Jemena Limited

Information disclosure and arbitration framework [a]

Consultation on initial National Gas Rules

Submission

Public

20 July 2017

An appropriate citation for this paper is:

Information disclosure and arbitration framework

Contact Person

Jan Peric
General Manager Pipleine Markets
Ph: 03 9173-7000
jan.peric@jemena.com.au

Jemena Limited

ABN 95 052 167 405
Level 16, 567 Collins Street
Melbourne VIC 3000

Postal Address

PO Box 16182
Melbourne VIC 3000
Ph: (03) 9713 7000
Fax: (03) 9173 7516

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OVERVIEW

Jemena owns and operates a diverse $9 billion portfolio of energy and water transportation assets across the east coast of Australia. Jemena is committed to proactively implementing the key pipeline recommendations from the Gas Market Reform Package, supportive of the establishment of a liquid gas market on the east coast of Australia and actively seeking to contribute to achieving the National Gas Objective.

Jemena welcomes the opportunity to comment on the draft version of the Initial National Gas Rules ('**draft Rules**') for the Gas Pipeline Information Disclosure and Arbitration Framework. In addition to this submission, Jemena has contributed to and supports the Australian Pipeline and Gas Association's submission on this matter.

Throughout the reform process, Jemena has engaged with the Gas Market Reform Group (**GMRG**) via formal submissions, membership of working groups and through its Managing Director's representation on the Advisory Panel to provide feedback and advice on the proposed gas market reforms. Despite this, it is not readily apparent that any of the pipeline sectors feedback and concerns have been duly considered, and Jemena is concerned with a number of aspects of the proposed framework and the draft Rules. Specifically, we:

- are concerned with the lack of due process in the design and implementation of the framework, and the limited evidence to show that the GMRG has appropriately considered the reasonable concerns raised by pipeline operators;
- are firmly of the view that the proposed framework will not meet its stated objectives, and will give rise to numerous unintended consequences;
- consider the transition timetable and the timetable for the development of the financial reporting guidelines are inadequate and must be extended; and
- are concerned that the Rules are overly prescriptive, do not provide for flexibility in negotiations, and drive shippers towards seeking arbitration over negotiated outcomes.

Our submission includes:

- a discussion of the above key issues (**Overview**), which must be addressed before the framework is finalised;
- responses to the issues for stakeholder consideration identified in the GMRG *Explanatory note for stakeholder consultation*[1] ('**Explanatory note'**) (in **Section 1**); and
- comments on specific draft Rules, in the template provided by the GMRG (in **Section 2**).

Jemena is extremely concerned with the lack of due process in the design and implementation of the new Information Disclosure and Arbitration Framework

Jemena is concerned about the haste in which the framework has been developed and the detrimental gas market outcomes and unintended consequences that will likely emerge. The consultation by the GMRG on the design and implementation of the framework has been inadequate for such an important package of work. Due process has not been followed, which has meant that the impacts on the pipeline sector and the broader gas market have not been appropriately addressed. Jemena has previously raised its concerns with the tightly constrained timetable for developing and implementing an information disclosure and arbitration framework.[2] This is evidenced by:

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1 GMRG, *Gas Pipeline Information Disclosure and Arbitration Framework, Initial National Gas Rules, Explanatory note for stakeholder consultation*, June 2017

2 Jemena submission to GMRG on the Implementation Options paper, 13 April 2017

- The haste in which the National Gas Law Amendment (**NGL Amendment**) was developed and rushed through South Australian Parliament. Interested stakeholders were provided with only nine days to make a submission in response to the NGL Amendment, which was finalised within days of stakeholders providing their feedback.
- The timetable for the GMRG to design, consult on, and implement the framework – with final Rules due to be initially published by 1 September 17. This has since been accelerated by the Council of Australian Governments (the **COAG**) Energy Council to 1 August 2017. In a similar vein, the initial draft Rules contain a number of requirements which the GMRG has not previously consulted on (e.g. the options considered under Rule 569 on the asset valuation).
- No Regulatory Impact Statement has been prepared (which is consistent with best practice policy-making) to consider the impacts of this change on the pipelines sector and the broader gas market.
- A lack of meaningful engagement from the GMRG with the Advisory Panel of senior industry executives.

This hastened consultation appears to have contributed to delivering a framework that does not stimulate a workably competitive market design, as envisaged by Dr Michael Vertigan in his *Examination of the Current Test for the Regulation of Gas Pipelines* (the Vertigan Report). As it presently stands, the framework is not only a significant deviation from the commercially minded approach envisaged by the Vertigan Report, it is likely to operate to the detriment of achieving these objectives.

The framework will not achieve the desired objectives and will result in significant unintended consequences

A fundamental problem with the draft Rules is that the proposed arbitration framework struggles for substantive distinction from price setting arrangements already available under the existing Rules (i.e for covered pipelines), other than through the adoption of short-cut processes and principles that are ill-conceived. Through its decision to adopt pipeline costs as its fundamental reference point, the GMRG has opened the 'can of worms' that comes with the proper determination of costs for services provided by long-lived assets, especially when those assets also provide services to other users. The consequence is that the proposed rule framework will almost certainly will not achieve the objectives set for it while also risking significant unintended consequences.

Jemena accepts that the objective that the arbitration framework should facilitate terms and conditions of access to non-scheme pipelines that, as far as practical, reflect the outcomes of a workably competitive market. However, the associated requirement (Rule 569) that prices must reflect the cost of providing the relevant service and that asset values should take into account past recoveries of capital, do not sit comfortably with this objective.

Although it may be economically correct to observe that, in a workably competitive market, suppliers can generally expect their costs (including capital-related costs) to be recovered over the long run, this principle certainly does not hold true at any or every point in time. By requiring an arbitrator to attempt to reconcile the workably competitive market objective with a cost-based pricing constraint, the proposed framework establishes a 'worst of both worlds' framework, being that involving:

- on one hand, cost-based price determinations that should reduce risks for both shippers and pipeline owners, but is unable to achieve that because it is applied in only partial terms; but
- on the other hand, an overarching objective that should allow prices and pipeline investment to adjust to changing market conditions, but is prevented from doing so by the constraints imposed by any time application of cost-based pricing.

The existence of this fundamental tension is most clearly evident under a scenario where market conditions are characterised by excess pipeline capacity – as is presently the case for several east coast gas pipelines.

In this scenario, a shipper operating in a workably competitive market would expect to receive a discount to the long run average cost of providing the services, as pipelines seek to win business in an over-supplied market.

The resulting stimulation of demand from such reduced pipeline tariffs assists in making best use of an underutilised asset, while also signalling that no further investment is required.

By contrast, under the application of the cost-based pricing principles, the existence of under-utilised pipeline capacity is likely to give rise to higher prices than those that would prevail in a workably competitive market. The latter reflects the well-recognised property of cost-based, regulatory pricing models that, in effect, cause market demand risks to be borne by, or at least shared with, customers.

The vice versa applies when a pipeline is fully utilised: a workably competitive market benchmark in that circumstance would suggest pipeline charges higher than the long run average cost of pipeline services, with the need for new investment signalled accordingly. However, when cost-based pricing principles are applied, the charges for pipelines on which almost all capacity is utilised will be less than implied by a workably competitive market outcome.

The draft Rules are silent as to how, in resolving a price dispute under conditions of pipeline under-utilisation (or as applicable, maximum-utilisation), an arbitrator would resolve the conflicting positions of:

- a shipper (or, a non-scheme pipeline service provider) contending that the only outcome consistent with a workably competitive market is a reduction (or, an increase) in price; and
- a non-scheme pipeline service provider (or, a shipper) contending that cost based pricing principles require that shippers bear (or, benefit from) the risk of demand that sits below (or, above) full capacity, contrary to the lower (or, higher), workably competitive market prices that may otherwise arise.

The draft Rules provide the arbitrator with no guidance as to how this inherent conflict should be managed. The result is that the proposed framework will generate a high degree of uncertainty for both shippers and pipeline operators, since it will be unclear as to the extent to which any arbitrator may place greater weight on the broad objective of a workably competitive market or the specific pricing principles that contradict the broad objective. Such an arbitration framework is highly unlikely to achieve the outcomes that the GMRG maintains it is seeking.

Reinforcing the uncertainties created by the proposed framework, an arbitration in relation to a relatively minor pipeline service may also have the capacity to establish, for an indefinite period, the asset value for pricing purposes of an entire non-scheme pipeline. For example, an arbitration in relation to the price of a 'park-and-loan' service contract could conceivably require the arbitrator to set the asset value for one or more entire pipeline assets used in providing that service. Such an arbitration would then establish the effective starting point for the pricing of all services offered by that pipeline. This outcome is in stark contrast to both:

- the arrangements for covered pipelines, where pipeline asset values are linked only to reference services; and
- the arrangements that apply in workably competitive markets, where the cost of assets which substantive role is to provide very different services plays no part in price outcomes.

Jemena is of the view that such outcomes cannot reasonably accord with the objectives of the framework contemplated by the GMRG.

These problems are a direct consequence of the rushed nature of the GMRG process, and of seeking to jam the 'square peg' of cost-based pricing into the 'round hole' of a workably competitive market paradigm.

Reinforcing this inconsistency, Jemena notes that none of the four authorities cited by the GMRG for explanation and/or definition of a workably competitive market involve the same degree of emphasis as to the relationship between costs and prices that the GMRG itself portrays in 'Final Design Recommendation' report.[3] The GMRG's

[3] GMRG, *Gas Pipeline Information disclosure and Arbitration Framework Final Design Recommendation*, June 2017, page 20

interpretation of workable competition involves a much more precise reference to the relationship between costs than has been contemplated by others deploying the workably competitive market concept.

Although the concept of workable competition is a worthy objective for a commercial arbitration regime, the explicit and detailed references to costs proposed by the GMRG act severely to compromise this objective.

The transition timetable and the timetable for the development of the financial reporting guidelines is grossly insufficient and must be extended

The timetable imposed by the GMRG for the transition is inadequate and does not consider the work that will be required for pipeline operators to comply with these new Rule requirements. This is exacerbated by the availability of the arbitration mechanism from the commencement date.

The GMRG states that '*while the pipeline operator may not be in a position to provide information in the manner specified in the financial guideline, it should still be in a position to provide the arbitrator with the information it requires to apply the pricing principles'*[4] This statement is factually incorrect. The information that the pipeline operators will need to have available for the arbitrator to apply the pricing principles includes data and evidence to support the asset valuations for each pipeline, cost broken down by service (as defined in Rule 550), and the rate of return. It is unreasonable to expect that pipeline operators have this information at hand. Jemena will have to implement a significant program of work to develop and gather the information that is required to determine the cost of providing individual services (as required by Rule 569 *Pricing and other principles*). For example, we do not currently capture financial information in a manner which permits us to report costs by pipeline, let alone by service type. Financial information is captured by legal entity, rather than by pipeline, in accordance with accounting standards and the Corporations Act (2001). These obligations do not require pipeline operators to capture the costs of providing individual services.

Furthermore, Jemena will have to undertake full asset valuations for each of its pipelines in accordance with the Rule requirements. It is not clear how this can be done, given that:

- the technique that will apply will not be confirmed until the Rules are finalised (as two options have been presented for Rule 569); and
- the financial guideline, which provides detail of the information on the methods, principles and inputs used to calculate asset valuations, depreciation and the allocation of costs to pipelines and to services, will not be published until December 17.

The current timetable for implementing the arbitration framework will effectively force pipeline operators to second guess the final version of the Rules, and the requirements of the financial guidelines, in order to develop the information required to apply the pricing principles. Given the likelihood for the first arbitration to set a precedent for any further arbitrations (as evidenced by the requirement to publish the determined asset valuation), this will be a significant undertaking for pipeline operators. Pipeline operators will then be required to undertake a second round of work once the guidelines are finalised, to ensure compliance with the guidelines. This is clearly inefficient, and we question the benefit of such an approach.

Given that this new framework provides pipeline operators with no means of challenging the determinations made by arbitrators, it is essential that sufficient time is provided to enable pipeline operators to appropriately prepare for the new framework. Fast-tracking the implementation of the arbitration framework is unreasonable, and inconsistent with the typical timeframe in which legislative change is rolled out .

Additionally, we do not support the GMRG's constrained timetable for development of the financial reporting guidelines. Unnecessarily expediting the development of the guidelines increases the risk that reporting

[4] GMRG, *Gas Pipeline Information Disclosure and Arbitration Framework, Initial National Gas Rules, Explanatory note for stakeholder consultation*, June 2017, page 35, footnote 27

requirements will be poorly drafted, and unfit for purpose. The current timetable for the development of the guideline will see a draft guideline published in November, with a final guideline published in December. As with the current consultation process on the draft Rules, we are sceptical of what feedback the GMRG can reasonably take on board given the significantly constrained timetable.

Negative impact on broader gas market outcomes

The current GMRG work also appears to be occurring with little regard to broader gas market issues, including broader initiatives to address the current gas supply shortfall. There has been extra focus from the Commonwealth Government to ensure adequate gas supply, including:

- meetings with representatives from the gas industry to secure gas supply for the east coast of Australia to meet peak demand periods in the National Electricity Market; and
- work with States and Territories to remove blanket onshore gas moratoria via GST distribution reforms.

Developing new gas supplies is the most critical piece to resolving the current east coast gas crisis but this will also require new investment to deliver this gas to where it is needed most at the moment. Efficient investment in Australia's gas market relies on a stable and predictable regulatory framework. In 2015, Jemena committed to developing the $800 million Northern Gas Pipeline. However, such is the significance of the *additional* risk associated with the framework, that Jemena would not have been able to commit to this major development under this regime.

As such, Jemena does not support the GMRG's recommended position on the grounds that not only does this not meet the Vertigan Report's recommendations and there is no evidence to support that the framework will work in practice, it fails to account for broader gas market implications which are crucial to alleviating the current gas supply shortfall.

The proposed framework is essentially a regulated outcome

It is intended for the framework to apply to non-scheme pipelines; pipelines that do not satisfy the coverage criteria. The Vertigan Report recommended that the framework adopt a commercial approach. This is a fundamental and critical feature of the Vertigan Report, which intends that there be minimal legislative intervention for these unregulated assets.

While the GMRG acknowledges this important element, its final recommendation includes features that either resemble or directly refer to the NGL for the regulation of access to covered pipelines and has the potential to undermine the whole concept of distinguishing between scheme and non-scheme pipelines. This has resulted in an arbitration model and pricing principles (which are based on a cost of service approach rather than prevailing market prices) that are regulatory in substance.

As it presently stands, the framework is not only a significant deviation from the commercially minded approach envisaged by the Vertigan Report, it is likely to operate to the detriment of achieving these objectives.

The Rules must provide for flexibility in negotiations and must not be overly prescriptive

As currently drafted, the Rules include an unwarranted level of prescription in relation to how pipeline operators must undertake commercial negotiations. The timeline for commercial negotiations needs to be flexible, to accommodate commercial and operational issues which may arise throughout the course of negotiations. The expectation that an access offer can be made in all circumstances within a maximum of 60 days of receiving an access request is unrealistic. Negotiations may be impacted by the need to engage third parties to provide works and negotiation with upstream or downstream parties upon which the expansion is dependent. Recent expansion by Jemena on the QGP and EGP were subject to negotiations over several years. This was due to the complexity of the works required and market circumstances.

It is in a service provider's best interests to contract available pipeline capacity—the threat of arbitration in itself is enough to incentivise pipeline operators to ensure negotiations are conducted as efficiently and timely as possible. There is no need to specify the time in which negotiations must take place. At the very least the Rules must be updated to allow the timetable for negotiations to be extended subject to agreement between the parties.

It is not appropriate to apply civil penalty provisions (eg Rule 560) given the existing incentives on service providers to negotiate and the factors which can delay such negotiations.

Materiality and threshold limits should apply on whether something should go to arbitration

Given the time and cost involved in the applying the arbitration mechanism, the Rules should include a threshold test, below which the arbitration mechanism should not be available. For example it should only apply to a service that extends beyond one year or is of a certain contract value (based on the pipeline operators offer), for example $100k per annum. Not applying a materiality threshold to go to arbitration is inefficient. Similarly, a threshold test should be applied to matters going to arbitration, such that if it can be demonstrated that competition for the service exists, the arbitration should not proceed.

1. RESPONSE TO GMRG CONSULTATION QUESTIONS

Question 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?

Due to the extremely limited time to review and respond to the draft Rules, it has not been possible to undertake a detailed review of the obligations to confirm that they are clear and can be complied with in the time stipulated in Rule 552(2). More time should be provided to pipeline operators to undertake this exercise, particularly given that the GMRG is recommending that civil penalties apply to Division 2 obligations.

One obvious area requiring further clarification is the definition of *pipeline*. The draft Rules do not specify what constitutes a *pipeline* for the purposes of reporting obligations under Division 2. The definition of pipeline in the NGL is too general to be helpful in interpreting how to classify pipelines for the purposes of financial reporting. Unless clearly defined, it is likely that *pipeline* will be interpreted differently by different pipeline operators with the consequence that information is not comparable and operators may inadvertently contravene the obligations. The rules, rather than the guidelines, are the most appropriate place for this clarification to be provided. For example, a pipeline is not necessarily owned by a single corporate entity or linked to a single licence - some pipelines have many licences.

Given addition time, it is very likely that service providers would identify further issues requiring clarification.

Question 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)?

It is not appropriate for the Rules to specify how the daily capacity and the primary pipeline capacity should be measured, whether by reference to AS4564-2011, or any other standard. It should be left to the pipeline operator to determine the capacity of the pipeline, in line with the standards and specifications applicable to that pipeline. It is not in the interests of pipeline operators to misstate the capacity of their pipelines, and it is unclear why the GMRG considers it necessary to impose this requirement. Importantly, if AS 4565-2011 is enforced, it would result in less accurate determinations of pipeline capacity.

Question 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

Jemena does not consider that negotiation information provisions should be subject to civil penalties. If the party does not supply the information, it is likely that arbitration proceedings will follow and the question of whether the other party was disadvantaged will be considered as part of those proceedings. Note also that a party may have legitimate objections to providing irrelevant information requested or information privileged from disclosure as a matter of law.

The obligation to provide access negotiation information should not be classified as either a civil penalty provision or a conduct provision. This is appropriate given the unregulated nature of non-scheme pipelines and the ability to otherwise enforce statutory obligations.

As statutory obligations the access negotiation information provisions would be susceptible to enforcement action by the AER. Thus the AER may bring action under section 231 of the NGL to enforce compliance and on declaration of a breach can seek obtain injunctive relief to cease any activity or take remedial steps to remedy the breach. The AER may also accept enforceable undertakings to underpin administrative settlements in respect of any such breach. What would not be included is third party actions for loss or damage or the ability of the AER to seek a civil penalty from the Federal Court.

In our view this structure is both a sufficient and appropriate mechanism for ensuring compliance with the new information obligations, particularly in circumstances where this new regime applies to non-scheme pipelines that (ostensibly) are not regulated. A penalty regime or one which prescribes for third party damages claims are heavy-handed enforcement mechanisms that are is not necessary to ensure compliance with the statutory information requirements.

Question 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?

The GMRG's proposed framework will not incentivise commercial negotiation as the preferred approach for access to non-scheme pipelines. As currently proposed, the Rules create no incentive for shippers to seek a commercially negotiated outcome. The framework's design leads to an arbitrated outcome which determines price based only on the costs of the service provider (with no consideration of the value of the transaction to the shipper). This creates a perverse incentive for shippers to trigger the arbitration process:

- under Rule 569(3), the arbitrator must determine a price which is no higher than the last offer by the pipeline operator and no lower than the price that the shipper has offered to pay, meaning that there is no incentive for a shipper to offer a reasonable price for the service prior to the arbitration.
- at worst, shippers will have an access determination on terms they are unhappy with and on which they choose not to ship (as they are not bound to seek access);
- shippers would retain the ability to return to the pipeline operator and negotiate a variation of the access determination on terms that are commercially acceptable to both parties;[5]
- shippers may also seek access under the Rules after a 12 month period and commence a new negotiation to arbitration process, seeking a different result;
- the short arbitration timeframe (50 days, subject to any extensions in time permitted under Rule 572(2)) generates minimal risk for shippers who trigger arbitration, as there are often long lead times from commencing negotiations to the required commencement date for the service (so the shipper is not time constrained) and the costs of the arbitration will be immaterial in the context of the value of the agreement in dispute;

[5] Section 216R

- the shipper will not even be required to fully cover those costs (there is no requirement that a shipper which terminates or does not proceed to sign up for the access following an access determination has to pay all costs of the arbitration (i.e. including those incurred by the service provider);[6]
- meanwhile, pipeline operators will incur legal fees and arbitration costs unless they are willing to agree to terms of access proposed by shippers, regardless of how unfavourable these terms are;[7]
- furthermore, there is nothing preventing a shipper on routes with multiple pipelines from running parallel negotiations and potentially arbitrations with different pipeline operators;
- this is untimely, ineffective and shifts the imbalance of bargaining power heavily in favour of shippers having the potential to adversely distort the commercial environment in which pipeline services are being supplied.

Such an outcome clearly undermines the intention of the new regime, with arbitration likely to become the norm rather than merely a credible threat to incentivise commercial negotiations. In a commercial environment, both parties should be susceptible to the risk of an adverse outcome, before triggering arbitration.

Question 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?

The question assumes that all 'circumvention' of the framework is undesirable. If both parties, being commercial entities regularly engaged in the gas transportation industry wish to negotiate outside of the prescribed timeframes and process as this will result in a better commercial outcome for them, they must remain free to do so.

The introduction of the framework introduces the risk of it being 'gamed'. Jemena considers that the fact that arbitral determinations only bind one party is inherently unfair and an encouragement to shippers and prospective users to game the system. A shipper may use the process to extract confidential information and a best offer from a service provider; seek arbitration with the aim of minimising tariffs further and then walk away from an outcome it does not like with very little inconvenience. As a minimum, Jemena considers that the costs of the arbitration should automatically be borne by a prospective user which either terminates an arbitration prior to determination (save where the parties have agreed terms) or chooses not to proceed with a determination.

In relation to draft Rule 573(5), which attempts to deal with a shipper who seeks arbitration and does not give effect to the determination, only to then start a new access dispute, Jemena considers that the shipper should be prohibited from seeking further arbitration for substantially the same service on that pipeline for a period of at least five years. This would dis-incentivise gaming of the process by shippers, and is appropriate given the burden attached to arbitration and the relevant time horizon for access decisions/investments. Access to services is often sought well ahead of 12 months prior to actual access being required. The proposed 12 month time period in draft Rule 573(5) is insufficient, and will not stop gaming of the framework.

Jemena disagrees with GMRG's interpretation of NGL s216N that the NGL protects capacity contracts with other users only if they are in force before the access dispute notice is given. Such an interpretation is inconsistent with the stated aim of replicating a workably competitive market and in itself promotes gaming as:

- A service provider's ability to sell the same capacity to other prospective users is tied up;
- This places undue pressure on a service provider to agree to an agreement which is in dispute even where more commercially optimal offers may be available; and

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6 NGL Amendment, Cl216V(4).

7 GMRG, *Gas Pipeline Information Disclosure and Arbitration Framework Implementation Options Paper,* March 2017, Section 4.4.1.7, page 73.

- A prospective user is not bound to contract for the capacity if it receives a determination which it does not like.

Question 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)?

As previously submitted by Jemena, the exemption categories and criteria are much too narrow, and should be expanded to include:

- **Pipelines constructed following a competitive process, such as the Northern Gas Pipeline (NGP)** - Development of the NGP is currently underway, and is due for completion in 2018. Tariffs for the pipeline have been set in accordance with Jemena's tender proposal to the Northern Territory Government. The pipeline is subject to open access principles for at least 15 years, throughout which period the tariffs will be fixed in real terms. Given that the tariffs were competitively set, there is no basis for requiring disclosure of anything more than the information specified in those access principles. The exemption should be in place for the full period over which the open access principles apply.
- **Pipelines which are already subject to an access arrangement agreed with a State or Territory Government** - For the NGP, Jemena and the Northern Territory Government have agreed a set of access principles which will apply for at least the first 15 years of operation. These are legally binding obligations which address the information disclosure and pricing requirements necessary to achieve open access to the new pipeline. Regardless of whether Government initiates a competitive process (as happened with NGP), where an agreement between the proponent of a new gas transmission pipeline and a State or Territory Government includes binding access arrangements, overlapping requirements which apply to non-scheme pipelines more generally should not apply.

As currently drafted, Rule 585 does not compel the AER to grant exemptions in cases where the exemption criteria are met. This Rule should be redrafted, to remove AER discretion in cases where a pipeline or pipeline service meet the requirements for an exemption.

The AER should have a general power to grant exemptions if to do so would support the broader policy objective of securing gas supply for the east coast of Australia

Question 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?

As discussed in the Overview, the requirement (Rule 569) that prices must reflect the cost of providing the relevant service and that asset values should take into account past recoveries of capital does not sit comfortably with the

overarching objective of the framework. The draft Rules provide the arbitrator with no guidance as to how the inherent conflict between an objective which seeks to reflect the outcomes of a workably competitive market, and pricing principles based on a cost of service approach, should be managed. The result is that the proposed framework will generate a high degree of uncertainty for both shippers and pipeline operators, since it will be unclear as to the extent to which any arbitrator may place greater weight on the broad objective of a workably competitive market or the specific pricing principles that contradict the broad objective. Such an arbitration framework is highly unlikely to achieve the outcomes that the GMRG maintains it is seeking.

Even if an initially determined asset value is established by reference to the workably competitive market principles, an asset value for application at a subsequent point in time that has been locked-in and updated annually by a regulatory-style roll-forward mechanism[8] will not necessarily reflect the value that would be applicable by reference to the workably competitive market at that subsequent point in time, and similarly, the prices determined by reference to that value will not necessarily reflect either the long run average cost of the efficient new entrant cost of supplying the service at that future point in time. While Rule 555 states that the arbitrator is not bound by the financial information published as part of the disclosure of financial information in Division 2, given the short time available for the arbitrator to make a determination, it is likely that this will be used as the starting point for his/her assessment of the asset value. Furthermore, the GMRG has stated that once the asset value has been set by an arbitrator, pipeline operators will be required to update it on an annual basis.[9] As the binding financial guideline is yet to be developed by the AER (Rule 556), it is not clear what asset valuation method would apply under Option 1, or what is meant by 'including those that take into account past recoveries of capital' (Rule 596(2)(a)). Consequently, it is not possible to make a fully informed assessment of the options proposed by the GMRG.

It is important that there is a proper consultation on the mechanics of the approach to be used for asset valuation, especially under Option 1 and for assets commissioned before 1 July 2008 under Option 2. Such a consultation is important to retain incentives for businesses to continue to invest in these assets.

Option 2 (asset valuation as set out in Rule 77) provides the arbitrator with more guidance on how to determine asset valuation, and the approach would provide more predictability as to the asset values likely to be determined. However, it is not clear how depreciation would be measured (accounting or economic).

Jemena is extremely concerned with the limited time provided to pipeline operators to review and understand the two options put forward by the GMRG in Rule 569 for asset valuation. Given the significance of the asset valuation under a cost of service model, more time should be provided to enable pipeline operators to fully understand the practical implications of undertaking asset valuations under each option. Given the two proposals as they stand, we prefer the application of option 2 over option 1.

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

The requirement for an arbitrator to make a determination in 50 days is unrealistic, and will result in poorly considered determinations, particularly where the arbitrator is required to make a determination on an appropriate asset valuation for the pipeline. Given the critical importance of the asset valuation to future pipeline revenues under the cost based model, and the absence of any right for the pipeline operator to challenge the arbitrator's determination, it is essential that sufficient time is allowed for the arbitrator to review and assess the evidence available to them. Imposing an unrealistic timetable for the resolution of disputes will only result in poor decisions. Alternatively, arbitrators are likely instead to seek expert evidence and possibly further information from the parties, each of which can add time to the 10 week process under Rule 572.

8 As recommended by the GMRG in its Explanatory note (page 25)

9 GMRG Explanatory note, page 25.

The transitional proposals between 1 August 2017 and the publication of the guidelines are unlikely to result in fair or expeditious resolution as each arbitrator must develop its own valuation methodology and specifically request the financial information which he/she anticipates will be required by the financial reporting obligations. Again, additional time will need to be added to the base determination periods to permit this.

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

As discussed in the Overview, the transitional rules must be reviewed and updated to allow a longer transition period. The timetable stipulated in the rules for implementation of information disclosure and the arbitration mechanism is grossly inadequate and fails to recognise the work required for pipeline operators to comply with the new Rule requirements.

Question 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?

It would be highly inappropriate for the Rules to seek to extend the ring fencing requirements to non-covered pipelines. No justification or reasoning has been given for doing so. Ring fencing in Chapter 4, part 2 applies only to assets which have been determined to have engaged in monopolistic or similar market abusive behaviours. The review which gave rise to the Information Disclosure and Arbitration Reforms found no evidence of monopolistic behaviours which would justify extension of the coverage rules. Instead, the stated aim of the reforms is to promote access to non-covered pipelines by agreement and to avoid “a chilling effect on investment”. Application of ‘ring fencing’ rules to non-covered pipelines is inconsistent with these stated aims.

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

Jemena considers that the short time frame to consider the amendments to the NGL and the draft Rules has not provided sufficient time to respond to this question. Jemena does have some concern that the confidentiality provisions sit in the Rules rather than the NGL and consider that something so fundamental should have a higher status of protection.

2. DETAILED FEEDBACK ON DRAFT NATIONAL GAS RULES

Table 2–1: Detailed feedback

Draft Rules	Issue	Feedback
DIVISION 1	**PRELIMINARY**	
546	Objective	Jemena accepts that the objective that the arbitration framework should facilitate terms and conditions of access to non-scheme pipelines that, far as practical, reflect the outcomes of a workably competitive market. However, as explained in the Overview section, the framework proposed by the GMRG, that prices must reflect the cost of providing the relevant service and that asset values should take into account past recoveries of capital, does not sit comfortably with this objective. Such an arbitration framework is highly unlikely to achieve the outcomes that the GMRG maintains it is seeking. 546(2)(b) refers to a 'binding commercially-orientated arbitration process'. This statement is factually incorrect , as the arbitration is only binding on the service provider, which exacerbates the imbalance in this framework. The last paragraph of Rule 546(2) implies that all non-scheme pipelines exercise market power. This is factually incorrect and should be removed from the Rules. The Australian Competition and Consumer Commission (**ACCC**) in its East Coast Gas Inquiry did not find widespread evidence of monopoly pricing, or improper behaviour under the Competition and Consumer Act 2010. The ACCC used its information gathering powers under the Competition and Consumer Act 2010 (**CCA**)[10] to investigate claims by suppliers and users of eleven pipelines.[11] The extent of the ACCC's findings in relation to the exercise of market power were limited, and confined to:[12] • two pipelines that have recovered their costs of construction; • incremental pipeline investments; and • the pricing of ancillary or derivative services on some major pipelines.

10 ACCC, *Inquiry into the east coast gas market,* April 13 2016, page 1.

11 ACCC, *Inquiry into the east coast gas market,* April 13 2016, page 110. The pipelines are SEA, SWQP/QSN, BWP, RBP, CGP, MSP, EGP, SEPS, MAPS, DTS and TGP.

12 ACCC, *Inquiry into the east coast gas market,* April 13 2016, page 103.

Draft Rules	Issue	Feedback
		Although the ACCC states in the Executive Summary to the Inquiry that, 'there is evidence that a large number of existing pipelines have been engaging in monopoly pricing',[13] it is not supported by the substance of the report, and is a substantial overstatement, which is inconsistent with its detailed findings.
547	Application	No comment
548	Structure of this Part	No comment
549	Definitions	*arbitrator*: the word 'pool' should be deleted – see discussion of Rule 565. *gas day:* refers to 6.00am AEST. Currently the gas days start at different times in the states and territories and will not change pursuant to these draft Rules. At present, gas day harmonisation is not due to be implemented until 1 April 2021 The draft Rules do not specify what constitutes a *pipeline* for the purposes of reporting obligations under Division 2. The definition of pipeline in the NGL is too general to be helpful in interpreting how to classify pipelines for the purposes of financial reporting. Unless clearly defined, it is likely that *pipeline* will be interpreted differently by different pipeline operators with the consequence that information is not comparable and operators may inadvertently contravene the obligations. The rules, rather than the guidelines, are the most appropriate place for this clarification to be provided.
550	Interpretation	It is not clear what 'a service ancillary to' under Rule 550(1) covers. For example is it intended to cover distinct separate services such as processing gas The interpretation of a 'pipeline service' in Rules 550(2) and (3) is impractical and will result in a significant number of services on each pipeline. For example, under Rule 550(2), a pipeline is to be treated as distinct from another service having regard to service type, the priority of the service and the locations at which or between the pipeline service is available. For pipelines with multiple receipts points and delivery points (such as the Eastern Gas Pipeline), the application of this definition would result in a multitude of different services, most utilised by only one or two shippers on the pipeline. This is unworkable in practice, and will give rise to meaningless data and/or breach of confidentiality. The Rules should be revised to limit the number of pipeline services that have to be reported on under Division 2 to a meaningfully sensible number. This should reflect the broad service types available on each pipeline, thereby enabling meaningful comparisons to be drawn.
551	Access information standard	Rule 551(3) should be updated to allow a grace period (for example, 20 business days) to update errors before a civil penalty applies. The current drafting of this rule, which requires an update to the information 'as soon as practicable after the service provider becomes aware of the non-compliance', is open to interpretation and may result in pipeline operators incurring a civil penalty despite best endeavours to correct the non-compliance.

[13] ACCC, *Inquiry into the east coast gas market,* April 13 2016, page 8.

Draft Rules	Issue	Feedback
		The civil penalty provision applying to Rule 551(4) should be removed. Non-compliance with this section will have limited effect and accordingly should not be subject to a civil penalty. Should the GMRG continue to propose this as a civil penalty provision, an intermediate resolution should be inserted (e.g. if the AER or an access seeker notify the service providers that the published information is incomplete or has changed, the service provider has 20 business days to comply before a civil penalty will become payable).
DIVISION 2	**INFORMATION**	
552	Obligation to publish information	Under Rule 552(2), the phrases *'whenever there is a change'* and *'whenever a new pipeline serviced is added or an existing pipeline service changes or is withdrawn'* should be amended to take into account practical realities of managing pipeline operations and reporting obligations. As currently drafted they would place a service provider in breach the moment a change occurred. This is clearly unworkable. Jemena considers that the Rules should allow a period for compliance, for example 'within 20 business days'. Under Rule 552(3) pipeline operators are required to publish information on their website. It seems inefficient to also have to send the information to the AER. In any case, the meaning of "send" requires clarification. For example, is an email with a link to the pipeline operator's website sufficient, or does it refer to hard copies via post, or electronic copies via email?
553	Service and access information	Rule 553(4)(c),(d) and (e) - It is not clear why information on scheduled deliveries are required in the context of contributing to the objectives of the framework. The requirement to report this information should be removed. If it is not removed, the Rules should be updated to clarify the meaning of 'gas scheduled for' injection or withdrawal, and the purpose that the data will serve. For example, on some pipeline services shippers are able to renominate their scheduled delivery a number of times each day. Under the current drafting of the rule, it is not clear which nomination should be reported under the 'gas scheduled for injection/withdrawal.' Rules 553(5)(a) and (b) require pipeline operators to publish on a monthly basis, a 36 month period rolling forecast of pipeline capacity, including any matters (i.e. maintenance activities) expected to affect capacity. This is a significant additional requirement over current obligations to provide a 12 month forecast on an annual basis. The GMRG has not previously consulted on this obligation, and it is unclear what benefit will arise from its imposition. While it will be possible to provide such forecasts, the information will be subject to significant change (particularly activities planned in excess of 12 months ahead), and should not be relied upon when making decisions about likely accessibility to services.
554	Standing terms	No comment
555	Financial information	Rule 555(1)(b) is inconsistent with Rule 556(2)(d) in that it states that the financial information must be audited and certified in the manner provided for in the financial reporting guidelines, whereas Rule 556(2)(d) states that the financial information is to be audited and certified as being true and accurate.

Draft Rules	Issue	Feedback
556	Financial reporting guidelines	Rule 556(2) provides the AER with complete discretion on the contents of the financial reporting guidelines, meaning that the AER will be able to demand an unlimited scope of financial information from pipeline operators. This level of AER discretion is unwarranted for non-scheme pipelines. The Rules should limit the scope of financial information to be reported to only that which is required to meet the stated objectives of the framework, and should be no more detailed or onerous than financial reports prepared to comply with the Australian Accounting Standards and the Corporations Act (2001). More onerous reporting obligations will drive up the cost of providing pipeline services, by increasing compliance and audit costs, while only providing limited benefit to shippers who will have the ability to access much more detailed information under Division 3 of the Rules. In its Final Design Recommendation, the GMRG has stated in relation to financial reports, '*…while this information could not be used to carry out detailed bottom-up cost of service analysis, it would provide shippers with a good indication of the costs incurred, revenue earned and return on assets generated by the pipeline. It could therefore be used by shippers to carry out a high-level assessment of the cost reflectivity of the standing offers.*'[14] Unless the Rules clearly limit the scope of the AER in the development of the financial information guidelines, there is a significant risk that the reporting obligations imposed on pipeline operators will be overly onerous, requiring a much greater level of detail to be reported than envisaged by the GMRG. Additionally, we query why the Rules stipulate that the financial guidelines may include financial performance metrics (Rule 556(2)(iii)). Financial statements prepared for corporate reporting purposes do not typically contain this information, the financial performance metrics are not defined and would be open to interpretation, and we query what benefit is to be had from reporting this information. The financial information to be reported should be limited to a profit & loss statement and a balance sheet, and the information specifically requested in 556(2)(a)(i) and (ii). Rule 556(2)(d) requires that the financial statements be certified as 'true and accurate'. In practice, financial auditing firms are unable to provide this type of audit sign-off (auditors use the term 'true and fair'). Audits of financial information should be undertaken in accordance with the standards prepared by the Australian Government Auditing and Assurance Standards Board. Requiring pipeline operators to obtain an audit an sign-off that audit firms are unable to provide is unreasonable, particularly in light of the GMRG recommendation that a civil penalty provision apply (Rule 552). Note the typographical error in rule 556(3) – "AER may from time to **time** amend…" On page 27-28 of the GMRG Explanatory note, the GMRG has noted that the AER and ACCC consider that the guideline should prohibit pipeline operators from revaluing their assets over time. This is in direct contradiction to the objective of the framework which seeks to reflect the outcomes of a workably competitive market. A pipeline's value does not flatline over time, depending on risk and other commercial considerations. A prohibition on pipeline operators from revaluing their assets over time will distort value rather than providing transparency and objectivity.

[14] GMRG, *Gas Pipeline Information disclosure and Arbitration Framework Final Design Recommendation*, June 2017, page 45.

Draft Rules	Issue	Feedback
557	Weighted average prices	Rule 557(1)(b) requires pipeline operators to publish the methodology and inputs used to calculate the weighted average price for the pipeline service. This Rule requires clarification, as it currently implies that the individual prices, and in some instances volumes, for each service will have to be published. This appears contrary to the reason for publishing a weighted average price in the first place and will lead to breaches of shipper confidentiality. The Rule should be clarified to state what inputs must be published or the reference to 'inputs' removed. As discussed under Rule 556, it will not be possible to secure a "true and accurate" audit-sign-off of weighted average prices (as required by Rule 557(2)(a)). The Rule should be updated to require audits of weighted average prices be in accordance with the standards prepared by the Australian Government Auditing and Assurance Standards Board. Rule 557(5) should be clarified to allow the service provider a reasonable time to comply with an AER notice.
DIVISION 3	**ACCESS REQUESTS AND NEGOTIATIONS**	
558	User access guide	Jemena queries the reference in rule 558(2)(b) to "anything directly **or indirectly** inconsistent". Given that GMRG recommends that such provision is classified as a civil penalty provision, it should be clear what service providers should and should not do. Rule 558(2)(a) already requires compliance with and to give effect to Division 3.
559	Access requests	Rules 559 and Rule 560 stipulate the timeframes within which negotiations for pipeline services must be made. It is completely inappropriate for the Rules to stipulate how pipeline operators of uncovered pipelines must engage with shippers to negotiate new contracts and services. The Rules must provide for flexibility to accommodate the complex nature of commercial negotiations. It is in the interests of pipeline operators to negotiate with shippers to sell available pipeline capacity—there is no need for the Rules to prescribe how these negotiations take place. Shippers that are not satisfied with the progress of negotiations have the opportunity to lodge a notice of dispute. This acts as a sufficient incentive for pipeline operators to undertake bona fide negotiations with shippers. Significant additional resource effort will be required to ensure compliance with these Rule requirements, unnecessarily increasing the costs of providing pipeline services. At the very least, the Rules should allow for the timetables to be varied in agreement with the prospective shipper. While the Rules seek to govern the activities of the pipeline operator, no corresponding obligations are placed on shippers. This means that shippers can commence and halt negotiations as they see fit, yet the pipeline operator must remain at the ready to respond to shipper requests at any time and within fixed timescales (irrespective of what other negotiations or activities are taking place at the time). The Rules should accommodate longer timeframes to respond to shipper requests, particularly if a significant period of time has elapsed between the various stages of an access request and/or access offer, due to shippers taking extended periods of time to respond to information provided by the pipeline operator. Additionally, the parties should be free to negotiate outside of regime of the Rules. The access regime under the draft Rules should only apply if a user expressly states in its written access request that it is an access request for the purposes of the rules. Given the fluid nature of enquiries, preliminary negotiations and protracted negotiations (which are often due to the needs of the

Draft Rules	Issue	Feedback
		prospective user) the pipeline operator needs clarity in order to know when the prescriptive compliance obligations in respect of access negotiations are triggered. Not doing so will detrimentally impact on the normal commercial effective relationships, processes and outcomes for both parties. Rule 559(1) states that a prospective user may request access to a pipeline service to be provided by means of the non-scheme pipeline or by an extension to, or expansion of the capacity of the non-scheme pipeline. Noting that the GMRG has stated that pipeline extensions should be excluded from the arbitration framework, it is entirely inappropriate for this clause to refer to pipeline extensions. As noted by the GMRG, '*the market power that can be exercised in negotiations for extensions should be constrained by competition from other parties, similar to the development of new pipelines. Consistent with rule 118, the GMRG recommends excluding disputes in relation to pipeline extensions from being eligible to access the arbitration framework under the Rules*.'[15] The Rules should not seek to impose obligations on pipeline operators in relation to access requests or access offers relating to pipeline extensions, as these obligations may be in conflict with or inconsistent with competitive procurement processes. In addition, a request for an extension to a pipeline requires much more detailed engineering and other planning work to respond to than access to existing services. If such requests are not subsequently referrable to arbitration, to require service providers to respond to such enquiries in a set timescale with a fully termed offer capable of acceptance achieves little but places onerous and expensive obligations on service providers. The reference to extensions should be deleted from this Rule. Rules 559(2) provides for preliminary enquiries to be made before making an access request. It is not clear why the GMRG considers it necessary to govern how pipeline operators should respond to preliminary enquiries. This level of prescription on the operations of non-scheme pipelines is unwarranted, and unnecessary to the operation of the information disclosure and arbitration framework. If a prospective user wishes to rely upon the access regime, it should submit an access request which complies with the Rules. If a prospective user wishes to engage on an informal basis as an alternative to or a pre-cursor to the formal process regulated by the rules, the parties should be free to do so however they see fit. Rule 559(2) should be deleted. Rule 559(6)(b) requires a service provider to 'carry out further investigations expeditiously and at reasonable cost.' The GMRG states in its Final Design Recommendation that, *'if further investigation is required, the pipeline operator and shipper must undertake good faith negotiations about the terms of which that must be carried out*.'[16] The final design recommendation suggests that it is intended that the prospective user and service provider will negotiate in good faith to agree who will bear the

[15] GMRG, *Gas Pipeline Information disclosure and Arbitration Framework Final Design Recommendation*, June 2017, page 9, footnote 12.

[16] GMRG, *Gas Pipeline Information disclosure and Arbitration Framework Final Design Recommendation*, June 2017, page 66.

Draft Rules	Issue	Feedback
		costs of these further negotiations. The consequence of this rule is that the service provider is required to undertake further investigations and may be required to bear the significant cost of those investigations. The Rules should clarify that the reasonable costs will be paid by the prospective user as contemplated by Rule 559(6)(b). Rule 559(7) allows a prospective user to amend the details of the access sought in an access request. In these situations, pipeline operators should have any ability to either extend or reset the time allowed for the access offer.
560	Access Offer	Rule 560(1)(b) provides service providers with 60 days in which to carry out further investigations upon receipt of an access request and make a binding access offer. This requirement is impractical and fails to accommodate complex access requests which take greater than 60 days to investigate. For example, Front End Engineering and Design (FEED) studies can take much longer than 60 days to complete for complex access requests including potentially tendering processes for external service providers and complex engineering, design and costing work; relevant investigations for approvals and land access etc. Stipulating that a binding access offer must be prepared within 60 days is totally inappropriate given the level of work that is needed to be able to make an appropriate binding offer. Similarly, applying a civil penalty provision to the obligation is unworkable in practice, and unnecessarily punitive on service providers who are already required to carry out further investigations expeditiously and without reimbursement if no access arrangement is subsequently entered into. In order to meet this deadline, service providers will have to place many caveats on any service offer provided to the shipper, subject to further investigative work being undertaken. This issue can be overcome by providing greater flexibility in the Rules for negotiating parties to mutually agree an acceptable timetable for undertaking further investigations. Alternatively, 560(1)(b) should be amended to read 'within 20 business days of the further investigations being completed.' Rule 560(2)(c) specifically includes access offers for pipeline extensions. As noted above in comments on Rule 559. it is not appropriate for Division 3 to apply to pipeline extensions given that arbitration under this framework will not be available for extensions. References to pipeline extensions should be removed from this Rule. Neither Rule 560, nor any other Rule in Division 3, places any obligation on prospective shippers to provide a counter offer before triggering either negotiation or an arbitration process. This means that service providers may end up in arbitration without having any opportunity to undertake bona fide negotiations with prospective shippers. Rather than Rule 567(3) requiring the prospective user to state a price offer 20 Business Days **after** commencing the access dispute, there should be an obligation on the prospective user to provide a counter offer to the pipeline operator during negotiations. Without such a requirement there is no incentive on the prospective user to make an offer, which will encourage gaming of the framework by shippers.

Draft Rules	Issue	Feedback
561	Negotiations	No comment.
562	Access negotiation information	Rule 562 requires service providers to disclose a significant amount of information that we would not normally disclose to any external party. At this stage, no arbitration proceedings would be underway. This is open to abuse by disingenuous prospective users to pressure service providers to accept unfavourable terms so as to maintain control over commercially sensitive information or even to 'mine' information with no intention of entering into an access arrangement. No penalties apply to dissuade such behaviour. This is improper and unreasonable. Additionally, Rule 562 should expressly protect form disclosure privileged material (eg where subject to legal professional privilege or litigation privilege). Parties to legal proceedings would not usually be compelled to disclose all consultant reports (Rule 562(3)(c)) or to provide all information in native format with underlying data disclosed (Rule 562(4)(c)). It is certainly not the case that such information would be routinely disclosed as part of a commercial negotiation. Jemena notes that the description of and examples of information to be disclosed focus on information in the service provider's possession and as to the reasonableness of the service provider's actions and positions. This demonstrates a lack of balance and echoes unacceptable bias in the description of the objective – see comments on Rule 546. This is inconsistent with usual commercial negotiations where each party assesses the value they would obtain from the deal as part of their negotiation position. Given that commercial arbitration is intended to reflect the outcomes of a workably competitive market, the imbalance of the information disclosure impedes this objective. As per comments above on Rule 560, a prospective user should be required to make at least one counter-offer as part of the access negotiation process. Rule 562(2)(a) should refer to information relevant to determining whether each of the offer and counter-offer are made on reasonable terms. Rule 562(4)(b) seeks to limit the information provided to a party during negotiations so that it is proportionate and relevant to the subject matter of the negotiations, and not out of scope of excessive. This requirement requires clarification. Under the proposed framework, a shipper might seek arbitration on a service that is immaterial in value. However, in the process of making a determination, an arbitrator may review or revisit the pipeline asset valuation. The service provider is therefore incentivised to exchange detailed materials to justify the asset valuation, together with any other material to support the cost of providing service, including its rate of return. This volume of this material is unlikely to be proportionate to the subject matter of the negotiations. However, if a service provider does not provide this information to the shipper, it may be prejudiced in an arbitration. Rule 562(7) provides parties with 15 business days to provide access negotiation information requested by another party. This strict deadline is impractical, and may not be sufficient to provide the requested information. The Rules should provide greater

Draft Rules	Issue	Feedback
		flexibility—reference to the 15 business day time limit should be removed. The requirement to provide the information as soon as practical is sufficient.
DIVISION 4	**ARBITRATION OF ACCESS DISPUTES**	
563	Application of Division 4	As discussed in previous Jemena submissions to the GMRG, it is not appropriate to include expansions in this framework. Rules 563(2)(c) should be updated so that expansions are excluded from arbitration. In addition, given the time and cost involved in the applying the arbitration mechanism, Rule 563(2) should be updated to include a threshold test, below which the arbitration mechanism should not be available. For example it should only apply to a service that extends beyond one year or is of a certain contract value (based on the pipeline operators offer), for example $100k per annum. Not applying a materiality threshold go to arbitration is inefficient. Similarly, a threshold test should be applied to matters going to arbitration, such that if it can be demonstrated that competition for the service exists, the arbitration should not proceed. As we note in respect of rule 570 below, neither the NGL nor the Rules compel a service provider to reserve capacity during an access dispute. For the reasons we have explained elsewhere, to do so would be inconsistent with the objective of reflecting the outcomes of a workably competitive market (where potential customers seeking a lower price do not automatically receive priority if a later applicant makes a more attractive offer). Similarly, where capacity has been sold to others during a negotiation such that the access which is sought in an access dispute notice can no longer be provided, such disputes should be excluded from the arbitration process under Division 4. Rule 563(2) should be amended accordingly.
564	Access Dispute Notice	Jemena considers that Rule 564 should require a party giving notice to AER of a dispute to simultaneously serve the notice on the other party to the negotiation. This is a standard feature of commercial arbitration and of statutory dispute resolution processes such as adjudication of payment disputes in construction contracts. As noted below, some steps have timescales counted in days from the date an access dispute notice is given to the AER, but this disadvantages a respondent who only receives a copy of the notice up to 5 business days later (Rule 565(2)). Jemena queries why applicants are treated differently in Rules 564(4) and (5) depending upon whether they are user or provider. Since either party can commence arbitration and both parties must equally bear the costs of an arbitration which is terminated, the same conditions should apply in either case. There appears to be no good reason for the restriction in Rule 564(5).
565	Reference to arbitration	This rule involves an unnecessary imposition by the scheme administrator. In a commercial negotiate/arbitrate model, it is unclear why the arbitrator must be selected from the 'pool' created by the AER; where two parties agree to use an arbitrator this decision should be permissible and there should be no limitation on parties to only select an arbitrator from the AER's pool. Jemena recognises that the pool will be useful in situations where the AER is to select the arbitrator, but this should be its only role.

Draft Rules	Issue	Feedback
		Rule 565(2) – AER may take up to 5 business days from receiving an access dispute notice to notify other parties to the dispute. As noted above, since the referring party does not need to copy in other parties, notice from AER may be the first notification the responding party receives. That notice gives the parties a further 5 business days (ie potentially 10 business days from service of the access dispute notice) to advise of arbitrators they consider disqualified. However, the parties also have only 10 business days from service of the access dispute notice (ie the same period) to agree on an arbitrator. The responding party may therefore have only 5 business days to: • consider the content of the notice • research the pool of arbitrators and raise any objections to AER; and • attempt to agree upon an arbitrator with the referring party. This unfairly prejudices the responding party. Amending rule 564 to require simultaneous service on AER and the responding party would help responding parties make best use of the limited time available. Jemena notes also the references to time running from issue of an access dispute notice in rule 565(3)(a) and (4).
566	Conduct of the parties	No comment
567	Statements to be provided to the arbitrator on appointment	As per comment above, 20 business days after issue of an access dispute notice is too late for the prospective user to be required for the first time to make an offer. As above, a bona-fide counter-offer should be a binding obligation as part of the pre-dispute negotiation. It would then be possible for the parties to include their best offer in the rule 567(1) materials within the first 10 business days of the dispute
568	Arbitrator to give effect to negotiation principles	We repeat the comments made re rule 562. The scope of disclosure potentially required is broader than would be required in a commercial negotiation or an arbitration or even court proceedings. The arbitrator's power to draw adverse findings from a lack of compliance should be made expressly subject to reasonable objections, as outlined above.
569	Pricing and other principles	As discussed in response to question 7, Jemena is extremely concerned with the limited time provided to pipeline operators to review and understand the two options put forward by the GMRG in Rule 569 for asset valuation. Given the significance of the asset valuation under a cost of service model, more time should be provided to enable pipeline operators to fully understand the practical implications of undertaking asset valuations under each option. As the binding financial guideline is yet to be developed by the AER (Rule 556), it is not clear what asset valuation method would apply under Option 1, or what is meant by

Draft Rules	Issue	Feedback
		'including those that take into account past recoveries of capital' (Rule 596(2)(a)). Consequently, it is not possible to make a fully informed assessment of the options proposed by the GMRG. Given these uncertainties, Jemena prefers the alternative version of Rule 569(2)(a). In the explanatory note the GMRG has states, *'backhaul services do not actually involve use of the pipeline's capacity*', and it therefore intends the price of backhaul services to be determined using the principles in Rule 569(2)(a).[17] This statement is factually incorrect. Backhaul cannot exist in isolation of forward haul capacity as it is derived from a firm forward haulage service. A strict application of the Rule would require backhaul services to be assessed under Rule 569(2)(b). The rules should be redrafted to remove this confusion, by stating which provisions should apply to specific services types. Furthermore, the current drafting of the rules does not capture all of the charges that might apply to a pipeline service. For example, it is unclear how the principles should be considered by the arbitrator in the event of a dispute regarding unauthorised overrun charges. Rule 569(4) should not be subordinate to subrules (1) to (3), and should be redrafted to require the arbitrator to have regard to these important considerations before making an access determination. Other access regimes give these considerations equal access for very good reason. For example, as currently drafted, the arbitrator may, but is not required to, have regard to the operational and technical requirement necessary for the safe and reliable operation of the pipeline only where not inconsistent with subrules (1) to (3). This may give rise to absurd outcomes whereby a service provider may be bound to contract with a shipper for a service which poses an operational or technical risk to the safe and reliable operation of the pipeline. Rule 569(4)(d) makes reference to extensions. Noting that GMRG has recommended that extensions be excluded from the arbitration framework, this reference should be deleted. Similarly, as discussed in response to question 6, expansions of the pipeline should also be excluded from the framework.
570	Matters that may be dealt with in the determination	Rule 570 (1) and (2) raise issues regarding the ambit of a determination. Jemena considers that rule 570(1) should be expressly limited to the matters raised by the referring party in their rule 563 access dispute notice. Rule 570(2) appears to limit the ambit of a determination only to the parameters sought by the prospective user – eg if user sought a 10 year term, but the service provider was willing only to provide a 5 year term, the only possible determinations would be access on a 10 year term or no access. We query whether this is intended.

[17] GMRG, *Gas Pipeline Information Disclosure and Arbitration Framework, Initial National Gas Rules, Explanatory note for stakeholder consultation*, June 2017, page 22 footnote 22

Draft Rules	Issue	Feedback
		As set out in our previous submission to the GMRG, we consider that an access determination should not allow for the items listed in Rule 570(3)(d). We note the protection offered in rule 570(3)(b). However, it is necessary to state clearly that the user must fund such activities in advance (as opposed to requiring the service provider to invest its own capital and recover over the term through the tariff). The current drafting of Rule 570(5)(c) does not clearly accommodate situations where it is not possible for the arbitrator to reach a determination capable of immediate application.. For example, in situations where a service provider must acquire land to expand the capacity of the pipeline, the costs (and feasibility) of obtaining land access may be unknown for many months. Negotiations for land access can be protracted, and are unlikely to be resolved within the 60 day time limit set out in Rule 560(1)(b), or in time for an arbitrator to factor this into a pipeline access determination. In such cases, it might not be known at the time of the determination whether it is possible to provide access to the service (i.e. in cases were a land easement cannot be secured) or, if it is possible, how much this will cost. Furthermore, environmental approvals and pipeline licences take many months to secure, and the costs of securing these may be impossible to accurately forecast at the time an arbitrator is tasked with determining a price for the service. We suggest that either: a) the rules should provide greater flexibility for the arbitrator to make determinations where the final price and terms and conditions for the prospective service will be confirmed at a later point in time; or b) Rule 570(5) is amended to clarify that no determination can be made where further actions would be required to assess feasibility or practicality.
571	Interim access determinations	The Rules are not clear on how, or under what circumstances, a party could request an interim determination be made. The Rules should clarify the circumstances under which an interim determination can be made, together with the process. It is not appropriate to leave this level of detail to the guidelines, particularly as they are non-binding. Furthermore, the Rules do not currently address how service providers are to be paid for providing an interim service, or deal with how a service provider can recover monies owed in situations where a shipper chooses not to contract a service when the final determination price is greater than the interim determination price.
572	Final access determinations	This rule is overly complex and generates a risk of administrative error by the arbitrator. • Subrule(1)(b) allows parties to agree to an extension up to a 'maximum of 90 business days'. • Subrule(2)(a) allows parties to agree that days must be disregarded.

Draft Rules	Issue	Feedback
		• The effect of this is that the 90 business day deadline is not binding and that parties can in effect extend the timeframe as long as they choose. • However, the arbitrator may be in breach of this section if an arbitration exceeds the given time but they do not correctly distinguish between an agreement to extend and an agreement to disregard days. Accordingly, subrule (1)(b) should be deleted and any agreement to give the arbitrator further time can be effected by way of subrule (2)(a). We note that there appears to be an inconsistency arising from the operation of proposed Rules 572(4) and 579. Specifically, an arbitrator has up to 20 business days after making their final access determination to provide their statement of reasons. However, correction of errors (which are only likely to arise once a statement of reasons has been provided) must be made within 30 days of receipt of a final access determination. At best, this may limit parties to a very small window of time (i.e. a day or two) to digest the statement of reasons and seek a correction. We consider that this is clearly not the intended operation of the Rules. As such, the Rules should be revised so that the period in which to seek to correct errors starts upon receipt of the statement of reasons.
573	Effect of final access determination	Jemena refers to the comments made above regarding Rule 570. In the event that providing the access sought would require further transactions with third parties and/or further work on the part of the service provider, the Rules need to be clear that if a determination is conditional upon further actions being performed or conditions met, it is not capable of taking effect immediately.
574	Arbitration procedures	No comment
575	Experts appointed by the arbitrator	This rule should be redrafted to clarify what will happen if the parties cannot agree a maximum amount that may be charged by the expert (i.e. can the arbitrator determine what is a reasonable amount?).
576	Confidentiality	Rule 576(4) – an arbitrator should not be granted a broad discretion to allow confidential information to be disclosed. A party disclosing confidential information should have certainty and confidence that the information will be disclosed only in clearly defined circumstances, such as those in Rule 576(3). If there are any other circumstances in which confidential information should be disclosed these should be clarified and incorporated into the Rules. Jemena seeks a clarification in rule 576(3)(h) that AER as the scheme administrator is not “a competent regulatory body” which can require the disclosure of the confidential information as part of the arbitration process.

Draft Rules	Issue	Feedback
		Rule 576(2) should be extended to any experts engaged by the arbitrator.
577	Conflict of interest	This rule does not appropriately deal with circumstances where a party is aware of a conflict of interest prior to an arbitrator being selected. This will be material where the scheme administrator appoints an arbitrator over the objection of a party. This clause should be expanded to capture this concept (and therefore enable a court to determine the conflict of interest). In addition, any notice served on the arbitrator under rule 577(6) should be simultaneously served on all parties and the scheme administrator.
578	Termination of arbitration	A specific termination right needs to be inserted for situations where the capacity in dispute has already been granted to a third party at the date of the determination. We note the GMRG's commentary regarding this section (see page 29 of the explanatory memorandum to the rules) and submit that these comments are inconsistent with section 216N(1)(a) which, unlike paragraphs (b) and (c) has no stipulation that a user's access right be in force at the time of the notification of the dispute. In this regard the drafting of section 216N is consistent with section 188 of the NGL and 44W of the CCA (which have the same intent as section 216N). An example of where capacity may not be reserved by the operation of section 216N would be where a user enters into a contract after a dispute has been notified, but where that capacity formed part of its reasonably anticipated requirements measured at the time the access dispute was notified. This is consistent with the purpose of the regime (i.e. to facilitate commercial agreements being reached). In those circumstances Jemena submits that a specific termination right be included to deal with this situation. We note that the costs of a terminated arbitration are not expressly addressed in Rule 580, leaving the default position that the costs are shared equally between the parties. Where a prospective user terminates the arbitration, that party should bear the wasted costs save where the service provider agrees otherwise.
579	Correction of errors	It is not clear why the scheme administrator's power is time-limited i.e. if an error is identified three months after an access determination is given, why can it not be corrected? This is particularly relevant where determinations by arbitrators are likely to be used as a precedent for later disputes. For example, in relation to the valuation of pipeline assets. As discussed under our comments on Rule 572, we note that there appears to be an inconsistency arising from the operation of proposed Rules 572(4) and 579. Specifically, an arbitrator has up to 20 business days after making their final access determination to provide their statement of reasons. However, correction of errors (which are only likely to arise once a statement of reasons has been provided) must be made within 30 days of receipt of a final access determination. At best, this may limit parties to a very small window of time (i.e. a day or two) to digest the statement of reasons and seek a correction. We consider that this is clearly not the intended operation of the Rules. As such, the Rules should be revised so that the period in which to seek to correct errors starts upon receipt of the statement of reasons.

Draft Rules	Issue	Feedback
580	Costs	Rule 580(3)(b) is impractical. At the time of making an access determination an arbitrator will not know whether a party has entered into an access contract – the prospective user has 20 business days **after** the final determination to make this election. We suggest one way to resolve the issue is for an arbitrator to retain their jurisdiction for a short period (i.e. 30 business days) and should make a costs order at the end of this period.
581	Information to be published about access determinations	581(1)(g) requires the scheme administrator, in determinations including an asset valuation, to publish the asset valuation method and the asset value on its website. Jemena queries the reason for this. The requirement for the scheme administrator to publish this information has the potential to unfairly bias future negotiations with shippers for pipeline access. However, each arbitration should approach the valuation exercise afresh. Pipeline operators have no ability to seek a review of the determination by the arbitrator. For the reasons explained in the Overview, pipeline operators would be severely disadvantaged by a regime which has the practical effect of the first short duration arbitration decision on a pipeline setting an asset valuation which will apply for an indefinite period and which cannot be challenged. This is not the commercial deadlock breaking solution proposed by the Vertigan review.
DIVISION 5	**SCHEME ADMINISTRATOR**	
582	Role of the scheme administrator	No comment.
583	Pool of arbitrators	As per Jemena's comments above, we see no reason why the parties can only choose an arbitrator form a pool selected by AER. The parties should (as is the case in any other commercial arbitration) be free to select their arbitrator (and be given time to do so). AER's selection should feature only in the event of a deadlock.
584	Non-scheme pipeline arbitration guide	While we note that the guide is non-binding, it can be expected (and we think is intended) to be highly persuasive in steering the approach to be adopted by arbitrators in determinations under this framework. In that context, Rule 584 provides very little indication of what the guide can and cannot address. The discretion provided to AER is much too wide.
DIVISION 6	**EXEMPTIONS**	
585	Exemption categories	Rule 585 does not currently compel the AER to grant an exemption in instances where the pipeline meets the exemption criteria. The word 'may' should be changed to 'must'. The AER should have a general power to grant exemptions if to do so would support the broader policy objective of securing gas supply for the east coast of Australia
586	Exemption conditions	As per our previous submissions, the exemption criteria included in the Rules are far too narrow in scope and in practicality address only those parties who have chosen not to grant third party access. Pipelines which are the subject of an access

Draft Rules	Issue	Feedback
		regime agreed with or required by a State or Territory and/or which have been the subject of a competitive process should not be subjected to a second parallel framework.
587	Revocation	No comment
588	Making and form of application	No comment
589	Decision on application	No comment
590	Decision to vary or revoke an exemption	No comment
Proposed Transitional Rules		
Item 51, schedule 1	Initial financial reporting	The initial financial reporting requirements set out in Rule 51(2) will require Jemena to prepare financial accounts for its pipelines on 31 Dec 18 for the six month period 1 Apr 18 to 30 Sep 18. This will provide pipeline operators with approximately three months to implement system and accounting policy changes necessary to comply with the reporting guideline, which is due to be published in Dec 17. This timetable is grossly inadequate—it is unreasonable to expect that these changes could be implemented so quickly. A significant program of work will be required to ensure that Jemena can comply with the new financial reporting obligations. Jemena operates on a 31 Dec financial year end—the requirement to publish audited financial information for the period 1 April 18 to 30 Sep 18 is impractical and inefficient, given that the remainder of our corporate financial reporting and auditing is aligned to a 31 Dec financial year end (and noting that we have no obligation to prepare half yearly accounts). Stipulating a reporting period that is not aligned to our financial year end will mean that two additional audits will have to be undertaken (on the opening and closing balances). This introduces additional cost to Jemena, with questionable benefit to shippers. Given that pipeline operators will be required to publish a significant amount of other information on their websites, it is not clear what additional benefit will be sought from publishing six months of financial data as part of the transitional rules. A more reasonable approach would be to allow pipeline operators 12 months to review and update their systems to ensure compliance with the new reporting obligations. Financial reporting of data would commence thereafter, with the first report to be aligned to the financial year end.

Draft Rules	Issue	Feedback
Item 52, schedule 1	Initial weighted average prices	Rule 52(2)(b) requires pipeline operators to publish the methodology and inputs used to calculate the weighted average price for the pipeline service. This Rule requires clarification, as it currently implies that the individual prices, and in some instances volumes, for each service will have to be published. This appears contrary to the reason for publishing a weighted average price in the first place. The rule should be clarified to state what inputs must be published. Rule 52(3) requires that the weighted average prices be audited and published by 1 February 2018. As discussed in the Overview, the transition timetable and the timetable for the development of the financial reporting guidelines is grossly insufficient and must be extended. Additional time is required to meet the 1 February 2018 deadline. The financial reporting guideline is only due to be finalised in December 17, which leaves only one month to procure and undertake the audit. In addition, as Jemena works to a December year end, the annual audit of financial information will not be completed until March 18. To ensure cost efficiencies the weighted average price audits should be conducted on the same timeframe as the financial statements. Rule 52(3) should be updated to push the deadline for reporting back until 1 April 18. Alternatively, if the date is not revised, the Rules should provide some flexibility around the timing of the audit. An unaudited version of the weighted average prices could be published by 1 February 2018, with the audited version published by 1 April 18. As discussed in the comments on Rule 556 and 557, it will not be possible to secure a “true and accurate” audit-sign-off of weighted average prices (as required by Rule 557(2)(a)). The Rule should be updated to require audits of weighted average prices be in accordance with the standards prepared by the Australian Government Auditing and Assurance Standards Board.
Item 53, schedule 1	Access requests before the commencement date	Rule 53(4) provides prospective users with the right to elect any access offer made prior to commencement date as an access offer under Part 23, which means that it could be subject to the arbitration mechanism. This effectively means that the Rules have retrospective effect at the election of individual prospective users. We assume that this is not the intention of the GMRG. At most, we consider that prospective users should be entitled only to reissue under the framework access requests which are no more than 90 days old as at the commencement date.