Gas Pipeline Information Disclosure and Arbitration Framework

Initial National Gas Rules

Explanatory note

2 August 2017

GMRG
Gas Market Reform Group

Abbreviations

Term	Definition
ACCC	Australian Competition and Consumer Commission
AEMC	Australian Energy Market Commission
AEMO	Australian Energy Market Operator
AER	Australian Energy Regulator
Amendment Bill	*National Gas (South Australia) (Pipelines Access-Arbitration) Amendment Bill 2017*
CAA	Commercial Arbitration Act
CCA	*Competition and Consumer Act 2010* (Commonwealth)
COAG	Council of Australian Governments
Council	COAG Energy Council
CPA	Competition Principles Agreement
East Coast Review	AEMC's *Eastern Australian Wholesale Gas Market and Pipelines Framework Review* (May 2016)
ERA	Economic Regulation Authority
Examination	Dr Vertigan's *Examination of the current test for the regulation of gas pipelines* (December 2016)
GMRG	Gas Market Reform Group
GTA	Gas Transportation Agreement
Inquiry	ACCC's *Inquiry into the East Coast Gas Market* (April 2016)
NER	National Electricity Rules
NGL	National Gas Law
NGO	National Gas Objective
NGR	National Gas Rules
Package	COAG Energy Council's Gas Market Reform Package
SCO	Senior Committee of Officials
Vision	COAG Energy Council's *Australian Gas Market Vision* (December 2014)

The following terminology is used in this note:

- the term 'prospective user' is used to refer to existing and prospective shippers and is used interchangeably with the term shipper;
- the term 'service provider' and 'pipeline operator' are used interchangeably; and
- the term 'AER' has been used to jointly refer to both the Australian Energy Regulator and the Economic Regulation Authority (ERA) when discussing the roles that the relevant economic regulator will play under the framework.

1. Introduction

On 19 August 2016, the COAG Energy Council ('the Council') directed the Independent Chair of the Gas Market Reform Group (GMRG), Dr Michael Vertigan AC, to examine the current regulatory test for the regulation of gas pipelines, in consultation with stakeholders, and make recommendations on any further actions.

This direction was prompted by the ACCC's *Inquiry into the East Coast Gas Market* (*Inquiry*), which found that while pipeline operators had responded well to the changes underway in the market, there was evidence a large number were engaging in monopoly pricing. The ACCC also found that the ability of pipeline operators to engage in this behaviour was not being constrained by the threat of regulation, so recommended changes to the coverage test.[1]

Dr Vertigan undertook the *Examination of the current test for the regulation of gas pipelines* (*Examination*) in the latter half of 2016. Two of the key observations from the *Examination* were that:

- the operators of existing pipelines have market power and, in some instances, the exercise of this power was resulting in inefficient outcomes that did not promote the National Gas Objective (NGO), or facilitate the achievement of the Council's Australian Gas Market Vision (*Vision*);[2] and
- the test for regulation (the coverage test) did not appear to be posing a credible threat to pipeline operators.[3]

While a change to the coverage test was explored with stakeholders during the *Examination,* most shippers made it clear they were not looking for a traditional regulatory solution. Rather, most shippers wanted to find a way to reduce the imbalance in bargaining power they can face when negotiating with pipeline operators.[4] The *Examination* therefore recommended that an information disclosure and arbitration framework be introduced, to reduce the information asymmetry and imbalance in bargaining power that shippers can face when negotiating with pipeline operators. Specifically, the *Examination* recommended that steps be taken to strengthen the bargaining power of shippers by:[5]

- requiring pipeline operators to publish the information that shippers need to make an informed decision about whether to seek access to a pipeline service and to assess the reasonableness of an offer made by the pipeline operator; and
- introducing a binding commercially oriented arbitration mechanism into the National Gas Law (NGL) that would be available to parties as a backstop if commercial agreement cannot be reached.

These recommendations were endorsed by the Council on 14 December 2016 and work commenced on the development of the framework shortly thereafter.

1 ACCC, Inquiry into the East Coast Gas Market, April 2016, pp. 18-20.
2 Vertigan, M., Examination of the current test for the regulation of gas pipelines, 14 December 2016, pp. 9-10.
3 Ibid, pp. 12-13.
4 ibid, p. 78.
5 Ibid, pp. 13-15.

In late 2016 Council officials commenced work on the legislative changes required to give effect to the framework, which are set out in the *National Gas (South Australia) (Pipelines Access-Arbitration) Amendment Bill 2017 (Amendment Bill).* The draft *Amendment Bill* was agreed by Council on 17 February 2017 and tabled in the South Australian Parliament on 29 March. The *Amendment Bill* passed the South Australian House of Assembly on 17 May 2017 and the South Australian Legislative Council on 20 June 2017. The Act was proclaimed on 1 August 2017 and became operational on proclamation. The amendments to the NGL will apply the framework via jurisdictional Application Acts, across Australia excluding Western Australia. The GMRG understands that the Western Australia Government intends to make orders under its version of the National Gas Law to apply the framework in WA in due course.

The GMRG's work on the detailed design of the information disclosure and arbitration framework for non-scheme pipelines commenced in early 2017 and culminated with the provision of its final recommendations to the COAG Energy Council's Senior Committee of Officials (SCO) on 2 June 2017.[6] After considering the recommendations SCO agreed that the GMRG should proceed with the development of the draft initial National Gas Rules to give effect to the final design.

The draft initial rules were released for public consultation on 30 June 2017 and stakeholders were provided with three weeks to provide their feedback. In total, 24 submissions were received from organisations with interests across the gas supply chain and from the Australian Competition and Consumer Commission (ACCC) and the Australian Energy Regulator (AER). At the time the draft initial rules were released for public consultation it was expected that the framework would come into effect on 1 September 2017. However, on 14 July 2017 the Council directed the GMRG to accelerate the implementation timetable and ensure the framework commenced on 1 August 2017.[7]

Having regard to the feedback provided by stakeholders, the overarching objective of the framework, the rule making test set out in section 291 of the NGL[8] and the Council's *Australian Gas Market Vision,*[9] the GMRG developed the final initial rules for the Council's consideration and approval.

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6 On 21 March 2017, the GMRG published an Implementation Options Paper (*Options Paper*), which identified a number of options for the information disclosure requirements, the arbitration mechanism and principles to guide the arbitrator's decision making, and provided an indication of the GMRG's preliminary view on the package of options that should be implemented. Stakeholders were provided almost four weeks to provide written feedback on the options presented in the *Options Paper* and were also invited to attend a series of industry roundtable discussions. The roundtables were attended by 24 organisations with interests in non-scheme pipelines, upstream production, retailing, generation and industrial gas use. Written submissions were also received from 27 organisations with interests across the supply chain and from both the Australian Competition and Consumer Commission (ACCC) and the Australian Energy Regulator (AER). Feedback on the design of the framework was also provided through extensive bilateral discussions with stakeholders. In general, stakeholders were supportive of the development of the framework.

7 COAG Energy Council, Meeting Communique, 14 July 2017, p. 2.

8 The rule making test in section 291 of the NGL sets out the matters the AEMC is to consider when exercising its rule making functions. In short, this test states that:

- the AEMC may only make a rule if it is satisfied it will, or is likely to, contribute to the achievement of the NGO; and
- the AEMC may give such weight to any aspect of the NGO as it considers appropriate, having regard to any relevant Council statement of policy principles.

9 COAG Energy Council, Australian Gas Market Vision, December 2014.

On 1 August 2017, the initial rules were made by the South Australian Minister for Mineral Resources and Energy, in accordance with section 294F of the *National Gas Law*. The South Australian Minister published a notice of the making of the Rules in the South Australian Government Gazette stating the commencement of the Rules as 1 August 2017; and making the Rules publicly available.[10] Future amendments to the initial rules will proceed under the regular Australian Energy Market Commission (AEMC) rule making framework.

The remainder of this explanatory note is structured as follows:

- Section 2 provides an overview of the final design of the information disclosure and arbitration framework;
- Section 3 provides a summary of key areas of stakeholder feedback on the draft initial rules; and
- Section 4 sets out how the key elements of the framework have been reflected in the final initial rules.

[10] See the South Australian Government Gazette No 49, Tuesday 1 August 2017 which includes the proclamation of the *National Gas (Pipelines Access-Arbitration) Act 2017* on page 3037 and the notice of the Making of the National Gas (Pipelines Access-Arbitration) Amendment Rules 2017 on page 2994.

2. Final design of the information disclosure and arbitration framework

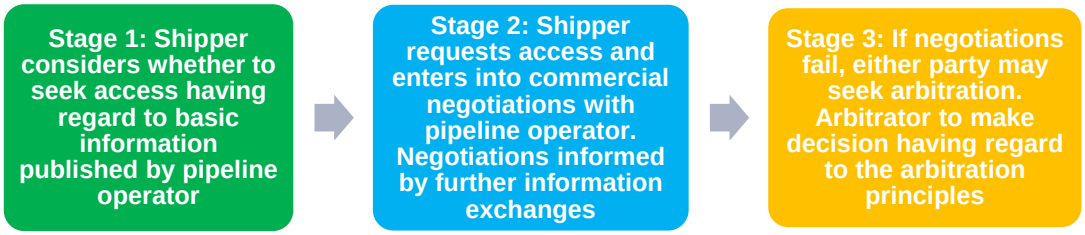
The final design of the framework follows extensive consultation with stakeholders, including in response to the *Options Paper*. The GMRG has been cognisant of the feedback shippers provided during the *Examination,* which was that they had little appetite for heavy-handed regulatory solutions and were looking for a mechanism that would reduce the imbalance in bargaining power and pose more of a constraint on the behaviour of pipeline operators.[11] The final design of the framework is not therefore intended to replicate the prescriptive rules that apply to pipelines subject to full regulation. It is intended to support commercial negotiations and outcomes that are consistent with what would prevail in a workably competitive market.

The final design provides for:

- The inclusion of an objects clause in the Rules, which will ensure that all parties (including arbitrators) have a good understanding of the objectives of the regime and how the Rules, including the arbitration principles, are intended to be applied.
- A clearly defined information disclosure regime that will provide for greater transparency on the part of non-scheme pipeline operators through the publication or exchange of information shippers require when:
  - considering whether to seek access to a pipeline; and
  - assessing the reasonableness of a pipeline operator's offer.
- A robust and commercially oriented arbitration mechanism that will provide a credible threat of intervention to constrain the exercise of market power during negotiations, while also providing for the cost-effective and efficient resolution of disputes.
- Well specified price, non-price and other guiding principles that the arbitrator will be required to have regard to when resolving price and non-price disputes, which embody the workably competitive market concept and also recognise the legitimate interests of the pipeline operator, other users and the safe and reliable operation of the pipeline.

Table 2.1 provides a summary of the key elements of the framework. While not shown in Table 2.1, the final design provides for a staged approach to information disclosure and the negotiation and arbitration processes, with the obligations of each party, and the processes to be followed in each stage, to be specified in the initial rules. Table 2.2 outlines what each stage will involve, while Figure 2.1 depicts the stages at a high level.

Figure 2.1: Stages for information disclosure, negotiation and arbitration



[11] Vertigan, M., Examination of the current test for the regulation of gas pipelines, 14 December 2016, p. 78.

Table 2.1: Final design of the information disclosure and arbitration framework

Information disclosure and arbitration framework			
Objective	The overarching objective of the information disclosure and arbitration framework is to facilitate access on reasonable terms to services provided by non-scheme pipelines – which for the purposes of the framework, will be taken to mean at prices and on terms and conditions that so far as practical to reflect the outcomes of a workably competitive market. To that end, the framework provides for: ▪ the publication and exchange of information to facilitate timely and effective commercial negotiations; ▪ a commercially-oriented process to resolve disputes about proposed terms of access in a cost-effective and efficient manner; and ▪ principles that the arbitrator must have regard to when determining access disputes, which are consistent with the outcomes of a workably competitive market.		
	Information disclosure requirements	**Arbitration mechanism**	**Arbitration principles**
Purpose	Reduce the information asymmetry shippers can face in negotiations and, in so doing, facilitate more timely and effective negotiations.	Provide a credible threat of intervention to constrain the exercise of market power by pipeline operators during commercial negotiations. To pose a credible threat, arbitration must provide for the final resolution of commercial disputes without unnecessary delay or expense.	
Detail	Non-scheme pipeline operators would be required to publish the following information on their website: ▪ The base level of information shippers require when considering whether to seek access, which is to include information on the pricing methodology and the inputs used to calculate the standing offers for each service offered by the pipeline ▪ The weighted average price paid for each service (published on an annual basis). ▪ Independently verified financial reports for each pipeline (prepared on an individual pipeline basis), and a breakdown of demand (by service). This information would be published on an annual basis four months after the end of the financial year and include information on the methods or principles the pipeline operator has used to determine the value of the assets, depreciation allowance and cost allocation. This information would be subject to a reporting standard and classified as civil penalty provisions. If access is sought, the pipeline operator would be incentivised to provide the shipper with information on the cost of providing the service as the information exchanged during negotiations will form the basis for any arbitration.	The arbitration mechanism is to be based on the conventional arbitration with partial transparency model. Key design elements include: ▪ Arbitration could be used to settle disputes in relation to all aspects of access to all types of services offered (excluding extensions). ▪ Arbitration would be 'on the papers' using information exchanged by parties in negotiations (Stage 2). The arbitrator would have the discretion to conduct hearings and request further information if required, but the parties would not have the right to introduce additional information on their own volition. ▪ Information on the existence of the arbitration would be published on the AER website.	When making a determination, the arbitrator must take into account: (i) the principle that services are to be provided on reasonable terms both in relation to the price and non-price terms and conditions of access; (ii) the pricing principles; and (iii) the operational and technical requirements necessary for the safe and reliable operation of the pipeline. <u>Pricing principles</u>: ▪ Firm transportation services, ancillary services and augmentations: When determining the price of these types of services, the arbitrator is to have regard to the cost of providing the service, which is to include a commercial rate of return that reflects the risks the pipeline operator faces in providing the service. The value of any assets used must be determined using asset valuation techniques that are consistent with the workably competitive market objective and unless inconsistent with this objective, should be calculated using the depreciated construction cost approach. ▪ Derivative services (i.e. services that utilise the capacity of the pipeline but are priced as a multiple of, or discount to, the firm transportation service): When determining the premium or discount for these services, the arbitrator is to have regard to the opportunity cost and/or benefit of providing the service (taking into account the effect on the cost of providing the firm service and/or the capacity of the pipeline) and provide a reasonable contribution to joint and common costs. <u>Other principles</u>: ▪ In addition to the principles above, the arbitrator may also take into account the pipeline operator's legitimate business interests, the interests of other persons who have rights to use the service, the value to the providers of extensions including expansions of capacity whose cost is borne by someone else, the value to the provider of interconnections to the facility whose cost is borne by someone else.

Table 2.2: Staged approach to information disclosure, negotiations and arbitration

Stage	Detail
Stage 1: Shipper considers whether to seek access	In this stage, non-scheme pipeline operators would be required to publish the following information on their website unless it is subject to an exemption: ▪ the base level of information that shippers require when considering whether to seek access to a pipeline, including the pipeline's standing offer for each service; ▪ the pipeline's financial reports and demand information; and ▪ the weighted average price received for each service if there are more than two shippers using the pipeline (this limitation is required to maintain confidentiality). This information would allow shippers to make an informed decision about whether to seek access and to carry out a high-level assessment of whether the pipeline operator's standing offers are reasonable, having regard to the pipeline's financial reports, the weighted average price per service and information published by the pipeline operator on how the standing offers for each of the services offered by the pipeline have been calculated. Exemptions: Pipelines not providing third party access (i.e. the service provider and shipper are related parties) or are servicing a single shipper will be able to apply for an exemption from the information disclosure requirements. An exemption from the requirement to publish financial reports, weighted average price information and some other base level information will also be available to pipelines that are below a specified size. If conditions change, the exemption will be extinguished.
Stage 2: Request for service and commercial negotiation	This stage is designed to facilitate timely and effective commercial negotiations and minimise the reliance on arbitration. It involves two key steps: Access request and response: General requirements, including with respect to timing, apply to a shipper making an access request, as well as a pipeline operator in responding to an access request. Further detail is to be outlined in a pipeline operator's user access guide. Negotiation: The pipeline operator and the shipper would exchange information to try to reach a negotiated outcome. During negotiations, the parties would be required to disclose all of the information, including expert reports that they would seek to rely on in an arbitration to demonstrate the pipeline's offer or the shipper's counter offer is reasonable. Thus, the pipeline operator would be incentivised to provide the shipper with detailed information on the cost of providing the service sought by the shipper. If the parties cannot reach an agreement then they can proceed to Stage 3.
Stage 3: Arbitration	The arbitration mechanism provides a backstop, or last resort, for overcoming disputes that cannot be settled through negotiation (Stage 2). Availability: Arbitration is available when: a shipper is seeking access; when an existing shipper is seeking to add a new service to an existing contract; or when an existing shipper seeks a new contract to take effect on expiry of the existing Gas Transportation Agreement (GTA). Arbitration is not available for disputes about services already contracted under a GTA or for variations to the service terms for those services and is not available with regard to pipeline extensions. Documentation: Arbitration is to be conducted using information exchanged in Stage 2. The arbitrator may direct a party to an access dispute to provide information and may grant leave for parties to provide information not exchanged not provided to the other parties to the negotiations before the access dispute notice was given. Determination: The arbitrator's determination must take into account: (i) the principle that services are to be provided on reasonable terms as defined in the objective; (ii) the pricing principles; and (iii) the operational and technical requirements necessary for the safe and reliable operation of the pipeline. Timeframe: The arbitrator would have 50 business days to make a determination, or a maximum of 90 days on the agreement of parties to extend. Binding nature: The shipper must notify the pipeline operator and the AER within 10 days if it intends to proceed with access on the basis determined by the arbitrator. A shipper declining access may seek access at any future time but cannot seek arbitration for a substantially similar service for a period of one year following the determination. Partial confidentiality: Information on the existence of the arbitration would be published on the AER website after the arbitration has concluded, including: the non-scheme pipeline involved; the parties to the arbitration (subject to the consent of the shipper); the name of the arbitrator; and the time taken for the arbitration; which of the pipeline services offered was the subject of the dispute; if the prospective user has given notice that it wishes to enter into an access contract; and if the determination includes a determination with respect to asset valuation, the valuation method adopted and the determination of the asset value. Exemption: Non-scheme pipelines that do not provide third party access (i.e. the service provider and shipper are related parties) will be able to apply for an exemption. If third party access is provided the exemption would be revoked. AER role: As scheme administrator, the AER would provide oversight and administration of the framework, including establishing the pool of arbitrators, publishing information about the arbitration, and publishing a non-binding procedural guide for arbitrators and parties to disputes. As regulator, the AER would also be responsible for granting exemptions, compliance and enforcement.

The overarching objective of the information disclosure and arbitration framework is, as noted at the top of Table 2.2, to facilitate access to services provided by non-scheme pipelines on reasonable terms, which is taken to mean at prices and on terms and conditions that so far as practical reflect the outcomes that would occur in a workably competitive market (see Box 2.1). To that end, the framework:

- provides for the publication and exchange of information to facilitate timely and effective commercial negotiations;
- provides for a commercially-oriented arbitration process to resolve disputes about proposed terms and conditions of access in a cost-effective and efficient manner; and
- sets out the principles an arbitrator would be required to have regard to when determining disputes, consistent with the outcomes that would be expected in a workably competitive market.

Box 2.1: Workable competition

The concept of workable competition, which underpins a number of access regimes in Australia, was described by the Independent Committee of Inquiry on National Competition Policy (the Hilmer Committee) in 1993 as follows:[12]

> *"In markets characterised by workable competition, charging prices above the level of long run average costs will not be possible over a sustained period, for higher returns will attract new market entrants or lead customers to choose a rival supplier or product…*
>
> *Where the conditions for workable competition are absent — such as where a firm has a legislated or natural monopoly, or the market is otherwise poorly contestable — firms may be able to charge prices above the efficient level for periods beyond those justified by past investments and risks taken or beyond a time when a competitive response might reasonably be expected. Such "monopoly pricing" is seen as detrimental to consumers and to the community as a whole."*

It has also been described by the Australian Competition Tribunal (Tribunal) in *Re Queensland Co-operative Milling Association; Re Defiance Holdings* (1976) 25 FLR 169 at 188 as follows:

> *"As was said by the United States Attorney General's National Committee to Study the Antitrust Laws in its Report of 1955 (at p 320): 'The basic characteristic of effective competition in the economic sense is that no one seller, and no group of sellers acting in concert, has the power to choose its level of profits by giving less and charging more. Where there is workable competition, rival sellers, whether existing competitors or new potential entrants into the field, would keep this power in check by offering or threatening to offer effective inducements…'."*

More recently it was described by the Tribunal as follows:[13]

> *"Perhaps the best shorthand description of workable competition is to envisage a market with a sufficient number of firms (at least four or more), where there is no significant concentration, where all firms are constrained by their rivals from exercising any market power, where pricing is flexible, where barriers to entry and expansion are low, where there is no collusion, and where profit rates reflect risk and efficiency."*

In a similar vein, the New Zealand High Court has previously observed that:[14]

> *"…the tendencies in workably competitive markets will be towards the outcomes produced in strongly competitive markets. The process of rivalry is what creates incentives for efficient investment, for innovation, and for improved efficiency. The process of rivalry prevents the keeping of all the gains of improved efficiency from consumers, and similarly limits the ability to extract excessive profits".*

[12] Independent Committee of Inquiry on National Competition Policy, National Competition Policy Review, 25 August 1993, p. 269.
[13] Application by Chime Communications Pty Ltd (No. 2) [2009] ACompT 2, para 37.
[14] Wellington International Airport Ltd & Ors v Commerce Commission [2013] NZHC [11 December 2013], para 22.

In the GMRG's view the workably competitive market principle should result in the prices charged for pipeline services better reflecting the cost of service provision. This will, in turn, benefit upstream and downstream users of non-scheme pipelines and should also encourage more efficient investment in, and efficient operation and use of, natural gas services. The ultimate beneficiaries of these improvements will be consumers of natural gas. The adoption of this benchmark can therefore be expected to promote the NGO.

Further information on the final design, including stakeholder feedback, is provided in the GMRG's Final Design Recommendation Report.

3. Stakeholder feedback on the draft initial rules

The draft initial rules were released for public consultation on 30 June 2017 and submissions were due by 20 July 2017. Submissions were received from 24 organisations with interests across the supply chain and from both the Australian Competition and Consumer Commission (ACCC) and Australian Energy Regulator (AER).

A summary of the key areas of stakeholder feedback and the GMRG's response to this feedback is provided below. Please note that this summary provides a snapshot of stakeholder views as articulated in the public submissions responding to the draft initial rules and does not identify all issues raised. All public stakeholder submissions can be accessed on the GMRG website.

3.1 Information disclosure (Division 2)

Stakeholders raised the following concerns in relation to the information disclosure required by pipeline operations under Division 2 of the draft initial rules:

- Several stakeholders raised concerns with the proposed timing of the information provision.
    - On the one hand, pipeline operators suggested that even with the early commencement of the rules (on 1 August not 1 September), information obligations under rule 552 should not commence until 1 February 2018, given the costs associated with IT changes and the limited availability of key personnel for a 1 January commencement. On the other hand, the EUAA suggested that the timeframe for publication, particularly with regard to the financial information, was overly generous and given much of the information would already be available internally, pipeline operators should be required to provide information in two months at the most.
    - Some stakeholders also raised concerns with regard to information not being available on the commencement of the initial rules as an input to negotiations and noted this may limit the value of the framework until early 2018. Pipeline operators also noted that they will not have all the information in place to participate in an arbitration on the pricing principles from 1 August 2017.
- Pipeline operators indicated that the proposed provision of a 36 month forecast of the firm capacity of a pipeline and information about matters expected to affect the capacity of the pipeline (including any planned expansions of the capacity) for each month was a significant additional requirement that does not represent standard industry practice and may have limited value (see rule 553(5) in the draft initial rule).
- Pipeline operators questioned the meaningfulness of weighted average price information and how different services would be required to be treated (see rule 557 in the draft initial rules, now rule 556). Some pipeline operators indicated that weighted average prices should not be required to be published and that doing so would create a disincentive for pipeline operators to negotiate. Other pipeline operators indicated that weighted average price information needed to be clarified in the initial rules, including with regard to what services should be captured and what inputs would need to be reported.

- A number of stakeholders indicated that the information required to be provided by distribution pipelines required further clarification, particularly with regard to nameplate capacity of which there is no equivalent rating for distribution pipelines.
- A number of stakeholders raised concerns about using audit standards as the standard to which information would need to be certified.
- A number of stakeholders raised the need for consultation on the initial financial reporting guidelines.

The GMRG's response to each of these issues is summarised in the table below.

Table 3.1: Response to issues raised about information disclosure

Stakeholder concern	GMRG response
The timing of the information disclosure should be maintained as the 1 February 2018, rather than brought forward in line with the 1 August commencement	The GMRG understands that the information provision outlined in the rules will impose a burden on pipeline operators. To ensure pipeline operators have adequate time to make the necessary system changes and provide information in accordance with the rules (including the information standard), the GMRG has maintained the 1 February 2018 commencement date. This is reflected in rule 552 and the definition of "application date".
The timing is overly generous and should be brought forward	
Information in accordance with Division 2 would not be available on commencement of the Rules as an input to negotiations	Pipeline operators are not expected to have all information available on 1 August. Rather, information targeted at a particular service sought by the prospective user will only need to be provided if requested by a prospective user in negotiations in accordance with the Rules. Rule 568 has been amended to require the arbitrator, when considering whether to grant leave to a party to provide information not provided in negotiations, to take into account whether a party had a reasonable opportunity to provide the information before the access dispute notice was given.
A 36 month outlook of service availability information and capacity outlook would be unnecessarily onerous and have limited value	The GMRG disagrees with the view that providing a 36 month outlook for service availability is unnecessarily onerous, because the information will just be drawn from the contracts that pipeline operators have in place with shippers, which is already used to determine the 12 month outlook for pipelines that are required to report on the Bulletin Board. In the GMRG's view a 36 month outlook is appropriate given that shippers are usually looking for primary capacity more than 12 months out. The GMRG accepts that it may be difficult for pipeline operators to provide a 36 month forecast of matters that could affect the capacity of the pipeline. The initial rules have therefore been amended to reduce this forecast to 12 months, which is consistent with the Bulletin Board reporting requirement. This change is reflected in rule 553(5)(b).
Weighted average price information should not be published, would be of limited value and has practical difficulties that need to be overcome	The GMRG is of the view that the benefits associated with the provision of weighted average price information are likely to outweigh the costs of provision. The GMRG agrees, however, that further work and consultation needs to be undertaken on the methodology to be used to calculate the weighted average price, the services for which weighted average prices should be calculated and the inputs that should be reported. The initial rules have been amended to provide for this to occur as part of the development of the financial reporting guidelines (see rule 557(2)(b)).

Stakeholder concern	GMRG response
	Given the time it is expected to take to develop the guidelines, the first reporting date for the weighted average prices has been aligned with the first reporting date for the financial reports. This change is reflected in Schedule 4, Part 1, rule 2.
Pipeline information required to be published in relation to a non-scheme distribution pipeline needs to be clarified, particularly with respect to nameplate rating	The GMRG accepts that distribution pipelines may not have a single nameplate rating. The initial rules have therefore been amended to require distribution pipelines to report the quantity of gas that can be transported through each gate station on the pipeline in any 24 hour period. This amendment is reflected in rule 553(2)(c)(i).
As the financial information will not be prepared consistent with accepted accounting standards, they will be unable to be audited	The GRMG accepts that a different standard may need to apply and has amended rule 557 to allow the appropriate standard to be developed as part of the financial reporting guidelines.
There needs to be a commitment to consultation on the initial financial reporting guidelines	Consultation will be undertaken on the initial financial reporting guideline. Schedule 4, Part 1, rule 1 allows the AER to consult on the draft but in deciding whether to do so, it will be able to take into account prior consultation.

3.2 Access requests and negotiations (Division 3)

Stakeholders raised the following concerns about the draft initial rules relating to access requests and negotiations under Part 23 of the NGR and the provision of access negotiation information:

- Pipeline operators were concerned that there was no requirement or incentive for prospective users to negotiate prior to going to arbitration. Thus, pipeline operators suggested that prospective users should be required to negotiate under rule 561 and that this should act as a threshold before a prospective shipper can go to arbitration.
- A number of gas producers raised concerns that rule 562 may impose an overly burdensome obligation upon a party to provide access negotiation information that may extend beyond what is required to assess the reasonableness of an access offer.
- Stakeholders had differing views with regard to whether the obligation to provide access negotiation information should be classified as a civil penalty and/or conduct provision. Pipeline operators suggested that access negotiation information should not be classified as a civil penalty or conduct provision because compliance will be taken into account during the arbitration, the scope of the information is undefined and there are not protections for a pipeline operator as to the reasonableness and proportionality of information requests. Conversely, the Major Energy Users suggested that failure to provide sufficient and/or accurate information should be a civil penalty provision as a conduct obligation would impose a cost barrier to small users from accessing adequate information.
- Pipeline operators were also concerned about the prescriptive approach to the information requirements and timeframes for preliminary enquiries and access offers and requested flexibility to agree longer time frames with prospective users.

Additionally, a number of pipeline operators suggested that it should be made clearer in the rules that requests for pipeline extensions will not be subject to Divisions 3 and 4 of Part 23.

The GMRG's response to each of these issues is summarised in the table below.

Table 3.2: Response to issues raised about negotiations

Stakeholder concern	GMRG response
Negotiation under rule 561 should be required before a prospective shipper can go to arbitration	The GMRG notes that there is already a duty to negotiate in good faith under the NGL. There is also a strong incentive for prospective users to negotiate so as to obtain access negotiation information under rule 562 to support their case if they go to arbitration. Under rule 562(6)(a) parties are now required to provide notice to, and request access negotiation information from, the other party before they can issue an access dispute notice. There is a 15 business day wait after the request is made before the access dispute notice can be issued.
Rule 562 may impose an overly burdensome obligation to provide access negotiation information that may extend beyond what is required	The GMRG agrees that rule 562 should not be used by parties to obtain information from each other that is not relevant to the dispute. The GMRG has made a number of amendments to rule 562 and the definition of access negotiation information, including to distinguish between the information that must be provided about costs (access offer information) and the information that must be provided because a party is seeking to rely on it (access negotiation information). The rule also provides express protections for confidential information.
Rule 562 should not be classified as a civil penalty and/or a conduct provision	The provision of information to establish the reasonableness of an offer is central to the effectiveness of the framework. The GMRG is of the view that the obligation to provide information about costs (the access offer information) in rule 562(3) should be classified as a civil penalty and conduct provision to further incentivise compliance. The obligation to provide access negotiation information (the information a party will seek to rely on in an arbitration) is not classified as a civil penalty or conduct provision. Parties should be incentivised to disclose this information during negotiations under Part 23 since they may be precluded from doing so in the arbitration.
The Rules should accommodate longer timeframes to respond to shipper requests, be less prescriptive about responses to preliminary enquiries and allow service providers to check creditworthiness	Changes have been made to rules 558, 559 and 560 to give shippers and service providers more flexibility to agree timeframes and to be less prescriptive about the information needed to complete access offers.
Application of Divisions 3 and 4 to pipeline extensions	The GMRG agrees that it should be made clearer in the rules that while a prospective user can submit an access request for an extension, the service provider is not required to make an access offer and any dispute relating to a proposed extension will not be subject to the arbitration mechanism. It was always the GMRG's intent that extensions would be excluded from arbitration (this is consistent with what applies to scheme pipelines and reflects the fact that the development of extensions can be subject to competition) and while this was reflected in Division 4, it was not made clear in Division 3. This restriction is now reflected in rules 560(4)(e) and 563(2)(c).

3.3 Arbitration of access disputes (Division 4)

Stakeholder responses to the arbitration-related provisions in the draft initial rules primarily focused on the principles that the arbitrator would need to have regard to when making a final access determination. The specific issues that were raised in this context related to:

- The role that the following matters should play in the arbitrator's assessment:
  - the safe and reliable operation of the pipeline – a number of pipeline operators expressed concern about the fact that the arbitrator was not *required* to have regard to whether the service sought by the shipper could be provided in a manner consistent with the safe and reliable operation of the pipeline;
  - competition for the provision of services – a number of pipeline operators were of the view that the arbitrator should be required to consider whether the service sought by the shipper is provided in a workably competitive market and, if so, then it should not be required to apply the pricing principles; and
  - the service provider's legitimate business interests, the interests of persons who have rights to use the pipeline and the value to the service provider of extensions, expansions or interconnections the cost of which is borne by another person – a number of pipeline operators were of the view that these matters should have equal standing to the pricing principles and the more general principle that access must be provided on reasonable terms.
- The asset valuation techniques that an arbitrator should have regard to when applying the pricing principles – mixed views were expressed on this issue, with some stakeholders believing:

  (1) the rules should provide the arbitrator with greater discretion, subject to the requirement that the asset valuation techniques are consistent with the objective of the framework, including those that take into account past recoveries of capital – this view was supported by a number of shippers and pipeline operators; or

  (2) the rules should provide the arbitrator with more direction by either requiring the arbitrator to apply:

    (a) the same asset valuation techniques that would apply to scheme pipelines as set out in rule 77 of the NGR (which require the application of four different approaches depending on when the pipeline was commissioned)[15] - this view was supported by a number of shippers and pipeline operators; or

    (b) the depreciated cost of construction asset valuation technique (i.e. the original cost of constructing the pipeline plus capital expenditure less asset disposals and capital recovered since the pipeline was commissioned) – this view was supported by the ACCC, the EUAA and one shipper.

[15] Rule 77 currently draw a distinction between:
1. Pipelines built prior to November 1997 - in this case the AER has regard to a range of asset valuation techniques, including the depreciated construction cost and the depreciated optimised replacement cost.
2. Pipelines built post November 1997 - in this case the AER utilises the depreciated construction cost (note that for pipelines built between November 1997 and July 2008 the AER can also take into account redundant capital).
3. Pipelines that have previously been regulated - in this case the AER utilise the prior regulatory value as the starting point.

The stakeholders that advocated option (2)(b) noted that it would be simpler to implement and provide all stakeholders greater certainty about how assets would be valued. The stakeholders that advocated option (1), on the other hand, were concerned that the application of option 2(a) or 2(b) may, in some circumstances, result in the asset valuation failing to reflect what would occur in a workably competitive market.

A number of stakeholders also noted in their submissions that the use of the term 'depreciation' in the asset valuation methods is confusing because it could mean return of capital or accounting depreciation. They therefore suggested that this be clarified in the rules.

- The proposal to require the arbitrator's pricing decision to be no lower than the shipper's offer and no higher than service provider's offer – concerns were raised by a number of stakeholders about the effect that the inclusion of these bounds could have on the arbitrator's decision, with a number noting that the inclusion of the bounds may incentivise parties to adopt more extreme values for their offers.
- Pipeline operators sought clarification that a shipper using capacity used under an interim access determination would need to pay for that capacity.

Additionally, stakeholders have questioned whether an arbitration should terminate where, during the course of an arbitration about access to capacity, the service provider enters into an access contract such that the capacity is no longer available. Pipeline operators have suggested that an arbitrator should not be able to issue a determination over capacity if it has been sold before the determination is made.

The GMRG's response to each of these issues is summarised in the table below.

Table 3.3: Response to issues raised about arbitration

Stakeholder concern	GMRG response
Safe and reliable operation of the pipeline	While the draft initial rules stated that an access determination must not require the service provider to carry out a range of activities requiring works unless they are consistent with the safe and reliable operation of the pipeline, the GMRG understands the concerns that pipeline operators have raised about this issue. The final initial rules now state that when making a final access determination the arbitrator **must** take into account the operational and technical requirements necessary for the safe and reliable operation of the pipeline. This amendment is reflected in rule 569(1)(c).
Competition for the provision of services	While the GMRG understands the theoretical appeal of including a provision that would require the arbitrator to consider whether a service is provided in a workably competitive market, in practice the majority of services offered by non-scheme pipelines are not subject to effective competition as highlighted in the ACCC's Inquiry. The GMRG is also concerned that including this type of threshold could undermine the intent to provide for expeditious dispute resolution as parties argue about the effectiveness of competition for the provision of the service. When coupled with the fact that an arbitration is unlikely to be called if there is effective competition for the service, the GMRG is of the view that this threshold should not be included in the rules.
Treatment of other principles	The GMRG disagrees with the view expressed by pipeline operators that the service provider's legitimate business interests, the interests of persons who have rights to use the pipeline and the value to the service provider of

	extensions, expansions or interconnections should be treated equally to the principle that access must be on reasonable terms and the pricing principles. This issue was consulted upon in the design stage and it became clear through this process that requiring the arbitrator to have regard to such a broad range of matters (which in some cases may conflict with the overarching principles) may undermine the intent to provide for expeditious dispute resolution. A decision was therefore made to make this set of principles subordinate to the principle that access must be on reasonable terms and the pricing principles. The feedback provided on the draft rules has not caused the GMRG to alter its view on this issue, although in response to the feedback, changes have been made to the way that the relationship between the different principles is expressed in the initial rules.
Asset valuations	The GMRG is of the view that the value of any assets used in the provision of services should be based on the depreciated cost of constructing the pipeline, unless the arbitrator considers the value arising from the application of this approach is inconsistent with the outcomes that would be expected in a workably competitive market. This approach, which is a hybrid of options (1) and (2)(b) has been made in response to feedback from the ACCC and a number of other stakeholders and is intended to: ▪ simplify the arbitrator's task by adopting the depreciated cost of construction asset valuation technique as the starting point; ▪ provide pipeline operators and shippers with greater certainty about the asset valuation technique that will apply, while also recognising that there may be circumstances where the asset value should be above or below the value implied by this technique.[16] The adoption of this depreciated cost of construction asset valuation technique as the starting point is also intended to reflect the approach that would apply if a pipeline was regulated and constructed after the original regulatory framework came into effect. The GMRG understands that for pipelines commissioned prior to November 1997, the use of the depreciated cost of construction approach as the starting point may be seen as going beyond what would apply if the pipeline was regulated. However, the depreciated construction cost approach is one of the techniques that the AER could have regard to when determining the value of these assets.[17] Under the approach outlined above, it would still be open to a pipeline operator to argue that the asset value should be based on the application of any of the other techniques set out in section 8.10 of the Gas Code (or any other asset valuation technique) if it can be shown that the use of the depreciated construction cost approach is inconsistent with the workably competitive market objective. Finally, the GMRG has some sympathy for the view expressed by a number of stakeholders that: ▪ the range of asset valuation provisions currently applying to regulated pipelines is confusing and the basis for the difference is unclear (for example, when determining the value of pipelines commissioned between November 1997 and 1 July 2008 the AER can take into account redundant capital while for pipelines commissioned post 1 July 2008 it cannot); and

[16] For example, if the pipeline is sold for a price that is below the depreciated construction cost, then it would be open to a disputing party to argue that a lower asset value is appropriate (i.e. because the asset value has been written down with the prior shareholders bearing the cost of the write down). Similarly, if the pipeline has a significant amount of redundant capital it would be open to a disputing party to argue that a lower asset value is appropriate.

[17] See section 8.10(a) of the National Third Party Access Code for Natural Gas Pipeline Systems.

	▪ enough time has passed since the regulatory framework was introduced in November 1997 to move on from the complex considerations set out in sections 8.10-8.11 of the Code to a simpler asset valuation approach. It is, however, beyond the scope of this review for the GMRG to make changes to these provisions. The GMRG suggests that the AEMC or SCO consider this issue as part of their reviews into the regulation of gas pipelines.
Bounds for the arbitrator's pricing decision	The GMRG agrees that requiring the arbitrator's pricing decision to fall within the bounds set by the shipper's and pipeline operator's respective offers may encourage gaming and incentivise parties to set extreme values in negotiations rather than encouraging parties to reveal their actual values. The bounds have therefore been excluded from the initial rules.
It needs to be clear that a user must pay for access granted under an interim determination	To avoid doubt, rule 571 requires reasonable payment terms to be specified where access is granted under an interim access determination.
An arbitrator should not be able to issue a determination over capacity if it has been sold before the determination is made	Such an event has not been included as grounds for termination of arbitration, as the GMRG is of the view that the NGL deals with the protection of rights under contracts in force when the access dispute notice is given (see section 216N). Parties to negotiations and access disputes will need to consider and manage the risks associated with the sale of capacity the subject of negotiations or an access dispute.

3.4 Exemptions (Division 6)

Stakeholders raised the following concerns in relation to the exemptions under Division 6 of the draft initial rules:

- Pipeline operators indicated that the AER appears to have discretion as to whether it grants an exemption, even where the conditions of exemption are satisfied, due to the use of 'may' rather than 'must' in draft interim rule 585(1).
- A number of gas producers suggested that exemption category 1 of exemptions should include an exemption from the operation of Division 3, in addition to Division 4.
- One distribution network raised concerns that the rules will apply even if a pipeline does not have market power and the costs associated with information provision in accordance with Division 2 are likely to outweigh the benefits. Accordingly, it was suggested that the exemptions which are available to a category 2 pipeline should be available to a category 3 pipeline or alternatively, an exemption to rules 554 and 557 should apply to a category 3 pipeline in addition to the exemptions already drafted.

The GMRG's response to each of these issues is summarised in the table below.

Table 3.4: Response to issues raised about exemptions

Stakeholder concern	GMRG response
The AER is not compelled to grant an exemption when the exemption criteria are satisfied	The GMRG agrees and rule 585(1) now requires the AER on the application of the service provider for a non-scheme pipeline, grant an exemption, if: ▪ the exemption sought falls within one of the exemption categories; ▪ the service provider has demonstrated to the reasonable satisfaction of the AER that the non-scheme pipeline satisfies the exemption criteria applicable to the exemption category; and ▪ the AER is otherwise satisfied that in all the circumstances the exemption should be granted.
Exemption category 1 should extend to Division 3	The GMRG agrees that exemption category 1 should extend to Division 3 and 4.
The costs associated with information provision in accordance with Division 2 for small pipelines are likely to outweigh the benefits	Recognising the costs associated with information provision, the exemption available to small pipelines (Category 3) has been expanded, limiting the information required to be reported under Division 2 to pipeline information and pipeline service information. This exemption is designed to minimise the burden associated with reporting for small pipelines.

3.5 Transitional rules

Stakeholders raised the following concerns in relation to the transitional rules proposed in the draft initial rules:

- Pipeline operators suggested that additional time should be provided for the implementation of the framework and that the commencement of the arbitration mechanism be delayed to align with the information disclosure requirements, whether this be 1 February 2018 or later to align with the provision of financial information. This would help to ensure that pipeline operators are able to adequately prepare, and that information provided in response to an access request is consistent with the expectations of the framework.
- With regard to the initial financial reporting requirements, one pipeline operator suggested that it is not clear what additional benefit will be gained from publishing six months of financial data and a more reasonable approach would be to allow a pipeline 12 months to review and update their systems to ensure compliance with the new obligations.
- In relation to weighted average price information, numerous pipeline operators indicated that this information should be conducted on the same timeframe as financial statements and that it will not be possible to obtain a “true and accurate” audit-sign-off of weighted average price information.
- The following concerns were raised by pipeline operators in relation to transitional rule 53 of the draft initial rules:
    - this transitional rule is unreasonable, there is a high degree of uncertainty regarding operation and represents retrospective regulation and no case has been made as to the urgency of this framework to suggest such retrospective arrangements are appropriate;

- a service provider is at a considerable disadvantage because they may have been negotiating under different non-prescriptive pricing principles at the time the offers were made;
- it should be deleted or failing that, limited to access requests and offers made on and from 1 August or 'open' offers in a form capable of acceptance should be captured by the rules.

The GMRG's response to each of these issues is summarised in the table below.

Table 3.5: Response to issues raised about transitional rules

Stakeholder concern	GMRG response
Commencement of the arbitration mechanism be delayed to align with the information disclosure requirements	While the GMRG understands pipeline operators concerns, on 14 July 2017 the COAG Energy Council directed the GMRG to accelerate the implementation timetable and ensure the framework commences on 1 August 2017. In any event, changes to Part 23 may address some of these concerns. Changes to rules 568 and 572(2) give the arbitrator more guidance about when to allow information to be submitted in the arbitration that was not provided in negotiations and a broader discretion to extend timeframes to allow that information to be prepared. Rule 561(4) requires both parties in negotiations to accommodate the reasonable timing requirements of the other.
The initial financial reporting requirements should be delayed and provided for a 12 month period	While system changes will be required by pipeline operators to ensure compliance, the GMRG disagrees that financial information should not be provided until pipeline operators are in a position to provide a report covering a 12 month period. In the GMRG's view, the disclosure of some financial-based information is required sooner than following the pipeline operator's 2018-19 financial year to enable shippers to assess the reasonableness of standing offers and to provide market participants and policy makers with greater clarity about the returns being earned by non-scheme pipeline operators. One matter that will be considered during the development of the guidelines is whether different certification requirements should apply to the initial reporting.
Weighted average price information should be published at the same time as financial information and it will not be possible to obtain an audit in accordance with a "true and accurate" standard as proposed	The GMRG agrees that the weighted average price information should be published at the same time as the financial information under rule 555 and be certified in the manner provided for in the financial reporting guidelines, which will be subject to stakeholder consultation prior to finalisation (see Schedule 4, Part 1, rule 1).
Transitional rule 53 should be deleted or amended to limit its retrospective application	Recognising that unintended consequences that may arise from the retrospective application of the transitional rule 53, the GMRG has deleted this rule. In response to a request from the Tasmanian Government, a fast track arbitration mechanism has been created for pipelines in or partly in Tasmania.

4. Overview of the initial Rules

This section provides an overview of the key components of the framework as reflected in the initial Rules.

The rules relating to the information disclosure and arbitration framework are set out in Part 23 of the National Gas Rules, which is structured as follows:

- Division 1 sets out the objectives of the framework and deals with preliminary matters.
- Division 2 sets out information that must be published by the service provider of a non-scheme pipeline.
- Division 3 provides for access requests and negotiations.
- Division 4 provides for the arbitration of access disputes.
- Division 5 contains provisions about the role of the scheme administrator.
- Division 6 provides for exemptions from the application of Part 23.

4.1 Application of Part 23

The information disclosure and arbitration framework will apply to non-scheme transmission and distribution pipelines. The term “non-scheme pipeline” is defined in section 83A of the NGL as a transmission or distribution pipeline that is not a scheme pipeline, while the term “scheme pipeline” is defined in section 2 of the NGL as:

- a covered pipeline;[18] or
- an international pipeline to which a price regulation exemption applies.

While rare, a pipeline may be classified as both a scheme pipeline and a non-scheme pipeline if coverage has been revoked on part of a covered pipeline, or if an extension or expansion of a covered pipeline does not form part of the covered pipeline. In this case, the part of the pipeline that:

- remains covered will be classified as a scheme pipeline and not subject to Part 23 of the NGR; and
- does not form part of the covered pipeline will be classified as a non-scheme pipeline and subject to Part 23 of the NGR.

4.2 Objective

The final initial rules commence by outlining the objective of the information disclosure and arbitration framework, which reflects the purpose of the framework outlined in Chapter 2. Specifically, rule 546(1) states that:

> *The objective of this Part is to facilitate access to pipeline services on non-scheme pipelines on reasonable terms, which, for the purposes of this Part, is taken to mean at prices and on*

[18] A covered pipeline means a pipeline to which a coverage determination applies or is deemed to be a covered pipeline by the operation of section 126 or 127 of the NGL.

other terms and conditions that, so far as practical, reflect the outcomes of a workably competitive market.

The inclusion of the objective in rule 546 is intended to explain the purpose of the mechanisms and principles in Part 23 (summarised in rule 546(2)) so that those mechanisms and principles are applied consistently with and in light of, furthering the objective of the framework.

4.3 Stage 1: Prospective user considers whether to seek access having regard to information published by service provider

This stage is intended to provide a prospective user with adequate information to consider whether it should seek access to services on a non-scheme pipeline and to carry out a high-level assessment of the reasonableness of the service provider's standing price, as well as terms and conditions associated with the services available.

Division 2 of the final initial rules require service providers of non-scheme pipelines, not subject to an exemption, to publish the following information on their website (or provide a link to the information if it is published on a Gas Bulletin Board):[19]

- Service and access information (see rule 553), including:
  - Pipeline information:
    - **Transmission pipeline:** the pipeline's nameplate rating, details of receipt and delivery points, and a schematic map of the pipeline.
    - **Distribution pipeline:** the quantity of natural gas that can be transported through each gate station on the distribution pipeline in any 24 hour period, the details of all points on the pipeline where the service provider takes delivery of natural gas, and a schematic map of the pipeline that shows the location on the pipeline of the delivery points and the geographic limits of the areas served by the pipeline.
    - **Transmission and distribution pipelines**:
      - The classification of the pipeline as either a transmission or distribution pipeline.
      - Any technical or physical characteristics of the pipeline that may affect access to or use of the pipeline or the price for pipeline services on the pipeline.
      - Policies of the service provider that may affect access to or use of the pipeline or the price for pipeline services on the pipeline, such as queuing arrangements, a receipt or delivery point change policy, a metering and measurement policy, and for a distribution pipeline a balancing policy.

[19] Natural Gas Services Bulletin Board or the Gas Bulletin Board Western Australia.

- Pipeline service information: a description of the services offered by the pipeline, any locational limitations on availability of services and the priority ranking of services.
- Service usage information: the total quantity of gas actually injected and withdrawn from the pipeline during the month, the total quantity of gas scheduled to be injected and withdrawn from the pipeline during the month (after taking into account rescheduling, so that only the final schedules need be reported) and the quantities attributable to each category of pipeline service as identified in the pipeline service information.
- Service availability information: an outlook of uncontracted primary capacity of the non-scheme pipeline for each month in the following 36 month period and information about matters (including any planned expansions) that are expected to affect the capacity of the non-scheme pipeline for each month in the following 12 month period.

- Standing terms for each pipeline service offered and the methodology used to determine the standing prices as well as sufficient information to enable prospective users to understand how the standing price reflects the application of the methodology. Under rule 554(2) the standing terms must include:
  - the service provider's standard terms and conditions for the service;
  - the standing price for the service; and
  - other information about prices and charges applicable to the service including the charging structure, any minimum charge and any additional charges such as imbalance or overrun charges.
- Financial information for the non-scheme pipeline (see rule 555), which is to be published annually in the form and manner specified within the financial reporting guideline published by the AER. The financial information must be certified in the manner provided for in the financial reporting guidelines. An arbitrator is not bound by financial information published under rule 555 or by any methods, principles or inputs that have been used to calculate financial information published under rule 555.
- Weighted average price information for a non-scheme pipeline (see rule 556), including the weighted average prices paid by users for pipeline services and a description of the methodology used by the service provider to calculate the weighted average prices. The weighted average price must be determined using a methodology set out in the financial reporting guidelines[20] and be in the form and contain the information specified in the

[20] The methods are likely to differ depending on whether the service has a capacity based charge, or a throughput or per unit based charge. For example:

- if the service is a firm forward haul service that is charged on a $/GJ of MDQ basis, then the weighted average price is likely to be calculated as the revenue received from the provision of that service in the last year divided by the capacity that shippers using that service had reserved over the same period; and
- if the service is an interruptible transportation service that is charged on a $/GJ basis, then the weighted average price is likely to be calculated as the revenue received from the provision of that service in the last year divided by the volume of gas transported under the interruptible service over the same period.

The method may also differ if the pipeline utilises a distance, zonal or postage stamp tariff structure. For example, if the pipeline utilises a per km charge then the weighted average price will also need to be expressed on a per km basis, while if the pipeline utilises a postage stamp tariff structure then the weighted average price will also need to be expressed on

financial reporting guidelines. The weighted average price information must also be certified in the manner provided for in the financial reporting guidelines. To maintain the confidentiality of shippers, the service provider is not required to publish the weighted average price if the pipeline service was provided, directly or indirectly, to no more than two users of the non-scheme pipeline and the service provider gives a notice to the AER at least 20 business days before the date required for publication certifying this. When such a notice is given, the AER may by notice to the service provider require services to be combined for the purpose of calculating the weighted average price. This discretion is designed to mitigate the risk of gaming.

The disclosure of this information is intended to allow shippers to make an informed decision about whether to seek access, but it may not provide sufficient information for the prospective users to determine whether the price offered is cost reflective (as this will depend on the methodology the pipeline operator uses to determine its standing price). Further information is therefore expected to be disclosed in Stage 2.

In effect, rule 552(2), when read together with the definition of the application date in rule 549, provides for the publication of the information outlined above in accordance with the timelines set out in Table 4.1.

this basis. If the pipeline utilises a zonal stamp tariff structure then weighted average prices would also need to be calculated for each zone.

Table 4.1: Publishing timeframes of the information disclosure obligations

Information type		Timeframe
Service and access information	Pipeline information	For existing non-scheme pipelines or a pipeline that becomes a non-scheme-pipeline within 5 months after the commencement date (expected to be 1 February 2018). For new non-scheme pipelines, when commissioned or when the pipeline ceases to be covered. Updated information must be published within 20 business days after there is a change.
	Pipeline service information	As for the pipeline information.
	Service usage information	By the last business day of each month for the prior month.
	Service availability information	By the last business day of each month for the next 36 months, an outlook of firm capacity. By the last business day of each month for the next 12 months, information about matters expected to affect the capacity of the pipeline.
Standing terms		For existing non-scheme pipelines or a pipeline that becomes a non-scheme-pipeline within 5 months after the commencement date (expected to be 1 February 2018). For new non-scheme pipelines, when commissioned or when the pipeline ceases to be covered. Updated information must be published within 20 business days after there is a change.
Financial information		Annually within four months of the end of the service provider's financial year. Under the transitional rules, initial financial information covering a 6 month period will be published in October 2018 or January 2019, depending on the service provider's financial year.
Weighted average price information		Annually within four months of the end of the service provider's financial year. Under the transitional rules, initial weighted average price information covering a 6 month period will be published in October 2018 or January 2019, depending on the service provider's financial year.

Rule 551(1) requires the information published under Division 2 of Part 23 to be prepared and maintained in accordance with the *access information standard*. The access information standard means that the information:

- is not false or misleading in a material particular;
- in relation to information of a technical nature, is prepared in accordance with the practices, methods and acts that would reasonably be expected from an experienced

and competent person engaged in the ownership, operation or control of a pipeline in Australia acting with all due skill, diligence, prudence and foresight; and

- in relation to a forecast or estimate, is supported by a statement of the basis of the forecast or estimate and:
  - is arrived at on a reasonable basis; and
  - represents the best forecast or estimate possible in the circumstances.

Where a service provider becomes aware that information required to be published does not comply with the access information standard, rule 551(3) requires the service provider to publish information that does comply as soon as practicable after the service provider becomes aware of the non-compliance.

Rule 551(4) requires information published under Part 23 to include the date of publication, the date to which the information is current and, if the information replaces an earlier version as provided for by subrule (3), notice of that fact.

4.3.1 Compliance

Section 27 of the NGL requires the AER to monitor, investigate and enforce compliance with the NGL, NGR and Procedures. The AER has these roles in relation to the information disclosure requirements in Part 23, including with regard to the financial information reporting in accordance with the guideline.

Under the NGL, the enforcement tools that the AER could employ if a pipeline operator fails to comply with the disclosure requirements will depend on whether the disclosure framework is classified as a civil penalty provision[21] and/or conduct provision.[22] If it is not classified in this way, then the AER would only be able to:

- seek an administrative resolution, which may include a voluntary commitment by the operator to rectify non-compliance; or
- institute civil proceedings in the Federal Court and seek an injunction or an order that the pipeline operator cease or remedy the conduct.

Rules classified as civil penalty provisions allow the AER to issue an infringement notice to the pipeline operator, or institute civil proceedings in the Federal Court seeking an order that the penalty be paid.

The GMRG has recommended that the obligation to publish the information outlined above in accordance with rules 551(1) and (3) and 552(1) be classified as civil penalty provisions.[23] This classification is appropriate given the broader range of enforcement

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21 Civil penalty provisions are used in the National Electricity Law and National Gas Law to provide additional compliance incentives on participants for obligations that are material to network planning and operation and where a failure to comply could risk the reliability, safety and security of the electricity or gas system.

22 Conduct provisions gives rise to private enforcement rights. In general, conduct provisions apply to conduct of one industry participant that will affect another industry participant. The conduct provisions are effective in encouraging compliance with, or otherwise enforcing bilateral conduct obligations between regulated entities.

23 To give effect to these recommendations, the National Gas Regulations will need to be amended to specify these provisions as civil penalty provisions.

options available to the AER under that classification and the role that the information plays in the framework.

Under the *Gas (South Australia) Act 2008,* Regulations prescribing the provisions as civil penalty provisions or conduct provisions will need to be made on the unanimous recommendation of the Ministers of the participating jurisdictions of the COAG Energy Council sitting as the Ministerial Council on Energy for that purpose.

4.4 Stage 2: Prospective user requests access and enters into commercial negotiations with the service provider

If the shipper decides to seek access, then it would make an access request to the non-scheme pipeline operator. If the shipper wishes to commence negotiations, the negotiations would be informed by further information exchanges between the parties, which should include further detail on the costs associated with providing the service sought by the shipper.

In this stage, the prospective user may submit a preliminary enquiry or an access request to the service provider. The service provider must respond to the prospective user with an access offer after making further investigations if required. Should the prospective user not wish to accept the access offer, commercial negotiations will commence. Given the arbitration mechanism provides for disputes to be resolved using the information provided in this stage (subject to some caveats), the service provider and prospective user will be incentivised to exchange any information that they may wish to rely on in an arbitration during this stage. This will allow the commercial negotiations to be carried out on a more informed basis than they otherwise might and is intended to facilitate timely and effective commercial negotiations.

4.4.1 User access guide

Rule 558(1) requires a service provider for a non-scheme pipeline to develop, maintain and publish on its website a user access guide for each of its non-scheme pipelines.

The aim of the user access guide is to provide prospective users with timely information about what they must do to make an access request and their rights and duties in negotiations and if there is an access dispute.

To limit the potential for the user access guide to become a means by which the service provider can hinder access or give itself an advantage in negotiations, rule 558(2) requires the user access guide to:

- comply with and give effect to Division 3;
- not contain anything inconsistent with Division 3, the objective of Part 23 or the outcomes described in rule 546(2); and
- not operate or be applied by a service provider in a manner that prevents or delays a prospective user from referring an access dispute to arbitration.

Subrule (6) requires each user access guide to:

- identify the service provider for the non-scheme pipeline;

- set out the contact details for an officer of the service provider to whom preliminary enquiries and access requests can be sent;
- describe the process for making an access request, the information to be included with the access request and response times;
- describe the arrangements for undertaking further investigations;
- explain how the service provider will deal with and use any confidential information exchanged between the service provider and the prospective user;
- describe the process for preparing an access offer and for requesting negotiations under Part 23 in relation to an access offer;
- include a statement of the obligation to negotiate in good faith under section 216G of the NGL and the right to refer an access dispute to arbitration under section 216J of the NGL; and
- describe the arrangements in rule 562 for the exchange of information during negotiations under Part 23.

The same user access guide may apply to one or more of the service provider's non-scheme pipelines. The service provider is required to publish the user access guide for the non-scheme pipeline no later than 20 business days after the application date for the non-scheme pipeline (20 business days after 1 January 2018 for existing non-scheme pipelines).

The GMRG has recommended that rule 558(1) and (2) are classified as civil penalty provisions.

4.4.2 Access requests and offers

Stage 2 of the framework involves two key steps:

- the service provider making an access offer in response to an access request; and
- commercial negotiations in which the parties can request information, including expert reports, required for negotiations and to resolve an access dispute if the negotiations fail.

Rules 559 and 560 provide the prospective user and service provider with clarity as to the overall process for making an access request with further detail required to be outlined in a service provider's user access guide.

Rule 559 defines access requests, consistent with section 216F of the NGL.

Subrule (2) allows for a prospective user to make a preliminary enquiry about access to a pipeline service before making an access request. A service provider cannot require a prospective user to make a preliminary enquiry before making an access request, and if requested by the prospective user, must carry out further investigations on the basis of the preliminary enquiry before the prospective user makes an access request.

The preliminary enquiry process is intended to enable a prospective user to find out quickly if the service they seek is available on the standard terms at the time sought or to explore

the options available and the costs of any works that may be required before making a formal access request. This preliminary enquiry may be used by parties that are not yet ready to formally request access to a service but want to ascertain the availability and expected price of a service in the future to inform their decision-making.

An access request by a prospective user is required under subrule (3) to be made in writing and must include the information reasonably required to be provided by the prospective user for the service provider to prepare an access offer in relation to the access sought or to determine whether the service provider needs to undertake further investigations.

If an access request is incomplete, under subrule (4) the service provider must notify the prospective user within 5 business days after the access request is received, specifying the additional information required.

Under subrule (5), if the service provider needs to undertake further investigations in relation to the access request, it must notify the prospective user within 10 business days of receiving the access request. A prospective user can also ask the service provider to undertake further investigations following a preliminary enquiry under subrule (2).

Subrule (6) requires that a service provider must, for any further investigations:

- only undertake further investigations in relation to an access request when and to the extent reasonably necessary; and
- carry out further investigations expeditiously.

Rule 560(1) requires a service provider for a non-scheme pipeline in receipt of an access request to prepare and make an access offer that complies with subrule (3) within the period determined under subrule (2). The GMRG has recommended that this rule be classified as a civil penalty and conduct provision.

Rule 560(2) allows the parties to agree the time within which an access offer must be made or if no agreement is reached, requires an access offer to be made within 20 business days for a request that can be met using existing capacity and 60 business days if further investigations are needed.

The access offer must:

- set out the price and other terms and conditions on which the service provider offers to make the pipeline service available to a prospective user;
- contain the details of any works to be undertaken by the service provider and prospective user and any applicable technical and performance specifications; and
- be in a form capable of acceptance by the prospective user so as to constitute a new access contract or form part of an existing access contract.

A service provider is not required to make an access offer if:

- the access request has been withdrawn;

- the service provider has concluded that it is not technically feasible or consistent with the safe and reliable operation of the pipeline to provide the service requested by the prospective user; or
- the provision of the pipeline service requested by the prospective user would require the extension of the service provider's non-scheme pipeline.

4.4.3 Negotiations under Part 23

A prospective user who has made an access request may by notice to the service provider for the non-scheme pipeline request negotiations under Part 23 in relation to any aspect of access to a pipeline service including whether access can be granted; and the price and other terms and conditions of an access offer. Section 216G of the NGL, which requires parties to negotiate in good faith applies to negotiations under Part 23.

The rules do not require negotiations for access to be undertaken under Part 23. Commercial negotiations can continue to occur in the ordinary course of business (subject to the good faith duty in the NGL) and are only subject to the requirements of Part 23 when the prospective user elects to do so by notifying the service provider.

Where negotiations take place under Part 23, prospective users and service providers will be able to decide their own timing and needs, subject to the requirement for each party to accommodate all reasonable requirements of the other parties regarding the timetable for negotiations, the good faith duty under the NGL and the arrangements for the exchange of information in rule 562.

Under rule 561(6) if an access request is for more than one pipeline service, the prospective user may by notice to the service provider require negotiations under Part 23 in relation to those pipeline services take place as part of the same negotiation process.

A prospective user may at any time bring negotiations requested under Part 23 to an end, whether or not it also refers (or has referred) a related access dispute to arbitration.

Information exchanged in negotiations under Part 23 is subject to the confidentiality obligations in rule 561(8).

4.4.4 Access negotiation information

A prospective user seeking access may need more information than the information disclosed in Stage 1 to assess the reasonableness of the offer made in response to an access request relative to the objective and principles of Part 23.

Rule 562 sets out a process for requesting information to inform negotiations under Part 23. This process is subject to the general obligation to negotiate in good faith.

Rule 562 covers two categories of information.

Access offer information is information relevant to the principles and other matters in rule 569, that is, the principles that the arbitrator must or may have regard to when determining an access dispute. This category of information is expected to include more detailed information about costs.

Under subrule (2) a prospective user may request the service provider to provide access offer information in relation to any aspect of the matters being negotiated.

Subject to confidentiality obligations and legal professional privilege, under rule 562(3) a service provider given a notice under subrule (2) must comply with the request within 15 business days of the notice or any longer period agreed by the prospective user. The GMRG has recommended that rule 562(3) be classified as both a civil penalty provision and a conduct provision.

Access offer information provided in response to a request must:

- comply with the access information standard;
- be relevant to the subject matter of the request; and
- be provided in a readily readable form including where requested in electronic file format with all underlying data files and inputs.

Access negotiation information is the second category. It refers to the following information of a party to the negotiations, including information prepared for the party such as expert reports and consultant reports, data sets, models and other documents or materials:

- the party's access offer information; and
- any other information that the party may seek to rely on for determination of an access dispute in relation to the subject matter of the negotiations.

Under subrule (5), either party to negotiations under Part 23 may request another party to the negotiations to provide that other party's access negotiation information – that is, the information that other party may seek to rely on. A request can be made in relation to a specific matter arising in the negotiations or in relation to all access negotiation information of the other party.

A party must request all the access negotiation information of the other party before issuing an access dispute notice and must give the other party 15 business days to respond.

This rule is intended to give the other party reasonable time to respond to the request before an access dispute notice can be given. Making such a request is not intended to commit a party to proceed to give an access dispute notice.

Subrule (7) requires a party to negotiations under Part 23 to provide access negotiation information requested within 15 business days of the request or any longer period agreed by the party making the request.

Access negotiation information can be requested more than once.

Combined with the requirement for parties to negotiate in good faith under section 216G of the NGL and the requirement for the arbitrator to give effect to rule 562 in an arbitration, rule 562 is intended to ensure service providers disclose cost and other information relevant to the reasonableness of an access offer (whether or not the service provider seeks to rely on it), give both parties an incentive to disclose information in negotiations and prevent prospective users from bypassing commercial negotiations and going straight to arbitration.

If negotiations are unsuccessful, either party may refer the matter to arbitration (Stage 3).

4.5 Stage 3: Arbitration mechanism

Division 4 of the initial rules set out the detail of the arbitration mechanism.

The initial rules in this Division primarily reflect the GMRG's final design but also relevant provisions in Parts 6 and 6A of the NGL and (where not covered by those provisions) provisions from jurisdictional Commercial Arbitration Acts (CAA) that reflect the *Model Commercial Arbitration Bill 2010.* The CAAs in each jurisdiction implement the Model Bill in a largely uniform manner, although some minor variations do exist. For the purposes of this note, the *Commercial Arbitration Act 2010* (NSW) is referred to throughout.

This section summarises the key components of the arbitration mechanism.

As provided for in section 216E of the NGL, Part 23 does not limit how a dispute about access to a pipeline service can be raised or dealt with.

4.5.1 Application of Division 4

If the parties are unable to reach a commercial agreement, then the arbitration mechanism can be triggered by one of the parties by submitting an access dispute notice to the scheme administrator.

Under rule 563(1) an access dispute notice may be given to the scheme administrator in relation to:

- a request for access to a pipeline service under a new access contract;
- a request to add a new pipeline service to an existing access contract;
- a request for a new access contract to take effect on the expiry of an existing access contract; and
- a request for a pipeline service commencing after the expiry of the service term for the same service under an existing access contract.

Arbitration under Part 23 is available to resolve disputes on any matter, including price or other terms and conditions, associated with seeking access to the following types of services:

- services that require the use of the existing capacity of the pipeline, including transportation, park and loan and ancillary services; and
- services that require further augmentation of the pipeline, which may occur if:
    - an expansion is required;
    - the pipeline needs to be converted to a bi-directional pipeline;
    - a new receipt or delivery point is required (or points need to be expanded); or
    - an interconnection with another pipeline or pipelines is required.

Under initial rule 563(2) the following matters are excluded from reference to arbitration:

- a dispute about a pipeline service provided under an existing access contract;
- a request to vary the terms and conditions of access applicable to a pipeline service provided under an existing access contract;
- an access request that would require the extension of a non-scheme pipeline;[24]
- an access dispute in relation to a non-scheme pipeline that has an exemption; and
- an access dispute about standard terms and conditions for secondary trading of capacity excluded from the operation of this Part by a provision of the NGL or the Rules.

4.5.2 Procedural requirements

The arbitration will be conducted using information exchanged in negotiations, unless the arbitrator grants leave to a party to enable it to provide additional information and/or seeks the assistance of an independent expert.

Access dispute notice – rule 564

Under section 216H(1) of the NGL, if a prospective user and a service provider cannot agree about one or more aspects of access after a request has been made in accordance with the rules, the prospective user, or the service provider may notify the scheme administrator that an access dispute exists. An access dispute notice must be in writing and state the matters specified in rule 564(2) and be accompanied by the fee (if any) set by the scheme administrator and specified on its website. An access dispute notice must be given to the other parties to the negotiations as soon as practicable after it is given to the scheme administrator.

In the event a prospective user has submitted the access dispute notice, the prospective user may withdraw the notice at any time before the appointed arbitrator makes a final access determination. If the access dispute notice is given by a service provider, the service provider may only withdraw the access dispute notice if the other party (or parties) to the dispute agree.

Reference to arbitration – rule 565

Rule 565 sets out the procedure by which a scheme administrator refers the dispute to an arbitrator. The arbitrator must be selected from the pool of commercial arbitrators established by the scheme administrator in accordance with rule 583. As provided by section 216K of the NGL, the parties to the access dispute are given an opportunity to agree on the identity of the arbitrator.

The scheme administrator is required to refer an access dispute to a pool arbitrator no later than 15 business days after the receipt of the access dispute notice. Within 5 business days

[24] This exclusion is consistent with rule 118 of the NGR. It is understood that this exclusion exists because there can be competition for the construction and operation of extensions from a range of parties, whereas, expansions can only be provided by the pipeline operator. Therefore, the market power that can be exercised in negotiations for extensions should be constrained by competition from other parties, similarly to the development of new pipelines. Consistent with rule 118, disputes in relation to pipeline extensions are excluded from accessing the arbitration framework under the Rules.

of receipt of an access dispute notice the scheme administrator must determine the parties to the access dispute and give a notice to each party which:

- identifies the parties to the access dispute;
- invites the parties to provide the scheme administrator within 10 business days of the dispute notice being given written submissions as to which if any of the pool arbitrators should be disqualified from appointment, with reasons;
- require the parties to notify the scheme administrator of the identity of the pool arbitrator agreed by the parties to determine the access dispute (if any) within 10 business days of the dispute notice being given; and
- informs the parties that in default of agreement being reached and notified to the scheme administrator within that time, the scheme arbitrator will select the arbitrator.

Under subrule (3) the parties to an access dispute must:

- as soon as practical after an access dispute notice is given notify the other parties to the dispute of at least two pool arbitrators the party will agree to be appointed as the arbitrator to determine the access dispute;
- negotiate in good faith to agree to the identity of the arbitrator for the access dispute from among the pool arbitrators; and
- notify the scheme administrator if agreement has been reached, including confirmation that the pool arbitrator is available to undertake the arbitration.

If the parties to the access dispute do not notify the scheme administrator of the identity of the pool arbitrator agreed by the parties within 10 business days of the dispute notice, the scheme administrator will make the selection. In the event the scheme administrator selects the arbitrator that decision is final and binding on the parties to the access dispute.

To assist parties to select an arbitrator, under rule 583 the scheme administrator must:

- publish on its website and keep up to date the name, contact details and a professional profile of each person in the pool of arbitrators; and
- establish and maintain for each pool arbitrator an indicative schedule of fees for the conduct of arbitrations by the pool arbitrator which may include fixed or capped rates for specified categories of access dispute which must be provided on the request of a prospective user, a service provider or any party to an access dispute.

Consistent with normal practice and based on an equivalent provision in the CAAs, an exclusion of liability for the arbitrator is provided by subrule (7). This is supported by a rule allowing the arbitrator to seek an indemnity from claims, similar to the approach taken in the National Electricity Rules.

In the event the arbitrator does not make a final access determination within the time specified in rule 572, withdraws from or abandons the arbitration, or is unable to continue the arbitration, any party to the access dispute may notify the other parties and the scheme administrator that they require a new pool arbitrator to be appointed. The same process as outlined above is to be followed to make the new appointment.

Statements to be provided to the arbitrator on appointment – rule 567

Given the short time frame required for making determinations, rule 567 provides for the parties to give information to the arbitrator (and the other parties) soon after the appointment is made. The information takes the form of statements about the access negotiation information they provided in negotiations, any further information that the party seeks leave to rely on, and the determination they say should be made. The statement about access negotiation information must, if the arbitrator so requires, be verified by statutory declaration of an appropriate officer of the party.

The timeframes required are as follows:

- Within 10 business days of the access dispute being referred to the arbitrator a statement:
    - listing the access negotiation information provided to the other parties to the negotiations during negotiations and that the party seeks to rely on in the arbitration;
    - identifying with reasonable particularity any further information not provided by the party to the other parties to the negotiations before the access dispute notice was given and that the party seeks leave under rule 568(1) to submit and rely on in the arbitration or; that the party requested from another party to the negotiations and that has not been provided by that other party.
- Within 15 business days of referral to the arbitrator a statement of the access determination the party claims should be made and the matters supporting the party's claim.

These timeframes are intended to reflect that the parties have had a period of negotiation in which to establish the areas of disagreement between them, put forward their arguments and all supporting information before the other party in an effort to negotiate a mutually acceptable outcome.

The arbitrator is left to determine the time within which the parties must provide statements in response.

Subrule (4) provides for a party to amend or supplement during the course of the arbitration any statement made by the party under this rule with the agreement of the arbitrator.

Arbitrator to give effect to rule 562 – rule 568

Rule 568 is directed at ensuring the arbitrator, in so far as doing so is consistent with the proper consideration of the access dispute, gives effect to the obligation to exchange information in negotiations.

Subrule (1) requires a party to an access dispute wishing to submit and rely on information that it did not provide to the other parties to the negotiations before the access dispute notice was given, to seek the leave of the arbitrator. In determining whether to grant leave the arbitrator must:

- seek to give effect to rule 562 insofar as doing so is consistent with the proper consideration of the access dispute; and
- have regard to whether the party seeking leave was given a reasonable opportunity to provide the access negotiation information to the other parties to the dispute before the access dispute notice was given.

Under subrule (3) an arbitrator may direct a party to an access dispute to provide information that it did not provide to the other parties to the negotiations before the access dispute notice was given and the party must comply with the direction without undue delay.

Drawing on section 25 of the *Commercial Arbitration Act* 2010 (NSW), subrule (4) provides examples of the steps the arbitrator may take if there has been inordinate and inexcusable failure by a party to comply with the obligation of the party to provide information in accordance with rule 562 or subrule (3) or if a party fails to do any other thing necessary for the proper and expeditious conduct of the arbitration, including drawing adverse inferences from the failure to comply.

Arbitration procedures – rule 574

Section 216S of the NGL applies Chapter 6, Part 6 of the NGL (with some exclusions), which provides the arbitrator with broad discretion to determine the procedures to apply in the arbitration.

Consistent with the GMRG's final design and the procedural flexibility afforded to arbitrators under jurisdictional CAAs, rule 574 provides for the arbitrator to determine the procedures for the arbitration and conduct the arbitration in such manner as it considers appropriate, including whether to hold any dispute hearings.

Some additional procedural provisions, based primarily on section 24 of the *Commercial Arbitration Act 2010* (NSW) are also included, such as the requirement for the arbitrator to, as soon as practicable after the arbitrator's appointment and after consultation with the parties, notify the parties of the procedures and timetable to apply to the arbitration.

Experts – rule 575

An arbitrator is able to appoint an independent expert to assist it in determining the matters in dispute. Chapter 6, Part 6 of the NGL (as applied under Chapter 6A) permits the arbitrator to refer any matter to an independent expert and accept the expert's report as evidence.[25]

Under Rule 575(1) unless otherwise agreed by the parties, if the arbitrator appoints an independent expert, the arbitrator may require a party to give the independent expert any relevant information or to produce, or to provide access to, any relevant documents or places for the independent expert's inspection.

[25] *National Gas Law*, section 199(1)(e).

Under rule 575(3), before appointing an independent expert under subrule (1), the arbitrator must notify the parties to the dispute of its intention to refer a matter to an independent expert, identifying: the proposed independent expert and the amount that the independent expert will charge and obtain the consent of the parties to the maximum amount that may be charged by the independent expert. This is intended to reduce cost risks for parties.

Confidentiality – rule 576

The parties to an access dispute and an arbitrator must not disclose confidential information in relation to the course of the arbitration unless the disclosure is allowed under rule 576.

Subrule (3) provides that, subject to an order under section 200 of the NGL, confidential information in relation to the course of the arbitration may be disclosed by a party or the arbitrator:

- with the consent of all the parties to the access dispute;
- in the case of a party, to a professional or other adviser of the party who agrees to maintain the confidentiality of the confidential information;
- in the case of the arbitrator, to an independent expert appointed by the arbitrator who agrees to maintain the confidentiality of the confidential information;
- if it is necessary to ensure that a party has a reasonable opportunity to present the party's case and the disclosure is no more than reasonable for that purpose;
- if it is necessary for the establishment or protection of a party's legal rights in relation to a third party and the disclosure is no more than reasonable for that purpose;
- if it is necessary for the purpose of enforcing an access determination and the disclosure is no more than reasonable for that purpose;
- if it is required by, or necessary for the purposes of, these Rules or the *NGL*;
- if the disclosure is in accordance with an order made or a subpoena issued by a court of competent jurisdiction; or
- if the disclosure is authorised or required by a law of a participating jurisdiction or required by a competent regulatory body, and the person making the disclosure gives written details of the disclosure (including an explanation of the reasons for the disclosure) to:
    - if the person is a party – the other parties and the arbitrator; and
    - if the arbitrator is making the disclosure – all the parties.

These exceptions are drawn from similar exceptions in the CAAs.

4.5.3 Arbitration principles

Rule 569 sets out the pricing and other principles that the arbitrator must take into account in making an access determination. The arbitration principles are a key element of the framework, as they establish the basis on which shippers should expect to be able to access the services provided by non-scheme pipelines.

As noted in section 4.2 (see rule 546), the objective of the framework is to facilitate access to pipeline services provided by non-scheme pipelines on reasonable terms, which is taken to mean at prices and on other terms and conditions that, so far as practical, reflect the outcomes of a workably competitive market. The principle is reflected in subrule (1), which states that the arbitrator **must** take into account the following matters when making a final access determination:

- the principle that access to pipeline services on a non-scheme pipeline must be on reasonable terms as defined in rule 546(1);
- the pricing principles; and
- the operational and technical requirements necessary for the safe and reliable operation of the pipeline.

When making a final access determination, subrule (2) states that the arbitrator **may** also take the following matters into account:

- the legitimate business interests of the service provider;
- the interests of all persons who have rights to use the pipeline;
- the value to the service provider of any extension or expansion of the pipeline the cost of which is borne by another person; and
- the value to the service provider of interconnections to the pipeline the cost of which is borne by another person.

These matters are based on the principles set out in the Competition Principles Agreement and the *Competition and Consumer Act 2010* (Cth) (CCA)[26] (see Box 4.1 for an overview of how these principles have previously been interpreted). When applying these principles, the arbitrator would be expected to do so consistently with, and in light of, furthering the overarching objective of the framework and in a manner that is not inconsistent with the principles set out in subrule (1).

[26] This list mirrors the list of principles in the CPA although two principles have been removed (i.e. the direct costs of providing access to the service and the economically efficient operation of the pipeline) because they are already reflected in the pricing principles.

Box 4.1: Interpretation of CCA principles

On 19 July 2007, the ACCC issued its Arbitration Report regarding an access dispute between Services Sydney Pty Ltd and Sydney Water Corporation. The dispute related to the methodology for pricing access to declared (under the then *Trade Practices Act 1974*) sewage transportation services supplied by Sydney Water by means of its North Head, Bondi and Malabar sewerage reticulation networks. The ACCC interpreted the relevant principles as follows:[27]

Legitimate business interests of the provider, and the provider's investment in the facility

> *"The term 'legitimate business interests of the provider' refers to the commercial considerations of the service provider such as the provider's obligations to shareholders and other stakeholders, including the need to earn normal commercial returns on the facility. The term '…and the provider's investment in the facility' reinforces that the access provider should be able to recover the costs (including earning a normal commercial return) of its efficient investment in the facility. Consideration of section 44X(1)(a) also includes ensuring that the access provider has appropriate incentives to maintain, improve and invest in the efficient provision of the facility."*

The interests of all persons who have rights to use the service

> *"All persons that have rights to use the service refers to the access provider, current users of the service and future potential access seekers. The Commission considers that access prices should reflect efficient provision of the service and should not incorporate pricing designed to generate monopoly profits or to artificially favour some persons who have rights to use the service over other such persons."*

The value to the provider of extensions whose cost is borne by someone else

> *"This criterion requires that if an extension is made to the facility at the cost of someone other than the access provider, then access terms and conditions should take into account the economic value to the access provider of the extension. For example, if an access seeker bears the cost of extending the facility, and this extension is expected to provide benefits to the access provider, then the access price could be lower than it would otherwise be, so as to reflect the value to the provider of such benefits."*

The value to the provider of interconnections whose cost is borne by someone else

> *"This criterion operates in a similar fashion to section 44X(1)(e). It requires that if an interconnection is made to the facility at the cost of someone other than the access provider, then the access terms and conditions should take into account the economic value to the access provider of the interconnection."*

Operational and technical requirements necessary for safe and reliable operation

> *"The Commission notes in the ACCC's guide to the resolution of telecommunications access disputes that an access price should not lead to arrangements between access providers and access seekers that encourage the unsafe or unreliable operation of a facility. This criterion may often be more relevant to the consideration of non-price terms and conditions."*

Price disputes

The matters that an arbitrator must have regard to include the **pricing principles** in rule 569(3), which state the following:

(a) The price for access to a pipeline service should reflect the cost of providing that service, including a commercial rate of return that is commensurate with the prevailing

[27] The ACCC's Arbitration Report, including the final determination and statement of reasons, is available at: http://registers.accc.gov.au/content/index.phtml/itemId/867741.

conditions in the market for funds and reflects the risks the service provider faces in providing the pipeline service.

(b) When applying the principle in paragraph (a) to a pipeline service that when used affects the capacity of the non-scheme pipeline available for other pipeline services and is priced at a premium or a discount to the price for a firm haulage service on the relevant non-scheme pipeline (e.g. as available, interruptible or park and loan services), [28] the premium or discount must:

- take into account any opportunity cost or benefit to the service provider of providing the pipeline service, having regard to any effect on the cost of providing firm haulage services or the capacity of the non-scheme pipeline; and
- be consistent with the price for the pipeline service providing a reasonable contribution to joint and common costs.

For the purposes of subrule (3)(a), rule 569(4) states that the value of any assets used in the provision of the pipeline service:

(a) must be determined using asset valuation techniques that are consistent with the objectives of this Part set out in rule 546(1); and

(b) unless inconsistent with (a), the value of any assets is to be calculated as:

(i) the cost of construction of the pipeline and pipeline assets incurred before commissioning of the pipeline (including the cost of acquiring easements and other interests in land necessary for the establishment and operation of the pipeline);

plus:

(ii) the amount of capital expenditure since the commissioning of the pipeline;

less:

(iii) the return of capital recovered since the commissioning of the pipeline; and

(iv) the value of pipeline assets disposed of since the commissioning of the pipeline.

The asset valuation method set out in rule 569(4)(b) is consistent with the method in rule 77(1)(b), although the term 'depreciation' in rule 77(1)(b)(iii) has been replaced with 'return of capital recovered since the commissioning of the pipeline' to avoid any confusion about what is meant by the term 'depreciation'. The term 'return of capital' is used in this context to refer to the capital recovered through tariffs and any capital contributions made by shippers. Once an asset value has been determined by an arbitrator, the service provider will be required to report the value (see rule 581). It is intended that this value will be reported in the service provider's financial reports under Part 23 and updated annually (i.e. to adjust for subsequent capital expenditure, capital recoveries and asset disposals) on that basis.

[28] In the *Options Paper,* it was also noted that this type of principle could be applied to backhaul services, however, as noted in the *Final Design,* backhaul services do not actually involve the use of the pipeline's capacity. The GMRG therefore intends the price of backhaul services to be determined using the principles in paragraph (a).

As noted in section 3.2, the initial rules no longer require the arbitrator's decision to fall within the bounds set by the shipper's and service provider's offers.

Non-price disputes

In relation to non-price terms and conditions of access, the arbitrator will be required to take into account the matters set out in rule 569(1)(a) (i.e. access must be on reasonable terms as defined in rule 546(1)) and 569(1)(c) (relating to safe and reliable operation of the pipeline) and may also take into account the matters set out in rule 569(2).

4.5.4 Access determinations

Matters that may be dealt with in determinations – rule 570

Rule 570 provides guidance to the arbitrator about the matters that may be included in an access determination. While a determination does not have to require the service provider to provide access to the service sought by the prospective user, an access determination may:

- require the service provider for a non-scheme pipeline to provide access to a pipeline service;
- specify the price and other terms and conditions on which the prospective user has access to the pipeline service;
- require the service provider to permit another facility to be connected to the non-scheme pipeline;
- subject to subrule (5), require the service provider to carry out, either alone or in combination:
    - an expansion of the capacity of a non-scheme pipeline;
    - a conversion of a non-scheme pipeline to a bi-directional pipeline;
    - the development of a new receipt or delivery point;
    - an expansion of an existing receipt or delivery point; or
    - an interconnection with another pipeline or other facility;
- specify conditions to be satisfied before access to a pipeline service commences.

Under subrule (3) an access determination may require access to be provided for a service term different to that sought by the prospective user but must otherwise be made in relation to the pipeline service or services sought by the prospective user.

When making a determination, the arbitrator is also subject to a number of constraints under rule 570, including that an access determination:

- must not require the service provider to provide a pipeline service or carry out any of the activities referred to in subrule (2)(d) unless the provision of the pipeline service or activity is:
    - technically feasible; and
    - consistent with the safe and reliable operation of the pipeline.

- must not, unless the service provider agrees, require the service provider to:
  - extend the geographical range of a non-scheme pipeline; or
  - carry out any of the activities referred to in subrule (2)(d) unless the prospective user funds the activity in its entirety.
- must not provide for a prospective user to acquire an interest in a non-scheme pipeline by funding an expansion of the capacity of the pipeline unless the service provider agrees.

Interim access determinations – rule 571 (NGL section 199(2))

Under Chapter 6, Part 6 of the NGL, the arbitrator may provide an interim determination.

Given the terms of rule 570 (which extends to both final and interim determinations), an interim determination may put terms and conditions of access in place for the short term while a final determination is made.

An interim determination is only likely to be sought in instances where an existing contract is about to conclude and a user is seeking continuance of service provision. For example, in the event a contract would roll off while the arbitration is underway, an interim determination could be made to continue a user's access on existing terms and conditions until a determination is made (assuming the capacity is still available).

An interim access determination provides for access to a pipeline service before the final access determination is made and must be in writing and specify the terms and conditions on which the prospective user must be given access to the pipeline service including reasonable payment terms.

Under rule 571(2), if an interim determination is made that provides access to a non-scheme pipeline service, the final determination must provide for payment adjustments or other measures to account for any differences between the interim determination and the final determination.

Under subrule (4) an interim access determination takes effect from the later of the time specified in the access determination and the time it is communicated to the parties to the access dispute.

Final access determinations – rule 572 and 573

Under rule 572, the time limit for making a final access determination is 50 business days, which may be extended by agreement between the parties up to 90 business days. The time can be further extended if the arbitrator seeks advice from an independent expert, or if the arbitrator allows a party time to prepare access negotiation information not provided in negotiations.

The rule sets the administrative requirements for the form of the access determination and how it is communicated to the parties and the scheme administrator, including that it:

- be in writing and dated and signed by the arbitrator;

- identify the parties to the determination and the place the determination is made;
- set out the matters agreed by parties and the matters in dispute;
- set out the arbitrator's determination of the matters in dispute;
- be communicated by email when it is made to the parties to the access dispute and the scheme administrator; and
- be sent by post to the parties and the scheme administrator within 5 business days of being made.

Under rule 572(4), the arbitrator must provide the parties and scheme administrator a statement of reasons for the arbitrator's final access determination, which must explain how the arbitrator took into account the pricing and other principles outlined in the rules. The statement of reasons may be provided with the final access determination or within 20 business days of the final access determination being made.

Under rule 573, a final access determination takes effect from the later of the time specified in the determination and the time it is communicated to the parties to the access dispute. A final access determination is binding on the parties unless the prospective user chooses not to seek access to the service to which the final determination relates in accordance with 216Q(2) of the NGL.

A prospective user wishing to enter into an access contract giving effect to a final determination must notify in writing that decision to the other party to the access dispute and the scheme administrator within 10 business days of the determination being made. If the prospective user gives such a notice, the parties to the access dispute must enter into an access contract for the provision of access in accordance with the final access determination.

If a prospective user decides not to seek access to the service, the prospective user and any associate (as defined in the NGL) of the prospective user must not seek arbitration under the rules in relation to the same or a substantially similar pipeline service on the non-scheme pipeline the subject of the final access determination for a period of one year from the date of the final access determination.

4.5.5 Costs

Section 216V(1) of the NGL stipulates that the costs of arbitration will be shared equally between parties to the arbitration. Rule 580(2) specifies that the costs of arbitration include: the fees and expenses of the arbitrator; the fees and expenses of any expert retained by the arbitrator under rule 575; the costs of room hire; and the cost of any additional input (including expert reports) agreed by the parties to be necessary to the conduct of the arbitration.

In accordance with section 216V(3) of the NGL, rule 580 provides for the arbitrator, in making a final access determination or within 30 business days after the final access determination is made, to direct the arbitration costs be paid in unequal shares, taking into account:

- in the case of a party to the access dispute other than the service provider or prospective user – the role of the party in the access dispute and the arbitration;
- whether the prospective user elects not to enter into an access contract in accordance with the access determination;
- whether a party has conducted itself in the arbitration in a way that unnecessarily disadvantaged another party:
- whether a party has been responsible for unreasonably prolonging the time taken to complete the arbitration; and
- any other matter the arbitrator considers relevant.

The costs of the arbitration are a debt due by the party to the arbitrator, or the person to whom the arbitrator has ordered that they be paid.

Under rule 580(1) the parties to an arbitration must bear their own costs in accordance with section 216V(4) of the NGL.

4.5.6 Information to be published on access determinations

Under the initial rules, information on the existence of the arbitration but not the content of the final determination will be published on the AER website. The confidentiality of the content of the final determination, including the price and other terms and conditions, will protect the commercial interest of the parties from the disclosure of sensitive information.

Under rule 581(1), within a reasonable time of a final access determination being made, the scheme administrator must publish the following information on its website:

- the non-scheme pipeline the subject of the arbitration;
- with the consent of the prospective user, the parties to the arbitration;
- the name of the arbitrator who made the final determination;
- the time elapsed between the access dispute being referred to the arbitrator and the making of the final determination;
- which of the pipeline services offered on the non-scheme pipeline was the subject of the access dispute;
- whether the prospective user has given notice that it wishes to enter into an access contract in accordance with the final access determination; and
- if the final access determination includes a determination with respect to asset valuation, the valuation method adopted, the assets to which the valuation applied and the determination of the asset value.

The reputational harm to parties that may arise from this transparency is intended to further incentivise commercial agreements. It may also assist others in selecting an arbitrator with relevant experience. Further, the information published will be important inputs to the review that SCO is scheduled to undertake two years following implementation and will assess whether the framework is effectively advancing its objectives or if further action is required.

In the event a final determination is not made (for example if an arbitrator or prospective user terminates an arbitration), none of the information required by rule 581(1) would be published. Instead, under rule 581(2) the scheme administrator will be required to publish on its website information about the number of access disputes referred to arbitration and brought to an end before a final determination is made. This information would not reveal the identities of the parties or the arbitrator involved in the arbitration.

4.6 Scheme administrator and regulator roles

The AER has an important role under the framework, both as the scheme administrator and regulator.[29]

In its role as scheme administrator, the AER is required to provide oversight and administration of the arbitration mechanism in accordance with the NGL, and Division 4 and 5 of the Part 23. This includes the following roles:

- Establishing a pool of arbitrators (see rule 583).
- Referring access disputes to arbitration (see rule 565).
- Selecting an arbitrator in the event parties are unable to agree (see rule 565(4)).
- Publishing information about access determinations (see rule 581).
- Correcting errors in access determinations (see rule 579).
- Publishing non-binding guides on the AER website providing procedural guidance to an arbitrator and potential parties to an arbitration (see rule 584). This should help ensure potential parties and arbitrators understand the procedural requirements associated with arbitration under the NGL. Reflecting that any such guides will be procedural in nature and non-binding, the development and updating of any guides will not be subject to the AER's standard consultation procedures.

In its role as regulator, the AER is responsible for:

- Developing and publishing, and from time to time updating, the financial reporting guidelines, which provides for the publication of financial information about each non-scheme pipeline (see rule 555).
- Compliance and enforcement of the information disclosure obligations of service providers in relation to non-scheme pipelines under Divisions 2 and 3 that are not subject to an exemption.
- Granting exemptions in accordance with Division 6.

4.7 Exemptions

Division 6 of the initial rules provides an exemption mechanism, which allows non-scheme pipeline operators to apply to the AER for an exemption from the framework in its entirety, or some or all of the information reporting requirements in certain circumstances.

[29] The ERA will play these roles in Western Australia.

Under rule 585 the AER may only grant exemptions in relation to three categories of exemption (as outlined in Table 4.2) and the following exemption criteria:

- **A non-scheme pipeline is not a third party access pipeline** (rule 585(5)(a)): A non-scheme pipeline is a third party access pipeline if any pipeline services on the non-scheme pipeline are offered or provided, directly or indirectly, to any person other than:
  - the service provider for the non-scheme pipeline;
  - a related body corporate[30] of the service provider for the non-scheme pipeline; or
  - a joint venture in which the service provider for the non-scheme pipeline or a related body corporate of the service provider is a joint venture participant;

  In those cases where the pipeline operator is not providing third party access (i.e. the service provider and shipper are related parties), a third party shipper wanting access to such a pipeline should be required to apply for coverage. While coverage is often thought about as the test for regulation, it is also the process by which third parties can try and obtain access to facilities that would not otherwise provide that access. In the GMRG's view this is still the appropriate means by which third party access to a pipeline that is not already providing that access should be sought. Some examples of the types of pipelines that could fall into this category include:
  - pipelines servicing gas fired generators, where the pipeline operator and gas fired generator are related parties; and
  - pipelines servicing LNG facilities, where the pipeline operator and LNG proponents are related parties.
- **Non-scheme single user pipelines** (rule 585(5)(b)): A non-scheme single user pipeline is a third party access pipeline and all pipeline services are provided to a single user, taking into account pipeline services provided both directly and indirectly by the service provider. The costs of requiring the operators of single shipper pipelines to publish the information contained in Division 2 of the final initial rules will likely outweigh the benefits. The operators of these pipelines will, however, still be subject to Division 3 and Division 4.
- **Small non-scheme pipelines**:[31] For small pipelines the costs of some of the information disclosure in Division 2 is likely to outweigh the benefits. In the case of the pipeline information and pipeline service information, the cost of this disclosure is expected to be relatively low. However, the costs associated with providing service usage information, service availability information, standing terms, weighted average price information and financial information by these pipelines would likely outweigh the benefits. Like single shipper pipelines, the operators of these pipelines will still be subject to the requirements of Division 3 and Division 4.

30 In accordance with rule 585(5)(c), related body corporate has the meaning in the *Corporations Act 2001* of the Commonwealth.

31 Small non-scheme pipeline refers to a non-scheme pipeline that, at any time, the average daily injection of natural gas into the non-scheme pipeline calculated over the immediately preceding 24 months is less than 10TJ/day.

Table 4.2: Exemption framework

Exemption category	Exemption criteria
1. An exemption from the operation of Division 3 and Division 4.	The non-scheme pipeline is not a third party access pipeline (i.e. the pipeline operator and shipper are related parties).
2. An exemption from the obligation to publish information under Division 2 in relation to the non-scheme pipeline.	The non-scheme pipeline is not a third party access pipeline (i.e. the pipeline operator and shipper are related parties). The non-scheme pipeline is a single user pipeline – that is, the pipeline provides third party access but all relevant services are provided to a single user.
3. An exemption from the obligations to publish information under Division 2 other than pipeline information and pipeline service information.	The average daily injection of natural gas into the non-scheme pipeline calculated over the immediately preceding 24 months is less than 10TJ/day.

On the application of a service provider, the AER must grant an exemption in respect of the service provider's non-scheme pipeline, if:

- the exemption sought is one of the exemption categories outlined in rule 585(4) (as reflected in Table 4.2);
- the service provider has demonstrated to the reasonable satisfaction of the AER that the non-scheme pipeline satisfies the exemption criteria applicable to the exemption category; and
- the AER is otherwise satisfied that in all the circumstances the exemption should be granted.

Exemptions may be granted subject to conditions determined by the AER, in accordance with rule 586. The GMRG has recommended that rule 586(2), which requires a service provider of a non-scheme pipeline for which an exemption has been granted to comply with any conditions of the exemption, be classified as a civil penalty provision.

Under rule 588, an application for an exemption must be in the form, and contain the information, specified in any guidelines issued by the AER. Within 20 business days of receiving an exemption application, the AER may seek further information if, in the AER's reasonable opinion, the application is incomplete or requires clarification.

The AER must decide whether to grant or refuse to grant an exemption application within 40 business days after the application is made, unless the AER has extended the 40 business day time period by a further 20 business days by giving the applicant written notice of the extension no later than 30 business days after the application was made.

The AER may also revoke or vary exemptions, including any conditions associated with an exemption, on the application of the service provider, any other interested party or on the initiative of the AER.

Exemptions granted by the AER will take effect on the date specified by the AER in its decision to grant the exemption and end on the date specified in the exemption or, if earlier, the date a revocation of the exemption comes into effect.

If a service provider is granted an exemption and the circumstances of the non-scheme pipeline change such that the pipeline no longer qualifies for an exemption, the service provider must notify the AER without delay. To encourage service providers to notify the AER of changes in circumstances of this nature, the GMRG has recommended that rule 585(8) be classified as a civil penalty provision. It would also be open to the AER to impose conditions to facilitate compliance monitoring, such as requiring providers to report on an annual basis on whether the exemption is still valid. This is similar to the approach the AER uses to monitor the compliance of scheme pipelines with a range of other provisions in the NGL and NGR.

Under rule 585(7), the AER must establish, publish and maintain a register of exemptions and exemption revocations made under Division 6.

4.8 Transitional arrangements

The final initial rules also contain transitional rules that form part of Schedule 4 of the NGR. The transitional rules address the transitional arrangements in relation to the initial financial reporting guideline and the initial financial reporting and average weighted prices.

Under rule 552(2), non-scheme pipeline service providers are required to publish service and access information, the standing terms and weighted average prices on their websites no later than 20 business days after the application date for the non-scheme pipeline (generally 20 business days after 1 January 2018).

It will take longer for pipeline operators to be in a position to publish financial reports, because before this information can be published:

- the guideline on the preparation of financial reports will need to be developed and published by the AER; and
- pipeline operators may need time to amend their financial reporting systems to be able to produce the information required and comply with the guideline.

The commencement of financial reporting by pipeline operators is linked to the publication of the financial reporting guideline.

Rule 1 in Schedule 4, Part 1 of the initial rules requires the AER to publish the initial financial reporting guidelines under rule 557(1) no later than 5 months after the commencement of the initial rules (1 January 2018). Before publishing the initial financial reporting guidelines, consultation must be undertaken, whether it be undertaken by the AER or any other person. To ensure this timeframe is achieved, the development of the initial guideline is being accelerated by commissioning the assistance of a consulting firm with expertise and experience in financial reporting requirements. The GMRG is currently working with the AER and ERA to engage a suitable consultant. The final initial guidelines

will be publicly released and consulted on, with the initial guidelines expected to be published in December 2017.

Rule 2 in Schedule 4, Part 1 of the initial rules requires the service provider of a non-scheme pipeline to prepare and publish the financial information under rule 555 and average weighted price information under rule 556 for its non-scheme pipelines as follows:

- where the financial year of the service provider current on 1 December 2017 ends on or before 30 June 2018 – the last date of publication is 31 October 2018 for the six month period ending on 30 June 2018; and
- where the financial year of the service provider current on 1 December 2017 ends after 30 June 2018 – the last date of publication is 31 January 2019 for the six month period ending on 30 September 2018.

Following the provision of the initial financial information, service providers will be required to provide this information annually in accordance with rule 552(2).

4.9 Derogations

In the context of the NGL, derogations can be understood to cover rules or legislative provisions that limit, vary or alter the effect, scope or operation of the NGL or NGR in a particular jurisdiction. This is derived from the terms of the Australian Energy Market Agreement, which also requires any such derogations to be agreed by all Energy Ministers. Derogations may apply generally or in relation to a person (or class of persons) or asset type (or class of assets).

Schedule 4 of the initial rules includes two derogations requested by the relevant jurisdictions.

The derogation provided for under Part 2 exempts the Northern Gas Pipeline (NGP) from the operation of Part 6A of the NGL for a period of 15 years from when the pipeline is commissioned. The NGP is being developed by Jemena Northern Gas Pipeline Pty Ltd (Jemena) following a competitive tender process conducted by the Northern Territory Government in 2015 and is due to be completed in late 2018. The Project Development Agreement signed by Jemena and the NT Government sets out the access principles that were agreed to as a result of the competitive process and are intended to address many of the same issues the framework is designed to address.

Under Part 3, the derogation provides a fast-track arbitration mechanism, available in relation to a non-scheme pipeline any part of which is situated in Tasmania for a period of one year from the commencement of the initial rules.