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Rowena Park
General Manager, Compliance and Enforcement
Australian Energy Regulator
GPO Box 3131
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Dear Rowena,

AER Compliance Procedures and Guidelines for gas pipeline service providers - Consultation Paper

Jemena welcomes the opportunity to make this submission in response to the Australian Energy Regulator's (AER) consultation paper on [REDACTED]

[REDACTED] owns and operates a scheme distribution pipeline (Jemena Gas Networks (NSW) Ltd) as well as a number of non-scheme transmission pipelines throughout eastern and northern Australia which would be subject to the proposed Procedures and Guidelines.

We appreciate the opportunity to engage constructively with the AER's team throughout this consultation to date. **Attachment A** to this letter includes a table outlining our feedback on specific aspects of the proposed Procedures and Guidelines. For convenience, the table in Attachment A is divided into substantive and administrative items, with bold text used for emphasis within the paragraph excerpts. We look forward to further engagement with the AER on these and other matters.

Should you have any questions regarding this submission, please contact Catherine Chen, Regulatory Compliance Manager, at [REDACTED].

Yours Sincerely

[REDACTED]
Ana Dijanosic
General Manager Regulation

Attachment A – Feedback on proposed Procedures and Guidelines

Procedures and Guideline Reference	Paragraph excerpts	Jemena Feedback
Substantive items		
3.2.5	The NGL refers to general regulatory information orders, regulatory information notices and price information orders as ‘regulatory information instruments’.	Section 3 is focused on the general regulatory information orders and regulatory information notices without much elaboration on price information orders. We would like to seek further clarity from the AER in terms of the information collection process under ‘price information order’. For example, whether the process to obtain information under such order is the same as those under a general regulatory information order or regulatory information notice.
3.3.7	When using a general regulatory information order, the AER is not precluded from supplementing information collected from particular service providers by serving a regulatory information notice or using the general information gathering powers under s. 42 of the NGL .	<p>We would like to seek further clarity from the AER regarding the specific circumstances under which the AER would use regulatory information instruments including general regulatory information orders, regulatory information notices and price information orders, as opposed to the general information gathering powers under s. 42 of the NGL.</p> <p>Specifically, it would be useful for stakeholders if the AER outlined any differences between the notice types and why the use of one would be more desirable in some circumstances. For example, do they have different consultation process, penalties for non-compliance or time period for response etc?</p>
3.6.1	In the circumstances that a potential breach or issue of noncompliance with the NGL is identified in the context of a regulatory information instrument the AER will provide separate written notification of the nature of the breach identified and the relevant course of action that is to be pursued. At this stage, a service provider will be provided with an opportunity to provide a response.	<p>It would be helpful if the AER clarifies whether it is referring to an identified breach of the NGL based on a response to a regulatory information instrument, or a breach of the NGL arising from a non-compliant or incomplete response to the regulatory information instrument.</p> <p>If it is the former, can the AER please provide guidance on what it might do in circumstances where it deems the information requested under a regulatory information instrument incomplete or inconsistent with the instructions of a regulatory information instrument? Would it provide any written notice about its suspicion and give the service provider an opportunity to reply?</p>
3.7.8	An application for exemption from providing the information under the ACO must be provided in writing. A pro-forma of the exemption application form that must be used is provided in Appendix B	The word ‘the ACO’ should be replaced with ‘a general regulatory information order’.

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		We would like to see clarity from the AER whether exemptions granted are specifically tied to a general regulatory information order. If an order is amended or a new order is published, would the exempted service provider need to reapply the exemption?
3.7.11	From time-to-time, the AER may also need to revisit its decision as to the nature of the exemption and who is required to report under the general regulatory information order.	What is the process if the AER decides to revoke or vary an exemption?
4.2.3	Further, section 4.2 of the ACO instrument states that the basis of preparation must: a) describe the source of the information provided b) document the methodology (if any) used to transform the source data to meet the requirements of Order c) list the assumptions used in applying the methodology noted under (b) d) classify the information as actual information or estimated information or a NULL response e) where estimated information is provided: (i) explain why actual information cannot be provided; and (ii) why the estimated information provided is the Service Providers best estimate f) where a NULL response is provided explain why the information requirement is not relevant to the Service Provider, and g) explain any changes in the information sources or methodology that have occurred in the reporting period.	Given the nature of the questions in the ACO, which often requires the service provider to confirm or deny a fact, the requirements specified for the basis of preparation with respect to each question, as stipulated in section 4.2 of the ACO, appear not fit for purpose. For example, the response to many of the questions in the ACO reporting template depends on the service provider’s staff knowledge of whether specific incidents have occurred or particular obligations have been discharged by the service provider. There is no underlying source data or methodology per se, and it is not relevant to classify the information as actual or estimated information. We note that the examples provided in the Procedures and Guidelines are relatively high-level, and that some of the requirements stipulated under section 4.2 of the ACO seem relevant only in circumstances where a service provider needs to provide a numerical or data response.
4.2.9	If no interconnection request is received during the compliance period to which the response applies, a service provider may provide a NULL response and explain that this item is not applicable for that reason. This information, along with the	The guidance provided under paragraph 4.2.9 is somewhat confusing. As discussed above, the requirements outlined in section 4.2 of the ACO are unlikely to be applicable to a question of fact on whether an interconnection

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	<p>information outlined in section 4.2 of the ACO instrument, will allow the AER to better assess the compliance in line with section 4.1 of the ACO instrument.</p> <p>Example: a service provider producing a response to item 7.1 may include a links to or a description of where each of the four categories of information specified in r. 101A of the NGR are published on their website within their basis of preparation. Responses to this item may also include any basis of preparation templates prepared in relation to the Pipeline Information Disclosure Guidelines as attachments.</p>	<p>request was received or on what grounds an interconnection request was refused.</p> <p>Further, the example provided under paragraph 4.2.9 discusses how a service provider may explain the basis of preparation for item 7.1 by providing supporting documents or a website, which is irrelevant to item 4.1 (i.e. interconnection requests) and does not match all the information requirements outlined in section 4.2 of the ACO.</p>
4.2.19	<p>If the list of associates provided in response to item 8.1 clearly identifies all associates that are directly involved in the sale, marketing or advertising of pipeline services, then a service provider may refer to this list rather than reproducing the entire list in response to item 9.1.</p>	<p>It would be helpful if the AER can clarify whether the intent of item 9.1 is to capture the identity of the Service Provider’s associates that undertake a related business (as opposed to all associates, or associates that undertake a pipeline service) and are involved in the sale, marketing or advertising of the Service Provider’s pipeline services (as opposed to the associates’ pipeline services).</p> <p>Item 9.1, as it is currently drafted in the ACO Reporting Template, is likely to yield the same response as item 8.2 which asks for the identity of all associates of the Service Provider that provides a pipeline service. Such response would not provide any insight on whether, or the extent to which, marketing staff is shared between a Service Provider and any associates that undertake a related business.</p>
4.2.20	<p>In relation to item 16.3, a service provider is only required to include contracts that start within the relevant compliance period (as defined in section 4.1 above) rather than all current contracts.</p>	<p>We would appreciate it if the AER could clarify whether the intention of this requirement is for the service provider to produce all access contracts entered into during the relevant compliance period, including contracts that were renewed or varied even if they do not result in access granted to a new customer or changes to non-price terms?</p> <p>It’s worth noting that the most typical contract variations relate to pricing, delivery points and quantity of gas contracted and these variations are captured in the Actual Prices Payable Information Reports published by non-scheme pipeline</p>

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		<p>service providers under Part 10 of the NGR. Further, the Actual Prices Payable Information Reports also contain information about whether each pipeline service is provided on the same or substantially the same non-price terms as the standard terms and conditions that the service provider publishes.</p> <p>As raised in Jemena’s submission to the ACO consultation process, it would be helpful if the AER can outline how it intends to use the access contracts to assess the service provider’s compliance with the access negotiation obligations under NGL Chapter 4, Part 3 and NGR Part 11—which relate to conduct during the access request/access offer process (prior to entering into an access contract).</p> <p>In its final decision for the ACO, the AER states that the provision of access contracts would allow it to assess the compliance of service providers with aspects of access contract that are not included in the reference terms published. We would appreciate it if the AER could explain what aspects of access contract it is referring to, and how the AER may draw inferences from the terms and conditions in an access contract to assess the service provider’s conduct during the access request/offer process?</p> <p>Also, access contracts are generally required to be kept confidential unless the service provider is compelled by law to produce them. Given the sensitive nature and the potential number of access contracts that are required to be submitted, we would appreciate it if the AER could outline in the Procedures and Guidelines the procedures or options available for a service provider to share files in a safe and secured manner (other than via emails).</p>
Administrative/editorial items		
2.4.11	<p>An additional requirement in the structural and operational separation provisions is that related businesses should not contract with each other on terms that are different to those that would be entered into with unrelated businesses. Associate contracts between related business should be neither anti-competitive in effect nor be on terms that are different to entities that are</p>	<p>The language in paragraph 2.4.11 could improve in clarity to make clear that the obligations rest on the service providers, rather than ‘related businesses’ generally. Also, the relevant law provisions require the terms in an associate contract to be no different to what would be offered if the associate was unrelated, not that the terms offered to a related associate must be the same as an unrelated business. There could be legitimate reasons why terms offered to an associate at arm’s length could differ from an unrelated business, such as differences in contract term or quantity in gas contracted.</p>

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	<p>unrelated unless approved by the AER under r. 32 of the NGR (ss. 147–148 NGL).</p>	
2.6		<p>Section 2.6 ‘Our approach to noncompliance’ seems redundant given Section 3.6 sets out the approach to noncompliance in relation to regulatory information instruments.</p>
3.2.4	<p>In circumstances where information is not forthcoming or is required to be complemented by a targeted and specific request, the NGL provides powers to enable us to compel parties to provide information.</p>	<p>While it is reasonable for the AER to resort to the compulsory information powers if information is not forthcoming, it is not apparent why the AER cannot rely on voluntary information requests for a targeted and specific request. Perhaps, a better justification for the AER’s use of compulsory information gathering powers is where the requested information is likely to be confidential or where there is a level of details or a degree of assurance that the AER needs.</p>
3.2.4	<p>To support our functions, we have information gathering powers, including:</p> <ul style="list-style-type: none"> • market monitoring information notices and orders (s. 30AL NGL) • general information gathering powers (s. 42 NGL) • general regulatory information order (s. 48(1)(b) NGL), which may require person(s) to which it applies to do either or both of the following 	<p>It may be clearer to specify “notices issued pursuant to the AER’s general information gathering power (s 42 NGL)” (since all the other dot points refer to the instruments, rather than the power conferred under the NGL)</p> <p>It may be clearer to use the phrase ‘a class of service providers or related providers’, rather than ‘person(s)’ to clarify that the order does not apply to a natural person.</p>
3.3.8	<p>A regulatory information notice or general regulatory information order can require the service provider, or a related provider, named in the notice to:</p> <ul style="list-style-type: none"> • to provide information to the AER, and • prepare, maintain or keep information specified in the notice in a manner and form specified. 	<p>This paragraph repeats the information provided under paragraph 3.2.4.</p> <p>The bolded text ‘notice’ should be replaced by ‘regulatory information instrument’ or ‘instrument’, to encompass both the regulatory information notice and general regulatory information order.</p>
3.3.12	<p>A general regulatory information order may also specify that the information be verified by an officer by way of a statutory declaration or be audited by a class of person specified in the instrument before it is provided to the AER at the expense of the person</p>	<p>This paragraph repeats the last two dot points of the preceding paragraph (3.3.11).</p>

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	to whom the order applies (ss. 55(d) and 55(e) NGL).	
3.3.23	For an urgent regulatory information notice the service provider is allowed at least five but no more than 10 business days, and for all other notices at least 20 business days, to make written representations.	It would be helpful if the AER clarifies in which jurisdiction the number of business day would be counted?
3.3.24	The AER will endeavour to notify service providers subject to a general regulatory information around two months prior to the date that the requested information is due to be provided.	<p>With respect to the bolded text, does the AER mean ‘general regulatory information order’, ‘regulatory information notice’ or both?</p> <p>We would like to seek clarification from the AER on whether the same timeframe applies for notifying a specific service provider subject to a regulatory information notice.</p>
3.5.2	Additionally, we will consider the timeframes of existing information collection instruments when setting the timeframe of a general regulatory instrument .	‘General regulatory instrument’ is not a defined term. Does the AER mean ‘regulatory information instrument’ ?
3.6.7	The form in which information needs to be provided to the AER subject to a general regulatory information order is stipulated in the order itself.	This sentence seems to be more appropriate under the heading ‘form and content’, following paragraph 3.3.9.
3.6.8	The AER expects that service providers or related providers will provide information to the AER in accordance with section 1.4.4 and ss. 57A and 57B of the NGL.	The reference to ‘section 1.4.4’ appears incorrect.
3.6.9	The AER may use information provided under its general information gathering powers or under a regulatory information instrument for any purpose connected with the performance and exercise of its function or power (s. 66 NGL).	For the bolded text, it may be clearer to use the term ‘a notice under section 42 of the NGL (which gives the AER general information gathering powers)’.
3.6.11	As noted in section 1.4.3 above, the AER may disclose information gathered using a general regulatory information order with other regulators.	The reference seems to be ‘paragraph 1.6.3’ instead.

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3.6.12	In complying with a regulatory information instrument, a person cannot refuse to comply with the order, on the ground of a duty of confidence. A person does not incur a liability for breach of confidence, breach of contract or any other civil wrong by complying with the order (s. 61 NGL).	The words ‘the order’ should be replaced with ‘a regulatory information instrument’ to include the regulatory information notice as well.
3.6.13	A person, however, is not required to provide the AER information in response to a general regulatory information instrument that is subject to legal professional privilege, or provide a document that is the subject of legal professional privilege (s. 62 NGL).	‘General regulatory information instrument’ is not a defined term. The term should be ‘regulatory information instrument’.
3.7.1	As outlined in section 1.3 above, a general regulatory information order applies to specified class of service providers of scheme and non-scheme pipelines, and may apply to a related provider.	The reference to section 1.3 appears incorrect.
4.2.14	Table 1 under paragraph 4.2.14 of the draft Procedures and Guidelines includes an example where NULL can be provided as a response under the “Attachment provided” column.	‘NULL’ is not available in the dropdown option for the ‘Attachment provided’ field in the ACO reporting template. We would like to seek clarity on whether a ‘No’ response is sufficient or request the AER to include a “NULL” in the dropdown option.
4.2.16	As noted in section 4.2.2 , responses to item 1.3 must identify all relevant pipelines that the service provider is provided a response for.	The correct reference seems to be 4.2.27 (which comes after paragraph 4.2.16). There is a typo for the bolded text ‘provided’, it should be ‘providing’.
5.5.5	If a mid-term progress report is required under the Terms of Reference, the AER may give the service provider feedback on the mid-term progress report, including any failure to address the Terms of Reference and/or other identified deficiencies of the audit process to date.	We would like to seek a definition or description for the ‘mid-term progress report’ in the Procedures and Guidelines. What does it entail?
5.7.10	The regulated entity must provide a copy of the final audit report to the AER within 20 business days of the conclusion of the audit, or as otherwise agreed with the AER. ⁵⁸	Footnote 58 appears incorrect – s64B(3) of the NGL does not exist. Does the production of the final audit report by the relevant auditor considered as the conclusion of the audit?

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5.7.10-5.7.11		Does the 'regulated entity' referred to in paragraph 5.7.10 and the 'regulatory entity' referred to in paragraph 5.7.11 have the same meaning as a 'Service Provider' ? It would be good to refer to 'Service Provider' for consistency.
5.8.1	In order to promote transparency, the AER will publish a summary of outcomes of each audit carried out pursuant to ss. 64B or 64C of the NGL on its website at the conclusion of the audit process.	Repetition – paragraph 5.8.1 repeats paragraph 5.7.14.
5.9.1	After the final audit report following an audit carried out pursuant to ss. 64B or 64C of the NGL , we will seek a response from the relevant service provider in relation to the findings of the report. This may include any proposed corrective actions and timeframes to rectify any noncompliance	Paragraph 5.7.12 states that a final audit report produced in an audit pursuant to s 64C should be accompanied by a letter from the service provider about proposed corrective actions etc. Therefore, it would be unnecessary for the AER to seek another response from the service provider about proposed corrective actions if this is already addressed in the letter accompanying the final audit report. Therefore paragraph 5.9.1 should refer to s64B only, where the AER will need to seek a response from the service provider after it publishes its final audit report.
Appendix B		'General regulator information order' – there is a misspelling in the pro-forma in Appendix B.
Appendix C		'3' is missing in the numbering of steps.
Appendix C	The AER can choose to use its powers under section 64C of the NGL	The reference to section 64C of the NGL appears incorrect.