



**Discussion paper on the Draft Guideline for the
resolution of distribution and transmission
pipeline access disputes under the National Gas
Law and National Gas Rules**

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Request for submissions

Interested parties are invited to make written submissions to the AER on the proposed positions set out in this paper by 5.00pm A.E.D.T, 24 October 2008. Submissions can be sent electronically to AERInquiry@ aer.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 on (02) 6243 1233 or to the above email address.

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1 Background

1.1 Introduction

The *Draft Guideline for the resolution of distribution and transmission pipeline access disputes under the National Gas Law and National Gas Rules (Draft Access Dispute Guideline)* has been prepared to assist service providers and users or prospective users to understand how the AER will conduct an access dispute hearing under the National Gas Law (NGL) and National Gas Rules (NGR).

The NGL and NGR reflect the previous access disputes regime under the now repealed National Third Party Access Code for Natural Pipeline Systems (Gas Code). The *Draft Access Dispute Guideline* reflects a negotiate-arbitrate dispute resolution framework. This reinforces the primacy of commercial negotiations as a means to solving issues around access supported by the use of an arbitral process in circumstances where these access issues can not be resolved commercially or between the relevant parties.

The *Draft Access Dispute Guideline* is procedural in nature, providing guidance for parties to an access dispute about what they can expect from the AER in hearing an access dispute. In providing this guidance, the AER intends to inform service providers and users or prospective users of:

- their obligations under the NGL and NGR in respect of access disputes
- the AER's expectations in relation to the conduct of service providers and users or prospective users that are parties to an access dispute
- the AER's obligations under the NGL and NGR in making an access determination
- the AER's practice in relation to the conduct of a hearing of an access dispute which may not be outlined in any detail in the NGL or NGR, identifying key steps in the process and how the AER will manage these steps, and
- other relevant matters that the AER considers may assist service providers and users who may be involved in an access dispute hearing.

The *Draft Access Dispute Guideline* has the primary purpose of replacing the *Resolution of Transmission Pipeline Access Disputes under the Gas Code - draft guideline*¹ (ACCC's *Draft Access Dispute Guideline*) relevant for access disputes for transmission pipelines dealt with under the Gas Pipelines Access Law (GPAL) and the Gas Code.

The *Draft Access Dispute Guideline* builds on the ACCC's *Draft Access Dispute Guideline* to include relevant features and obligations under the NGL and NGR.

¹ ACCC, *Resolution of Transmission Pipeline Access Disputes under the Gas Code - draft guideline*, May 2004.

For reference, and to facilitate discussion and consideration by interested parties, the additional features covered in the *Draft Access Dispute Guideline* include:

- procedures to facilitate upfront confidentiality arrangements and undertakings between parties to ensure the efficient and timely resolution of access disputes
- guidance on how information, in particular confidential information, should be provided to the AER and how the AER will deal with requests to treat certain information as confidential
- details of how the AER will publicise the notification of an access dispute to allow interested parties and potential parties to the dispute to be aware of the dispute notification
- guidance on how the AER will interpret the concept of ‘sufficient interest’ of a party in the context of an access dispute
- introduction of new discretionary processes that will streamline the AER’s consideration of procedural matters for an access dispute, including the option to hold case management meetings and the option of issuing determinations in draft form
- details of the AER’s preference for hearings to be conducted ‘on the papers’
- an outline of the consultation process and specific timeframes for the parties in making submissions, and
- the decision-making processes and timeframes followed by the AER, during the course of an access dispute.

1.2 Why a new Access Dispute Guideline is necessary

The introduction of the NGL and NGR provides for an element of uncertainty for service providers about how the AER, as the new regulator of gas distribution and transmission pipelines, will conduct access disputes. This is compounded by the fact that there has been no access dispute for transmission pipelines.²

This uncertainty derives from several issues including:

- The introduction of light regulation services means that there may no longer be the upfront approval of the price conditions for access to certain pipelines. This increases uncertainty of elements of access for some users and prospective users. The Second Reading Speech for the NGL Bill outlines the importance of a governance framework which includes binding arbitration processes for an effective access regime for light regulation services.³
- The changing dynamic of market conditions over time, which may result in increased disputes about aspects of access.

² An access dispute was notified for a transmission pipeline but was subsequently withdrawn.

³ South Australia, *Parliamentary Debates*, House of Assembly, 9 April 2008, 2696 (Patrick Conlon, Minister for Transport, Minister for Infrastructure, Minister for Energy).

The new and additional features of the NGL and NGR relevant for updating the existing guidance for access disputes include:

- new and streamlined provisions and rules that frame how the AER may conduct access dispute hearings
- the change for many service providers from a state based regime and regulator to a single national regulator
- the introduction of new provisions for access disputes under the NGL and NGR which may alter service providers, users and potential users expectations of how an access dispute hearing may be conducted
- the limited experience in any jurisdictions with access dispute processes under the GPAL and Gas Code
- broader changes in relation to the classification of certain pipeline services as light regulation services and international pipeline services and the role of the AER in making access determinations for these services, along with those services subject to full access arrangements, and
- other general powers and functions of the AER and their interplay with the access dispute provisions and rules.

The *Draft Access Dispute Guideline* is intended to provide guidance for parties to an access dispute and what they can expect from the AER in hearing an access dispute. In this respect, the regulation impact about how an access dispute hearing will be conducted, places the onus or burden of regulation on the AER. The *Draft Access Dispute Guideline* is replacing the ACCC's *Draft Access Dispute Guideline* for gas and does not alter the regulatory burden for service providers and users or prospective users except as mandated by the NGL and NGR.

The *Draft Access Dispute Guideline* draws heavily on the ACCC's *Draft Access Dispute Guideline* and the ACCC's arbitration experience in other areas such as determining telecommunications access disputes under the Part XIC of the *Trade Practice Act 1974*.

2 Submissions

2.1 Content of submissions

In releasing this discussion paper, the AER seeks comment on the content and form of the *Draft Access Dispute Guideline*.

The AER does not wish to limit the nature and scope of submissions and invites interested parties to make relevant submissions on any other matter in relation to the *Draft Access Dispute Guideline*. Sections 1.1 and 1.2 provide guidance as to the issues parties may wish to submit on. In particular, the AER would be interested in comments on:

- the proposed arbitration process including discretionary steps balanced with the need to speedily resolve the matters in dispute
- the timeframes provided for consultation for various parts of the arbitration process
- the proposed framework for confidentiality
- the proposal to publish information from certain parts of the arbitration process
- the guidance provided about who is a party in a dispute, particularly persons with sufficient interest, and
- the likely costs associated with the implementation of these draft Guideline.