

## Summary of Submission from Jemena Gas Networks and AER Response

Issue / Reference	Submissions	AER Response
<p><b>External users</b> being parties to a dispute</p> <p>ADG 4.1.2</p>	<p><i>Jemena: Concept of sufficient interest (page 8)</i> – Jemena considers that the parties to dispute resolution should generally be limited to those immediately involved. Additionally, views of these external parties should not be accorded any status over the views of the disputing parties.</p> <p><i>Origin: Parties to the dispute (page 2)</i> – Only a narrow definition of ‘sufficient interest’ should be employed when determining relevant parties.</p>	<p>The NGL outlines that parties to an access dispute may include parties other than the service provider and user, if the person applies and is accepted as having sufficient interest (s. 183(c)(d)). The AER also retains the right to ‘inform itself about any matter relevant to the access dispute in any way it thinks appropriate’ under the NGL (s. 198(1)(c)). This is reinforced by the NGL which allows the AER to involve another party to the dispute if the person is required to do something (s.183(c)). The NGL establishes a framework that does accept that other parties may be joined to a dispute. The <i>Access Dispute Guideline</i> reflects the NGL.</p> <p>The <i>Access Dispute Guideline</i> was not amended in response to this issue. This is a matter best addressed taking account of the circumstances of the dispute.</p>
<p><b>Case Management</b></p> <p>ADG 4.1.4.1</p>	<p><i>Jemena: Case management approach (page 9)</i> – An AER staff member who has had ‘recent substantive involvement in regulatory decisions affecting the dispute pipeline’ should be excluded from being on the CMT.</p>	<p>The NGL affords the AER discretion in how it manages this process. Refer to s. 198(1)(c). However, any application from a party as to staff membership of the CMT would be considered at the time. The AER is mindful that its dispute resolution role is different to its regulatory role and requires different skills. The AER will select CMTs for access disputes based on the relevant skills required to support the process.</p> <p>The role of the CMT is a support and administrative role in the access dispute hearing process. Jemena’s submission does not recognise that the CMT is not the decision making body for the dispute hearing process (ADG 4.1.4.1). The decision making role remains the function of the AER or its delegates. As the decision making body, the AER is required to have regard to the need to ‘carefully and quickly inquire into and investigate the access dispute and all matters affecting the merits, and fair settlement, of the access dispute’ (s. 198(1)(b)).</p> <p>The involvement and experience of staff in previous regulatory matters would provide for a means to support the AER in acting in accordance with this obligation.</p> <p>The <i>Access Dispute Guideline</i> has been amended to clarify the AER’s position in response to this issue.</p>
<p><b>Procedure for obtaining evidence and information</b></p> <p>ADG 4.1.5</p>	<p><i>Jemena: Obtaining evidence and information (page 10)</i> – When using its section 48 information gathering powers, the AER should follow the full NGL requirements for consultation (providing drafts, allowing submissions, considering costs to the service provider) rather than any cut-down or expedited process.</p>	<p>Under the s. 199, the AER may give a direction in the course of, or for the purpose of, a dispute hearing. A direction can include the provision of information to the AER. This is likely to be the primary means for obtaining information in an access dispute hearing. However, the <i>Access Dispute Guideline</i> outlines that this is not the only means available to the AER to collect information.</p> <p>As outlined in the Jemena submission if the AER uses its other information powers as part of the dispute resolution process, it will abide by the relevant provisions for consultation. The AER can seek information from the service provider using the Regulatory Information Notice (RIN) or a General Regulatory Information Order (GRIO) served or made under NGL s. 48. The AER notes that it is not required to consult with parties when using its s. 42 powers.</p>

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		The wording in the <i>Access Dispute Guideline</i> has been updated to clarify this position and additional wording added to also reflect the recently released ACCC/AER's Information Policy.
Definition of a matter ' <b>expressly or impliedly dealt with under a contract</b> ' ADG 4.4.2	<i>Jemena: Termination of access dispute (page 11)</i> – The <i>Access Dispute Guideline</i> should clarify “expressly or impliedly dealt with under a contract”. 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.	The ADG reflects the NGL in its use of the term “expressly or impliedly dealt with” (NGL s. 186(2), ADG 4.4.2). If a contract is in place, the <i>Access Dispute Guideline</i> outlines that the AER will terminate an access dispute, consistent with the NGL. The AER may make an interim determination applying the terms and conditions of an access arrangement only if not already dealt with in an existing contract. To clarify this point, the <i>Access Dispute Guideline</i> has been amended at page 25 confirming the application of s. 186(2) in relation to issuing interim determinations.
Definition of ' <b>specified dispute termination circumstance</b> '	<i>Jemena: Termination of access dispute (page 11)</i> – The term 'specified dispute termination circumstance' should be defined and included in future revisions of the Rules.	The AER notes that the NGR currently does not define a 'specified dispute termination circumstance' (NGL s. 186(3)). If such a definition were to be added to the NGR at a later time, the <i>Access Dispute Guideline</i> would be updated accordingly. The <i>Access Dispute Guideline</i> has been amended at page 35 to clarify this situation.
<b>Publishing a determination</b> ADG 4.5, 6.1.1.1	<i>Jemena: Publication of determination (page 12)</i> – Publishing details of a determination will not promote significantly greater incentives for parties to negotiate positively for access to light regulation services. The AER need only publish that a dispute was notified, its generic nature and that a determination was or was not made.  <i>Origin: Publication of final determination (page 2)</i> – AER should strongly consider the objections of the parties before publicly disclosing a final determination.	First, the <i>Access Dispute Guideline</i> applies equally to international, light regulation and full regulation service pipelines. Second, the <i>Access Dispute Guideline</i> notes that the access dispute hearing process is, by its very nature, private (s. 196). In keeping with this, the hearing process outlined by the <i>Access Dispute Guideline</i> is generally subject to confidentiality orders. Once a determination is made the <i>Access Dispute Guideline</i> outlines that an access determination may be published if it is congruent with the National Gas Objective – more specifically, if it will improve transparency and inform users. Under the NGL, s. 324 allows the AER to disclose information given to in confidence in the performance or exercise of its functions and powers and in accordance with s. 205. Additionally, there are certain other circumstances where disclosure is permitted as outlined in ss. 325-329. Under s. 329, if the detriment of disclosure of confidential information does not outweigh the benefits, the AER considers that it may disclose certain information arising from an access dispute hearing including the publication of certain aspects of the access determination. While the AER notes Jemena's submission in this regard, the AER does not agree that the availability of more information for users and potential users is likely to hinder access negotiations for light regulation pipelines or other pipelines subject to the access dispute provisions, any more than the terms and conditions of access as outlined in approved full access arrangements does currently. In disclosing confidential information that may have ASX notification implications, the AER is required to follow certain procedures under s. 329. One of these procedures is to provide an initial disclosure notice outlining that the

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		<p>AER is intending to disclose information and then a further written notice. These notifications serve to afford parties time to notify relevant other institutions and regulators about the release of confidential information which may have disclosure implications under other Laws and rules.</p> <p>The AER does not propose to amend the <i>Access Dispute Guideline</i> in response to this issue.</p>
<p><b>Disclosing confidential information</b> to the other party in the access dispute</p> <p>ADG 4.1.6, 5.1.3, 5.1.4</p>	<p><i>Confidentiality Issues (page 14)</i> – a request for confidentiality by a light regulation service provider should be given very strong consideration by the AER and the <i>Access Dispute Guideline</i> should set a high bar for the potential disclosure of this information.</p>	<p>This point is partially addressed in the previous response regarding privacy and the disclosure of information.</p> <p>The <i>Access Dispute Guideline</i> reflects the NGL in emphasising the private nature of an access dispute hearing. The AER notes that the NGL contemplates that it may be required to disclose confidential information to the other party in a dispute. However, in disclosing confidential information to another party in an access dispute hearing, it is required to do so in accordance with s. 205. This provision can apply to any party joined to a dispute including parties that are joined to a dispute because they are deemed to have sufficient interest to do so.</p> <p>The AER does not propose to amend the <i>Access Dispute Guideline</i> in response to this issue.</p>
<p><b>Use and handling of information</b> that is sensitive or confidential</p> <p>ADG 6.1.1.2, 6.2</p>	<p><i>Use and handling of information (page 15)</i> – the <i>Access Dispute Guideline</i> should provide special protection to certain types of confidential information, including:</p> <ul style="list-style-type: none"> <li>▪ information that has been determined to be confidential prior to the dispute resolution process,</li> <li>▪ information otherwise restricted by ring-fencing arrangements, and</li> <li>▪ access arrangement information.</li> </ul>	<p>This point is partially addressed in the previous two responses on disclosure and privacy.</p> <p>The AER outlines in the <i>Access Dispute Guideline</i> when confidential information may be disclosed to either the other party in a dispute or the public. The <i>Access Dispute Guideline</i> follows the NGL, as has already been outlined above.</p> <p>In accordance with the <i>Access Dispute Guideline</i> and the ACCC/AER <i>Information Policy</i>, the AER accepts no restrictions on the use or handling of confidential information obtained from another source (that is, from outside the access dispute at hand) – as long as the use of information occurs in accordance with the NGL and the TPA.</p> <p>The AER does not propose to amend the <i>Access Dispute Guideline</i> in response to this issue.</p>
<p><b>Flexibility and approach</b> to Access Disputes</p> <p>ADG Part A (outline)</p>	<p><i>Origin: (page 1)</i> – The AER should allow for ‘flexibility in timeframes and process’ as a result of the ‘apparent inexperience of the AER in conducting access disputes’ and the AER should consider a supplementary review or enhancement of the guidelines once some disputes have tested the process.</p>	<p>The <i>Access Dispute Guideline</i> allows for flexibility in timeframes and process. As noted in the discussion paper, the <i>Access Dispute Guideline</i> draws heavily upon the ‘the ACCC’s arbitration experience in other areas such as determining telecommunications access disputes under Part XIC of the Trade Practice Act 1974.’ Further the <i>Access Dispute Guideline</i> (Part A – outline) acknowledges that over time that flexibility may be required and states that ‘From time-to-time, the AER may amend its access dispute process to reflect current best practice and procedures. Where new practices are not reflected in the Guideline, the AER will seek to inform parties, where practical, of any changes to its processes in the context of a particular access dispute.’ The AER considers that periodic updates of the <i>Access Dispute Guideline</i> based on best practice as envisaged above can address the issues of flexibility in timeframes and process if required.</p>