



Submission to the Australian Energy Regulator

**Draft guideline for resolution of
distribution and transmission
pipeline access disputes under the
National Gas Law and National Gas
Rules**

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1 Background to Jemena

Jemena (formerly Alinta) directly owns the major NSW gas distribution network and an electricity network in Victoria. Jemena also owns the Eastern Gas Pipeline (which delivers Victorian gas into NSW), the Queensland Gas Pipeline which links Wallumbilla to Gladstone and Rockhampton in Queensland and VicHub which allows EGP Shippers to move gas on and off the Victorian Principal Transmission System. Through its asset management business, Jemena provides services to gas and electricity networks and gas pipelines. Overall, Jemena manages \$8 billion worth of gas and electricity assets.

2 Introduction

Jemena agrees with the comment in the draft guideline that commercial arrangements and agreements for access to pipelines are far preferable to notifying an access dispute under Chapter 6 of the National Gas Law (NGL). This should be a last resort.¹

Once commenced however, dispute resolution under the NGL must proceed in accordance with the Law and the Rules². The proposed guideline is therefore potentially valuable in providing parties to a dispute with guidance on the AER's expectations and likely practices in relation to dispute hearings.

At the same time, in several matters the guideline has gone beyond the 'letter of the Law and Rules' in order to describe the more detailed procedures and policies the AER will adopt. Jemena is particularly interested in these matters, and they are the focus of this submission.

¹ AER *Draft Guideline for resolution of distribution and transmission pipeline access disputes under the National Gas Law and National Gas Rules*, p 9.

² The NGL (s 179) is quite clear that parties may deal with access disputes outside the NGL – ie there is no compulsion to notify a dispute to the AER.

3 Likely parties to dispute

Jemena also considers that in developing its guideline, the AER should keep in mind the parties who are likely to use dispute resolution. The AER guideline *discussion paper* alludes to this factor when it notes a level of uncertainty facing service providers:

- 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 changing dynamic of market conditions over time, which may result in increased disputes about aspects of access³.

While the possibility cannot be ruled out, Jemena considers it most unlikely that gas networks and pipelines with full access arrangements will be significant sources of disputes notified to the AER. Access arrangement reviews are exhaustive processes, resulting in prices and terms and conditions which leave limited scope for disagreement between a service provider and a prospective user. The discussion paper recognises that, since the introduction of the Gas Code, there have been no access disputes for transmission pipelines and (to Jemena's knowledge) there have been none for distribution networks.

However, Jemena considers that, in the future, light regulation pipelines do offer scope for wider variation in views between service providers and prospective users. The AER's role as arbitrator may be an important part of the negotiation-arbitration framework for such pipelines⁴. On the other hand, parties have the option of seeking commercial dispute resolution outside the NGL.

³ AER *Discussion Paper on the Draft Guideline for resolution of distribution and transmission pipeline access disputes under the National Gas Law and National Gas Rules*, p 2.

⁴ As noted in the Draft Guideline, the access dispute framework is consistent with the Competition Principles Agreement and Part IIIA of the *Trade Practices Act*.

4 Matters covered in this submission

Jemena wishes to comment on the following matters in the Draft Guideline:

- the concept of 'sufficient interest' of a party in the access dispute (section 4.1.2);
- the case management approach (sections 4.1.4.1 and 4.1.7);
- obtaining evidence and information (section 4.1.5);
- termination of an access dispute (section 4.4.2);
- publication of a determination (section 4.5);
- confidentiality issues (sections 4.1.6 and 5.1.4);
- AER use and handling of information (section 6)

5 Concept of ‘sufficient interest’

The Draft Guideline suggests that in practice, the persons most likely to have a sufficient interest in an access dispute are:

- users or prospective users of the access dispute pipeline, and
- operators, owners or controllers of a pipeline.

‘User’ and ‘prospective user’ are defined terms in the NGL, and refer to those persons who have or seek access to particular pipeline services. Jemena considers that for reasons of timeliness, cost and efficiency, the parties to dispute resolution should generally be limited to those immediately involved. Access seekers are either gas retailers or wholesalers, or self-contracting large users of gas, and the NGL definitions would most certainly exclude gas end-users served by retailers and their particular consumer groups.

The Draft Guideline observes that other interested persons, such as government bodies, industry organisations or consumer groups, may wish to make their views known to the AER, and that the AER may decide to accept such submissions⁵. While Jemena does not seek to limit necessary enquiry by the AER, Jemena considers that the views of these external parties should not be accorded any status over the views of the disputing parties. The disputing parties themselves can always cite external views to support their submissions.

⁵ Draft Guideline, p 15

6 Case management approach

The Draft Guideline has adopted a 'case management' approach, where a case management team (CMT) will be appointed from AER staff to facilitate dispute resolution and provide administrative support. The Draft Guideline also suggests using a discretionary 'case management meeting' early in the dispute to consider procedural and administrative issues⁶. These appear to Jemena to be sensible suggestions.

However, the Draft Guideline also observes that the CMT will 'provide advice to the AER and assist them in considering the substantive issues in dispute'.⁷ A similar provision was included in the ACCC's 2004 *Draft Access Dispute Guideline*⁸. Further, in a Consultation Paper preparatory to the earlier draft, the ACCC had observed that there may be benefit in appointing ACCC staff to the CMT who were familiar with the relevant pipeline⁹.

It is not clear from the Draft Guideline whether the AER currently envisages these kinds of staff appointments to the CMT. But if this were the case, Jemena would be wary of endorsing this approach. AER staff could have had prior involvement with the matters under dispute (eg in an access arrangement determination). Appointing such staff could weaken (or appear to weaken) complete objectivity in the arbitration process, and potentially blur the distinction between regulation and arbitration. At the very least, AER staff appointed to the CMT should have had no recent substantive involvement in regulatory decisions affecting the dispute pipeline.

⁶ Draft Guideline, p 20

⁷ Draft Guideline, p 16

⁸ ACCC: *Resolution of Transmission Pipeline Access Disputes under the Gas Code - draft guideline*, May 2004, p 15

⁹ ACCC Consultation Paper November 2003 p 5

7 Obtaining evidence and information

The Draft Guideline says¹⁰:

nothing precludes the AER from using its general information gathering powers (s. 42) for obtaining information or documentation from a person or using information instruments (orders or notices made or served under s. 48) to obtain information from service providers if the AER considers it appropriate to do so.

The AER's exercise of its section 48 powers is governed by certain requirements in the NGL - for example:

- The AER must have regard to the likely costs that may be incurred by an efficient pipeline service provider (or related provider) in complying with the notice or order (section 48(2)(b));
- the AER must consult with the public on the general regulatory information order it intends to make before it makes that order (section 50). It must also publish the order (s 51);
- before making a regulatory information notice, AER must notify the service provider (or related provider) and give it a draft of the notice (s 52(1)). The notice must invite the service provider (or related provider) to make written representations to the AER as to whether the AER should serve the RIN.

The Draft Guideline does not mention whether the AER will follow these procedures, but as they are provisions of the NGL it would seem self-evident that they would apply. However, the Draft Guideline does say that:

Before issuing these directions the AER will often (but not always) seek the parties' views on the information being requested¹¹.

On face value, this comment seems to suggest a more restrictive AER consultation when using regulatory information instruments for dispute resolution than that envisaged under ss 48-52 of the NGL. Jemena would welcome clarification that the AER will follow the full NGL requirements when using its s 48 powers in an access dispute proceeding.

¹⁰ Draft Guideline, p 19

¹¹ Ibid

8 Termination of access dispute

The NGL (s 188 (2)) provides that the AER may terminate an access dispute (without making an access determination) if the AER considers that the aspect of access about which there is a dispute is expressly or impliedly dealt with under a contract between either:

- the prospective user and the service provider; or
- the user and the service provider.¹²

The AER's Draft Guideline does not indicate what the AER would regard as a matter '*expressly or impliedly dealt with under a contract*', and, for the reasons given below, this is a matter which should be clarified.

S 188 (2) of the NGL appears to Jemena to cross-link with the requirement in s 189 of the NGL, which provides that the AER must give effect to an access arrangement applying to the services provided (now or in the future) by means of the dispute pipeline. For example, the Draft Guideline's discussion on the AER's powers to make an interim determination says:

The AER will generally make an interim determination when one or more of the issues in dispute are relevant terms and conditions of an approved (and current) access arrangement.¹³

Jemena notes that '*relevant terms and conditions*' of access are generally expressed in contractual form between a service provider and a user or prospective user. Prima facie, it would seem difficult to judge in advance whether the AER would be inclined to terminate an access dispute on the ground that a contract was in place, or would proceed to make an interim determination applying the terms and conditions of an access arrangement. This could be a matter of considerable uncertainty to parties contemplating using the dispute resolution process.

A specified dispute termination circumstance

Another issue is that the Draft Guideline notes that s186 (1)(d) of the NGL provides that the AER may terminate an access dispute when '*a specified dispute termination circumstance has occurred*' and s 186(3) defines this circumstance to be one specified by the Rules. However, the Rules (Part 12) do not appear to include the relevant specification. Presumably any clarification of the Rules will be noted in future revisions of the AER Guideline.

¹² This appears to be one of many new provisions in the NGL/NGR dealing with dispute resolution which were not included in the old Gas Pipelines Access Law or Gas Code.

¹³ Draft Guideline p 23

9 Publication of determination

The Draft Guideline says that while the AER has no obligation to publish access determinations, it may consider doing so for a number of reasons.

The Draft Guideline cites the following matters which would lead the AER to conclude that a determination and accompanying reasons should be published (after taking into account any objections from the parties):

Publishing a determination can promote competition where it will assist in establishing conditions to mirror an environment of competition.

For instance, when there are difficulties in negotiating the terms and conditions of access because of the lack of cost or price information, then publication of a determination setting out this information may help parties to commercially agree outcomes that result in the promotion of efficient operation and use of natural gas services for the long term interests of consumers in relation to price, quality, safety, reliability and security of supply of natural gas¹⁴.

In section 4 above, Jemena observed that, in the future, light regulation pipelines do offer scope for wider variation in views between service providers and prospective users and that the AER's role as arbitrator will be an essential part of the negotiation-arbitration framework for such pipelines.

The NGL does not require a light regulation service provider to submit a limited access arrangement at all.¹⁵ Therefore, in an access dispute, the AER may not be able to apply an access arrangement in accordance with NGL s 189. Further, although a limited access arrangement may be submitted and include terms and conditions, it excludes prices.¹⁶ While the Rules do require a light regulation service provider to publish prices on its website,¹⁷ these clearly are not intended to be part of any access arrangement.

In Jemena's view, the decision to publish an access determination for a light regulation pipeline involves a number of diverse considerations:

- The intent of light regulation is to establish considerably greater flexibility in the negotiating framework than is available under full regulation. Unlike full regulation, the framework deliberately avoids publication of service provider cost information;

¹⁴ Draft Determination p 34

¹⁵ NGL s 116

¹⁶ NGR s 45(1)(c).

¹⁷ NGR s 36(1)

- Although light regulation service providers must publish prices and associated terms and conditions on their websites, these parameters can be viewed as the starting points for negotiation rather than end-points. For example, an access seeker may negotiate a lower price with varied terms and conditions (eg lower quality service); or a higher price with improved quality of service;
- While the Draft Guideline presumes that publication of a determination will assist future negotiations, the reverse could be true. Publication could invite an access seeker to use the published information to determine its 'fallback' position¹⁸ and refuse to negotiate further when (objectively) this would be the preferred outcome. The result could be simply another round of dispute resolution;
- The Rules require light regulation service providers to report to the AER as required on the results of access negotiations¹⁹, and over time this is likely to place considerable information in the hands of the AER concerning actual prices and services in the 'market';
- The determination may involve commercially sensitive information, or it may have ASX notification implications. The AER should carefully consider such matters before contemplating publication.

A light regulation service provider would certainly be aware that if disputes arose with users or prospective users consistently over the same category of service, then (on notification of a dispute) the AER could make a 'benchmark' determination which it could apply in all similar future disputes. This would be virtual 'standardisation' of prices, terms and conditions and would make light regulation much closer to full regulation. Such a possibility should further encourage service providers to engage in meaningful negotiation.

On balance, Jemena submits that publication of determinations for light regulation services will not promote significantly greater incentives for parties to negotiate positively for access to these services. Jemena considers that the AER need only publish the facts that a dispute was notified, its generic nature and that a determination was (or was not) made by the AER.

¹⁸ Whether or not that information was appropriate to the current negotiation.

¹⁹ NGR s 37

10 Confidentiality Issues

The NGL allows:

- the AER to make a general confidentiality order for persons not to divulge or communicate specified information given to them in the course of an access dispute,²⁰
- a party to inform the AER that a specified part of a document includes confidential information, and to request the AER not to give a copy of that part to another party.²¹

The Draft Guideline indicates that the AER will usually apply the first of these provisions in an access dispute²², but that the second provision will be decided on a case-by-case basis²³.

Consistent with the views in the previous section, Jemena considers that a request for confidentiality by a light regulation service provider should be given very strong consideration by the AER.

The National Competition Council (NCC) is currently reviewing its role in making (or revoking) light regulation determinations under the National Gas Rules (NGR). The NCC describes the purpose of light regulation as follows:

This less intrusive form of regulation is considered to be appropriate where the market power exercised by the provider is less substantial and there is the potential for contestability for the services to emerge. It may also be appropriate where the number of access seekers is relatively small and these parties can themselves exercise some countervailing market power in the course of commercial negotiations. Further, light regulation may be an appropriate option for regulation where particular assets are in a transition towards effective competition.²⁴

Given the lower market power of the service provider under light regulation, and the greater potential for service contestability, maintaining confidentiality of information should be seen as an important issue. The dispute resolution process should recognise the likely sensitivity of any commercial-in-confidence information supplied to the AER by the service provider. Jemena considers that the AER's Guideline should set a high bar for the potential disclosure of this information.

²⁰ NGL s 200

²¹ NGL s 205(1)

²² Draft Guideline s 4.1.6

²³ Draft guideline s 5.1.4

²⁴ NCC: *A Guide to the functions and powers of the National Competition Council under the National Gas Law - Part C Light regulation of covered pipeline services*, National Competition Council Draft, August 2008, p 12

11 Use and handling of information

Section 6 of the Draft Guideline canvasses a number of substantial issues regarding the use of information within the dispute resolution process and how the AER handles confidential information. For example, section 6 discusses:

- procedures to give parties in a particular access dispute information which was obtained from parties in another access dispute (subject to certain controls)²⁵;
- the AER's ability to use information obtained in the course of the AER's other regulatory processes in a particular arbitration²⁶;
- General restrictions on the AER's use of information²⁷.
- All the above proposals appear to give no special protection to information which has, prior to the dispute resolution process, been determined to be confidential. This would include:
 - confidential 'sensitive information' supplied to the AER as part of any access arrangement information (Rules s 43(2));
 - 'relevant confidential information' defined in Part 16 of the Rules;
 - 'ring fenced' confidential information.

Chapter 10 of the NGL does permit the AER to disclose confidential information under defined circumstances (ss 324 – 329). This includes a very wide provision for disclosure where the detriment (of disclosure) does not outweigh the public benefit (s 329). The Draft Guideline lists a large number of potential factors that the AER may consider when assessing disclosure (p 44).

Despite Chapter 10 of the NGL, Jemena believes it is important to protect the credibility of ring fencing arrangements by not allowing parties to a dispute—which may involve multiple (non-disputing) parties with a 'sufficient interest' in the dispute—unrestricted access to confidential information.

Similar reasoning applies to access arrangement information. Respecting the confidentiality of information which has been given special protection should serve to maintain the integrity of a current or previous access arrangement process.

Jemena submits that the Guideline should specify that any information which was previously determined to be confidential should be restricted to internal use by the AER and the CMT.

²⁵ Draft Guideline, s 6.1.1.2

²⁶ Draft Guideline, s 6.1.1.3

²⁷ Draft Guideline, s 6.1.1.4