ²⁴³
Value of expansion or extension	The value to the service provider of any extension or expansion of the pipeline whose cost is borne by another person. ²⁴⁴

²³⁷ NGR, r 113Z(5)(b).

²³⁸ NGR, r 113Z(2)(c).

²³⁹ NGR, r 113Z(2)(d).

²⁴⁰ NGR, r 132ZA.

²⁴¹ Set out in r 113X(3) of the NGR.

²⁴² NGR, r 113Z(3)(a).

²⁴³ NGR, r 113Z(3)(b).

²⁴⁴ NGR, r 113Z(3)(c).

Rule	Principles
Value of interconnections	The value to the service provider of interconnections to the pipeline whose cost is borne by another person. ²⁴⁵

5.4.5 Matters an access determination may cover

The access determination may include a decision in relation to any matter that is the subject of the access dispute, and as necessary to resolve the dispute between the parties.²⁴⁶ This includes requiring a service provider to:

- provide access to a pipeline service;
- specify the price and other terms and conditions which must be given to the user or prospective user;
- permit another facility to be connected to the pipeline; and
- specify any other condition to be satisfied before access to a pipeline service commences.²⁴⁷

The access determination may be for a service term that is different from that sought by the user (or prospective user).²⁴⁸ Further, the arbitrator may make an access determination that access to the pipeline service does not need to be provided.

In addition, the access determination can require a service provide to make changes to their pipeline. That is, it can require the service provider to carry out (either alone or in combination):

- an expansion of the capacity of the pipeline;
- a conversion of the pipeline to a bi-directional pipeline; or
- the development of a new receipt or delivery point, the expansion of an existing receipt or delivery point, or interconnection with another pipeline or other facility.²⁴⁹

An access determination can only impose these requirements if it is:

- technically feasible; and
- consistent with the safe and reliable operation of the pipeline.²⁵⁰

Finally, the service provider must agree to the following before the access determination can require the service provider to:

- extend the geographical range of a pipeline, or

²⁴⁵ NGR, r 113Z(3)(d).

²⁴⁶ NGR, r 113V.

²⁴⁷ NGR, r 113V(2).

²⁴⁸ NGR, r 113V(4).

²⁴⁹ NGR, r 113V(2).

²⁵⁰ NGR, r 113V(5).

- permit another facility.²⁵¹

5.4.6 Restrictions on an access determination

An arbitrator cannot make an access determination which does any of the following:

- prevents a user from obtaining a sufficient amount of a pipeline service under a contract or previous access determination to be able to meet the user's reasonably anticipated requirements, as measured at the time of notification of the access dispute,
- prevent a user (or prospective user) from obtaining, by exercising a pre-notification right, a sufficient amount of a pipeline service to meet their actual requirements,²⁵²
- deprive a person of a relevant protected contractual right.²⁵³

5.4.7 Effect of final access determination

A final access determination is enforceable as if it were a contract between the parties. However, a user or prospective user does not have to seek access to the pipeline.²⁵⁴

That is, a final determination gives a user, or prospective user the option to enter into a contract with the pipeline service provider on terms specified in the final access determination.²⁵⁵

This option is exercised by the user giving notice to the service provider that they wish to enter into a contract with the pipeline service provider on the terms specified in the final access determination. The parties to the access dispute are then obliged to enter into an access contract on the terms specified in the final access determination.²⁵⁶

If a user wishes to enter into an agreement on the terms set out in the final access determination, they must do so within 10 business days after the final access determination is made.²⁵⁷

If notice is not given within this period:

- any interim access determination ceases, and access does not need to be provided in accordance with the access determination.²⁵⁸
- the user, prospective user, or any associate of the user or prospective user, must not give an access dispute notice about the same pipeline service (or a substantially similar

²⁵¹ NGR, r 113V(6).

²⁵² A pre-notification right is defined under section 163(2) of the NGL and means a right under a contract or access determination that was in force at the time when the access dispute was notified under section 152 of the NGL.

²⁵³ NGL, s 163.

²⁵⁴ NGL, s 170.

²⁵⁵ NGR, r 113ZE.

²⁵⁶ NGR, rr 113ZE(2) and 113ZE(4).

²⁵⁷ NGR, r 113ZE(3).

²⁵⁸ NGR, r 113ZE(5).

pipeline service) that was subject to the final access determination for one year from the date of the final access determination.²⁵⁹

A final access determination takes effect from the latter of the time specified in the access determination, or the time it is communicated to the parties to the access dispute.²⁶⁰ If the service provider of the pipeline changes, the subsequent service provider is bound by the final access determination.²⁶¹

5.4.8 Termination and withdrawal of access disputes

The arbitrator will not make a final access determination for an access dispute if the access dispute is terminated or if the dispute or the party who initiated the dispute withdraws it. Termination and withdrawal of disputes is discussed in Chapter 3.

5.5 Steps after the final access determination is made

After the arbitrator has made the final access determination and informed parties of the decision there are additional steps involved in finalising the dispute.

5.5.1 Publishing information about the dispute

Once the arbitrator makes its final access determination, we must publish the information about the final access determination on our website within a reasonable time (usually 15 business days). This includes:

- details of the pipeline that has been the subject of the dispute;
- if they consent, the identity of the user or prospective user;
- the name of the arbitrator;
- the time the arbitration took;
- the pipeline service that was the subject of the dispute;
- whether the user wishes to enter into a contract in accordance with the final access determination; and
- if dealt with in the final access determination, the asset valuation methodology used, the assets to which it was applied, and the asset value.²⁶²

5.5.2 Costs

The costs of the arbitration will generally be determined as follows:

- parties to the arbitration bear their own costs (for example, professional advice and legal representation); and

²⁵⁹ NGR, r 113ZE(5)(a).

²⁶⁰ NGR, r 113ZE(1).

²⁶¹ NGL, s 171.

²⁶² NGR, r 113ZD.

- the costs relating to the arbitration procedure must be equally shared between the parties.²⁶³

However, the arbitrator may make a determination within 30 business days after the final access determination is made that the costs of the arbitration be split between parties differently if they consider it would be fairer to do so after taking the following into account:

- if a party was not a service provider, user or prospective user, the role of that party in the dispute;
- whether the user or prospective user elects not to enter into a contract giving effect to the final access determination;
- whether a party unnecessarily disadvantaged another party by conduct such as:
 - failing to comply with orders or direction of the arbitrator or requirements of the NGR, NGL or the Regulations without excuse;
 - requesting an adjournment due to such a failure;
 - causing an adjournment;
 - attempting to deceive another party;
 - vexatiously conducting an access dispute;
- whether a party has unreasonably prolonged the time to complete the arbitration; and
- any other matters the arbitrator considers relevant.²⁶⁴

5.5.3 Variation of final access determination

A final access determination for a non-scheme pipeline dispute can only be varied by agreement between all parties to the dispute.²⁶⁵ An arbitrator may also correct clerical mistakes, errors arising from accidental slips or omissions, miscalculations or a defect in form.²⁶⁶

²⁶³ NGL, ss 188(2) and 188(3).

²⁶⁴ NGR, r 113ZM(2).

²⁶⁵ NGL, s 168.

²⁶⁶ NGL, s 195.

6 Small shipper mediation

This chapter discusses small shipper mediation. It covers the process for a small shipper to elect to have an access dispute mediated, the process for selecting the mediator (from the list of pool mediators), the conduct of the mediation, and the process for ending the mediation as well as selecting an alternative mediator. This chapter also covers guidance on how the mediation should be conducted, as well as the treatment of confidential information and conflicts of interest.

6.1 Overview of small shipper mediation

The mediation discussed in this chapter is only available to small shippers.²⁶⁷ If a small shipper has an access dispute relating to either a scheme pipeline or a non-scheme pipeline, they can elect for the dispute to be mediated. However, a small shipper does not have to use mediation, and can elect for a scheme pipeline access dispute to be resolved by the AER (as discussed in Chapter 4), and for a non-scheme pipeline dispute to be resolved by arbitration (discussed in Chapter 6).

A **small shipper** is a user or prospective user who procures, or seeks to procure, no more than the lesser of 5 TJ per day, or 20 per cent of the pipeline's nameplate capacity. A small shipper cannot be a corporation with a market capitalisation of more than \$500 million or a related body corporate of the corporation.²⁶⁸

While the exact steps in a small shipper mediation may differ from case to case, it will generally involve:

Stage 1: Initial steps

- **Commencing and electing to mediate the dispute:** once a scheme or non-scheme pipeline access dispute has been initiated through providing us with notice, a small shipper can elect for the dispute to be mediated.
- **Selecting the mediator:** once the small shipper elects to resolve the dispute by mediation, the parties to the dispute will agree to appoint a mediator from the mediator pool appointed by us, or if they cannot agree, we will select a mediator.

Stage 2: Mediation process

- **Mediation of the dispute:** the mediator will organise the procedures and timetable of the mediation, aiming to improve communication between the parties to the dispute, enable the exchange of views and facilitate a shared understanding, and to then use that understanding to facilitate a negotiated outcome.

Stage 3: Finalising the mediation

- **Dispute is resolved or mediation is terminated:** if the parties resolve the dispute via mediation, the mediator will issue a certificate to each of the parties, which states the

²⁶⁷ However as discussed in Chapter 4, the AER may refer scheme access disputes to ADR (including mediation).

²⁶⁸ NGL, s 8AB.

parties to the mediation and the outcomes of the process. If parties are unable to resolve the dispute via mediation, the mediator will bring the dispute to an end, and the dispute will then be resolved by the AER or an arbitrator depending on whether it is a scheme or non-scheme pipeline.

As for the other dispute resolution pathways, not all mediations will go through all of the steps listed above. For example, disputes may be withdrawn or terminated before the mediation process is finalised.

6.1.1 Benefits of mediation

Small shippers do not have to use mediation to resolve access disputes. However, there are a range of reasons why small shippers may prefer to mediate a dispute, than to use to arbitration or the AER resolution process. Some reasons that a small shipper may prefer mediation include that it:

- may be quicker than other dispute resolution processes
- is less formal and will often be less costly than the other dispute resolution processes
- may better account for (and mitigate) the power imbalances which may be present between parties
- can provide greater certainty of the process and outcome through negotiated consensus (rather than an uncertain access determination outcome).²⁶⁹

6.2 Initial steps in mediation

This section outlines the process for raising an access dispute for mediation, and the preliminary steps that must occur before a mediation will commence.

6.2.1 Commencing and electing to mediate an access dispute

If a small shipper is party to an access dispute they may elect to have that access dispute mediated.²⁷⁰ How a shipper may elect to mediate a dispute depends on which party commences the access dispute resolution process.

Small shipper commences the access dispute

A small shipper can commence an access dispute for either a scheme or non-scheme pipeline by providing the AER with the dispute notice. The process for providing notice, and what the notice must include, is outlined at Section 4.2.1 for scheme pipelines and Section 5.2 for non-scheme pipelines.

If a small shipper seeks to mediate an access dispute it must elect to do so in its dispute notice.

Service provider commences the access dispute

If the service provider has commenced the access dispute resolution process the small shipper can still elect for the dispute to be resolved by mediation. To do this, the small

²⁶⁹ See, Sir Laurence Street, *Mediation: A practical outline*, 2003.

²⁷⁰ NGL, s 156.

shipper must give written notice to us within 5 business days of the access dispute notice being given to the small shipper.²⁷¹

AER notification

When a small shipper elects to mediate a dispute, we will notify the other parties to the access dispute in writing that the election has been made.²⁷²

6.2.2 Selecting a mediator

Once a small shipper elects to mediate a dispute parties must take steps to appoint a mediator to resolve the dispute. The mediator must be selected from the pool of mediators that we establish and maintain.²⁷³ The list of mediators in the pool, their contact details, and professional profiles are available on the [AER website](#).

The process for selecting a mediator is as follows:

- First, we must give notice to each of the parties to the dispute. This notice will invite the parties to agree to appoint a mediator, list the steps parties must take to agree on a suitable mediator, and outline what will happen if agreement cannot be reached.²⁷⁴
- Second, each party to the access dispute must propose the names of at least two pool mediators that they will agree to be the mediator and negotiate in good faith to reach agreement on who the mediator will be.²⁷⁵
- Finally, if agreement has been reached, the parties to the access dispute must notify us and give us the name of the mediator selected.²⁷⁶ If agreement cannot be reached or if the AER is not informed within 5 business days of us providing notice inviting the parties to appoint a mediator, we will select a mediator from the list of pool mediators, after consulting with the parties.²⁷⁷

We must take reasonable steps to refer the access dispute to the selected pool mediator within 20 business days after receipt of the access dispute notice.²⁷⁸

Conflicts of interest

A mediator to an access dispute must be independent of the parties to the dispute, properly qualified to act in the resolution of the dispute and have no direct or indirect interest in the outcome.²⁷⁹ The mediator must always be transparent about their relations with the parties to the mediation.²⁸⁰

²⁷¹ NGR, r 113E(1).

²⁷² NGR, r 113E(2).

²⁷³ NGL, s 113E.

²⁷⁴ NGL, s 113E(3).

²⁷⁵ NGR, r 113E(4).

²⁷⁶ NGR, r 113E(4)(c).

²⁷⁷ NGL, s 157(3)(b).

²⁷⁸ NGR, r 113E(6).

²⁷⁹ NGL, s 157(4).

²⁸⁰ NGR, r 113I(1)(b).

When approached to mediate an access dispute, the mediator must disclose to the parties any actual or perceived conflicts of interest, either before mediation begins if known to the mediator at that time, or during mediation if the conflict arises after the mediation has commenced.²⁸¹

If a conflict of interest is disclosed, the mediator must discuss with the parties any circumstances that may affect (or be seen to affect) the mediator's impartiality or independence.²⁸² The mediator must not proceed or continue with the mediation unless:

- all parties agree that the mediator may act, or continue to act, in the mediation; and
- the mediator is satisfied that the conflict (or perceived conflict) of interest will not affect the mediator's impartiality, independence, and proper discharge of their duties.²⁸³

Appointing an alternative mediator

Parties may agree to the appointment of an alternative mediator.²⁸⁴ A party may do this due to a mediator's actual or perceived conflict of interest. However, parties to the mediation are not required to provide a reason explaining why they are seeking to appoint an alternative mediator, beyond the general requirement that they must act in good faith throughout the proceedings and take reasonable steps to resolve the dispute.

If a party to an access dispute wishes to appoint an alternative mediator, they must do so by written notice requesting the parties to the access dispute to agree to the appointment of an alternative mediator.²⁸⁵ A copy of the notice must be provided to the AER at the same time as it is provided to each of the parties to the access dispute.²⁸⁶ The notice may propose a pool mediator as the alternative mediator (subject to agreement between the parties).²⁸⁷ A party who receives the notice requesting agreement for an alternative mediator may also propose an alternative mediator from the pool of mediators.²⁸⁸ If the parties reach agreement, they must notify the AER of the agreement.²⁸⁹

An agreement must be reached within 20 business days from the date the earlier mediation ended (i.e. the date of termination of the earlier mediation).²⁹⁰ If the parties do not, or cannot, agree, the AER must appoint another mediator after consulting with the parties to the dispute.²⁹¹

²⁸¹ NGR, r 113I(1)(a).

²⁸² NGR, r 113I(2)(a).

²⁸³ NGR, r 113I(2).

²⁸⁴ NGL, s 157(5).

²⁸⁵ NGR, r 113K(1).

²⁸⁶ NGR, r 113K(3).

²⁸⁷ NGR, r 113K(2).

²⁸⁸ NGR, r 113K(4).

²⁸⁹ NGR, r 113K(5).

²⁹⁰ NGR, r 113K(6).

²⁹¹ NGL, ss 157(3) and 157(6).

6.3 Mediation of the dispute

This section sets out the mediation process and provides guidance for mediators on how the mediation should be conducted.

6.3.1 Conduct of the mediation

Following the provision of notice and appointment of a mediator, the mediator will conduct the mediation process to resolve the dispute. First, a mediator is required to set the day and time for the mediation as soon as practicable after their appointment and give notice of these details to the parties to the access dispute.²⁹² The mediator may vary the day and time by providing further notice to the parties.²⁹³ A party to a mediation may have a lawyer present at the mediation.²⁹⁴

After this, there is no set procedure for the mediation, and it is for the mediator to determine how the mediation will take place. The mediator will determine the procedure and timetables for the mediation.²⁹⁵ The mediator must inform us about the initiation of steps to conduct the mediation.²⁹⁶

While the mediation process will be flexible, and the mediator will tailor the process to the nature and circumstances of the dispute, there are general steps that most mediations will involve. These are:

- first, the mediator will open channels of communication between the parties;
- then, using the channels of communication that have been opened the mediator will assist parties to develop a shared understanding of each other's perceptions of the dispute; and
- lastly, the mediator will focus on assisting parties to negotiated resolution of the access dispute.²⁹⁷

Some more specific steps a mediator may take include:

- a preliminary conference (or teleconference) before mediation proceedings commence to arrange procedural matters;
- an opening statement by the mediator to both parties in a joint session, explaining the mediation process and inviting each party to outline their view of the matters in dispute;
- joint sessions, combined with the mediator conferring with each party privately; and
- meetings between advisers (if any) of the parties.

²⁹² NGR, r 113F(1).

²⁹³ NGR, r 113F(2).

²⁹⁴ NGL, s 158.

²⁹⁵ NGR, r 113F(3).

²⁹⁶ NGR, r 113F(4).

²⁹⁷ See, Sir Laurence Street, *Mediation: A practical outline*, 2003.

Obligations on parties during the mediation

Parties to the dispute are required to make their intention clear as to what they are trying to achieve through the mediation process at the beginning of the mediation.²⁹⁸

Parties to the dispute must attend the mediation, do all things necessary for the proper and expeditious conduct of the mediation, and take reasonable steps to resolve the dispute by mediation.²⁹⁹ Some of the actions we would expect parties take to fulfil this obligation include co-operating with each other and the mediator by, for example, providing relevant information without undue delay, genuinely participating in the proceedings and attempting to resolve the dispute.

6.3.2 Liability of the mediator

A mediator is not liable for anything done or omitted to be done in good faith in their capacity as mediator.³⁰⁰

Before undertaking the mediation, a mediator may require any, or all, parties to the access dispute to execute a release and indemnity indemnifying the mediator for any loss, damage or liability that party may suffer or incur as a consequence of anything done or omitted to be done in good faith in their capacity as mediator.³⁰¹

6.3.3 Confidentiality of the mediation

The mediator and all parties to the dispute must not disclose confidential information in relation to the course of the mediation, unless one of the conditions listed in rule 113H(3) of the NGR are satisfied.³⁰² Table 6.1 below outlines the circumstances where confidential information may be disclosed:

Table 6.1 Conditions where confidential information about a mediation may be disclosed

Rule	Condition
113H(3)(a)	The mediator or party has the consent of all parties to the access dispute.
113H(3)(b)	A party is disclosing confidential information to a professional or other adviser of the parties who has agreed to maintain the confidentiality of the confidential information.
113H(3)(c)	A mediator appoints an independent expert who agrees to maintain the confidentiality of the confidential information.
113H(3)(d)	It is necessary to disclose confidential information so that a party has a reasonable opportunity to present the party's case, and the disclosure is no more than reasonable for that purpose.

²⁹⁸ NGR, r 113G(4).

²⁹⁹ NGR, rr 113G(1) and 113G(4).

³⁰⁰ NGR, r 113E(8).

³⁰¹ NGR, r 113E(9).

³⁰² NGR, r 113H(1).

Rule	Condition
113H(3)(e)	It is necessary for the establishment or protection of a party's legal rights in relation to a third party and the disclosure is no more than reasonable for that purpose.
113H(3)(f)	The disclosure is made to the AER.
113H(3)(g)	It is required by the NGR or NGL or is necessary for the purposes of the NGR or NGL.
113H(3)(h)	The disclosure is in accordance with an order made or subpoena issued by a court of competent jurisdiction.
113H(3)(i)	Disclosure is authorised or required by a law of a participating jurisdiction or required by a competent regulatory body, and the person making the disclosure gives written details of the disclosure (including an explanation of the reason of the disclosure to): <ul style="list-style-type: none"> • all parties and the mediator (if the person disclosing is a party to the access dispute), or • all parties (if the person disclosing is the mediator).

6.4 Finalisation and outcomes of the mediation

The possible outcomes of the mediation are:

- the mediation is successful as the parties to the dispute resolve the dispute and the dispute is ended;
- the mediation is unsuccessful, and the mediator brings the mediation to an end. The dispute can then be resolved via AER resolution or arbitration, depending on if it is a scheme or non-scheme pipeline. The party who initiated the dispute can also withdraw the access dispute notice.

6.4.1 Mediation is successful

If the dispute is resolved by mediation, the mediator must issue a certificate stating the parties to the mediation, and the outcomes achieved in the resolution of the dispute.³⁰³

Copies of this certificate must be given to each of the parties to the dispute and the AER.³⁰⁴

6.4.2 Mediation is unsuccessful

A mediation may not be successful in resolving a dispute and if this is the case the mediator will need to bring the mediation to an end. A mediator may only bring the mediation to an end if 30 days have passed since the mediation began and the dispute has not been resolved, and the mediator considers there is no reasonable prospect that the dispute will be resolved by mediation.³⁰⁵

³⁰³ NGR, r 113F(5).

³⁰⁴ NGR, r 113F(6).

³⁰⁵ NGR, r 113J(1).

If the mediation is ended without resolution of the dispute, the mediator must issue a certificate stating that the dispute is unresolved, and that the mediation has been brought to an end.³⁰⁶ This certificate must be issued to each party to the access dispute, and the AER.³⁰⁷ While this brings the mediation to an end, it does not end the access dispute. This means that if mediation fails, the dispute can then be resolved through the AER resolution process for scheme pipeline disputes (discussed in Chapter 4), or by arbitration for non-scheme pipelines (as discussed in Chapter 5). If the parties do not wish to proceed with arbitration or AER resolution, they may withdraw from the access dispute by providing written notice (see Section 3.5).

³⁰⁶ NGR, r 113J(4).

³⁰⁷ NGR, r 113J(5).

Appendix A – Procedural issues for non-scheme pipeline arbitration

This appendix provides additional detail about procedural issues and the powers of an arbitrator in a non-scheme pipeline arbitration.

The key powers of an arbitrator, and the key procedural issues for the hearing of a non-scheme pipeline dispute, are discussed in Chapter 5. However, for reference Table A.1 below provides all procedural requirements and arbitrator powers.

Table A.1: Procedural issues for non-scheme pipeline arbitration

NGR/NGL reference	Summary of requirement
NGL, s 175	The party may appear in person or be represented by another person.
NGL, s 176	<p>The arbitrator:</p> <ul style="list-style-type: none"> • is not bound by technicalities, legal forms or rules of evidence • must act as speedily as a proper consideration of the access dispute allows, having regard to the need to carefully and quickly inquire into an investigate the access dispute and all matters affecting the merits, and fair settlement of the access dispute, and • may inform itself about any matter relevant to the access dispute in any way it thinks appropriate. <p>The arbitrator may determine the periods that are reasonably necessary for the fair and adequate presentation of the respective cases of the parties in the hearing and may require that the cases be presented within those periods.</p> <p>The arbitrator may require evidence or argument to be presented in writing and may decide the matters on which the arbitrator will hear oral evidence or argument.</p> <p>The arbitrator may determine that a dispute is to be conducted by:</p> <ul style="list-style-type: none"> • telephone • closed circuit television, or • any other means of communication.
NGL, s 177	<p>The arbitrator may do any of the following things for the purpose of determining an access dispute:</p> <ul style="list-style-type: none"> • give a direction during, or for the purpose of, a hearing. • hear and determine the access dispute in the absence of a party who has been given notice of the dispute hearing. • sit at any place. • adjourn to any time and place. • refer any matter to an independent expert and accept the expert's report as evidence. • make an interim determination.

NGR/NGL reference	Summary of requirement
NGL, s 184	<p>A party to an access dispute may inform the arbitrator that, in the party's opinion, a specified part of a document contains confidential information and request the arbitrator to not give a copy of that part to another party.</p> <p>If such a request is received, the arbitrator must inform the other parties that the request has been made and of the general nature of the matters to which the relevant part of the document relates and ask the other parties whether there is any objection to the arbitrator complying with the request.</p> <p>If there is an objection to the arbitrator complying with the request, the party objecting may inform the arbitrator of the objection and of the reasons for it.</p> <p>The adjudicator may decide, after considering a request and objection and further submissions that a party has made in relation to the request:</p> <ul style="list-style-type: none"> • not to give the other parties a copy of so much of the document as contains confidential information that the arbitrator thinks should not be given, or • to give a party a copy of the whole, or part, of the part of the document that contains confidential information, subject to a condition that the party gives an undertaking not to disclose the information to another person except to the extent specified by the arbitrator and subject to such other conditions as the arbitrator determines.

The requirements outlined in Table A.2 below are also relevant to the procedures for an arbitration.

Table A.2 Other procedural requirements for non-scheme pipeline arbitration

NGR Reference	Arbitration Procedure Requirement
113ZG(3)	The arbitrator must consult the parties about the procedures and timetables for the arbitration and notify the procedures and timetables to the parties as soon as practicable after the arbitrator's appointment.
113ZG(4)	The arbitrator may amend the procedures that apply to the arbitration during the arbitration.
113ZG(5)	The arbitrator may take possession of, make copies of, and take extracts from, any document produced to it and may keep such a document for as long as is necessary for the purposes of the arbitration.
113ZG(6) 113ZG(7)	Subject to section 184 of the NGL, all statements, documents or other information supplied to the arbitrator, and any expert report or evidentiary document on which the arbitrator may rely on in making its decision, must be communicated to the parties to the access dispute.