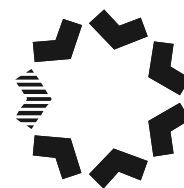


Light regulation of covered pipeline services

A guide to the function and powers of the National Competition Council under the National Gas Law
Part C – Light regulation of covered pipeline services



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The Council is updating its guides to reflect recent legislative changes and other developments, in particular those resulting from the passage of the Trade Practices Amendment (Infrastructure Access) Act 2010 and the High Court's decision in relation to the declaration of two Pilbara iron ore railways.

Until the updated guides are completed there is a heightened risk that some parts of the guides may not reflect recent amendments or represent the Council's current approach to particular issues.

On 1 January 2011 the Competition and Consumer Act 2010 (Cth) (CCA) replaced the Trade Practices Act 1974 (TPA). Until the guides are updated, references to the Trade Practices Act or TPA can be taken as references to the Competition and Consumer Act or CCA.

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The National Competition Council

The National Competition Council was established on 6 November 1995 by the *Competition Policy Reform Act 1995* (Cth) following agreement by the Australian Government and state and territory governments. It is a federal statutory authority which functions as an independent advisory body for all governments on third party access matters.

Information on the National Competition Council, its publications and its current work program can be found on the internet at www.ncc.gov.au or by contacting the Council on (03) 9981 1600 or by email to info@ncc.gov.au.

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Foreword

The National Competition Council has prepared a Guide to its functions and powers under the National Gas Law. This guide may be of relevance to parties interested in dealing with the Council under the National Gas Law.

The Guide is in four parts. Each part is available on the Council's website at www.ncc.gov.au. The Guide will be updated periodically as required.

Part A examines the rationale for the reform of the national gas access regulatory regime and the passage of the National Gas Law, and provides an overview of the National Gas Law framework. Part B examines the coverage and classification of pipelines. In particular, this Part looks at the Council's role in making coverage and coverage revocation recommendations, as well as its role in respect of the reclassification of pipelines. This Part C of the Guide has been developed to assist and inform on the Council's role in making and revoking light regulation determinations. Part D concerns the Council's functions in making no-coverage recommendations and price regulation exemption recommendations in respect of greenfields pipelines.

Glossary of terms and abbreviations

Abbreviation	Description
Access arrangement	An arrangement setting out the terms and conditions of access to pipeline services provided by means of a pipeline
Australian Energy Market Commission or AEMC	The Australian Energy Market Commission established by s 5 of the <i>Australian Energy Market Commission Establishment Act 2004 (SA)</i>
Australian Energy Market Operator or AEMO	A company limited by guarantee, established in 2009 by COAG and the MCE to manage the National Electricity Market (NEM) and the retail and wholesale gas markets of eastern and southern Australia and oversees system security of the NEM electricity grid and the Victorian gas transmission network. AEMO is also responsible for national transmission planning and the establishment of STTMs for gas.
Australian Energy Regulator or AER	The Australian Energy Regulator established by s 44AE of the <i>Competition and Consumer Act 2010 (Cth)</i>
CCA	<i>Competition and Consumer Act 2010 (Cth)</i>
Council or NCC	National Competition Council established by s 29A of the <i>Competition and Consumer Act 2010 (Cth)</i>
Coverage or covered	The status of a pipeline which is, or is deemed to be, the subject of a coverage determination and accordingly subject to economic regulation under the National Gas Law
Criminal Code	<i>Criminal Code Act 1995 (Cth)</i>
End user	A person who acquires natural gas or proposes to acquire natural gas for consumption purposes
ERA	The Economic Regulation Authority established by s 4 of the <i>Economic Regulation Act 2003 (WA)</i>
Expert Panel Report	<i>Expert Panel on Energy Access Pricing, Report to the Ministerial Council on Energy, April 2006</i>
Form of regulation factors	The factors relating to market power set out in s 16 of the National Gas Law
Full regulation or access arrangement regulation	The form of regulation applicable to covered pipelines without a light regulation determination

Abbreviation	Description
Gas Code	The National Third party Access Code for Natural Gas Pipeline Systems set out in Schedule 2 to the <i>Gas Pipelines Access (South Australia) Act 1997</i>
Light Regulation	The form of regulation applicable to a covered pipeline when a light regulation determination of the Council is in force
Limited access arrangement	An access arrangement that is not required to make provision for price or revenue regulation but deals with the matters for which the National Gas Law and the National Gas Rules require provision to be made in an access arrangement
National Gas Law or NGL	The Schedule to the <i>National Gas (South Australia) Act 2008</i>
National Gas Objective	The objective set out in s 23 of the National Gas Law
National Gas Rules or Rules	The rules initially made by the South Australian Minister under s 294 of the National Gas Law and include any amendments to the Rules made by the AEMC under the National Gas Law
MCE	The Ministerial Council on Energy established on 8 June 2001, being the Council of Ministers with primary carriage of energy matters at a national level comprising the Ministers representing the Commonwealth, the States, the Australian Capital Territory and the Northern Territory
MCE Decision	The Ministerial Council on Energy, <i>Review of the National Gas Pipelines Access Regime – Decision</i> , May 2006
Productivity Commission Report	The Productivity Commission Inquiry Report No. 31, <i>Review of the Gas Access Regime</i> , 11 June 2004
Prospective user	A person who seeks or wishes to be provided with a pipeline service by means of a scheme pipeline
Queuing requirements	Terms and conditions providing for the priority that a prospective user has, as against any other prospective user, to obtain access to spare capacity and developable capacity

Abbreviation	Description
Second Reading Speech	The Speech by the Hon. Mr Conlon, MP on the second reading of the <i>National Gas (South Australia) Bill 2008</i> found in the South Australian Hansard, House of Assembly, 9 April 2008, pp 2884-2916
Service provider	The owner, controller or operator of a pipeline
Regulations	<i>National Gas (South Australia) Regulations 2008</i>
User	<p>A person who—</p> <ul style="list-style-type: none"> • Is a party to a contract with a service provider under which the service provider provides or intends to provide a pipeline service to that person by means of a scheme pipeline; or • Has a right under an access determination to be provided with a pipeline service by means of a scheme pipeline

Version history

Version	Modifications made
July 2011	Minor modifications following the renaming of the <i>Trade Practices Act 1974</i> (Cth) to the <i>Competition and Consumer Act 2010</i> (Cth) (with effect 1 January 2011)
February 2010	Minor modifications following the commencement of <i>National Gas Access (WA) Act 2009</i> (WA) and the <i>National Gas (South Australia) (National Gas Law—Australian Energy Market Operator) Amendment Act 2009</i> (SA)
May 2009	First published

1 Overview

- 1.1 The National Gas Law (NGL) is set out in the Schedule to the *National Gas (South Australia) Act 2008* (SA and commenced on 1 July 2008. It is applied as a law of South Australia by that Act, and as a law of other jurisdictions by their Application Acts.¹
- 1.2 The National Competition Council (the Council) is the body under the NGL that has the responsibility of deciding whether or not to make a light regulation determination in respect of a covered pipeline.
- 1.3 This Part C of the Guide outlines the Council's role in making and revoking light regulation determinations under the NGL, and seeks to assist parties seeking the light regulation of pipeline services and others involved in the Council's consideration of such applications.

Overview of Part C of the Guide to the National Gas Law

Light regulation – Policy background

- 1.4 This section sets out the policy background to the light regulation regime and outlines the key differences between the regulation of a pipeline with a light regulation determination and regulation through an access arrangement.

Light regulation determinations – Overview

- 1.5 This section outlines the high level framework governing the making of light regulation determinations derived from the NGL.

Decisions on light regulation when pipeline is not a covered pipeline (but an application for a coverage determination has been made)

- 1.6 This section outlines the framework for joint consideration of light regulation and coverage when a coverage application is made in respect of a pipeline.

Decisions on light regulation when pipeline is a covered pipeline

- 1.7 This section outlines the framework for consideration of light regulation for covered pipelines which have an applicable access arrangement in force.

¹ See *National Gas (Queensland) Act 2008* (Qld); *National Gas (New South Wales) Act 2008* (NSW); *National Gas (ACT) Act 2008* (ACT); *National Gas (Victoria) Act 2008* (Vic); *National Gas (Tasmania) Act 2008* (Tas); *National Gas (Northern Territory) Act 2008* (NT); *Australian Energy Market Act 2004* (Cth). Western Australia applied the NGL in its jurisdiction on 1 January 2010 under the *National Gas Access (WA) Act 2009* (WA).

Section 122 – Principles governing light regulation determinations

1.8 This section analyses the key test for making and revoking light regulation determinations. It notes the focus upon a 'future with and without' analysis of the effectiveness and costs of each form of regulation guided by the application of the national gas objective, form of regulation factors and other relevant considerations. The primary test centres around the issues of effectiveness and cost, and the consideration of the national gas objective, each form of regulation factor and other relevant matters takes place in the application of the primary test.

Form of regulation factors – relevant considerations

1.9 This section further examines each of the form of regulation factors and their particular focus on the degree of market power and interrelationship with the coverage criteria.

National Gas Rules – requirements for making light regulation determinations

1.10 This section sets out the detailed process considerations for making a light regulation determination including what a service provider's application must contain, and the Council's obligations in following the standard consultative procedure.

Revocation of light regulation determinations

1.11 This section sets out the requirements for revocation of a light regulation determination either where the service provider requests this or another party applies for a revocation.

Merits review of light regulation decisions

1.12 This section notes the basic merits review rights which apply to the Council's decisions.

Other issues and jurisdictional differences

1.13 This section outlines a number of jurisdictional differences to the light regulation framework, particularly with regard to Western Australia and Queensland.

2 Light regulation – Policy background

The National Gas Law

- 2.1 The NGL is set out in the Schedule to the *National Gas (South Australia) Act 2008 (SA)* which commenced on 1 July 2008. It is applied as a law of South Australia by that Act, and as a law of other jurisdictions by their Application Acts.²
- 2.2 The NGL has been developed to reform the governance arrangements for the regulation of national gas pipeline services in Australia. It replaces the Gas Pipelines Access Law (including the Gas Code) which previously regulated pipeline services throughout Australia. Broadly speaking, these reforms separate high level policy direction, economic regulation, rule making, and rule enforcement. They are intended to operate so as to encourage efficient investment in gas infrastructure, streamline the rule change process and increase transparency in the gas market. The NGL is modelled on the National Electricity Law.³ The increased consistency between electricity and gas regulation is expected to strengthen the national character of the governance and economic regulation of the energy sector.⁴
- 2.3 Like the Gas Pipelines Access Law before it, the NGL only applies economic regulation to 'covered pipelines'. These are pipelines which meet the coverage criteria.⁵ Accordingly, the covered pipelines which are being assessed under this Part C can be taken to have a degree of market power which warrants some regulatory intervention to promote overall efficiency. The question which this Part C focuses on is the degree of regulatory intervention which is appropriate.

² See *National Gas (Queensland) Act 2008 (Qld)*; *National Gas (New South Wales) Act 2008 (NSW)*; *National Gas (ACT) Act 2008 (ACT)*; *National Gas (Victoria) Act 2008 (Vic)*; *National Gas (Tasmania) Act 2008 (Tas)*; *National Gas (Northern Territory) Act 2008 (NT)*; *Australian Energy Market Act 2004 (Cth)*. Western Australia applied the NGL in its jurisdiction on 1 January 2010 under the *National Gas Access (WA) Act 2009 (WA)*.

³ The National Electricity Law is set out in the Schedule to the *National Electricity (South Australia) Act 1996 (SA)*.

⁴ See generally the Second Reading Speech for the National Gas (South Australia) Bill 2008, Parliament of South Australia, Hansard, 9 April 2008 (Second Reading Speech) and clause 2.1 of the Australian Energy Market Agreement 2004 as amended in 2006 (AEMA).

⁵ Note that a number of pipelines remain covered pipelines in light of their original inclusion in Schedule A to the Gas Code and accordingly have never had the coverage criteria independently applied to them. All of these pipelines may be the subject of an application for revocation of coverage.

'Light handed' regulation

- 2.4 One new feature introduced by the NGL is the availability of a 'light handed' regulatory regime. This regime was the outcome of a number of reviews and Ministerial decisions including:
- Productivity Commission Inquiry Report No. 31, Review of the Gas Access Regime, 11 June 2004 (the Productivity Commission Report)
 - Expert Panel on Energy Access Pricing, Report to the Ministerial Council on Energy, April 2006 (the Expert Panel Report), and
 - Ministerial Council on Energy, Review of the National Gas Pipelines Access Regime – Decision May 2006 (the MCE Decision).
- 2.5 This policy background is recognised in the Second Reading Speech for the National Gas (South Australia) Bill 2008⁶ (the Second Reading Speech).
- 2.6 This regime is intended to operate so that not all covered pipelines will necessarily be subject to 'full' regulation under the access arrangement process. Rather, eligible pipeline service providers, operating covered pipelines, will be able to apply for a 'light regulation determination' to avoid the upfront setting of reference tariffs (price regulation) under the access arrangement process.
- 2.7 This new regime is intended to implement a number of key policy considerations common to both the Productivity Commission Report and Expert Panel Report. The principal concern under the NGL is to ensure that the form of regulation that is appropriate for particular pipeline services, is proportionate to the degree of market power that is involved.⁷ Costly forms of regulation should be adopted only where there is the potential for significant inefficiencies to arise from the exploitation of market power.⁸
- 2.8 The access arrangement process involves direct control being imposed on the prices and related terms and conditions of service supply, through upfront regulatory processes. This form of regulation often leads to significant administrative costs to the regulated service provider and the regulator. Direct regulation in this manner is still considered to be an appropriate form of regulation in cases where significant market power is possessed by the pipeline service provider.⁹
- 2.9 The move to providing for a lighter form of regulation under the NGL involves regulatory methods that do not control prices directly, but emphasise commercial negotiation and information transparency, with regulatory intervention through the

⁶ South Australian Hansard, House of Assembly, 9 April 2008, pp 2884-2916.

⁷ Expert Panel Report p 44.

⁸ Ibid.

⁹ Ibid pp 44-45.

right to the arbitration of disputes, being retained as a default. The intention in introducing this lighter form of regulation is that, through its use in appropriate circumstances, the administrative costs to the pipeline services provider and the regulator will be lower.¹⁰ This less intrusive form of regulation is considered to be appropriate where the market power exercised by the provider is less substantial and there is the potential for contestability for the services to emerge. It may also be appropriate where the number of access seekers is relatively small and these parties can themselves exercise some countervailing market power in the course of commercial negotiations. Further, light regulation may be an appropriate option for regulation where particular assets are in a transition towards effective competition.¹¹

- 2.10 Light regulation, in providing for a negotiate/arbitrate regime, offers various participants in the gas sector a different avenue for access where particular risks are differently balanced. Light regulation may provide timelier and lesser cost outcomes than full regulation. Where negotiations are successful, light regulation is likely to result in reduced front end costs and delay. However, if a negotiation is unsuccessful additional time will be required in order to resolve an access issue and back end costs are likely to be higher. Part of the Council's determination on the form of regulation involves evaluating the balance of the risks involved in a change in the form of regulation.

Key features of light regulation v. full regulation

- 2.11 It is important to understand the regulatory framework that applies to the pipeline if a light regulation determination is made compared to full regulation under an access arrangement. Because a level of market power is present for the pipeline to be a covered pipeline, both forms of regulation have mechanisms to protect third party users. The decision about light regulation is about deciding which of those options is more appropriate for a particular covered pipeline. Many obligations of the regime are common for light regulation and full regulation pipelines with the requirement to submit a full access arrangement being the key difference in the form of regulation. The main regulatory elements of each form of regulation are set out in the following table.

¹⁰ Ibid.

¹¹ Ibid.

Table 2-1 Key features of light v. full regulation

Full (access arrangement) regulation	Light regulation (additions or differences from full regulation)
<p>Service provider subject to general duties:</p> <ul style="list-style-type: none"> • Must be a specified legal entity (principally a corporation - s 131). • Must not engage in conduct to prevent or hinder access (s 133). • Obligated to disclose gas supply information in certain circumstances (r 138). 	<p>No difference.</p>
<p>Subject to 'ring-fencing' requirements</p> <ul style="list-style-type: none"> • Must not carry on a related business (s 139). • Must keep marketing staff separate from associate's related businesses (s 140). • Must keep consolidated and separate accounts (s 141). • Must comply with any AER regulatory information instrument about information reporting (s 48). • Must keep sensitive information confidential (r 137). • Any additional ring-fencing requirements imposed by the AER under s 143. 	<p>No difference.</p>
<p>Contracts with associates must not be entered into, varied or given effect to if they substantially lessen competition in a market for natural gas services or breach competitive parity rule unless approved by the AER under the rules (ss 147 and 148 and r 32). Entering into or varying an associate contract must be notified to the AER (r 33).</p>	<p>No difference.</p>
<p>Subject to rules relating to facilitating requests for access and information disclosure:</p> <ul style="list-style-type: none"> • Requirements to publish information and access arrangement (r 107). • Must provide certain information about tariffs (r 108). • Must not bundle services (r 109). • Must respond to request for access in structured manner (r 112). 	<p>Subject to same rules as for full regulation pipelines and additionally:</p> <ul style="list-style-type: none"> • Must report annually to the AER on access negotiations (r 37). • Must publish terms and conditions of access, including prices on offer, on website (r 36).
<p>Requirement to submit and have in force a full access arrangement which sets out terms and conditions of access and reference tariffs for services likely to be sought by a significant part of the market (s 132). Importantly:</p> <ul style="list-style-type: none"> • Non-price conditions subject to AER approval, 	<p>No requirement to submit or have in force a full access arrangement. A limited access arrangement (governing only non-price terms and conditions) may be submitted for approval by the service provider if it chooses to do</p>

Full (access arrangement) regulation	Light regulation (additions or differences from full regulation)
<p>including capacity trading requirements, changes of receipt and delivery points, extension and expansion requirements and queuing requirements (rr 103 - 106).</p> <ul style="list-style-type: none"> • Total revenue to be set by the AER taking into account the revenue and pricing principles (s 24 and 28) and using the building blocks approach to economic regulation (r 76) which is highly dependent upon: <ul style="list-style-type: none"> • rules relating to the establishment and roll forward of a regulatory capital base • determination of a rate of return on capital • assessment of regulatory depreciation allowances and schedules • estimates of corporate income tax (where post-tax model adopted) • maintenance and reporting of incentive arrangements • determining allowances for operating expenditure • creating a reference tariff variation mechanism based upon total revenue and appropriate cost allocation, and • complex arrangements relating to surcharges, capital contributions, speculative investment and capital redundancy (see generally Part 9 of the National Gas Rules). 	<p>so (s 116).</p> <p>Note that only conforming capital expenditure is included in a capital base while a pipeline is on full regulation, however if a light regulation pipeline returns to full regulation actual capital expenditure in the intervening period is rolled into the capital base (r 77(3))</p>
<p>Requirement to submit detailed access arrangement information with an access arrangement and keep this information available (rr 42 - 43). This extends to detailed financial and operational information (r 72). The AER may also impose additional information requirements to allow them to assess an access arrangement as a regulatory information instrument (s 48).</p>	<p>No general requirement to submit or have approved access arrangement information. Minimal access arrangement information on capacity required if service provider chooses to submit a limited access arrangement (r 45(2)).</p>
<p>Requirements relating to compliance (usually annually) with the reference tariff variation mechanism to increase reference tariffs by the control mechanism (including any pass through arrangements) (r 97).</p>	<p>No such requirements imposed.</p>

Full (access arrangement) regulation	Light regulation (additions or differences from full regulation)
<p>A user or prospective user is able to notify to the dispute resolution body (the AER everywhere but Western Australia) an access dispute about any aspect of access to pipelines services provided by means of a covered pipeline (s 181) and the access determination may deal with any matter relating to the provision of a pipeline service to a user or prospective user (s 193). The dispute resolution body must take into account the national gas objective and revenue and pricing principles in resolving a dispute (s 28). Existing user rights and usage are protected (s 188) and the applicable access arrangement must be applied (s 189). Geographical extensions of a pipeline cannot be ordered (r 118(1)(b)).</p> <p>Note that pipeline services which are not likely to be sought by a significant part of the market (i.e. non-reference services) may still be the subject of an access dispute even though no price is provided by the access arrangement (s 181).</p>	<p>Access dispute provisions apply, any approved limited access arrangement must be applied, but otherwise price and non-price terms and conditions set by the dispute resolution body.</p> <p>In relation to capacity expansions, for a light regulation pipeline the access seeker needs to fund the expansion entirely (r 118(2)(a)), an extension or expansion requirement in an access arrangement governs the ability for a service provider to be required to fund the expansion of a full regulation pipeline (r 118(2)(b)).</p>
<p>Price discrimination between users recognised in both prudent discount provisions (r 96) and pricing principles for distribution services (r 94). While service providers can offer other discounts, these would not be reflected in reference tariffs (r 96).</p>	<p>Prohibition on engaging in price discrimination unless that discrimination is conducive to efficient service provision (s 136).</p>
<p>Must comply with queuing requirements in an approved access arrangement (s 135).</p>	<p>Where a limited access arrangement is in force, the queuing policy must be complied with under s 135. Where no limited access arrangements are in place, issues about the priority of access could be resolved as part of an access dispute.</p>
<p>Other than for the queuing requirements, service providers and users are free to agree on alternative terms and conditions of access than set out in the access arrangement (s 322).</p>	<p>No difference.</p>
<p>Pre-existing contractual rights protected (ss 188 and 321)</p>	<p>No difference.</p>
<p>The extent to which an extension or expansion of a pipeline is taken to be part of the covered pipeline, and regulated by the regime, is governed by the extensions and expansion requirements in the access arrangement (s 18).</p>	<p>As for full regulation where a limited access arrangement applies, but otherwise all extensions and expansions are taken to be part of the covered pipeline (s 19).</p>

Full (access arrangement) regulation	Light regulation (additions or differences from full regulation)
May apply to be uncovered if the pipeline no longer satisfies the coverage test (s 102).	No difference. Note also that any person can at any time apply to revoke the light regulation determination (s 118).
<p>Must, for interconnected transmission pipelines, disclose information to the Bulletin Board:</p> <ul style="list-style-type: none"> • Nameplate rating (r 170). • 3-day capacity outlook (r 171). • Linepack/capacity adequacy indicators (r 172). • Nominated and forecast delivery nominations (r 173). • Actual delivery information (r 174). 	No difference.
Must, unless an exempt distribution network, maintain a register of spare capacity on its website (r 111).	No difference.

2.12 Note also that apart from the enforcement of access arrangements in access disputes (s 189), a number of the obligations are also enforceable by the AER as civil penalties and by other parties as conduct provisions.¹²

2.13 Additionally, pipelines may become subject to full access arrangement regulation through a competitive tendering process through s 126 of the NGL and Part 5 of the National Gas Rules. These pipelines are regulated like other pipelines on an access arrangement, but the content of their access arrangements and variation process does not need to comply with the ordinary rules in Parts 8, 9 and 10 of the National Gas Rules (see r 29).

¹² The NGL and *National Gas (South Australia) Regulations 2008* prescribe ss 56, 57, 91BE(1), 91BF(1), 91BJ(1), 91BN(5), 91BRD(1), 91BRJ(5), 91FEA, 91FC(3) & (4), 91LB(1), 91MB(6), 131, 133, 134, 135, 136, 139, 140, 141, 143(6), 147, 148, 168, 169(3), 170, 195, 223 and 225 and rr 27(4), 33(1), 36, 37, 43(1), 46, 52(1), 53(6), 107, 108, 109, 110, 111, 112, 135CE(2), 137, 138, 138A(2), 138A(4), 369 380(1), 387, 390(2), 399(1), 399(2), 399(5), 399(6), 410(1), 414(1), 418(3), 419(7)(b), 420(6)(b), 435(4), 436(4), 440(2), 440(3), 442(3), 442(4), 442(5), 445(3), 446(4), 470, 474(4), 476(1), 478(1), 485(2), 487(3), 488(3) and 488(10) as civil penalties and ss 91BP, 91BRF, 91BRG, 133, 134, 135, 136, 147, 148 and 170 and rr 33(1), 36, 107, 108, 109, 110, 111, 112, 115(3), 137, 138, 138AC, 369, 387, 390(1), 394, 399(1), 399(2), 399(5), 399(6), 410(1), 418(4), 419(7)(b), 420(6)(b), 421(1)—(4), 421(6), 424(6), 435(4), 436(4), 440(3), 446(4), 452(6), 470, 474(4), 476(1), 478(1), 485(2), 487(3), 488(3), 488(10) and Schedule 1, clauses 26(4) and (7) as conduct provisions.

3 Light regulation determinations – overview

3.1 Part 2 of Chapter 3 of the NGL provides for the light regulation of covered pipeline services.¹³ The following table is a short overview of the key legislative provisions relevant to the Council’s function of making light regulation determinations, which are expanded upon below.¹⁴

Table 3-1 Key provisions for making light regulation determinations

Subdiv 1 of Div 1 of Pt 2 (especially s 110)	the Council can make a light regulation determination in respect of a pipeline which is not a covered pipeline - where an application for a coverage determination in respect of that pipeline has been made
Subdiv 2 of Div 1 of Pt 2 (especially s 114)	the Council can make a light regulation determination in respect of a covered pipeline when an access arrangement is in force
Section 114	sets out the requirements for the Council’s decision on light regulation of pipeline services, including a requirement in s 114(2)(a) that a light regulation determination must be made in accordance with the NGL and the Rules
Section 122	requires the Council to consider the principles governing the making of light regulation determinations set out in s 122(1). In doing so, the Council must have regard to: <ul style="list-style-type: none"> • s 23 the national gas objective, and • s 16 the form of regulation factors, and • any other matters it considers relevant (s 122(2)(c))

References in this Guide to particular examples and extrinsic materials

3.2 The Council notes that the references in this Guide to examples and extracts of the extrinsic materials which refer to various applications of the legal framework are used for illustrative purposes only. It is not necessarily the case that the examples given are the only instances of the matters under consideration or are determinative of how a particular application will be assessed. The Council will assess each application on its

¹³ A covered pipeline for the purposes of the NGL means a pipeline to which a coverage determination applies, or one that is deemed to be a covered pipeline by operation of ss 126 or 127.

¹⁴ Note, decisions to revoke a light regulation determination are dealt with separately in Section 9 of this Part C of the Guide.

own facts and merits rather than presume particular outcomes from the examples which are used in this Guide. The Council acknowledges that the differences in gas markets throughout Australia mean that generalisations about particular aspects of light regulation will need to be substantiated by a detailed analysis of the circumstances surrounding the pipeline in question.

Light regulation determinations

- 3.3 The Council is required to decide whether to make a light regulation determination under the NGL in the following two circumstances:
- (a) where a pipeline is not a covered pipeline, but an application has been made under s 92 for a coverage determination in respect of that pipeline,¹⁵ and
 - (b) where an application for a light regulation determination is made by a service provider that provides pipeline services by means of a covered pipeline to which an applicable access arrangement approved or made under a full access arrangement decision applies.¹⁶
- 3.4 A light regulation determination cannot be made in respect of pipeline services provided by means of a designated pipeline (see ss 109 and 111).¹⁷ The covered South Australian, Victorian and Western Australian distribution pipelines, the Principal Transmission System in Victoria, the Dampier to Bunbury Natural Gas Pipeline and Goldfields pipeline are the initial designated pipelines.¹⁸ The Regulations may, on the unanimous recommendation of the MCE, be amended to remove one or more of these pipelines from being so designated.¹⁹ The MCE or a service provider can seek AER advice on whether a pipeline should no longer be designated under s 125 of the NGL.
- 3.5 The two circumstances in which the Council must decide whether to make a light regulation determination are discussed in more detail below.

¹⁵ See Subdiv 1 of Div 1 of Pt 2 of the NGL.

¹⁶ See Subdiv 2 of Div 1 of Pt 2 of the NGL.

¹⁷ A designated pipeline means a pipeline prescribed by the Regulations to be a designated pipeline (see s 2).

¹⁸ See Schedule 1 of the Regulations and Schedule 1 of the *National Gas Access (WA) (Part 3) Regulations 2009*.

¹⁹ See s 11(4) of the *National Gas (South Australia) Act 2008* which limits the ability of Regulations to add other pipelines as designated pipelines.

4 Decisions on light regulation when pipeline is not a covered pipeline (but an application for a coverage determination has been made)

- 4.1 The Council must decide whether to make a light regulation determination where an application has been made under s 92 for a coverage determination and the pipeline the subject of the application is not a designated pipeline. That is, the Council must decide whether to make a determination that the pipeline services provided, or to be provided, by means of the pipeline are light regulation services (see ss 109 and 110).

Coverage recommendations

- 4.2 Where a person applies to the Council for a coverage determination (i.e., that a pipeline be a covered pipeline), the Council is required to make a coverage recommendation to the relevant Minister in respect of that application. The Council's recommendation must be either that the pipeline:
- (a) be a covered pipeline, or
 - (b) not be a covered pipeline.
- 4.3 On receiving the Council's recommendation, the relevant Minister must decide whether to make a coverage determination in respect of the pipeline to which the recommendation relates (see ss 92-99).

Light regulation determination

- 4.4 At the same time as making the recommendation to the relevant Minister in relation to coverage, the Council must decide whether to make a light regulation determination in respect of the pipeline the subject of the application for the coverage determination. That is, the Council must decide whether to make a determination that the pipeline services provided, or to be provided, by means of the pipeline are light regulation services. This decision must be made by the Council at the same time as it makes the coverage recommendation to the relevant Minister; and within the time it must make the coverage recommendation (see s 110).

Requirements

- 4.5 The light regulation determination (or a decision not to make a light regulation determination), that is made by the Council at the time it makes a coverage recommendation must:
- (a) be made in accordance with the NGL and the Rules, and
 - (b) be attached to the coverage recommendation, and

(c) contain the information required by the Rules (see s 110(3)).

4.6 The requirements for paragraphs (a) and (c) are the same for a light regulation decision made when the pipeline the subject of the application is already a covered pipeline, and are discussed further below. The requirement in paragraph (b) that the light regulation determination be attached to the coverage recommendation confirms that a decision in respect of light regulation must be made at the same time as a recommendation on coverage.

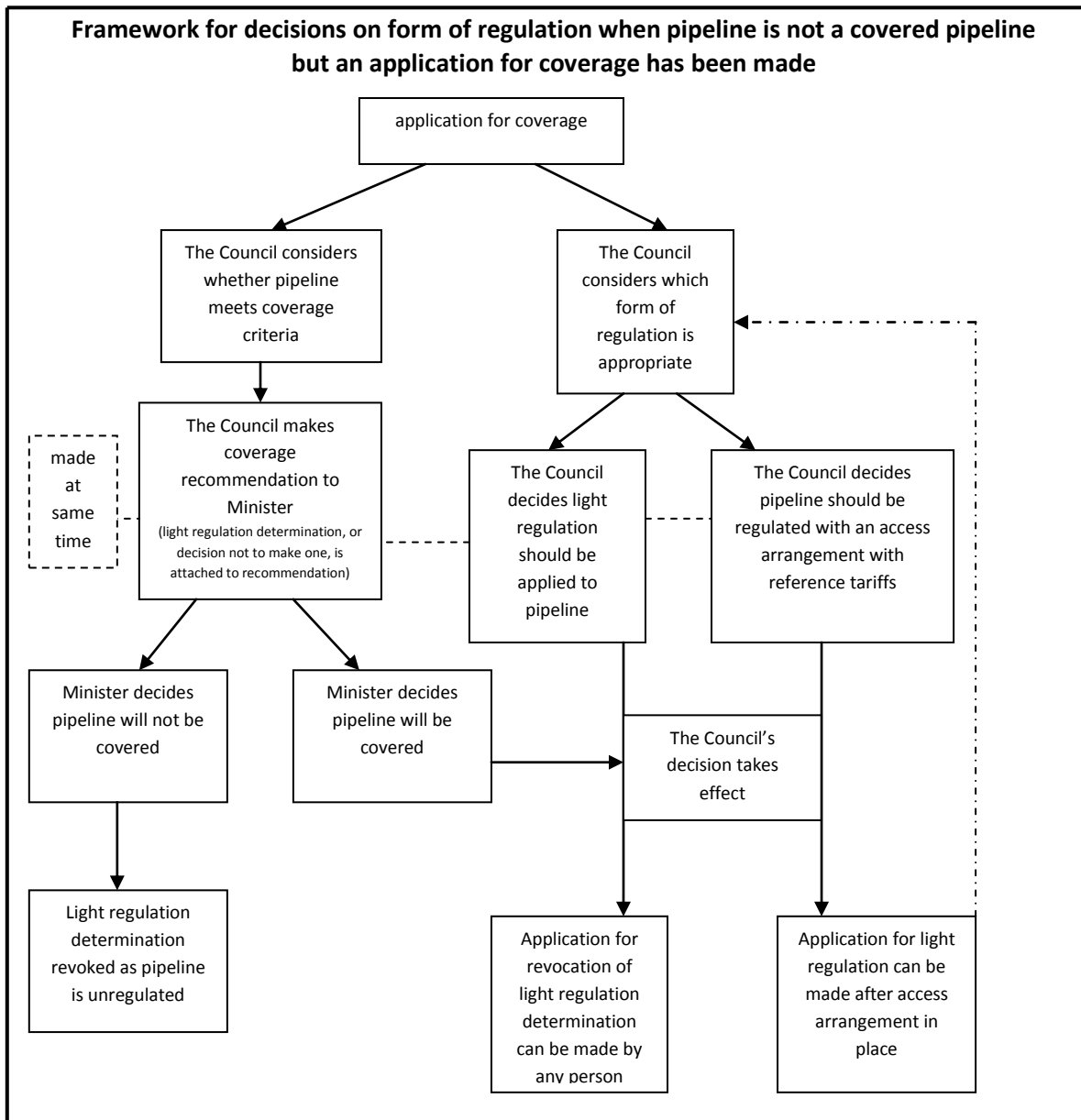


Figure 1 Framework for decisions on the form of regulation when a pipeline is not a covered pipeline but an application for coverage has been made

5 Decisions on light regulation when pipeline is a covered pipeline

Application for light regulation

- 5.1 The requirements for an application for light regulation are set out in s 112(1) of the NGL. That section provides that a pipeline service provider may apply to the Council for a determination that its pipeline services, provided by means of a covered pipeline, be light regulation services. Under s 112(2) the application must:
- (a) be in accordance with the Rules, and
 - (b) contain the information required by the Rules
- (see paragraphs 8.4 - 8.23 below).
- 5.2 An application may only be made in respect of all of the pipeline services provided by means of the covered pipeline (s 112(3)).
- 5.3 The Council must deal with an application under s 112 in accordance with the Rules (s 113). We discuss the requirements set out in the Rules that the Council must follow in Section 8 of this Part C of the Guide.

The Council's decision on light regulation of pipeline services

- 5.4 Section 114 of the NGL sets out the requirements that the Council must comply with when making a decision on the light regulation of pipeline services. Section 114 provides:

114—NCC's decision on light regulation of pipeline services

- (1) The NCC must decide whether to make a light regulation determination within—
 - (a) 4 months after receiving an application under section 112; or
 - (b) if the Rules specify a later period, that period.
- (2) A light regulation determination or a decision not to make a light regulation determination must—
 - (a) be made in accordance with this Law and the Rules; and

Note—

For example, see section 122.

- (b) contain the information required by the Rules; and
- (c) be given to the persons specified by the Rules; and
- (d) be made publicly available in accordance with the Rules.

Note—

If the NCC makes a light regulation determination, the service provider may submit a limited access arrangement in respect of the light regulation services to the AER for approval: see section 116.

Subsection 114(1) – timing

- 5.5 In relation to s 114(1), the Council must decide whether to make a light regulation determination within 4 months after receiving an application under s 112, or such later period as is specified in the Rules.
- 5.6 The Council is mindful of the intention of the MCE to increase the timeliness of decision making and will use its best endeavours to meet the time frame of 4 months unless there are exceptional circumstances. The discussion below outlines the legal framework surrounding the calculation of time in making light regulation determinations. Should time limits be extended in accordance with the provisions below, all parties will be kept informed in a transparent manner.

Calculating time

- 5.7 Rule 11 assists in calculating time. It allows a decision-maker, when calculating elapsed time (such as the 4 months provided for in s 114), to disregard any of the following periods:
 - (a) any period allowed to the proponent for correction or revision of the proposal
 - (b) any period taken by the proponent or any other person to provide information, relevant to the decision maker's decision on the proposal, in response to a notice or requirement issued or made by the decision maker under the NGL
 - (c) any period allowed for public submissions on the proposal or on a draft decision on the proposal
 - (d) any period allowed for submissions on a proposal by the AER to disclose confidential information, any period then taken by the AER to consider the submissions and decide whether to disclose the information, and any period occupied by a review of the decision

- (e) the period between commencement and conclusion of court proceedings to determine questions arising from the proposal or the decision maker's handling of the proposal.

5.8 Where the Council makes a decision under r 11 to disregard a particular period, the Council must give notice of that decision to the proponent and must also publish notice of the decision on its website (see r 11(2)).

Extending time limits

5.9 Under r 12(1) the Council has the power to extend time limits, such as the 4 months in which it is required to make a light regulation determination. However, under r 12(2) the power to extend the 4 month time limit can only be exercised if:

- (a) the proposal involves questions of unusual complexity or difficulty, or
- (b) the extension of time has become necessary because of circumstances beyond the Council's control.

5.10 If the Council decides to extend this 4 month time limit, it must give notice of the extension to the proponent giving reasons for the extension. Additionally, it must publish notice of the extension (and reasons) on its website and in a newspaper circulating generally throughout Australia (see rr 12(3) and (4)).²⁰

Decisions made out of time

5.11 Rule 14 operates so that where the Council fails to make decision within 'an overall time limit', it must report on its failure to the MCE (see r 14(2) for the reporting requirements). An 'overall time limit' is defined in r 7 to mean 'the time within which a decision maker is required by the Law to make a final decision on a proposal'. This would include, therefore, any extensions made to a time limit under r 12.

5.12 Non-compliance with a time limit does not, however, invalidate a decision made by the Council (see s 332).

Subsection 114(2) – requirements for light regulation determination

5.13 The Council must comply with all of the four requirements set out in s 114(2) when making a light regulation determination, or a decision not to make a light regulation determination. Each requirement is referred to separately below.

(a) *made in accordance with this Law and the Rules*

5.14 The requirements for light regulation determinations which are set out in the NGL and Rules are discussed in detail below. In summary, when making a light regulation

²⁰ The Council's standard practice is to publish in *The Australian*.

determination, the Council is required under the NGL to consider the principles governing light regulation determinations which are set out in s 122. These principles are discussed in detail below and refer, amongst other things, to the national gas objective and the form of regulation factors.

5.15 The requirements for light regulation determinations which are set out in the Rules are also discussed separately in Section 8 below.

(b) contain the information required by the Rules

5.16 Rule 35(2) specifies the information to be included in a light regulation determination or a decision not to make a light regulation determination. More specifically, r 35(2) provides that a light regulation determination, or a decision not to make a light regulation determination, must:

- (a) identify the pipeline, and the pipeline services, to which the determination or decision relates, and
- (b) include a reference to a website at which a description of the pipeline, and the pipeline services, can be inspected, and
- (c) state the terms of the determination or decision and the reasons for it (see also r 8(3)(b)).

(c) be given to the persons specified by the Rules

5.17 In accordance with the standard consultative procedure set out in the Rules, after making a final decision in respect of an application for light regulation the Council must give copies of the final decision to 'the parties to the administrative process in which the decision is made' (see r 8(4)(b)). In this case, this will be the service provider that made the application for light regulation and any other party which has been actively involved in the decision making process.

(d) be made publicly available in accordance with the Rules

5.18 Once made, the Council must publish the final decision in respect of a light regulation determination on its website (see r 8(4)(c)). The Council must also make the final decision available for inspection during business hours at its office (see r 8(4)(d)). The AEMC is also required to keep an online register of light regulation determinations (r 133).²¹

5.19 For more detailed discussion of the requirements for making a light regulation determination see Section 8 of this Part C of the Guide.

²¹ See <http://www.aemc.gov.au/Gas/Scheme-Register/Scheme-Register-Detail.html>

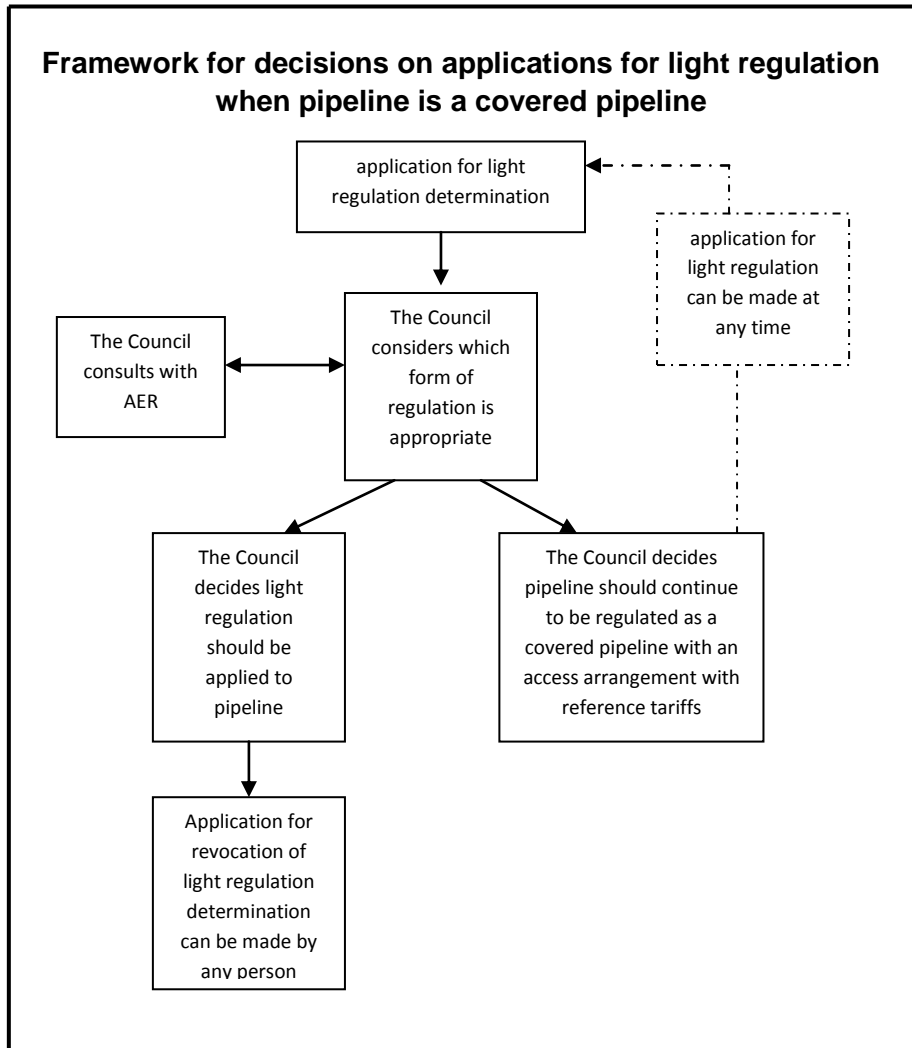


Figure 2 Framework for decisions on applications for light regulation when a pipeline is a covered pipeline

6 Section 122 – Principles governing light regulation determinations

- 6.1 As indicated above (at paragraph 5.14), the Council is required to make a decision on the light regulation of pipeline services in accordance with the NGL and the Rules (see s 114(2)(a)).

The requirement that the decision be made in accordance with the Law obliges the decision-maker to consider the principles governing the making or revoking of light regulation determinations which are set out in s 122.

Section 122

- 6.2 Section 122 is in the following terms:

122—Principles governing the making or revoking of light regulation determinations

- (1) In deciding whether to make a light regulation determination under Division 1 or to revoke a light regulation determination under Division 2, the NCC must consider—
- (a) the likely effectiveness of the forms of regulation provided for under this Law and the Rules to regulate the provision of the pipeline services (the subject of the application) to promote access to pipeline services; and
 - (b) the effect of the forms of regulation provided for under this Law and the Rules on—
 - (i) the likely costs that may be incurred by an efficient service provider; and
 - (ii) the likely costs that may be incurred by efficient users and efficient prospective users; and
 - (iii) the likely costs of end users.

Note—

The forms of regulation provided for under this Law and the Rules to regulate the provision of the pipeline services by means of a covered pipeline are—

- (a) making a light regulation determination so that those services become light regulation services;

- (b) not making a light regulation determination so that those services are regulated under a full access arrangement decision that approves or makes the applicable access arrangement that applies to those services.
- (2) In doing so, the NCC—
- (a) must have regard to the national gas objective; and
 - (b) must have regard to the form of regulation factors; and
 - (c) may have regard to any other matters it considers relevant.

6.3 In the Council’s view, it is clear from the words 'in doing so' in s 122(2), that the factors in that subsection require consideration in the course of the Council’s contemplation of the matters in subsection (1). This approach is supported by the discussion in the NGL's Second Reading Speech of the manner in which light regulation determinations are to be made:

Determining how covered pipeline services are to be regulated requires an assessment of the potential for market power to be exploited by a service provider. The National Gas Law requires the National Competition Council to consider the likely effectiveness of light regulation as opposed to access arrangement regulation in promoting access to pipeline services in light of the costs of each form of regulation. Accordingly, where light regulation can reduce the costs of regulation while still providing an effective check on a pipeline's market power, the light regulation option should be available. Light regulation may be particularly relevant for point to point transmission pipelines with a small number of users who have countervailing market power.

The National Gas Objective and 'form of regulation factors' guide this assessment of the form of regulation to apply to covered pipeline services. This framework effectively implements the Expert Panel recommendations and mirrors considerations in the National Electricity Law.²²

Factors the Council 'must have regard to' under s 122(2)

6.4 As indicated above, s 122(2) sets out three factors that the Council 'must have regard to' when considering the issues set out in s 122(1) relevant to deciding whether to make a light regulation determination (or to revoke a light regulation determination).

²² Page 2889.

(a) *The national gas objective*

6.5 Section 23 of the NGL sets out the national gas objective as follows:

The objective of this Law is to promote efficient investment in, and efficient operation and use of, natural gas services for the long term interests of consumers of natural gas with respect to price, quality, safety, reliability and security of supply of natural gas.

6.6 The inclusion of an overarching objects clause is one of the key changes in the NGL compared to the previous regulatory regime.

Purpose of an overarching Objective

6.7 In its decision on the review of the National Gas Pipelines Access Regime (MCE Decision),²³ the MCE indicated that the inclusion of the national gas objective is intended to clarify the policy intent of the regime; to guide and improve the accountability of all decision makers; provide greater certainty to service providers and access seekers about possible regulatory intervention; and promote national consistency (both across jurisdictions and between access regimes). Further, the consistency achieved between the national gas objective and the national electricity objective, contained in the National Electricity Law, is intended to promote a seamless approach to energy access across the energy sector.²⁴

Objective guides decision-making

6.8 The national gas objective is intended to guide decision making, rather than being a provision that is referred to once ambiguity or uncertainty as to a provision's meaning arises.

6.9 This intention is evident in the background policy material to the NGL. For example, in its 2004 Review of the Gas Access Regime,²⁵ the Productivity Commission discussed the role of an objects clause in the context of coverage and regulation decisions:

The overarching objects clause should provide the guiding principle with which other, second tier, criteria would need to be consistent. That is, coverage criteria and guidance on deciding the form of regulation..., and guidance for designing access arrangements..., should flow from this objective.²⁶

²³ Ministerial Council on Energy, *Review of the National Gas Pipelines Access Regime – Decision May 2006*.

²⁴ See Ministerial Council on Energy, *Review of the National Gas Pipelines Access Regime – Decision May 2006* at p 7.

²⁵ Productivity Commission Inquiry Report No. 31, *Review of the Gas Access Regime*, 11 June 2004 (the Productivity Commission Report).

²⁶ Productivity Commission Report at p 185.

6.10 Accordingly, the national gas objective is explicitly referred to as a consideration for all of the key decisions in the regime.²⁷

6.11 The Second Reading Speech set out the key principles underlying the insertion of the objective as follows:

The national gas objective is an economic concept and should be interpreted as such.

The long term interest of consumers of gas requires the economic welfare of consumers, over the long term, to be maximised. If gas markets and access to pipeline services are efficient in an economic sense, the long term economic interests of consumers in respect of price, quality, reliability, safety and security of natural gas services will be maximised. By the promotion of an economic efficiency objective in access to pipeline services, competition will be promoted in upstream and downstream markets.²⁸

6.12 The national gas objective accordingly requires the consideration and balancing of productive, allocative and dynamic efficiencies in the provision of network services as well as in upstream and downstream markets where competition is the key driver of welfare gains.²⁹ The need for a 'long term' perspective is also a caution against focusing on short term benefits to consumers which undermine longer term investment and welfare gains. The light regulation option is a key initiative to promote the objective of continuing to deliver efficiency gains without unnecessary administrative or regulatory costs.³⁰

6.13 In *Re: Application by ElectraNet Pty Limited (No 3)* [2008] ACompT 3 (30 September 2008) the Australian Competition Tribunal summarised the intent of the equivalent national electricity objective as follows:

The national electricity objective provides the overarching economic objective for regulation under the Law: the promotion of efficient investment in the long term interests of consumers. Consumers will benefit in the long run if resources are used efficiently, i.e. resources are allocated to the delivery of goods and services in accordance with consumer preferences at least cost. As reflected in the revenue and pricing principles, this in turn requires prices to reflect the long run cost of supply and to support efficient investment, providing investors with a return which covers the opportunity cost of capital required to deliver the services.³¹

²⁷ See ss 28, 72, 97, 100, 105, 107, 154, 157, 163, 165 and 291 of the NGL.

²⁸ Page 2885.

²⁹ See discussion in the Expert Panel Report pp 31 - 58.

³⁰ Ibid.

³¹ At [15]. And reaffirmed by the Tribunal in *Application by Energy Australia and Others* [2009] ACompT 8 (12 November 2009) at [18].

(b) The form of regulation factors

6.14 The Council is required by s 122(2)(b) to have regard to the form of regulation factors set out in s 16 of the NGL. Section 16 provides:

16—Form of regulation factors

The form of regulation factors are—

- (a) the presence and extent of any barriers to entry in a market for pipeline services;
- (b) the presence and extent of any network externalities (that is, interdependencies) between a natural gas service provided by a service provider and any other natural gas service provided by the service provider;
- (c) the presence and extent of any network externalities (that is, interdependencies) between a natural gas service provided by a service provider and any other service provided by the service provider in any other market;
- (d) the extent to which any market power possessed by a service provider is, or is likely to be, mitigated by any countervailing market power possessed by a user or prospective user;
- (e) the presence and extent of any substitute, and the elasticity of demand, in a market for a pipeline service in which a service provider provides that service;
- (f) the presence and extent of any substitute for, and the elasticity of demand in a market for, electricity or gas (as the case may be);
- (g) the extent to which there is information available to a prospective user or user, and whether that information is adequate, to enable the prospective user or user to negotiate on an informed basis with a service provider for the provision of a pipeline service to them by the service provider.

6.15 Section 7 of this Part C discusses the relevant considerations to be taken into account under each of the form of regulation factors. Section 7 should therefore be referred to when considering the form of regulation factors in respect of a particular application.

(c) Any other matters it considers relevant

6.16 This section gives the Council the ability to consider other related and relevant issues. Given the economic focus of the legislation and the large number of factors already being considered, the Council does not see this ability as a mechanism for a large

number of arguments and perspectives to be put outside of those already under consideration. To do so would be to take the reference out of context. The Council notes the reason for its inclusion links back to the Expert Panel which observed that:

The Panel believes that it would be prudent to allow the AEMC to consider any other factors that might be relevant to the assessment of the extent of market power to ensure that any extenuating circumstances can be included in the assessment. For example, there may be circumstances where a service provider's past behaviour in not misusing the market power it possesses becomes relevant to a consideration of whether a less intrusive form of regulation could be applied to it.³²

6.17 What may be relevant will differ for each pipeline and market circumstance, but will usually have some relationship to the national gas objective or one of the form of regulation factors.

Factors the Council must consider under s 122(1)

6.18 As discussed above, the Council must have regard to the three factors in s 122(2)(a)-(c) in the course of considering the matters set out in s 122(1) of the NGL.

6.19 Section 122(1) itself has two elements. As indicated, that section provides:

- (1) In deciding whether to make a light regulation determination under Division 1 or to revoke a light regulation determination under Division 2, the NCC must consider—
 - (a) the likely effectiveness of the forms of regulation provided for under this Law and the Rules to regulate the provision of the pipeline services (the subject of the application) to promote access to pipeline services; and
 - (b) the effect of the forms of regulation provided for under this Law and the Rules on—
 - (i) the likely costs that may be incurred by an efficient service provider; and
 - (ii) the likely costs that may be incurred by efficient users and efficient prospective users; and
 - (iii) the likely costs of end users.

6.20 It is clear from the extract above from the Second Reading Speech (see paragraph 6.3) that the purpose of s 122(1) is to require the Council, when making a light regulation determination, to consider the likely effectiveness of light regulation

³² Page 53.

(as opposed to access arrangement regulation) in promoting access to pipeline services and the likely costs of each form of regulation. The test is intended to be a 'future with and without' analysis looking at what would be the likely result of the pipeline being subject to the full regulation regime as opposed to the light regulation regime.³³ In looking at each future scenario the Council needs to take the current legal structure of law and rules as a given rather than postulating potential changes to the NGL and Rules, which may make either form of regulation more or less expensive or effective.

- 6.21 The Council also considers that the questions of judgement involved in assessing the likely future scenarios and the explicit role given to the national gas objective and form of regulation factors indicates a need to focus on qualitative rather than a pure quantitative economic analysis which would be highly dependent upon the assumptions included in the model. Nonetheless, in some circumstances quantitative data and other modelling may be useful in informing the Council in its application of the principles under s 122 and the Council will consider the value of data provided on a case by case basis.

The operation of s 122(1)(a)

- 6.22 The question in s 122(1)(a) of whether light regulation or full access arrangement regulation will be more effective in a particular case, must be informed by considerations determined through consideration of the national gas objective and form of regulation factors.
- 6.23 The consideration of the effectiveness of each form of regulation in regulating to promote access to the particular pipeline services in the market in question is a central part of the 'with or without' analysis to be conducted. The effectiveness analysis of the light regulation compared to the full regulation scenarios is guided principally by the economic efficiency focus of the national gas objective and degree of market power considerations inherent in the form of regulation factors.³⁴
- 6.24 Effectiveness needs to be examined by looking at how the key regulatory differences between light and full regulation impact upon the access rights of third parties in the relevant upstream and downstream markets, including potential new entrants and the likely outcomes which will be generated by the regulatory framework.³⁵ Issues which may be raised in this analysis of effectiveness include:
- (a) How the nature of the pipeline network (e.g. point-to-point, meshed, long/short) and the particular users and likely prospective users of the

³³ Compare the authorisation test under the CCA: *Re Queensland Independent Wholesalers Ltd* (1995) ATPR 41-438.

³⁴ See generally Expert Panel Report at p 53.

³⁵ See Second Reading Speech at p 2889.

pipeline might interact with each regulatory framework to grant effective access rights and promote their long term interests.

- (b) The efficiency benefits and regulatory certainty likely to be delivered by having an approved access arrangement in force.
- (c) The effectiveness of additional obligations on light regulation pipelines, including prohibition against price discrimination, reporting and disclosure of offers for pipelines services, in addressing likely access issues for users and prospective users.
- (d) How effective an access dispute process is likely to be in resolving likely access disputes in respect of the particular pipeline services, which may have regard to:
 - (i) the nature of capacity rights already in existence and the actual capacity and developable capacity of the pipeline
 - (ii) the ability to use previous regulation, and in particular previously approved capital bases and reference tariffs, to assist in resolving a dispute, and
 - (iii) any potential barriers users may face in resolving their disputes by means of an access dispute.
- (e) The risk of regulatory error in setting access prices either too high or too low under the full access arrangement framework, taking into account the revenue and pricing principles and relevant rules for AER decision making.
- (f) The incentives on the particular service provider to misuse its market power, including its relationship with participants in upstream and downstream markets and potential sources of competition, including other pipelines and storage facilities.
- (g) The application of particular form of regulation factors to the pipeline in question and their likely impact upon the exercise of market power possessed by the pipeline.

6.25 The analysis of these issues should focus on the particular pipeline, market circumstances, particular users and prospective users rather than being based on abstract theory or generalised assumptions.

The operation of s 122(1)(b)

6.26 In making a decision as to which form of regulation is appropriate in a particular situation, the Council is required under s 122(1)(b) to consider the effect that each form of regulation may have on a number of different entities, in terms of the likely costs that may be incurred by those entities. Consistent with the national gas objective, a primary issue in determining the form of regulation is to minimise the overall costs of regulation across all parties.

(i) *the likely costs that may be incurred by an efficient service provider*

6.27 This assessment looks at the likely costs of each form of regulation to the service provider, if that service provider is acting in an efficient manner. An estimate of this cost is required to be submitted by the service provider (r 34(2)(h)) but the Council will need to come to an independent view of the level of those likely costs. The focus of 'likely' costs is also structured to exclude consideration of costs which are unlikely to be, or improbable of being, incurred.

6.28 An efficient service provider should minimise its own transaction costs in dealing with both the regulator and users wherever feasible. As such, a service provider which engages in regulatory processes in a manner which incurs unnecessary costs should not be able to use those costs to seek a more advantageous form of regulation. As there are some costs which are incurred under both light and full regulation (e.g. ring-fencing and regulation of associate contracts) the Council will focus its attention on costs which are likely to differ under the two forms of regulation. It must be recognised that costs imposed by regulation on service providers are passed on to users and end users through the regulatory regime.³⁶ The Council considers that the compliance/transaction/administrative costs involved in each form of regulation are the primary issue to be considered under s 121(1)(b).

6.29 The likely costs that may be examined include:

Where light regulation applies	Where full regulation applies
The likely costs of potential access disputes given the nature of existing users and prospective users.	The costs involved in fully participating in the access arrangement approval process and associated information requirements.
Any costs of complying with additional provisions only applicable to light regulation pipelines (e.g. reporting on access negotiations, r 37).	The costs of complying with a reference tariff variation mechanism and associated reporting concerning compliance with the access arrangement.

(ii) *the likely costs that may be incurred by efficient users and efficient prospective users*

6.30 This assessment looks at the likely costs of each form of regulation on users who have access to pipeline services and prospective users who may seek access to spare or developable capacity. This clause also assumes that these users will be acting in an efficient manner, minimising their own transaction costs. The key issue for consideration is the transaction costs involved for users in negotiating new or altering existing access arrangements. In undertaking this assessment the actual costs of users and prospective users in negotiating access under the existing regulatory

³⁶ Note that the revenue and pricing principles in s 24(2)(b) explicitly refer to the recovery of costs involved in complying with regulatory obligations which include the NGL and Rules.

arrangements may be taken into account to determine what costs are likely to be incurred in the future.

6.31 Under the NGL, when an access arrangement is in place, this arrangement, including the regulated prices, will be applied in an access dispute.³⁷ The certainty of this structure significantly reduces transaction costs for users as, while light regulation pipelines are required to publish prices and terms and conditions under r 36, these are not binding in an access dispute which is guided by the revenue and pricing principles and national gas objective.³⁸ However, where the number of users is small, existing capacity is fully contracted and long term contracts are in place, there may be little cost for users of moving to light regulation and no material lessening of the effectiveness of the regulation in preventing the exercise of market power.

(iii) the likely costs of end users

6.32 This assessment looks at the comparative costs which might flow through to end use consumers of natural gas through the different forms of regulation. It includes the pass through of costs imposed upon service providers and users from the two forms of regulation and any additional burden which may be felt by end users from the arrangements.

³⁷ See s 189 of the NGL.

³⁸ See s 28 of the NGL.

7 Form of regulation factors – relevant considerations

Introduction

7.1 Section 6 of this Part C of the Guide explains that, when considering an application for light regulation of an existing covered pipeline, the Council must have regard to the form of regulation factors, which are set out in s 16 of the NGL (see s 122(2)(b)). More specifically, regard must be had to these factors when considering the matters referred to in s 122(1) in the course of making a light regulation determination.

7.2 Section 16 provides:

16—Form of regulation factors

The form of regulation factors are—

- (a) the presence and extent of any barriers to entry in a market for pipeline services;
- (b) the presence and extent of any network externalities (that is, interdependencies) between a natural gas service provided by a service provider and any other natural gas service provided by the service provider;
- (c) the presence and extent of any network externalities (that is, interdependencies) between a natural gas service provided by a service provider and any other service provided by the service provider in any other market;
- (d) the extent to which any market power possessed by a service provider is, or is likely to be, mitigated by any countervailing market power possessed by a user or prospective user;
- (e) the presence and extent of any substitute, and the elasticity of demand, in a market for a pipeline service in which a service provider provides that service;
- (f) the presence and extent of any substitute for, and the elasticity of demand in a market for, electricity or gas (as the case may be);
- (g) the extent to which there is information available to a prospective user or user, and whether that information is adequate, to enable the prospective user or user to negotiate on an informed basis with a service provider for the provision of a pipeline service to them by the service provider.

7.3 This section of the Guide discusses the relevant considerations to be taken into account in respect of each factor. These considerations have been drawn from a large body of relevant background material, including:

- the Second Reading Speech
- the Productivity Commission Report
- the Expert Panel Report
- the MCE Decision, and
- relevant case law.

7.4 The above materials are the key documents which underpin the reform of Australia's gas access regulatory regime which has culminated in the NGL. In particular, we note that the Productivity Commission Report, the Expert Panel Report and the MCE Decision, are all expressly referred to in the Second Reading Speech. While these documents are not part of the NGL, they may be relevant in its interpretation.³⁹

Weight to be given to each factor

7.5 The next issue for consideration is, as between the form of regulation factors, how much weight is to be given to each factor? In determining this issue, it is relevant to note that some of the form of regulation factors raise similar considerations to those required to be considered under the pipeline coverage criteria set out in s 15 of the NGL.

Relevance of the pipeline coverage criteria

7.6 Section 15 of the NGL sets out the pipeline coverage criteria as follows:

15 Pipeline coverage criteria

The pipeline coverage criteria are –

- (a) that access (or increased access) to pipeline services provided by means of the pipeline would promote a material increase in competition in at least 1 market (whether or not in Australia), other than the market for the pipeline services provided by means of the pipeline;
- (b) that it would be uneconomic for anyone to develop another pipeline to provide the pipeline services provided by means of the pipeline;

³⁹ The use of extrinsic materials in the interpretation of the NGL and Rules is discussed at 11.5 Appendix B.

- (c) that access (or increased access) to the pipeline services provided by means of the pipeline can be provided without undue risk to human health or safety;
- (d) that access (or increased access) to the pipeline services provided by means of the pipeline would not be contrary to the public interest.

7.7 Clearly coverage criteria (c) and (d) raise considerations entirely separate from those required to be considered under the form of regulation factors. However, criteria (a) and (b) conceivably require the assessment of similar considerations to at least some of the form of regulation factors. Both the coverage criteria and form of regulation factors are based on the economic concept of market power which is both:

- (a) a threshold trigger for regulation to be applied at all (coverage), and
- (b) a key consideration in the choice of the form of regulation, whereby the degree of market power is relevant rather than a threshold presence.

7.8 This raises the question of the extent to which the Council is required to separately evaluate, for the purposes of assessing the most appropriate form of regulation, issues that may have already been considered during the process of determining coverage.

7.9 Where an application for light regulation is made for an already covered pipeline, the Council considers there are three main reasons why it is inappropriate for it to rely on assessments made at the coverage stage in relation to issues that may arise for consideration under the form of regulation factors. Those reasons are that:

- (a) there are differences between the coverage criteria and the form of regulation factors
- (b) the coverage criteria and form of regulation factors address different purposes, and
- (c) practical constraints arising, for example, from changes or developments occurring since coverage.

The Council can determine the weight to be given to each factor

7.10 The Council considers that the requirement that it 'must have regard to' the form of regulation factors does not prescribe that each factor is to be given the same weight in determining the form of regulation in respect of a particular application for light regulation.

7.11 The significance of each factor may vary depending upon a range of considerations for each application. For example, it is possible that different factors may be more or less significant depending upon whether the application is made by a transmission or

distribution pipeline. It is also possible that the significance of each of the factors may vary from application to application.

7.12 In relation to the weight or significance to be attributed to each form of regulation factor, the Expert Panel Report indicated that:

The framework of laws and Rules should make it clear that the degree of market power associated with the supply of the service is the principal criterion in deciding the form of regulation to be applied.⁴⁰

7.13 Accordingly, the Council has the capacity to decide the appropriate weight to be given to each of the form of regulation factors, in the circumstances of each case. More specifically, as long as the Council has regard to each of the form of regulation factors in s 16, the relevance and weight to be attributed to each factor can be determined by the Council on the basis of the circumstances of the application in question. The Council acknowledges that the differing nature of gas markets throughout Australia means that care needs to be taken in appropriately weighing up each factor relative to the particular market circumstances in question.

Form of regulation factors

7.14 The relevant considerations for each form of regulation factor are set out below.

(a) The presence and extent of any barriers to entry in a market for pipeline services

7.15 The requirement to consider the presence and extent of any barriers to entry in a market for pipeline services necessarily requires consideration of the applicant's market power and the market power that the existing service providers in that market may have. This is because barriers to entry are a primary determinant of the existence of market power.

7.16 The question of whether barriers to entry exist requires consideration of the question 'to what extent is it rational or possible for new entrants to enter the market?'⁴¹ As the High Court noted in *Queensland Wire Industries*:

...the ease with which competitors would be able to enter the market must ... be considered. It is only when for some reason it is not rational or possible for new entrants to participate in the market that a firm can have market power.⁴²

7.17 Only in the presence of significant barriers to entry is a market insulated from competition, so that a company operating in that market can sustainably raise prices

⁴⁰ Expert Panel Report at 53.

⁴¹ *Eastern Express* (1992) 35 FCR 43 at [66].

⁴² (1989) 167 CLR 177 at [189].

above economic costs, or otherwise behave independently of competition, without losing customers over time to new entrants into the market.

Examples of barriers to entry

7.18 Discussed below are the following examples of barriers to entry that may be relevant to a market for gas pipeline services:

- (a) where the existing provider in that market has a natural monopoly
- (b) economies of scale and scope, and
- (c) other factors, such as administrative or operational arrangements.

The height of barriers to entry

7.19 The size or height of the barriers to entry to a particular market will directly affect the access of a service provider to that market and the degree of market power that a provider can exercise. With high barriers to entry there are likely to be fewer opportunities for competitive pressure because it would be uneconomic for other players to enter and compete for market share. The more substantial these barriers are, the greater are the potential costs from the exercise of the resulting market power.⁴³

Comparison to issues considered at the coverage stage

7.20 As discussed above, although it might be said that for a pipeline to be a covered pipeline there must be existing barriers to entry to a particular market, the Council is nevertheless required to consider the presence and extent of those barriers under form of regulation factor (a), even if barriers to entry may have previously been identified during the coverage process. This is because the relevant barriers to entry may have changed during the period since coverage was determined and the focus is on the degree of those barriers to entry rather than the fact that they are present.

(b) The presence and extent of any network externalities (that is, interdependencies) between a natural gas service provided by a service provider and any other natural gas service provided by the service provider

7.21 This factor requires the Council to identify the presence and extent of any network interdependencies (externalities), between a natural gas service provided by a service provider and any other natural gas service provided by the same provider. The Second Reading Speech indicates this is for the purpose of identifying those interdependencies as potential sources of market power.⁴⁴ That is, the interdependent nature of network services often predisposes pipelines towards

⁴³ Expert Panel Report at p 48.

⁴⁴ See p 2889.

natural monopoly status. This means that it is usually more efficient to have one service provider provide a pipeline service to a given geographical area. Additionally it may be more efficient to have the same company provide other pipeline services to the same geographical area.⁴⁵

- 7.22 Whether the particular natural gas service in question is a transmission service or a distribution service may be relevant to whether network externalities or interdependencies exist.

Transmission services

- 7.23 Network externalities or interdependencies are less pronounced for gas transmission pipelines which typically provide end-to-end services that can be operated independently without loss of efficiency. This point was made in the Expert Panel Report as follows:

...individual gas transmission pipelines typically can be operated independently with little loss of overall efficiency, and it is also typically feasible to assign capacity rights associated with the asset's existing and new capacity. Thus, users can be provided with a choice about which pipeline to use where there are multiple, independent pipelines, and users can also be provided with a choice about whether they wish to use (and contribute to) any augmentation. Thus, ongoing competition between pipelines (i.e. where multiple pipelines serve the same markets) is feasible, and 'market forces' can be left to play a greater role in deciding when new investment should occur (that is, users can be left to contract for their needs, and pipelines get built when sufficient capacity in a pipeline will be contracted).⁴⁶ (Footnotes omitted)

- 7.24 Therefore, direct competition between individual gas transmission pipelines and tradeable rights to pipeline capacity are two means of establishing contestability in a particular market for gas transmission services, lowering market power.⁴⁷ This may be less so for meshed transmission networks, particularly those which are less able to use linepack as a balancing mechanism than longer pipeline systems.

Appropriate form of regulation

- 7.25 End-to-end networks with fewer network interdependencies and greater potential for contestability are likely to be more amenable to less direct forms of regulation. This is particularly the case where there are alternative supply options and users have considerable countervailing market power.

⁴⁵ See the Second Reading Speech p 2889.

⁴⁶ Expert Panel Report at p 13.

⁴⁷ Expert Panel Report at p 49.

Examples

- 7.26 The Expert Panel identified two examples of transmission services with relatively low levels of interdependence with other natural gas services, resulting in relatively low levels of market power. First, certain transmission pipelines in the South East Australian market have been found to be sufficiently competitive with each other to justify the removal, or non-application, of regulation. Secondly, where a new, independently-owned pipeline is to join a new source of gas supply to an existing demand centre, it would be difficult to conclude that the owner of the new facility would be in a position to exercise substantial market power.⁴⁸
- 7.27 Applications for light regulation by service providers in similar circumstances to these in terms of network externalities or interdependencies and market power, may therefore be more appropriately regulated by light regulation.

Distribution services

- 7.28 By contrast, network externalities or interdependence may be more apparent for gas distribution pipelines. Where strong network externalities or interdependencies and any-to-any supply characteristics operate to strengthen the market power of service providers, a more restrictive form of regulation is likely to be warranted.
- 7.29 However, this may not necessarily apply in all cases. Market power may not exist in areas where the supply of natural gas has recently been introduced. Further, even in large gas markets, where rates of connection and/or average usage is low, the unit cost for the provision of natural gas may be sufficiently high that competition from alternative energy sources provides an effective constraint on market power. In either situation, as the market power would be low, so the network externalities or interdependence are also likely to be low.⁴⁹

(c) The presence and extent of any network externalities (that is, interdependencies) between a natural gas service provided by a service provider and any other service provided by the service provider in any other market

- 7.30 Form of regulation factor (c) requires the Council to identify the presence and extent of any network externalities (that is, interdependencies) between a natural gas service provided by a service provider and any other service provided by that provider in any other market. As for form of regulation factor (b), discussed above, these externalities or interdependencies must be identified as potential sources of market power.⁵⁰ Externalities or interdependencies may still be relevant to related

⁴⁸ Expert Panel Report at p 14.

⁴⁹ Expert Panel Report at p 14.

⁵⁰ See the Second Reading Speech at p 2889.

businesses in upstream and downstream markets (such as gas retailing), although ring-fencing and associate contract provisions apply to both forms of regulation to mitigate and control the risks of anti-competitive outcomes. Some distribution networks may also have externalities with business units providing other utility services, such as electricity, water and telecommunications. The trial of metering systems which read and allow joint billing of gas, electricity and water usage is one such example of this.

(d) The extent to which any market power possessed by a service provider is, or is likely to be, mitigated by any countervailing market power possessed by a user or prospective user

7.31 This form of regulation factor requires consideration of the extent to which market power possessed by the owner, operator or controller of a pipeline by which services to be subject to regulation are provided is likely to be mitigated by countervailing market power possessed by the users of those services. This factor allows the Council to consider this type of countervailing market power from a major user in deciding whether to apply the light handed form of regulation.⁵¹

Countervailing market power

7.32 Countervailing market power can occur where users (i.e. customers) have sufficient size and negotiating power in a market for network services to mitigate a service provider's market power in the negotiation of the terms and conditions of access. Some of the factors relevant to the existence of countervailing market power, which were identified in the Expert Panel Report,⁵² include circumstances where:

- (a) users are large or concentrated and can present a credible threat of bypass or securing an alternative source of supply, or
- (b) where the cost and demand circumstances of the infrastructure provider is such that it would be adversely affected by the failure of users, or a group of users, to take supply (e.g., resulting in the full or partial stranding of certain assets).

Where these circumstances are present, users are in a stronger position to protect themselves from the potential for service providers to exercise market power. Users are also more likely to be able to negotiate more economically efficient prices and conditions of access. The countervailing power of users may be strengthened when they are relatively few in number and are sufficiently well resourced to protect their own interests.

⁵¹ See the Second Reading Speech at p 2889.

⁵² See the Expert Panel Report at p 49.

- 7.33 Where there is significant countervailing market power, a less intrusive form of regulation, such as light regulation, may be more appropriate.
- 7.34 By contrast, as noted above, where a service provider operates a meshed monopoly network with strong externalities and significant information asymmetry, users may be less able to exercise countervailing market power. In these circumstances, stronger regulation through an access arrangement, rather than light regulation, may be more appropriate.
- 7.35 The analysis of countervailing market power needs to be assessed in relation to the pipeline and markets in question and will draw on evidence from those markets to determine the extent to which any countervailing market power of users may be an effective constraint upon the market power of the relevant service provider.
- 7.36 For example, in considering the application for light regulation of the Central West Pipeline, the Council concluded that although there were several large users and spare capacity on the pipeline, this was unlikely to be sufficient to counter balance the provider's market power, particularly because there was no alternative pipeline providing substitute services to users.⁵³

(e) The presence and extent of any substitute, and the elasticity of demand, in a market for a pipeline service in which a service provider provides that service

- 7.37 This form of regulation factor allows the Council to consider the presence and extent of substitutions for users with the particular gas pipeline service.

Substitution and the elasticity of demand

- 7.38 The price responsiveness of users to the cost of energy can impose some constraints on the exercise of market power in certain situations. For example, if the price of gas rises (including as a result of a rise in the costs of network services) such that users no longer find value in purchasing an additional unit of gas, the most likely responses are either a reduction in the level of consumption by the user (demand side management), or a shift towards an alternative means of supply.⁵⁴ This shift may be either to an alternative means of gas supply, or to an alternative source of energy. This latter situation is discussed below in relation to form of regulation factor (f).
- 7.39 Users are better able to exercise a choice on the source of their gas supply where there are competing sources of supply to a common area. These competing sources may be in the form of an alternative pipeline from the same gas source, or a pipeline

⁵³ National Competition Council, Light regulation of the Central West Pipeline, Final Determination and Statement of Reasons, 19 January 2010, p 16.

⁵⁴ See the Expert Panel Report at p 50.

from an alternative gas basin. The availability of gas storage facilities and use of linepack capacity may also mitigate the need to rely on a particular pipeline when there is a constraint upon contracted supply sources.

- 7.40 This means that where a pipeline service provider with market power seeks to limit supply and raise prices, there is some potential for users to exercise their choice to use alternative gas pipeline services or substitute energy sources.

The nature of the pipeline

- 7.41 The nature of the pipeline, that is whether it is for transmission or distribution, or point to point or meshed, may be relevant to the presence and extent of any substitute for a particular service.

- 7.42 In relation to transmission pipelines, there has been an emergence of competing pipelines for the supply of gas to large demand centres from competing gas basins. This inter-basin and pipeline-to-pipeline competition has increased the competitiveness of the market and in a number of cases has moderated the market power of particular pipeline owners.⁵⁵

- 7.43 Distribution pipelines have less users with the ability to substitute supply, although market circumstances differ depending upon the reliance on gas for heating and hot water in different parts of Australia.

Comparison to issues considered at the coverage stage

- 7.44 This form of regulation factor is one where there is possibly some overlap with the matters to be considered under the coverage criteria in s 15 of the NGL (see especially, criterion (a) which requires consideration of competition issues).

- 7.45 However, as explained above, while criterion (a) requires consideration of competition issues for the purposes of determining whether a pipeline should be regulated, form of regulation factor (e) requires the consideration of competition issues for a different purpose. That is, any consideration of competition issues under form of regulation factor (e) is for the purpose of determining the extent of regulation that should be applied to a particular pipeline service.

- 7.46 In a practical sense, this means that the greater the elasticity of demand for a particular gas pipeline service (i.e. where substitutes for that service exist), the less likely the service provider is to exercise significant market power. In these circumstances, it may be more likely that a lighter form of regulation should be applied to the pipeline service provider.

⁵⁵ Expert Panel Report at pp 13 - 14.

(f) The presence and extent of any substitute for, and the elasticity of demand in a market for, electricity or gas (as the case may be)

7.47 The degree to which other products may be substituted for gas is another factor affecting the choice of the form of regulation and is related to factor (e). Form of regulation factor (f) allows the Council to consider the presence and extent of substitutes, and the elasticity of demand, for the gas product itself. For example, electricity may also compete with natural gas for some or all of a customer's needs or a gas fired generator may be able to switch fuel sources between diesel, coal or LPG depending upon their availability and relative prices. However, other users may not have realistic substitutes for natural gas, such as those users who use natural gas as a feedstock in a production process or where there is no cost effective method of modifying their plant to use another fuel source.

7.48 The Expert Panel Report noted that, generally speaking, energy services, and in particular electricity services, are considered to have relatively inelastic demand. In relation to electricity, this reflects the essential nature of electricity to commercial and industrial activity and to modern domestic life. This is less so for gas which some consider to be a 'fuel of choice', meaning that it is subject to more competition from substitutes.⁵⁶ Accordingly, in general, electricity provides a better substitute for gas, than gas does for electricity. As a result, gas has a greater elasticity than electricity.

7.49 In relation to gas, this means that where a pipeline service provider seeks to limit supply and raise prices there may be some potential for users to shift consumption away from gas towards alternatives, such as electricity. Where this is the case, it may be more likely that light regulation should be applied. However, it is noted that elasticity of demand is not static and must be considered in relation to each market on a case by case basis.

(g) The extent to which there is information available to a prospective user or user, and whether that information is adequate, to enable the prospective user or user to negotiate on an informed basis with a service provider for the provision of a pipeline service to them by the service provider

7.50 Users can only negotiate with service providers when they have adequate information to determine whether or not payments required of them accurately reflect the efficient cost of providing the service. In a competitive market the efficient cost is revealed as competing providers seek to out bid each other down to the point where they are covering their costs plus a normal profit. Where a business is a natural monopoly this does not occur and it can be difficult for consumers and regulators to access information from natural monopoly service providers. The final form of regulation factor allows the Council to consider the extent to which there is adequate

⁵⁶ Expert Panel Report at p 49.

information available to users, to enable them to negotiate with the service provider on an informed basis.⁵⁷

- 7.51 Generally speaking, where there is a lack of competitive pressure to drive down prices, the true costs of a service provider are unlikely to be revealed in market prices. As a result, where a degree of market power is exercisable by a service provider, there is likely to also be a disparity of information (information asymmetry) between a service provider and users of that service.
- 7.52 As a result, the superiority of the service provider's information about its costs, services, infrastructure and market environment places it in a significant position of advantage over network users, in seeking to negotiate commercial terms and conditions of access, and in the absence of some form of regulation to redress this imbalance.⁵⁸

Provision of information requirements under the National Gas Law

- 7.53 The NGL and Rules contain extensive mechanisms that are intended to facilitate the provision of information in various circumstances. These may operate to assist in addressing any information asymmetry between service providers and users. These mechanisms include:
- (a) disclosure of prices and terms and conditions on offer for pipeline services (r 36)
 - (b) the Natural Gas Services Bulletin Board and Short Term Trading Markets (see below)
 - (c) rules relating to facilitating requests for access including:
 - (i) providing general information to users (s 107)
 - (ii) providing tariff information on request (r 108)
 - (iii) not bundling services (r 109), and
 - (iv) handling access requests (r 112)
 - (d) registers of spare capacity (r 111)
 - (e) any information requirements imposed by the AER in relation to ring-fencing obligations in the NGL (such as s 141)
 - (f) information contained in any AER performance reports under s 64 of the NGL
 - (g) information reported to and disclosed by the AER about the success of access negotiations (r 37), and

⁵⁷ See the Second Reading Speech.

⁵⁸ See the Expert Panel Report at p 50.

- (h) the information disclosed from periods of regulation (see below).

Natural Gas Services Bulletin Board

7.54 Chapter 7 of the NGL provides for the Natural Gas Services Bulletin Board. The purpose of the Natural Gas Services Bulletin Board is to both facilitate trade in natural gas and markets for natural gas services through the provision of system and market information which is readily available to all interested parties, including the general public, and assist in emergency management through the provision of system and market information.⁵⁹ Information to be disclosed by service providers to the Bulletin Board operator includes three day capacity outlooks and actual flow data which will be reconciled against the three day outlooks and indicate where pipelines may have available spare capacity. The ability to trade gas allocations in downstream markets also mitigates market power in the provision of pipeline services.

Short term trading markets

7.55 Division 2A in Part 6 of the NGL provides for Short Term Trading Markets (STTM). Operated by the Australian Energy Market Operator (AEMO), STTMs currently exist for the gas hubs in New South Wales and Adelaide.⁶⁰ The STTM is a market-based wholesale gas balancing mechanism to facilitate the short term trading of gas between pipelines, participants and production centres via market driven daily prices. Operating daily in advance, in relation to specific gas hubs, the STTM uses bids, offers and forecasts submitted by participants and pipeline capacities to determine schedules for deliveries from the pipelines which ship gas from producers to transmission users and the hubs.⁶¹

Disclosure of historic information from access arrangement approvals

7.56 The NGL places certain requirements on covered pipelines to make some information publicly available about the access arrangements applying to the pipeline (see rr 43 and 44) and additional information may be released by the AER in assessing an access arrangement under Part 2 of Chapter 10. Given the high initial capital costs of pipeline infrastructure, the establishment or proxy for an assessed capital base (such as through a competitive tendering process) will give users greater bargaining power over prices and greater certainty over the outcomes of any potential access disputes.

7.57 It is also possible that service providers may disclose information to users in other ways not required by the NGL and Rules. These disclosures may also be relevant to the analysis. Nonetheless, the Council notes that where a covered pipeline competes

⁵⁹ See the Second Reading Speech p 2892 and www.gasbb.com.au.

⁶⁰ Having commenced on 1 September 2010.

⁶¹ See AEMO, Overview of the Short Term Trading Market, Version No. 3, 1 March 2010 and www.aemo.com.au.

with other pipelines for a particular market, a service provider may be less willing to publicly disclose information which may undermine its competitive position in that market.

- 7.58 The information disclosed under these mechanisms may go some way in addressing any information asymmetry between service providers and users and assist in providing a more even platform for negotiations to take place between them. The adequacy of the information available is a key component of this along with the ability for users and prospective users to be able to access updated information.
- 7.59 In circumstances where the disclosure of information in accordance with the NGL and Rules provides adequate information to users and prospective users to enable them to engage in effective negotiations with service providers then light regulation may be the more appropriate form of regulation. Where it is considered that the disclosure requirements under light regulation, along with the disclosure of information to the Natural Gas Services Bulletin Board, will effectively operate to ensure that the service provider discloses adequate information in the future to ensure the degree of information asymmetry is as small as possible, then light regulation is likely to be the more appropriate form of regulation.

Summary Table

7.60 A summary of considerations which may make light regulation more or less likely is below.

Form of regulation factor (s16)	Circumstances conducive to light regulation	Circumstances where light regulation less likely
(a) the presence and extent of any barriers to entry in a market for pipeline services	Barriers to entry present but are relatively low	Barriers to entry relatively high.
(b) presence and extent of any network externalities (that is, interdependencies) between a natural gas service provided by a service provider and any other natural gas service provided by the service provider	Stand alone pipeline activity, where a service provider has no other pipeline operations Rights to pipeline capacity readily tradeable Transmission services and other end to end services generally involve less interdependence with other pipelines	Greater interdependence, where a service provider has other pipeline interests in the same regions as a pipeline for which light regulation is sought Rights to pipeline capacity not readily traded Distribution services (especially established ones) are likely to be more interdependent with other pipeline services

Form of regulation factor (s16)	Circumstances conducive to light regulation	Circumstances where light regulation less likely
<p>(c) presence and extent of any network externalities (that is, interdependencies) between a natural gas service provided by a service provider and any other service provided by the service provider in any other market</p>	<p>Service provider has no involvement in upstream or downstream markets (at least in areas served by a pipeline for which light regulation is sought)</p> <p>Ring fencing and other regulatory requirements effectively prevent a service provider from taking advantage of market power in upstream or downstream markets</p>	<p>Service provider has upstream or downstream involvements in gas or other energy businesses</p> <p>Upstream or downstream involvements are in related but not ring fenced activities, or ring fencing of pipeline operations is ineffective</p>
<p>(d) the extent to which any market power possessed by a service provider is, or is likely to be, mitigated by any countervailing market power possessed by a user or prospective user (countervailing market power)</p>	<p>Large or concentrated users</p> <p>Users with by-pass opportunities</p> <p>High interdependence between users and service provider</p> <p>Users involved in pipeline services elsewhere (such users may face lesser information asymmetry given their direct knowledge and experience of pipeline operations)</p>	<p>Many small users</p> <p>Users have limited resources</p> <p>Diverse user interests (for example where users span different industries or economic sectors)</p> <p>Significant users have the capacity to pass through higher pipeline service costs (these users may have less incentives to expend resources to resist increases in pipeline costs)</p> <p>Poorly represented users</p>

Form of regulation factor (s16)	Circumstances conducive to light regulation	Circumstances where light regulation less likely
(e) the presence and extent of any substitute, and the elasticity of demand, in a market for a pipeline service in which a service provider provides that service	<p>Greater substitution possibilities exist</p> <p>Relatively high elasticity of demand suggesting bypass or other substitution opportunities exist</p> <p>Transmission pipelines (demand is generally more elastic than for distribution services)</p> <p>Availability of large (independent) storage capacity</p> <p>Ability to defer gas production/expansion for significant periods</p>	<p>Lower substitution options</p> <p>Low elasticity</p> <p>Distribution pipelines (especially established distribution pipelines with a high market penetration)</p>
(f) the presence and extent of any substitute for, and the elasticity of demand in a market for, electricity or gas (as the case may be)	<p>Fuel choice available to significant proportion of users</p> <p>Narrower relative prices per unit energy produced from different fuel sources</p> <p>Use of multi fuel plant</p>	<p>Wider relative prices between fuel types</p> <p>Gas dependent users</p> <p>Other energy sources have efficiency disadvantage</p> <p>Dedicated gas plant</p>
(g) the extent to which there is information available to a prospective user or user, and whether that information is adequate, to enable the prospective user or user to negotiate on an informed basis with a service provider for the provision of a pipeline service to them by the service provider	<p>Previous regulated pipelines (a significant base of publicly available and regulator tested information will be available for use in negotiations)</p> <p>Historic pipeline costs available and previously exposed to public/industry scrutiny</p> <p>NGL information disclosure requirements operative</p>	<p>Previously unregulated pipelines</p> <p>NGL information requirements impeded (for example through use of related party contracting which prevents effective scrutiny of underlying costs)</p>

8 National Gas Rules – requirements for making light regulation determinations

8.1 The procedural requirements for making light regulation determinations are set out in Part 7 of the National Gas Rules. Broadly speaking, these rules concern three different aspects of the light regulation regime provided for in the NGL:

- (a) the application process (that is, the requirements with which an application for light regulation must comply)
- (b) the Council's decision-making process, and
- (c) the compliance requirements for light regulation once a light regulation determination has been made.

8.2 Point (a) refers to the rules concerning the application process. They are referred to below to indicate the necessary requirements for applications for light regulation that will be received by the Council. Point (b) refers to the rules concerning the light regulation decision-making process. These are directly applicable to the Council and are discussed in detail below. Finally, point (c) refers to the rules that concern the compliance requirements for light regulation. These rules are not relevant to the Council decision-making process, but rather apply to a pipeline service provider once a light regulation determination is made. Accordingly, those kinds of rules are not discussed here. Pipeline service providers operating a pipeline that provides light regulation services will need to seek their own advice on the operation of rules that apply specifically to them.⁶²

8.3 The rules concerning the application process are set out below, followed by those that apply to the Council when making light regulation determinations.

National gas rules relevant to light regulation determinations

(a) Rules concerning the application for light regulation

8.4 As mentioned above, an application for light regulation where the pipeline is a covered pipeline must be in accordance with the Rules and contain the information required by the Rules. Also, an application may only be made in respect of all the pipeline services provided by means of the covered pipeline (see paragraphs 5.1-5.2 above).

8.5 The specific requirements for an application for light regulation (in particular, the information that should be included in an application), is set out in r 34 of the Rules.

⁶² Note also the AER's Annual Compliance Guideline, last updated in April 2010, which deals with the annual compliance information to be provided to the AER under the NGL and Rules (see www.aer.gov.au).

Rule 34 is set out in full at Appendix A. The following paragraphs explain what is required by r 34 in an application for light regulation.

(a) *the application must be in writing*⁶³

8.6 This requirement can be satisfied by emailing an application which covers the requirements of the Law and Rules to gas@ncc.gov.au and also delivering a hard copy of the application to:

National Competition Council
GPO Box 250
Melbourne Victoria 3001

(b) *the application must identify the pipeline that provides, or is to provide, the services for which the determination is sought and include a reference to a website at which a description of the pipeline can be inspected*

8.7 This requirement can be satisfied by setting out the name by which the pipeline is commonly known, stating the relevant pipeline licence number, providing a link to a website where interested parties can see the locations served by the pipeline and including a map depicting the pipeline's route and proximity, connections or relationship to other pipelines (if any).

(c) *the application must include a description of all pipeline services provided or to be provided by means of the pipeline*

8.8 This requirement can be satisfied by setting out the basic parameters of each pipeline service provided or to be provided by means of the pipeline, including any services which differ depending on the location of the user's receipt or delivery points and other specialised services for particular users which are being or are to be provided. The understanding of each of the services provided is essential to weighing up the market power associated with the basket of services being provided.

(d) *the application must include the applicant's reasons for asserting that the pipeline services should be light regulation services*

8.9 The applicant must address the reasons for why the services should be lightly regulated as relevant to the Council's application of the test in s 122. The Council would expect the reasons to cover all aspects of the test and why the overall decision should be in favour of light regulation.

⁶³ Note 'writing' is defined broadly in clause 10 of Schedule 2 to the NGL as including 'any mode of representing words in a visible form'.

(e) the application must include other information and materials on which the applicant relies in support of the application.

8.10 The applicant should submit to the Council the key factual and evidentiary materials which are necessary to back up the arguments presented in favour of light regulation and rebut potential arguments against making a light regulation determination. This may include information about actual pipeline usage and any other confidential information which the Council is obliged to keep confidential in accordance with ss 90 and 331 of the NGL.

(f) the application must include certain specific information

8.11 Subrule 34(2) sets out certain specific information that must also be included in an application for light regulation. That information must include the following:

(a) the capacity of the pipeline and the extent to which that capacity is currently utilised

8.12 This requirement primarily relates to the maximum capacity of pipeline throughput on the central parts of the pipeline (rather than every receipt point) and the manner in which that capacity is being utilised. Where pipeline usage is relatively stable and just varies with the seasons, average utilisation in summer and winter may be sufficient. Where pipeline usage is more erratic and driven by peaks (such as high electricity prices), some discussion of the utilisation in those peak periods may be necessary.

(b) for a transmission pipeline

8.13 For a transmission pipeline, the application must include a description of:

- (a) all locations served by the pipeline (i.e. all locations at which receipt or delivery points for natural gas carried by the pipeline exist), and
- (b) all pipelines that currently serve the same locations, and
- (c) all pipelines that currently pass within 100 km of any location served by the pipeline.

8.14 For transmission pipelines, this requires a description of where gas comes in and out of the pipeline (such as the various production facilities or electricity generators) and other pipelines which either serve the same location or could potentially be extended to serve the same location (i.e. are within 100 km of a location being served).

(c) for a distribution pipeline

8.15 For a distribution pipeline, the application must include a description of:

- (a) the geographical area served by the pipeline, and

(b) the points at which natural gas is, or is to be, injected into the pipeline.

8.16 For distribution pipelines, this requires a map and/or post code zones where end users are supplied gas by the pipeline and the points where gas comes into the distribution system (either production facilities, storage facilities or other pipelines).

(d) a description of the pipeline services provided, or to be provided, by the pipeline

8.17 This requires no further information than already required under r 34(1)(c) discussed above, but more detailed service descriptions may be provided where they are useful in understanding the nature of the network and the markets it supplies.

(e) an indication of any other sources of energy available to consumers of gas from the pipeline

8.18 This should set out the substitution possibilities for the consumers of gas served by the pipeline. Some idea of whether particular large users have dual fuel capabilities will be important as will other potential bypass opportunities. The nature of consumers' usages, such as the reliance of end users on gas for heating, may be relevant to fully understand the extent to which the other sources of energy are a realistic option for those consumers.

(f) the identity of the parties with an interest in the pipeline and the nature and extent of each interest

8.19 This requirement relates to the structure of each pipeline service provider for the pipeline and other persons with an interest in the pipeline, such as ownership interests in a service provider. As a matter of practicality, where a pipeline service provider's shares are held by a large number of individuals an appropriate threshold will need to be found for those with 'an interest' relevant to the analysis and those which are irrelevant for the analysis. At the very least, it is expected that, shareholders with 5 per cent or more equity in a service provider would be declared. The need to explain the interests involved may differ depending upon the ability for the person/entity to exercise control over the operation of the pipeline or profit from any exercise of market power in either the provision of pipeline services or associated upstream or downstream markets.

(g) a description of certain relationships

8.20 An application must include a description of the following relationships:

(a) any relationship between the owner, operator and controller of the pipeline (or any 2 of them)

(b) any relationship between the owner, operator or controller of the pipeline and a user of pipeline services or a supplier or consumer of gas in a location or geographical area served by the pipeline, and

- (c) any relationship between the owner, operator or controller of the pipeline and the owner, operator or controller of any other pipeline serving any one or more of the same locations or the same geographical area.

8.21 This requirement focuses on the relationship between various service providers of a pipeline, users in upstream and downstream markets and other pipelines which may potentially compete with the pipeline. To establish that any of these relationships are unlikely to produce anti-competitive effects or an abuse of market power, an applicant should set out what has been put in place to mitigate the likelihood of that occurring.

(h) an estimate of the annual cost to the service provider of regulation on the basis of light regulation and on the basis of full regulation

8.22 This requirement is designed to allow the Council to clearly understand the differential costs involved in both forms of regulation for the purposes of applying s 122(1)(b). To make the cost estimate meaningful, a breakdown on how it was arrived at (including relevant assumptions, such as the level of access disputes) and what constitutes the annual cost will be essential. The analysis and substantiation of the various transaction costs involved in each regulatory approach will be an important factor for the decision making process.

(i) any other information the applicant considers relevant to the application of the National Gas Objective or the form of regulation factors in the circumstances of the present case

8.23 This allows the applicant to bring forward other relevant material to assist the application of the test in s 122(2). The applicant should ensure that the application as a whole contains all relevant information for the application of the statutory test and has not failed to disclose information which it considers material but unhelpful to its application. This may include information about significant developments which the applicant knows are likely to occur, such as a change in ownership of the pipeline in question.

False or misleading information

8.24 Persons submitting information to the Council are advised that the giving of false or misleading information to a Commonwealth entity, such as the Council, is a serious offence. In particular, s 137.1 of the Commonwealth Criminal Code⁶⁴ makes it a criminal offence for a person to supply information to a Commonwealth body knowing that the information is false or misleading in a material particular (s 137.1(b)(i) of the Criminal Code) or omitting any matter or thing without which the information is misleading in a material particular (s 137.1(b)(ii) of the Criminal Code).

⁶⁴ *Criminal Code Act 1995* (Cth)

Applications that do not comply with the Rules

8.25 An application received by the Council that does not comply with the requirements set out in r 34 will not comply with the requirements in s 112(2) of the NGL that the application 'be in accordance with the Rules'. The Council is not obliged to consider an application for light regulation that has not been made in accordance with s 112(2) and the Rules and has the power to reject non-compliant or frivolous proposals under r 10. That rule provides that a decision maker may, despite any other provision of the Rules, reject a proposal (i.e., an application for light regulation)⁶⁵ on the ground that:

- (a) the proposal has not been made in accordance with the Law, or
- (b) relevant information or materials have not been provided as required by the Law, or
- (c) the proposal is frivolous or vexatious.

8.26 A decision to reject a proposal under r 10 must be made within 10 business days after receipt of the proposal by the decision maker, and the decision must also:

- (a) be made in writing, and
 - (b) set out the reasons for the decision, and
 - (c) be given to the proponent without delay
- (see rr 10(2) and (3)).

(b) Rules concerning the Council’s decision on an application for light regulation

8.27 In making a decision in respect of an application made under s 112(2) for light regulation (i.e., where the pipeline is a covered pipeline),⁶⁶ the Council is required to comply with the procedures set out in r 35.

35 NCC's decision on the application (Sections 113 and 114 of the NGL)

- (1) In deciding an application for a light regulation determination, the NCC must:
 - (a) proceed in accordance with the standard consultative procedure; and
 - (b) consult with the AER.

⁶⁵ The term 'proposal' for the purposes of r 10 means: (a) an application; or (b) an access arrangement proposal; or (c) a proposal that a decision maker itself initiates for making a decision of a particular kind under the Law (see r 7). This would therefore include an application for light regulation made pursuant to s 112 of the NGL.

⁶⁶ Note, that a decision on light regulation where the pipeline is not a covered pipeline (but an application for coverage has been made) takes effect after coverage is decided (s 115).

- (2) A light regulation determination or a decision not to make a light regulation determination must:
 - (a) identify the pipeline, and the pipeline services, to which the determination or decision relates; and
 - (b) include a reference to a website at which a description of the pipeline, and the pipeline services, can be inspected; and
 - (c) state the terms of the determination or decision and the reasons for it.

8.28 Rule 35(1) requires that in making a decision on an application for light regulation, the Council must proceed in accordance with the standard consultative procedure, and consult with the AER.

The standard consultative procedure – r 35(1)(a)

8.29 The 'standard consultative procedure' is defined in r 3 to mean the procedure for consultative decision making laid down in r 8. Rule 8(1) provides that if the Law requires a decision maker to deal with a proposal in accordance with the standard consultative procedure, the decision maker must proceed in accordance with r 8.

8.30 Rules 8(2)-(4) set out the procedure to be followed when making light regulation determinations, and relevantly provide:

- (2) The decision maker must proceed as follows:
 - (a) the decision maker must publish a notice on its website and in a newspaper circulating generally throughout Australia:
 - (i) describing the proposal and giving the address of a website at which the proposal can be inspected; and
 - (ii) inviting written submissions on the proposal within 15 business days of the date of the notice; and
 - (b) the decision maker must, after considering relevant submissions made within the time allowed in the notice and other matters the decision maker considers relevant, make a draft decision; and
 - (c) if the draft decision identifies changes to the proposal that should, in the decision maker's opinion, be made, the decision maker must:
 - (i) ...
 - (ii) if someone else is the proponent – notify the proponent of the decision and the reasons for it and give the proponent

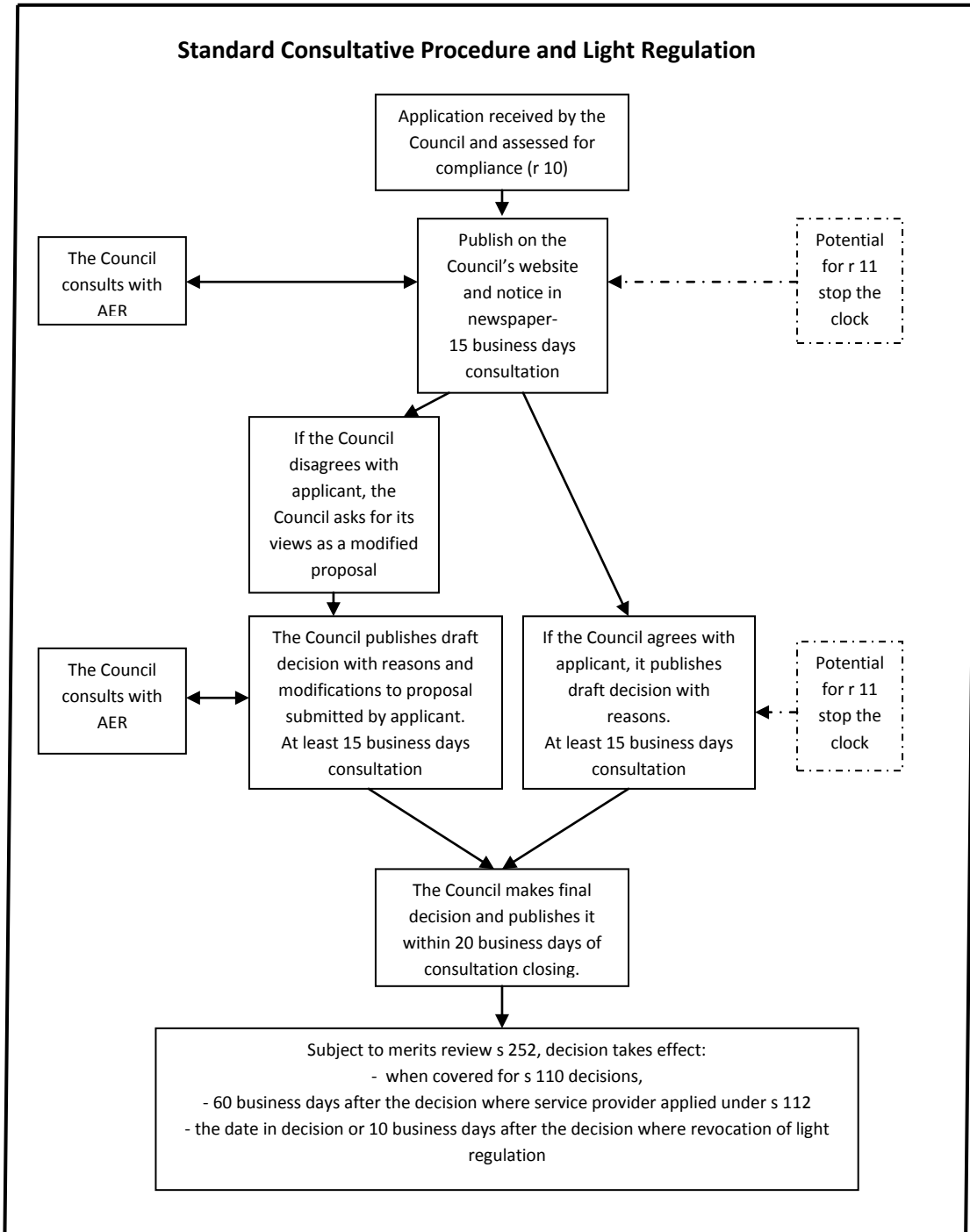
- a reasonable opportunity to modify its proposal in the light of the decision;
- (d) the decision maker must then publish, on its website and in any other way the decision maker considers appropriate:
 - (i) the draft decision; and
 - (ii) any modification of the proposal made in the light of the draft decision; and
 - (iii) a notice inviting written submissions and comments on the draft decision, and (if applicable) the modified proposal, within a period (at least 15 business days) stated in the notice;
 - (e) the decision maker must, within 20 business days after the end of the period allowed for making submissions and comments on the draft decision, consider all submissions and comments made within the time allowed and make its final decision.
- (3) A draft or final decision must:
- (a) be in writing; and
 - (b) state the terms of the decision and the reasons for it.
- (4) After making a final decision, the decision maker must, without delay:
- (a) ...
 - (b) give copies of the final decision to the parties to the administrative process in which the decision is made; and
 - (c) publish the final decision on the decision maker's website; and
 - (d) make the final decision available for inspection during business hours at the decision maker's public offices.

8.31 We note that r 8(5) provides that, subject to the Law, a decision made in accordance with r 8 takes effect on the date provided for its commencement under the terms of the decision or, if no date is so provided, 10 business days after the date of the decision. This applies for decisions to revoke a light regulation determination. However, where a light regulation determination is made with a coverage recommendation, s 115(1)(a) of the NGL provides that it comes into effect on the day the relevant coverage recommendation takes effect.⁶⁷ Where a light regulation determination is made on the application of a service provider under s 112,

⁶⁷ Subject to merits review which would ordinarily stay the decision in accordance with s 252(b), this is the date specified by the Minister in accordance with s 99(6) of the NGL.

s 115(1)(b) of the NGL provides that it comes into effect 60 business days after the light regulation determination is made.

8.32 In brief, the standard consultative procedure operates as follows:



Further details about the standard consultative procedure

- 8.33 It should be noted that the consultation on the original proposal/application is locked in at 15 business days by r 8(2)(a)(ii). A business day is a weekday which is not a public holiday simultaneously in all States and Territories.⁶⁸
- 8.34 After consultation ends, the Council will consider all of the issues raised (including from its consultation with the AER) and make its draft decision. Rule 8(2)(c)(ii) then requires the Council to consider whether there are 'any changes to the proposal that should... be made' and, if so, notify the applicant of the decision, the reasons for it and give the proponent an opportunity to modify its proposal. In the context of applications for light regulation, where the Council does not agree with the application, the likely application of r 8(2)(c)(ii) will mean that the Council is obliged to give the draft decision first to the applicant and ask them if they wish to submit a revised proposal in light of the Council's decision. The rules require this to be a 'reasonable opportunity' but do not specify a period. If the applicant chooses to submit a revised proposal in light of the draft decision, r 8(2)(d) requires the Council to publish on its website this proposal with the decision it first gave to the applicant. The rules do not contemplate the Council considering the revised proposal or modifying its decision in light of what has been put before publication.
- 8.35 Once a draft decision and any revised proposal have been published on the Council's website, the Council must specify a public consultation period in a notice on its website and that period must be at least 15 business days (r 8(2)(d)(iii)). The Council considers that 15 business days would ordinarily be long enough except in circumstances where the decision raises particularly difficult or complex issues.
- 8.36 The final decision must be:
- (a) in writing with full reasons (r 8(3))
 - (b) given to the applicant and any other party which has been actively involved in the decision making process (r 8(4)(b))
 - (c) be published on the Council's website (r 8(4)(c)), and
 - (d) available for inspection at the Council's office (r 8(4)(d)).

Consult with the AER – r 35(1)(b)

- 8.37 As mentioned above, r 35(1)(b) requires the Council to consult with the AER in deciding an application for a light regulation determination. The Council proposes to seek views of the AER when first receiving an application, in light of its draft determination and at other points where relevant. It will take the AER's views into account as is relevant to applying the statutory test.

⁶⁸ See clause 10 of Schedule 2 to the NGL.

- 8.38 It may be necessary for confidential information to be shared between the AER and the Council to ensure that a proper consideration of all the issues will be undertaken. This is possible under ss 30 and 90 of the NGL and s 44AAF of the *Competition and Consumer Act 2010* (Cth).⁶⁹

Requirements for a light regulation determination – r 35(2)

- 8.39 The Council’s decision will identify the pipeline, and the pipeline services, to which the determination or decision relates consistent with that in the application and include a reference to the website at which the description of the pipeline and service provider can be inspected as provided by the applicant, to comply with rr 35(2)(a) and (b). In compliance with r 35(2)(c), the decision will state whether the Council has decided to make a light regulation determination in relation to the application or decided not to make such a determination and give the reasons for that decision.
- 8.40 Note that section 10 of this Part C of the Guide sets out how the merits review framework applies after this point.

⁶⁹ See in particular regulation 7, item 1.1 of the *Competition and Consumer Regulations* which prescribes the Council for the purpose of s 44AAF(3)(e) of the CCA.

9 Revocation of light regulation determinations

Advice by service provider that light regulation services should cease to be light regulation services

- 9.1 A service provider who provides light regulation services may advise the Council in writing that it wishes that the pipeline services it provides cease to be light regulation services (ss 117(1) and (2) of the NGL). For example, a service provider may wish to be subject to a full access arrangement again in circumstances where light regulation becomes comparatively more costly for the service provider.
- 9.2 On receiving an advice of this kind from a service provider, the Council must, without delay, publish notice of that advice on its website and in a newspaper circulating generally throughout Australia (s 117(3) of the NGL).
- 9.3 On publication of a notice under s 117(3), the service provider must submit (in accordance with s 132) to the AER, for approval under the Rules, a full access arrangement in respect of the pipeline services that it provides. The light regulation determination applying to the pipeline services will, by force of s 117(5), be revoked on the same day that an access arrangement that applies to the pipeline services provided by that service provider is, as the case requires, approved or made under a full access arrangement decision. On the revocation of the light regulation determination the pipeline services to which the light regulation determination applied cease to be light regulation services (s 117(6)).

Application (other than by service provider) for the revocation of a light regulation determination

- 9.4 A person other than the service provider who provides light regulation services may apply to the Council under s 118(1) of the NGL for the revocation of a light regulation determination relating to those services. An application of this kind must:
- (a) be in accordance with the Rules, and
 - (b) contain the information required by the Rules (see s 118(2)).
- 9.5 The requirements for an application under s 118 for the revocation of a light regulation determination are set out in r 38 of the National Gas Rules. The requirements of r 38 are set out in full in 11.5Appendix A. We consider each requirement in turn.

(a) state the applicant's name and contact details

- 9.6 The applicant's name and all relevant contact details should be provided (such as contact person, postal address, email address, phone number and fax number).

(b) identify the light regulation determination to which the application relates

9.7 The applicant should identify the original decision which granted light regulation to the pipeline. The name and date of the decision would be sufficient.

(c) identify the service provider

9.8 The applicant should identify which service provider or providers currently owns, controls and operates the pipeline in question.

(d) identify the covered pipeline

9.9 The applicant needs to clearly identify which covered pipeline the application relates to, noting that some service providers own, control or operate more than one covered pipeline.

(e) state the applicant's reasons for asserting that light regulation determination should be revoked

9.10 The applicant must address the reasons for why the services should no longer be lightly regulated as relevant to the Council's application of the test in s 122 of the NGL. The Council would expect the reasons to cover all aspects of the test and why the overall decision should not be in favour of light regulation. This could be expected to include some analysis of how the pipeline operator has behaved while the light regulation determination has been in force.

(f) include any information and materials on which the applicant relies

9.11 The applicant should provide supporting materials or evidence to justify the arguments it has presented for why the services should cease to be light regulation services and a full access arrangement apply. It is understood that users will not have all of the relevant pipeline information or information about other users' usage to establish a complete picture of the pipeline in question, but what can be gathered and presented will be an important input into the Council's deliberations.

False or misleading information

9.12 Persons submitting information to the Council are reminded that the giving of false or misleading information to a Commonwealth entity is a serious offence under the Criminal Code. Refer to the note above at paragraph 8.24.

Applications that do not comply with the Rules

9.13 An application received by the Council that does not comply with the requirements set out in r 38 will not comply with the requirements in s 118(2) of the NGL that the

application 'be in accordance with the Rules'. The Council is not obliged to consider an application for the revocation of a light regulation determination that has not been made in accordance with s 118(2) and the Rules and has the power to reject non-compliant or frivolous proposals under r 10. That rule provides that a decision maker may, despite any other provision of the Rules, reject a proposal (i.e. an application for revocation of a light regulation determination)⁷⁰ on the ground that:

- (a) the proposal has not been made in accordance with the Law, or
- (b) relevant information or materials have not been provided as required by the law, or
- (c) the proposal is frivolous or vexatious.

9.14 A decision to reject a proposal under r 10 must be made within 10 business days after receipt of the proposal by the decision maker, and the decision must also:

- (a) be made in writing, and
- (b) set out the reasons for the decision, and
- (c) be given to the proponent without delay

(see rr 10(2) and (3)).

The Council's decision on an application for the revocation of a light regulation determination

9.15 Sections 119 and 120 of the NGL govern the Council's decisions on an application for revocation of light regulation under s 118 depending upon whether an application for revocation of coverage needs to be considered. Under s 119, if there is an undecided application for revocation of coverage or one is made after the application under s 118, both applications are required to be dealt with together and delivered at the same time (s 119(4)). Under s 119(5) the decisions must:

- (a) be made in accordance with this Law and the Rules, and
- (b) be attached to the coverage revocation recommendation, and
- (c) contain the information required by the Rules.

9.16 Where there are no applications to revoke coverage, s 120(3) provides that the Council decision on the application must be made within 4 months (subject to the procedures in rr 11 and 12 for extending this period). Subsection 120(4) requires such a decision to:

⁷⁰ The term 'proposal' for the purposes of r 10 means: (a) an application; or (b) an access arrangement proposal; or (c) a proposal that a decision maker itself initiates for making a decision of a particular kind under the Law (see r 7). This would therefore include an application for the revocation of a light regulation determination made pursuant to s 118 of the NGL.

- (a) be made in accordance with this Law and the Rules, and
- (b) contain the information required by the Rules, and
- (c) be given to the persons specified by the Rules, and
- (d) be made publicly available in accordance with the Rules.

9.17 For the purposes of both ss 119(5) and 120(4), r 39 of the National Gas Rules sets out the procedural requirements for making a decision on an application for the revocation of a light regulation determination.

39 NCC's decision on application (Sections 119 and 120 of the NGL)

- (1) In deciding an application for revocation of a light regulation determination, the NCC must:
 - (a) proceed in accordance with the standard consultative procedure; and
 - (b) consult with the AER.
- (2) A decision on an application for revocation of a light regulation determination must:
 - (a) be in writing; and
 - (b) identify the light regulation determination; and
 - (c) identify the service provider and the covered pipeline; and
 - (d) describe the pipeline services affected by the decision; and
 - (e) state the terms of the decision and the reasons for it.

9.18 Rule 39(1) requires that in making a decision on an application for light regulation, the Council must proceed in accordance with the requirements of the standard consultative procedure, and consult with the AER. See the discussion in section 8 of this Part C of the Guide about the standard consultative procedure.

9.19 The Council's decision will identify the previous determination, the pipeline, the pipeline services to which the determination relates and the relevant service provider in accordance with r 39(2)(a) to (d). In compliance with r 39(2)(e), the decision will state whether the Council has decided to revoke the light regulation determination the subject of the application or decided not to revoke the determination and give the reasons for that decision.

10 Merits review of light regulation decisions

10.1 Merits review is available under Part 5 of Chapter 8 of the NGL for reviewable regulatory decisions, including:

- (a) a light regulation determination, or a decision of the Council under Part 2 of Chapter 3 not to make a light regulation determination, and
- (b) a decision of the Council under Part 2 of Chapter 3 to revoke or not revoke a light regulation determination.⁷¹

10.2 Judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) is available for decisions of the AER, the Council and Commonwealth Minister under the NGL.⁷²

Application for review

10.3 An application for review of one of the above reviewable regulatory decisions, may be made to the Australian Competition Tribunal, with the leave of the Tribunal (s 245(1) of the NGL). The application may be made on one or more of the following grounds:

- (a) the original decision maker made an error of fact in the decision maker's findings of facts, and that error of fact was material to the making of the decision
- (b) the original decision maker made more than 1 error of fact in the decision maker's findings of facts, and those errors of fact, in combination, were material to the making of the decision
- (c) the exercise of the original decision maker's discretion was incorrect, having regard to all the circumstances
- (d) the original decision maker's decision was unreasonable, having regard to all the circumstances (see s 246(1) of the NGL).⁷³

Time limitations

10.4 The time period within which an application for review must be made varies depending upon whether the original decision was a coverage related light regulation decision or not.

⁷¹ See ss 244 and 245 of the NGL. Note also additional procedural provisions in s 44ZZR of the CCA and Regulation 7B of the Competition and Consumer Regulations.

⁷² See Schedule 3 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth).

⁷³ See discussion of these grounds in *Re: Application by ElectraNet Pty Limited (No 3)* [2008] ACompT 3 (30 September 2008) at [64] - [79].

- 10.5 A 'coverage related light regulation decision' is defined for the purposes of Part 5 to mean a decision of the Council under either s 110(1) or s 119(3) of the NGL (see s 244). An application for review of one of these decisions must be made:
- (a) in the case of a decision of the Council under s 110(1) of the NGL, no later than 15 business days after the making of the coverage determination relating to the coverage recommendation to which the decision under s 110(1) is attached (s 247(2)(a) of the NGL)
 - (b) in the case of a decision of the Council under s 119(3) of the NGL, no later than 15 business days after the making of the coverage revocation determination relating to the coverage revocation recommendation to which the decision under s 119(3) is attached (s 247(2)(b) of the NGL).
- 10.6 In the case of applications for review of a reviewable regulatory decision which is not a coverage related light regulation decision, the application must be made no later than 15 business days after the reviewable regulatory decision is published in accordance with the NGL or the Rules (s 247(1)).
- 10.7 There are also a number of situations where the Tribunal may refuse to hear an application for merits review which are set out in ss 248 – 251 of the NGL. Some of these are discussed in *Re: Application by ElectraNet Pty Ltd [2008] ACompT 1* (23 June 2008) at [39] – [42] and [58] – [63]. In particular, s 250 requires that the Tribunal refuse leave to persons who have not made submissions in relation to the making of the decision (which would include submissions to the Council in relation to Ministerial coverage decisions). Additionally, leave may be refused where a service provider has:
- (a) without reasonable excuse, failed to comply with a request for information from the Council (s 251(2)(a)(i)) or conducted itself in a manner that resulted in the delay of the decision (s 251(2)(a)(ii)), or
 - (b) misled or attempted to mislead the Council in making a recommendation or decision (s 251(2)(b)(ii)).
- 10.8 It should be noted that under s 261 of the NGL parties are unable to introduce new information to the Tribunal not submitted as part of the original decision making process to make out a ground of review. Subsection 258(2) also limits parties from raising issues not raised in submissions to the decision maker. Subsection 261(2) is also designed to ensure that the Tribunal has regard to public policy statements, such as this Guide, in conducting its review of the decision.

11 Other issues and jurisdictional differences

Jurisdictional differences

11.1 It should be noted that there are some jurisdictional differences in the application of the light regulation regime and the Council's role. The designation of particular pipelines in Victoria, South Australia and Western Australia is one key difference already discussed.

Western Australia

11.1 The Council needs to consult in relation to Western Australian pipelines with the Western Australian Economic Regulatory Authority (ERA) rather than the AER unless the pipeline is an international pipeline or crosses into South Australia or the Northern Territory (which remain under AER jurisdiction).

11.2 The dispute resolution body in Western Australia remains the arbitrator originally established under their *Gas Pipelines Access (Western Australia) Act 1998*.

11.3 In Western Australia, under s 20 of the *National Gas Access (WA) Act 2009* the Kalgoorlie to Kambalda pipeline had 6 months after the commencement of that Act to apply for light regulation under s 112, despite the fact that it did not have an applicable access arrangement in place (as required by s 112). Southern Cross Pipelines Australia Pty Ltd (a wholly owned subsidiary within the APA Group) applied to the Council for a light regulation determination for the services provided by the Kalgoorlie to Kambalda pipeline on 22 April 2010. The Council issued its light regulation determination for the Kalgoorlie to Kambalda pipeline on 29 June 2010, with that determination coming into effect 60 business days after that date.

Queensland

11.4 In Queensland, Regulation 3 of the *National Gas (Queensland) Regulation* deems the Carpentaria Gas Pipeline (which serves the Mt Isa region) to be the subject of a light regulation determination and provides that the pipeline cannot be made the subject of a full access arrangement until 30 April 2023.

11.5 The Queensland Gas Pipeline and South West Queensland Pipeline are also uncovered by the Regulation with no applications for coverage allowed until 1 July 2011 and 1 July 2009 respectively.

Appendix A National Gas Rules

Rule 34 Application for light regulation determination (section 112(2) of the NGL)

A.1 Rule 34 of the National Gas Rules sets out the specific requirements for an application for light regulation (including the information that must be included) and is in the following terms:

- (1) An application for a light regulation determination must:
 - (a) be in writing; and
 - (b) identify the pipeline that provides, or is to provide, the services for which the determination is sought and include a reference to a website at which a description of the pipeline can be inspected; and
 - (c) include a description of all pipeline services provided or to be provided by means of the pipeline; and
 - (d) include the applicant's reasons for asserting that the pipeline services should be light regulation services; and
 - (e) include other information and materials on which the applicant relies in support of the application.
- (2) The application must also include the following information:
 - (a) the capacity of the pipeline and the extent to which that capacity is currently utilised; and
 - (b) for a transmission pipeline, a description of:
 - (i) all locations served by the pipeline (i.e. all locations at which receipt or delivery points for natural gas carried by the pipeline exist); and
 - (ii) all pipelines that currently serve the same locations; and
 - (iii) all pipelines that currently pass within 100 km of any location served by the pipeline; and
 - (c) for a distribution pipeline, a description of:
 - (i) the geographical area served by the pipeline; and

- (ii) the points at which natural gas is, or is to be, injected into the pipeline; and
- (d) a description of the pipeline services provided, or to be provided, by the pipeline; and
- (e) an indication of any other sources of energy available to consumers of gas from the pipeline; and
- (f) the identity of the parties with an interest in the pipeline and the nature and extent of each interest; and
- (g) a description of the following relationships:
 - (i) any relationship between the owner, operator and controller of the pipeline (or any 2 of them);
 - (ii) any relationship between the owner, operator or controller of the pipeline and a user of pipeline services or a supplier or consumer of gas in a location or geographical area served by the pipeline;
 - (iii) any relationship between the owner, operator or controller of the pipeline and the owner, operator or controller of any other pipeline serving any one or more of the same locations or the same geographical area; and
- (h) an estimate of the annual cost to the service provider of regulation on the basis of light regulation and on the basis of full regulation; and
- (i) any other information the applicant considers relevant to the application of the National Gas Objective or the form of regulation factors in the circumstances of the present case.

Rule 38 Application for revocation of light regulation determination (section 118(2) of the NGL)

A.2 Rule 38 of the National Gas Rules sets out the requirements for an application for revocation of light regulation, and is in the following terms:

An application for the revocation of a light regulation determination must:

- (a) state the applicant's name and contact details; and
- (b) identify the light regulation determination to which the application relates; and
- (c) identify the service provider; and
- (d) identify the covered pipeline; and

- (e) state the applicant's reasons for asserting that light regulation determination should be revoked; and
- (f) include any information and materials on which the applicant relies.

Appendix B Use of extrinsic materials in this Guide

Use of extrinsic materials to assist interpretation

- B.1 In developing this Guide, a range of relevant extrinsic materials are referred to in order to assist in the interpretation of the NGL. A key preliminary consideration, therefore, is the legitimacy of referring to extrinsic material for this purpose, and its relevance to the interpretation of the Law and Rules.
- B.2 Section 9(2) of the *National Gas (South Australia) Act 2008* (SA) provides that the *Acts Interpretation Act 1915* (SA) does not apply to the *National Gas (South Australia) Act 2008* (SA), which contains the NGL, or the *National Gas (South Australia) Regulations* (the Regulations).⁷⁴ Rather, the NGL contains its own interpretation provisions which are set out in Schedule 2.
- B.3 The interpretation provisions in Schedule 2 apply to the NGL, the Regulations and the Rules and any other statutory instrument made under the NGL (see s 20 of the NGL; see also subclause 51 of Schedule 2).

Interpretation best achieving Law's purpose

- B.4 Subclause 7(1) of Schedule 2 provides that in the interpretation of a provision of the NGL, the interpretation that will best achieve the purpose or object of the NGL is to be preferred to any other interpretation. Subclause 7(1) applies whether or not the purpose is expressly stated in the NGL.

Use of extrinsic material in interpretation

- B.5 Subclause 8(2) of Schedule 2 provides that in the interpretation of a provision of the NGL, consideration may be given to 'Law extrinsic material' capable of assisting in the interpretation—
- (a) if the provision is ambiguous or obscure, to provide an interpretation of it, or
 - (b) if the ordinary meaning of the provision leads to a result that is manifestly absurd or is unreasonable, to provide an interpretation that avoids such a result, or
 - (c) in any other case, to confirm the interpretation conveyed by the ordinary meaning of the provision.
- B.6 'Law extrinsic material' is defined in subclause 8(1) as 'relevant material not forming part of this Law'. That provision then goes on to list a number of examples of relevant

⁷⁴ A similar provision exists in the Application Acts for the other State and Territory jurisdictions.

Law extrinsic material, including an explanatory note or memorandum and the Second Reading Speech relating to the Bill that contained the provision.

- B.7 Subclause 8(3) is in similar terms to subclause 8(2) but relates to the interpretation of the Rules. It provides that in the interpretation of a provision of the Rules, consideration may be given to Law extrinsic material or 'Rule extrinsic material' capable of assisting in the interpretation of a provision where its meaning is unclear. 'Rule extrinsic material' is defined in subclause 8(1) to mean:
- (a) a draft Rule determination; or
 - (b) a final Rule determination; or
 - (c) any document (however described)–
 - (i) relied on by the AEMC in making a draft Rule determination or final Rule determination; or
 - (ii) adopted by the AEMC in making a draft Rule determination or final Rule determination.
- B.8 In determining whether consideration should be given to Law extrinsic material or Rule extrinsic material, and in determining the weight to be given to that material, subclause 8(4) requires that regard is to be had to the desirability of a provision being interpreted as having its ordinary meaning; and the undesirability of prolonging proceedings without compensating advantage, as well as any other relevant matters.
- B.9 Accordingly, it may be possible in particular cases regarding pipeline services for courts to have regard to the Second Reading Speech for the NGL, and the other documents referred to therein, to help establish the object of a particular provision and to point to why the provision should be interpreted in a particular way. For this reason, we have referred to these materials in our discussion below of the form of regulation factors in s 16 of the NGL.
- B.10 Importantly, however, extrinsic material cannot be used to alter the clear meaning of a provision. This point was noted, for example, in the case of *Re Bolton: Ex parte Beane* (1987) 162 CLR 514, when the High Court stated that 'the words of a Minister must not be substituted for the text of the law'.⁷⁵ Accordingly, while the extrinsic materials may be relevant to the interpretation process, those materials cannot be used to alter or detract from what is a clear and unambiguous meaning on the face of a provision.
- B.11 Additionally, it must be recognised that the policy surrounding the light regulation regime, while consistent at a high level, did develop significantly from the Productivity Commission's review, the Ministerial response, Expert Panel and the final

⁷⁵ at [518] per Mason CJ, Wilson and Dawson JJ.

consultation and implementation such that some care needs to be taken in relying too heavily on any one particular statement.