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Dr Michael Vertigan AC
Gas Market Reform Group
c/o Australian Energy Market Commission
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Dear Dr Vertigan

APA Group submission on the Gas Pipeline Information Disclosure and Arbitration Framework: Initial draft rules

Please find with this letter APA Group's submission responding to the Gas Pipeline Information Disclosure and Arbitration Framework: Initial draft rules.

APA is acutely aware of the charged political environment surrounding energy policy and energy prices and the desire to act now to address these concerns. Within this environment, however, it is equally important that responses to immediate market concerns remain in the long term interests of consumers. This necessarily requires a balance, and APA does not consider that the proposed Information Disclosure and Arbitration Framework appropriately strikes this balance. There is a critical need for policy makers to take a step back from this process and carefully consider the *aggregate* impacts of the current push to intervene in multiple aspects of the energy market, as would be expected in any good policy process.

The Information Disclosure and Arbitration Framework design and draft rules have been developed in a rush with, in APA's view, little consideration of all stakeholder views, and of the impacts of these rules over the longer term. In particular, APA believes that the proposed framework will have profound negative impacts on investment and innovation in the sector. This is not in the long term interests of consumers.

We discuss key shortcomings with the proposed Information Disclosure and Arbitration Framework in the accompanying submission, as well as changes to improve the workability of the draft Rules, and to remove some of the opportunities embedded in the current draft for shippers to game the process. These changes, however, do not resolve the fundamental flaws associated with imposing a heavy handed regulatory pricing framework on pipelines for which no case for regulation has been made. APA remains of the view that this scheme is poorly conceived and targeted and requires wholesale rewrite to be to consistent with the National Gas Objective.

Yours sincerely

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APA Group submission

Gas Market Reform Group consultation – Gas pipeline information disclosure and arbitration framework: Initial draft rules

By e-mail: enquiries@gmrg.coagenergycouncil.gov.au

1. Submission summary

Inappropriate focus of the scheme

The intent and focus of the information disclosure and arbitration scheme has changed significantly from that originally identified by Dr Vertigan and endorsed by Energy Ministers in December 2016. It has moved from its initial focus on supporting commercial negotiations with additional information, and addressing concerns over pipeline operator market power by establishing a 'back-stop' right to arbitration where commercial negotiations fail, to a scheme with a specific regulatory focus.

In contrast to the original intended focus, the design of the scheme of the draft Rules shows no real understanding of commercial negotiation and does not provide effective support for commercially negotiated outcomes. With their overwhelming focus on historical costs, and prices determined from those costs, the draft Rules implement a *de facto* regulatory regime alongside the existing regime of the National Gas Law. The design, put together with limited understanding of the incentives it creates for both parties, will incentivise the replacement of commercial negotiation with arbitrated outcomes.

The replacement of commercial outcomes with those derived under a rigid regime of service definition, disclosure and arbitration will not be in the long term interests of consumers. It will, in APA's view, stifle innovation in pipeline services and chill investment in future pipeline capacity.

Further, the draft Rules establish a regime that deprives pipeline operators and owners (who are, in the main, small shareholders and superannuation funds) of significant rights, and lacks any of the necessary checks and balances of a regulatory regime. In doing so, the scheme creates extreme risk of decision-maker error and offers no protections for pipeline operators, ignoring many of the principles embodied in the National Gas Objective that are intended to protect and promote efficient investment in pipelines. This risk and uncertainty will also negatively impact investment in the sector.

Rushed implementation and ill-conceived transitional arrangements create unmanageable compliance risk and will lead to substantial error

The proposed scheme start date of 1 August 2017 is manifestly unreasonable and creates unacceptable and unmanageable risk for pipeline operators in respect of compliance with civil penalty (and potentially conduct) provisions.

The proposed transitional arrangements in respect of access requests and offers that are 'on foot' represents retrospective regulation and expose the pipeline operator to unacceptable risk under the new scheme. As currently drafted, these provisions can relate to any offer or request made in the past, with no time limit beyond which prices could be determined as 'stale'. These transitional arrangements must be revised to refer only to offers made in a form capable of acceptance by the shipper, and which are still 'open'.

Essential revisions to the scheme

APA considers that the scheme requires wholesale revision and retargeting towards the original aims as described by Dr Vertigan. Failing this necessary work to make the scheme proportionate and responsive to the interests of both prospective shippers and pipeline operators, APA has identified a number of critical areas for revision to make the regime at least less inconsistent with the National Gas Objective, as follows.

Competition for a service and safe and reliable pipeline operation should be threshold questions for scheme application

As currently drafted the scheme applies to all pipeline services, even those that are provided in a demonstrably competitive market. The stated objective for the information disclosure and arbitration scheme as set out in the *Explanatory Note* refers to the regime posing a 'constraint on the exercise of market power'. It follows that for services where there is no market power, the regime should not apply.

Further, the scheme demotes the consideration of the operational and technical requirements for the safe and reliable operation of the pipeline to a subordinate principle that the arbitrator only takes into account if it chooses. This is unacceptable for critical gas infrastructure and is inconsistent with the conduct of the scope of an access arbitration, which can extend to whether access can or should be granted. Safe and reliable operation of the pipeline should be a threshold question for the arbitrator, before proceeding to a price determination.

Arbitration hierarchy putting all else subordinate to cost is inconsistent with the scheme objective and the National Gas Objective

The arbitration principles place cost as the single most important principle to determine tariffs, with all other considerations, including the business interests of the pipeline operator, and the interests of existing users of the pipeline, as subordinate objectives. APA considers that these elements are at least as important as the specific cost of service, when designing a scheme that is in the long term interests of consumers, as required by the National Gas Objective. They should receive the same consideration in a determination as pipeline operator costs.

Potential term and scope of an arbitral decision represents an unacceptable risk for the service provider

As drafted, arbitration can relate to any amount of capacity over any contract term. The risk to the pipeline operator of an incorrect or unreasonable arbitral decision in these circumstances is very high, particularly as price determinations are to be made in a very short timeframe. This risk is exacerbated by the lack of redress to an arbitrator's decision, with the arbitrator's liability removed by statute.

To address this risk, there is a critical need to limit the potential scope of a poor arbitral decision by setting a maximum contract term to which a single arbitrated outcome can apply. Consistent with access arrangement reset periods, APA considers this maximum term should be 5 years, to provide opportunity for a reset where prevailing conditions change, and limit the term of the potentially significant impact of a poor decision.

Directions in pricing principles inconsistent with scope of discretion of the arbitrator

In respect of the asset base calculation, APA considers that both formulations of the asset base rule embody regulatory-type approaches that are inconsistent with the concept of a workably competitive market. Within the choice given, APA prefers the second formulation that directs the arbitrator to the relevant asset base clause of the National Gas Rules.

Public asset valuation places too much emphasis on single determination and creates unacceptable risk for the service provider

The draft Rules retain confidentiality for the outcomes of access determinations, with the exception of any asset value determined, and the method adopted, which the AER is required to publicly disclose.

APA considers that this disclosure is inappropriate, as it takes no account of the nature of the arbitrated decision (which is limited to the issues in dispute between the parties and is conducted on the papers exchanged in the negotiation), and places considerable importance into each asset base determination (in particular the first), which could relate to a contract of very low value.

The scheme design does not support negotiation and agreement

The design of the draft Rules will remove incentives for negotiation for both parties. The incentives for the pipeline operator arising from the scheme will be to standardise services, eliminate flexible arrangements and not discount. This is the only way that a pipeline operator can mitigate risk in a cost-based arbitration. Small retailers and industrial shippers will be particularly disadvantaged when this occurs, as they often have need for tailored or discounted services.

For prospective shippers, the scheme incentivises them to rely on arbitration instead of negotiating. This incentive is created by the design of the pricing principles, which removes risk for the shipper seeking arbitration to end up with a higher tariff than offered in negotiation, as well as providing significant scope for gaming the arbitration process, by bypassing the negotiation phases set out in the rules to remove opportunities for pipeline operators to provide evidence in support of their offers.

To address some of these issues, the scheme must be revised to ensure that the parties have incentives to negotiate through 'no prejudice' provisions that are effectively excluded from the formal record of negotiation that will be the basis of the arbitrator's decision.

Extension of information disclosure scheme to extensions without need or justification

Draft rule 570 explicitly excludes pipeline extensions from the scope of the arbitration scheme, but the current drafting of rules 559 and 560 means that the Division 3 information gathering provisions will apply. Extensions are provided in a competitive market, and the application of the Division 3 information requirements to them will undermine that market and create significant risks of gaming by parties. To avoid this, Division 3 information arrangements must not extend to pipeline extensions.

2. Introduction

2.1. Design of information disclosure and arbitration scheme is not consistent with original intent or the National Gas Objective

The intent and focus of the information disclosure and arbitration scheme has changed significantly from that originally identified by Dr Vertigan and endorsed by Energy Ministers in December 2016.

In the original *Examination*[1] report, Dr Vertigan recommended a new scheme designed to address a perceived imbalance in bargaining power during negotiations for pipeline services. The scheme was also intended to address concerns over pipeline operator market power by establishing a 'back-stop' right to arbitration where commercial negotiations fail. Importantly, the new scheme was to be targeted to support commercially negotiated outcomes, and was preferred by shippers over options that increased regulation of gas pipelines.[2]

In contrast to this intended focus, the design of the scheme implemented by the draft Rules shows no real understanding of commercial negotiation and does not support commercially negotiated outcomes. With their overwhelming focus on historical costs, and prices determined from those costs, the draft Rules implement a *de facto* regulatory regime alongside the existing regime of the National Gas Law. The design, put together with limited understanding of the incentives it creates for both parties, will incentivise the replacement of commercial negotiation with arbitrated outcomes.

The replacement of commercial outcomes with those derived under a rigid regime of service definition, disclosure and arbitration will not be in the long term interests of consumers. It will, in APA's view, stifle innovation in pipeline services and chill investment in future pipeline capacity.

The Rules applying to regulated pipelines have been carefully designed to ensure that scope for commercial negotiation is maintained, as users benefit from services that are designed to meet their specific needs, particularly in the relatively small Australian market. The shifting of this arbitration scheme from supporting commercial negotiations to its current overt regulatory focus, as is evident from the proposed objective and the design of the scheme, has been made without any regard to whether the costs outweigh the benefits or whether the scheme, as now designed, would achieve the National Gas Objective.

Contrary to Dr Vertigan's *Framework* paper, the design of the draft Rules will remove incentives for negotiation for both parties, as discussed in section 4.1 below.

Further, the draft Rules establish a regime that deprives pipeline operators and owners (who are, in the main, small shareholders and superannuation funds) of significant rights, and lacks any of the necessary checks and balances of a regulatory regime. In doing so, the scheme creates extreme risk of decision-maker error and offers no protections for pipeline operators, ignoring many of the principles embodied in the National Gas Objective that are intended to protect and promote efficient investment in pipelines. This risk and uncertainty will negatively impact investment in the sector.

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[1] Dr Michael Vertigan AC 2016, *Examination of the current test for the regulation of gas pipelines*, 14 December

[2] Vertigan 2016, *Examination of the current test for the regulation of gas pipelines*, p 77

In a bid to solve for one issue, the regime will create far more significant problems, distortions and risks in the gas sector as a whole. While pipeline operators were commended for their investment and flexibility throughout the transition of the gas sector brought about by LNG exports, this scheme will make this type of responsive investment and flexibility a thing of the past. Rigid mandated processes and arbitrated outcomes will prevail.

The profound risks presented by this scheme leaves pipeline operators in the position of having to consider voluntarily opting for full regulation of assets, even though the assets involved would not satisfy the coverage test justifying price regulation. This is in direct contravention of the wishes of shippers, which Dr Vertigan reported did not want increased regulation, presumably because of the costs and risks associated with regulation in respect of innovation, investment and flexibility.

2.2. Failure to consider the aggregate impacts of the package of gas pipeline interventions being implemented

APA understands the immediate concern of Governments in respect of gas supply and affordability for Australian businesses and households. The sudden increase in gas prices brought about by tightness in gas supply is being felt by APA and its customer base, particularly in the industrial and manufacturing sectors. It is important for Governments to support Australian businesses to manage the transition to higher gas prices that appear to be the new norm.

Addressing these concerns, however, should not come at the expense of longer term investment in the gas sector that is critical to deliver new gas supply, as well as ensure electricity market stability and security.

To ensure a secure energy future, there is an urgent need for holistic and integrated policy consideration, including comprehensive analysis and modelling, of how elements of the gas reform agenda can link with and support (or detract from) the broader energy security aims of Governments. This work is particularly needed in respect of the development of the information disclosure and arbitration scheme, and its interaction with the Australian Energy Market Commission recommendations to support increased market liquidity.

There is a real risk that some aspects of the current suite of market interventions will not only fail to deliver an environment for increased market liquidity, but will at the same time undermine incentives for the next wave of investment needed to ensure ongoing energy market security. There is an urgent need for the proposed disclosure and arbitration scheme, and its interaction with other initiatives also being implemented, to be substantially reviewed to ensure their complementarity and combined achievement of the National Gas Objective, prior to their start.

2.3. Rushed implementation risks pipeline operator non-compliance and will lead to significant error

The proposed scheme start date of 1 August 2017 is manifestly unreasonable and creates unacceptable and unmanageable risk for pipeline operators in respect of compliance with civil penalty (and potential conduct) provisions.

With the final rules still under consultation until 20 July, with no opportunity for pipeline operators to even see the final form of the scheme to which they will be subject before it is implemented, the expectation that pipeline operators can be ready to comply with these rules on 1 August 2017 is clearly unreasonable. The risk of non-compliance or incomplete information available for arbitration for the pipeline business is enormous and unmanageable.

Notwithstanding the risk that having limited information available at scheme commencement creates for a pipeline operator in terms of an arbitration outcome, pipeline operators are at clear risk of breach of these new rules, simply because they have been given no time in which to comply. APA takes compliance with the law and obligations as a fundamental part of doing business. Being placed in a circumstance where it is not able to maintain this standard is untenable.

While the GMRG acknowledges that it will take time to prepare financial information for the reporting requirements (originally due to start 1 February 2018, however it is unclear whether this deadline is also intended to shift with the earlier implementation of this scheme), the same pipeline specific information must be ready for response to access requests, and potential arbitration, from 1 August 2017. As APA advised in its response to the GMRG Options Paper, it prepares group level accounts only.[3] Many costs, such as debt and equity costs, tax and corporate costs, are incurred at the group level and are not currently allocated to specific assets. Substantive system changes will be required to make this allocation, and this will only be possible after a robust allocation methodology has been established. APA expects that the financial reporting guidelines will be foundational to this allocation methodology, which the *Explanatory Note* states will only be published in December 2018.[4]

APA considers that it is unreasonable for the stage 2 negotiation arrangements, or the arbitration scheme, to become available on 1 August 2017, effectively immediately after the final form of the proposed rules are known, and before other details of the scheme are established and enacted.

A more reasonable (although still challenging) start date for the rules would be 1 February 2018, in line with requirements to publish much of the information that will be relevant to an arbitration on the pipeline operator's website.

APA notes that under the current drafting of the draft Rules, the publication date would accelerate by 1 month with the decision by the COAG Energy Council to implement the information disclosure and arbitration scheme 1 month earlier than originally planned. APA considers that the information disclosure deadline should remain at 1 February 2018 as the necessary steps for compliance have not changed with the advanced of the commencement date of the scheme, and a 1 January 2018 deadline would impose significant and unnecessary additional costs on pipeline operators due to the technical and other staffing needs over holiday period, as well as increasing compliance risk.

A 1 February 2018 start date for the stage 2 negotiation arrangements and the arbitration scheme would align the commencement of processes that rely on the published information with the availability of that published information. Such information includes the user access guide that gives context to user access requests, and the pricing methodology that explains how prices are derived.

In addition, there are significant gaps, errors and shortcomings in the proposed draft Rules that can be readily addressed. More significantly, the scheme has clearly been designed without consideration of how it can be gamed by prospective users, in preference for designing a scheme that is maximally punitive on pipeline operators. The opportunities for shippers to abuse this scheme in ways not conceived by the drafters are significant, however APA, and the pipeline

[3] APA Group 2017, *Submission responding to Gas Market Reform Group Gas Pipeline Information Disclosure and Arbitration Framework Options Paper*, p 29

[4] GMRG 2017, *Gas Pipeline Information Disclosure and Arbitration Framework; Explanatory note*, p 35

sector more generally, has not had opportunity to present these issues to the GMRG, or to policy makers privately, given the truncated time for consultation on the draft Rules and the direction to expedite the passage of the Amendment Bill.

The consequences of getting this scheme wrong are very significant and enduring, and will deliver very poor outcomes for consumers that are contrary to the National Gas Objective. The scheme requires wholesale retargeting and review, to create a proportionate and targeted package to address the issues identified by Dr Vertigan in his original review.

2.4. Transitional arrangements are retrospective regulation and must be removed

The transitional arrangements provide a mechanism for a shipper to elect to deem any "access request" made before the start date to be an access request under the Rules, and any response to such an "access request" (however informal) to be deemed to be an access offer under the Rules.

This proposed transitional arrangement represents retrospective regulation and exposes the pipeline operator to unacceptable risk under the new scheme. If the intent is that it only applies to 'open' term sheet negotiations, then the drafting needs to reflect this.

First and primarily, the proposed arbitration scheme sets out principles for how an arbitrator should determine prices that apply Rules that currently do not apply to operators of non-scheme pipelines, and that impose a new and different test for prices that is not embodied in current prices set by pipeline operators on the basis of commercial negotiations. By the operation of these transitional arrangements, prices indicated at any time in the past (APA notes that there is no time limit beyond which prices could be determined as 'stale') can be imported into this scheme through the deeming arrangements and tested against a new standard. This is unreasonable, and does not give the pipeline operator any opportunity to develop a pricing methodology and prices that are consistent with the standard to be applied by the arbitrator.

These proposed transitional arrangements are manifestly unreasonable, unfair, and deny pipeline operators basic legal principles and rights of equity and natural justice.

No rationale has been given at any stage as to why such punitive and inequitable transitional arrangements are appropriate for this scheme. No rationale is given in the *Explanatory Note* as to why they are necessary other than to avoid 'delays'. There is no discussion of the actual real implications, positive or negative, of a delay in applying Divisions 3 and 4 of this scheme to coincide with the information disclosure requirements, nor is there any discussion or recognition of the implications, positive or negative, of its rushed application through these transitional arrangements. It would appear that no thought whatsoever has been applied to how these transitional arrangements will work in practice, including how historic information exchanges can be deemed as offers, or how these transitional provisions will impact current access requests and negotiations.

The transitional arrangements in respect of negotiations 'on foot' are unnecessary and must be removed. Failing this, the scope of offers that it captures must be significantly constrained, to only include offers that made in a form capable of acceptance by the prospective shipper (as would apply under draft Rule 560(1), and which are still 'open' when the scheme commences.

2.5. While wholesale review of the scheme is required, some changes are critical to avoid significant adverse outcomes

To remain true to the original vision endorsed by the COAG Energy Council, the scheme of the draft Rules needs to be refocused on supporting commercially-negotiated outcomes. Such a scheme would provide for information disclosure that addresses the concern of prospective pipeline users that they do not have the information needed for successful access negotiations, rather than imposing, through a costly regime of heavy-handed government red tape, a cost of service regulatory regime which is unresponsive to either the needs of those users, or to pipeline operators. It needs to be refocused to facilitate binding commercial arbitration, rather than impose *de facto* regulation via incentives for rapid default to determinations by an arbitrator who is to apply regulatory pricing mechanisms.

APA has identified key shortcomings with the proposed Information Disclosure and Arbitration Framework in the remaining submission, as well as changes to improve the workability of the draft Rules, and to remove some of the opportunities embedded in the current draft for shippers to game the process. These changes, however, do not resolve the fundamental flaws associated with imposing a heavy handed regulatory pricing framework on pipelines for which no case for regulation has been made. APA remains of the view that this scheme is poorly conceived and targeted, and requires wholesale rewrite to be to consistent with the National Gas Objective.

2.6. Structure of remainder of submission

The remainder of the submission follows the following structure:

- Sections 3 and 4 of this submission discuss key shortcomings of the scheme, as well as ways these can be addressed.
- Section 5 responds to the questions in the Explanatory Note.
- Section 6 includes a rule by rule review of the package.

3. Arbitration design is inconsistent with the scheme objective and the National Gas Objective

3.1. Competition and safety/reliability are threshold questions for scheme application and an arbitrator

As currently drafted the scheme applies to all pipeline services, even those that are provided in a demonstrably competitive market. The objective for this scheme refers to it posing a 'constraint on the exercise of market power'. It follows that for services where there is competitive constraint on the exercise of market power, the regime should not apply.

Further, the scheme demotes the consideration of the operational and technical requirements for the safe and reliable operation of the pipeline to a subordinate principle that the arbitrator only takes in to account if it chooses. This is unacceptable for critical gas infrastructure and is inconsistent with the conduct of the scope of an access negotiation, which can extend to whether access can or should be granted. In fact, the Victorian Government is currently undertaking consultation to increase the consideration of safety and reliability matters in economic regulatory decision making. Safe and reliable operation of the pipeline should be a threshold question for the arbitrator.

Competition

The ACCC, in its *Inquiry Report*, identified a number of areas where competition did appear to be setting prices for transmission pipeline services on the east coast, applying an effective constraint on the behaviour of pipeline operators and delivering benefits to shippers.[5] In particular, the ACCC identified a project to expand the South West Queensland Pipeline as being made in a competitive market due to a number of alternative pipeline options being available. The ACCC noted that the competition delivered benefits to both Origin and AGL, as the proponents.[6]

Another example of competitive service provision involves APA's Parmelia Gas Pipeline. For most of its length the Parmelia Gas Pipeline runs parallel to the relatively newer, and much larger, Dampier to Bunbury Natural Gas Pipeline. The Dampier to Bunbury Natural Gas Pipeline transports gas into the south west of Western Australia from producers in the Carnarvon Basin, and from the much smaller Perth Basin. The Parmelia Gas Pipeline transports only from the Perth Basin, and the operators of both pipelines compete vigorously for the limited opportunities to transport Perth Basin gas.

In the case of the Parmelia Gas Pipeline, there is no need or justification for the information disclosure and arbitration regime of the draft Rules.

A further example includes the provision of storage services to support users of the Victorian Declared Wholesale Gas Market (DWGM). Four separate pipelines connected to the DWGM, as well as two unregulated storage facilities, offer storage services to market participants, and they compete in providing those services. [7] Regulation of these services through the operation of the proposed scheme, is unnecessary and costly. Going forward, the secondary trading market and

[5] Australian Competition and Consumer Commission2016, *Inquiry into the east coast gas market*, April, p 97
[6] ACCC 2016, *Inquiry into the east coast gas market*, p 97
[7] They are the Moomba Sydney Pipeline, Eastern Gas pipeline, Tasmanian Gas Pipeline, SEA Gas Pipeline, Dandenong LNG facility, and the Lochard underground gas storage facility. It is worth noting that all of these facilities are also competing with the provision of swing services from connected gas production facilities.

auctions will also be an important competitor to primary capacity, and constrain any potential for market power.

Despite evidence from the ACCC Inquiry as to the existence of competition for some pipeline services, as well as long-accepted principles of competition policy in Australia which emphasise the benefits of relying on market based outcomes where they are available, the draft Rules set out a scheme of regulation which makes the existence of competition irrelevant to its application.

APA notes that the *Options Paper* 'preliminary view' included, as a pricing principle to be followed by the arbitrator, consideration of whether there is competition for the service and, if there is, a requirement that the arbitrator take this into account in determining whether an offer is reasonable. This has been removed from the final recommendation with the following comment:

> *On reflection, it is not clear what role this principle could play in pricing disputes that are focused on whether the price is cost-reflective. The GMRG is therefore no longer recommending the inclusion of this principle.*[8]

The Gas Market Reform Group has in effect decided to apply the scheme irrespective of whether it is needed. It has decided that regulation, with prices for all services provided by the operators of non-scheme pipelines determined by an external arbitrator under time and information constraints, is better than relying on a competitive outcome. Surely this was not the intent of the scheme, with its stated focus on commercial outcomes.

Where competition for a service exists, the outcomes are by definition workably competitive and the scheme is not needed. The scheme design needs to recognise this, first by providing scope for the AER (as scheme administrator) to grant an exemption to a particular pipeline, service type or service where it is satisfied that there is sustained competition. An exemption should apply from the requirements of Divisions 3 and 4 of the draft Rules, as part of the exemption regime under Division 6.

The arbitrator should also be required to assess whether there is competition for a particular service as a threshold question before commencing arbitration.

This would be consistent with the current direction in draft Rule 569 to the arbitrator to set prices reflecting outcomes of a workably competitive market as set out in draft Rule 546 – in determining this threshold issue the arbitrator would be free to find that the market for the service was workably competitive, and therefore the outcome of that process constitutes "reasonable terms". As currently drafted, however, the arbitrator is forced to determine a price for the service based on its view of the costs of provision as the only conduit to an outcome that is consistent with a workably competitive market. This is unnecessary and is likely to lead to poorer market outcomes because of the known shortcomings of regulation in respect of incentives and risks, including the risk of decision-maker error.

Including competition as an alternative methodology for setting price is also consistent with the approach for regulated gas infrastructure, where section 187 of the National Gas Law states that an arbitrator may refuse to make a determination if it considers that 'the pipeline service the subject of the access dispute could be provided on a genuinely competitive basis by a person other than the service provider or an associate of the service provider.'

[8] Gas Market Reform Group 2017, *Gas Pipeline Information Disclosure and Arbitration Framework: Final Design Recommendation*, June, p 52

Safe and reliable operation

The safe and reliable operation of the pipeline must be a critical threshold question in relation to whether a service should proceed to arbitration.

This consideration goes beyond that contemplated under draft Rule 570(5)(c), which only applies in respect to a price determination rather than as a threshold question as to whether an arbitration should proceed. The inclusion of safe and reliable operation as a consideration in whether to make an access offer (draft Rule 560(3) and (4), and which is also a decision that can be subject to arbitration), also suggests that safe and reliable operation should be a threshold issue for the arbitrator to consider.

As another point, the *technical feasibility* of a change to the pipeline's operation is a patently inadequate standard for a determination that will force a pipeline operator to comply with the determination at a particular tariff. This standard creates significant risk that the pipeline operator will be required to undertake a change to a pipeline in a way that is not practically possible or optimal given the configuration of the pipeline, or which creates significant risk for the pipeliner operator in completing a project for an expected (arbitrated) price that embodies a cost for those works that is not reasonable.

Finally, nowhere in the regime is there any ability for the pipeline operator (in considering whether to make an access offer) or the arbitrator (in determining whether to make an access determination) to have regard to the financial position of the access seeker and their creditworthiness.

3.2. Arbitration hierarchy putting all else subordinate to cost is inconsistent with the scheme objective and the National Gas Objective

The arbitration principles place cost as the single most important principle to determine tariffs, with all other considerations, including safe and reliable operation of the pipeline, the business interests of the pipeline operator, and the interests of existing users of the pipeline, as subordinate objectives. This is clearly inconsistent with the National Gas Objective, which directs decision makers to the long term interests of consumers, which would include considerations of the efficient investment in, and the efficient operation and use of, a pipeline alongside considerations of lowest cost delivery and maximising pipeline utilisation.

APA considers that elements such as the legitimate business interests of the service provider, as well as the interests of all persons who have rights to use the pipeline, are at least as important as the specific cost of service, when designing a scheme that is in the long term interests of consumers.

Clearly, the Commonwealth, States and Territories all agree that these principles are important, as they are the principles set out in the current *Competition and Consumer Act*, applied in all jurisdictions, for arbitrations conducted by the ACCC under the National Access Regime.

No explanation is given for the subordination of these principles in the proposed scheme, compared to the Intergovernmental Agreement on Competition and Productivity – Enhancing Reforms (Intergovernmental Agreement) from where they are copied. The Final Design Recommendation paper notes that they are lifted from the Agreement, but determines, without explanation, to give them lesser status than they are afforded in that Agreement, and the legislation based on that agreement. Indeed, the demotion of these principles occurs between

the *Options Paper* and the *Final Design Recommendation* without opportunity for stakeholder comment.[9]

APA considers that the subordination of the safe and reliable operation of the pipeline, the legitimate business interests of the service provider, and the interests of persons who have rights to use the pipeline, to considerations of only costs of service provision, places an unacceptable risk on the community, service providers, and existing users that the arbitrator will make isolated and 'stand-alone' decisions without consideration of how these may impact the operation of the pipeline as a whole over the longer term. As an example, this subordination may mean that the arbitrator will not be able to take into account important elements such as the impact of existing 'most favoured nation' clauses on total pipeline operator revenue, and with that the ability of the service provider to earn a commercial rate of return in respect of the pipeline after the specific determination is made.

APA considers that these principles in draft Rule 569(4) must have equal standing to considerations of cost of service, as they do under the National Access Regime. APA can conceive of no reason why this should not be the case under this scheme (under which no coverage or declaration decision is made), and certainly the GMRG gives no reason other than a disproportionate emphasis on costs as the only acceptable rationale for pricing of infrastructure services. This emphasis appears to have been reached in the absence of understanding the incentive arrangements that are critical to infrastructure pricing to ensure that costs of service (in particular funding costs) are competitive.

3.3. Potential term and scope of an arbitrator decision represents an unacceptable risk for the service provider

The potential enterprise value for the pipeline operator of a single arbitration is currently unlimited. As drafted, an arbitration can relate to any amount of capacity over any term of contract. In practice, it can relate to 100 per cent of a pipeline's capacity over a term of 20 or more years, and the outcome will be binding on the pipeline operator. The risk to the pipeline operator of an incorrect or unreasonable arbitral decision in these circumstances is very high.

This risk is compounded by the broad scope of an arbitrator's decision-making power, the limited amount of time that the arbitrator will have to make a decision, as well as the lack of review right of decisions or liability of the arbitrator in circumstances where the arbitrator does make an error.

There is a critical need to limit the potential scope of a poor arbitrator decision by setting a maximum contract term to which a single arbitrated outcome can apply. A maximum term for an arbitrated outcome provides opportunity for a reset where prevailing conditions change, and limits the term of any financial impact of a poor decision.

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[9] As presented in the option that was flagged as the GMRG's 'preliminary view' in the *Options Paper*, these principles were to be "In addition to pricing principles… to guide the arbitrator when making its determination about the price or non-price terms and conditions of access and other disputes." In considering options, the GMRG concluded that "the principles set out in the Intergovernmental Agreement, provides a good starting point for the other principles that an arbitrator could be required to have regard to under the new arbitration mechanism." Upon resolving on a list, the GMRG described their role as "the set of other principles that the arbitrator could be required to have regard to" [pages 135-7].

This suggests that the other pricing principles would be at least as important as 'costs' in reaching a determination.

On reaching the *Final Design Recommendation*, however, these principles are now listed as 'subordinate' principles that 'assist' the arbitrator is reaching a decision [page 75]. The demotion of these principles is complete in the draft Rules, where they are discretionary rules that are subordinate to considerations of cost.

APA considers that a reasonable maximum term for an arbitrated outcome would be five years. This period matches the 'no discretion' term for access arrangement decisions under the National Gas Rules, whereby the regulator cannot decide to extend the term of an access arrangement beyond five years unless the service provider proposes a longer term.[10] This limits the risk of a single regulated outcome, and allows changing conditions in respect of costs and demand to be taken into account in subsequent access arrangement periods.

Where a prospective shipper is seeking a term that exceeds five years, the parties would be free to negotiate and contract for terms that exceed this period. Where a party chooses to go to arbitration, then the arbitrated outcome term would be capped at five years. At the end of that period, the parties may renegotiate terms, and if those negotiations fail, may seek another arbitrated outcome for a further term up to a maximum of five years.

3.4. Directions in pricing principles inconsistent with scope of discretion of the arbitrator

The stated objective of the information disclosure and arbitration scheme is targeted to achieve outcomes that are consistent with those of a workably competitive market "so far as practical".

In respect of the asset base calculation, APA considers that both formulations of the asset base rule embody regulatory-type approaches that are inconsistent with the concept of a workably competitive market. Within the choice given, APA considers the second formulation, that directs the arbitrator to the relevant asset base clause of the National Gas Rules is to be preferred to the first option as it at least provides some 'scaffolding' for an arbitral decision that may decrease the risks for pipeline operators from a price determination.

3.5. Public asset valuation places too much emphasis on single determination and creates unacceptable risk for the service provider

The draft Rules retain confidentiality for the outcomes of access determinations, however with significant exceptions in that the AER is required to publicly disclose any asset value determined, and the method adopted.

APA considers that such disclosure is inappropriate, as it takes no account of the nature of the arbitrated decision (which is limited to the issues in dispute between the parties and is conducted on the papers exchanged in the negotiation), and places considerable importance on each asset base determination (in particular the first), which could relate to a contract of very low value. This is not in the interests of prospective users, who may find a relatively minor dispute sets a public asset base for a major pipeline, leading to a situation where the pipeline operator is forced to lodge an amount of material in defence of an asset base decision that is disproportionate to the value of the dispute to either party.

The *Explanatory Note* to the initial rules makes no reference to the reasons for wanting this disclosure, however the *Final Design Recommendation* makes one reference going to intent by stating:

> *Further, to minimise repeat arbitrations on the same issue, the asset valuation determination should also be made publicly available.*[11]

[10] See National Gas Rules, Rules 50

[11] GMRG 2017, *Gas Pipeline Information Disclosure and Arbitration Framework: Final Design Recommendation*, p 73. The GMRG also references this publication in response to concerns expressed by

This suggests that the GMRG considers that the asset value determined in one arbitration may be relevant to another. That it is, in effect, fixed by the first arbitration, and only 'rolled forward' by subsequent capital expenditure.

APA fundamentally rejects this principle. This would create unacceptable and unmanageable risk for the pipeline operator associated with a single arbitration, which may involve a relatively low contractual value, as that determination may set the future revenue potential of the pipeline in question. The risk of error in that framework is profound.

There is no discussion or recognition of the risks this disclosure presents for the pipeline operator in the GMRG papers, or how the disclosure will impact the conduct of all arbitrations, even those involving low value contracts.

In a regulatory process for setting the initial asset base for a newly regulated pipeline, there is a clear process, with significant checks and balances that normally takes 12-18 months from submission preparation to final regulatory decision, to ensure that the rights of the service provider are heard and appropriately taken into account in making this decision. A key reason for this is the primary importance of the initial capital base value in determining the recovery of the pipeline operator's efficient costs – once set it is not returned to, and it is the core basis of future pricing decisions.

Under the proposed arbitration regime, these checks and balances are not in place. An arbitration determination is related only to the issues under dispute between the parties, and is made under limited timelines – the arbitrator does not have time (or necessarily the skills or materials before it) to consider all options for asset valuation and their implications. Because of this, the risks of error are high for both shippers and pipeline operators.

APA considers that all elements of an arbitrator's decision should remain confidential, including asset valuations. This is in line with accepted terms for commercial arbitration which are necessarily limited to, and specific to, the issues in dispute between the parties.

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the ACCC and AER that pipeline operators will continuously revalue assets. The linkage is not explained. (GMRG 2017, *Final Design Recommendation*, pp 27-28)

4. Scheme disincentivises negotiation and encourages arbitration and gaming, contrary to intent

4.1. The scheme design does not support negotiation and agreement

The design of the draft Rules will remove incentives for negotiation for both parties.

For pipeline operators, the scheme design, with its focus on historic service provision, costs and tariffs, will lead to risk management strategies in respect to service provision. This means a standard set of defined services at fixed price points fully reflective of costs, and no incentives to provide flexible services to shippers, as these will create additional arbitration risks and create additional compliance costs.

The arbitration scheme, with its basis on costs only, will mean that negotiation from fixed prices will only provide downside risk for pipeline operators, as there is no scope for other deals to compensate for discounts provided to other shippers in order to deliver an overall commercial rate of return for a pipeline. While the GMRG papers suggest that the design of the scheme will incentivise pipeline operators to reach a deal to avoid arbitration, it will in fact do the opposite of this, and ensure that no deal is offered that delivers a non-standard service, or that does not include a full allocation of costs for the service. Small retailers and industrial shippers will be particularly disadvantaged when this occurs, as they often seek bespoke arrangements.

For prospective shippers, the scheme incentivises them to rely on arbitration instead of negotiation. This is created by the design of the pricing principles, which removes any risk for the shipper seeking arbitration to end up with a higher tariff than offered, as well as providing significant scope for gaming the arbitration process, by bypassing negotiation phases set out in the rules and removing opportunities for pipeline operators to provide evidence in support of their offers. Because of the commercial imperative on pipeline operators not to discount, a prospective shipper knows they can achieve no better through negotiation than arbitration, so arbitration replaces negotiation as a low cost way to finalise a deal.

The 'negotiation' phase envisaged by this scheme becomes an inconsequential procedural precursor to arbitration.

To reduce the risk of offering discounts in respect of costs for the pipeline operator, two changes are required to the scheme:

- Remove the requirement to publish a prevailing tariff for all pipeline services; and
- Amend the negotiation process to make clear there is scope for a 'no prejudice' negotiation phase where offers or material exchanged do not make up part of the record of a dispute.

These elements are discussed below.

Publication of prevailing prices

APA notes that the prevailing tariff has no relevance to the decision of the arbitrator under the proposed scheme. Further, the GMRG has made clear that it believes that the prevailing tariff will

be affected by monopoly pricing, so is not an appropriate benchmark for prices for other shippers.[12]

The GMRG gives no rationale for the publication of prevailing tariffs that are relevant to the design of the scheme, and certainly no reasons that overcome its earlier concerns over the relevance of this information for prospective shippers. In justifying the disclosure, the GMRG simply note that, as the provision of prevailing tariff information was supported by a majority of pipeline operators and a number of shippers, its view was it was a 'low cost, no-regrets' option.[13] This is not the case.

Publication of prevailing tariffs was proposed by pipeline operators in the context of an alternative arbitration model based on prices paid, not a cost-based model as is now found in the draft Rules. Their publication was a necessary part of the alternative pipeliner scheme – at no stage was it suggested that the publication would be low cost. In fact, deriving average prevailing tariffs from the myriad of bespoke service offerings for each pipeline is complex, and a systems-based approach has proven to be difficult to establish.

Further, the GMRG scheme requires the publication of multiple prevailing tariffs for each pipeline – one for each service with three or more users. For a single APA pipeline, this will require the publication of between 10 and 20 prevailing tariffs relating to different services. This is unlikely to assist shippers to identify relevant services and tariffs, and will instead create significant confusion over the relevance of posted 'standing tariffs' for standard services, and the proliferation of 'prevailing tariffs' (some quite historic), whose pricing basis differs significantly from the standing tariff because of the structure of the arbitration scheme.

APA considers that the requirement for publication of prevailing tariffs, which serves no purpose for the design of the scheme with its basis in costs, should be removed from stage 1 information disclosure. It is not a low cost no-regrets option, it is in fact quite a costly value to produce and verify (as will be required to meet the access information standard and avoid the proposed civil penalty consequences), and its publication creates disincentives to discount because of their impact on the prevailing tariff. At the very least the number of tariffs that require publication should be limited, for example not to require publication of tariffs that are derived from the firm service under the pipeline operator's pricing methodology.

Clear phasing of negotiation to ensure discounts can be offered

Under the draft Rules, the arbitrator must determine a price that is bounded by the offers of the pipeline operator and the prospective user, as per draft rule 569(3). This bounding of the decision, together with the restriction of the arbitrator to consideration of access negotiation information exchanged between the parties, will have the perverse effect of neither party, through their offers, having an incentive to negotiate to reach a deal. This is because if the matter comes to arbitration, an offer made by either party has the potential to determine the final arbitrated price, even where the costs calculation would suggest otherwise. As a result, the scheme removes incentive for commercial negotiation for gas pipeline services as both parties avoid the risk of setting the arbitrated price through their offers.

The parties must be able to exchange information and offers, without prejudice, prior to the formal 'access request' and 'access offer' phases set out in draft Rules 559 and 560, without those offers restricting the range of tariffs an arbitrator may determine.

[12] GMRG 2017, *Final Design Recommendation*, p 49
[13] GMRG 2017, *Final Design Recommendation*, p 45

While it appears that it may have been the intention that the 'preliminary enquiry' phases support this type of exploratory work, its rigidity and unclear relationship to the heavily prescribed access request phase means it delivers little to the conduct of a necessarily iterative negotiation process. There must be a clear separation between the preliminary phase of a negotiation, and that part where information exchanges are 'on the record'.

This can be achieved by the removal of references to 'preliminary enquiries' from the draft Rules, and by making it clear that the record for a possible arbitration begins with the formal access request phase under current draft Rule 559(3). Such a request must also be clearly indicated as an access request to avoid uncertainty as to when (and if) the access request rules are triggered.

Prospective users do not need a rule to request negotiations. Exploratory discussions, initiated by the prospective user, are often the starting point for the negotiating a gas transportation agreement. Prospective users will typically talk to the pipeline operator on multiple occasions while they develop their own proposal before signalling any intention to buy. Commercial negotiations are initially exploratory; they do not proceed through a clearly defined sequence of steps like those set out in draft Rules 559 to 562.

For the information disclosure and arbitration scheme to operate effectively as a backstop where negotiations fail (rather than the current design, which will serve to replace negotiations), there needs to be a clear delineation between the conduct of negotiation, and the triggering of the arbitration process. Indeed, few rules are required to support negotiation, and the parties certainly do not need to be told to negotiate, particularly as the ACCC found that access was not an issue in the sector. Much of the detail in draft Rules 561 and 562 is unnecessary and should be removed from the Rules.

The only codified 'pre-arbitration' steps required would be:

- the ability to request of the other party further information to support an access request or access offer made (which should not be a civil or conduct provision; rather failure to share information or otherwise act in good faith during the negotiation can be considered by the arbitrator under draft Rule 568(4)); and
- a requirement to issue a notice, to be served by one party to the other, that it intends to go to arbitration, with a mandatory waiting period to allow the parties to exchange information that they would rely on in an arbitration.

This provides for the sharing of information within a negotiation in accordance with good faith provisions, as well as providing adequate opportunity to the parties to share information they would seek to rely on in an arbitration before a matter is formally referred to arbitration. Such a reformulation of draft Rule 562 is clearly targeted at addressing real issues of imbalance of bargaining power during pipeline access negotiations.

4.2. Restriction of arbitrator to determinations between the bounds of offers undermines the scheme objectives

Draft Rule 569 appears to require that a determination in relation to price must satisfy two requirements:

1. That the price must reflect the outcomes of a workably competitive market (interpreted as the cost of service) as per draft rule 569(1); and

2. That the arbitrator must determine a price that is bounded by the offers of the pipeline operator and the prospective user, as per draft rule 569(3).

This formulation suggests that the arbitrator's assessment of costs is not independent of the pipeline operator's and shipper's offers – the arbitrator must ensure that its determination on costs fits within these bounds. The effect of this possible interpretation is that a pipeline operator will never offer a discount relative to costs as this can result in a lower asset base calculation, as the arbitrator seeks to force their calculation of costs into the bounds of the offers. As the asset base calculation is intended to be public (though APA argues this should be reconsidered), offering a discount on costs creates a significant risk for service provider, contrary to the intent of the scheme.

APA considers that this possible reading of this Rule may be able to be addressed by placing at the start of both sub-rules 569(1) and (2), the following phrase '*Subject to sub-rule (3),*'.

4.3. Extension of information disclosure scheme to extensions without need or justification

The current drafting of proposed Rules 559 and 560 includes a requirement to respond to an access request, and exchange information in respect of pipeline extensions.

This has the effect of creating an obligation on the pipeline operator to respond to any request for extension of a pipeline with an offer that is capable of acceptance, with the failure to do so being proposed as a civil penalty provision.

The outcome of the inclusion of extensions in these provisions is to effectively force a pipeline operator to make an offer to extend its pipeline in response to any request from the prospective user, and to have to honour that request if accepted. This is clearly an unreasonable extension of the scheme into the provision of services that have been recognised as being offered in a competitive market. APA notes that the National Gas Rules explicitly state that scheme pipeline service providers cannot be forced to extend the geographical range of a pipeline, yet this scheme applying to non-scheme pipelines could effectively force this investment.[14]

There may also be many reasons why a pipeline operator may not want to take the risk to extend its pipeline network, including because of the risk created by this scheme for arbitration in respect of future requests for access. APA further notes that the response to an access request for an extension does not appear to be able to take account of counterparty credit risk, where in some circumstances a pipeline operator may ultimately decline to provide a service.

In addition to the forced extension issue above, APA considers that the scope for gaming this requirement amongst competitors for providing a new extension is high. As currently drafted, a competitor to the service provider in developing a new pipeline could seek detailed cost information from the service provider under the guise of an access seeker. There is no ability for the pipeline operator to decline to provide information to non-*bona fide* access seekers, and failure to do so would be subject to civil penalties. Indeed, there may be circumstances where a competitor could be a *bona fide* access seeker, and may use the process to gather information to inform an alternative bid for an extension. This risk in fact extends to any service that can be provided by a competitor, and is another reason why the scheme should be careful about the risks of its application into areas of otherwise competitive service provision.

[14] See National Gas Rules, Rule 118

It should also be recognised that not all bidders in a competitive process will be subject to these kinds of rules. Where a bidder is not currently a service provider, or is offering a non-pipeline option (such as LNG or diesel power generation solutions), there is an uneven playing field where existing service providers are subject to the risk of predatory information gathering, while others are not.

The information gathering powers can also be used by a proponent conducting a competitive process to undermine that process. Even after a competitive tender to services is complete, a proponent could use the access request process to gain information from a service provider and undermine that competitive process. A proponent could also use this information gathering process to inform their own alternative extension project, where they had no intention to engage external service provision.

As an example of the kind of competitive processes this requirement could undermine, APA periodically participates in tender processes to provide energy to remote mining sites. APA's recent announcement of the 198 km Yamarna Gas Pipeline and associated 45 MW gas powered generation project is an example of one of these processes.[15]

These processes generally involve an open call for proposals to provide a certain amount of MWh in power generation. Competing proponents typically include Pipeline/Gas Powered Generation (GPG) options, trucked LNG/GPG options, diesel generation options and electricity transmission options. There can be multiple pipeline routes involved, linking to pipelines with different owners.[16] The awarding of the tender was a highly competitive process that led to a good outcome for the proponent. The application of stage 2 information exchange to extensions could significantly undermine these types of processes and create an uneven information disclosure environment that means that all parties cannot participate in these competitive processes on the same basis.

It is imperative that the information disclosure regime be removed for extension projects.

The inclusion of extensions in the access request and stage 2 information gathering is poorly conceived and inconsistent with the rationale for the scheme. It demonstrates the lack of sensible, measured and dispassionate consideration of the impact of these rules on the future operation and growth of the gas sector. It represents another example of why this scheme is poorly conceived at its outset, and requires far more careful analysis, thought and review before implementation, as the scope for, and costs of, these types of unintended consequences are significant.

[15] APA Group 2017, ASX Release: *APA to build new gas pipeline and power station in the goldfields region, WA*, 21 Jun. Accessed on 19 July 2017 at https://www.apa.com.au/news/asx-releases/2017/apa-to-build-new-gas-pipeline-and-power-station-in-the-goldfields-region-wa/

[16] For example, the Goldfields Gas Pipeline and the Dampier Bunbury Pipeline compete to provide services to mining sites across Western Australia using their respective pipelines with different proposals to construct laterals to particular sites.

5. Responses to specific questions posed in the Explanatory Note

1. **Are the information disclosure obligations of service providers in Division 2 sufficiently clear and can they be complied with by both transmission and distribution pipelines? If not, what changes could be made to clarify the information disclosure obligations?**

APA notes that many of the obligations are linked to the concept of a pipeline service, which is described in draft Rule 550(2) in a reasonably disaggregated manner. This is likely to lead to a large number of pipeline services being identified for some pipelines, some with very few users. APA makes this observation, noting that the disaggregation of services appears to be intentional; however this disaggregation may be at the risk of the ready interpretation of the data ultimately disclosed in compliance with these requirements.

2. **Given the potential for the capacity of a pipeline to be affected by the assumption made about gas specification, should the draft Rules require the daily capacity and the primary pipeline capacity to be measured using the gas specification set out in AS 4564-2011 (as amended or replaced from time to time)?**

Application of this requirement would lead to meaningless and misleading capacity information.

AS 4564-2011 does not set out a target to be achieved. It sets out maximum values for certain key components and characteristics of the natural gas which can be transported in pipelines. If those maximum values are exceeded, there will be a risk that delivered gas will be unsafe for general purpose use. In particular, the gas will be unsafe for use in domestic appliances, presenting a genuine safety concern.

AS 4564-2011 sets a maximum value for the higher heating value of gas transported of 42.3 MJ/m^3. Higher heating value is an important determinant of pipeline capacity (of the capability of a pipeline to deliver energy).

By way of example, APA has recently calculated the capacity for the scheme pipeline, the Goldfields Gas Pipeline. That capacity was determined for a range of higher heating values between 35.5 MJ/m^3, and 39.0 MJ/m^3. Across this range, the pipeline capacity varies significantly: by some 12 TJ/d.

Gas quality legislation and regulations applying in Western Australia have the effect of imposing a minimum higher heating value of 35.5 MJ/m^3. Gas producers supplying into the Western Australian market supply gas with a higher heating value below 39.0 MJ/m^3.

Pipeline capacity calculations are complex engineering calculations made using computer simulation models. They are not usually made every day, and they are not made unnecessarily. APA has not determined the capacity of the Goldfields Pipeline at a higher heating value of 42.3 MJ/m^3. Gas with that higher heating value is unlikely to become available in the Western Australian market.

Determining the capacity at 42.3 MJ/m^3, would grossly inflate the "measured" capacity of the Goldfields Gas Pipeline. With producers supplying gas with higher heating values less than 39.0 MJ/m^3, APA could never deliver the total capacity "measured" at 42.3 MJ/m^3. Were such a "measurement" to be published, prospective shippers would be misled into believing that a significant amount of additional capacity was available when, in fact, that was not the case.

APA and other pipeline operators post applicable gas specifications for their pipelines on their websites. These specifications reflect the characteristics of the gas that might be delivered into each pipeline, and are used in pipeline capacity calculations. The applicable gas specification would be required under the requirements of the draft Rules to disclose the technical or physical characteristics of the pipeline, or alternatively, to disclose policies that affect access or use of the pipeline. Applying the appropriate (and relevant) gas specification to calculate capacity would be embodied in the requirements of the access information standard under Rule 551 requiring information not to be false or misleading, and to be arrived at on a reasonable basis. Further rules are not required.

3. **The obligation to provide access negotiation information when requested during negotiations is not currently assumed to be classified as either a civil penalty or conduct provision. Do you think there would be any value in classifying the obligation to provide this information as:**

   - a civil penalty provision – if a provision is classified as a civil penalty provision then the AER may issue an infringement notice to the relevant party, or institute civil proceedings in the Federal Court seeking an order that the penalty be paid; and/or

   - a conduct provision – if a provision is classified as a conduct provision then persons other than the AER that suffer loss or damage as a result of the conduct of another person that was done in breach of a conduct provision can seek to recover the amount of the loss or damage by action against that person in court?

   Please note that similar provisions in Part 11 of the NGR (see rule 107), have been classified as both civil penalty and conduct provisions.

These information supply requirements should not be a civil or conduct provision.

This question states that 'similar provisions' in Part 11 are both civil and conduct provisions. This is incorrect.

Access negotiation information relates to information requested by a prospective user in a negotiation. It includes any information that a prospective user may request, including information to support any part of an access offer, and any request, however unreasonable, which it purports to require to support that offer. This information is also subject to a highly subjective information standard. In particular, the scope of access negotiation information is undefined, and there are no protections for a pipeline operator as to the reasonableness and proportionality of requests from prospective users.

As a standard of information disclosure, this bears no resemblance whatsoever to the disclosure requirements under Part 11 of the NGR. The requirements under Part 11, in particular those under Rule 112, relate to a defined set of information related to responding to a request for access with an offer, or to conduct an investigation. Unlike the proposed access negotiation information rules, Rule 112 does not extend to providing underlying calculations or cost information to an information standard, and does not include an open ended right for an access seeker to request any information that it desires. The scope of the obligation under Rule 112 is finite, and defined in the rules – the steps required for compliance are clear and able to be anticipated.

The effect of making the proposed access negotiation information rules civil or conduct provisions would be to provide a prospective user the ability to define the compliance obligations of the pipeline operator, and then prosecute the pipeline operator for non-compliance with that

standard. This is patently unacceptable and, if implemented, shows a complete lack of understanding of appropriate regulatory and legal design.

4. **Do the draft initial rules provide a credible threat of arbitration, whilst still incentivising commercial negotiation as the preferred approach for access to non-scheme pipelines?**

As noted above in the discussion of the combined effect of Rules 569(1) and (3), the scheme as designed provides no incentives for commercial negotiation for either party, and ensures that commercial negotiation will not occur. Rather, these draft Rules will inevitably result in shippers giving only cursory acknowledgement to the commercial negotiation stage before proceeding to arbitration.

5. **Are there any changes to the draft Rules that you consider are necessary to ensure parties are unable to game or circumvent the framework?**

As noted above in section 2.4, the transitional measures, through the deeming of historic offers, can lead to substantial gaming as there is no sunset on those offers provided for under the proposed transitional rule.

Further and also discussed above, the stage 2 information gathering powers in respect of extensions can be used by competitors to undermine otherwise competitive services by gaining access to commercially sensitive cost information related to an extension. These risks also extend to any service that is provided in a competitive market. The scheme should provide for exemptions, as well as scope for the arbitrator to determine that prices have been set through a competitive process, and not to proceed with an arbitration based on costs. These issues are described in section 3.1 and 4.3 of the submission.

6. **Are the exemption categories and criteria sufficiently clear and can they be applied to both transmission and distribution pipelines? If not, what changes could be made to clarify the exemptions?**

   - **One exemption criterion that has been identified as potentially problematic is the nameplate capacity criterion, which the GMRG has been informed may not be appropriate for distribution pipelines. If this is the case, what is an alternative criterion that could be used to achieve the same objective (i.e. to identify small pipelines)?**

APA considers that the same considerations that have led the GMRG to include an exemption for weighted average price information would also apply to demand information for that same service. APA considers that, where a service has less than three users, the pipeline operator should be able to gain an exemption from publishing demand information to protect commercially sensitive shipper information.

Further, an additional exemption criterion should be included under category 1 to permit the AER to exempt a non-scheme pipeline from the operation of Divisions 3 and 4 where the services supplied by the pipeline are supplied in a workably competitive market. See submission section 3.1.

7. **Do you think the pricing principles should provide the arbitrator with:**

   - **More guidance on how to determine the value of the assets used in the provision of services? If so, please explain why you think more prescription is necessary.**

- **Greater discretion on how to determine the value of the assets used in the provision of services, subject to the caveat that the asset valuation techniques are consistent with the workably competitive market objective? If so, please explain why you think greater discretion is required.**

  If you think more guidance on asset valuation is required, do you think the arbitrator should be required to employ the same techniques that would apply to scheme pipelines (as set out in rule 77 of the NGR), or are there are alternative approaches that you think are feasible and appropriate?

APA addresses this question in the discussion in section 3.3 of this submission.

8. **Is there anything in the draft initial rules which may suggest that the expeditious resolution of the access dispute will not occur?**

The draft Rules have been crafted to deliver an expeditious resolution of a dispute, but without any care or concern over accuracy or fairness for the pipeline operator to which it is a binding decision. Given the complexity of issues a commercial arbitrator is required to consider under these draft Rules (the arbitrator is required to perform, in 50 business days, a task that takes the AER, with an existing asset valuation, more than a year to complete), it is also highly likely that the time extension provisions will be applied. APA remains sceptical that even the most competent arbitrator can reach a complying decision within the extended time frames.

9. **Are any other transitional rules required? If so, what are they and why are they required?**

The implementation of the arbitration scheme must be delayed to align with the first information disclosure requirements (1 February 2018) to ensure that pipeline operators are able to prepare for the scheme, and ensure that information provided in response to an access request is consistent with the expectations of the scheme. See section 2.3 of the submission.

Further, the transitional rules require wholesale amendment, with the removal of any early 'deeming' requirements. No case has been made as to the urgency of this scheme such as to suggest such retrospective arrangements are appropriate. As we already observe, they create perverse incentives on pipeline operators not to engage in negotiations as any offer made in a negotiation is likely to prejudice the calculation of a pipeline's costs through the combined operation of Rules 569(1) and (3). See section 2.4 of the submission.

10. **Section 83A(2)(e) of the Amendment Bill contemplates that the rules may provide for ring-fencing requirements, similar to those contained in Chapter 4, Part 2 of the NGL that apply to scheme pipelines. Are similar requirements necessary under the draft initial rules? Why/why not?**

This question is being asked of stakeholders without any context or explanation as to what ring-fencing arrangements are designed to address, or how they may assist the operation of this scheme. Asking this question without context invites uninformed responses likely to lead to the unnecessary extension of regulation designed to deal with specific market circumstances that are not relevant to the current scheme.

There is no argument for ring-fencing requirements to apply in respect of this scheme.

Notwithstanding that the sector is generally not vertically integrated and any pipeline that is vertically integrated is effectively exempt from this scheme, the information disclosure requirements, in particular those relating to financial information, are pipeline by pipeline and will

be governed by a guideline that is likely to be more prescriptive, as well as inconsistent, with any existing regulatory reporting requirements.

11. Should anything in the rules be moved to the NGL in a future review?

This question cannot be answered at this stage of the scheme design and implementation.

6. APA comments on specific provisions

Draft Rules	Issue	Feedback
DIVISION 1	**PRELIMINARY**	
546	Objective	The proposed objective is directed towards access and pricing concerns rather than the original focus of the scheme to support commercial negotiations. APA considers that the scheme should be redirected towards its original aims. See further in section 2.1.
547	Application	No comments
548	Structure of this Part	No comments
549	Definitions	The definition of the application date must be revised to retain the 1 February 2018 start date for information disclosure – see comments in section 2.3. Many definitions used in this part conflict with the use of the same terms in other parts of the National Gas Rules. This creates confusion in the application and interpretation of the rules. APA also notes that some definitions are specific to their use in the Part, and do not reflect their ordinary meaning. As an example, the definition of Pipeline primary capacity is stated as: *firm capacity on a pipeline that is sold by the service provider to a user, giving the user the right to transport an agreed quantity of natural gas on that pipeline for an agreed period* The ordinary meaning of primary capacity is capacity that is available for sale or purchased directly from the pipeliner operator. It is not limited to firm capacity. This specific definition in this section is likely to be problematic after the introduction of the rules in relation to contracted but un-nominated capacity auctions, or a capacity trading platform, which are likely to require a broader definition of primary pipeline capacity.
550	Interpretation	As noted in section 0 response to question 1, Many of the reporting obligations are linked to the concept of a pipeline service, which is described in this draft Rule in a reasonably disaggregated manner. This is likely to lead to a large number of pipeline services being identified for some pipelines, some with very few users. APA makes this observation, noting that the disaggregation of services appears to be intentional; however this disaggregation may be at the expense of the ready interpretation of the data disclosed.

Draft Rules	Issue	Feedback
551	Access information standard	This is a very high information standard that exceeds information standards currently in place under the National Gas Rules. To the extent that it is applied, its application must be limited to information disclosure requirements that can be defined and understood in advance, such that compliance can be monitored and confirmed, with reasonable opportunity for the pipeline operator to develop systems and processes to ensure that data gathering, analysis and publication can be undertaken to this standard. It is inappropriate for this standard to apply to information of a specific or non-recurrent nature, such as in response to information requests from prospective users under draft Rule 562, as the limited timeframes and bespoke nature of those requests will make it impossible to ensure that information is prepared and provided to this standard. In these circumstances, the standard currently set out in draft Rule 562(1)(b), that actions are done in a manner and at a time consistent with the duty of the party to negotiate in good faith, is an appropriate standard.
DIVISION 2	**INFORMATION**	
552	Obligation to publish information	See below in relation to weighted average price information.
553	Service and access information	As noted above in section 0 in response to question 6, APA considers that the same considerations that have led the GMRG to conclude that an exemption for weighted average price information is appropriate would also apply to demand information for that same service. APA considers that, where a service has less than three users, the pipeline operator should be able to gain an exemption from publishing demand information to protect commercially sensitive shipper information. APA also queries the value of a 36 month outlook on available capacity. As drafted, it appears to anticipate a 36 month outlook of capacity including the impact of planned maintenance. This is an unnecessary obligation that is unlikely to provide meaningful information to a prospective shipper. It is unlikely that any contractual arrangements for which a 36 month outlook may be relevant (that is a firm service in excess of 12 months) would be impacted in any way by planned maintenance, which is scheduled to occur in low demand periods so as not to materially impact the actual expected delivery needs of shippers. All other services, which may be impacted by planned maintenance, are likely to be short term or interruptible services which would not require an outlook over this term. The existing 12 month planning outlook published on the bulletin board is sufficient for these purposes. APA considers that the planning outlook should be limited to changes in contractual load and expected expansions without consideration of maintenance. Further consideration is also needed as to the actual

Draft Rules	Issue	Feedback
		value of a 36 month contractual outlook where a shipper seeking a long term contract can (and does) readily ask the pipeline operator for information on available capacity.
554	Standing terms	No comments
555	Financial information	APA expects that the information required to be reported will not be 'auditable' in terms of a normal audit. Any certification by external audit bodies is more likely to take the form of 'special purpose reports'. APA queries whether the specific reference to 'audited' financial reports in this rule is creating an expectation on the possible level of certification of financial disclosure that cannot be satisfied within standard accounting practice. It may be more prudent to leave the level of certification open, and allow the guideline itself to define the appropriate standard related to the nature of the reporting involved. This can include a full audit, where this is appropriate to the information involved. It should also be noted that the scheme does not appear to include any mechanism for recovery of the costs of complying with such a mandatory standard. This is particularly relevant where the level of certification rises, as costs can be expected to increase commensurately.
556	Financial reporting guidelines	APA notes there is very little detail available as to the financial information that will be required to be prepared and published. In particular, APA notes that at no stage has the GMRG committed to consultation on these guidelines, which will be important obligations for pipeline operators to comply with. APA is concerned that it will not be able to comply with guidelines that do not acknowledge and accommodate its group structure. Moreover, there are significant financial inter-relationships within these rules that will need to be acknowledged and accommodated through the financial reporting guidelines. These issues can only be resolved through adequate consultation.
557	Weighted average prices	As discussed in section 4.1 above, APA does not consider that the scheme should require the publication of weighted average prices. The assumption on the *Final Design Recommendation* that this is a low cost no regrets option is incorrect, and in fact this publication, in the scheme of information disclosure and arbitration set out in the draft Rules, has no role, and actually creates a disincentive for pipeline operators to negotiate. If the GMRG resolves to retain this requirement, it should be limited to services that are not 'derivative' services. This is because the pricing of these services are not benchmarked to costs in themselves, but are linked to values for firm services in contracts. The information on prevailing tariffs therefore has little meaning for the pricing of these services. Further, variation across contracts in the firm tariff on which they are based will lead to the posting of tariffs that will be within a broader range (and therefore less accurate) because of their linkage to the underlying firm service tariff.

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		APA also has similar concerns as with the financial reporting guidelines as to the expectation that the weighted average tariff will be able to be 'audited' within the meaning of this word under standard account practice. A certification process is more likely to be possible and appropriate. It may be more prudent to leave the level of certification open, and allow the guideline itself to define the appropriate standard related to the nature of the certification involved.
DIVISION 3	**ACCESS REQUESTS AND NEGOTIATIONS**	
558	User access guide	The user access guide standard, which is a proposed civil penalty provision, is highly subjective, and as a result, pipeline operators could not be certain of compliance. The specific requirement is that the user access guide cannot include something that would 'defeat the objective of this part, or the outcomes described in section 546(2)". These outcomes include to facilitate timely and effective commercial negotiations and an effective and binding commercially orientated arbitration process. It also must not operate or be applied by a service provider in a manner that prevents or delays a prospective user referring an access dispute to arbitration. APA considers that the requirements for compliance must be far clearer, and be limited to ensuring that the guide gives effect to the prescribed negotiation steps and timings as set out in this rule. Any obligation beyond this would amount to an undefinable obligation that creates unacceptable compliance risk for the pipeline operator. Further, the information that a service provider may require from a prospective user in respect of an access request is more restrictive than the disclosure and information requirements imposed upon the service provider. There may be circumstances where a service provider is required to establish more than merely (1) the identity of the prospective user; and (2) the pipeline services to which it relates in considering an access request. For example, the creditworthiness of a prospective user will also be a key consideration that feeds into whether a service is offered. This means that financial information from a prospective shipper will also be needed.
559	Access requests	APA has provided comments in section 4.3 of this submission as to the inappropriateness of the stage 2 information requirements applying to extensions of the pipeline. A limitation of application of this scheme to extensions is required for both Division 3 and Division 4 of the draft Rules. Rule 559(7) allows a prospective user to amend details of an access request. This is appropriate, however in circumstances where a prospective user amends a request, there are no provisions for a restart or revision of the timing to conduct investigations or provide an offer under rule 560. These provisions are needed. A pipeliner operator may not be able to agree to an amendment to an access request, if to do so would

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		mean that it is at risk of a breach of the timelines in draft rule 560. As a result, a pipeline operator may need to proceed to respond to an access request in accordance with draft Rule 560 within set time periods, so as to avoid breach of these rules, even where that response is now not required by the prospective user. Where the GMRG determines that it will proceed with prescribing a negotiation process (a course that it previously did not think necessary, and which it has included within the draft Rules without consultation over the process), there must be scope for the time period for providing an offer, or conducting an investigation, to be extended in circumstances where a prospective user amends its access request.
560	Access Offer	APA considers that provision for preliminary requests should be removed from the rules. The draft Rules should deal with a formal access request and offer process that is on a path to arbitration, while leaving space for 'no prejudice' negotiation to occur between the parties if the parties so choose. This is discussed in section 4.1 of the submission. APA notes that there are no provisions for the timelines listed in draft Rule 560 to be extended by agreement of the parties. This is a simple change that would increase the flexibility of the scheme, without undermining the rights of any prospective shipper for expeditious response to any request. This flexibility may be particularly important where a shipper has complex, changing and or uncertain requirements, and is seeking a more iterative request/offer process. APA further notes that the strict deadlines for completing an investigation effectively remove the ability for a pipeline operator to develop an accurate cost forecast for complex expansion or extension works. An offer prepared in 60 days is likely to have a high degree of uncertainty, and certainly could not reflect the outcome of a competitive tendering process for that work, which most pipeline operators conduct for major works, and which would deliver the best, and most accurate, quote for a prospective user. As a result, the strict timetable for investigations is likely to lead to unnecessarily high quotes for works as they embody consideration of construction risk and do not take account of the specifics of the works, as more accurate estimates are not available in that period. This outcome is not in the interests of a prospective user, particularly where they may have time to allow for more accurate estimates to be developed. This time is not available, however, as the scheme lacks provisions for the parties to agree to these extend time periods, because to do so would put the pipeline operator at risk of breach, as well as having that the missed deadline prejudice arbitration outcomes. As noted above in respect of draft Rule 559 and in section 4.3, this information gathering scheme should not apply to pipeline extensions.
561	Negotiations	APA considers that this rule is unnecessary. The parties do not need a rule to be told to negotiate.

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562	Access negotiation information	APA has raised significant concerns with the proposed negotiation process in section 4.1 above. There are considerable problems with this clause and the risks it creates in respect of gaming of provisions, abuse of information powers, potential creation of obligations that are subject to penalty provisions, and its expansive scale. The current approach perversely incentivises early arbitration, rather than good faith, negotiation. Abuse of expansive information powers and gaming risks: 1. A non-bona fide access seeker uses the information gathering powers through an access request to gather critical business information related to a competitor 2. An access seeker bypasses the negotiation and access negotiation information processes and proceeds to arbitration, such that the pipeline operator does not have opportunity to put all information forward that may be relevant to a dispute 3. An access seeker imposes unreasonable requests in respect of access negotiation information, to which the pipeline operator is obliged to comply Unacceptable risks of non-compliance for the pipeline operator 4. There is no test as to the reasonableness of a request for information, while the explanatory note suggests failure to comply could become a civil penalty and/or conduct provision. In these circumstances, a prospective user is effectively defining the scope of the scheme and required compliance, and then has the power to enforce that scheme 5. The access information standard is subjective, and not appropriate for enforcement by parties other than the scheme regulator APA notes that a prospective user is not required to issue a request under Rule 562(5)(b) before proceeding to an arbitration, this should be a necessary step before arbitration. This is in line with the description of the application of this rule in the explanatory note. APA considers that this rule should be targeted to information sharing that is relevant to the negotiation. Under this approach, the only 'pre-arbitration' steps required would be: • the ability to request of the other party further information to support any access request or access offer made (which should not be a civil or conduct provision, but failure to share information or otherwise act in good faith during the negotiation can be considered by the arbitrator under Rule 568(4)); and • a requirement to issue a notice served by one party to the other that it intends to go to arbitration,

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		with a mandatory waiting period to allow the parties to exchange information that they would rely on in an arbitration. This provides for the sharing of information within a negotiation in accordance with good faith provisions, as well as providing adequate opportunity to the parties to share information they would seek to rely on in an arbitration before a matter is referred to arbitration. This reformulation of Rule 562 is clearly targeted at addressing real issues of imbalance of bargaining power during pipeline access negotiations.
DIVISION 4	**ARBITRATION OF ACCESS DISPUTES**	
563	Application of Division 4	APA considers that pipeline services that are subject to competition should be exempt from the arbitration scheme (Division 4). This can be achieved through a specific exemption category, which APA considers should also include exemption from the requirements of Division 3. APA further considers that the arbitrator should also be able to determine that a specific pipeline service that has been brought to arbitration is provided in a workably competitive market, and to terminate an arbitration at that stage. These matters are discussed in section 4.3 of the submission.
564	Access Dispute Notice	An access dispute notice can currently be filed without a prospective user issuing a notice to the other party to disclose all the things that it would like to rely on (clause 562(5)(b)). This does not give a service provider adequate opportunity to provide information in a negotiation. APA considers that a prospective user should be required to give notice under clause 562(5)(b) before lodging an access dispute notice. This increases the opportunity for the parties to agree to terms on the basis of negotiation, rather than proceeding to arbitration. See section 4.1 of the submission for more detail.
565	Reference to arbitration	APA considers that the parties to the access dispute should have an ability to agree any arbitrator and not be restricted only to the pool which is selected by the AER. This allows the parties to identify and agree to an appropriately qualified arbitrator with skills relevant to the matters in dispute between the parties.
566	Conduct of the parties	No comments
567	Statements to be provided to the arbitrator on appointment	The access negotiation information rules and the pricing principles are focused on setting a price for pipeline services by reference to the pricing principles. There are no requirements for a prospective shipper to present an alternative view of costs – as currently drafted the prospective shipper appears to be able to gather all the pipeline operator's information and present this to the arbitrator without providing an alternative view on how costs should be calculated. Under this scheme the arbitrator acts as the agent of

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		the prospective shipper, much like a regulator does. This is a significant shortcoming of the scheme and means that prospective shippers will not engage in negotiation or develop a meaningful alternate offer. The prospective shipper must be required to develop an alternative view on costs and provide that to the pipeline operator during a negotiation, rather than use the arbitration process to set that alternative for them.
568	Arbitrator to give effect to negotiation principles	APA considers that the implications of failure to provide information in response to a request made by either party under Rule 562 should be limited to the considerations of the arbitrator relevant under 568(4) and implications stated in that rule. This approach provides incentives for the parties to share information in a negotiation, but also protects each party from unreasonable requests (where the arbitrator would determine whether a request was reasonable) and does not create open ended compliance obligations.
569	Pricing and other principles	APA has significant concerns with this provision, as described in detail in sections 3.1 and 3.2 above. In summary, APA considers that: 1. There needs to be two threshold questions for the arbitrator to decide on before proceeding to a price determination: a. that the pipeline service can be provided in safe and reliable manner, and b. whether the services are provided in a workably competitive market. In each of these cases, the arbitrator should not proceed to a price determination. 2. The principles under 569(4) should have the same status for arbitrator consideration as 569(1). 3. In respect of the asset base calculation, the arbitrator is told that they are at large to determine an asset base in any way they see fit, however in one formulation of 569(2)(a), unnecessary direction is also given that appears to be suggesting a particular path to the arbitrator. This is inappropriate. APA prefers the second formulation as it gives the arbitrator discretion, while also providing some 'scaffolding' for the decision. This is discussed in section 3.4.
570	Matters that may be dealt with in the determination	APA considers that the scope of an arbitrator's decision should be limited to a determination not exceeding five years, as discussed in section 3.3 above. This approach limits the risk to the pipeline operator of a single price determination. Further, consideration of only the technical feasibility of a change to the pipeline's operation is a patently inadequate standard for a determination that will force a pipeline operator to comply with the

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		determination at a particular tariff. This creates significant risk that the pipeline operator will be required to undertake a change to a pipeline in a way that is not practically possible or optimal given the configuration of the pipeline, or which creates significant risk for the pipeline operator in completing a project for an expected (arbitrated) price that embodies a cost for those works that are not reasonable. Feasibility is too low a standard for an arbitrator to apply in requiring works to change the capacity or configuration of the pipeline. This is discussed in section 3.1.
571	Interim access determinations	APA is concerned that interim access determinations have the effect of reserving capacity that is subject to arbitration, where this is not the intent of the scheme. Further, an interim determination can be made in a number of circumstances, including in respect of a prospective user that does not have, or never has had, a contractual relationship with the pipeline operator. There does not appear to be any provision under an interim determination where a prospective user is obliged to pay a pipeline operator. While payment appears to be the intent under draft Rule 571, the drafting does not achieve this.
572	Final access determinations	APA considers that the time designated for an access arbitration of 50 business days, extendable to 90 days by agreement of both parties, is manifestly inadequate for the task set for the arbitrator, particularly where the scheme design requires the arbitrator to set themselves in the shoes of a regulator, and determine the merits of a pipeline operator's cost claim.
573	Effect of final access determination	APA considers that the time made available for the access seeker to take up access under a final access determination is unnecessarily long, and creates additional risks for the pipeline operator in respect of other access requests. APA considers that 10 business days is an adequate period within which a prospective user can accept an access determination.
574	Arbitration procedures	This rule requires all statements, documents etc provided to the arbitrator to be 'communicated' to the other party. It is unclear how confidentiality obligations for service providers fit in here – there seems to be little protection.
575	Experts appointed by the arbitrator	The arbitrator has very broad information gathering powers under this provision. The arbitrator can give directions to any party to give the expert any relevant information. This is extremely broad. These powers are in fact broader than those afforded the regulator in an access arrangement process. It is unclear why the arbitrator needs these powers. Similar to a regulatory process, the parties are incentivised to provide the arbitrator with information. The implications of failure to do so (without reasonable excuse) should be limited to the arbitrator's powers under 568(4). This approach would avoid

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		giving extraordinary powers to the arbitrator. APA further notes that the arbitrator can require the parties to provide any information to the expert, however this disclosure is not protected under Rule 576. This exposes the service provider (who is subject to specific confidentiality provisions in the NGL) to breach.
576	Confidentiality	The arbitrator has greater powers to disclose confidential information than the regulator under the NGL, and there are none of the checks and balances that apply under the NGL to ensure disclosure of confidential information is in fact in the long term interests of consumers. No explanation is given as to why the arbitrator needs these broad powers to disclose confidential information. Far more protection is needed for shipper confidential information – as currently drafted a prospective shipper can use the arbitration process to extract information on another shipper's contractual arrangements, using the arbitrator as an agent, without the other shipper's knowledge of the disclosure, or opportunity to stop that disclosure.
577	Conflict of interest	It does not appear appropriate that an arbitrator should decide on a challenge to their impartiality or independence. It would appear that the scheme administrator is better placed to make such a judgement.
578	Termination of arbitration	No comments
579	Correction of errors	No comments
580	Costs	The arbitrator is effectively given powers under the rules to penalise a party for non-compliance with the NGL, Regulations or the Rules through a costs order. This is inappropriate and puts the arbitrator in the role of scheme regulator without any rights of review.
581	Information to be published about access determinations	As discussed in section 3.5 of the submission, APA considers that publication of the asset base value is inconsistent with the principles of an arbitration which is between the parties, and determined on the papers shared between the parties. Publication also creates unacceptable risk for the pipeline operator in respect of a single arbitration, which may relate a very small contract value/service.
DIVISION 5	**SCHEME ADMINISTRATOR**	
582	Role of the scheme	The scheme administrator has a broad power to establish guides under this rule. Unless specifically specified under the Rules (as it is for the financial information guide), APA assumes that any guideline prepared under

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	administrator	this rule would be non-binding.
583	Pool of arbitrators	There is very little guidance as to the qualifications of a commercial arbitrator. APA considers that a suitably qualified arbitrator must have direct commercial experience (not just a regulatory or legal background) to be able to navigate the commercial arrangements relevant to pipeline service provision.
584	Non-scheme pipeline arbitration guide	No comments
DIVISION 6	**EXEMPTIONS**	
585	Exemption categories	The AER appears to have enormous scope as to whether it grants an exemption, even where the conditions of exemption are satisfied. APA is concerned that this provides scope for the intent and coverage of the scheme to be changed by the AER in ways contrary to the intent in the Rules. APA considers that draft Rule 585(1)(c) should be deleted as it provides unnecessary and inappropriate discretion to the AER in respect of granting exemptions to the scheme. APA considers that an additional class of exemption is required for services that are provided in a workably competitive market. This exemption should apply to Divisions 3 and 4 of the rules. This is discussed in section 3.1 of the submission. APA notes that the exemption provisions are complex and hard to follow.
586	Exemption conditions	No comments
587	Revocation	No comments

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588	Making and form of application	It is unclear why there needs to be a rule requiring an application for exemption to lapse if information is not provided within 20 days. This effectively puts a cap on the consultation period that the AER can offer for the provision of further information, regardless of its nature. The AER is able to manage its own processes for granting an exemption, including for an exemption application to lapse, without these rules. This is an unnecessary procedural regulation for a party that conducts these types of processes as a matter of course.
589	Decision on application	No comments
590	Decision to vary or revoke an exemption	No comments
Proposed Transitional Rules		
Item 51, schedule 1	Initial financial reporting	No comments
Item 52, schedule 1	Initial weighted average prices	As discussed in section 4.1 of the submission, APA does not consider that publication of the weighted average tariff for each service is consistent with the scheme design. At the least, this publication obligation needs to be refined to only refer to tariffs that are based on a cost build, not those that are 'derivative' tariffs.
Item 53, schedule 1	Access requests before the commencement date	As discussion in section 2.4 of this submission, this transitional rule is unreasonable and represents retrospective regulation. No case has been made for it, and it should be deleted. Failing removal of this transitional rule altogether, APA considers that it must be more tightly constructed to only refer to 'open' offers made in a form capable of acceptance by the prospective shipper. As currently drafted, it can include any indicative tariff advice provided by a pipeline operator to a prospective user at any time in the past. This is clearly unreasonable.