

Our Ref: D21/12651064

14 October 2021

Michele Johnstone  
Department of Industry, Science, Energy and Resources  
Commonwealth Gas Taskforce  
GPO Box 2013  
Canberra ACT 2601

Dear Mr Johnstone

**Re: Improving gas pipeline regulation – Proposed legal package to give effect to the Decision Regulation Impact Statement**

We welcome the opportunity to comment on the Energy Senior Official's consultation paper on the gas pipeline regulation reforms draft legal package. The consultation paper sets out the broad reform objectives as providing for the "implementation of a simpler regulatory framework that will continue to support the safe, reliable and efficient use of and investment in pipelines."<sup>1</sup> We are supportive of the objective to simplify the regulatory framework and better promote competition and fair access to gas pipelines.


A new framework should seek to ensure the best outcome for operators, shippers and consumers, while providing the regulator with the required toolkit to operate in the long-term interests of consumers. Our submission therefore is designed to articulate our views on whether the proposed legal package allows us to regulate gas pipelines effectively, and to enforce compliance with the relevant Law and Rules.

We have completed the stakeholder feedback template at [Attachment A](#).

We are supportive of the objectives and direction of the reforms and look forward to continuing to be engaged in this process. However, implementing the new requirements will provide the AER with some challenges and we would welcome the opportunity to work closely with DISER to ensure that we can manage effectively the making of scheme determinations, scheme pipeline elections and initial access arrangement determinations.

We would be happy to discuss any of the above points in more detail. If you have any questions about our submission, please contact [REDACTED]

Yours sincerely



James Cox  
Deputy Chair  
Australian Energy Regulator

Sent by email on: 14.10.2021

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<sup>1</sup> Consultation paper, p. 1.

## Attachment A

## Stakeholder feedback template

### Submission from The Australian Energy Regulator

The template below has been developed to enable stakeholders to provide feedback on the draft amendments to the NGL, Regulations and NGR as per the consultation paper. Energy Senior Officials strongly encourage stakeholders to use this template, so that it can have due regard to the views expressed by stakeholders on each issue.

#### 1. Questions for stakeholders

Number	Question	Response
1 Page 22	Do you agree with the proposal to allow Chapter 4 of the NGL, or particular provisions in this chapter, to be applied to a person other than a service provider if prescribed in Regulations? If not, please explain why not.	We support the proposal.
2 Page 22	Do you think it is necessary to prescribe any persons other than a service provider in the Regulations at the commencement of the legal package, or should it be assessed at a later stage? If you think the Regulations should prescribe any persons other than a service provider at the commencement of the legal package, please explain why.	It is appropriate to assess, as a priority, whether to prescribe persons currently holding a significant proportion of nameplate capacity on a pipeline.
3 Page 22	Do you agree with the proposal to replace the voluntary access arrangement mechanism with a scheme election option? If not, please explain why not.	<p>We agree that it is beneficial to simplify this procedure where full regulation is warranted.</p> <p>However, we recommend revising the drafting to give the AER the discretion to decide not to accept a scheme pipeline election, having regard to the principles governing the making of a particular determination (NGL s. 109).</p> <p>The decision to make a pipeline subject to full regulation should be consistent with the idea that it is more likely to deliver the best outcomes for consumers. Service providers may have reasons to elect to become a scheme pipeline that are inconsistent with the best outcomes for consumers. It may then be useful for the regulator to consider whether full regulation is in the best interests of consumers. For example, if gas markets decline substantially in the future, a service provider may elect a pipeline if they believe full regulation will offer a more reliable return on investment. For these reasons, we consider that the regulator should be the final arbiter on which pipelines should be subject to full regulation.</p>

Number	Question	Response
		We have made further comments about scheme pipeline elections in table 2.
4 Page 25	Do you agree with the proposal to allow the relevant regulator to determine that a pipeline should be subject to full regulation if the service provider has not provided any of the required information in a timely manner and to the reasonable satisfaction of the relevant regulator? If not, please explain why not.	We support the proposal.
5 Page 27	Do you agree with the proposal to employ the same test for form of regulation and greenfields incentive determinations, but modified in the manner set out above?	We support the proposal.
6 Page 28	Do you agree with the proposal to remove the 15-year price regulation exemption and to treat all pipelines in the same manner for the purposes of any greenfields incentive? If not, please explain why not.	We support the proposal.
7 Page 30	Do you agree with the proposal to require expansions of non-scheme pipelines to be treated as part of the same pipeline for the purposes of the NGL and NGR? If not, please explain why not.	We support the proposal.
8 Page 32	Do you agree with the proposed changes to the pipeline classification and reclassification mechanism? If not, please explain why not.	<p>We support the proposal. However, it may be appropriate to also give the AER powers to reclassify a pipeline on its own initiative, because:</p> <ul style="list-style-type: none"> <li>• of the incentives of service providers to classify in a particular way after the introduction of the capacity trading reforms, as noted in the consultation paper (p. 30), or conversely their disincentive to apply to reclassify</li> <li>• circumstances may have changed to support a reclassification, but the service provider has not applied for a reclassification.</li> </ul>
9 Page 34	<p>Rule 109 currently prohibits a service provider from making it a condition of the provision of a particular pipeline service that the prospective user accept a non-gratuitous service unless the bundling of services is reasonably necessary. Do you:</p> <p>(a) Agree with the scope of this prohibition, which has been adopted in the draft legal package and only applies to the bundling of non-gratuitous services?</p> <p>(b) Think the prohibition should apply more broadly to any bundling of services (i.e. gratuitous and non-gratuitous services) unless it is reasonably necessary?</p>	<p>We consider the prohibition should apply more broadly to any bundling of services (i.e. gratuitous and non-gratuitous services). This broader application will minimise any potential for anti-competitive effects or a possible evasion mechanism (loophole) if gratuitous services are not prohibited under this rule.</p> <p>We recommend that r. 109 be changed from “must not make it a condition...[to] accept another non-gratuitous service” to “must not make it a condition...[to] accept another service”.</p>
10 Page 35	Do you think s. 134 of the NGL (renumbered s. 148E), which imposes obligations on producers in relation to the supply and haulage of natural	We do not have a view.

Number	Question	Response
	gas using scheme pipelines, should be retained in the regulatory framework or removed? Please explain your response to this question.	
11 Page 35	<p>If you think the obligation (refer to question 10) should be retained in the NGL, do you think:</p> <p>a. it should continue to just apply to producers, or do you think the obligation should extend to retailers? Please explain your response to this question.</p> <p>b. it should continue to just apply to scheme pipelines, or do you think the obligation should extend to non-scheme pipelines? Please explain your response to this question.</p>	We do not have a view.
12 Page 38	<p>Do you agree with the proposed interconnection requirements, or are there:</p> <ul style="list-style-type: none"> <li>- other requirements that you think should be specified in the NGR?</li> <li>- some requirements listed in section 4.2 that you think should not be specified in the NGR?</li> </ul> <p>If you think the proposed interconnection requirements need to be amended, please explain why you think this is required.</p>	We support the changes as proposed.
13 Page 40	Do you agree with the proposal to limit the prohibition on cross-subsidising the development of new capacity to transmission pipelines operating under the contract carriage model? If not, please explain why not.	We support the proposal.
14 Page 40	Do you agree with the proposal to require the dispute resolution body in a scheme pipeline access dispute and the arbitrator in a non-scheme pipeline access dispute to (where relevant) give effect to the prohibition on cross-subsidising the development of new capacity in their access determinations?	We support the proposal.
15 Page 45	Do you agree with the proposed cost allocation principles in the draft rules? If not, please explain why not.	We support the proposal.
16 Page 45	Are the proposed cost allocation principles likely to conflict in any way with the principles applying to scheme pipelines in Part 9 of the NGR? If so, please explain in what way they conflict and how the conflicts could be resolved.	We have not identified any conflict.

Number	Question	Response
<p>17 Page 47</p>	<p>Do you agree with the proposal to require service providers to publish the following non-price terms and conditions alongside the individual prices paid by shippers:</p> <ul style="list-style-type: none"> <li>(i) the date the trade was entered into and the service term;</li> <li>(ii) the type of service provided and the service priority (e.g. firm, as available or interruptible);</li> <li>(iii) the receipt and delivery points at or between which the service is provided and in the case of a forward haul or backhaul service, the direction of the service;</li> <li>(iv) the contracted quantities, expressed as a maximum daily quantity (in GJ/day) and maximum hourly quantity (in GJ/hour);</li> <li>(v) the price escalation mechanism;</li> <li>(vi) whether or not the transaction is on the same or substantially the same terms as the pipeline's standard terms for that service; and</li> <li>(vii) the imbalance and overrun allowance associated with the service?</li> </ul> <p>If you do not agree with this proposal because you think there are:</p> <ul style="list-style-type: none"> <li>a other non-price terms and conditions or information that should also be reported (e.g. other non- liability caps, gas specification, higher heating value requirements etc), please identify what those other non-price terms and conditions are and why you think they should be reported; and/or</li> <li>b some non-price terms and conditions listed in (i)-(vii) that should not be reported, please identify what those non-price terms and conditions are and why you think they should not be reported.</li> </ul>	<p>We support the proposal.</p>
<p>18 Page 52</p>	<p>In relation to past capital contributions, do you:</p> <ul style="list-style-type: none"> <li>(a) Agree with the proposal to extend the requirement to consider past capital contributions to non-scheme pipelines? If not, please explain why not.</li> <li>(b) Think the requirement to consider past capital contributions should only apply to contributions of capital by the user to fund installations or the construction of new facilities, or should it also apply to contributions to the original construction of the pipeline? Please explain your response.</li> <li>(c) Think the extent to which a party has fully recouped past capital contributions should be taken into account by the relevant adjudicator when making an access determination?</li> </ul>	<ul style="list-style-type: none"> <li>a) We agree with this proposal.</li> <li>b) We consider that it should also apply to contributions to the original construction of the pipeline. This is because the same basic principles that the dispute resolution body should have regard to are equally applicable for capital contributions toward the construction of new facilities or for the original construction of the pipeline.</li> <li>c) Yes.</li> </ul>

Number	Question	Response
19 Page 52	Do you agree with the proposal to extend the safety of operation provisions to non-scheme pipelines? If not, please explain why not.	We support the proposal.
20 Page 56	Do you agree with the proposed definition of a small shipper? If not, please explain why you think this threshold is not appropriate and set out the alternative definition you think should be employed.	We support the proposal.
21 Page 56	Do you agree with the proposal to accord small shippers that are using either a scheme or non-scheme pipeline the option to elect to have a dispute mediated by a regulator appointed mediator? If not, please explain why you think the extension of this option to scheme pipelines should not occur.	We support the proposal.
22 Page 58	Do you agree with the proposed approach to each of the transitional arrangements set out in Table 9.1? If not, please explain why not.	We support the proposal.
23 Page 58	Are there any other transitional arrangements that you think need to be provided for in the NGL or NGR? If so, please explain what they are and why they are required.	No.
24 Page 58	Do you agree with the proposal to treat expansions that do not currently form part of a scheme pipelines that is subject to full regulation as part of the scheme pipeline from the commencement of the new package and to be rolled into the access arrangement at the next access arrangement review? If not, please explain why not.	<p>We support the proposal.</p> <p>We note that this change was in principle agreed to by Energy Ministers on 16 August 2018, but was not implemented in AEMC's Rule Determination (14 March 2019) because of the required legislative change.</p> <p>We also note that in our previous submission (AER, <i>Submission – Draft Report – Review into the scope of economic regulation applied to covered pipelines</i>, March 2018, p. 7) we said:</p> <p>“We support the AEMC's recommendations that all existing and future expansions to a covered pipeline be included in the access arrangement, and that extensions be treated on a case-by-case basis.”</p>
25 Page 58	Are you aware of any transitional arrangements that would need to be provided for to account for similar examples under the regulatory framework?	No.
26 Page 68	Do you agree with the proposal to remove the scheme pipeline grandfathering arrangement for contracts that were in force prior to 30 March 1995? If not, please explain why not.	We support the proposal.

Number	Question	Response
<p>27 Page 77</p>	<p>Do you agree with the proposal to require the following non-price terms and conditions to be published by Part 18A facility service providers alongside the individual price information?</p> <ul style="list-style-type: none"> <li>- the facility by means of which the service is provided;</li> <li>- the date the contract was entered into or varied and the service term (start and end dates);</li> <li>- the type of service provided (for example, a storage service, compression service) and the priority given to the pipeline service (such as firm, as available or interruptible);</li> <li>- the contracted quantity, which for: <ul style="list-style-type: none"> <li>– a compression service facility should be the maximum daily quantity (in GJ/day);</li> <li>– a storage facility should be: <ul style="list-style-type: none"> <li>• the storage capacity the subject of the transaction (in GJ); and</li> <li>• where relevant, the injection and withdrawal capacity, expressed as a maximum daily quantity or MDQ (in GJ/day);</li> </ul> </li> </ul> </li> <li>- whether the service is provided on the same or substantially the same non-price terms as those set out in the standing terms published by the service provider;</li> <li>- the price paid for the service as specified in the contract (if these prices are not expressed on a \$/GJ/day or \$/GJ basis, service providers will also be required to publish the price converted to such a basis together with an explanation as to how the conversion was made);</li> <li>- the price structure applicable to the service (for example, whether it is a fixed price or a variable price or a combination of the two); and</li> <li>- any price escalation mechanism applicable to the price paid for the service.</li> </ul> <p>If you do not agree with this proposal because you think there are:</p> <p>a) other non-price terms and conditions or information that should also be reported, please identify what those other non-price terms and conditions are and why you think they should be reported; and/or</p>	<p>We support the proposal. However, the reference to 'price paid' could be clarified to 'actual prices paid (or payable, if not already paid)' – please see comment on rule 101E(1)(k) below (in relation to pipelines).</p>

Number	Question	Response
	b) some non-price terms and conditions that should not be reported, please identify what those non-price terms and conditions are and why you think they should not be reported.	
28 Page 77	Do you agree with the proposal to align the requirements for the standing terms with those that will apply to pipeline service providers? If not, please explain why not.	We support the proposal.

## 2. Feedback on proposed changes

Section	Issue	Feedback on proposed changes to the NGL / NGR / Regulations
NGR rr. 17, 19, 22, 28 and others	Managing the timing of regulatory processes relating to scheme pipeline (and related) determinations	<p>We have concerns about the practicalities of managing our new obligations, particularly with respect to the timing of making scheme determinations, scheme pipeline elections and approving access arrangements for pipelines that become scheme pipelines as a result of the new mechanisms established by the proposed NGL amendments. We anticipate that, in the short to medium term, there will be a surge in scheme pipeline applications from third parties. To help us make effective determinations, we recommend both proactive and reactive mechanisms to manage this appropriately.</p> <p>We also observe that the timeframes prescribed in the Rules (including the standard consultative procedures, and decisions to which the SCP applies), offer too little flexibility, and increase the risk that decisions will not meet the NGO to the greatest extent, particularly cases where we are making multiple determinations or access arrangement decisions concurrently. Compared with the current arrangements with the NCC, we note the AER will be approaching its scheme determination decisions with fresh eyes, and that the NCC is not responsible for approving access arrangements. We also note that the AER has different decision-making processes and procedures which must be taken into account.</p> <p><u>We would welcome the opportunity to work with DISER to settle specific mechanisms/provisions that will allow the AER to manage the making of scheme determinations and scheme pipeline elections effectively.</u></p> <p><i>Proactive mechanisms</i></p> <ul style="list-style-type: none"> <li>It may be beneficial to allow the AER to set a limit on how many scheme pipeline (and related) determinations it works on concurrently, to allow it to effectively manage any surge in applications or elections.</li> <li>Alternatively, the AER may be given powers to stagger the commencement date of scheme pipeline's access arrangements, to allow for workload management.</li> </ul> <p><i>Reactive mechanisms</i></p> <p>We recommend the following changes:</p> <ul style="list-style-type: none"> <li>For r. 8(2)(e) change "within 20 business days" to "as soon as practicable". For scheme pipeline determinations under r 17 (and the other similar decisions that the AER will be required to make under</li> </ul>



Section	Issue	Feedback on proposed changes to the NGL / NGR / Regulations
		<p>rr. 22 and 28), for example, it may not be feasible (either practically, or due to the complexity of the issues raised in the relevant submissions, or a combination of both) for the AER to fully consider and evaluate those submissions within this timeframe, and to then incorporate that work into its final decision.</p> <ul style="list-style-type: none"> <li>○ In addition to issues of the AER practicably being able to meet this requirement, the broader deadlines imposed by NGR rr. 17, 22 and 28 already put an overall ceiling on how quickly the AER must make these determinations. Therefore, an additional fixed 'deadline within a deadline' set by r. 8(2)(e) is not necessary.</li> <li>• For rr. 17, 22 and 28 (decisions for which the SCP applies), allow the decision-maker to extend (or defer, per the proactive provision proposed above) the overall timeframe by <u>at least</u> 2 months, similar to the provision in r. 62(8). <ul style="list-style-type: none"> <li>○ This would allow the AER some flexibility to manage instances where we may need to make multiple rr 17, 22 and 28 determinations over a given period.</li> </ul> </li> </ul>
<p>NGL ss. 95–96 NGR r. 19</p>	<p>Scheme pipeline elections</p>	<p>The current drafting allows for service providers to elect to become a scheme pipeline almost instantaneously, without needing to provide advance notice to the AER.</p> <p>Given that a scheme pipeline election event triggers a series of regulatory processes that must be completed, we recommend a mandatory notice period – where the pipeline provider must notify the AER of its intention to effect a scheme pipeline election before it formally triggers the election. We suggest that this notice period should be at least 20 business days.</p>
<p>NGR Division 2, subdivision 1</p>	<p>Information disclosure requirements - data provision to the AER</p>	<p>We propose a provision that, when a service provide publishes information under NGR subdivision 1 of Division 2, it must provide a copy of that information (in an appropriate machine-readable format) to the AER. This may be best placed as a new r. 101A(8).</p> <p>We consider that this provision is prudent to allow us to fulfil our obligations under NGL ss. 63A and 63B and monitoring service providers' compliance with NGL chapter 4:</p> <ul style="list-style-type: none"> <li>• There will be a large number of pipelines subject to the information publication requirements and the general requirements for provision of pipeline services.</li> <li>• It will be neither practical nor efficient to request the information required to fulfil NGL ss. 63A and 63B from service providers separately, or to gather the information from service providers' websites (through web-scraping or any other means)</li> <li>• We consider that a requirement placed on service providers to send us this information electronically at the same time as they publish it will place only a small burden on each individual service provider, compared with a substantial burden on the AER to compile all the information ourselves across so many pipelines.</li> </ul>
<p>NGR r. 68G</p>	<p>Capacity trading requirements</p>	<p>The AER considers that the Rules ought to provide greater clarity about the following aspects of the operation of rule 68G:</p> <ul style="list-style-type: none"> <li>• whether the Bulletin Board under Part 18 is a "gas market" for the purposes of rule 68G;</li> </ul>

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		<ul style="list-style-type: none"> <li>if so, whether Part 18, s190C is intended to be a rule or Procedure that, by reason of rule 68G(1), excludes the operation of rule 68G(2), such that the rule 68G(2) would only apply to facilities not registered on the Bulletin Board (remote facilities and facilities with &lt; 10 TJ per day nameplate rating) or to any other transactions that do not need to be reported on the Bulletin Board (e.g. excluded transactions under Part 18).</li> </ul> <p>The AER's view is that a gas shipper that has reported its on-sale of capacity on the Bulletin Board should also be required to report that transaction to the service provider under rule 68G(2)(b). One way of doing this might be to amend 68G(1)(a) to refer to a gas trading exchange (rather than gas market) which is defined in the Gas Law and is inclusive of facilitated capacity markets. This may help to clarify that the Bulletin Board is not a gas market and that Bulletin Board reporting entities must report off-market capacity trades to the respective service provider under 68G(2)(b) in addition to reporting such trades to the Bulletin Board under s.190C. The AER supports a consistent approach to reporting all such trades. The AER also considers that that, for the purposes of Part 8 of the Gas Rules, service providers should be directly notified when capacity is on-sold on their facilities.</p> <p>Further to the term 'gas market' used in 68G(1)(a), it is the AER's understanding that the Capacity Trading Platform and Day Ahead Auction, established under Parts 24 and 25, are intended to be gas markets for the purposes of rule 68G but we suggest this be made clearer.</p> <p>Lastly, and separately from the issues identified above, the AER notes that 68G is located under Part 8 of the Gas Rules and does not address exemptions. The AER seeks clarity about whether it is intended that the reporting requirements under 68G will apply to all facilities regardless of nameplate capacity or pipeline classification. The AER is supportive of greater transparency but notes there are challenges associated with monitoring compliance with 68G(2)(b). This is because the rule relates to reporting that will be conducted exclusively between participants.</p>
NGR 101E(1)(k)	Actual prices paid information	We recommend clarifying the drafting (particularly r 101E (1)(k)) by referring to 'actual prices paid (or payable, if not already paid)'. This would be particularly relevant where a service provided for under an access contract may not necessarily be used (and a variable charge not incurred).
NGR r. 26	Pipelines developed following a competitive process	We recommend changing "a genuine competition" to "genuine competition" for greater clarity and consistency with normal usage.
NGR r. 105G(b)	Existence of access dispute	<p>This rule says that "an access dispute is taken to exist...if an agreement is not reached within the timeframe agreed to in the negotiation timetable referred to in rule 105E(4)."</p> <ul style="list-style-type: none"> <li>It is unclear what happens if the parties fail to agree on a negotiation timetable under r. 105E(4). Consider adding this to the list of specified circumstances in which an access dispute will be taken to exist (i.e. add a new sub-rule r. 105G(c)).</li> <li>Rule 105E(4) does not explicitly require the parties to agree a timetable. Consider strengthening rule 105E(4) accordingly.</li> </ul>

Section	Issue	Feedback on proposed changes to the NGL / NGR / Regulations
NGR r. 113R(2)	Arbitrator to support full disclosure in negotiations	Because of the differences between the negotiation and arbitration procedures, it does not seem appropriate to require the arbitrator to “give effect to” the content of rule 105F. For clarity, consider amending rule 113R(2)(a) to read as follows: “ ... seek to give effect to rule 105F, as if the requirements of that rule applied to the arbitration, insofar as doing so .... ”.
NGL s. 103(2) NGR r. 24		Whilst the intent of these provisions seems clear enough, they could still be interpreted very broadly. For clarity, consider amending section 103(2) to read as follows “... relevant pipeline description, the design and specifications of items that are excluded infrastructure... ”.
NGL s. 114(2)		The currently proposed wording of section 114(2) states that the service provider must make an application (for a classification decision) “within 20 business days after the commissioning of the pipeline”. This clause therefore doesn’t impose an obligation on the service provider for an existing unclassified pipeline to apply for classification.  In the case that there are any existing unclassified pipelines, there does not appear to be anything in the proposed amendments that would require the relevant service provider to apply for classification.
NGL s. 157		It is not clear what will happen if mediation under this section ultimately fails. Appointment of another mediator may not solve the issue, as that mediator may also fail to complete the mediation of a dispute. Consider inserting an additional provision to make it clear that, if a second or subsequent mediation fails, the dispute resolution body or the AER may decide whether to try another mediator, or to move the dispute to the relevant form of arbitration.
	Inserting of independent review provisions	We seek the inclusion of provisions allowing for the AER, or for the AER to compel a service provider, to make certain independent reviews in respect of compliance with its general obligations under NGL chapter 4, its information disclosure requirements under NGR Division 2 subdivision 1, or any other matter decided on by the AER.  <ul style="list-style-type: none"> <li>• We propose that these provisions be similar to those set out in the NERL ss. 275 and 276.</li> <li>• We propose that the term ‘independent review’ or similar, be used, and that this term be defined as including, but not as limited to, audits.</li> </ul>
NGL ch. 2	Repeated heading	Note that Division 4 is repeated in NGL ch. 2, at s. 43 and s. 63A.