Comments on the Initial National Gas Rules for the Gas Pipeline Information Disclosure and Arbitration Framework

The Australian Pipelines and Gas Association provides the following comments on the Initial National Gas Rules published by the Gas Market Reform Group on Friday 30 June.

APGA understands that the GMRG is challenged in achieving the new implementation timeframe of 1 August decreed by the CoAG Energy Council on Friday 14 July. The approach of the CoAG Energy Council on this matter should give all energy stakeholders cause for concern, this is not effective policy making.

It is vital that the potential for unintended consequences arising from such a rushed process is addressed in every line of the draft rules. APGA has some issues to raise with the GMRG on drafting and policy matters and understands that pipeline operators will be providing extensive feedback on legal interpretation of the current drafting.

With the surprise truncation of the implementation process, APGA considers the most important matter to address is arbitration during the transition period. The process creates a higher likelihood of unintended consequences. Pipelines taken to arbitration at the beginning of the scheme should not be exposed to more risk than those taken to arbitration once the scheme is established.

Matters of Policy

RULE	ISSUES	PROPOSED RESPONSE
Transitional rules	It is unreasonable to expect that a pipeline service provider will have all the information ready to properly participate in an arbitration on the pricing principles from 1 August 2017. By way of example, companies with multiple assets currently have no guidance on how tax, which Australia law requires to be calculated on a consolidated basis, should be attributed on an asset basis. The above is one of many issues that require clarity. This is of high consequence as the first arbitration on each pipeline will have the additional requirement of forcing the first publication of asset valuation by arbitration. Whilst the asset valuation may be subject to change in the future, the published value will have extra weight.	The transitional rules currently allow for initial publication of some information to be first required on 1 February 2018. This is the same date at which arbitration to the pricing principles should be made available. Access disputes occurring before 1 February 20178 should be referred to some form of interim determination. It could be written as an 'transitional determination' and reconsidered in accordance with the pricing principles after 1 February.

		At a minimum, there should be a right (as opposed for the ability to apply) for a pipeline operator to provide additional information to the arbitrator for arbitrations that occur in the transition period.
569(4) Additional principles	Current drafting makes these additional principles sub-ordinate to costs and allows discretion ('may'). These principles have been included because they are in the CCA 2010 but they are not given the same weight as in the CCA 2010. There is no good reason why the ACCC should be required to give them equal weight to cost based principles but the arbitrator is not required to do so.	569(4) should be drafted such that the additional principles are not sub-ordinate and not subject to the arbitrator's discretion.
569(2)(a) Asset valuation methodology.	Both options are likely to deliver outcomes that reflect regulation rather than the commercial outcomes in workably competitive markets.	The mechanism is now undeniably one of 'quasi-regulation'. There should be a threshold question for the arbitrator before the principles are applied.
569 Threshold question before the pricing principles are applied	The pricing principles have no reference to the level of competition for a service or whether the service is offered in a market. This should be highly relevant for service that are provided in competitive environments eg storage services in Victoria.	Two threshold questions should be included that must be answered before the pricing principles are applied. Given the objective of the regime is to deliver outcomes consistent with a workably competitive market, the first threshold question should be: 'Is the service offered in a workably competitive market?' Is the answer is yes, the pricing principles do not need to be applied.

		There should also be a threshold question relation to the safe and reliable operation of the pipeline. If the arbitrator is not satisfied the service can provided in accordance with the safe and reliable operation of the pipeline, it should not be able to deliver a determination. To leave this to the arbitrator's discretion is unacceptable.
Reservation of capacity subject to arbitration	Law 216N protects existing contractual rights but does not explicitly: • allow a pipeline operator to sell the capacity/service subject to arbitration; or • require a pipeline operator to reserve the capacity/service subject to arbitration. The explanatory memorandum states the pipeline operate can sell the capacity/service subject to arbitration, but this does not prevent the arbitrator from issuing a binding determination on the same capacity. This effectively requires the pipeline operator to reserve the capacity/service. If a third party is willing to pay more than the counter-party to arbitration capacity, the pipeline operator should be able to sell it.	The arbitrator should not be able to issue a determination over capacity if it has been sold before the determination has been made.

Matters of drafting

Draft Rules	Issue	Feedback
DIVISION 1	PRELIMINARY	
546	Objective	
547	Application	
548	Structure of this Part	
549	Definitions	
550	Interpretation	
551	Access information standard	
DIVISION 2	INFORMATION	
552	Obligation to publish information	With the commencement date brought forward to 1 August 2017, the initial publishing of information under 552(2) would now be 1 January 2017. There are well established reasons for not mandating legislation obligations commence on 1 January. These include: • Cost. IT and other service providers are less available on this date. • Key personnel are also less available. • In this case, it is unlikely any access seekers will be wondering about pipeline access on 1 January. It is appropriate that the information obligations still commence on 1 February 2018.
553	Service and access information	553 (5)(a) requires 36 months forward publishing of available pipeline capacity. 553 (5)(b) requires 36 months forward publishing of maintenance impacts on pipeline capacity. Such forward planning is not standard industry practice. 36 month forward publishing of this information was investigated by the AEMC in 2015. APGA appreciates that the intent of the framework is different to that of the AEMC's investigation in 2015. The fact remains that forward

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		maintenance planning does not occur to this extent and any information published would be so uncertain and subject to change that it is difficult to see any value to the market from its publication.
554	Standing terms	
555	Financial information	
556	Financial reporting guidelines	
557	Weighted average prices	
DIVISION 3	ACCESS REQUESTS AND NEGOTIATIONS	
558	User access guide	
559	Access requests	559(6)(c) allows the service provider and access seeker to negotiate about terms and conditions for further investigations. 560(1)(b) requires that access offers requiring further investigation be made within 60 business days. Parties should be able to agree to terms beyond 60 days: • FEED studies typically take longer than this. • When investigating an expansion or other investment, pipeline service providers will typically seek out other interested parties, through direct engagement and/or open season. Economies of scale for infrastructure projects tend to mean the large the project the cheaper the unit cost of capacity. Potential additional parties need time to consider these unanticipated approaches. 559(7) allows a prospective user to amend the details of access sought. Such an amendment should be accompanied by an ability to either extend the time allowed for the access offer or restart the clock.
560	Access Offer	See above. 560(2)(c) extends the obligations of access offers to enquiries about extensions. As extensions are offered in a competitive environment, this is not appropriate. Further, it is subject to gaming, as rival pipeline projects and potential users of them could use the mechanism to gain access to information on costs and tariffs not otherwise available.

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561	Negotiations	Section 216G on the NGL requires parties to negotiate in good faith. 561 only sets out that a prospective user *may* negotiate. This creates the circumstance where disputes may be referred to arbitration without any negotiation having occurred. This should be corrected. It is insufficient that the arbitrator may have a negative view that negotiation has not occurred. A party should not be subject to arbitration at all if no negotiation has occurred. This may be best dealt with in Rule 564(2) with the addition of a requirement that the access dispute notification set out that a statement by the initiator that negotiation under Rule 561 has occurred.
562	Access negotiation information	562(5)(b) sets out that parties may request information that will be required in arbitration. It does not require that this step occurs. This creates the circumstance where a party that is negotiating in good faith and avoiding providing a burdensome level of information is subject to an access dispute notification without having the opportunity to provide all the information it will rely on during arbitration. This should be corrected. If the request set out in 562(5)(b) is not made, the party that did not receive the request should have the right, as opposed to opportunity. This right may be best implemented in Rule 568.
DIVISION 4	ARBITRATION OF ACCESS DISPUTES	
563	Application of Division 4	
564	Access Dispute Notice	
565	Reference to arbitration	
566	Conduct of the parties	
567	Statements to be provided to the arbitrator on appointment	
568	Arbitrator to give effect to negotiation principles	
569	Pricing and other principles	569(1) refers back to the objective, which requires the arbitrator deliver an outcome consistent with that arising from a workably competitive market. The arbitrator should be able to determine that a service has been offered in a workably competitive market and make no further determination. For example, gas storage services in Victoria are

Draft Rules	Issue	Feedback
		available from multiple pipeline and non-pipeline providers. It is not appropriate that the arbitrator deliver determinations on pipelines for such a service. 569(3) should be reworded to make explicitly clear that the requirement for the arbitrator to deliver a price within the bounds of the final offers of negotiation is to be undertaken after the requirement of 569(2) to determine a cost-reflective price has occurred. The current wording may leave some arbitrators with the view they are to achieve the requirements of (2) and (3) simultaneously, ie deliver a price that is both cost reflective and fits the bounds. No good reason has been provided as to why the additional principles set out in 569(4) are at the discretion of the arbitrator and sub-ordinate to the first three principles. This is inconsistent with the CCA 2010. The pricing principles place no onus on the access seeker to prepare an alternate case for consideration by the arbitrator. As read, the arbitrator must determine a price that is cost reflective, with a commercial rate of return, regardless of whether the access seeker has made an appropriate counter-offer. This is not consistent with commercial arbitration, which requires the arbitrator to consider the merits of each party's position. As written, there is no incentive for the access seeker to prepare an alternate case or negotiate meaningfully, as an access seeker can be confident the arbitrator must assess the service providers case in accordance with the pricing principles.
570	Matters that may be dealt with in the determination	570(5)(b) should make clear that 'funds in its entirety' means 'pay in full up front'. Service providers should not be exposed to the credit risk of a long-term repayment through contract by an arbitrator's access determination. APGA appreciate that the wording for this rule is consistent with Rule 118(2)(a) for scheme pipelines. However, for scheme pipelines, Rule 118(2)(a) would be read in conjunction with Rule 104(3) and Rule 118(2)(b) which make clear a pipeline service provider cannot be forced to provide funds it does not agree to. These additional rules would not be read by an arbitrator applying 570(5)(b), which may lead to a circumstance that mandates a pipeline provide funds for a project and recover them through tariff.
571	Interim access determinations	It is not clear to APGA that 571 provides sufficient assurance that a service provider will be paid for providing a service under an interim determination as there does not appear to be a contract associated with the interim determination.
572	Final access determinations	
573	Effect of final access determination	
574	Arbitration procedures	

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575	Experts appointed by the arbitrator	
576	Confidentiality	
577	Conflict of interest	
578	Termination of arbitration	
579	Correction of errors	
580	Costs	
581	Information to be published about access determinations	
DIVISION 5	SCHEME ADMINISTRATOR	
582	Role of the scheme administrator	
583	Pool of arbitrators	
584	Non-scheme pipeline arbitration guide	
DIVISION 6	EXEMPTIONS	
585	Exemption categories	It is not clear why the word 'may' is used in 585(1) rather than 'must'.
586	Exemption conditions	
587	Revocation	