

Amendments to pipeline regulatory determinations and elections guide

Explanatory note

May 2024

© Commonwealth of Australia 2023

This work is copyright. In addition to any use permitted under the *Copyright Act 1968*, all material contained within this work is provided under a Creative Commons Attributions 3.0 Australia licence with the exception of:

- the Commonwealth Coat of Arms
- the ACCC and AER logos
- any illustration diagram, photograph or graphic over which the Australian Competition and Consumer Commission does not hold copyright, but which may be part of or contained within this publication.

The details of the relevant licence conditions are available on the Creative Commons website as is the full legal code for the CC BY 3.0 AU licence.

Inquiries about this publication should be addressed to:

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

AER reference: 15616258

Amendment record

Version	Date	Pages
1	16 May 2024	7

Contents

1	Introduction	1
1.1	Consultation process	1
2	AER response to submissions to the Draft Guide	2
2.1	Notice and information requests	2
2.2	Timing for making submissions.....	5
2.3	Other issues	7

1 Introduction

The Australian Energy Regulator (AER) is responsible for determining the regulatory treatment of gas pipelines, through regulatory determinations and classification and reclassification decisions.¹ As part of this role, we published a Pipeline regulatory determinations and elections guide (the Guide) in September 2023. The Guide outlines how we will approach regulatory determinations, and how stakeholders can make applications relating to the regulatory treatment of a pipeline.

In March 2024 we published a draft of a revised guide for consultation on several minor amendments to the Guide (Draft Guide). The amendments:

- clarify the scope of information we can ask under rule 16 of the National Gas Rules
- include new information about the use of compulsory notices under section 42 of the National Gas Law in a form of regulation review
- update the consultation process and the timing for stakeholders to provide written submissions
- reflect the new National Gas Objective
- make minor amendments to terms to reflect amendments to the National Gas Law on 7 March 2024 to cover hydrogen, biomethane and other renewable gases under the national gas regulatory framework.

The AER has decided to make the amendments proposed in the Draft Guide and published the revised Guide on 16 May 2024. This explanatory note covers the issues raised by stakeholders in consultation on the Draft Guide and explains our responses to these issues.

1.1 Consultation process

On 15 March 2024, we published the Draft Guide and invited stakeholders to provide feedback by 5 April 2024.

We received three submissions on the amendments to the Guide from:

- Australian Pipelines and Gas Association (APGA)
- APA Group Limited (APA)
- Australia Pacific LNG Pty Ltd (APLNG).

We have considered these submissions in amending the Guide.

¹ See Chapter 3 of the NGL, and Part 4 of the NGR.

2 AER response to submissions to the Draft Guide

This chapter outlines the issues raised in submissions to the Draft Guide, and our views on, and responses to, those issues.

2.1 Notice and information requests

We have proposed the following amendments to sections 3.3.1 of the Guide, dealing with notice and information requests:

3.3.1 Notice and information requests

If we receive an application for a form of regulation determination or commence an AER-initiated review for a form of regulation determination, we will notify the service provider for the pipeline that we have received the application or that we are commencing such a review.²⁸

After we provide such notice, we may request the service provider to submit certain information about the pipeline. ~~If requested, the service provider must provide the information to us within the time specified in our request.²⁹~~ **We may request this information by:**

- **sending an information request under rule 16 of the NGR, or**
- **issuing a compulsory notice to obtain information and documents under section 42 of the NGL.**

The time **provided to respond to the information request or notice** ~~we specify~~ will depend on the amount of information and the complexity of the information sought from the service provider. However, we will generally provide at least 20 business days for a service provider to respond to our request.

Request under rule 16 of the NGR

A service provider must provide the information in response to a request issued under r 16 of the NGR, within the time specified. If a service provider considers that it will have difficulty in providing the information requested, it should inform us as soon as possible. We may extend the time to respond to the request if the service provider is able to provide good reasons to do so.

Where we are conducting a form of regulation review in response to an application, and a if a service provider does not provide the requested information within the specified period, we may draw such adverse inferences from the failure to comply as the circumstances justify.³⁰ To determine this, we will consider the extent of the non-compliance and the effect of the

²⁸ NGR, rr 16(1) and 21.

²⁹ ~~NGR, rr 16(2), 21(2) and 21(3).~~

³⁰ NGR, rr 16 and 21.

To determine this, we will consider the extent of the non-compliance and the effect of the non-compliance on our ability to make a decision on whether to make the form of regulation determination.³¹

In deciding whether to draw an adverse inference, we will consider the circumstances of any non-compliance in determining whether to draw any adverse inferences on a case-by-case basis. However, some examples of where we are more likely to draw an adverse inference include:

- where a service provider refuses to provide the information requested, and does not provide any reasons for its refusal
- where a service provider fails to provide information that it should readily have access to
- where information is important to make the form of regulation determination, such as price, costs or capacity information.

The type of 'adverse inference' that we may draw because of non-compliance will also depend on the circumstances of the non-compliance. The inference could include that information that was not provided supported us making a scheme pipeline determination.

Further, if we do not receive a response to an information request, we may make a form of regulation determination based on information that is available and which we consider to be relevant.³²

Content of a rule 16 information request

Information we may seek in a **rule 16** information request includes:³³

- the capacity of the pipeline and the extent to which that capacity is currently utilised
- for a **transmission pipeline**, a description of:
 - all locations served by the pipeline
 - all other pipelines that currently serve the same locations
 - all pipelines the service provider is aware of that pass within 100 km of any location served by the pipeline
- for a **distribution pipeline**, a description of:
 - the geographical area served by the pipeline
 - the points at which natural gas is, or is to be, injected into the pipeline
- any other sources of energy available to consumers of gas from the pipeline of which the service provider is aware
- the parties with an interest in the pipeline and the nature and extent of each interest
- a description of the following relationships:

³¹ NGR, rr 16(4)(a).

³² NGR, rr 16(4)(b) and 21(8).

³³ NGR, rr 16(2) and 21(4).

- any relationship between the owner, operator and controller of the pipeline (or any 2 of them)
- any relationship between the owner, operator or controller of the pipeline and a user, supplier or end user in a location or geographical area served by the pipeline
- any relationship between the owner, operator or controller of the pipeline and the owner, operator or controller of any other pipeline serving any one or more of the same locations or the same geographical area
- an estimate of the annual cost to the service provider of regulation as a scheme pipeline and as a non-scheme pipeline
- **if we are conducting a review in response to an application for a scheme pipeline determination**, any other information that we consider to be relevant to the application ~~or proposal~~.

Compulsory notice under section 42 of the NGL

We may also issue a compulsory notice under section 42 of the NGL to obtain information and documents to assist us in conducting a form of regulation review. We will use section 42 notices if we are not able to obtain the relevant information under rule 16, or if we require documents.

A person must comply with the compulsory notice by the due date unless there is a reasonable excuse or a variation is granted. Penalties apply for non-compliance with a compulsory notice.

Further information and guidance about compulsory notices is available in [the AER's Compulsory Notice Guidelines](#).

2.1.1 Submissions

APGA submitted that it is not clear why the AER is proposing to use section 42 notices, and that they are 'unnecessarily punitive in compelling provision of information for a form of regulation review and do not provide an opportunity for stakeholders to provide comment on whether the notice is warranted'. It notes that general regulatory information orders under division 4 of the National Gas Law (NGL) do provide an opportunity for stakeholders to comment, and section 50 of the NGL requires the AER must consult on a regulatory information order before making an order. It submits that under division 4 the AER is required to consider matters relevant to a form of regulation review, and general regulatory information orders should be pursued before issuing a section 42 notice.

APA submitted that if the AER issues a compulsory notice to obtain information, a service provider should be given 20 business days to provide comments on a draft notice, consistent with the approach for regulatory information notices under section 46 of the NGL.

2.1.2 AER Response

We have decided to make the proposed amendments to the Guide, and not to include any additional amendments relating to consultation on a section 42 notice.

In relation to APGA's submissions, we do not consider that section 42 notices are 'punitive'. The AER is intending to use section 42 notices in form of regulation reviews to ensure that we are able to obtain information and documents necessary for us to make a robust and informed decision. Further, as outlined in the AER's [Compulsory notice guidelines](#) the AER

considers the burden on a notice recipient, including the time and cost burden.² We will balance that burden with the value of the information and documents sought.

In relation to the use of regulatory information notices or regulatory information orders under Chapter 2, Part 1, Division 4 of the NGL, we do not consider that these are well suited for the purposes of a form of regulation review. Regulatory information notices and orders are generally used to periodically obtain information (rather than documents), sometimes across multiple service providers, and/or require service providers to keep information in a form specified in the notice. However, as part of a form of regulation review, the AER will only seek information and documents from a single service provider about a single pipeline and is not likely to require the provision of ongoing information.

Finally, we have also decided not to set out in the Guide that the AER will provide 20 business days to consult on section 42 notices. There are no requirements as to the time that must be provided to consult on a section 42 notice under the NGL or NGR.

Where possible, the AER endeavours to consult with a service provider about the content of a section 42 notice before issuing that notice to the party. The time we provide for such consultation will depend on the circumstances. However, we consider a mandatory 20 day consultation period could affect the AER's ability to conduct a form of regulation review in a timely way, and will often not be necessary. For these reasons we have decided not to include a time for consultation on section 42 notices. This will allow us to consult on notices flexibly. For example, we may provide a shorter consultation period for notices which are simple, or where we have conducted a form of regulation review of a pipeline operated by the service provider previously.

2.2 Timing for making submissions

We have proposed to amend section 3.3.2 of the Guide to change the time the AER can invite submissions about an application for the AER to conduct a form of regulation review, or an AER-initiated review, as follows:

² See, Australian Energy Regulator, [AER Compulsory Notice Guidelines](#), January 2021, pp 6 – 8

3.3.2 Consultation process

We must follow the standard consultation procedures set out in the NGR when considering whether to make a form of regulation determination (as part of an AER-initiated review or following an application).³⁴ The following summarises the steps for a form of regulation review:³⁵

- We receive an application for a form of regulation determination or decide to commence an AER-initiated review.³⁶
- We provide the service provider with notice of the application or our decision to conduct an AER-initiated review.³⁷
- We will publish information about the application or AER-initiated review on our website, which describes the form of regulation determination being considered.³⁸ Stakeholders will be given **at least** 15 business days to make written submissions on whether or not we should make the determination.³⁹

³⁴ NGR, r 17(1).

³⁵ NGR, r 8.

³⁶ NGR, ~~r~~ 18(1) and 21(1).

³⁷ NGR, ~~r~~ 18(1), 21(2) and 21(3)(a).

³⁸ NGR, r 8(2)(a)(i).

³⁹ NGR, r 8(2)(a)(ii).

2.2.1 Submissions

APGA submitted that the proposed amendment provides an unacceptably short timeframe for stakeholder to provide written responses to a complex regulatory process, is inconsistent with a commitment to consult with stakeholders and may be inconsistent with the standard consultative procedure outlined in rule 8 of the National Gas Rules (NGR). APA similarly submitted that a 15 business days timeframe is too short, at that at least 30 business days should be provided.

APLNG notes that ‘at least 15 business days’ is the time frame provided for in rule 8 of the NGR, and it submits the AER should request a rule change as 15 business days is too short a period. APLNG considered that a longer period would improve the quality of feedback provided to the AER.

2.2.2 AER Response

When we conduct a form of regulation review (either following an application or an AER-initiated review), we must follow the standard consultative procedure set out in rule 8 of the NGR. Rule 8(2)(a) of the NGR provides that when dealing with a proposal, in this case the proposal is whether to make a form of regulation determination, the AER must publish a notice on its website:

- describing the proposal and giving the address of a website; and
- inviting written submissions on the proposal within 15 business days of the date of the notice.

As a result, under the NGR we must provide 15 business days to provide a submission, and not 15 business days as a minimum.

We recognise that 15 business days may be a short period for making submissions and in some circumstances, the AER may consider submissions received after the 15 business day consultation period has ended. When considering late submissions, we will assess any impacts to the overall time limit to make a decision on a form of regulation review. Where appropriate and permitted under the NGR, we may consider extending the overall time limit to make a decision. The AER may only extend the overall time limit where it involves questions of unusual complexity or difficulty, or the extension of time has become necessary because of circumstances beyond the AER's control.³ For applications for a scheme pipeline determination, an extension of the overall time limit is limited to a further period not exceeding 2 months.⁴

The AER also considers that there is a case for seeking a change to the NGR so that the AER can invite submissions for a longer time period.

2.3 Other issues

We also consulted on a number of other minor amendments to the Guide, including updating the National Gas Objective, and updating references to 'natural gas' to 'covered gas'. We did not receive any submissions on these issues and have decided to make these amendments.

2.3.1 Public forums

APA submitted that the Guide could be amended to include public forums in the consultation process. It suggests that public forums be held after submissions on the initial consultation paper and draft decisions close.

We agree that public forums can be a useful way to engage with stakeholders as part of regulatory processes. However, whether a public forum will be effective and useful depends on the regulatory process and the timing for the review. Therefore, while we will consider using public forums when we conduct form of regulation reviews, we do not think it is necessary to amend the guide to set out that we will hold forums for every review. This will ensure that we are able to maintain flexibility in the review process, and complete reviews in the time required.

³ NGR, r 12(2).

⁴ NGR, r 17(3).