

16 September 2024

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Dear Ms Park,

AER Consultation: Proposed draft AER Compliance Procedures and Guidelines for pipeline service providers (Annual Compliance Order) – Confidential Submission

[REDACTED]

[REDACTED] understands that the purpose of the *draft P&G* is to set out how audits are to be carried out both in relation to the auditing of information provided in response to the Annual Compliance Order (a type of general information order made under section 48(1)(b) of the NGL) and in relation to compliance audits that may be required under sections 64B and 65C of the NGL from time to time.

The existing regulatory reporting obligations on market participants are burdensome and the proposed Annual Compliance Order and further compliance obligations required by the draft P&G add another significant layer of regulatory reporting compliance burden and increases regulatory compliance cost to market participants. These compliance costs are likely to outweigh any public benefit that that could flow from the proposed draft P&G and ACO especially where pipeline services provided to third parties is only a very small part of usual business operations.

Additional wording to be included in section 2.4.18.

The draft P&G sets out the relevant provisions of the NGL and NGR which the Annual Compliance Order is relevant to. We suggest that section 2.4.18 that refers to access arrangements requires additional information to be included to more accurately reflect the provisions of the NGR.

Section 2.4.18 states:

“With the potential for certain service providers providing pipeline services, not being subject to full access arrangements under the NGL there is an increased obligation for certain service providers to maintain and publish access information on their websites. The purpose of mandating the public availability of such information is to assist users and potential users in negotiating contracts for the use of relevant pipeline services...”

To ensure the provisions of the NGR are reported accurately and are not inadvertently misleading, section 2.4.18 should also provide that a pipeline operator is not required to publish service and access information, standing terms, financial information and actual prices payable where a pipeline service provider has an exemption pursuant to Part 10 Subdivision 2 – section 102.

Therefore, we suggest a change be made to the wording in section 2.4.18 – by including an additional paragraph (noted in blue font below):

“With the potential for certain service providers providing pipeline services, not being subject to full access arrangements under the NGL there is an increased obligation for certain service providers to maintain and publish access information on their websites. The purpose of mandating the public availability of such information is to assist users and potential users in negotiating contracts for the use of relevant pipeline services.

However, it should be noted that a pipeline operator is not required to publish service and access information, standing terms, financial information and actual prices payable where a pipeline service provider has an exemption pursuant to Part 10 Subdivision 2 – section 102.

Efficient Information Collection

Section 3.5.1 provides that *"before seeking information through a regulatory information instrument the AER will consider the availability and suitability of any publicly available information, information that the AER has gathered through other regulatory functions and information available to the AER from other agencies such as the ACCC..."*

Industry participants currently report voluminous data and information to regulators and other government agencies including the AER, ACCC (though the Gas Inquiry and in relation to the Gas Market Code of Conduct), and AEMO (through Gas Bulletin board reporting, GSOO data requests). LNG producers are also required to make information available on their website in compliance with the mandatory Gas Market Code of Conduct and the Heads of Agreement. Gas suppliers have extensive record keeping obligations under the mandatory Gas Market Code which are monitored by the ACCC. The ACCC periodically collects data and information in respect of the Gas Market Code pursuant to s.53ZT Notices issued under the *Competition and Consumer Act 2010* (Cth) and as part of the Gas Inquiry pursuant to s.95ZK Notices also issued under that Act.

The existing reporting obligations are burdensome and the proposed Annual Compliance Order and further compliance obligations with the draft P&G add another significant layer of regulatory reporting compliance burden. This adds cost to pipeline service providers and, consequently, increases pipeline service tariffs.

Further the constant change in the regulatory landscape continues to discourage investment in gas developments and infrastructure which is needed to prevent the short-term gas supply shortfall identified by the ACCC in its latest report.

■ encourages the AER to work with the ACCC, AEMO, government and industry to harmonise regulatory data and information requests to reduce the regulatory compliance burden and costs that will ultimately impact the price of gas to consumers.

Annual Compliance Orders (ACO)

The Annual Compliance Order is used to monitor compliance with Chapter 4 of the NGL. Section 4 of the draft P&G is intended to provide guidance to service providers on how to respond to an ACO.

Pursuant to section 2.2.2 of the draft P&G guidance is provided on what a service provider is required to include in the *basis of preparation* (which must be described in the ACO).

The draft guidelines proposes that the following be included in the basis of preparation:

- Policy documents or operating instructions used to direct the compilation and preparation of information to respond to the ACO
- Description of sources of information
- List of assumptions and methodologies
- Identify actual and estimated data and basis for information,
- Changes in information and methodologies
- Relevant attachments including links to information
- *Explanation, if considered necessary, of how the attachments provide the information and relate to and satisfy the requirements of the relevant section of the NGL or rule in the NGR*
- *Explanation, if considered necessary, of relevant internal procedures that provide assurance that the information provided is complete and correct.*

(This is not an exhaustive list)

Based on the current draft guidelines, service providers will be required to provide a substantial amount of documentation and information to respond to the ACO and we raise no issue with this point. However, we take issue with the two “guidelines” that we have noted in italics. The provision of information is sufficient for the AER to discharge its duty to monitor compliance. In our view, an explanation as to how and why documents establish compliance with the ACO and Chapter 4 of the NGL should only arise in an audit process or where a breach of the NGL and NGR has been identified or, in the event, there is a significant risk of such a breach occurring which will have a significant impact on market participants.

We suggest that the requirement to provide explanations of processes, procedures, and assurance should be removed from the basis of preparation. If the AER is unable to accept this submission, then we recommend the inclusion of “if considered necessary” which imports a reasonable discretion on the participant responding to an ACO.

Audit Provisions

a. Placing limits on the use of the audit powers

Section 5 of the draft P&G provides that “*compliance audits are a valuable tool for assessing the compliance practices, systems and procedures a service provider uses to monitor, identify and report on potential breaches of key provisions in the NGL and NGR relating to efficiency and efficacy of pipeline services*”. Conceptually, ■ does not take issue with this statement and, accordingly, the inclusion of an audit process.

However, the audit provisions in section 5 provide the AER with an inordinately wide scope in compelling an audit and then the use of that audit. We do object to the power to have a third party (auditor) *investigate potential non-compliances* with the NGR and NGL, with the cost seemingly to be borne by the service provider. This misconceives the purpose of an audit and, in fact, is a newly created “investigative power” disguised as an “audit”.

The purpose of an audit is for an independent third party to form an opinion on a set of records and to confirm their regularity (and, if necessary, recommend process improvements). If they detect irregularities, then the auditor may make procedural findings with suggestions for compliance improvement. They may also identify more material issues and report on those matters.

Importantly, the purpose of an audit is not to investigate potential non-compliances. The proposed power for the AER to determine the scope must be limited and should not constitute an investigation or quasi-investigation. In the event that the AER reasonably believes that there has been a non-compliance, it should use its existing powers to investigate the matter. Alternatively, if the AER determines that its current powers are insufficient, then it should draft a separate “investigations” section in the draft P&G.

Further, where the audit is used to audit the information provided in response to the ACO, then a question arises as to whether that is consistent with the legislative regime. Section 48(3) of the NGL relevantly provides that a general information order must not be made, solely for the purpose of investigating breaches or possible breaches of provisions of the NGL and NGR, including offences against the NGL.

Chapter 5 of the *draft P&G* suggests that it is focussed on compliance audits under sections 64B and 64C of the NGL. However, it appears that this would also apply to the audit of information provided in response to the ACO. While this is expressly permitted by section 55(e) of the NGL, the fact that the audit process is being used to investigate non-compliances suggests that the Order is, in fact, for a predominant (if not sole) purpose of investigating breaches.

While the AER might argue that is not strictly prohibited, ■ does not believe that this is consistent with the legislative purpose of general information orders. We are very concerned with the conflation of an audit power with the AER’s investigative and enforcement function. The exercise of the audit function must be clearly defined as to scope, not overly used and limited to a proper purpose. The broader disclosure power should be deleted as a clear overreach into the enforcement function.

b. Providing a panel of auditors should be considered

Section 5.4 provides for the use of third-party auditors to carry out an audit. As it is proposed under the draft P&G that the cost of the audit can be met by the service provider, the draft P&G should allow for the AER to submit a panel of auditors and for the parties to select an auditor from that panel.

c. Protecting the confidentiality of documents and information provided to an auditor

The draft P&G also provides that the service provider must take reasonable steps to ensure the auditor has access to people, relevant information and records, complaints register, training and induction programs, documents prepared by consultants to carry out the services, including policies and procedures.

The documents and records required to be provided to an auditor must be limited by the scope of the audit. The scope of the audit must be limited and not provide the auditor with the ability to have an unfettered discretion (take a scatter gun approach) when requesting documents and information from the service provider. To do otherwise is to turn the audit into an investigation which would be an improper use of an audit.

Further, much of the information and documents provided to an auditor during the audit process are likely to be commercially and/or operationally sensitive. Therefore, the draft P&G must include provisions for auditors to enter into confidentiality agreements and/or place an obligation on auditors to keep confidential all information they are provided with in conducting their audit. Only the findings of the audit should be disclosed to the AER.

d. A summary of the audit findings should not be published

We also note the draft P&G provides that the AER will publish a summary of outcomes from an audit. ■ strongly objects to this measure. This again is the improper use of an audit power and implies an outcome from some form of enforcement when such is not the case.

If the AER is seeking to increase its enforcement powers, then it should be transparent and draft an appropriate section in the draft P&G.