



DRAFT

Access arrangement guideline

September 2008

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Request for submissions

Interested parties are invited to make written submissions to the AER on the draft Access Arrangement Guideline (Guideline) by 5.00pm A.E.D.T, 12 December 2008. Submissions can be sent electronically to AERInquiry@er.gov.au:

Attention: Mr Mike Buckley
General Manager
Network Regulation North Branch
Australian Energy Regulator

The AER prefers that all submissions be in an electronic format (in MS Word or PDF format). Submissions should be in writing and be text-searchable to allow a 'copy and paste' function.

Submissions will be treated as public documents and posted on the AER's website. Parties wishing to submit commercial-in-confidence material as part of their submission should submit both a public and commercial-in-confidence version of their submission. The public version of the submission should clearly identify the commercial-in-confidence material by replacing the confidential material with an appropriate symbol or 'c-i-c'. The AER encourages parties to make their submissions in a way that facilitates the efficient assessment of their various submissions, including the verification of any facts or data upon which those submissions are based.

Please direct any inquiries to the Network Regulation North Branch: (02) 6243 1233 or to the above email address.

Contents

1	Introduction	3
1.1	Overview	3
1.2	Role of this Guideline	4
1.3	Revision of this Guideline	4
2	Nature of pipelines and pipeline services	5
2.1	Classification of pipelines and pipeline services	5
2.2	Application of this Guideline.....	11
3	Decision making process for access arrangements.....	13
3.1	Decision making framework for assessing a full access arrangement.....	13
3.2	Decision making framework for assessing a limited access arrangement proposal.....	19
3.3	Decision making framework for a tender approval pipeline	22
3.4	When a service provider fails to submit an access arrangement proposal...	24
3.5	Decision making framework for variations to an access arrangement	27
3.6	Calculating time for decision making processes.....	28
4	Information collection	30
4.1	Submissions	30
4.2	Other means of collecting information	35
5	Access Arrangement submission.....	41
5.1	General requirements of an access arrangement.....	41
5.2	Access arrangement proposal and approval.....	42
5.3	The role of access arrangement information and other supporting information.....	43
5.4	General requirements of an access arrangement proposal.....	43
5.5	Other relevant matters.....	68
5.6	When the AER can revoke or vary an access arrangement	70
6	Reference tariff variations	71
6.1	Tariff variation mechanism framework	71
6.2	Other matters.....	76
7	Review of decisions	78
7.1	Merits review by the Tribunal.....	78
7.2	Judicial review	82
	Glossary	84
Appendix A:	Decision making processes	85
Appendix B:	Competitive tender access arrangements	87
Appendix C:	Transitional arrangements.....	92
Appendix D:	Other relevant information for service providers.....	94
Appendix E:	Checklist - Access arrangement submission.....	101

1 Introduction

1.1 Overview

The National Gas Law (NGL) and National Gas Rules (NGR) comprise part of the legislative scheme to establish a new cooperative national access regime for natural gas distribution and transmission pipelines.

The objective of the NGL and NGR is outlined in the Explanatory Memorandum for the Energy Legislation Amendment Bill 2006:¹

The appropriate regulation of gas and electricity infrastructure is essential to efficient infrastructure investment, competitive energy markets and lower energy prices for consumers. Energy specific regulatory arrangements are considered necessary to accommodate the technical aspects of service provision in gas and electricity networks and associated market power issues. A co-ordinated approach to energy access is also essential to maintaining consistency with national arrangements for access to essential infrastructure in the TPA and to promote more competitive energy markets.

This national gas objective is restated in s. 23 of the NGL as:

To promote efficient investment in, and efficient operation and use of, natural gas services for the long term interests of consumers of natural gas with respect to price, quality, safety, reliability and security of supply of natural gas.

In carrying out its functions, the AER must do so in a manner that will (or is likely to) contribute to the achievement of the national gas objective (s. 28(1)). This Guideline considers issues relevant to the AER's economic regulatory function relating to access arrangements (ss. 2 and 27(1)(e)).

In addition to the national gas objective, the NGL specifies revenue and pricing principles. These principles are fundamental in ensuring that the Ministerial Council on Energy's aim of increasing the efficient delivery of gas services is achieved.² Broadly, these principles indicate that a service provider should be provided with the opportunity to recover efficient costs and have effective incentives to promote efficiency (s. 24). These principles are particularly relevant for the AER's consideration of full access arrangements and are discussed further in section 5.4.3.1 of this Guideline.

All references to legislation in the Guideline, unless otherwise specified, are for the NGL and NGR. NGL references are denoted with an 's.' for a single section or 'ss.' for more than one section. Rule references will preface a rule number as an 'r.' for a single rule or 'rr.' if the reference relates to more than one rule.

¹ Commonwealth of Australia, Explanatory Memorandum, Energy Legislation Amendment Bill 2006 (Cth), 2.

² South Australia, *Parliamentary Debates*, House of Assembly, 9 April 2008, 2697 (Patrick Conlon, Minister for Transport, Minister for Infrastructure, Minister for Energy)

1.2 Role of this Guideline

This Guideline has been formulated to provide information to service providers and interested parties about the content of access arrangements and access arrangement proposals and the AER's decision making processes relating to access arrangements under the NGL and NGR. Key features of the processes, relevant criteria and other information are covered in this Guideline.

It is anticipated that this Guideline will assist service providers in the preparation of access arrangement proposals. It is also anticipated that the Guideline will aid interested parties in fully participating in the relevant decision making processes involved in establishing and revising access arrangements within the NGL and NGR framework.

Nevertheless, parties should refer to the NGL and NGR to fully understand the provisions of the NGL and NGR relating to access arrangements discussed in this Guideline.³

1.3 Revision of this Guideline

The AER may amend and revise this Guideline from time to time. A version number and an effective date of issue will identify every version of this Guideline.

³ Appendix C provides information on relevant transitional provisions and rules under the NGL and NGR.

2 Nature of pipelines and pipeline services

Natural gas pipelines provide haulage and storage services for natural gas users and producers. Under the NGL a pipeline can be classified by its technical characteristics as either a distribution or transmission pipeline and the relevant jurisdiction of the pipeline.

The classification of whether a pipeline is a distribution or transmission pipeline is either designated⁴ or made by the National Competition Council (NCC) as part of its coverage recommendation to the relevant Minister (s. 98). The criteria are set out in the NGL and relate to the primary function of the pipeline: whether it is to ‘reticulate gas within a market’ or ‘convey gas to a market’ (s. 13(1)). In addition, in determining a pipeline’s classification, regard must also be had to, among other things, the pipeline diameter, pipeline pressure, the number of injection points and the extent of the area served by the pipeline (s. 13(2)).

The coverage decision by the relevant Minister determines whether a pipeline should be subject to coverage⁵, and what form that coverage should take. A coverage decision is ultimately a decision about whether a particular pipeline will be subject to an access arrangement and in what form.

This chapter outlines the types of pipelines and/or pipeline services described under the NGL, and the nature of regulation of particular pipelines and pipeline services. The chapter also identifies when a pipeline is required to have an access arrangement in place.

2.1 Classification of pipelines and pipeline services

In addition to the technical classification as to whether a pipeline is a distribution or transmission pipeline, there are different classifications of pipelines and pipeline service providers that are used throughout this Guideline.

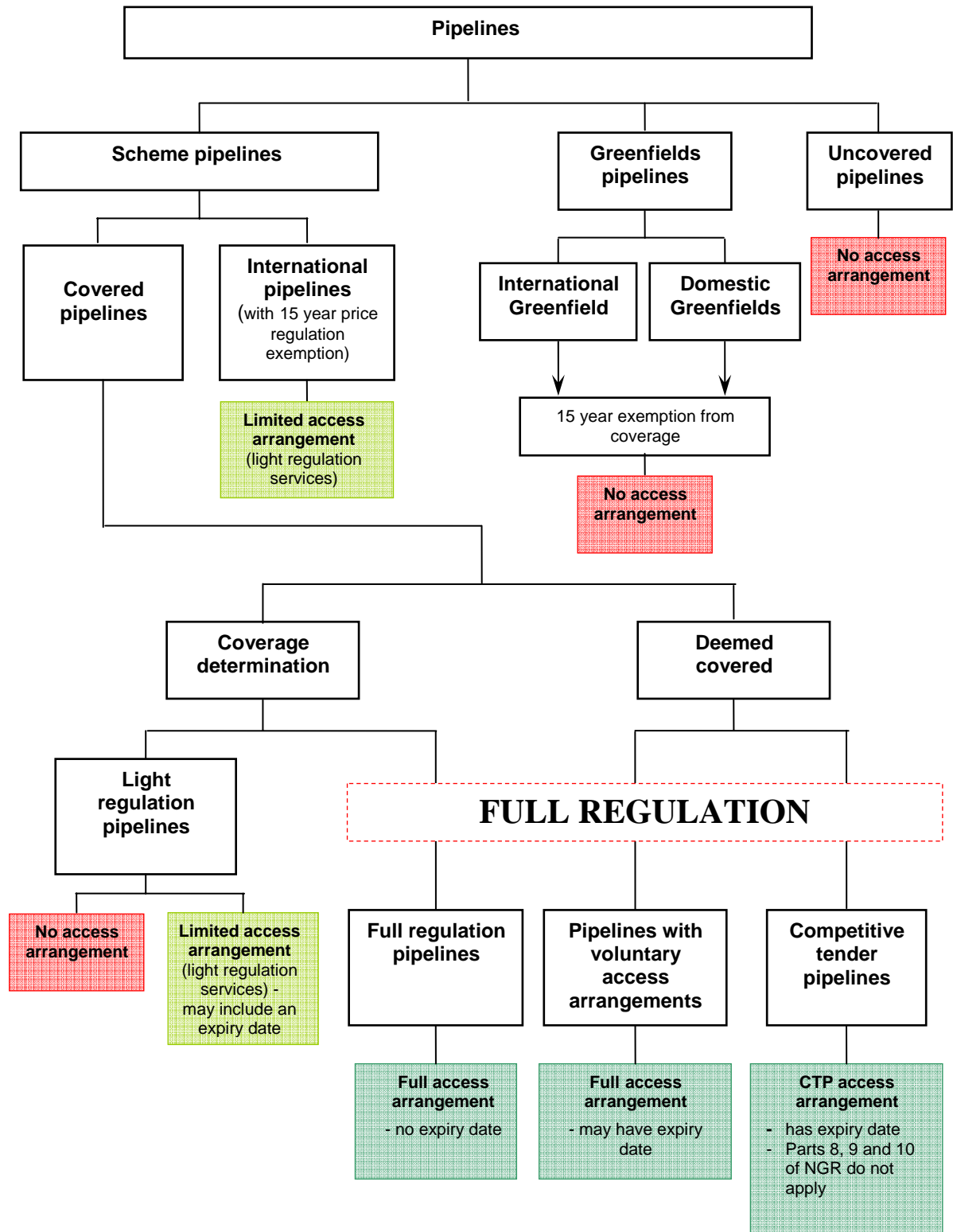
The figure below illustrates the different classifications of pipelines and pipeline services under the NGL, and the various types of access arrangements.

It should be noted that while certain domestic and international greenfields pipelines may not be subject to regulation by the AER, the relevant service providers may still have particular obligations under the NGL.

⁴ The National Gas Regulation, Schedule 1 – Designated pipelines, outlines the classification of pipelines from the commencement of the NGL.

⁵ See s. 15 for coverage criteria and NGR, Part 4 for the coverage process.

Figure 1: Basic schema of pipelines and pipeline services under the NGL



2.1.1 Uncovered pipelines

The AER does not approve access arrangements or make access determinations about the terms and conditions of access for uncovered pipelines. Consequently, this Guideline does not apply to uncovered pipelines.

Even though a pipeline may be uncovered under the NGL, some service providers of uncovered pipelines may be subject to the Gas Market Bulletin Board provisions and rules.⁶

There is a possibility over time that an uncovered pipeline may be subject to a coverage application under the NCC under Chapter 3, Part 1 of the NGL. This may result in the pipeline becoming covered.

2.1.2 Greenfields pipeline incentives

Before a new (greenfields) domestic or international pipeline is commissioned, a service provider may apply to the NCC for a 15-year no-coverage determination (s. 151 and r. 122).

A 15-year no-coverage determination by the Minister means that the pipeline remains uncovered for 15 years from the commissioning of the pipeline (s. 158).

During the period in which a no-coverage determination applies, the AER does not approve access arrangements or make access determinations (in relation to access disputes) about the terms and conditions of access for these pipelines.

This Guideline does not apply to greenfields incentive pipelines with a 15-year no-coverage determination.

2.1.3 International pipelines

An international pipeline is defined under the NGL as a pipeline for the haulage of gas from a foreign source (s. 2) and it is, for the purposes of the greenfields pipeline incentives provisions, a transmission pipeline (s. 150).

As outlined above, greenfields international pipelines (proposed or commenced) can apply for a 15-year no-coverage determination before the pipeline is commissioned. If a 15-year no-coverage determination for international pipelines is granted, that pipeline remains uncovered for 15 years from the commissioning of the pipeline.

In addition to the 15-year no-coverage determination greenfields incentives, service providers of greensfields international pipelines (proposed or commenced) have the option of applying for a 15-year price regulation exemption before the pipeline is commissioned (s. 160).

⁶ NGL, Chapter 7. The Natural Gas Services Bulletin Board applies to service providers s. 223(1)(a). Service providers are defined as an owner, controller and operator or a potential owner (including gas market operators), operator and controller of a pipeline or scheme pipeline (s. 8).

The Second Reading Speech for the NGL outlines that the 15-year no-coverage determination may not be able to provide timely regulatory certainty for complex international greenfields gas pipeline projects. It is for this reason that the option of a price regulation exemption has also been included in the provisions for international pipelines.⁷ The service provider of an international pipeline that is granted a price exemption may subsequently apply for a no-coverage exemption.

An international pipeline that has been granted a price regulation exemption will not be subject to any price or revenue regulation under the NGL for 15 years from the commissioning of the pipeline (s. 167).

For the price regulation exemption to be effective, the service provider must submit a limited access arrangement within 60 business days after the exemption is granted (s. 168). A limited access arrangement is only required to contain non-price elements.

A 15-year price regulation exempt pipeline is categorised as a scheme pipeline for the duration of the price regulation exemption (s. 2). While the AER may not have a role in approving price elements of an access arrangement, the AER will still be able to approve an access arrangement or make an access determination about all aspects of access other than price and revenue.

This Guideline will apply to international pipelines with a 15-year price regulation exemption that are required to have a limited access arrangement in place.

2.1.4 Covered pipelines

The other category of pipelines falling under scheme pipelines are those termed covered pipelines.

In general they can be broadly categorised as pipelines with coverage determinations and pipelines that are deemed to be covered.

For transition purposes, distribution and transmission pipelines that were covered under the *National Third Party Access Code for Natural Gas Pipeline Services* (the Code) prior to the commencement of the NGL, are deemed to be covered pipelines under the NGL.⁸ However, regulations in some jurisdictions may deem different classifications for pipelines.⁹

2.1.4.1 Pipelines with coverage determinations

⁷ South Australia, *Parliamentary Debates*, House of Assembly, 9 April 2008, 2703 (Patrick Conlon, Minister for Transport, Minister for Infrastructure, Minister for Energy)

⁸ NGL, Schedule 3, ss. 6 & 7.

⁹ National Gas (Queensland) Regulation 2008 provides for transitional arrangements for transition pipelines in the following way: South West Queensland Pipeline is uncovered for a period of 1 year from 1 July 2008, Queensland Gas Pipeline is an uncovered pipeline for a period of 3 years from 1 July 2008 and the Carpentaria Gas Pipeline is a light regulation services pipeline with a light regulation determination until 30 April 2023. National Gas (Queensland) Regulation 2008, pp. 2-3.

i. Light regulation pipelines

Under the NGL, not all covered pipelines will necessarily be required to have an access arrangement which provides for a reference tariff that is approved by the AER.

The NGL allows service providers to apply for a determination that its pipeline services provided by means of a covered pipeline be light regulation services (s. 112). Light regulation pipelines are a new classification of covered pipeline under the NGL. Some pipelines will be able to seek reclassification as a light regulation pipeline from the commencement of the NGL.¹⁰ For a pipeline that is not already covered, the NCC must make a light regulation determination at or within the same time as it makes a coverage recommendation to the relevant Minister. For a pipeline that is already covered and for which an access arrangement is in place, the service provider may apply to the NCC for a determination that the services provided by the pipeline be light regulation services (s. 111 and 112).

Light regulation is considered particularly relevant for point-to-point transmission pipelines with a small number of users who have countervailing market power.¹¹

The key aspect of light regulation services pipeline is that a service provider may, but is not obligated to, submit a limited access arrangement to the AER for approval (s. 116). A limited access arrangement is an access arrangement that is not required to make provisions for price terms but must contain non-price terms of access (s. 2).

Limited access arrangements may include an expiry date (r. 45(1)(i)). Even if there is no limited access arrangement in place, the service provider of light regulation services will still need to comply with other obligations under the NGL and NGR.

This Guideline provides information relevant to the regulation of light regulation pipeline service providers.

Even though light regulation pipelines are not subject to upfront economic regulation and the establishment of reference tariffs, under the NGL the AER may hear access disputes for both price and non-price terms and conditions of access. In these circumstances the AER may determine price and non-price terms and conditions of access, which may include setting revenue and prices for pipeline services.

ii. Full regulation pipelines

A full regulation pipeline is a pipeline that has been subject to a full coverage determination.

Full regulation pipelines are required to have a full access arrangement in place that contains price and revenue terms and other (non-price) terms and conditions of access for reference services provided by the pipeline.

¹⁰ The National Gas Regulations designate Victorian and South Australian distribution pipelines and Victorian transmission pipelines, which prevents the NCC making a light regulation determination for these pipelines.

¹¹ South Australia, *Parliamentary Debates*, House of Assembly, 9 April 2008, 2701 (Patrick Conlon, Minister for Transport, Minister for Infrastructure, Minister for Energy)

The service provider of a covered pipeline providing full regulation services is required to submit a full access arrangement proposal to the AER within three months of becoming a covered pipeline (r. 46).

Even though an access arrangement for a full regulation pipeline can be revised or varied from time to time, as set out in the access arrangement or under the NGR,¹² these access arrangements do not expire. Access arrangements cease to have effect, if coverage is revoked or the relevant Minister makes a light regulation determination (after due process and consideration) regarding the relevant pipeline.

A service provider of a full regulation pipeline must, on or before, the review submission date of an applicable access arrangement, submit an access arrangement revision proposal to the AER for approval (r. 52(1)).¹³

The AER may extend the period for submitting an access arrangement revision proposal under this rule, but the period (or aggregate period) of extension cannot exceed 2 months.

This Guideline applies to full regulation pipelines.

2.1.4.2 Pipelines deemed to be covered

The NGL also provides for two types of pipelines with certain access arrangements that are deemed to be covered under the NGL.

These pipelines are discussed below.

i. Voluntary access arrangements

The NGL allows service providers of uncovered pipelines to voluntarily submit an access arrangement at any time (s. 127).

Any voluntary access arrangement submitted must be a full access arrangement ((r. 47(1)). A voluntary access arrangement may contain an expiry date. Once the approved full access arrangement takes effect, the pipeline remains a covered pipeline until the full access arrangement expires (ss. 127(2) and 172(3) and r. 47(1)).

This Guideline applies to service providers with a voluntary access arrangement in place.

¹² Revisions are amendments to an access arrangement that are made as required by the access arrangement. These could be as scheduled according to the review submission date or as anticipated by a trigger event in the access arrangement. Variations are amendments to an access arrangement that are proposed by the service provider voluntarily.

¹³ This subrule is a civil penalty provision for the purposes of the NGL. (See the Regulations, Clause 6 and Schedule 3.)

ii. Competitive tender process access arrangements

In the circumstances where a tender process is used for the construction of a pipeline, under the NGL, a proponent of a pipeline may obtain approval for this process as a competitive tender process (CTP).

One outcome of the tender process is the need to determine the terms and conditions of access for these types of pipelines. This is first formalised as proposed terms and conditions of access in a tender and documented for the AER in a compliance report provided by the proponent (after the selection process for the tender is complete) (r. 24). A further requirement is that at least six months prior to the commissioning of a tender approval pipeline, the service provider (successful tenderer) must submit a proposed access arrangement which reflects the proposed terms and conditions of access (r. 27(1)).

A CTP access arrangement must include an expiry date of no more than 15 years from the commissioning date of the pipeline (r. 24(2)(c)(vi)). A pipeline with a tender approval is deemed to be a covered pipeline from the date of the tender approval until the expiry date of its CTP access arrangement or when a coverage revocation determination is made (s. 126(2)).

This Guideline applies to pipelines with CTP access arrangements.

2.2 Application of this Guideline

Table 1 summarises the nature of pipelines and where relevant the access arrangement under the NGL, and in doing so outlines whether this Guideline is relevant to the pipeline.

Table 1: Application of the access arrangement guideline

Type of pipeline	Scheme pipeline	Other relevant classifications	Applicable access arrangement in place	Does the Access Arrangement Guideline apply?
Uncovered pipeline	×		None	×
Greenfields pipeline	×	15-year no coverage determination	None	×
	×	International with 15-year no coverage determination	None	×
	×	International (i.e. with a 15-year price exemption)	Limited access arrangement	✓
Pipeline with coverage determination	✓	Full regulation services	Full access arrangement	✓
		Light regulation services	Limited access arrangement	✓
			No access arrangement	×
Deemed covered pipeline	✓	Voluntary access arrangement	Full access arrangement	✓
	✓	Tender approval pipeline	CTP access arrangement	✓

3 Decision making process for access arrangements

A key feature of the legislative framework for access arrangements is the prescribed decision making processes and timing set out in the NGR.

The process and timing for decisions made by the AER varies according to the type of access arrangement and/or proposal being made. For example, the AER must carry out a significant multi-stage process that includes public consultation when assessing a full access arrangement proposal. In contrast, a proposal for non-material variations to an access arrangement that is submitted voluntarily to the AER is not subject to such an extensive process with the intent that the proposal can be assessed relatively quickly.

3.1 Decision making framework for assessing a full access arrangement

The NGR establishes a specific assessment process and the timing for the AER to make a decision about a full access arrangement. The process outlined below is required for all assessments of full access arrangements including: the initial assessment (whether required or voluntary), and the assessment of (scheduled) revisions to a full access arrangement.¹⁴

The key phases and timing of the decision making process for a full access arrangement is as follows.

3.1.1 Phase 1: Pre-proposal submission process

A service provider may request a 'pre-submission conference' before submitting its full access arrangement proposal (r. 57(1)).

The AER considers that participation in a pre-submission conference and other relevant processes provides considerable benefits to both parties. It provides a constructive forum to discuss the development of the service provider's proposal, to ensure the service provider develops a complete and well-framed proposal.

The pre-proposal submission process can be iterative and need not be confined to a single meeting or conference, and will be different for each service provider in order to reflect the different operating circumstances of the relevant pipeline.

The AER recommends that a service provider contacts the AER approximately six months prior to the proposal submission date.

The issues that may be discussed during the pre-submission process include, but are not limited to:

¹⁴ Service providers are able to propose variations to an access arrangement at any time voluntarily. Such variations can be non-material or material. See 3.5 of this guideline for further information.

- the proposed terms and conditions of access for the access arrangement
- any proposed changes to the current access arrangement
- information required to be submitted with a proposal including the use of the AER's information powers and how commercially sensitive information should be submitted
- use and reliance on consultants and experts to support a service provider's submission, and
- any proposed discretionary consultation processes such as public forums and hearings.

The pre-submission process may be undertaken as:

- pre-submission conferences, meetings or discussions, and
- provision of background documentation, models and information about any aspects of the proposal.

Any information provided in this process to assist in formulating a service provider's proposal can generally be provided on a without prejudice basis. For consideration and approval by the AER as part of an access arrangement proposal, any matters and information provided on a without prejudice basis will need to be submitted formally as part of a service provider's proposal.

The key benefit of the pre-proposal submission process is to ensure a compliant proposal, reduce compliance costs and improve certainty for service providers.

3.1.2 Phase 2: Proposal submission and consultation process

Once the service provider submits its proposal, the AER is required to form a view as to whether the proposal complies with the requirements.

If the AER finds the proposal is complete then it must as soon as practicable publish a notice (an initiating notice) (r. 58(1)).

If the AER finds the proposal deficient, it may only defer the publication of the notice for up to 30 business days after the proposal is submitted (r. 58(2)). If the deficiencies are minor in nature, the AER will attempt to notify the service provider within this time period so that the service provider is given an opportunity to correct the deficiency in the proposal before the notice is published. However, with the consent of the AER, a service provider may revise a full access arrangement even though the initiating notice has been published (r. 58(3)).

The AER will place a notice on the AER website and in a national newspaper as required by the rules, and as is usual practice may provide electronic notices to interested parties. The AER will place on its website the proposal and outline the consultation process for the proposal, which must provide at least 20 business days for

written submissions to be made (r. 58(1)(c)). Section 4.1 of this Guideline outlines how interested persons can make submissions to the AER.

The AER may also consider holding a public meeting so that the service provider can explain the basis of its proposal; the AER can outline the decision making process (including consultation) for the proposal, and if it is known the nature and extent of external consultants to be used. This is considered a discretionary step in the decision making process and the need to hold such a meeting will be determined in light of the complexity and nature of the proposal being assessed and the interest of users to participate in such meetings.

3.1.3 Phase 3: Draft decision

After considering submissions on the proposal and other relevant information such as advice from consultants, the AER will make a draft decision (r. 59(1)). The draft decision indicates whether the AER is prepared to approve or not approve the submitted proposal.

If the draft decision indicates that the AER will not approve the proposal then the AER will indicate in its draft decisions the nature of the amendments that the service provider is required to make to the proposal (r. 59(2)).

One key difference between the consultation and decision making process under the former code and the NGL (and NGR) is the limited opportunity for the AER to respond to new (and substantive) issues once the draft decision is made. The consultation process after the draft decision focuses on the service provider's response including amendments to the proposal to reflect the draft decision. The decision making process in the NGR does not envisage substantive issues being raised and deliberated on after the draft decision is made. It is for this reason that the AER considers that if the service provider and parties require a thorough and complete examination of issues, these issues are put before the AER prior to it making its draft decision.

When the draft decision is released the AER will publish a notice on its website and in a national newspaper, and will in addition generally email interested parties including any person who has made a submission on the proposal.

The public notice on the AER's website will contain information required in the NGR (r. 59(5)(c)), including the period allowed by the service provider for the revision of its proposal in light of the draft decision and invite written submissions from interested parties.

If the AER indicates that it is prepared to approve the proposal as submitted it will consult for at least 20 business days from the date of the draft decision.

On the other hand, if the draft decision does not indicate an approval of the proposal, the AER will give the service provider at least 15 business days to submit revisions to its proposal (r. 59(3)). After that time, the revised proposal (if received) will be available on the AER's website (r. 60(4)) and at least a further 20 business days provided for parties to make a submission on the revised proposal.

Hearings on the draft decision

The NGR provides the AER with discretion to hold a hearing after the draft decision is made, whether on its own initiative or on request by any person (r. 61(1)). A service provider or other interested party may request a hearing within 10 business days of the draft decision (r. 61(2)(a)).

The NGR makes it clear that the decision to hold a hearing is at the AER's discretion. The AER will determine the necessity to hold a hearing on a case-by-case basis. The AER considers a hearing is appropriate to discuss and explain complex matters arising from the draft decision and if appropriate the service provider's revised proposal. At the time the AER makes the decision to hold a hearing it will also make available relevant details about the agenda, location and time of the hearing. The NGR does not prescribe or provide details about the form and content of a hearing. However, the AER intends that such hearings would be informal and would not mirror formal court processes. In general, they will take the form of a round table meeting, including a briefing about the relevant matters contained in the draft decision or the service provider's proposal and then they would provide an opportunity for interested parties to ask questions.

If the AER does hold a hearing, it will be held within the consultation period for the draft decision. In the circumstances that a request for a hearing is refused the AER will provide its reasoning as required by r. 61(3).

3.1.4 Phase 4: Final decision

Following consideration of submissions and any revised access arrangement proposal provided within relevant periods, the AER must make a final decision to approve or refuse to approve the proposal including a statement of reasons (r. 62(4)).

The final decision will be made for either the proposal as first submitted by the service provider or a revised proposal submitted in response to the draft decision (r. 62(3)).

A copy will be provided to the service provider as well as published on the AER's website (r. 62(5)).

If approved, the access arrangement takes effect on the date set in the AER's final decision or, where no date has been specified, 10 business days after the date of the final decision (r. 62(6)).

The AER will place its final decision and the approved access arrangement (with relevant supporting information) on its website and make them available for inspection at its public offices. Under r. 107 the service provider must also place the approved access arrangement on its website.

Other circumstances for approving a full access arrangement

If the AER's final decision refuses to approve an access arrangement proposal (as submitted or as revised after the draft decision) the AER must make an access arrangement proposal and then approve this access arrangement proposal (r. 64(1)).

The AER may, but is not required to, consult on this proposal (r. 64(3)) and must make a ‘determination’ to give effect to its proposal within two months of the final decision (r. 64(4)).

The determination will be provided to the service provider and published on the AER website (r. 64(5)). The access arrangement made by the AER takes effect at the date specified in the determination or, if there is no date specified, 10 business days after the date of the determination (r. 64 (6)).

The AER will place the access arrangement (with relevant supporting information) on its website and make it available for inspection at its public offices.

The service provider is also required to place this access arrangement on its website (r. 107).

3.1.5 Summary of the decision making time and process for assessing a full access arrangement

A summary of the decision making process relevant to full access arrangements is provided in Table 2. A detailed flow diagram is provided in Appendix A of this Guideline.

The decision making time period for a final decision for a full access arrangement is six months from receipt of the access arrangement proposal (r. 62(7)). For the purposes of calculating the actual time for the decision making process, broad consultation processes and information gathering processes will ‘stop-the-clock’.

The six months decision making process can be extended by a further two months (r. 62(8)).

Any extension of time to the decision making process for a full access arrangement, whether under the stop-the-clock provisions or by another means, is subject to an absolute time limit of 13 months for making a decision about a full access arrangement (r. 13).

If the AER refuses to approve an access arrangement in its final decision, the AER must propose an access arrangement (or revisions to the access arrangement). The AER will have two months after the access arrangement final decision to give effect to its access arrangement proposal.

Further detail about timing of decision making processes under the NGL is outlined in section 3.6 of this Guideline.

Table 2 shows how time is calculated under the NGL using the stop-the-clock provisions. The indicative timetable shows that, a total of 85 days is not counted as part of the decision making time under these provisions in the NGL, taking into account the stop-the-clock provisions.

Table 2: Decision making process and timing for a full access arrangement

Key phases of the decision making process for a full access arrangement	Estimated time from proposal submission date	Decision making time under the NGL stop-the-clock provisions from the proposal submission date
Phase 1: Pre-consultation		
Commencement of pre-consultation process	- 6 months	0
Phase 2: Proposal		
Proposal submitted	0	0
Proposal published	+30 business days	0
Submissions on proposal due	+50 business days	0
Phase 3: draft decision		
Draft decision released	+80 business days	+30 business days
SP revised proposal	+95 business days	+30 business days
Submissions on draft decision due	+115 business days	+30 business days
Phase 4: final decision		
Final decision released	+ 135 business days	+50 business days
Total estimated time	+135 business days (approximately 6.5 months)	+50 business days (approximately 2 months)
Time prescribed by the NGL	Maximum 13 months	Minimum 6 months

3.2 Decision making framework for assessing a limited access arrangement proposal

Limited access arrangements apply to pipelines providing light regulation services (voluntary) and international pipelines (mandatory).

A final decision on a limited access arrangement proposal for a light regulation pipeline or international pipeline must be made within four months after submission of the proposal for the AER's approval (rr. 55 and 130).

The decision making framework when assessing a limited access arrangement is the expedited consultative process set out in r. 9 (rr. 55 and 130). The key phases of the expedited decision making process are outlined below.

3.2.1 Phase 1: Pre-submission consultation

The expedited consultative process does not contemplate a pre-submission consultation process. However the AER is amenable to discussing any aspects of the limited access arrangement proposal with a service provider before it is submitted. An indicative timeframe for commencement of these discussions is three months prior to the submission of a proposal.

For further details about the pre-submission consultation phase refer to section 3.1.1 of this Guideline.

3.2.2 Phase 2: Proposal submission and consultation process

Service providers of an international pipeline with a price regulation exemption are required to submit a limited access arrangement. However service providers of pipelines providing light regulation services may but are not required to submit a limited access arrangement proposal to the AER.

When a proposal is submitted, the expedited consultative process does not require the AER to consult on the proposal before releasing its draft decision.

This does not preclude the AER from consulting about the proposal prior to making a draft decision. Any decision to consult about the proposal will need to take into consideration the limited time for making a decision under the expedited consultative process and the complexity of issues of access contained in the proposal or the implications of the proposal for broader policy outcomes.

Regardless of whether the AER consults on the proposal or not prior to making a draft decision, the AER will publish the limited access arrangement proposal on its website as soon as practical after it is received. At that time, the AER will inform interested parties if it will undertake any consultation on the proposal and what form that consultation will take.

3.2.3 Phase 3: Draft decision and post draft decision consultation

Under the expedited decision making procedure the AER must publish the draft decision on its website and invite written submissions from interested parties. The AER will provide at least 15 business days for parties to make submissions on the draft decision.

At this stage, as at any time before a final decision is made, the service provider of a pipeline providing light regulation services may choose to withdraw its access arrangement proposal, which will terminate the process for approving the access arrangement proposal (r. 55(2)).

3.2.4 Phase 4: Final decision

Once the AER has considered the submissions on the draft decision, it must make a final decision within 20 business days after the end of the submission period for the draft decision.

The final decision, which must be in writing and include reasons, will be given to the service provider. The AER must publish the final decision on its website and make copies available for inspection during business hours at its public offices.¹⁵

Copies of the approved limited access arrangement will also be placed on the AER's website. Under r. 107 the service provider is also required to place the approved access arrangement on its website.

Once a limited access arrangement proposal is approved, the access arrangement, or the revision or variation, to which the proposal relates, takes effect on a date fixed in the final decision or, if no date is fixed, 10 business days after the date of the final decision (rr. 55(3) and 130(2)).

When the AER needs to make and approve a limited access arrangement proposal

If the AER does not approve the limited access arrangement proposal then the AER must formulate and approve a limited access arrangement for the pipeline.

Exception for international pipelines

The AER may, but is not required to, formulate an access arrangement proposal for an international pipeline (r. 64(1)). However, a price regulation exemption for an international pipeline is ineffective unless a limited access arrangement approved by the AER is in force (s. 167(2)).

The AER may, but is not required to, consult on its proposal to make or revise a limited access arrangement. The AER must make a decision giving effect to its

¹⁵ Rule 9(c) and (d)

proposal within two months after its final decision refusing to approve the service provider's limited access arrangement proposal (r. 64(4)). This time is not counted in the mandated decision making time for a limited access arrangement.

The AER is required to provide a copy of the decision to the service provider. The AER must also publish a copy of the decision on its website and make it available for inspection at the AER's offices during business hours.

The access arrangement or revisions take effect on the date specified in the decision or, if there is no date specified, 10 business days after the date of the decision (r. 64(6)). The service provider must also place the limited access arrangement made by the AER on its website (r. 107).

3.2.5 Summary of the decision making time and process for assessing a limited access arrangement

The AER must make a final decision on a limited access arrangement within four months of the service provider submitting its proposal. The decision making period for a limited access arrangement can be extended by two months (r. 55). A separate timeframe exists when the AER needs to make and approve a limited access arrangement proposal as outlined above.

An approved access arrangement takes effect on the date set in the final decision or if no date is specified, 10 business days after the date of the final decision (r. 55(3)).

A summary of the assessment process is shown in the figure below. The decision making process is shown in more detail in Appendix A.

Figure 2: Summary of assessment process – limited access arrangement

Key phases of the decision making process for a full access arrangement	Estimated time from proposal submission date
Phase 1: Pre-consultation	
Commencement of pre-consultation process	- 3 months
Phase 2: Proposal	
Proposal submitted	0
Proposal published	+ 1 business days
Phase 3: draft decision	
Indicative time taken to make draft decision	+ 25 business days
Draft decision released	+ 26 business days
Submissions on draft decision due	+ 42 business days
Phase 4: final decision	
Indicative time taken to make final decision	+ 62 business days
Final decision released	+ 63 business days
Total estimated time	3 months
Time prescribed by the NGL	Minimum 4 months

Refer to Appendix A for a more detailed schema.

3.3 Decision making framework for a tender approval pipeline

Certain rules apply for pipelines that are constructed by means of a tender process, and are to be considered as a competitive tender pipeline (CTP). The AER is required to undertake two decision making processes for these tender approval pipelines, these are approval of the tender process as a competitive tender process and approval of the CTP access arrangement. Each of these processes is outlined in further detail below.

3.3.1 Approval of a tender process as a competitive tender process

The proponent of the tender process may submit the tender process to the AER for approval (r. 21(1)).

Before the AER approves an access arrangement for a tender approval pipeline the AER needs to approve the tender process as a competitive tender process.

The AER must approve the process as a competitive tender process if certain requirements are met (r. 22(3)) and specific essential elements are included (r. 22(4)).

The AER has two months to make its decision, with an extension of one month possible (rr. 22(1) and 22(2)).

The proponent needs to provide the AER with a compliance report after the tender process is complete (r. 24). One key section of the compliance report is the terms and conditions of access proposed in the successful tender (r. 24(2)).

The tender approval may lapse or be revoked, if the following occurs:

- the time limit for completion of the tender process expires before a compliance report is submitted,
- a compliance report is not submitted within two months of the selection of a tender, or
- the AER, after carrying out the due process in the rules, revokes the tender approval process because some aspect of the tender process was not undertaken, as approved (r. 25).¹⁶

3.3.2 Approval of a CTP access arrangement

The successful tenderer (the service provider) of a CTP pipeline needs to submit a CTP access arrangement proposal to the AER six months before the pipeline is commissioned (r. 27(1)). The terms and conditions for an access arrangement may be amended before it is submitted, with the AER's approval, and by agreement between the proponent and the service provider (r. 27(2)).

If the AER is satisfied that the CTP access arrangement proposal reasonably reflects the terms and conditions contained in the successful tender the AER must approve the access arrangement proposal (r. 27(3)). The NGR does not prescribe the decision making process for the approval of a CTP access arrangement. The AER will consider the extent and nature of any further consultation process in relation to the CTP access arrangement proposal on a case-by-case basis. The AER will place a copy of its decision including other relevant material such as the approved CTP access

¹⁶ Within 20 business days, the AER is required to notify the proponent in writing (including reasons) of its proposal to revoke the tender approval decision. The AER is then required to provide at least 20 business days for the proponent to make submissions on the proposed revocation (r. 25(3)). The AER has three months from the submission of a compliance report to revoke the tender approval (r. 25(5)).

arrangement on its website. The service provider is required to publish the CTP access arrangement on its website (r. 27(4)).

An access arrangement approved under a tender process may be amended by the service provider with the AER's approval (r. 27(5)). Refer to section 3.5.3 of this guideline for further detail.

Appendix B of this Guideline outlines the tender approval and further information about the CTP access arrangement decision making processes.

3.4 When a service provider fails to submit an access arrangement proposal

The AER is required to propose an access arrangement or revisions to an access arrangement if the service provider fails to submit a proposal when it is required to do so (r. 63(1)).

The circumstances in which this applies include, when a service provider is required to submit:

- a full access arrangement proposal (initial access arrangement) (r. 63(1)(a))
- a revision to a full access arrangement (revision to an applicable (full) access arrangement) (r. 63(1)(b)), or
- revisions to a limited access arrangement (revision to an applicable (limited) access arrangement) (r. 63(1)(b)).

The relevant decision making processes and timing for the AER to make and approve an access arrangement are outlined below.

3.4.1 How the AER makes and approves a full access arrangement proposal

If the AER is required to propose an access arrangement and give effect to a full access arrangement proposal (whether this is an initial or revised full access arrangement proposal) the AER must use the standard consultative procedure (r. 63(3)(b)). The standard consultative procedure (r. 8) is illustrated below:

Figure 3: Standard consultative procedure for making and approving a full access arrangement proposal

Standard Consultative Process
Phase 1: Initial proposal
<p>Publish a notice on its website and in a national newspaper describing the proposal</p> <p>Make proposal available on its website</p> <p>Invite written submissions within 15 business days</p>
Phase 2: Draft decision
<p>Consider written submissions on the proposal</p> <p>Make and publish a draft decision and give reasons, and publish a modified proposal if required on the AER's website</p> <p>Provide a copy of the draft decision, modified proposal and reasons to the service provider</p> <p>Invite written submissions giving at least 15 business days</p>
Phase 3: Final decision
<p>Make and publish a final decision, (including access arrangement) and give reasons</p> <p>Provide a copy of the final decision, access arrangement and reasons to the service provider</p>

Source: r. 8.

The approved full access arrangement takes effect on the date specified in the determination or, if no date is specified, 10 days after the date of the determination (r. 64(6)).

3.4.2 How the AER makes and approves a limited access arrangement proposal

If the AER is required to make and give effect to a limited access arrangement proposal, the AER must use the expedited consultative procedure (r. 63(3)(a)).

The main difference as outlined below between the expedited and standard consultative process is that the AER is not required to undertake the preliminary consultation steps on the proposal (Phase 1 for the standard consultative process).

Figure 4: Expedited consultative procedure for making and approving a limited access arrangement proposal

Expedited Consultative Process
Phase 1: Initial proposal (optional)
<p>Publish a notice on its website and in a national newspaper about making a limited access arrangement proposal</p> <p>Invite written submissions within 15 business days</p> <p>Make proposal available on its website</p>
Phase 2: Draft decision
<p>Consider written submissions on the proposal</p> <p>Make and publish a draft decision and give reasons and modified proposal if required on AER's website</p> <p>Provide a copy of the draft decision, modified proposal and reasons to the service provider</p> <p>Invite written submissions giving at least 15 business days</p>
Phase 3: Final decision
<p>Make and publish a final decision, (including access arrangement) and give reasons</p> <p>Provide a copy of the final decision, access arrangement and reasons to the service provider</p>

Source: r. 9.

3.4.3 International pipelines

The NGR makes no provision for the AER to formulate an access arrangement in the event that a service provider of an international pipeline fails to submit an initial access arrangement within 60 business days of the price exemption being granted (s. 168(1)).

As previously mentioned the price regulation exemption would be ineffective unless a limited access arrangement is in force (s.167(2)).

3.4.4 Timeframe for making and approving an access arrangement proposal

The AER has six months to make and approve (give effect) to its proposal, from when the service provider was required to submit its proposal (r. 63(2)).

This time period can be extended under certain circumstances. To do so, the AER must publish a notice on its website and in a national newspaper stating that it is extending the decision making time period. The notice must specify the time extension and provide reasons for it (r. 12).

The time period for the AER to make and approve a full access arrangement proposal is subject to the absolute time limit of 13 months under r. 13.

3.5 Decision making framework for variations to an access arrangement

There is a separate decision making process in the circumstances when a service provider seeks approval for a variation of an access arrangement (an ‘access arrangement variation proposal’), which it can do at any time except between a review submission date and the commencement of a new access arrangement (r. 65(2)).

An access arrangement variation proposal must be in writing, stating the variation and the reasons for it. If relevant, the proposal must state why the service provider considers a variation is non-material (r. 65(3)).

3.5.1 Non-material variations

If the service provider proposes that the variation is non-material, the AER must decide within 20 business days of receiving a variation proposal whether it considers the variation non-material (r. 66(1)).

In making this decision the AER will take into account the significance of the proposed variation on the terms and conditions of access including as relevant the impact (if any) on reference tariffs.

If the AER agrees that the variation is non-material it can approve the non-material variation without consultation (r. 66(2)).

If the AER does not agree that the variation is non-material, then the AER must provide the service provider with written reasons for its decision (r. 66(4)). It will then need to make a decision as outlined below for material variations.

The AER must provide a copy of the decision (in writing and with reasons) to the service provider and publish it on the AER’s website (r. 67). The decision to approve a non-material variation must set out the terms of the approved variation and the commencement date of the variation (r. 67(c)).

3.5.2 Material variations

The decision making framework and timeframe for considering material variations for limited access arrangements is the same as for limited access arrangements outlined in section 3.2 of this Guideline (r.66(3)).

The decision making framework and timeframe for considering material variations for full access arrangements is the same as for full access arrangements outlined in section 3.1 of this Guideline (r.66(3)).

The AER must provide a copy of the decision (in writing and with reasons) to the service provider and publish it on the AER's website (r. 67).

3.5.3 Variations to CTP access arrangements

The rules do not contemplate that these provisions apply to CTP access arrangements as Parts 8, 9 and 10 of the rules do not apply to CTP access arrangements (r.29).

The rules do not provide for a prescribed process in which to consider an amendment to an approved CTP access arrangement, which require under r. 27(5) the AER's approval.

The AER will determine the decision making and approval process for CTP access arrangements on a case-by-case basis taking into consideration the nature of the amendment sought, this may but will not necessarily mirror the processes as outlined in sections 3.5.1 and 3.5.2 for other access arrangements.

3.6 Calculating time for decision making processes

As outlined above, the NGR specifies overall time limits for the decision making processes for making, varying or approving access arrangement proposals.

These decision making periods generally start at the (scheduled) date of the submission of the proposal and conclude at the release of the AER's final decision. It is important to understand what time is counted and what time is not included for the purposes of determining decision making time limits.

How the decision making time is calculated under the NGR

The overall time limit for a decision making process may not, at the discretion of the AER, include, for example, the time allocated for:

- the service provider to correct or revise its proposal
- the service provider or any other person to provide information in response to a notice or other requirement under the NGL, or
- submissions in response to the proposal or the draft decision (r. 11).

That is, these events ‘stop the clock’ when calculating the elapsed time for a decision making process. An example of how the stop-the clock provisions work under the NGL and NGR is provided in Table 2 of this Guideline. Further details are also provided in Chapter 4.

If the AER fails to make a decision within the overall time limit (or, for a full access arrangement, the absolute time limit) it must report this to the Ministerial Council on Energy (r. 14). Nevertheless, failure to meet a time limit does not invalidate the decision.

3.6.1 Extending time limits for decision making processes under the NGL

The AER can extend the time for a proponent to do something required or that the AER takes to make a decision (r. 12(1)) if the proposal involves questions of unusual complexity or the extension is necessary due to circumstances beyond the AER’s control (r. 12(2)).

In general, extensions of time may be considered in circumstances where a term and condition of access being proposed requires additional analysis and consultation before a considered decision can be made. This may be because of the impacts on users and end-users of the pipeline arising from the proposal. Extensions of time may also be necessary if there are changing circumstances in the operation of the pipeline or there is development or decommissioning of the pipeline infrastructure that will materially impact any decision that the AER may make about the terms and conditions of the proposal under consideration.

Where the AER does extend the overall time period it must notify the proponent. It must also publish a notice on its website and in a national newspaper that it is extending the decision making time period. The notice must specify the time extension and provide reasons for it (r. 12(3)).

4 Information collection

In carrying out its regulatory functions, the AER receives information from service providers and interested parties in various forms. This chapter provides guidance on making submissions to the AER, how to manage confidential information and how the AER intends to use information notices and orders.

4.1 Submissions

The term ‘submission’ refers to information provided to the AER during a decision making process. For an access arrangement proposal process this includes, but is not limited to, the access arrangement proposal itself, access arrangement information, the supporting information provided by a service provider with its access arrangement proposal, and other information provided by the service provider during the assessment process. It also includes submissions made by interested parties as part of any consultation process associated with the review of an access arrangement proposal by the AER.

Generally, the AER prefers written submissions, but other forms of communication such as oral submissions, which are suitably supported by written documentation, may be accepted.

In providing submissions parties should be aware of the requirements of providing material and information to the AER in the context of assessing an access arrangement proposal. These requirements are common to most regulatory processes that the AER undertakes under the NGL and NGR.

The requirements outlined below apply to a proponent or service provider or any other interested party participating in a consultation process and making a submission in connection with an access arrangement proposal.

4.1.1 How the AER will seek submissions

The AER may be required to publish a notice inviting submissions in relation to a decision making process for approval of an access arrangement.

Particular decision making processes require the AER to invite submissions by a notice in a national newspaper; others require a notice on the AER website. There may also be occasions when the AER will seek submissions even though this is not required by the NGL or NGR.

In any event, the AER will generally invite written submissions to decision making processes by at least providing a notice on its website.

Any notice published seeking submissions will include information about the proposal, contact details about where the submission should be sent to, and a date by which submissions should be sent (the submission date). In some cases, a notice will also refer interested parties to background material or discussion papers that may assist them in making a submission.

4.1.2 What submissions the AER needs to consider

The AER is required to consider every submission it receives within a submission period that it sets for public consultation for its key regulatory decision making processes. The AER will exercise its discretion as to whether it takes into consideration submissions it receives outside of the specified period as permitted under the NGL (ss. 65(a) and (b)).

The NGR also states that whatever additional information is used by the AER it must still consider submissions received during the public consultation process when making its decision to approve or not approve the access arrangement proposal (r. 71(2)).

Business days

Under the NGL and NGR submissions are generally required to be provided within a set period. The period is generally a certain number of business days. If the period commences on a certain day, the period is calculated by excluding that day and, if the period is expressed to be a specified number of clear days or at least a specified number of days, by excluding the day on which the purpose is to be fulfilled. If the period is not expressed in either of these ways, the day on which the purpose will be fulfilled will be included in the period. Under the NGL a business day is not a Saturday or Sunday or a common public holiday in all relevant states and territories that the AER has jurisdiction. If a due date for a submission is not on a business day it may be provided at the same time on the next business day in the place in which the thing is to be done. (NGL, Sections 10 and 28(2) and (3), Part 3, Schedule 2)

4.1.3 Guidance for making submissions

Given the provisions about when the AER must and may consider a submission under the NGL, when making submissions, parties should observe the timeframes which the AER has set out in any public notices or other correspondence during the course of the decision making process.

This will ensure that the AER can consider the issues and information provided in the submission.

All correspondence, submissions and supporting documents should be sent by email to the nominated contact point or email address specified in the consultation notice. While the AER prefers that submissions are provided electronically via email, parties may arrange an alternative means of delivery with prior consent from the relevant AER contact officer.

Submissions should be provided in one of the two of the following electronic formats: a .doc; .rtf file format readable by Microsoft Word or a .pdf format. Electronic documents should also be capable of: being printed; having text and images copied

from the document and inserted into another document; and being fully text searchable without requiring the use of any additional software.

Spreadsheets should be in tab delimited format, compatible with Microsoft Excel. Spreadsheets should not be password protected as this prevents the AER from carrying out an audit.

Submissions should be succinct, logically structured, outlining key issues in dispute and the party's position in respect of these issues. Parties should ensure that their submissions are both relevant and complete and correctly references or attributes third party information. To ensure completeness of submissions, parties should place all the relevant information before the AER as part of their submissions. In circumstances where parties wish to rely on material from, for example, websites, consultants' or experts' reports, the AER's or other regulators' papers, a court or tribunal decision, they should include a copy of the relevant documentation and information with their submission. The AER's preference is for parties to observe the following when providing such documentation:

- If the document is publicly available they should submit the relevant part of the document which is relied on (for example, this may be a relevant paragraph, page or section) and the relevant text should be identified such as by highlighting the text.
- Even if the document has been provided in a previous submission for the same or different regulatory process, the entire document should be submitted. If the information was created or submitted from another party and is not in the public domain the submitting party should be cognisant of its obligations under the NGR (rr. 136-137). The relevant passage, page or section of the document which is relied on or which is of particular relevance to the submission may be highlighted for ease of reference, but will need to be accurately referenced.
- It is suggested for ease of reference, parties should also provide an index to the extraneous material provided as part of its submission.

A checklist has also been prepared to assist service providers when submitting their access arrangement proposal (refer to Appendix E) to ensure they meet the mandated requirements and provide all relevant information.

The requirements for submitting commercial-in-confidence material are outlined below.

4.1.4 Submitting commercial-in-confidence material

In general, the AER will publicly conduct its decision making processes for the assessment of access arrangement proposals, with transparency and an expectation that all documentation is available for review by all interested parties. The NGR requires that the AER publish an access arrangement proposal and access arrangement information relating to the access arrangement or its proposal (r. 44). However, the AER appreciates that parties, particularly service providers, may wish to submit commercial-in-confidence material to support their access arrangement proposal or submission. This is also contemplated in the NGR in the context of a service provider's submission of access arrangement information. The NGR stipulates that

the AER may allow certain information to be aggregated, generalised or suppressed to protect the legitimate business interests of a service provider, user or prospective user (r. 43(2)).

In submitting confidential information:

- Two versions of the document should be submitted: a confidential version and a non-confidential version.
- The non-confidential version should be produced by replacing any confidential information with the text [c-i-c] or some other appropriate symbol. The pagination for the non-confidential version of the document should be the same as it appears in the confidential version.
- Each page which contains confidential information should be marked by: inserting 'confidential' in the header, footer or as a watermark; and then by highlighting or underlining the confidential information.

In addition, when submitting confidential information, parties should provide the reasons why the identified information is confidential and how its public disclosure could cause undue harm to their legitimate business interests or those of other parties. See section 3.1.4 of this guideline for further discussion.

The AER will only accept a claim of confidentiality where the information is truly confidential in nature. Information submitted to the AER that is confidential must be clearly marked as confidential. All information that is not marked as confidential will be treated as public information. In the circumstances where a confidential document is submitted but not accompanied by a non-confidential version of the document the AER may treat the submitted version as being non-confidential or it may give the confidential part of the submission less weight.

There may be circumstances where it would be appropriate for confidential information to be provided to a third party, such as a user or potential user or a relevant industry or user association, in order to test its veracity and so that the party can provide informed submissions. In such a case, the relevant third party will need to make appropriate arrangements to obtain access to the confidential information from the provider. These confidentiality arrangements would need to be established directly between the provider of the information and the relevant third party seeking the information. A contact person will need to be nominated by the service provider or party submitting confidential information to whom queries about the confidential information can be directed, including access to the confidential information. However, to the extent that confidential information is not made available to third parties, the AER may give such information less weight, given that third parties had not been provided with an opportunity to provide submissions on it.

4.1.5 Handling confidential information

The AER notes that courts have generally balanced three factors when considering whether to grant access to confidential information. In considering a claim that information is confidential commercial information the AER will consider the following:

- any harm to the legitimate commercial interests of the information provider

- any harm to the interests of the other party who does not have access to the information, and
- any hindrance to the ability of the AER to perform its functions (that is, in this context, to assess the veracity of the information).

The AER will make such assessments on a case-by-case basis.

Section 44AAF of the *Trade Practices Act 1974* (Cth) which deals with confidentiality operates as if it were a part of the NGL (s. 30). Under s. 44AAF the AER must take all reasonable measures to protect from unauthorised use or disclosure information that it has:

- (a) received in confidence or in connection with the performance of its functions or exercise of its powers, or
- (b) obtained by compulsion in the exercise of its powers.

Disclosure of the information as required or permitted by law is taken to be an authorised use and disclosure. This includes disclosure to the ACCC, the AEMC, the National Electricity Market Management Company Ltd, any consultants assisting these bodies, and any other person or body as prescribed.

In addition, subject to certain conditions,¹⁷ Chapter 10 of the NGL provides that confidential information may be disclosed by the AER in the following circumstances:

- if it is already in the public domain
- where it is has prior written consent to do so by the relevant party (s. 325)
- if it is being used for the purposes of court and tribunal proceedings and to accord natural justice (s. 326)
- if a redacted form of the documentation is provided by a party and excised of all confidential information, the redacted version of the document can be released (s. 327)
- if it does not identify, or disclose any elements of the information that could lead to the identification of, a person to whom the information relates (s. 328), or
- in circumstances where the public benefit of disclosing the information outweighs the detriment and certain requirements are met. (s. 329)

Other factors may also be relevant when the AER assesses whether to disclose confidential information. These factors include: the validity of the harm that may be caused to legitimate business interests; how current or relevant the information is to the commercial operations, the materiality or importance of the information to the matter under assessment; if the confidential information relates to competing operations of the parties or not; and whether information could be disclosed to a confined number of staff or external advisers or both.

¹⁷ See Chapter 10, Part 2 – Handling of confidential information held by the AER, NGL.

4.2 Other means of collecting information

In circumstances where information is not provided voluntarily, the NGL provides powers to the AER to compel parties to provide information. These powers are designed to:

- address the issue of information asymmetry between service providers and the AER
- ensure that the AER has sufficient information to perform its functions, and
- discourage service providers from using corporate structures to avoid disclosure of information to the AER.¹⁸

The information gathering powers can be used in the context of making a decision about an access arrangement proposal. The three relevant powers are outlined below. In general, parties submitting information arising from an information request initiated by the AER should provide this information to the AER as outlined in section 4.1 of this Guideline.

4.2.1 Obligations for service providers to comply with information requests from the AER under its information powers

A person named in a regulatory notice must comply with that notice (s. 56).

A person must comply with a general regulatory order if they are a member of the class named in that order (s. 57). However, exemptions to either a particular person or a class of persons can be obtained from the AER under s. 58. An exemption can be granted wholly or in part and can be subject to conditions.

The penalties associated with non-compliance are discussed in section 4.2.6 of this Guideline.

4.2.2 Serving an information notice

Information notices are more likely to be used by the AER when assessing an access arrangement proposal than information orders, as they are served on individual service providers or related providers.¹⁹

Before the AER serves an information notice on a service provider (or related service provider), the AER is required to notify the service provider in writing that it intends to serve a notice and also provide the service provider with a draft copy of the regulatory information notice (s. 52). This will generally be done at the same time so that the draft notice indicates the AER's intent to serve a notice.

The AER can serve an urgent information notice by giving reasons and identifying the notice as urgent. Urgent notices will generally be issued in making decisions about

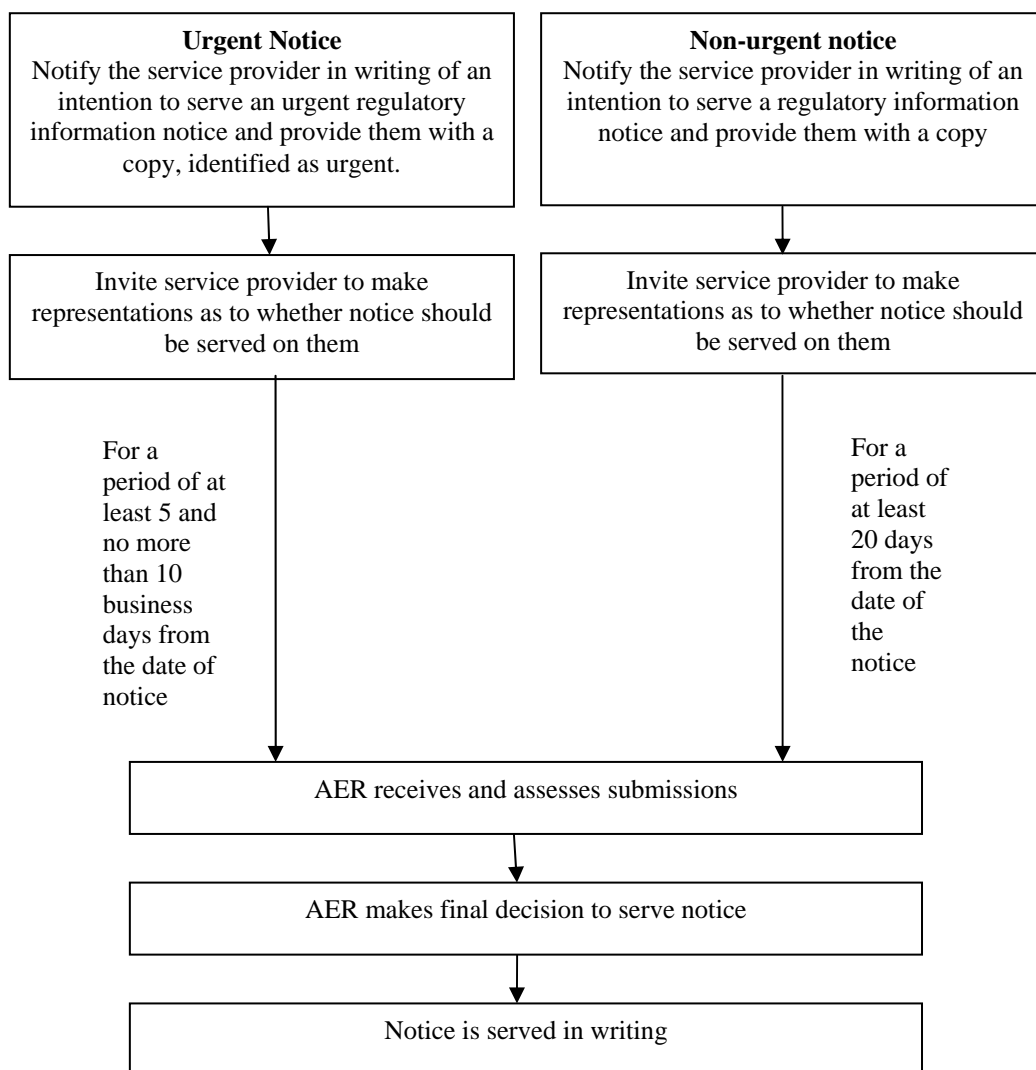
¹⁸ South Australia, *Parliamentary Debates*, House of Assembly, 9 April 2008, 2699 (Patrick Conlon, Minister for Transport, Minister for Infrastructure, Minister for Energy)

¹⁹ The NGL defines 'related provider' as 'a person who supplies a contributing service to a scheme pipeline service provider'.

access arrangement proposals where information is required to make the decision and there is a fixed timeframe associated with the decision making process that limits the time available to assess the information (s. 52(3)).

In considering whether to serve a notice, the AER will address any matters it is required to under the NGL including the likely costs that may be incurred by an efficient service provider or related service provider in complying with the notice (s. 48(2)(b)) and, if the notice applies to a related service provider any issues outlined in s. 49 of the NGL. The process for the serving of a regulatory information notice is outlined in Figure 5.

Figure 5: Process for serving an Information notice



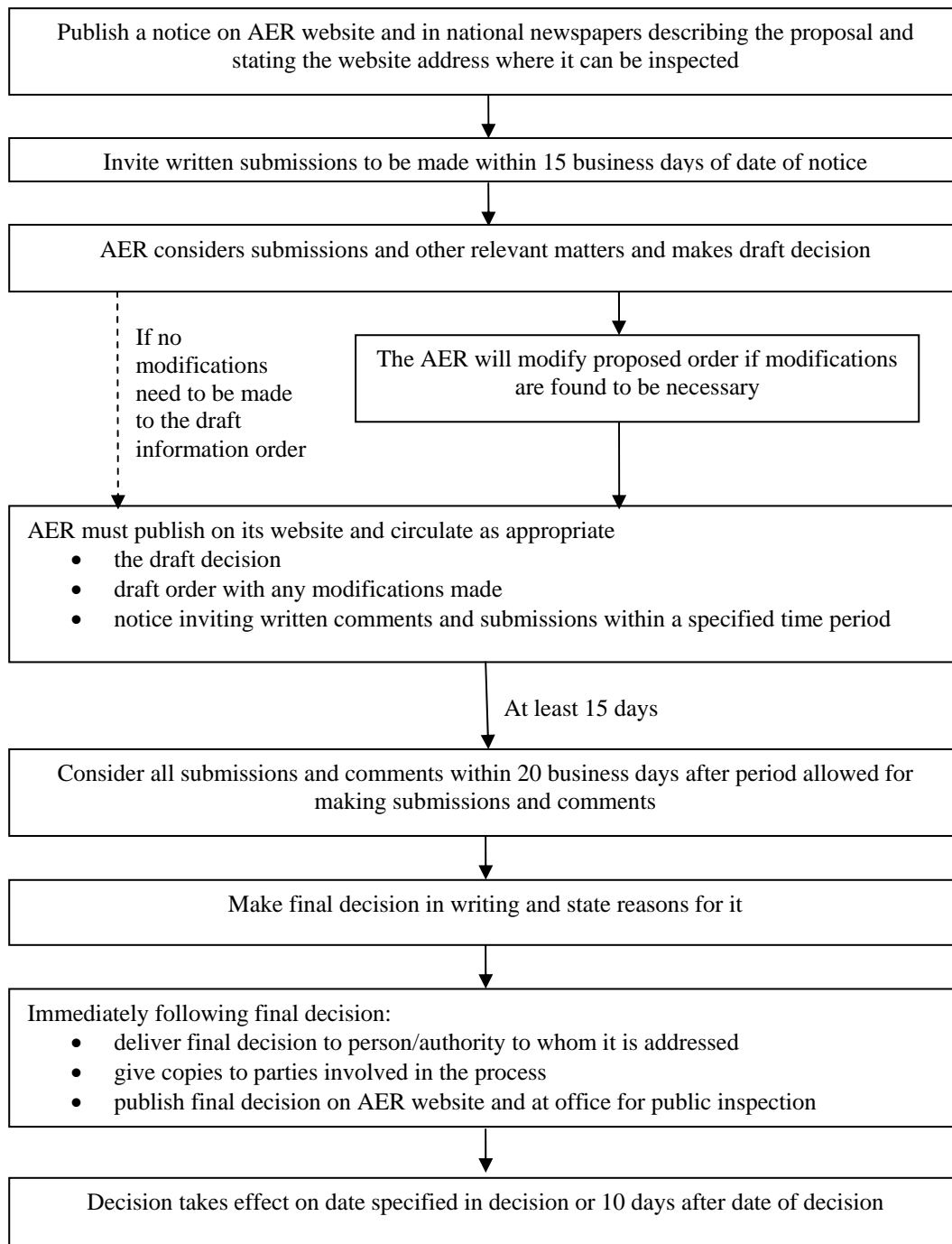
Issues of non-compliance with a regulatory information notice are contained in section 4.2.6 of this Guideline.

4.2.3 Making an information order

An order, like an information notice, applies to service providers and related service providers. However, unlike an information notice, an order is made to apply to more than one type or class of service provider or related service providers at the same time. For this reason, orders are less likely to be used in the context of making a decision about an access arrangement proposal than an information notice. However, this does not preclude their use for this purpose, particularly when access arrangement revision proposals for a number of pipelines are being assessed concurrently.

The AER is required to consult prior to publishing a general information order (s. 50). The consultation process mandated in the NGR is the standard consultative procedure set out in r. 8 (r. 139). In addition, the AER is required to publish the order once it is made on its website and in a national newspaper (s. 51). The figure below outlines the process the AER will follow in making an information order.

Figure 6: Process for making an information order



As with the serving of an information notice, the AER will in general, in seeking submissions in the process illustrated above, address any matters it is required to under the NGL. This includes the likely costs that may be incurred by an efficient service provider or related provider in complying with the order (s. 48(2)(b)) and if the order applies to a related provider any issues outlined in s. 49 of the NGL.

Issues of non-compliance with a regulatory information order are contained in section 4.2.6 of this Guideline.

4.2.4 General information gathering powers

In addition to regulatory information notices and orders, the AER also has general information gathering powers that apply to anyone. If the AER has reason to believe a person can provide information or produce a document that the AER may require in the performance or exercise of its functions or powers (s. 42). The use of this type of information gathering power may be required in the course of the AER assessing an access arrangement proposal. Section 42 gives the AER the power to obtain information and documents in relation to the performance or exercise of the AER's functions or powers from anyone by serving a written notice.

These powers can be employed by the AER to obtain information in the context of assessing an access arrangement proposal.

Issues of non-compliance with a general information notice are contained in section 4.2.6 of this Guideline.

4.2.5 Use and handling of information received under the NGL's information powers

In some cases, the AER may make information requests under the information powers publicly known. This may be particularly relevant for regulatory information orders, but may not be appropriate for regulatory information notices and section 42 notices. If this is the case it will do so as soon as practical and generally by way of a copy of the relevant notice on its website. In some instances, because of the nature of the information the need for a public notice may not be required.

The AER will endeavour to also place any relevant information received that (and that is not confidential) on its website, subject to its obligations under the NGL.

If information is received that is confidential in nature, the relevant procedures as set out above for confidential information need to be followed by the party providing the information.

The AER may use information provided under a s. 42 notice or a regulatory information instrument for any purpose in the performance or exercise of a function or power (s. 66).

4.2.6 Penalties associated with the AER's information powers

4.2.6.1 Regulatory information instruments

Non compliance with a regulatory information notice or regulatory information order is a civil penalty provision as outlined in Appendix D of this Guideline.

The maximum penalty for knowingly providing false and misleading information to the AER in response to a regulatory information instrument (s. 60) is \$10 000 for a body corporate or \$2 000 for a natural person.

A person cannot rely on duty of confidence to refuse to comply with a regulatory information instrument (s. 61). However, a person may refuse to comply with a regulatory information instrument on the grounds that the information sought by the AER is subject to legal professional privilege (s. 62) or that compliance with the instrument may make the person liable to a criminal penalty (s. 63).

4.2.6.2 General information gathering powers

A person served a notice under s. 42 must comply with the notice unless they have a reasonable excuse (that they are not able to supply the information sought or providing the information sought may make the person liable to a criminal penalty). A duty of confidence is not a reasonable excuse. A person is not required to produce documents that are subject to legal professional privilege that would disclose the contents of cabinet documents.

Failure to comply with a s. 42 notice attracts a maximum penalty of \$10 000 for a body corporate or \$2 000 for a natural person (s. 42(3)).

5 Access Arrangement submission

When a service provider submits an access arrangement proposal the NGR requires that the proposal is accompanied by access arrangement information. In addition, a service provider may also wish to provide supporting information to support the proposal. Collectively, these documents and information are referred to as the service provider's access arrangement submission.

While chapter 4 of this Guideline outlines the requirements for service providers and other parties providing information in decision making processes for an access arrangement proposal, this chapter discusses what information should be included in a service provider's access arrangement submission. In particular, the chapter details whether the information that must be submitted should form part of the access arrangement proposal (which is what will be approved by the AER) or other supporting information such as the access arrangement information (which supports and explains the proposal but is not approved by the AER).

A summary checklist of information that must be included in a service provider's submission (and which document it should be included in) is set out at Appendix E.

5.1 General requirements of an access arrangement

In preparing an access arrangement proposal and access arrangement submission, a service provider should be aware of the general requirements for an access arrangement.

The basic requirement in the NGR is that the provisions of an access arrangement must be consistent with the national gas objective (r. 100).

An access arrangement:

- may vary according to factors or with a formula stated in the access arrangement, which are not considered to be a variation of the access arrangement (r. 102)²⁰
- must not make it a condition of the provision of a particular pipeline service to a prospective user that the prospective user accept another non-gratuitous service from the service provider unless the bundling of these services is reasonably necessary (r. 109)
- must not deprive a person of a protected contractual rights (s. 321) and
- continues to apply regardless of who provides the pipeline service (s. 323).

Service providers are, however, able to enter into contracts with users or prospective users for access to a pipeline service that are different from an applicable access arrangement (s. 322).

²⁰ Variations of access arrangements are considered in Part 8, Division 10 of the NGR.

5.2 Access arrangement proposal and approval

One of the key economic regulatory functions and powers of the AER is to make a decision to approve or not approve the terms and conditions of access to pipeline services contained in a proposal. The terms and conditions of access are framed in an access arrangement proposal for a full or limited access arrangement or a proposal for revisions of the arrangement.²¹

In making a decision about an access arrangement proposal, the AER's approval implies approval of each element of that proposal (r. 41(1)).

If the AER does not approve any one element of the access arrangement proposal then the access arrangement proposal cannot be approved (r. 41(2)).

A key feature of the legislative framework for gas is the decision making or 'fit for purpose' framework which has the objective of balancing the risk of regulatory error, the interests of consumers and the service provider, and allowing for the regulatory regime to evolve where required.²² The 'fit for purpose' framework relates to the different levels of discretion that the AER has in making its decision about an access arrangement and different aspects of an access arrangement proposal.

In some cases the AER has no discretion under a provision and must accept that aspect of a service provider's proposal to which that provision of the Law relates (r. 40(1)). In other cases, it has limited discretion, if the service provider's proposal complies with requirements and criteria under the NGL (r. 40(2)). A 'limited discretion' rule is an acknowledgement that there are a range of possibilities that may meet the particular criteria in the rules but presumes acceptance on the part of the AER and limits the AER's ability to require a particular outcome or apply a more specific test.²³

However, the AER does have full discretion in some cases and can put forward a more preferable alternative, if it considers that it complies with the NGL and relevant criteria (r. 40(3)). Section 5.4 of this Guideline notes where appropriate the provisions of the Law under which the AER has limited or no discretion in decision making.

The AER's decision is to approve or not approve the access arrangement proposal. This does not infer the AER is approving the reasoning (access arrangement information) or submissions made to support that proposal unless it is required to do so under the NGL or NGR.

²¹ Sections 2 and 27 and r. 3.

²² South Australia, *Parliamentary Debates*, House of Assembly, 9 April 2008, 2703 (Patrick Conlon, Minister for Transport, Minister for Infrastructure, Minister for Energy)

²³ South Australia, *Parliamentary Debates*, House of Assembly, 9 April 2008, 2703 (Patrick Conlon, Minister for Transport, Minister for Infrastructure, Minister for Energy)

5.3 The role of access arrangement information and other supporting information

Access arrangement information is regarded as information necessary to understand an access arrangement proposal, and the basis for deriving elements contained in the proposal (r. 42(1)). Access arrangement information that is specifically required (r. 42(2)) must be submitted with the access arrangement proposal (r. 43(1)).

If the information is considered deficient by the AER, the AER may require the information be revised and resubmitted or supplemented with additional information (r. 43(3)).

There may also be other supporting information, not required by the NGR that is also provided as part of a service provider's submission and the access arrangement information.

The AER is required to publish both the access arrangement proposal and access arrangement information (r. 44). The AER considers this requirement extends to other supporting information also included as part of a service provider's submission. As outlined in section 4.1.4 of this Guideline, some of this information may be submitted by the service provider with the approval of the AER in an aggregated or generalised way or suppressed if it contains commercially sensitive information that would harm its legitimate business interests (r. 43(2)).

In discussing the elements of an access arrangement proposal, section 5.4 of this Guideline outlines what access arrangement information is required along with other supporting information that may be provided in a service provider's submission.

5.4 General requirements of an access arrangement proposal

All access arrangement proposals must include certain non-tariff elements. These are discussed in detail in section 5.4.1 of this Guideline.

Full access arrangement proposals must also include tariff components, which are discussed in detail in 5.4.2 of this Guideline.

The requirements for a CTP access arrangement proposal are contained in this chapter (as relevant) and in detail at Appendix B of this Guideline.

The NGR is silent on how (in what form) information should be provided. In some circumstances the AER may prescribe the form of an access arrangement proposal and other supporting information. This will generally be done using the information powers. It may be relevant to meet the requirements for the access arrangement information in a model or by some means other than a written submission.

If service providers are to submit information in different forms and this information is required or prescribed under the NGR, the AER suggests that service providers include a list that cross references the parts of their submissions that address these mandatory requirements.

5.4.1 Non-tariff elements of an access arrangement proposal

The NGR specifies a number of non-tariff elements to be included in a service provider's access arrangement proposal.

The common non-tariff elements required for all arrangements are:²⁴

- identification of the pipeline and reference to a website that includes the pipeline's description
- description of the pipeline services to be offered
- specification of the non-tariff terms and conditions²⁵
- inclusion, if required, of the queuing requirements²⁶
- the capacity trading requirements and terms and conditions for changing receipt and delivery points, and
- the extension and expansion requirements.

The main difference in the non-tariff elements required for a full and limited access arrangement is the inclusion of the review and expiry dates as discussed below. Requirements or criteria that differ according to pipeline classification or the type of access arrangement are highlighted.

The non-tariff elements for a CTP access arrangement are generally the same as those listed above (r. 22(4)). However, there is no requirement to include any capacity trading requirements (r. 24(2)(c)). In addition, it must have an expiry date of no more than 15 years after the commissioning of the pipeline (r. 24(2)(c)(vi)).

5.4.1.1 Pipeline identification and description

An access arrangement needs to identify the pipeline. It also must include a reference to a website that includes a description of the pipeline.²⁷

Generally the following information would meet the requirements for inclusion in an access arrangement proposal:

- the identification of the pipeline by its pipeline licence(s)
- pipeline classification (that is, distribution or transmission),
- a map of the pipeline or network, and

²⁴ Rule 45 (limited access arrangement), r. 48 (full access arrangement) and r. 129 (limited access arrangement for international pipeline)

²⁵ For a limited access arrangement, the terms and conditions for 'pipeline services likely to be sought by a significant part of the market' are to be included (r. 45(1)(c)). For a full access arrangement, the terms and conditions relating to the reference service must be provided (r. 48(1)(d)).

²⁶ Service providers of distribution pipelines may not be required to include queuing requirements in an access arrangement.

²⁷ As outlined in r. 45(1)(a) for limited access arrangements, r. 48(1)(a) for full access arrangements, r.s 129(1)(a) for international pipelines and r. 24(2)(c)(i) for CTP access arrangements.

- the general location and key points (such as origin, end and key intersections with laterals or other pipelines).

Service providers are also required to provide particular information to the AEMC for the scheme register (r. 133), which includes a description of the pipeline, its classification and regulatory history. As also outlined in Appendix D of this Guideline certain technical characteristics of the pipeline need to be provided to the Bulletin Board Operator. This information may also be included as part of the pipeline description in the supporting information for an access arrangement proposal.

5.4.1.2 Pipeline services

All access arrangements are required to name and describe the pipeline services provided by the pipeline.²⁸ The description of each service must conform with the requirements of r. 109 which prohibits the bundling of services, unless it is reasonably necessary.

A full access arrangement is also required to specify all the reference services (r. 101). A reference service is defined as a pipeline service that is likely to be sought by a significant part of the market (r. 101(2)).

Supporting information needs to distinguish a reference service from other pipeline services and demonstrate how the reference service is demanded by a significant part of the market.

5.4.1.3 Terms and conditions

All access arrangements are required to specify the non-tariff terms and conditions relevant to the reference²⁹ or pipeline³⁰ services.

Non-tariff terms and conditions typically include (but are not limited to) the obligations between a service provider and user regarding system use gas, linepack, overruns, gas quality and metering.

The NGR does not specify any criteria for the AER to make an assessment as to the reasonableness of the terms and conditions included in an access arrangement proposal. The relevant terms and conditions may be clarified as part of the information requirements in a regulatory information notice.

Service providers are expected to provide an explanation in the supporting information for their access arrangement proposal as to why the proposed terms and conditions are reasonable for the relevant services. This should include reasoning as to how the non-tariff terms and conditions are consistent with the national gas objective (r. 100) and other aspects of the access arrangement.

²⁸ As outlined in r. 45(1)(b) for limited access arrangements, r. 48(1)(b) for full access arrangements, r. 129(1)(b) for international pipelines and r. 24(2)(c)(ii) for CTP access arrangements.

²⁹ Rule 48(1)(d) for full access arrangements, and r. 24(2)(c)(iii) for CTP access arrangements

³⁰ Rule 45(1)(c) for limited access arrangements for light regulation services and r. 129(1)(c) for international pipelines

5.4.1.4 Queuing requirements

Queuing requirements must be included in access arrangements for transmission pipelines³¹ and may be required for distribution pipelines (r. 103(2)).

Queuing requirements must establish a process or mechanism that provides for an order of priority between prospective users of spare or developable capacity where all prospective users are treated on a fair and equal basis (r. 103(3)). They may, but are not required, to specify that priority is determined by a first-come-first-serve basis or by a public auction (r. 103(4)).

These requirements must be sufficiently detailed to enable prospective users to understand how the order of priority is determined and their position in the queue (r. 103(5)). The AER considers this should include, but is not limited to:

- specifying on what conditions requests for access may be denied
- frequency of notifying prospective users of their place in the queue
- how users may be able to request queue information from the service provider
- how prospective users may request removal from the queue, and
- under what conditions a service provider may remove a prospective user from the queue.

These requirements should be included in the access arrangement proposal and may be included in the information requirements as part of a regulatory information notice.

5.4.1.5 Extensions and expansions requirements

All access arrangements must include requirements relating to extensions of, and expansions to, a pipeline.³² An expansion relates to an augmentation to the capacity of the pipeline infrastructure which enhances its capacity to deliver an increased volume of gas to users. An extension relates to an augmentation of the pipeline infrastructure which extends the pipeline such that it can receive or deliver gas to or from new locations.

The extension and expansion requirements in an access arrangement may state whether the access arrangement applies to incremental services provided as a result of the extension or expansion or will be resolved at a later date (r. 104(1)).

In the case that incremental services are to be covered by the access arrangement arising from an extension or expansion, the effect on tariffs must also be outlined (r. 104(2)). However, the extension and expansion requirements cannot require the service provider to fund any work unless the service provider agrees (r. 104(3)). The access dispute provisions stipulate that an access determination cannot require the

³¹ Rule 103 and specifically, r. 48(1)(e) for full access arrangements, r. 45(1)(d) for limited access arrangements, r. 129(1)(d) for international pipelines and r. 24(2)(c)(iv) for CTP access arrangements

³² Rule 48(1)(g) for full access arrangements, r. 45(1)(f) for limited access arrangements for light regulation services, r. 129(1)(f) for international pipelines, and r. 24(2)(c)(v) for CTP access arrangements.

service provider to fund an expansion if this is not provided for in the extension and expansion requirements of an access arrangement.³³

The value of the extension or expansion that will be included in the capital base is assessed using the new capital investment criteria in r. 79 (see section 5.4.2.3 of this Guideline for further details of the new capital investment criteria). The timing of when the value of the extension or expansion is included in the capital base is usually during the review of an access arrangement revision after the extension or expansion has been completed. However, this does not preclude reference tariffs being based on forecast capital expenditure (see s. 6.4.2.1 of this Guideline for more details.)

The NGL requires that expansions and extensions are part of a covered pipeline if this is the policy outlined in an approved access arrangement.³⁴ Extensions or expansion to light regulation services pipelines are part of the covered pipeline unless otherwise determined by the AER.³⁵

In general, the AER considers it is appropriate for expansions to be included as part of the covered pipeline and if relevant subject to the reference tariff(s) unless otherwise determined by the AER. However, because of the different characteristics of extensions, it may be appropriate for an access arrangement to provide that the service provider retains discretion over whether to elect that an extension is included as part of the pipeline subject to an access arrangement.

The extension and expansion requirements and incremental services (where relevant) should be included as part of the access arrangement proposal. The supporting information should include the rationale for the proposed extension and expansion requirements and compliance of these requirements with the NGR.

5.4.1.6 Capacity trading and changing receipt and delivery points requirements

Limited and full access arrangements are required to include requirements relating to the trading of capacity and changing receipt and delivery points.³⁶

The capacity trading requirements included in an access arrangement must allow a transfer of capacity in accordance with any applicable gas market rules or the capacity trading requirements in the NGR (r. 105(1)).

In its access arrangement proposal, the service provider should outline whether the capacity trading requirements are subject to the gas market rules or not.

If applicable, the gas market rules will form the basis for the capacity trading requirements in an access arrangement proposal.

³³ Rule 118 (2)(b)

³⁴ NGL, s.18

³⁵ NGL, s.19

³⁶ Rule 48(1)(f) and (h) for full access arrangements, r. 45(1)(e) and (g) for limited access arrangements for light regulation services, r. 129(1)(e) and (g) for international pipelines. This provision is not a requirement of a CTP access arrangement.

If this is not the case the capacity trading requirements must be consistent with the following:

- a user may subcontract its contracted capacity to a third party without the consent of the service provider in such a manner that the rights and obligations to the service provider are unaffected. Notice of the transfer must be provided to the service provider (r. 105(2)).
- a user may, with the service provider's consent, transfer contracted capacity to a third party if the rights to the service provider are modified in accordance with the trading requirements and a contract arises between the third party and the service provider (r. 105(3)). A service provider must not withhold consent unless it has reasonable grounds (based on technical or commercial considerations) to do so (r. 105(4)).

In its supporting information the service provider should outline how the proposed capacity trading requirements in its access arrangement proposal are consistent with the relevant gas market rules or the NGR, whichever requirement applies.

The trading of capacity does not affect any rights or liabilities under the contract between the service provider and user. The capacity trading requirements may specify in advance conditions under which the service provider's consent will (or will not) be given as well as any conditions that are to be complied with for consent to be granted (rr. 105(5)-105(6)).

The AER strongly recommends that such information is included in the capacity trading requirements of the access arrangement to allow users and prospective users to comprehensively understand these requirements.

Similarly, an access arrangement must provide for the change of receipt or delivery points on condition that the service provider's consent is required and that this consent must not be withheld unless there are reasonable grounds to do so. The access arrangement may specify under what conditions the service provider's consent will (or will not) be given as well as any conditions relevant for consent to be granted (r. 106).

As with the capacity trading requirements, the AER strongly recommends that such information be included in the access arrangement with respect to changing receipt and delivery points.

5.4.1.7 Review and expiry dates

The requirement for the inclusion of a review and/or expiry date in an access arrangement varies between the different types of access arrangement.

The table below provides a summary of the rules in relation to these requirements.

Table 3: Summary of review and expiry date provisions

Type of arrangement (rule reference)	Review submission date	Revision commencement date	Expiry date
Full (r. 49(1))	required	required	not permitted
Full (voluntary) (r. 49(2))	optional	optional (required if review submission date set)	Optional (required if no review submission date set)
Limited (r. 49(2))	optional	optional (required if review submission date set)	optional (required if no review submission date set)
Limited (international) (r. 129(1))	may only be varied for the period until the expiry date	not applicable	required
CTP (r. 24(2)(c)(vi))	may only be varied for the period until the expiry date	not applicable	required

There is a ‘general rule’ for the review dates in an access arrangement (r. 50) that the review submission date will fall four years, and the revisions commencement date five years, after the start of the access arrangement period. The general rule reflects an access arrangement period of five years.

It also schedules an AER review of the next proposed access arrangement one year before it is due to commence (at the start of year four of the current access arrangement period).³⁷

The review submission date, revisions commencement date and expiry date, where required or proposed by a service provider, must be included as part of the access arrangement proposal.

A service provider may propose, however, different dates than those set out in the general rule (r. 50(4)). The AER must accept any proposals consistent with the general rule for the review and revision commencement date (rr. 50(2)-(3)).

Even though it is optional for limited and voluntary access arrangements, the AER considers that it is appropriate to provide for a review submission date in access arrangements preferably once every five years, as consistent with the general rule.

5.4.1.8 Trigger events

Any access arrangement may include trigger events which provide a means to initiate a review of an access arrangement before a scheduled review (r. 51). The process

³⁷ For example, if an access arrangement that conforms to the general r. commences on 1 January 2000, revisions to the access arrangement must be submitted by 1 January 2004. The revisions will be expected to take effect on 1 January 2005.

undertaken to assess these revisions will be the same as if the service provider was submitting revisions on the specified review submission date.³⁸

A trigger event may be any significant circumstance or a combination of circumstances that have the ability to influence the competitive conditions in related markets. The NGR provides three examples for consideration: a change in the direction of the flow of gas through a pipeline; a new competing source of gas becoming available; and a significant extension, expansion or interconnection to a pipeline (r. 51(2)). A trigger event could also be, for example, actual throughput, revenues or profits exceeding the forecast by a specific amount, a change in the mix of pipeline services requested, or the need for a new service by a significant part of the market.

The AER may insist on the inclusion of one or more trigger events in the access arrangement and specify what events are to be regarded as trigger events (r. 51(3)). In general, the AER considers that it is prudent and appropriate to provide for changing circumstances within an access arrangement period, and in particular within an access arrangement period that exceeds five years, by the inclusion of one or more trigger events in an access arrangement proposal. It recommends that where such an extended access arrangement period is included in an access arrangement proposal, a service provider also includes a trigger event clause.

Trigger events proposed by the service provider must be included in an access arrangement proposal. The inclusion of the trigger events in the access arrangement proposal may be explained in the supporting information to the proposal.

5.4.1.9 Non-tariff elements summary

The elements discussed above are relevant for full, limited and CTP access arrangements. The table below provides a summary of which elements are relevant according to type of access arrangement.

³⁸ Revisions submitted as a result of a trigger event are not variations to an access arrangement that are submitted voluntarily at any time while the access arrangement remains in force.

Table 4: Summary of non-tariff elements

Element	Full access arrangement	Limited access arrangement	Limited access arrangement	CTP access arrangement
		(light regulation)	(international pipeline)	
pipeline identification	✓	✓	✓	✓
description of pipeline services	✓	✓	✓	✓
identification of reference services	✓	×	✓	✓
terms and conditions	✓	✓	✓	✓
queuing requirements ^(a)	✓	✓	✓	✓
capacity trading requirements	✓	✓	✓	×
requirements for changing receipt and delivery points	✓	✓	✓	×
extensions and expansions requirements	✓	✓	✓	✓
review submission date and revisions commencement date	✓	may be included	×	×
expiry date	×	may be included	✓	✓

Note: (a) For transmission pipelines but only for distribution pipelines as directed by the AER.
(b) A full access arrangement submitted voluntarily may include an expiry date.

5.4.2 Tariff components

Tariff components are relevant for full access arrangements which need to specify the reference tariff. The following may also provide relevant guidance for service providers considering tariff components for CTP access arrangements.³⁹

This section outlines:

- the revenue and pricing principles that need to be adhered to for the construct of a tariff in an access arrangement proposal (section 5.4.2.1)

³⁹ Rule 24(2)(c)(iii) for CTP access arrangements and r. r. 48(1)(d(i)). The AER notes that while parts 8,9 and 10 of the NGR pertain to price and revenue regulation and other elements of access arrangements relevant for access arrangements other than CTP access arrangements (r. 29), the guidance provided in this section may assist service providers preparing a proposal for a CTP access arrangement which includes a reference tariff.

- the relevant price and revenue components that need to be considered for a service provider's submission. This focuses on the building blocks approach to determine revenue (total costs) that underlie the relevant tariffs for pipeline services (section 5.4.2.2) and
- how the total revenue (total costs) for the pipeline services is allocated to calculate the reference and other tariffs for the relevant pipeline services (section 5.4.2.3).

The tariff variation mechanism⁴⁰ which describes how the reference tariff(s) will vary within an access arrangement period is considered in Chapter 7.

5.4.2.1 Revenue and pricing principles

While all components of an access arrangement must be consistent with the national gas objective, tariff components must also be consistent with the revenue and pricing principles that are set out in s. 24 of the NGL. The aim of these principles is to provide a framework for determining access pricing that provides for the efficient investment in gas pipelines.⁴¹ These principles state that:

- a service provider should be provided with a reasonable opportunity to recover at least the efficient costs incurred in providing the reference services and complying with regulatory obligations or requirements
- a service provider should be provided with effective incentives to promote economic efficiency in relation to the reference services. This includes efficiency in investment, the provision of pipeline services and use of the pipeline
- regard should be had to any previously established capital base valuation
- a reference tariff should allow for a return commensurate with the risks associated with providing the reference service, and
- regard should be had to the economic costs and risks associated with a service provider's potential under and over investment and under and over utilisation of the pipeline.

To determine whether operating or capital expenditure is efficient and complies with the NGR, the AER may infer compliance from the use of an incentive mechanism or some other means (r. 71).

The NGR clearly indicates that regard must be given to the costs of a prudent and efficient service provider of a pipeline service. As a result, the operating and capital expenditures included in the calculation of total revenue and reference tariffs may not necessarily reflect costs that are expected to be incurred, unless they are also efficient. The AER will also take into consideration the particular circumstances of the operations of the pipeline to which the access arrangement relates when considering the determination of forecast operating and capital expenditures. The AER will also consider the relevance and application of information from experts, submissions from

⁴⁰ A full access arrangement may include a reference tariff variation mechanism (r. 97(1)).

⁴¹ South Australia, *Parliamentary Debates*, House of Assembly, 9 April 2008, 2697 (Patrick Conlon, Minister for Transport, Minister for Infrastructure, Minister for Energy)

interested parties, benchmarking, the operation of efficiency mechanisms and key performance indicator information and any other information as relevant provided to support the proposal from the service provider.

5.4.2.2 Fixed principles

Full access arrangements may include principles that may be fixed for a stated period over two or more arrangement period (r. 99).

Any existing fixed principles are binding on the AER and the service provider but may be revoked or varied by the AER at any time with the service provider's consent (r. 99(4)).

Any fixed principles need to be included in the access arrangement proposal. Justification or explanation to support the inclusion of these principles should be included in the access arrangement information.

5.4.2.3 The building block approach to determining total revenue

The building block approach is used to identify the costs that comprise total revenue that are expected to be incurred by an efficient service provider providing pipeline services. This revenue is used as the basis to calculate reference tariffs.

Total revenue (total costs) under the building block approach (r. 76) is comprised of the following capital and non-capital costs relating to pipeline services:

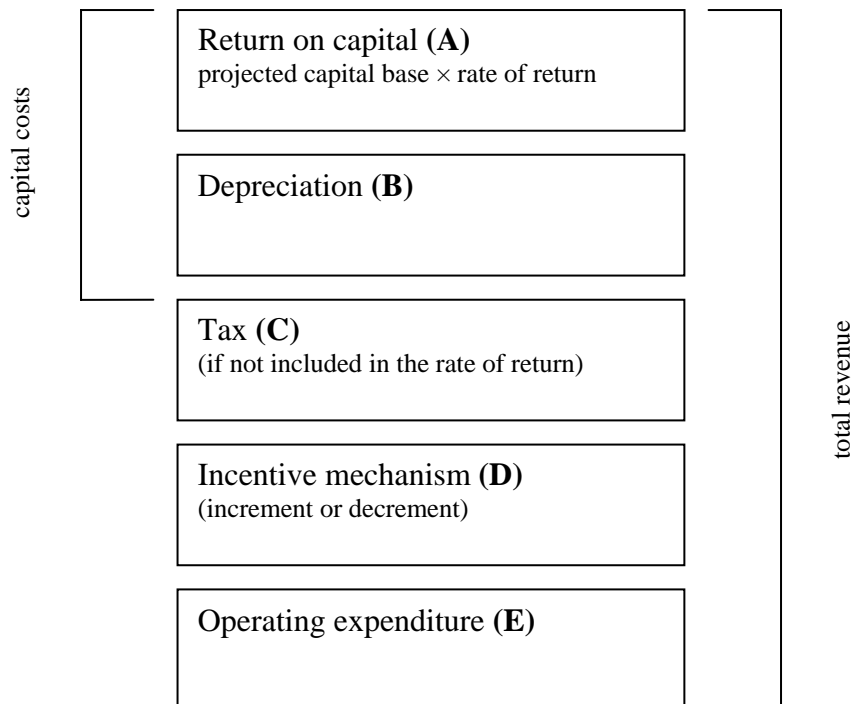
- a return on the projected capital base
- depreciation on the projected capital base
- corporate income tax if relevant⁴²
- increments and decrements resulting from an incentive mechanism,⁴³ and
- forecast operating expenditure.

This can be illustrated by the following diagram.

⁴² This will be included in operating expenditure or, if a pre-tax model is used, in the return on the capital base.

⁴³ This may refer to operating expenditure and/or capital expenditure according to the incentive mechanism.

Figure 7: Building block components



Once the total revenue is determined it is allocated between the pipeline services. The tariffs for the pipeline services are determined by reference to the recovery of the total costs (total revenue) of providing those services.

The NGL only allows the building blocks (cost of service) approach to determining tariffs.

However, not all access arrangements (approved under the code) have used a cost of service methodology to determine total revenue.¹

For example, the Central West Pipeline access arrangement makes use of a NPV framework.

The AER will work with the relevant service providers transitioning from a methodology not consistent with the building block method to determining total revenue

The total revenue to be derived from the pipeline services for each year of the access arrangement period as determined by the building block approach needs to be included in the access arrangement information (r. 72(1)(m)).

Return on the projected capital base (A)

The return on the projected capital base is calculated with reference to the pipeline's capital base and the required rate of return on that capital base. These two components are discussed in turn here.

Return on projected capital base (A) = project capital base (1) x rate of return (2)

1. The **projected capital base** is defined in r. 78 as

$$\begin{array}{r} \text{projected} \\ \text{capital} \\ \text{base} \end{array} = \begin{array}{r} \text{opening} \\ \text{capital} \\ \text{base} \end{array} + \begin{array}{r} \text{forecast} \\ \text{conforming} \\ \text{capital} \\ \text{expenditure} \end{array} - \begin{array}{r} \text{forecast} \\ \text{depreciation} \end{array} - \begin{array}{r} \text{forecast value} \\ \text{of assets to be} \\ \text{disposed} \end{array}$$

All components of the projected capital base are required to be included as part of the access arrangement information (rr. 72(1)(c) and 72(1)(b)) and are defined as follows:

Opening capital base: The opening capital base is the capital base at the start of the access arrangement period.

If the period is the initial access arrangement period and the pipeline was commissioned prior to the introduction of the NGL, then the opening capital base will be set according to the code (r. 77(1)(a)). The factors that the AER must have regard to are listed in s. 8.10 of the code. In addition, s. 8.11 of the code requires that the initial capital base should not normally fall outside the range of values determined by the depreciated actual costs (DAC) and the depreciated optimised replacement cost (DORC).

If the pipeline was commissioned after the commencement of the NGL then the opening capital base for the initial access arrangement period will be calculated according to the NGL as the construction cost of the pipeline and any actual additional capital expenditure subsequently undertaken less depreciation and disposed assets (r. 77(1)(b)).

The opening capital base for subsequent access arrangement periods will be the opening capital base from the previous period plus actual conforming capital expenditure (from the previous period), amounts from the speculative investment fund and the re-used redundant assets less depreciation, redundant assets and disposed assets (r. 77(2)).

Service providers are required to explain how the opening capital base is arrived at and if relevant demonstrate how the capital base changed over a previous access arrangement. This information needs to be in the access arrangement information (r. 72(1)(b)).

Service providers are required to include in the access arrangement information capital expenditure by asset class over the earlier access arrangement period (r. 72(1)(a)(i)). The asset classes for capital expenditure relating to the earlier access arrangement period needs to be consistent with the asset classes for the opening capital base. If these are not consistent the service provider will need to provide a reconciliation or explanation of the differences.

Actual data for the earlier access arrangement period may not be available at the time an access arrangement proposal and access arrangement information are submitted.

To the extent that actual data are available, these should be provided, and supplemented with estimates and up-to-date forecasts. Based on previous experience the broad categories of asset classes used includes: land; buildings; pipelines; compressors; regulators; meters; communication (SCADA); and other (including motor vehicles and IT).⁴⁴

Moomba to Sydney Pipeline System – a case study

Establishment of the initial capital base (ICB) for the Moomba to Sydney Pipeline System (MSP) was the main issue considered in the Australian Competition Tribunal's (Tribunal's) review of the ACCC's Final Decision on the access arrangement for the MSP released on 8 December 2003.

On 8 July 2004 the Tribunal set aside the ACCC's Final Decision and decided that the ICB should be derived using the DORC methodology. The Tribunal rejected the traditional straight line methodology for calculating DORC in favour of a DORC based on the net present value of costs (NPV DORC). The Tribunal adjourned to enable the ACCC and EAPL to make submissions on how this methodology should be applied.

Key fundamental differences arose between the ACCC and EAPL on the underlying assumptions used to calculate an NPV DORC. First, the ACCC considered that DORC should be viewed from the prospective of the incumbent rather than a hypothetical new entrant. This had implications for the treatment of tax. Second, the ACCC considered that the risk free rate should be used to discount costs rather than the weighted average cost of capital.

The Tribunal rejected the ACCC's arguments on the basis that these constituted new matters which the GPAL (s. 39(5)) did not allow the Tribunal to consider. As a consequent the Tribunal set the ICB at \$835m, which was substantially higher than the value of \$563m calculated by the ACCC.

Nevertheless, the Tribunal emphasised that its decision related to the MSP only and was not binding on future decisions of the ACCC (or by implication its successor the AER). The Tribunal noted that the ACCC was not prevented from raising those issues in other cases. Furthermore, the Tribunal also noted that while the ICB of the MSP was based on the NPV DORC methodology, it did not follow that DORC would always be the appropriate method of setting the ICB for existing gas pipelines. (Reference: Tribunal, *Reasons for decision*, 18 March 2005.)

Forecast conforming capital expenditure: Forecast conforming capital expenditure is added to an opening capital base in the calculation of the projected capital base. Conforming capital expenditure is capital expenditure that meets the requirements of r. 79 that capital expenditure needs to be prudent⁴⁵ and 'justifiable'. Capital expenditure is justifiable if it meets one of the conditions set out in r. 79(2). These are:

- the overall economic value of expenditure is positive (economic value test)
- the present value of the expected incremental revenue exceeds the present value of the capital expenditure (incremental revenue test)

⁴⁴ The NGR also outlines the capital base for a pipeline once subject to full regulation and after a period of limited or non-regulation, becomes fully regulated again. The opening capital base for the new access arrangement will be the closing capital base when it was last regulated as a full regulation pipeline including any capital expenditure since then, less depreciation and assets disposed (r. 77(3)).

⁴⁵ R. 79(1)(a) specifies the prudent test as capital expenditure that 'would be incurred by a prudent service provider acting efficiently, in accordance with accepted good industry practice, to achieve the lowest sustainable cost of providing services'.

- the capital expenditure is necessary to: maintain and improve the safety of services; maintain the integrity of services; meet regulatory obligations; or continue to meet current demand (safety and integrity test), or
- the capital expenditure is an aggregate of two parts – one of which satisfies the incremental revenue test and the other meets the safety and integrity test.

Rule 79(4) provides guidance on the calculation of the present value of expected incremental revenue required for r. 79(2)(b). It specifies:

- that the tariff assumed will be the prevailing reference tariff or an estimate of the reference tariff that would have been set for the service if it was a reference service
- incremental revenue is the gross revenue from the incremental service less incremental operating expenditure for the incremental service, and
- the discount rate is to be the rate of return used for the calculation of the reference tariff (or the estimated reference tariff).

While the value of the proposed new capital expenditure is required to be included as part of the access arrangement information (r. 72(1)(c)(i)), service providers will need to outline the nature and measurement of the benefits of a new facility consistent with the NGR as part of its access arrangement information and supporting information for the AER's assessment.

Where possible capital expenditure should reflect relevant asset classes that comprise the capital base. This may not be possible in all circumstances particularly if capital expenditure reflects an entirely new asset class.

What is overall economic value?

Rule 79(3) states that consideration must be given only to the economic value directly accruing to the service provider, gas producers, users and end users.

The policy intent behind the implementation of rr. 79(2)(a) and 79(3) provides some guidance on how the overall economic value test for capital expenditure should be interpreted.

The concept of overall economic value is new to gas regulation and replaces the code's system wide benefits test. The intention of the overall economic value test is to clearly include benefits that may not have been included under the system wide benefits test (particularly benefits that accrue to users and end users of gas).¹ The benefits include:²

- the net value to end users in being able to purchase additional supplies of gas
- the net value to gas producers of being able to sell additional quantities of gas, and
- the net value to retailers (or aggregators) of being able to offer their services across a greater volume of gas sold.

These are the benefits of competition arising from increased sales and increased system security and reliability.

The inclusion of these benefits in the conforming capital expenditure test is expected to assist in promoting efficient investment in gas pipelines.³ The overall economic value test does require some form of cost-benefit analysis. However, this does not need to be a comprehensive test. The overall economic value test will not address whether a different option to expand a pipeline may provide greater benefits. Rather, the test is a positive benefits test: it should focus on the task of whether there are sufficient benefits to meet, or exceed, the cost of the proposed facility. This is the distinguishing feature between the NGR's overall economic value test and the regulatory test included in the National Electricity Rules.⁴

It should be noted that, unlike the system wide benefits test in the code, the overall economic benefit test does not address the question of who pays for the new facility. The question of who pays is determined through the cost allocation process in allocating total revenue (total costs) across different pipeline services.⁵

The AER will implement the overall economic value test in light of this policy context. Over time, as regulatory practice develops in this area, the implementation of the overall economic value test will provide further guidance on the interpretation and application of the test.

1. Explanatory material for the second exposure draft of the National Gas Law, p. 31.
2. NERA, as referred to in Explanatory material for the second exposure draft of the National Gas Law, p. 31.
3. NERA, as referred to in Explanatory material for the second exposure draft of the National Gas Law, pp. 32-33. This is reiterated in the Second reading speech of the National Gas (South Australia) Bill 2008 [South Australia, *Parliamentary Debates*, House of Assembly, 9 April 2008, 2703 (Patrick Conlon, Minister for Transport, Minister for Infrastructure, Minister for Energy)].
4. NERA, as referred to in Explanatory material for the second exposure draft of the National Gas Law, p. 33.
5. NERA, as referred to in Explanatory material for the second exposure draft of the National Gas Law, p.33

The AER's discretion for assessing the capital expenditure criteria is limited per r. 79(6). This means the AER must approve new capital expenditure if it meets the criteria and other requirements under r. 79. Capital expenditure conforming in part

with the criteria in r. 79 will be regarded as conforming capital expenditure to that extent (r. 79(5)).

In determining whether capital expenditure is efficient and complies with the relevant criteria in the NGR, the AER may infer compliance from the operation of an incentive mechanism or any other basis it considers appropriate (r. 71(1)).

Non-conforming capital expenditure may be made by a service provider during an access arrangement period (r. 81). This will not be included in the capital base unless it subsequently meets the criteria in r. 79.

In the circumstances that new capital expenditure is partly or entirely funded by a user, r. 82 allows the expenditure be rolled into the capital base if this does not result in increased revenue (and effectively does not increase reference tariffs).

When non-conforming capital expenditure is made by the service provider, the amount, or part of the amount can be recouped by means of a separate surcharge on users of incremental services to recover the cost of this expenditure. This capital expenditure cannot be included in the capital base. Rule 83 outlines the relevant criteria and process for approving a surcharge.

Other relevant issues for capital expenditure

- Speculative capital expenditure: a full access arrangement may include an amount of non-conforming capital (that is not recovered by a surcharge). This needs to be provided for in a notional fund (the speculative investment account). The fund can increase at a rate determined by the AER such as the rate of return. If this capital expenditure subsequently meets the conforming capital criteria it can be included in the capital base at the commencement of the next access arrangement period (r. 84).
- Capital redundancy: A full access arrangement may also include a mechanism to ensure assets that no longer contribute to the provision of the pipeline services are removed from the capital base (rr. 85(1) and (2)). The value of any redundant capital that was removed from the capital base but is now being used to deliver pipeline services will need to meet the criteria in r. 79 before it is included in the capital base, see r. 86 for details.
- Cost sharing arising from lower demand: a full access arrangement may also include a mechanism to share costs between the service provider and users arising from a decline in demand for the pipeline services (r. 85(3)).

If proposed these issues need to be included in the access arrangement proposal and any supporting information and justifications need to be provided with the access arrangement information.

A service provider may make an application to the AER for a determination to be made that future capital expenditure made in accordance with the service provider's proposals and specified in the determination will meet the new capital expenditure criteria (r. 80(1)). Such a determination will be binding on the AER, however, if such a determination is not made, no presumption is created that future expenditure will not meet the relevant criteria (r. 80(3)).

Forecast depreciation: forecast depreciation for the forthcoming access arrangement period is to be deducted from the capital base in calculating the project capital base for an access arrangement period. It will be determined from the depreciation schedule. The specific requirements relating to establishing depreciation schedules are set out at rr. 88 to 90 and are discussed further below.

Forecast value of assets that will be disposed: the forecast value of assets that will be disposed of during an access arrangement period will be the remaining capital value of the asset after deducting depreciation to the date of disposal. The actual value of assets that have been disposed of will be used when determining the opening capital base for a subsequent access arrangement period.

Rate of return: the relevant rate of return to apply to the projected capital base must be commensurate with prevailing market conditions for funds and the risk in providing the reference services (r. 87(1)).

The rate of return proposed should assume the service provider meets benchmark levels of efficiency and uses a financing structure (gearing and financial parameters) for a going concern that reflects best practice (r. 87(2)(a)).

Consistent with r. 87(2)(b), a well accepted approach that incorporates the cost of equity and debt such as the weighted average cost of capital (WACC) and the well accepted financial model such as the Capital Asset Pricing Model (CAPM) is to be used.

A service provider should refer to recent ACCC and AER regulatory decisions (including any merits review outcomes of these decisions) for guidance including any relevant comprehensive reviews of cost of capital issues periodically undertaken by the AER. The reason for this is that these regulatory decisions will contain the AER's most up-to-date analysis and current views on a relevant rate of return. This is particularly relevant for parameters such as interest rates, inflation and equity beta which are influenced by prevailing market conditions.

The proposed rate of return and assumptions used to calculate and demonstrate the rate of return needs to be included in the access arrangement information (r. 72(1)(g)).

Depreciation (B)

In the building block model, depreciation is:

- a capital cost component for total revenue in the building blocks model, and
- an amount which represents a change in the capital base from one access arrangement period to another, which is used to determine the opening value of the capital base at the start of an access arrangement period.

Depreciation as a capital cost in total revenue

Depreciation for the revenue calculation is identified in r. 76 as a component of revenue for the building block approach, which is derived from the projected capital base proposed for the next access arrangement period. The projected capital base will consist of a number of assets which will depreciate over time (that is, a depreciation

schedule for a pipeline may relate and identify a number of assets or asset classes (r. 88)). The forecast depreciation for the building block component will be the sum of the forecast depreciation for the various assets.

In estimating the value of forecast depreciation, a depreciation schedule needs to be devised. The main principles in designing a depreciation schedule are that: the assets are only depreciated once over their economic life; it can reflect changes in the economic life of assets; it allows for reference tariffs to vary over time in a way that promotes efficient growth in the market⁴⁶, and it will also need to allow for the cash flow needs arising from financing, non-capital and other costs (r. 89).

In assessing a proposed depreciation schedule, the AER has limited discretion under r. 40(2). This means the AER must approve a proposed depreciation schedule if it is satisfied that it complies with the relevant requirements and criteria specified, for example, in rr. 88-89.

The depreciation schedule that supports the value of depreciation included in the total revenue estimate needs to be included in the access arrangement information (r. 72(1)(c)(ii)).

Depreciation to determine the opening capital base

A full access arrangement is required to have provisions governing how depreciation should be calculated for establishing the opening capital base for the next access arrangement period (r. 90(1)).

Depreciation determined reflects the depreciation amount accumulated over the earlier access arrangement period (r. 77(2)(d)). The NGR requires that any provisions for the calculation of depreciation for the opening capital based must resolve whether it is based on forecast or actual capital expenditure (r. 90(2)).

In regulatory decisions made by the ACCC to date relating to gas, the depreciation used for the opening capital base of the next access arrangement period has been the same figure as the depreciation figure used (at the time of the previous assessment) for the revenue calculation for the current access arrangement period.⁴⁷ The figure for the revenue calculation is necessarily the forecast depreciation (that is, based on forecast capital expenditure, redundancies and disposals). The consistent use of forecast depreciation for both revenue calculation and calculation of the opening asset base will ensure that the service provider's assets are depreciated completely, but only once, over their economic lives.

The depreciation schedule that comprises the opening capital base needs to be included in the access arrangement information (r. 72(1)(c)(ii)).

⁴⁶ This may involve deferring a substantial proportion of the depreciation, particularly where the market is relatively immature; the reference tariffs have been calculated on the assumption of significant market growth; and the pipeline has been designed and constructed so as to accommodate future growth in demand (r. 89(2)).

⁴⁷ For example, if in 2008 the AER is assessing a proposal for 2009-2013, the depreciation figure used to calculate the opening capital base for 2009 will be the figure forecast in 2003 (the time of the previous assessment) for the 2004-2008 period and used in 2003 to calculate the revenue for 2004-2008.

Estimated income tax (C)

An estimate of the corporate tax payable over the next access arrangement period is also a component of the building block approach. Either of two approaches may be used.

First, where the service provider proposes a pre-tax revenue approach to determine tariffs, the estimated income tax payable by the service provider will be captured in the rate of return calculation through the use of a pre-tax rate of return (for example, a pre-tax WACC) on the projected capital base. The relevant tax rate to use is the effective tax rate of the service provider rather than the corporate tax rate.

The second method is the use of a post-tax revenue approach to determine tariffs. Under this approach an estimate of the income tax payable will be calculated as a separate expense to be recovered when setting tariffs. This method is preferred by the AER and is demonstrated in the PTRM available on the AER website.⁴⁸

The proposed method for dealing with taxation and how the tax allowance is calculated needs to be included in the access arrangement information (r. 72(1)(h)).

Increments or decrements arising from an incentive mechanism (D)

An access arrangement may include (and the AER may require it to include) one or more incentive mechanisms to encourage the service provider to provide services efficiently. An incentive mechanism may provide for the carry over of increments or decrements across access arrangement periods. Any mechanism must be consistent with the revenue and pricing principles (r. 98).

GasNet incentive mechanism

The access arrangement for the Victorian gas transmission service provider GasNet includes an efficiency carry over mechanism for operating expenditure. The mechanisms created for the various Victorian service providers aimed to encourage a more efficient operation of the relevant business by the service provider. A more efficient performance was rewarded by allowing service providers to retain the savings from the efficiency over five years. As the mechanisms operated symmetrically (that is, took into account both positive and negative changes in efficiency), service providers were also penalised for a decline in efficiency.

Incentive mechanisms calculate a rolling carry over (either positive or negative) for each year the mechanism is in place under an access arrangement. At the time of assessing proposed revisions to an access arrangement, the increment or decrement arising from the implementation of the mechanism must be accounted for in moving to the next access arrangement period. In this way, the operation of the incentive mechanism is not limited to a particular access arrangement period. In providing the guidance in r. 98, the NGR recognises that there are benefits in operating a mechanism over the longer term – certainly longer than a typical access arrangement period.

⁴⁸ Australian Energy Regulator, *PTRM*, Australian Energy Regulator, Canberra, 2001, <<http://www.aer.gov.au/content/index.phtml/itemId/681037>>

Rolling carry over mechanisms (under rr. 98 and 76) are not the only incentive mechanisms that may be utilised by service providers. Other mechanisms that may be consistent with the revenue and pricing principles include:

- use of forecast expenditure for the duration of an access arrangement period (that is, not replacing forecasts with actuals during the access arrangement period). In calculating reference tariffs on the basis of forecast expenditure, and not making a subsequent adjustment for actuals, a service provider is given an incentive to perform better (achieve lower actual costs) than it has forecast and retain the cost savings that arise. This encourages a service provider to outperform the forecasts early in the access arrangement period as it is able to retain the cost savings for longer.
- use of forecast demand for the duration of an access arrangement period. In a manner similar to the point above, the use of forecast demand (with no subsequent adjustment for actuals) will encourage a service provider to develop the market and increase demand as it will retain the additional revenue for the remainder of the access arrangement period.
- use of benchmark costs rather than actual costs. This could, for example, include the use of industry benchmarks developed from a number of comparable businesses for operating costs, rather than using firm specific information to determine total revenue and reference tariffs. Whatever benchmarks are used, the aim is to break the link between actual costs and revenues and provide an incentive for the service provider to outperform the benchmark through the retention of the savings achieved.

For pre-existing incentive mechanisms, the carry-over of increments for efficiency gains or decrements for efficiency losses from the previous access arrangement period and the demonstration of how allowance has been made for any such increments or decrements must be included in the access arrangement information (r. 72(1)(i)).

The rationale for proposed incentive mechanisms needs to also be included in the access arrangement information (r. 72(1)(l)).

Forecast operating expenditure (E)

Forecast operating expenditure is the final component of the building block approach.

Operating expenditure includes operating, maintenance and other expenditure of a non-capital nature incurred in providing pipeline services. This also includes expenditure incurred increasing long term demand for pipeline services and developing the market (r. 69).

Operating expenditure must reflect the costs incurred by a prudent service provider acting efficiently, in accordance with accepted good industry practice, to achieve the lowest sustainable cost of delivering reference services (r. 91(1)).

The AER's discretion under r. 91 is limited so that the AER must approve operating costs as proposed by the service provider if it is satisfied that these costs comply with the relevant requirements and criteria specified.

In assessing the efficiency of the proposed forecast operating expenditure as required by r. 91, the AER may infer compliance with the relevant criteria from the application

of an incentive mechanism (r. 71(1)). In making a decision about the effectiveness of an incentive mechanism for demonstrating the efficiency of operating expenditure, the AER will have regard to the type of mechanism included in the relevant access arrangement, the duration of its operation, past performance of the service provider and the likelihood of the incentive mechanism continuing into future access arrangement periods.

The forecast operating expenditure needs to be included in the access arrangement information (r. 72(1)(e)) and should be appropriately classified for the nature of the pipeline service such as: wages and salaries; corporate overheads (by insurance, direct administration expenses, share of head office and other); materials; and gas.

Operating expenditure over the earlier access arrangement period also needs to be included in the access arrangement information (r. 72(1)(a)(ii)), and should be presented in a form consistent with categories of expenditure used for the forecast operating expenditure.

5.4.2.4 Reference tariffs

Once total revenue (total costs) to be recovered has been determined, the reference tariffs can be calculated. An access arrangement needs to specify a reference tariff for each reference service provided by the pipeline (r. 48(1)(c)).

The total revenue (in the ratio of costs for each pipeline service) needs to be allocated between the reference services and the other services provided by the pipeline. Costs may comprise direct costs attributable to the relevant service and other or indirect costs that may relate to a range of services provided by a pipeline or pipelines but are not directly traceable to the provision of a particular service, such as overheads costs.

Indirect costs can be allocated any number of ways. The basic principles are that the allocation key is relevant and reflects the level of effort in providing, or resources consumed by, a particular service. For example, indirect costs may be allocated according to the contribution each service makes to total revenue. Alternatively, indirect cost allocation may reflect the proportion of assets to total assets associated with providing the service. In reviewing the appropriateness of the allocation method for indirect costs across pipeline services, the AER will have regard to the nature of the indirect costs and their relevance to the service (and the tariff) to which they are allocated.

Costs of rebateable services may also be allocated in whole or in part to the reference services under certain conditions.⁴⁹

Once costs are allocated among the different pipeline services, reference tariffs can be calculated with the relevant demand information.⁵⁰

⁴⁹ This is conditional on an appropriate portion of revenue derived from rebateable services being applied to price rebates or refunds to users of reference services and other relevant requirements as imposed by the AER (r. 93(3)). Rebateable services are not a reference service, have demand that is substantially uncertain, and are providing a service in a different market to the reference service (r. 93(4)).

A reference tariff should recover the costs incurred in providing that reference service and allocated amongst the relevant users.⁵¹

The methodology for the allocation of costs, the relationship between costs and tariffs for services and any pricing principles used but not disclosed elsewhere need to be included in the access arrangement information as part of the proposed approach to setting tariffs (r. 72(j)).

The methodology and pricing principles will need to specifically address and consider the nature of costs that are classified as direct costs and other costs and provide support for these classifications. Any allocation of other costs should necessarily provide information about the cost drivers used to allocate these costs. Service providers will also need to support the nature and classification of costs included in the direct and other cost pools and the relevance of cost drivers for the allocation of other costs.

The cost allocation methodology and pricing principles should also include where relevant the specific cost allocation requirements for either distribution or transmission pipelines which are considered below.

Distribution pipeline cost allocation

The general allocation rules apply. In addition there are specific requirements for determining tariffs for distribution pipelines. These are:

- tariff classes must be established to determine reference tariffs. These classes need to group customers on an economically efficient basis and avoid unnecessary transaction costs⁵²
- revenue expected to be recovered must be between the stand alone cost of providing the reference service to the tariff class (upper bound) and the avoidable cost (lower bound) of not providing the reference service to the tariff class
- a tariff must (and if it consists of more than one parameter, each parameter must) take into account the long-run marginal cost for the reference service, and
- any tariff must (and if it consists of more than one parameter, each parameter must) be determined have regard to transaction costs and customer responsiveness to price changes (elasticity of demand) (r. 94).

If the service provider is not able to recover the expected revenue, having taking these factors into account, then tariffs must be adjusted to ensure that the expected revenue is obtained. The adjustment is to have minimum impact on efficient patterns of consumption (r. 94(5)).

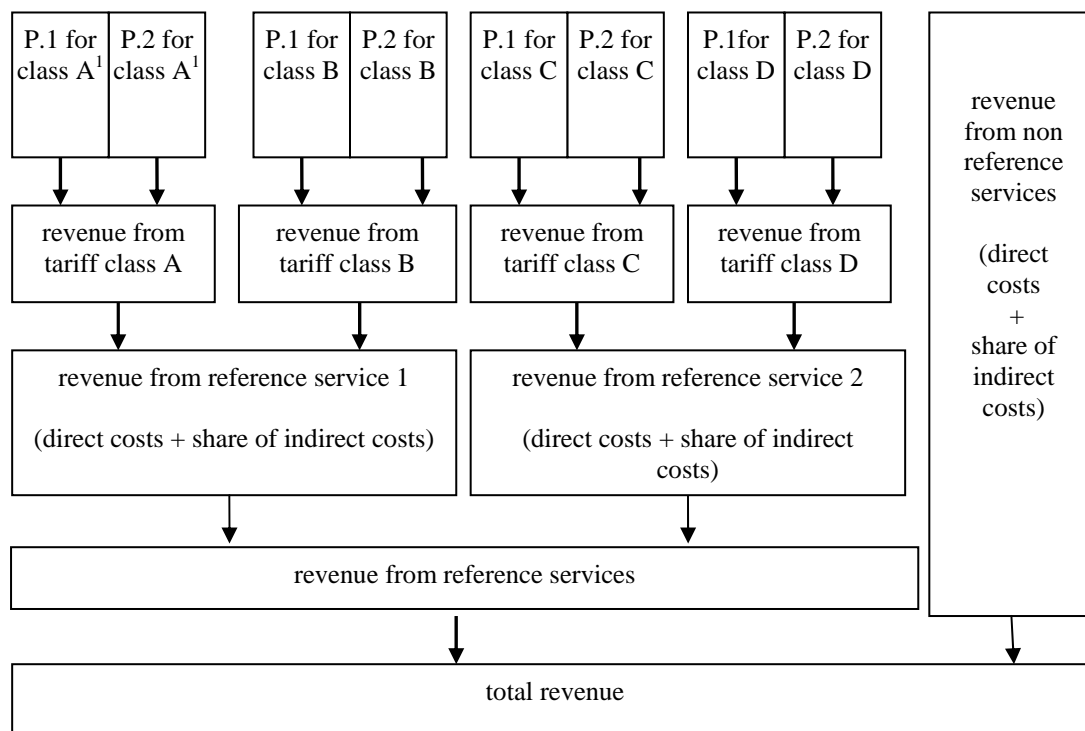
⁵⁰ Demand information is to be included in the access arrangement information. See section 6.4.4 of this guideline for further discussion.

⁵¹ Subject to the use of prudent discounts (r. 96).

⁵² A tariff class are customers for a reference services under a full access arrangement (r. 69).

The AER's discretion is limited (r. 94(6)), which means the AER must approve tariffs if they meet the criteria and other requirements under r. 94. The cost allocation approach process for distribution pipelines is illustrated by figure 8.

Figure 8: Distribution cost allocation requirements



1. P.1 and P.2 are two different tariff or charging parameters charged to a class of users (tariff class A). Revenue from tariff class A may be obtained from two different sorts of charges (P.1. and P.2). These revenue sources comprise the revenue derived from tariff class A, which use along with tariff class B reference service 1.

Transmission pipeline cost allocation

The general allocation rules apply for transmission pipelines. In addition a tariff for a reference service for a transmission pipeline must:

- be designed to reflect the relative revenue referable to the reference service and that revenue is allocated between users or a class of users of the reference service
- reflect total revenue for the reference service which comprises direct costs for the reference service and other costs. These costs need to be consistent with the revenue and pricing principles, and
- allocate revenue for a reference service to a user or class of users that reflects direct costs and other costs (consistent with the revenue and pricing principles) referable to the user or class of users (r. 95).

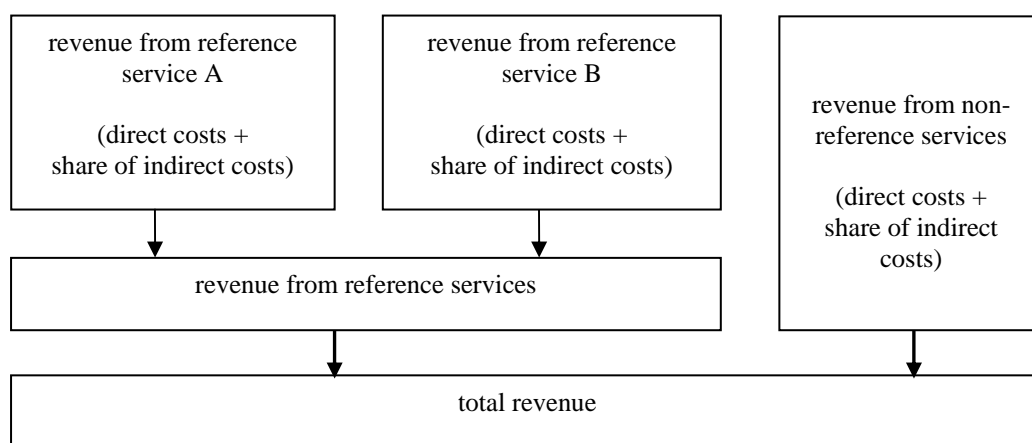
The AER is required to determine or approve the relative revenue attributed to a reference service and this revenue to users or a class of users based on the allocation

of direct and other costs. This will generally be undertaken as part of the AER approval for the access arrangement itself. The inclusion of this information as part of the cost methodology requirements (r. 72(1)(j)) in the access arrangement information does not in itself mean that the cost methodology is being approved.

The AER’s discretion under r. 95 is limited so that the AER must approve the direct and indirect costs of providing the reference service to the relevant user if it is satisfied the costs comply with the relevant requirements and criteria. The AER will provide a separate statement as part of its decision document to approve or determine the allocation of costs to a reference service under this rule.

The cost allocation approach for transmission pipelines is illustrated by figure 9.

Figure 9: Transmission cost allocation requirements



5.4.3 Other relevant information to be provided with an access arrangement proposal

In addition to the aforementioned information that needs to be provided, the access arrangement information also needs to include:

- the forecast pipeline capacity and utilisation of the pipeline capacity over the forthcoming access arrangement period and for full access arrangements the basis on which the forecast has been derived⁵³
- key performance indicators for the pipeline,⁵⁴ to support the expenditure to be incurred over the access arrangement period.

The NGR does not specify any particular KPIs that should be included in the access arrangement information as they will be specific to the type of pipeline and access arrangement. The nature and range of KPIs relevant to an access arrangement

⁵³ Rule 72(1)(d) for full access arrangements, r. 45(2)(a) for limited access arrangements for light regulation services and r. 129(2)(a) for limited access arrangements international pipelines.

⁵⁴ Rule 72(1)(d) for full access arrangements, r. 45(2)(b) for limited access arrangements for light regulation services and r. 129(2)(b) for limited access arrangements international pipelines.

proposal may be one issue for consideration in the pre-consultation process. A range of financial, technical and user/customer KPIs may also be included in the access arrangement information (rr. 45(2)(b), 72(1)(f), and 129(2)(b)).

In addition, for a full access arrangement, access arrangement information needs to include usage of the pipeline over the earlier access arrangement period showing:

- for a distribution pipeline: minimum, maximum and average demand and customer numbers in total and by tariff class
- for a transmission pipeline: minimum, maximum and average demand for each receipt and delivery point and user numbers for each receipt and delivery point (r. 72(1)(a)(iii)).

Service providers are also required to provide information in regard to pipeline capacity and utilisation to the Bulletin Board Operator (refer to Appendix D of this Guideline for further information about these requirements).

The AER considers there is other relevant information that the service provider may include as part of its access arrangement information to support its access arrangement proposal.

The background information that can be included as part of the access arrangement information are:

- the market context for a pipeline including information about the demand and support conditions along the supply chain for the pipeline
- an overview of the operations of the pipeline and service provider (including any relevant corporate structure) as relevant for the access arrangement proposal, and
- expert or consultants reports that support a service provider submission.

5.5 Other relevant matters

5.5.1 Basis on which financial information is provided

Financial information is required to be provided as part of the access arrangement proposal, access arrangement information and may also be provided as supporting information and in a form other than a written submission.

Service providers necessarily provide financial models as well as written submissions to support the total revenue and tariff calculations. The information provided in any financial models may be considered separate to, or part of, the access arrangement information. For ease of reference and to ensure all the relevant NGR requirements are met, service providers should provide the relevant financial information that may be derived in a model as part of a separate access arrangement information document.

In providing this financial information (regardless of form) the NGR requires:

- It is provided on a nominal, real or some other recognised basis (that can deal with the access arrangement information)

- The basis on which the information is provided is stated in the access arrangement information
- The financial information and calculations are made on a consistent basis
- Forecast information needs to be determined on a reasonable basis and be the best forecast or estimate possible and it must be supported by a statement outlining the basis for the estimate or forecast
- Extrapolated or inferred information needs to be supported by primary information on which it is based (rr. 73-75).

Service providers should ensure that the time period of financial information provided is consistent with the underlying analysis and justifications supporting the access. For example, an access arrangement proposal commencing on 1 January lends itself to the provision of supporting information on a calendar year basis. Access arrangements which commence on 1 July are more suited to information based on financial year basis.

As outlined earlier in this chapter, an information checklist should reference how a service provider's submission meets any mandatory requirements to provide information, so that its proposal is not deficient and the access arrangement information is complete.

5.5.2 Division or consolidation of access arrangements

Access arrangements can be consolidated or separated (r. 53).

The AER may by notice and either by its own initiative or on application by the service provider:

- direct a service provider to submit separate access arrangement proposals for different parts of the one covered pipeline (r. 53(1)), or
- direct a service provider to submit a consolidated access arrangement proposal for two or more covered pipelines (including consolidating distribution and transmission pipelines) (r. 53(2)).

The AER must have regard to the nature of the pipeline(s); the nature of the pipeline service(s) and any other matter it considers relevant (r. 53(4)).

Each situation will be considered on a case-by-case basis. As a general guide, the separation of one access arrangement into two or more access arrangements may be relevant where the ownership or control over different segments of a covered pipeline changes. It may also be relevant where different pipeline segments provide different pipeline services or have different coverage or type of regulation. It may also be appropriate to separate an access arrangement where the covered pipeline consists of geographically separate pipelines.

Separating an access arrangement into two or more access arrangements will provide an opportunity for each pipeline segment and the relevant pipeline services to have an

access arrangement that contains tailored tariff and non-tariff terms and conditions of access. In effect, the different pipeline segments will be treated as separate covered pipelines for the purposes of the NGL (s. 17). In considering whether to make a direction to separate an access arrangement the AER will have regard to any additional regulatory costs that may arise.

The consolidation of two or more access arrangements may be relevant where, for example, two or more joining covered pipelines become regulated by the same regulator. It may also be relevant where, by change in ownership of businesses, a common service provider(s) emerges for the pipelines.

The pipelines may have, or be able to have, common non-tariff terms and conditions, and common cost allocation and reference tariff methodologies. However this does not imply that the AER will accept the costs of one pipeline to be recovered from the users of the other pipeline. The access arrangement will still be required to satisfy the relevant cost allocation requirements of the NGR. Nevertheless, the AER considers that a benefit of consolidating access arrangements is likely to be the easing of the administrative burden of regulation.

The AER is required to consult with the service provider and may also consult more broadly on the proposed terms of its direction which are at its discretion (rr. 53(5) and 53(7)). It will generally do this by public notice on its website and general email list, as well as informing the relevant service provider(s). The service provider must comply with any direction made by the AER (r. 53(6)).

5.6 When the AER can revoke or vary an access arrangement

The AER can vary or revoke an access arrangement during an access arrangement period if it considers that the decision is affected by a material error or deficiency (r. 68(1)). A material error or deficiency can be:

- a clerical mistake or accidental slip or omission
- a miscalculation or misdescription
- a defect in form, and/or
- a deficiency resulting from false or misleading information provided to the AER (r. 68(1)).

If the AER revokes an access arrangement it must make a new access arrangement that will apply for the remainder of the access arrangement period (r. 68(2)).

The AER is required to consult the service provider before it varies or revokes and substitutes an access arrangement and the AER may also consult with other affected parties as it considers appropriate (r. 68(4)). The decision to consult with parties other than the service provider will be made on a case-by-case basis.

The new access arrangement will be placed on the AER's website as soon as practicable after the access arrangement has been revoked and varied.

6 Reference tariff variations

A full access arrangement must include a mechanism to provide for the variation of a reference tariff during an access arrangement period.⁵⁵ This chapter outlines first, the broad framework provided by the NGR and second, provides more detailed information on the particular components of the reference tariff variation mechanism and relevant procedures.

Again where relevant the following may provide guidance for service providers of CTP access arrangements which contain reference tariffs that are proposed to be varied periodically during the term of the access arrangement.

6.1 Tariff variation mechanism framework

A reference tariff variation mechanism must be designed to equalise in present value terms forecast revenue from reference services and the portion of total revenue allocated to reference services over the access arrangement period (r. 92(2)).

If there is any delay in the time when the new access arrangement actually commences (compared with when it should have commenced in the access arrangement), reference tariffs in force at the end of the previous access arrangement period continue without variation for this period of time. This contingency needs to be factored in when setting the reference tariffs (r. 92(3)). Some access arrangements have defined a tariff commencement date in an access arrangement as the later of:

- the start of the period in which the reference tariffs are to apply, or
- the date that the AER approves, or is deemed to have approved, the proposed reference tariff variation.

A reference tariff variation mechanism is the only means by which reference tariffs are able to be varied within an access arrangement period (r. 97(5)). A reference tariff variation mechanism may include (r. 97(1)):

- a schedule of fixed tariffs
- by a formula set out in the access arrangement
- a cost pass through for a defined event, or
- the combined operation of two or more of the above.

The formula for varying reference tariffs can be implemented using a number of approaches, for example:

- variable cap on revenue (derived from a particular combination of reference services)
- tariff basket price control
- revenue yield control, or
- a combination of all or any of the above.

⁵⁵ Rule 92(1)

While a service provider has some discretion as to the implementation of a reference tariff variation mechanism, the AER must consider whether a proposed mechanism is appropriate for the particular access arrangement. In doing so, the AER must (under r. 97(3)) have regard to all of the following:

- the need for efficient tariff structures
- the possible effects of the mechanism on the administrative costs of parties (the AER, the service provider, users and potential users)
- any previous regulatory arrangements applicable to the reference services
- the desirability for consistency between regulatory arrangements for similar services (both intra and inter jurisdiction), and
- any other relevant factor.

In addition, r. 97(4) requires that adequate oversight or powers of approval for the AER are included in the proposed reference tariff variation mechanism.

The NGR does not specify any requirements in relation to the annual process for administering a reference tariff variation mechanism. The following provides the AER's views on implementing components of the tariff variation mechanism of an access arrangement.

The tariff variation mechanism needs to be included in the access arrangement proposal and the justification for any proposed reference tariff variation mechanism is required to be provided as part of the access arrangement information (r. 72(1)(k)).

The tariff variation mechanism should include the date on which reference tariffs will vary during the access arrangement period (for example, at 1 July or 1 January each year). Generally, tariffs will vary not more than once annually. Annual changes are consistent with market expectations and provide a balance between the interests of service providers and users and prospective users. Consideration of more frequent variations to reference tariffs will need to factor in any additional administrative costs for the service provider and the AER.

6.1.1 Schedule of fixed tariffs

The AER expects that an access arrangement that utilises this method would clearly set out a schedule of nominal reference tariffs, identifying that the reference tariffs will vary at the start of each period within the access arrangement period (generally either at 1 January or 1 July each year).

The NGR contemplates delays in an access arrangement commencing. An access arrangement proposal should take into account how tariffs will be set for the new access arrangement period in the circumstances of a delay (r. 92(3)).

An access arrangement proposal containing a schedule of fixed nominal tariffs will need to outline how the service provider will confirm the change in reference tariffs over the access arrangement period. Depending on the schedule of tariff changes, this should be done at least once a year, shortly (no less than 15 business days) before the service provider changes the reference tariff according to the schedule.

The service provider will need to demonstrate that the reference tariff is consistent with the fixed schedule.⁵⁶ This can be done by way of notifying the AER so that it can confirm the proposed reference tariff is consistent with the schedule of fixed tariffs. If the reference tariff is currently the tariff used in shipper or customer contracts, copies of notifications to users and prospective users could be used as evidence or a statement that the reference tariff will apply from a certain date. Notwithstanding any requirements under the NGR service providers should provide a website address which contains this information on the first business day after the date for the tariff variation the tariff has been changed. Any publication requirements for tariffs under this tariff variation mechanism may also be outlined in the proposal.

6.1.2 Specified formula

Another means for varying tariffs within an access arrangement period is by use of a formula specified in the access arrangement (r. 97(1)(b)). While the NGR does not mandate the formula (and several examples are provided in r. 97(2)), a CPI-X formula is generally used.

If a service provider intends to use a CPI-X formula to vary reference tariffs during an access arrangement period then the access arrangement proposal needs to specify:

- the CPI-X formula to be used including a description of all terms in the formula
- the CPI values are defined as the Consumer Price Index (All Groups-weighted average of eight capital cities) published by the Australian Bureau of Statistics (ABS)⁵⁷
- the starting reference tariffs and the value for X
- the proposed form of notification to fulfil requirements under r. 97(4) to allow the AER oversight or approval of the proposed tariff variation. This oversight or approval function will generally require a decision by the AER to approve or not approve a proposed reference tariff variation. The AER suggests that a key requirement in fulfilling r. 97(4) is the frequency of the notification and the timing of that notification. The AER suggests that a notification should be consistent with the frequency of the tariff variation mechanism in an access arrangement and any notification should be provided at least 30 business days before a tariff is scheduled to change. The notice needs to outline the current reference tariffs, CPI, X and the calculation of the proposed reference tariffs, and demonstrate compliance with the reference tariff variation mechanism, and
- what will happen in the event the service provider fails to provide a reference tariff variation notice (in relation to the specified formula approach), which should state that the AER will vary the reference tariffs in a manner consistent with the reference tariff variation mechanism in the access arrangement.

⁵⁶ Rule 97(4)

⁵⁷ If this ABS series is discontinued or unavailable, the relevant measure for CPI will be agreed between the AER and the service provider. This could be achieved through an access arrangement variation process.

If a service provider notifies the AER 30 business days before a reference tariff is scheduled to change, the AER intends to inform the service provider of its decision at least 10 business days before the tariff is scheduled to change.

Any tariff variation formulae that use CPI values need to reflect the latest publicly available CPI data. Practically, this will mean March quarter data for tariffs changing on 1 July and September quarter data for tariffs changing on 1 January.

Notwithstanding any requirements under the NGR, consideration of when tariffs are published may also be included in the proposal for the tariff variation mechanism using a specified formula.

6.1.3 Cost pass through

A reference tariff mechanism may include a cost pass through for a defined event clause in an access arrangement (r. 97(1)(c)). This can be combined with say a schedule of fixed tariffs or a formula (r. 97(1)(d)).

Cost pass through events reflect a change in or additional costs incurred by the service provider, requiring a change in the reference tariff. The nature of these events and costs are generally outside a service provider's control and are not known with accuracy when an access arrangement is approved.

A cost pass through event may be, for example:

- a tax event such as the removal or imposition of (or changes to existing) taxes, duties, levies or imposts, or
- a regulatory event such as the removal, imposition or change to technical standards or requirements (such as safety, environmental or technical standards or requirements) that impacts on the operation of the pipeline.

The nature of events relevant for a cost pass through tariff variation needs to be included in the access arrangement proposal. The cost pass through component of the tariff variation mechanism in an access arrangement proposal needs to:

- specify the defined events
- provide for a symmetrical mechanism so that both increases and decreases in tariffs are contemplated associated with additional costs incurred or reduced costs incurred arising from a defined event
- specify the starting reference tariffs
- include details about the proposed form of notification to fulfil requirements under r. 97(4) to allow the AER oversight or approval of the proposed tariff variation. This oversight or approval function will generally require a decision by the AER to approve or not approve a proposed cost pass through. The AER suggests that a key requirement in fulfilling r. 97(4) is to periodically report or notify the AER (and at least once a year) as to whether a cost pass through event has occurred. Another means of meeting this obligation is to outline the timing of that notification. The AER considers that this should be provided at least 50 business

days before a tariff is proposed to change because of a cost pass through event. Further details are provided in section 6.4.1 below, and

- state that in the event that a the service provider fails to provide notification of a cost pass through event, either because no tariff variation is sought or no cost pass through event has occurred, the AER will not vary the reference tariffs for the relevant year in the access arrangement period for a cost pass through event.

As part of the justification for any proposed reference tariff variation mechanism to be provided in the access arrangement information (r. 72(1)(k)), service providers are to provide any background information about a known event and the likely nature of costs that may be incurred. Service providers should also include estimates or forecasts of any relevant costs for the event. For example, for a tax event (say a change in an existing tax rate), relevant information may relate to the nature and value of the tax currently paid by the service provider. In some instances, a service provider may consider that a cost pass through amount is not material and may prefer to not vary reference tariffs to take into account the cost pass through event. A reference tariff variation mechanism may establish a materiality test that is applied to cost pass through events or it may be silent – requiring inclusion of all specified cost pass through events in the calculation of reference tariff variations. The AER will consider any of these approaches to the materiality of cost pass through events as proposed by a service provider. It will have regard to the types of cost pass through events proposed, the possible costs that may be incurred or saved, the overall operation of the reference tariff variation mechanism and the operational circumstances of the pipeline.

To assist users and prospective users and for administrative ease, the timing of cost pass through applications should be considered so that any changes to tariffs for all proposed tariff variations in accordance with the tariff variation mechanism in an access arrangement occur simultaneously.

In the circumstances a tariff variation for a cost pass through event is to commence at the same time as an any other annual tariff variation under the tariff variation mechanism, the AER recommends that service providers submit the cost pass through notification at least 50 business days prior to the tariff commencement date.

If more than one tariff variation method operates in an access arrangement, it is practical to also provide the notification for this method at the same time as a cost pass through notification, particularly if the proposed commencement date of the tariff variation for both methods coincides. In this way the AER can consider the impacts of both tariff variation methods and approve them together.

If a service provider notifies the AER 50 business days before a cost pass through tariff variation takes effect the AER intends to inform the service provider of its decision at least 10 business days before the tariff is scheduled to change.

As with other components of a tariff variation mechanism, a cost pass through for a defined event must be included in the access arrangement proposal.

6.1.4 Cost pass through notifications

6.1.4.1 When a tariff variation is sought

To assist service providers in designing the form and identifying the relevant contents of a cost pass through notification when an event has occurred and a tariff variation is being sought, the AER considers the following should be included in the notification:

- nature of the event or events
- financial impact of the event or events (separately identified for each event) and
- current reference tariffs
- proposed reference tariffs as a consequence of the events and how the financial impact of each cost pass through event has varied the reference tariffs, and
- a demonstration of the compliance with the reference tariff variation mechanism in the access arrangement.

In providing a notification any relevant supporting information relied on to support the notification should also be provided to the AER.

6.1.4.2 When a tariff variation is not sought

Two instances may arise in relation to a cost pass through component of the tariff variation mechanism which may not result in a tariff variation. This is when the cost pass through event is not material and a variation is not sought or when a cost pass through event does not occur in the relevant year of an access arrangement period.

In these circumstances a cost pass through notification can be fairly simple, noting that an event has not occurred, or an event has occurred but the effect on tariffs is immaterial and no pass through is sought. The timeframe for notifications in which no tariff variation is sought from a pass through event can be aligned to the shorter timeframes for the notifications of other tariff variations (that is, 30 days instead of 50 days).

6.2 Other matters

The previous sections of this chapter have provided guidance on aspects relevant to each reference tariff variation mechanism relevant for a service provider's access arrangement proposal and its submission (including access arrangement information). This section provides guidance on other issues relevant for the operation of a reference tariff variation mechanism.

For transparency, any notifications made to the AER for oversight or approval of a reference tariff variation mechanism and any subsequent decisions will be made publicly available. The AER will publish on its website the service providers' proposed reference tariff variation notices,⁵⁸ the AER's decision, and its reasons for its decision.

⁵⁸ If these proposals contain commercial in confidence information this will need to be submitted as outlined in section 4.1.4 of this Guideline.

Depending on the nature of the tariff variation mechanism, the AER may request additional information to fulfil its oversight or approval function, if sufficient information is not forthcoming or included in the service provider's notification.

For the benefit of users and prospective users, the AER considers that the annual reference tariff variations discussed in this chapter are administrative processes to confirm that a service provider complies with the reference tariff terms and conditions contained in the relevant access arrangement. A reference tariff variation mechanism has been subject to review and public consultation in context of the AER's approval of the access arrangement proposal. It is intended to be largely a mechanical process. For these reasons, as a general rule the AER does not intend to include public consultation in any reference tariff variation process. This follows past practice by the ACCC and jurisdictional regulators and will allow timely assessment and implementation of the proposed reference tariff variations.

7 Review of decisions

To ensure consistency in the review of regulatory decisions that impact on the energy sector, both the National Electricity Law and NGL provide for judicial and merits review.⁵⁹ Decisions made by the AER in relation to access arrangement proposals are, in certain circumstances, subject to a limited merits review by the Australian Competition Tribunal (Tribunal) and/or judicial review by the Federal Court of Australia (Federal Court). The NGL also sets out a process of merits review for decisions made by the AEMC and the Bulletin Board operator. The relevant provisions in the NGL and NGR are discussed in turn below.

7.1 Merits review by the Tribunal

7.1.1 Reviewable decisions

Other than a decision refusing to approve a full access arrangement or a decision in relation to confidential material under Chapter 10 Part 2, most decisions made by the AER in relation to a full access arrangement or a limited access arrangement are reviewable regulatory decisions (s. 244).

Applicable access arrangement decisions that are reviewable (subject to the exception mentioned above) include:

1. Full access arrangement decision (s. 2) - a decision of the AER under the NGR that
 - (a) approves a full access arrangement or a revision to an applicable access arrangement submitted to the AER under s. 132 or the NGR; or
 - (b) makes a full access arrangement:
 - (i) in place of a full access arrangement the AER does not approve in that decision; or
 - (ii) because a service provider does not submit a full access arrangement in accordance with s. 132 or the NGR;
 - (c) makes revisions to an access arrangement:
 - (i) in place of revisions submitted to the AER under s. 132 that the AER does not approve in that decision; or
 - (ii) because a service provider does not submit revisions to the AER under s. 132.
2. Limited access arrangement decision (s. 2) - a decision of the AER under the NGR that approves or does not approve:
 - (a) a limited access arrangement submitted to the AER under s.116 or s. 168; or

⁵⁹ South Australia, *Parliamentary Debates*, House of Assembly, 9 April 2008, 2705 (Patrick Conlon, Minister for Transport, Minister for Infrastructure, Minister for Energy)

- (b) revisions to a limited access arrangement submitted to the AER under s. 116(3) or 168(3) or the NGR.

7.1.2 Grounds for review and leave to apply

An affected party can apply for a review of a reviewable regulatory decision made by the AER regarding an access arrangement, on one or more of the following grounds (s. 245(1)):

- the AER made one or more errors of fact in its findings which were material to the making of the decision
- the AER exercised its discretion incorrectly, having regard to all the circumstances, or
- the AER's decision was unreasonable, having regard to all the circumstances (s. 246(1)).

A finding of fact includes the existence of a historical fact being an event or circumstance, the existence of a present fact being an event or circumstance and an opinion about the existence of a future fact or circumstance.⁶⁰ A discretion may be exercised incorrectly where:

- its exercise is based upon a misconstruction or misapplication of the relevant principles, methodologies or factors to be considered;
- its exercise is affected by a failure to have regard to a mandatory relevant factor including any one or more of the requisite principles, methodologies or factors; or
- its exercise is affected by the pursuit of some purpose extraneous to the purposes not permitted.⁶¹

A decision may be unreasonable where the decision is such that no decision maker could have come to that decision, or where the decision entails logical error or irrationality,⁶² or where the exercise of the discretion is not justified by reference to stated reasons.⁶³

The Tribunal must not grant leave to apply for a review unless it is satisfied that there is a serious issue to be heard and a ground for review exists (s. 248). The onus is on the applicant seeking review of an AER decision to establish that grounds exists (s. 246(2)).

⁶⁰ *Australian Competition & Consumer Commission v Australian Competition Tribunal* [2006] FCAFC 83 at [171] per French, Goldberg and Finkelstein JJ.

⁶¹ *Ibid*, at [174].

⁶² *Ibid*, at [177].

⁶³ *Ibid*, at [178].

Even where it can be established that there is a serious issue to be tried, the Tribunal must not grant leave to apply under s 245(1) if:

- the application for review concerns an error in a reviewable regulatory decision that is a full access arrangement decision, and
- the ground/s relied on related to the amount of revenue that may be earned by a covered pipeline service provider that is specified in or derived from that decision,

unless:

- the amount that is specified in or derived from the decision exceeds the lesser of \$5 million or two percent of the average regulated revenue of the covered pipeline service provider (s. 249).

An application for review of an AER decision must be made no later than 15 business days of the publication of the decision for which review is sought (s. 247(1)).

7.1.3 Who can seek leave for a review

The parties to a Tribunal review of an AER access arrangement decision are the AER, the applicant and any intervener (s. 257).

Applicants

A service provider, user, prospective user or a ‘user or consumer association’⁶⁴ that is affected by a reviewable AER decision may apply to the Tribunal for a review of certain decisions under s. 245(1).

In order to apply for a review, the affected person or body needs to have made a submission when invited by the AER to do so during the course of an access arrangement assessment process (s. 250(a)). Alternatively, if the person provided a late submission and that submission was taken into account when the AER made its decision then the person may apply for a review (s. 250(b)).

The Tribunal may refuse to grant leave to a service provider to apply for review if the Tribunal is satisfied that the service provider, without reasonable cause (s. 251(2)):

- failed to comply with a request (including a request for relevant information) or direction of the AER
- conducted itself in a manner that resulted in a delay to the AER’s decision, or
- misled or attempted to mislead the AER.

Interveners

Certain persons can intervene in a review. These are:

⁶⁴ A ‘user or consumer association’ is defined in s. 244 as an association or body that has at least one user, prospective user or end user as a member and it represents and promotes the interests of its members in relation to the provision of gas services.

- the service provider and a Minister of a participating jurisdiction who can intervene without leave of the Tribunal (s. 253)
- a person who made a submission or comment which was considered in making the decision and has a sufficient interest. The Tribunal must grant leave (s. 254) to a user or consumer association or interest group if the Tribunal is satisfied:
 - that the user or consumer intervener's application for leave raises a matter that will not otherwise be raised
 - that information or submissions from the user or consumer intervener is likely to be better presented by the user or consumer intervener than any other party, or
 - the interests of the user or consumer intervener (or its members) are affected by the decision under review (s. 255).

7.1.4 Matters that can be raised in a review

In addition to the grounds relied on by the applicant, an intervener may raise any of the grounds for review set out in s. 246 even if they were not raised by the applicant (s. 256(1)).

The AER may also raise a matter that relates to a ground for review that was not raised by the applicant or an intervener (s. 258(1)).

Other than the AER, a party to a review may not raise any matter that was not raised in submissions in relation to the reviewable regulatory decision before that decision was made.

During a review, it is open to the AER to raise the following:

- (a) a matter not raised by the applicant or an intervener that relates to a ground for review
- (b) a matter raised in support of a ground for review, raised by the applicant or an intervener;
- (c) a possible outcome or effect on the reviewable regulatory decision being reviewed that the AER considers may occur as a consequence of the Tribunal making a determination setting aside or varying the reviewable regulatory decision.

7.1.5 Tribunal determination

The Tribunal must not consider any matter other than a review related matter in reviewing a reviewable regulatory decision, subject to s. 261 (s. 261(1)). Section 261(7) provides a list of matters that are defined to be review related matters.

In reviewing a reviewable regulatory decision, the Tribunal must have regard to the following:

- in all cases, any documents prepared, used and made publicly available by the original decision maker for the purpose of making the reviewable regulatory decision (s. 261(2)(a));
- in the case of a Ministerial coverage decision, also any document prepared, used and made publicly available by the NCC for the purpose of making the NCC recommendation relating to the Ministerial coverage decision (s. 261(2)(b)); and
- in the case of a review of a decision of the AER to make a full access arrangement decision in place of an access arrangement that the AER did not approve, the reasons of the AER for its decision not to approve the access arrangement (s. 261(6)).

Where the Tribunal is of the view that a ground of review has been established in a review, new information or material may be submitted if:

- it would assist the Tribunal on any aspect of the determination to be made; and
- it was not unreasonably withheld from the original decision maker and in the case of a Ministerial coverage decision, the NCC when it was making the recommendation.

Information or material not provided to the original decision maker or the NCC following a request for that information or material under NGL or the NGR will be taken to have been unreasonably withheld (ss 261(3)-(4)).

In making its determination the Tribunal may affirm, set aside, vary the AER's decision, or remit the matter back to the AER (s. 259(2)). In doing so, it may perform all the functions and exercise all the powers available to the AER when it made its decision. If the Tribunal's determination is to affirm, set aside or vary the AER's decision then the Tribunal's decision is taken to be that of the AER (s. 259(5)). If the Tribunal's determination is to remit the matter back to the AER then the Tribunal must have regard to the nature and relative complexities of the AER's decision and the matter under review in making this determination (s. 259(4)).

The Tribunal will use its best endeavours to make a determination within three months of granting leave, but may extend the period (s. 260). The Tribunal may extend the period any number of times. However, at each time extension the Tribunal must publish a notice in a national newspaper and provide a new date for its determination.

The Tribunal may order a party to a review to pay all or part of the costs of another party to the review (s. 268(1)).

7.2 Judicial review

A person who is adversely affected by a decision of the AER in respect of a decision related to an access arrangement may seek reasons for that decision and a review of the legality of the decision by the Federal Court under the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act).

Applications for review must be made within 28 days of a decision being made, or reasons for the decision being furnished, or within such period as the court allows.

The ADJR Act provides a number of grounds for review of a decision made by an Australian government authority. These are set out at s. 5 of the ADJR Act and include:

- that a breach of natural justice occurred in making the decision
- procedures that were required by law to be followed were not observed
- the decision maker did not have jurisdiction to make the decision
- that making the decision was an improper use of the powers of the decision maker
- the decision involved an error of law
- the decision was induced or affected by fraud
- there was no evidence or other material to justify making the decision, and
- the decision was otherwise contrary to law.

Glossary

Term	Explanation
AEMC	Australian Energy Market Commission
AER	Australian Energy Regulator
Access arrangement	An arrangement setting out terms and conditions about access to pipeline services provided or to be provided by means of a pipeline (s. 2).
code	National Third Party Access Code for Natural Gas Pipeline Systems
covered pipeline	A pipeline to which a coverage determination applies or deemed to be a covered pipeline by operation of ss. 126 or 127 of the NGL.
GPAL	Gas Pipeline Access Law
Guideline	Access Arrangement Guideline
NCC	National Competition Council
NGL	National Gas Law 2008
NGR	National Gas Rules 2008
Regulations	National Gas Regulations 2008
related provider	A related provider is a person who supplies a contributing service to a covered pipeline service provider (s. 43).
scheme pipeline	A covered pipeline or an international pipeline to which a price regulation exemption applies (s. 2).
service provider	A service provider is a person who owns, controls or operates or intends to own, control or operate a pipeline or any part of a pipeline. A service provider may also be a gas market operator that controls or operates a pipeline or part of a pipeline (s. 8).

Appendix A: Decision making processes

Figure A1: Assessment process for a full access arrangement

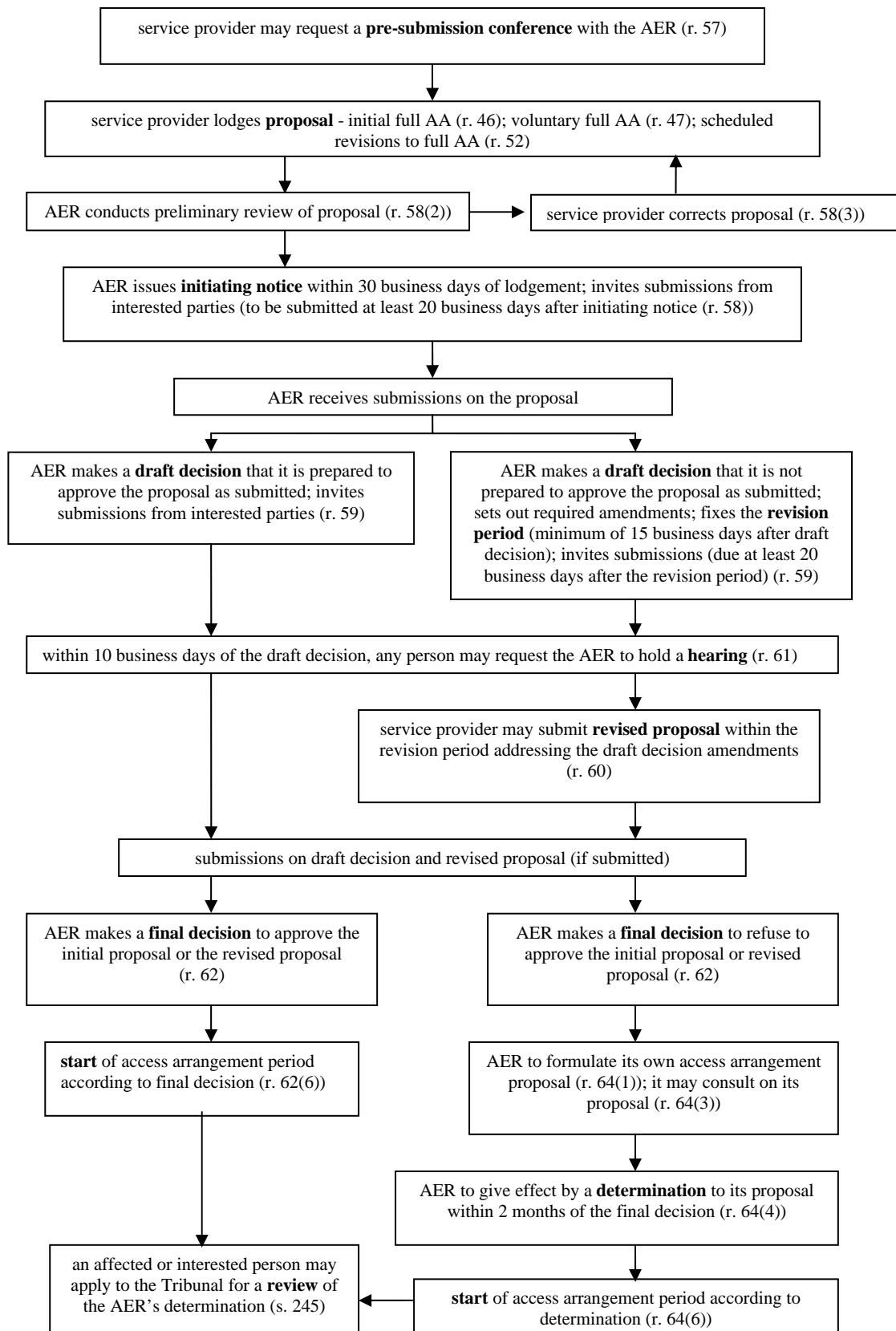
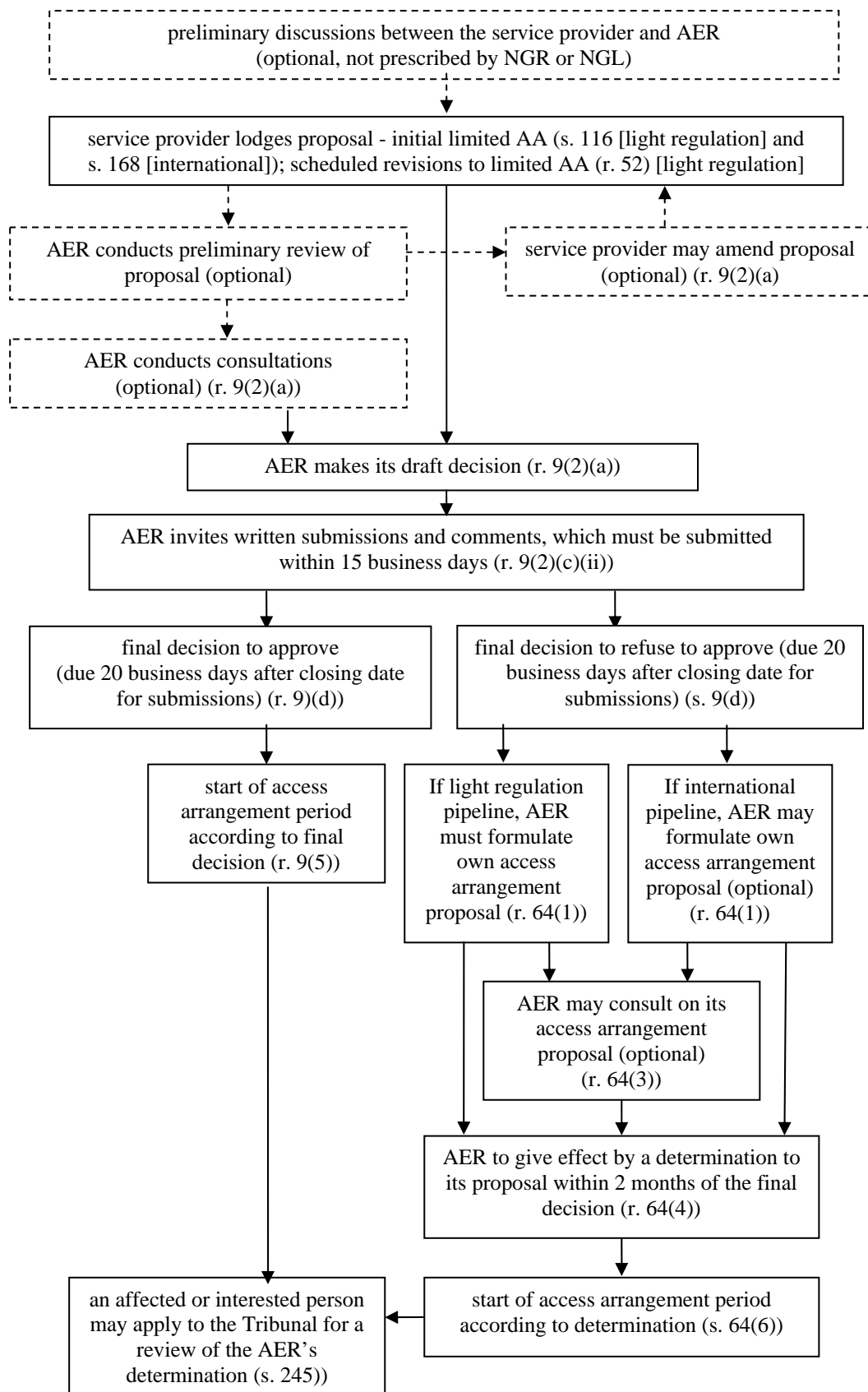


Figure A2: Assessment process for a limited access arrangement



Appendix B: Competitive tender access arrangements

The discussion below provides an overview of the provisions relating to a competitive tender process used for the construction and operation of a new pipeline. The process that ultimately establishes a CTP access arrangement consists of three phases:

- the approval of a proposed tender process
- confirmation that the actual tender process was consistent with the approved competitive tender process, and
- approval of a CTP access arrangement.

The NGR contains a simplification of the processes set out in the code and provides an increase in the level of certainty for pipeline developers. The NGR provisions support the policy intent of increasing the penetration of gas in Australia by developing pipelines in new and unproven markets.⁶⁵

The three phases of the CTP process are discussed below.

Tender approval process

The proponent of a new pipeline may apply to the AER for a tender process that it proposes to use for the construction of a new pipeline to be approved as a competitive tender process under the NGR (r. 21). This application must relate to particular pipeline services and the construction and operation of a new pipeline. It must also:

- describe the particular tender process that the proponent intends to implement, and
- specify the criteria which will be applied in selecting a successful tender.

The proponent may withdraw a tender approval application at any time. This should be done in writing to the AER. The AER will notify interested parties and place a notice on its website that the tender approval process has ceased.

The AER must assess a proposed tender process from a pipeline proponent against the following criteria:

- the proposed tender process must be for pipeline services as described in the tender approval application
- whether the proposed tender process is appropriate to determine the terms and conditions of access with respect to the national gas objective and procedural fairness and probity
- that the proposed request for tender does not limit the pipeline services that may be sought or impose conditions that may limit or discourage the lodgement of a tender that would otherwise be consistent with the proposed tender selection criteria

⁶⁵ South Australia, *Parliamentary Debates*, House of Assembly, 9 April 2008, 2703 (Patrick Conlon, Minister for Transport, Minister for Infrastructure, Minister for Energy)

- that the proposed tender selection criteria states that tenders that do not include any of the essential elements are to be excluded from further consideration. These essential elements are (r. 22(4)):
 - (a) a description of the proposed pipeline
 - (b) a description of the proposed services
 - (c) the proposed reference services, reference tariffs and term and conditions
 - (d) the proposed queuing requirements (for a transmission pipeline)
 - (e) the proposed extension and expansion requirements, and
 - (f) the proposed expiry date of the CTP access arrangement (which is not to exceed 15 years from the pipeline's commissioning).

The AER must either approve or refuse to approve a proponent's tender approval application within two months of receipt (r. 22(1)). This period can be extended, at most, by one month (r. 22(2)). Approval must be granted if the AER is satisfied that the proposed tender process meets the criteria. The process is then referred to as a competitive tender process.

In approving a proposed tender process, the AER may, in its decision, specify a time by which the tender process should be completed (r. 23). This time limit can be extended by the AER. The proponent should seek an extension to the time limit with sufficient time prior to reaching the existing time limit expiring for the AER to consider the application and make a decision. An application to extend the time limit should be accompanied by reasons for the time extension and a proposed new time limit.

If the AER is not satisfied that the proposed tender process meets the criteria (that are outlined above) then it will refuse to approve the process as a competitive tender process. This does not restrict the proponent from carrying out a tender process for the construction and operation of a pipeline. However, any process that is undertaken is not subject to the NGL or NGR and no CTP access arrangement will be required of the service provider. In such circumstances, the pipeline will be subject to a party seeking coverage by application to the NCC. Alternatively, the service provider could submit a full access arrangement voluntarily.

Compliance report

When the successful tender is selected the proponent must provide the AER with a written report (the compliance report) on the conduct of the tender process (r. 24(1)). The compliance report must include (r. 24(2)):

- the reasons for selecting the successful tender
- information showing the actual tender was conducted in a manner consistent with the competitive tender process approved by the AER
- the terms and conditions proposed by the successful tenderer, and
- information showing that the successful tenderer's terms and conditions are consistent with the national gas objective.

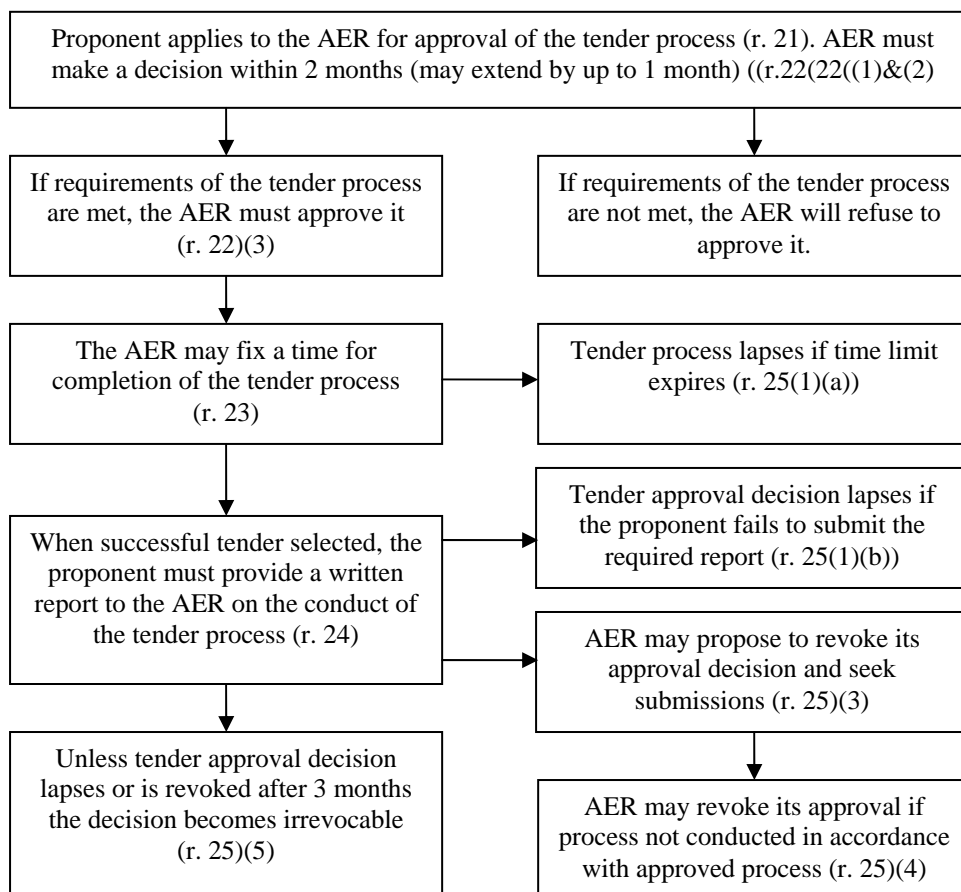
The AER is required to assess the compliance report submitted by the proponent. In doing so, the AER may revoke its tender approval decision if it is not satisfied that all aspects of the tender process were in accordance with the approved competitive tender process (r. 25(2)).

If the AER does propose to revoke its tender approval decision then the AER must, within 20 business days of receiving the compliance report, give the proponent written notice that:

- the AER proposes to revoke its tender approval decision (including the reasons for revocation)
- invites the proponent to make a submission on the proposed revocation, and
- submissions must be made within 20 business days of the notice (r. 25(3)).

If the tender approval decision is not revoked (or hasn't lapsed)⁶⁶ the AER's decision becomes irrevocable (r. 25(5)). These first two phases of the competitive tender process under the NGR are summarised by the figure below.

Figure B.1: Tender approval process



⁶⁶ A tender approval decision will lapse if the time limit for completing the process expires before the proponent submits a compliance report. It will also lapse if the proponent fails to submit a report. See r. 25(1).

Once the tender approval decision by the AER becomes irrevocable the pipeline is then referred to as a 'CTP pipeline'. The AER must then request the NCC to classify the pipeline as either a transmission or distribution pipeline according to the relevant criteria in the NGL (r. 26). The NCC must notify the AER and AEMC of its classification decision.

CTP access arrangement

Once the AER makes a decision to approve the tender process, the successful tenderer then becomes the service provider. The next phase is for the service provider to submit an access arrangement proposal (a CTP access arrangement proposal) to the AER for approval. The service provider must do so at least six months before the pipeline is commissioned (r. 27(1)).

However, before a CTP access arrangement proposal is submitted to the AER, the terms and conditions contained in the successful tender may be amended, with the AER's approval, by agreement between the proponent and the service provider (r. 27(2)).

To amend the terms and conditions, the service provider should seek the AER's approval in writing. The application should clearly identify the terms and conditions that the proponent and service provider wish to amend, the nature of the proposed amendments, the reasons for the amendment and how the amended terms and conditions reasonably reflect the terms and conditions that were included in the tender.

The NGR does not establish any process to assess proposed amendments to terms and conditions of the successful tender prior to the submission of the CTP access arrangement proposal to the AER. The AER will endeavour to make a decision regarding proposed amendments to terms and conditions such that it does not impact on the service provider's ability to submit its CTP access arrangement proposal. However, it does retain its discretion to seek submissions from interested parties if it considers that this will better inform its decision.

On making its decision, the AER will notify the service provider and proponent. It will also place its decision on its website.

If the CTP access arrangement proposal (including any amended terms and conditions) reasonably reflects the elements contained in the successful tender, the AER must approve the CTP access arrangement proposal (r. 27(3)).

The NGR does not establish any process for the AER to make this decision. It will publish the CTP access arrangement proposal and other relevant documents on its website as well as its decision.

The AER will use its discretion to determine whether to seek submissions from interested parties on the CTP access arrangement proposal.

An access arrangement approved under a tender process may be amended by the service provider with the AER's approval (r. 27(5)).

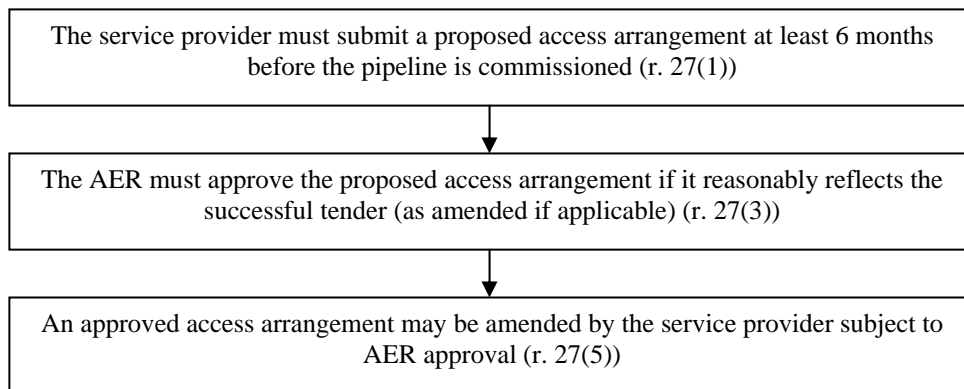
As outlined in section 3.5.3 of this guideline, the NGR does not establish any process or provide any criteria for the AER to consider a proposed amendment to a CTP access arrangement. Similar to amending the terms and conditions of the CTP access arrangement prior to its submission to the AER noted above, the AER will endeavour to make a decision on proposed amendments to an approved CTP access arrangement promptly. It will retain its discretion as to how it undertakes this approval process including how to seek submissions if appropriate from interested parties if it considers that this will better inform its decision.

On making its decision, the AER will notify the service provider and proponent. It will also place its decision on its website.

An approved CTP access arrangement must be available from the service provider's website (r. 27(4)).

The CTP access arrangement process is illustrated by the following diagram.

Figure B.2: CTP access arrangement process



Appendix C: Transitional arrangements

The NGL provides transitional arrangements for the move from GPAL and the code to the NGL and NGR.⁶⁷ In brief, the transitional arrangements are:

- decisions made prior to the commencement of the NGL remain valid (NGL, Schedule 3, clause 3). For example, ring fencing waivers remain in place (NGL, Schedule 3, clause 40).
- access arrangements in existence remain valid and are deemed to be full access arrangements approved by the AER (NGL, Schedule 3, clause 26).
- until revisions come into effect, current access arrangements will be referred to as ‘transitioned access arrangements’ (NGR, Schedule 3, clause 1).
- NCC and Ministerial decision making processes regarding coverage that are underway at the time of the NGL’s commencement continue under the provisions of the code (NGL, Schedule 3, Part 3).
- a decision making process regarding an access arrangement (for example, the assessment of revisions to an access arrangement) commenced by a relevant regulator continue under the code by that relevant regulator (NGL, Schedule 3, clauses 28 and 29). For example, if the ACCC is carrying out an assessment of access arrangement revisions at the time the NGL starts, then that assessment process continues under the provisions of the code.
- access disputes that have not been finalised prior to the start of the NGL are to be dealt with under the code provisions (NGL, Schedule 3, clause 42).
- in using the overall economic value test to make a decision on capital expenditure for a transmission pipeline in Western Australia, the AER⁶⁸ must consider r. 79(3) (to refer to the economic value accruing to the service provider, gas producers, users and end users) but also the ‘material economic value that is likely to accrue directly to electricity market participants from additional gas fired generation capacity’.⁶⁹ This provision will not apply to new transmission pipelines.

On commencement of the NGL:

- sections 3 (content of an access arrangement), 8 (reference tariff principles) and 10.8 (definitions) of the code will apply to transitional access arrangements until the access arrangement is revised (NGL, Schedule 3, clause 30).
- references to a relevant regulator in an access arrangement will be deemed to be a reference to the AER (NGL, Schedule 3, clause 52).
- existing extension and expansions policies and existing queuing policies contained in access arrangements will be deemed to be extension and expansion requirements and queuing requirements respectively under the NGL (NGL, Schedule 3, clauses 33 and 34).

⁶⁷ Schedule 3 to the NGL. See Part 3 in particular.

⁶⁸ The WA application legislation specifies that all references to the AER are to be read as references to the Economic Regulatory Authority (ERA).

⁶⁹ NGR, Schedule 1 Transitional provisions, clause 7.

- compliance with the code's ring fencing provisions is deemed to be compliance with the relevant NGL provisions during the first six months of the NGL. Service providers are to comply with the code's ring fencing unless the service provider is preparing to comply with the relevant provisions for the NGL (NGL, Schedule 3, Part 6).
- tender approval requests and final approval requests that have been submitted under the code but have not been the subject of a decision, lapse (NGL, Schedule 3, clauses 49 and 50).
- applications made under the code for a prudent discount (under s. 8.43 of the code), surcharge (s. 8.25) or an advance determination of capital expenditure (s. 8.21) that have not been subject to a decision become applications under the relevant provisions of the NGR (NGR, Schedule 1, clause 3).
- the AER must reject an access arrangement variation proposal for a transitional access arrangement if it considers that the proposal raises issues previously decided under the code (NGR, Schedule 1, clause 8).

Appendix D: Other relevant information for service providers

The NGL and NGR place certain obligations on service providers in addition to any requirements relating to, or arising from, an access arrangement that is in place. Service providers and other interested parties are referred to the *Annual Compliance Guideline* and the *Guideline for the resolution of distribution and transmission pipeline access disputes under the National Gas Law and National Gas Rules* for a comprehensive treatment of the specific requirements related to these processes.

This appendix outlines other requirements relevant to service providers that have an access arrangement. First, obligations relevant to all service providers that have an access arrangement (regardless of the type of access arrangement) are outlined. This is followed by a discussion on the particular additional requirements relevant to limited access arrangements. Last, an outline of the penalties for not meeting certain requirements is also outlined in this appendix.

Requirements relevant to all access arrangements

This section outlines the obligations that the NGL and NGR place on service providers that have an access arrangement in place.

Obligations of the service provider to provide information about access

Tariff information

Rule 107(1) requires that a service provider makes the applicable access arrangement available on its website.⁷⁰ The AER, by notice, may require a service provider to provide information regarding access to the pipeline reasonably sought by a prospective user under r. 107(2).

If there is no published tariff for a service that a service provider is in a position to provide, under r. 108(1), a prospective user can ask a service provider to fix a tariff and notify the prospective user of the tariff.

Access requests

On receiving a request for access in writing, a service provider is required to respond to the request within 20 business days (r. 112(3)):

- informing the prospective user whether the service can be provided and, the terms and conditions of access, or
- informing the prospective user that the service provider must carry out further investigation to determine whether the requested service can be provided, including details of the investigations.

⁷⁰ This r. applies to scheme service providers which includes service providers of covered pipelines (with coverage determinations and deemed covered) and international pipelines with price exemptions.

If the service provider cannot provide the requested service then it must provide written reasons to the prospective user as well as an indication of when the service may be available in the future (r. 112(4)).

Alternatively, where the service provider carries out an investigation into the requested service and the parties do not subsequently agree to the supply of a service within 20 business days then the service provider is deemed to have rejected the request for a service (r. 112(5)(a)). Alternatively, if an agreement is reached, the service provider must conclude its investigation in accordance with the agreement and notify the prospective user of the outcome (r. 112(5)(b)).

Obligations to provide information to the Bulletin Board

A Natural Gas Services Bulletin Board (Bulletin Board) has been established under the NGL. The Bulletin Board provides system and market information to facilitate trade in gas and gas services and to assist in emergency management (r. 142).

The service providers of certain transmission pipelines (including some pipelines that are not covered),⁷¹ are required to provide certain information to the Bulletin Board operator,⁷² including:

- a ‘nameplate rating’ – the maximum quantity of gas (TJ) that can be transported through a pipeline on a day under normal operating conditions (r. 141(2)(a))
- a three day capacity outlook for gas that can be transported under normal operating conditions
- linepack/capacity adequacy (LCA) indicator – providing the LCA flag for the current day and the next two days, and changes to the LCA flag during the day and for the next two days (if expected capability to meet aggregate delivery nominations changes)
- nominated and forecast delivery information (except for pipeline operator in Victoria) – daily aggregate delivery information for each demand or production zone for a pipeline, and aggregate forecast deliveries for subsequent days from Bulletin Board shippers. (The operator of the Victorian transmission system must provide aggregated scheduled injections less aggregated scheduled withdrawals in each production zone and the interconnect with NSW.)
- gas delivery information to each demand and production zone for the previous day (for the Victorian market this is the aggregate injections less withdrawals from the previous day in each production zone and the interconnect with NSW)
- the time when the gas day starts
- emergency information as required by the Bulletin Board procedures, and

⁷¹ Schedule 2 of the NGR sets out the pipelines, production facilities and storage facilities that are required to provide information for the Bulletin Board.

⁷² Initially, the bulletin board operator will be VENCORP. It will then be the Australian Energy Market Operator once this body is established: South Australia, *Parliamentary Debates*, House of Assembly, 9 April 2008, 2704 (Patrick Conlong, Minister for Transport, Minister for Infrastructure, Minister for Energy)

- contact details for the service provider.

This information is to be updated as changes occur (rr. 170-175, 178 and 181).

Register of spare capacity

Service providers of transmission and distribution scheme pipelines as directed by the AER must establish and maintain a register of spare capacity (r. 111(3)). This register is to be available on the service provider's website and is to include information such as:

- the spare capacity for transport of gas between defined receipt and delivery points
- planned developable capacity and expected additions to spare capacity
- when the spare capacity is, or will become, available, and
- the quantity, type and proposed terms and conditions of unutilised contracted capacity (r. 111(4)).

Queuing requirements

A covered pipeline service provider must comply with the queuing requirements specified in the access arrangement (s. 135).

While an access arrangement for a transmission pipeline is required to contain queuing requirements, distribution pipelines may also be required to include queuing requirements in access arrangements (r. 103).⁷³

Non-compliance with the queuing requirements of an access arrangement is a civil penalty and a conduct provision under ss. 3 and 4 of the NGL (see below for further information on penalties for non-compliance).

Prohibition on the bundling of services

A scheme pipeline service provider cannot make it a condition of access to one pipeline service that the prospective user accepts another non-gratuitous service unless the bundling of services together is reasonably necessary (r. 109(1)). The description of pipeline services in an access arrangement must reflect this principle (r. 109(2)).

⁷³ Queuing requirements are an essential element for terms and conditions of access for a transmission pipeline subject to a competitive tender process (r. 22(4)(d)), which will need to be incorporated into the relevant CTP access arrangement; and while necessary for a transmission pipeline, queuing requirements may be required for a distribution pipeline if the AER has given prior notification of the need to include queuing requirements (r. 103(1)(b)). An international pipeline with a price exemption, as a transmission pipeline, is required to set out the queuing requirements in the limited access arrangement.(r. 129(1)(d)).

Extensions and expansions to a pipeline

An extension to or an expansion of a covered pipeline becomes part of the covered pipeline if provided for under the access arrangement. In this case, the access arrangement for the pipeline also applies to the extension or expansion (s. 18).⁷⁴

Other requirements for service providers

As noted previously, covered pipeline service providers have other requirements under the NGL and NGR. In summary these include but are not limited to:

- general duties for the provision of pipeline services by covered pipelines (ss. 131-136)
- structural and operational separation requirements (ring fencing) for covered pipeline service providers (ss. 137-146)
- requirements for covered pipeline service providers entering or varying associate contracts (ss. 147-148)
- restrictions on the disclosure of confidential information by scheme pipeline service providers (r. 137), and
- compliance of a scheme pipeline service provider as a party to an access dispute with an access determination (s. 195).

The AER has also released guidelines specifically in relation to these issues and other relevant regulatory processes. Service providers and interested parties are directed to the AER's *Annual compliance guideline* and the *Guideline for the resolution of distribution and transmission pipeline access disputes under the National Gas Law and National Gas Rules* for a more comprehensive discussion of most of these issues.

Specific requirements for service providers of light regulation services

In addition to the general requirements identified above, service providers of light regulation services have some additional obligations under the NGL and NGR. These obligations arise regardless of whether a limited access arrangement is in force, unless otherwise specified.

Terms and conditions of access

A service provider of a light regulation pipeline must publish on its website the terms and conditions of access, including prices, for the provision of light regulation services (r. 36).

If a service provider has a limited access arrangement, publishing the limited access arrangement on a service provider's website (as required by r. 107(1)) can serve to meet the requirements of publishing the non-price terms and conditions of access under r. 36.

⁷⁴ For further discussion on this provision see section 6.4.1.5 of this Guideline.

Access negotiations

A service provider of a light regulation pipeline is required to report to the AER on access negotiations for light regulation services in a manner and form approved by the AER (r. 37(2)).

These requirements are to be captured in the annual compliance reporting process.

Price discrimination

A service provider that provides light regulation services must not engage in price discrimination unless it is conducive to efficient service provision (s. 136). This is both a civil penalty and a conduct provision under ss. 3 and 4 of the NGL (see below).

Extensions and expansions to a pipeline

Extensions to and expansions of a light regulation pipeline that does not have a limited access arrangement in place, also form part of the covered pipeline unless the AER has otherwise determined in writing (s. 19).

Specific requirements for service providers of international pipeline services

A service provider that provides services using an international pipeline that has obtained a price regulation exemption must not engage in price discrimination unless it is conducive to efficient service provision (s. 170).

This is both a civil penalty and a conduct provision under ss. 3 and 4 of the NGL (see below).

In addition, the service provider must also:

- publish on its website tariffs for the services provided by the pipeline (s. 166(a))
- publish the limited access arrangement⁷⁵ and register of spare capacity on its website (s. 166(b))
- report annually, and as required by the AER or Minister, on access negotiations (s. 166(c))
- comply with certain duties of a service provider in Chapter 4, Part 1 of the NGL (except ss. 132 and 136). These provisions are excluded because an international pipeline does not need to submit a full access arrangement and does not provide light regulation services (s. 169(1)(a))
- comply with the structural and operational separation requirements in Chapter 4, Part 2 of the NGL (s. 169(1)(b))
- comply with the rules that relate to the facilitation of, and access to, pipeline services, which apply (s. 169(2)), and

⁷⁵ A limited access arrangement is required to retain the price exemption granted by the Minister under s. 159.

- ensure compliance with any conditions to which the price exemption is subject (s. 169(3)).

Penalties

Service providers are required to comply with certain provisions under the NGL. Non-compliance with these provisions can attract civil or conduct penalties.

Sections 3 and 4 of the NGL and Schedules 3 and 4 of the Regulations, outline which provisions are civil penalty provisions and conduct provisions or rules.

Other penalties also apply such as the provision relating to false and misleading information.

The nature of penalties for non compliance with the relevant provisions under the NGL for service providers is outlined below.

Civil penalties

The most relevant civil penalty provisions for service providers of pipelines using this Guideline are:⁷⁶

Related to provisions in the NGL	
Section 56	Complying with a regulatory information notice
Section 57	Complying with a regulatory information order
Section 168	Submission of a limited access arrangement for services provided by an international pipeline with a price exemption
Related to provisions in the NGR (per Schedules 3 and 4 of the Regulations)	
27(4)	Service provider publishing approved CTP access arrangement on its website
36 *	Service provider publishing terms and conditions of access for light regulation services
37	Service provider providing information about access negotiations for light regulation services
43(1)	Submitting access arrangement information with an access arrangement proposal
46	Submitting a full access arrangement proposal when required

⁷⁶ This does not abrogate the responsibility of service providers to comply with other relevant civil and conduct provisions under the NGL or guidance provided by the AER for its other regulatory powers and functions.

52(1)	Submitting an access arrangement revision proposal when required
53(6)	Complying with a direction by the AER to submit separate access arrangement proposals for different parts of a covered pipeline
107*	A service provider making an applicable access arrangement available on its website
108*	A service provider making information about tariffs available to a prospective user when no tariff is published
109*	No bundling of services by service providers
110*	Information is to be provided by users about unutilised contracted capacity
111*	Complying with a determination by the AER to establish a public register of spare capacity
112*	Complying with requests for access
137*	Not disclosing confidential information or not using it for unintended purposes
138*	Disclosure of gas supply information when requested

* These rule provisions are also conduct provisions

The maximum penalty for breaching a civil penalty provision is, for a body corporate, \$100 000 and \$10 000 for every day the breach continues. In the case of a breach by a natural person the maximum penalty is \$20 000 and \$2000 per day (s. 2). The matters that must be taken into consideration when determining a civil penalty are set out at s. 234 and include the nature of the breach, circumstances in which the breach took place, whether similar conduct has occurred previously and whether there is a compliance program in place.

Conduct penalties

If a court finds that a body corporate or natural person is in breach of a conduct provision then it may order that body corporate or person to cease or remedy the breach or carry out other actions (s. 232). A person that suffers loss or damage as a result of the conduct breach may seek to recover the amount of the loss or damage (s. 233).

Appendix E: Checklist - Access arrangement submission

Rule	Requirement or component	Where should this information be included?	
		Access arrangement proposal	Access arrangement information
Tariff components			
48(1)(c) & (d)(i)	Reference tariff for each reference service	✓	
Building block components			
72(1)(b); 86	Opening capital base (including capital contributions, re-used redundant assets, speculative investment)		✓
72(1)(b) & (c)(i)	Forecast conforming capital expenditure		✓
72(1)(b) & (c)(ii)	Forecast depreciation		✓
72(1)(b)	Forecast value of assets to be disposed (including information on capital redundancy)		✓
72(1)(b) & (g)	Rate of return (including approach components and assumptions)		✓
72(1)(b) & (c)(i); 79	How forecast conforming capital expenditure meets NGR requirements (r. 79)		✓
Depreciation			
72(1)(b) & (c)(ii)	Depreciation schedule		✓
90(2)	Whether depreciation for the opening capital base is based on actual or forecast depreciation	✓	
72(1)(a)(i)	Actual capital expenditure		✓
72(1)(a)(ii)	Actual operating expenditure		✓
72(1)(h)	Tax		✓

Rule	Requirement or component	Where should this information be included?	
		Access arrangement proposal	Access arrangement information
72(1)(h)(i)	Incentive mechanism (proposed and existing)		✓
72(1)(l)	Rationale for incentive mechanism		✓
72(1)(e)	Forecast operating expenditure		✓
72(1)(m)	Total pipeline revenue		✓
72(1)(j)(i) & (ii)	Cost allocation method, pricing principles and basis of setting tariffs		✓
72(1)(j); 92(1)	Tariff variation mechanism	✓	✓
72(1)(k)	Rationale for tariff variation mechanism		✓
72(1)(d); 129(2)(a)	Forecast pipeline capacity and utilisation		✓
84	Speculative capital expenditure & investment policy	✓	
85	Capital redundancy policy	✓	
85(3)	Policies for other mechanisms (cost sharing if demand falls)	✓	
72	Financial Models		✓
Non-tariff requirements or components			
45(1)(a); 48(1)(a); 129(1)(a)	Pipeline description	✓	
Div 5	Additional information about pipeline (BB facility/pipeline operators)		✓
45(1)(b); 48(1)(b); 129(1)(b)	Description of pipeline services	✓	
101	Demonstration that a pipeline service is a reference service		✓
45(1)(c); 48(1)(d)(ii);	Terms and conditions	✓	

Rule	Requirement or component	Where should this information be included?	
		Access arrangement proposal	Access arrangement information
129(1)(c)			
45(1)(c); 48(1)(d)(ii); 129(1)(c)	Explanation as why the terms and conditions of access are reasonable for the pipeline services		✓
45(1)(d); 48(1)(e); 129(1)(d)	Queuing requirements	✓	
45(1)(f); 48(1)(g); 129(1)(f)	Extensions and expansions requirements	✓	
45(1)(f); 48(1)(g); 129(1)(f)	Explanation/justification of extension and expansion requirements (policy) and compliance with NGR		✓
104(2)	Incremental services effect on tariffs	✓	
45(1)(e); 48(1)(f); 129(1)(e)	Capacity trading requirements	✓	
105	How capacity trading requirements are consistent with gas market rules or NGR requirements		✓
45(1)(g); (48)(1)(h); 129(1)(g)	Changing receipt and delivery points	✓	
45(1)(h) & (i); 48(1)(i) & (j); 129(1)(h)	Review and expiry dates (if relevant)	✓	
51	Trigger events (if relevant)	✓	
Other background information			
72(1)(d); 129(2)(a)	Forecast capacity and utilisation and where relevant the basis on which forecast is derived		✓
45(2)(b); 72(f); 129(2)(b)	KPIs		✓
45(2)(a); 72(1)(a)(iii)A & B; 129(2)(a)	Actual usage and capacity of pipeline (including actual demand, customer/user numbers)		✓

Rule	Requirement or component	Where should this information be included?	
		Access arrangement proposal	Access arrangement information
42	Market context relevant for pipeline (supply, demand for the supply chain)		✓
42	Overview of operations of the service provider		✓
42	Expert and consultant reports to support service provider's submission		✓