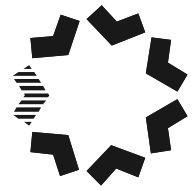


NATIONAL
COMPETITION
COUNCIL



Greenfields pipeline incentives

A guide to the functions and the
powers of the National Competition
Council under the National Gas Law:
Part D Greenfields pipeline incentives



September 2011

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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.

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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, revocation of coverage and classification of pipelines. Part C examines the Council's role in making and revoking light regulation determinations. This Part D concerns the Council's function in making no-coverage recommendations and price regulation exemption recommendations in respect of greenfields pipelines.

Glossary of terms and abbreviations

Abbreviations	Description
15-year no-coverage determination	A determination whereby a new pipeline cannot be covered for 15-years from its commissioning
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	Australian Energy Market Commission established by section 5 of the <i>Australian Energy Market Commission Establishment Act 2004 (SA)</i>
Australian Energy Regulator or AER	Australian Energy Regulator established by s 44AE of the CCA
CCA	<i>Competition and Consumer Act 2010 (Cth)</i>
Commonwealth Criminal Code	<i>Criminal Code Act 1995 (Cth)</i>
Council or NCC	National Competition Council established by s 29A of the CCA
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 NGL
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 Authority Act 2003 (WA)</i>
Expert Panel Report	Expert Panel on Energy Access Pricing, <i>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 NGL
Full regulation or access arrangement regulation	The form of regulation applicable to covered pipelines without a light regulation determination
Gas Code	<i>National Third Party Access Code for Natural Gas Pipeline Systems</i> set out in Schedule 2 to the <i>Gas Pipelines Access (South Australia) Act 1997 (SA)</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 NGL and the National Gas Rules require provision to be made in an access arrangement
MCE	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	Ministerial Council on Energy, <i>Review of the National Gas Pipelines Access Regime: Response to the Productivity Commission Review of the Gas Access Regime – Decision May 2006</i>

Abbreviations	Description
National Gas Law or NGL	Schedule to the <i>National Gas (South Australia) Act 2008</i>
National gas objective	The objective set out in s 23 of the NGL
National Gas Rules or Rules	The rules initially made by the South Australian Minister under s 294 of the NGL and include any amendments to the Rules made by the AEMC under the NGL
Part IIIA	Part IIIA of the CCA
Price regulation exemption	A determination by the Commonwealth Minister that a new international pipeline is exempt from price or revenue regulation for 15 years from commissioning, but is subject to other non-price regulation under the NGL and Rules
Productivity Commission Report	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
Regulator	AER, other than in respect of Western Australian pipelines where it means the ERA
Regulations	<i>National Gas (South Australia) Regulations 2008</i>
Second Reading Speech	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
Tribunal	Australian Competition Tribunal
User	<p>A person who—</p> <ul style="list-style-type: none"> a. 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 b. 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
September 2011	Minor modifications following the renaming of the <i>Trade Practices Act 1974 (Cth)</i> to the <i>Competition and Consumer Act 2010 (Cth)</i> (with effect 1 January 2011)
February 2010	Minor modifications following the commencement of the <i>National Gas Access (WA) Act 2009 (WA)</i> and the <i>National Gas (South Australia) (National Gas Law—Australian Energy Market Operator) Amendment Act 2009 (SA)</i>
September 2009	First edition

1 Overview

- 1.1 The National Gas Law (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.¹
- 1.2 The National Competition Council (the Council) is the body under the NGL that has the responsibility of recommending whether or not to apply access regulation in respect of a pipeline. This is called the 'coverage' process and pipelines which are subject to access regulation under the NGL are called 'covered pipelines'. In respect of covered pipelines the Council also has a role in relation to determining the form of regulation which should be applied - either light regulation or full access arrangement regulation.
- 1.3 This Part D of the Guide outlines the Council's role in making recommendations with regard to greenfields pipeline incentives for new pipeline projects. The two incentives available are a 15-year no-coverage determination and a price regulation exemption. The first incentive is potentially available to all new pipeline projects whereas the latter is only available for international pipelines which bring gas to Australia.
- 1.4 If a 15-year no-coverage determination is made the pipeline cannot be covered or regulated until 15 years after commissioning of the pipeline. A price regulation exemption exempts an international pipeline from being price or revenue regulated for 15 years after commissioning, but other non-price regulatory requirements apply. The availability of these incentives is intended to promote regulatory certainty for new pipeline projects and allow efficient investment in new pipeline infrastructure.

Overview of Part D of the guide to the NGL

Section 2, Greenfields pipeline incentives – policy background

- 1.5 This section sets out the policy background to the greenfields pipeline incentives and outlines what they entail.

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 3, Greenfields pipeline incentives overview

1.6 This section outlines the common decision making framework that applies to the greenfields pipeline incentives.

Section 4, Principles governing no-coverage determinations

1.7 This section outlines the key decision making criteria for making no-coverage determinations - the four coverage criteria. It sets out how each of these criteria are to be applied, having regard to the national gas objective.

Section 5, Principles governing price regulation exemptions

1.8 This section outlines the key decision making criteria for providing recommendations on price regulation exemptions. It sets out how the criteria are to be applied, having regard to the national gas objective.

Section 6, Procedural requirements of no-coverage and price regulation exemption recommendations

1.9 This section goes through the procedural requirements relating to greenfields pipeline incentives. In particular, it sets out the requirements for applications, the operation of the standard consultative procedure and the requirements for what the Council's recommendations need to contain.

Section 7, Modification and termination

1.10 This section outlines the instances in which the pipeline can be modified from that of the pipeline description and when a binding no-coverage determination and a price regulation exemption may be terminated.

Section 8, Merits review of decisions

1.11 This section notes the basic merits review rights which apply to decisions regarding greenfields pipeline incentives.

2 Greenfields pipeline incentives – 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 The NGL has been developed to reform the *governance arrangements for the regulation* of natural 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 intended to strengthen the national character of the governance and economic regulation of the energy sector.⁴

Reform of the gas access regime

2.2 The NGL, while replicating many aspects of the Gas Pipelines Access Law, includes a number of new aspects. The revised regime was the outcome of a number of reviews and Ministerial decisions including:

- The Parer Review (20 December 2002)
- 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: Response to the Productivity Commission Review of the Gas Access Regime – Decision* May 2006 (the MCE Decision) (see Appendix A).

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); *National Gas Access (WA) Act 2009* (WA); *Australian Energy Market Act 2004* (Cth).

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, 12 June 2008 and clause 2.1 of the Australian Energy Market Agreement 2004 as amended in 2006 and 2009 (AEMA).

The legal principles in relation to the use of these and other extrinsic materials in interpreting the NGL and the National Gas Rules is discussed in Appendix B.

- 2.3 This policy background is recognised in the Second Reading Speech for the *National Gas (South Australia) Bill 2008*⁵ (the Second Reading Speech). Some key features of the regime are detailed below.

National gas objective

- 2.4 A centre piece of the NGL is the national gas objective which is set out in s 23 of the NGL:

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.

- 2.5 In the MCE Decision, 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; to provide greater certainty to service providers and access seekers about possible regulatory intervention; and to 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.⁶

Regulation of covered pipelines

- 2.6 Like the Gas Pipelines Access Law before it, the NGL only applies economic regulation/third party access to 'covered pipelines'. These are pipelines which meet the coverage criteria⁷ which in effect mirror the declaration criteria under Part IIIA of the *Competition and Consumer Act 2010* (CCA). 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),

⁵ South Australian Hansard, House of Assembly, 9 April 2008, pp –2884-2916.

⁶ See MCE Decision at p 7.

⁷ See s 15 of the NGL and Part B of this Guide.

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;
- (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.

2.7 Under the NGL a pipeline may be covered in a number of ways.

- (a) Pipelines which were covered pipelines under the Gas Code have been deemed by items 5, 6 and 7 of Schedule 3 of the NGL to be covered pipelines under the NGL (with some exceptions in Queensland).⁸
- (b) Any person may apply to the Council for the coverage of a particular pipeline under s 92 of the NGL and the relevant Minister⁹ will make a decision on that application to cover or not cover the pipeline by applying the coverage criteria and having regard to a recommendation from the Council (ss 99 and 100).¹⁰
- (c) A pipeline will be covered where a service provider has been awarded a tender to construct and operate a pipeline as a result of a tender approval process which was approved under the National Gas Rules (s 126).¹¹ or
- (d) A pipeline will be covered where a service provider voluntarily submits a full access arrangement to the regulator and the regulator makes or approves that voluntary access arrangement (s 127).

⁸ 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 are eligible to apply for revocation of coverage.

⁹ The relevant Minister is the Commonwealth Minister for both cross-boundary transmission pipelines and transmission pipelines in NSW, Queensland, Victoria, Tasmania, ACT and NT and the local State or Territory Minister in all other circumstances.

¹⁰ With the exception that pipelines which have been awarded a greenfields pipeline incentive (i.e. a 15-year no-coverage determination or a price regulation exemption under Chapter 5 of the NGL) may not be covered until the end of the 15 year exemption period (see s 167(4)).

¹¹ Note that coverage through a competitive tendering process was previously recognised under the Gas Code (s 3.21 - 3.36) and a modified version of this is now in s 126 of the NGL and Part 5 of the National Gas Rules.

- 2.8 Any person may apply to the Council to revoke the coverage of all or part of a pipeline at any point in time (s 102). As with coverage applications, the Council makes a recommendation to the relevant Minister who decides whether or not to revoke coverage. Pipelines covered as part of a tender process or through voluntary submission of an access arrangement become uncovered on the expiry of their access arrangements,¹² but all other covered pipelines remain covered until a coverage revocation decision is made under s 106 of the NGL.

Greenfields pipeline incentives

- 2.9 The beginning of the Second Reading Speech highlights the desire to implement legislative changes to the old regime to encourage investment in gas infrastructure:

The Bill contains new incentives to encourage investment in gas infrastructure, which are particularly important in light of the important role gas is expected to play as we move to a carbon constrained economy. These incentives include the continuation of the greenfields pipeline incentives, a new light handed regulatory regime and improvements to the rules around cost recovery for investment in expanding existing gas infrastructure capacity.¹³

- 2.10 As can be seen from this statement, the issue of new investment and 'greenfields investment' in particular was a core concern for governments in implementing the NGL. 'Greenfields' investment is generally considered to be the investment in new infrastructure where there was none before, whereas 'brownfield' investment is investment in pre-existing infrastructure.
- 2.11 The inclusion of the greenfields pipeline incentives in the NGL needs to be seen in the context of the reviews leading up the introduction of the NGL which all commented on the issues associated with greenfields investment. Understanding the purpose that the incentives were designed to achieve remains important in the determination of whether an incentive should be granted in a particular case.

Parer Review

- 2.12 The Parer Review (otherwise known as the COAG Energy Market Review) put on the table the issue of regulatory exemptions for greenfields pipeline projects. The Parer Review supported introducing binding 15 year exemptions from coverage as follows:

In the Panel's view, binding up-front coverage rulings are important in reducing regulatory uncertainty. The Gas Code should be amended to enable the granting of binding coverage rulings for fixed periods of time, but with no ability to revoke that ruling within the period unless information relied upon proves to be false or intentionally misleading. This would allow companies to make

¹² See ss 126(2) and 127(2).

¹³ Page 2884.

a case to the regulator prior to construction that a prospective pipeline would not be likely to meet the coverage criteria for a certain period. The longer this period, the more difficult it will be to convince the regulator that the coverage criteria would not be likely to be met. Conversely, as this period is reduced, the magnitude of the benefits (in terms of greater regulatory certainty) diminishes. The ideal period would be the minimum period regulatory certainty was required to deliver an expected return sufficient to make the investment profitable. A period of fifteen years should be sufficient in most situations.

If a prospective pipeline does not meet the coverage criteria when assessed, the likelihood of it subsequently meeting the criteria within ten or fifteen years is remote and should be foreseeable. In the Panel's view, the market is more likely to develop in a way that brings some degree of competition to a new pipeline (and hence lessens further the likelihood of it meeting the coverage criteria).¹⁴

2.13 The Parer Review also supported 15-year price regulation exemptions for transmission pipelines ineligible for a binding no-coverage ruling as follows:

The arguments in support of economic regulation for new transmission pipelines may not be as strong as for established pipelines. Typically a proposed transmission pipeline is seeking to respond to a market demand. Either the developer of a new producing area intends to have its gas transported to a market or a customer (or group of customers) wish to have gas transported to them — or both. In such circumstances, the prospective initial users of the pipeline ('foundation users') have a significant degree of countervailing power — such that if a pipeline company seeks to charge them excessive tariffs, they can approach another pipeline company to build the pipeline for them. As such, any transportation agreement reached between the pipeline company and users prior to the construction of the pipeline should be reasonable for both parties — so long as there are no control issues arising from vertical ownership. This means that in the short term at least, there is little or no scope for benefit from imposing the burden of regulation upon the pipeline company. Indeed taking the costs into account, the short term impact of regulation in these circumstances is likely to be negative.

If an issue is to arise, it is likely to be some years after the pipeline is constructed. At that time, if a new prospective user seeks to negotiate terms to have its gas transported, the pipeline company can be in a position of market power which it can exploit to charge an excessive tariff since it can charge up to the next best alternative for the prospective user — which is usually to have a new pipeline built to service its needs. This will almost always be a significantly more expensive option. The more expensive the next best alternative, the greater the market power of the existing pipeline.

When a new transmission pipeline is first proposed, the prospective pipeline company will seek to identify and sign up all potential customers, since the per unit price of transportation falls markedly with increased volumes. This means

¹⁴ Page 211.

that there is a low likelihood of additional users arising in the early years of a new pipeline's operation.

The risk of a new pipeline being regulated, however, can create significant uncertainty — potentially sufficient to make otherwise marginally profitable proposed pipelines unprofitable and hence not proceed.

In the Panel's view, the solution is that prospective transmission pipeline companies should have the ability to choose to not have any price regulation imposed upon the new pipeline for the first fifteen years of its operation. Pipeline companies choosing this option would be free to negotiate with customers and enter into transportation contracts.¹⁵

2.14 In 2002 the Australian Competition and Consumer Commission also published a draft guideline on greenfields pipelines. Following on from this analysis the issue was considered again by the Productivity Commission in their Review of the Gas Access Regime. The Productivity Commission supported the first recommendation of the Parer Review to introduce 15 year binding no-coverage rulings which it had also considered in its 2001 Review of the National Access Regime. It considered that '[s]uch a ruling would reduce regulatory uncertainty and therefore might cause otherwise marginal pipeline investments to proceed.'¹⁶

2.15 The Productivity Commission did not support an additional general price regulation exemption regime finding:

The Commission's recommendation to introduce binding no-coverage rulings would give regulation free periods of at least 15 years to new pipelines that do not satisfy the coverage criteria. Extending the application of regulation free periods to new pipelines that satisfy the coverage criteria could reduce competition in upstream and downstream markets, and possibly distort investment. The case for providing regulation free periods to all new pipelines is weakened further by the Commission's recommendation to have a monitoring option as an alternative to a regulated access arrangement with reference tariffs.¹⁷

2.16 The Productivity Commission viewed that most new transmission pipeline investments would qualify for the binding no-coverage ruling and so the additional mechanism would add little to the regime.

2.17 The MCE in its response to the Productivity Commission agreed to the 15-year binding no-coverage ruling and also agreed to a limited form of price regulation exemption for international pipelines based upon the Parer Review model. In relation to the price regulation exemption option the MCE Decision stated:

¹⁵ Pages 211 - 212.

¹⁶ Productivity Commission Report, p 399.

¹⁷ Productivity Commission Report, p 432.

The MCE recognises that the coverage assessment process followed by Ministerial decision on a binding ruling may not be a sufficiently timely process in the context of projects that might bring gas to the Australian energy market from international sources, such as from East Timor, Indonesia or Papua New Guinea. To ensure that the regulatory regime does not inhibit such pipelines proceeding to financial close, the MCE has decided to make available a mechanism for a 15 year price regulation exemption for proposed international gas pipelines which originate in another country and bring gas from a source outside Australia as an additional option to the first measure described above. The MCE believes that Measure 1 and the light handed form of regulation provide sufficiently timely and appropriate mechanisms to promote investment in new pipelines from domestic gas sources when balanced against the concerns of users about potential abuse of market power. The additional incentive for overseas gas accords with Australia's long term energy security needs.¹⁸

- 2.18 In April 2006 the two greenfields pipeline incentives were introduced into the Gas Pipelines Access Law, in advance of the NGL amendments, to ensure that any potential new investment would not be delayed. This was passed as the *Gas Pipelines Access (South Australia) (Greenfields Pipeline Incentives) Amendment Act 2006 (SA)*. The Second Reading Speech to those amendments set out their rationale and scope as follows:

The purpose of the Gas Pipelines Access (South Australia) (Greenfields Pipeline Incentives) Amendment Bill 2006 (Greenfields Bill) is to amend the Gas Pipelines Access (South Australia) Act 1997 to provide greater certainty regarding the regulatory coverage of greenfields pipelines, thereby encouraging further investment in new pipelines.

The proposed greenfields amendments will aid the development of a strong, interconnected gas transmission network which is essential to the reliable supply of gas and improving competition in the gas market. Reliable supply of gas at efficient prices is essential to the community and to the ongoing competitiveness of South Australian businesses, small and large. Links with more remote gas fields will become essential over the medium term as demand grows and supply from closer fields diminishes.

...

Under the current gas regime, a new pipeline is not subject to any regulation under the Gas Pipelines Access Act unless an application for coverage is made and assessed in accordance with the coverage criteria. An application can, however, be made at any point in time by a third party, which, in effect, creates regulatory uncertainty for investors in new pipelines.

¹⁸ MCE Decision p 16. For the full text of the MCE Decision relevant to the greenfields pipeline incentives see Appendix A.

Consequently, the Ministerial Council on Energy agreed to implement two measures specifically to improve regulatory certainty and to encourage investment in gas pipelines:

Binding no-coverage ruling

Under the proposed reforms, the proponent of a proposed greenfield gas transmission pipeline or distribution network could apply to the National Competition Council for an upfront coverage assessment. Following an assessment of the pipeline against the coverage criteria, the National Competition Council could make a recommendation to exempt a pipeline from regulation for 15 years. The process for the National Competition Council to arrive at its recommendation would include the extensive public consultation as is currently undertaken under the present coverage process, which includes a draft and final report by the National Competition Council and consideration by the Minister. Upon receiving a National Competition Council recommendation that the proposed pipeline does not meet the coverage criteria, the relevant Minister may provide a binding 15 year no coverage ruling in respect of the pipeline.

...

Price regulation exemption

The coverage assessment process for Ministerial decision on a binding no-coverage ruling may not be a sufficiently timely process to provide regulatory certainty for some gas pipeline projects.

To ensure that the regulatory regime does not inhibit new international pipelines proceeding to financial close, the Ministerial Council on Energy decided to implement the option of a 15 year price regulation holiday for greenfields gas pipelines.

Price regulation exemptions would only apply to international transmission pipelines which originate in another country and bring gas from a source outside Australia. An application for a price regulation exemption would be made to the National Competition Council, with the Commonwealth Minister making the final determination based on the National Competition Council recommendations. The public interest considerations for granting this exemption are broader than the existing coverage criteria.

If a price regulation exemption is granted, the proponent must still submit a limited access arrangement, which governs regulation of non-price access provisions and meets certain transparency requirements, to the Australian Competition and Consumer Commission for approval.

For both these exemptions, the incentive will lapse if the pipeline is not commissioned within 3 years. The incentives cannot be revoked unless the applicant misrepresented a material fact or failed to disclose material information. The proponent of a proposed pipeline will also need to submit a

description of the project to allow the relevant Ministers to make informed decisions on granting the incentives. If for operational reasons the pipeline description needs to be varied, there is a process for a further approval to be sought from the Minister who granted the incentive before the pipeline is commissioned.¹⁹

- 2.19 The Second Reading Speech to the NGL confirms the intention to replicate the 2006 amendments to the Gas Pipelines Access Law in the NGL as follows:

Greenfields pipeline incentives

This Bill continues the greenfields incentives established in 2006 under the Gas Pipelines Access Law. The greenfields incentives allow the relevant Minister to make, following a recommendation by the National Competition Council, a no coverage determination that is binding for a period of 15 years (a 15 year no coverage determination) if a new pipeline does not meet the pipeline coverage criteria.

However, the 15 year no coverage assessment process may not be a sufficiently timely process to provide regulatory certainty for complex international greenfields gas pipeline projects. For this reason, the Ministerial Council on Energy also decided to implement the option of a price regulation exemption (also having effect for 15 years) for international transmission pipelines bringing gas from a source outside Australia.

The Ministerial Council on Energy implemented these two measures in the existing gas access regime in June 2006 and the relevant provisions (set out in Part 3A of the Gas Pipelines Access Law) are replicated in the National Gas Law.²⁰

- 2.20 Accordingly, the background to the amendments and 2006 explanatory materials are relevant to the current provisions.

Relationship with the Competition and Consumer Act

- 2.21 The Productivity Commission also recognised that a pipeline with a binding no-coverage determination could still be subject to regulation through declaration under Part IIIA of the CCA. Accordingly, it recommended amending Part IIIA to ensure that this could not happen. This was achieved for the CCA with its amendment in 2006 by the *Energy Legislation Amendment Act 2006* (Cth) and for the NGL through the *Australian Energy Market Amendment (Gas Legislation) Act 2007* (Cth). Accordingly, a pipeline with an exemption under the NGL cannot be declared and regulated under

¹⁹ Second Reading Speech, South Australian Hansard, House of Assembly, 11 May 2006, pp 276 - 277.

²⁰ See Second Reading Speech, South Australian Hansard, House of Assembly, 9 April 2008, pp 2993.

Part IIIA of the CCA.²¹ Additionally, Chapter 5 of the NGL is to be disregarded for the purposes of the certification of access regimes under Part IIIA of the CCA to ensure that there is no risk that the provisions could impede certification.²²

²¹ See s 44H(6B) of the CCA.

²² See s 44N(2A) of the CCA.

3 Greenfields pipeline incentives overview

Introduction

3.1 Chapter 5 of the NGL provides for the provision of greenfields pipeline incentives. The following table is a short overview of the key legislative provisions:

Table 3-1 Key provisions relating to greenfields pipeline incentives

Part 2- 15-year no-coverage determinations	
Section 151 applications	A service provider of a greenfields pipeline project can apply for a 15-year no-coverage determination. Application dealt with in accordance with the Rules (s 152 and Part 13 of the Rules).
Section 153 recommendation	The Council makes a no-coverage recommendation giving effect to the coverage criteria and having regard to the national gas objective (s 154). Classification decision also made (s 155).
Section 156 decision	The Relevant Minister makes a final decision on the application applying the same criteria as the Council (s 157). Determination has effect for 15 years from the commissioning of the pipeline (s 158).
Part 3 - Price regulation exemptions	
Section 160 applications	A service provider of a greenfields pipeline project to construct an international pipeline can apply for a price regulation exemption. Application dealt with in accordance with the Rules (s 161 and Part 13 of the Rules).
Section 162 recommendation	The Council makes a recommendation to Commonwealth Minister which weighs up the public benefits and detriments of granting the exemption (s 163).
Section 164 decision	The Commonwealth Minister makes a final decision on the application applying the same criteria as the Council (s 165). The exemptions are subject to a number of conditions (s 166) and continue for 15 years from date of commissioning (although if a 15-year no-coverage determination is subsequently granted that supersedes the price regulation exemption for the period the price regulation exemption would otherwise be in force (s 167).
Section 168 limited access arrangement	A service provider is required to submit a limited access arrangement within 60 days of being granted the price regulation exemption.
Sections 169 and 170	Service providers are also subject to other obligations (including ring-fencing) and must not engage in price discrimination.

Table 3-2(continued) Key provisions relating to greenfields pipeline incentives

Part 4 - Extended or modified application of greenfields pipeline incentives	
Section 171 pipeline description	Requirement for conformity between pipeline as constructed and pipeline description in application.
Section 172 amending description	Power for the Minister to amend a pipeline description before commissioning.
Part 5 - Early termination of greenfields pipeline incentives	
Sections 173 - 177	Termination of incentives where not commissioned within 3 years, with consent, where misrepresentation or breach of conditions.

Greenfields pipeline projects

3.2 A central concept for the application of Chapter 5 of the NGL is a ‘greenfields pipeline project’. This is defined in s 149 as follows:

greenfields pipeline project means a project for the construction of—

- (a) a pipeline that is to be structurally separate from any existing pipeline (whether or not it is to traverse a route different from the route of an existing pipeline); or
- (b) a major extension to an existing pipeline that is not a covered pipeline; or
- (c) a major extension to a covered pipeline by means of which light regulation services are provided if that extension is exempted by the AER under section 19.

3.3 The concept captures a very broad range of new pipeline investment but does not capture ‘brownfields’ expansions. In particular, it does not cover pipelines which are part of a covered pipeline because of the operation of the extension and expansion requirements in an access arrangement (paragraph (b)) or because of the operation of s 19 (paragraph (c)). However, extensions to covered pipelines need to be ‘major’ to qualify as a greenfields pipeline project.

Greenfields pipeline incentives

3.4 The NGL provides two different types of decisions which are designed to facilitate investment in greenfields pipeline projects. These are:

- (a) 15-year no-coverage determinations, and
- (b) price regulation exemptions.

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- 3.5 Applications for 15-year no-coverage determinations may be made in relation to all greenfields pipeline projects. Applications are made to the Council which then makes a recommendation to the relevant Minister²³ who may grant a 15-year no-coverage determination if the Minister is satisfied that one or more of the coverage criteria will not be met for the 15 year period for which the no-coverage determination would apply.
- 3.6 Price regulation exemptions are only available to international pipeline projects which will bring foreign gas to Australia. The Council makes recommendations on an application for exemption and the decision is taken by the Commonwealth Minister based upon weighing the benefits to the public of granting the exemption against the detriments to the public of granting the exemption. This assessment is guided by the national gas objective with particular regard to market power and effects on the public interest. Service providers of pipelines to which a price regulation exemption applies must still have a limited access arrangement approved, are subject to a number of non-price conditions and are subject to the access dispute provisions on non-price matters. (See further paragraph 3.8 below.)

Coverage applications during the period of a 15-year no-coverage determination or price regulation exemption

- 3.7 Both the 15-year no-coverage determination and price regulation exemption are intended to exempt a pipeline from coverage for 15 years from the commissioning of the pipeline. However, during the 15 year period a person may still apply for coverage of the pipeline the subject of the no-coverage determination or price regulation exemption under s 92 of the NGL although such an application can be made 'only if the coverage sought in the application is to commence from, or after, the end of that [15 year] period' (ss 158(2) and 167(4)).

Obligations applicable to price regulation exemptions

- 3.8 Service providers of pipelines to which a price regulation exemption applies are subject to a number of obligations under the NGL and Rules. These include:
- (a) they must publish on their website prices for the provision of pipeline services (s 166(a))
 - (b) they must have a limited access arrangement which provides for non-price aspects of access approved by the AER and publish it on their website (ss 166(b) and 168)

²³ The relevant Minister is the Commonwealth Minister for both cross-boundary transmission pipelines and transmission pipelines in New South Wales, Queensland, Victoria, Tasmania, Australian Capital Territory and Northern Territory and the local State Minister in all other circumstances.

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- (c) they must publish a register of spare capacity on their website (s 166(b))
 - (d) they must provide information and reports on access negotiations (s 166(c))
 - (e) they must comply with the general obligations in Part 1 of Chapter 4 (except ss 132 and 136) (s 169(1)(a))
 - (f) they must comply with the ring-fencing obligations in Part 2 of Chapter 4 (s 169(1)(b))
 - (g) they must comply with the Rules relating to requests for access (s 169(2) and Part 11 of the Rules)
 - (h) they must not engage in price discrimination unless that discrimination is conducive to efficient service provision (s 170), and
 - (i) they are subject to the access dispute provisions on non-price matters (s 180).
- 3.9 A price regulation exemption is ineffective if a limited access arrangement is not in force (s 167(2)). The Commonwealth Minister, on application by the AER, may revoke a price regulation exemption if one of the conditions of the exemption is breached (s 176).

4 Principles governing no-coverage determinations

Principles governing no-coverage determinations

- 4.1 Where a person applies to the Council for a 15-year no-coverage determination the Council is required to make a no-coverage recommendation to the relevant Minister in respect of that application. The Council's recommendation must be either that the pipeline:
 - (a) be exempt from being a covered pipeline for a period of 15 years, or
 - (b) not be exempt from being a covered pipeline for a period of 15 years (s 153(1)).
- 4.2 The Council's recommendation may recommend that only part of the pipeline be exempt from coverage (s 153(3)).
- 4.3 The Council's recommendation must be given to the relevant Minister without delay (s 153(4)).
- 4.4 On receiving the Council's recommendation, the relevant Minister must decide whether or not to make a 15-year no-coverage determination (s 156(1)).
- 4.5 The decision making process is designed to mirror the coverage and coverage recommendation process. Accordingly, the discussion in Part B of the Guide is relevant to no-coverage determinations.

Key decision making criteria

- 4.6 The principles for the Council to make no-coverage recommendations mirror those for coverage recommendations (s 97) and coverage revocation recommendations (s 105). Relevantly, s 154 provides as follows:

154—Principles governing the making of a no-coverage recommendation

- (1) In making a no-coverage recommendation, the NCC—
 - (a) must give effect to the pipeline coverage criteria; and
 - (b) in deciding whether or not the pipeline coverage criteria are satisfied must have regard to the national gas objective.
- (2) The NCC gives effect to the pipeline coverage criteria as follows:
 - (a) if the NCC is satisfied that all the pipeline coverage criteria are satisfied in relation to the pipeline—the recommendation must be against making a 15-year no-coverage determination;

- (b) if the NCC is not satisfied that all the pipeline coverage criteria are satisfied in relation to the pipeline—the recommendation must be in favour of making a 15-year no-coverage determination.

Giving effect to the pipeline coverage criteria

4.7 Accordingly, the test centres around whether or not the Council is satisfied that the pipeline coverage criteria are met. 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;
- (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.

Time horizon for assessment

4.8 The NGL provides that if the Council is satisfied that all four pipeline coverage criteria are met, the Council must recommend against making a 15-year no-coverage determination. If the Council is not satisfied that one or more of the criteria are met, the Council must recommend that the pipeline be granted a 15-year no-coverage determination.

4.9 The effect of a no-coverage determination is that a pipeline is exempt from coverage for a period of 15 years from its commissioning (s 158(1)). It follows that in considering a no-coverage recommendation the Council must do so applying a 15 year time horizon.

4.10 Where the Council is satisfied that all four coverage criteria will be met for the 15 year period, the result is straightforward—the Council must recommend against the determination. Similarly, where the Council is satisfied that at least one of the

criteria will not be met for the 15 year period it must recommend in favour of the determination.

- 4.11 In some cases it is possible to envisage a range of circumstances occurring or changing during the 15 year period the Council is required to consider in making a recommendation. Reaching a straightforward conclusion in these cases may be difficult, and the Council's recommendation will be made on the basis of the available information, having regard to the pipeline coverage criteria and the national gas objective.
- 4.12 The Council will need to look at the likelihood of various circumstances eventuating and the impact various scenarios are likely to have on the relevant pipeline coverage criteria.
- 4.13 The coverage criteria include whether access to the proposed pipeline services would not be contrary to the public interest (criterion (d)). This criterion is discussed in more length at paragraph 4.33 and following. In the case of a no-coverage determination, consideration of criterion (d) requires that the Council to have regard to whether the overall costs and benefits of access outweigh the costs and benefits of the no-coverage determination. The Council's assessment of these various costs and benefits will take into account the policy intention that motivated the inclusion of the no-coverage determination in the NGL as noted in Part 2 of this Part D of the Guide—namely the promotion of regulatory certainty to encourage viable long term investment decisions.

Having regard to the national gas objective

- 4.14 Subsection 154(1) makes clear that in deciding whether each criterion is satisfied, the Council must have regard to the national gas objective. 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.

- 4.15 The inclusion of an overarching objects clause is one of the key changes in the NGL compared to the previous regulatory regime. It is explicitly referred to as a consideration for all of the key decisions in the regime.²⁴
- 4.16 The Second Reading Speech set out the key principles underlying the insertion of the objective as follows:

²⁴ See ss 28, 72, 97, 100, 105, 107, 154, 157, 163, 165 and 291 of the NGL.

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.²⁵

4.17 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.²⁶ 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.

4.18 In *Re: Application by ElectraNet Pty Limited (No 3)* [2008] ACompT 3 (30 September 2008) the Australian Competition Tribunal summarised the intent of the 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.²⁷

4.19 The requirement that the Council have regard to the national gas objective in giving effect to each coverage criteria means that the Council must take into account the economic efficiency focus in determining whether the particular criterion is met. The national gas objective reinforces the importance of the focus on the market power of the service provider in applying the coverage criteria and considering whether the ability for the pipeline to become a covered pipeline during its first 15 years is a means of mitigating that market power.

²⁵ Page 2885.

²⁶ See discussion in the Expert Panel Report pp 31 - 58.

²⁷ At [15].

(a) 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

4.20 Criterion (a) in s 15 of the NGL, as with s 44G(2)(a) of the CCA, provides that the Council cannot recommend that a pipeline be covered unless it is satisfied that access (or increased access) to the pipeline services provided by means of the pipeline would promote a material increase in competition in at least one market other than the market for the service. The markets in which competition may be promoted are referred to as 'dependent markets'. The issue is whether access would improve the opportunities and environment for competition in dependent markets so as to promote materially more competitive outcomes. The assessment is concerned with the process of competition, rather than the particular commercial interests or pursuits of individual competitors, including an applicant for coverage, given that the access that may result from coverage is not limited to the party that made the application.

4.21 The purpose of criterion (a) is to limit coverage to circumstances where it is likely to materially enhance the environment for competition in at least one dependent market. Whether competition will be materially enhanced depends critically on the extent to which the incumbent service provider can and is likely, in the absence of coverage, to use market power to adversely affect competition in a dependent market(s). If the service provider has market power, as well as the ability and incentive to use that power to adversely affect competition in a dependent market, coverage would be likely to improve the environment for competition, offering the prospect of tangible benefits to consumers (including reduced prices and better service provision).

4.22 In assessing whether criterion (a) is satisfied, the Council:

- (a) identifies the relevant dependent (upstream or downstream) markets
- (b) considers whether the identified dependent market(s) is separate from the market for the pipeline service, and
- (c) assesses whether access (or increased access) would be likely to promote a materially more competitive environment in the dependent market(s).

4.23 The Council's approach to each of the above steps for assessing criterion (a) is considered in detail in Part B of this Guide which concerns the coverage and classification of pipelines. That approach applies equally to the application of this criterion to a greenfields pipeline as it does to an existing pipeline and is not repeated in this part of the Guide.

4.24 Nonetheless, in applying criterion (a) to greenfields pipeline projects in the context of a 15 year no-coverage application, the focus of the Council is on that 15 year period as the relevant time during which access might be promoted. Accordingly, the future development of the dependent markets over the 15 year period needs to be considered.

4.25 The comments of the Parer Review and Productivity Commission concerning the bargaining power of foundation customers in striking fair terms and conditions of access for new pipeline projects under long term contracts is also particularly relevant to this criterion. Nonetheless, the actual circumstances of the relevant dependent markets will need to be examined to test whether or not this is actually the case.

(b) It would be uneconomic for anyone to develop another pipeline to provide the pipeline services provided by means of the pipeline

4.26 Criterion (b) of s 15 of the NGL mirrors s 44G(2)(b) of the CCA and provides that 'it would be uneconomic for anyone to develop another facility to provide the service'. While s 44G(2)(b) of the CCA uses the word 'uneconomical' and the NGL 'uneconomic', in *Re Duke Eastern Gas Pipeline Pty Ltd* [2001] ACompT 2 (4 May 2001) the Tribunal stated in relation to the Gas Code that 'nothing turns upon this difference in language'.²⁸ Accordingly, the case law concerning criterion (b) in Part IIIA of the CCA is relevant to the interpretation of this criterion.

4.27 Criterion (b) is concerned with Australia's national interest not the private interests of any particular parties. The Council and the Tribunal have consistently found that the appropriate test for assessing whether criterion (b) is met is a social test and that the term 'uneconomic' should be construed in a social cost benefit sense rather than in terms of private commercial interests.²⁹ Part B of this Guide further explores this criterion and that discussion is not repeated in this part of the Guide.

4.28 The analysis of this criterion for greenfields pipeline projects, along with criterion (c), is likely to be the most similar to that for an existing pipeline.

²⁸ At [58].

²⁹ The Council notes that this approach may be in doubt following the decision of the Full Federal Court in *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* [2011] 277 ALR 282; [2011] FCAFC 58. A further update may be made in this regard depending on the outcome of current applications for special leave to appeal this decision to the High Court. Further, the Council advises that Part B of the Gas Guide has not yet been updated pending consideration of the matter by the High Court.

(c) 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

4.29 Under criterion (c) in s 15 of the NGL the Council must be satisfied that access to the pipeline services can be provided without undue risk to health and safety. In considering this criterion, the Council considers the following matters:

- (a) whether there is a statutory health and safety scheme which will apply to the pipeline services in circumstances where access is granted to third parties, and
- (b) whether the terms and conditions of access can adequately deal with any safety issues.

4.30 The rationale for this criterion is that coverage should not occur where access or increased access to pipeline services provided by a facility may pose a legitimate risk to human health or safety.³⁰

4.31 Where pipelines require a degree of spare capacity to provide appropriate safety margins, then an appropriate level of spare capacity will need to be maintained and, if necessary, the pipeline's capacity expanded to allow for this. In addition, access to pipelines may need to be governed by conduct codes and operational guidelines. For a pipeline to be covered, access must be possible without compromising system and operational integrity, and safe scheduling must be feasible.

4.32 This criterion is explored in Part B of this Guide and that analysis is not repeated here.

(d) Access (or increased access) to the pipeline services provided by means of the pipeline would not be contrary to the public interest

4.33 Under criterion (d) in s 15 of the NGL, access must not be contrary to the public interest. When applying the equivalent test in s 44H(4)(f) of the CCA, the Tribunal stated in *Re Services Sydney Pty Ltd* [2005] ACompT 7 at [192]:

This criterion does not require the Tribunal to be affirmatively satisfied that declaration would be in the public interest. Rather it requires that it be satisfied that declaration is not contrary to the public interest. It enables consideration of the overall costs and benefits likely to result from declaration and the consideration of other public interest issues which do not fall within criteria (a)-(e).

4.34 The term 'public interest' is not defined in the NGL but the Council considers that this term allows a consideration of a broad range of issues, with a particular focus on public interest issues raised directly by the national gas objective. Apart from the

³⁰ The Council notes that the mirror criterion (criterion (d) in ss 44G(2) and 44H(4)) of the CCA was repealed in 2010.

national gas objective, as with Part IIIA of the CCA, the Council also considers that public interest factors may include:

- (a) ecologically sustainable development
- (b) social welfare and equity considerations, including community service obligations
- (c) government legislation and policies relating to matters such as occupational health and safety, industrial relations, access and equity
- (d) economic and regional development, including employment and investment growth
- (e) the interests of consumers generally or of a class of consumers
- (f) the competitiveness of Australian businesses, and
- (g) the efficient allocation of resources.

4.35 Consideration of this criterion does not revisit the issues considered under the other coverage criteria. Rather it draws on the Council's conclusions in relation to those criteria. For example, where the Council has concluded that access will promote a material increase in competition in one or more dependent markets, this will give rise to benefits that should be included in the assessment of this criterion. Similarly where access will aid in avoiding duplication of a pipeline that exhibits natural monopoly characteristics, this too will lead to benefits that are appropriately considered under this criterion.

4.36 This criterion is also discussed in detail in Part B of this Guide and that discussion is not repeated here.

4.37 The discussion of economic efficiency and the regulatory costs of coverage will be particularly relevant to greenfields pipeline projects over the 15 year period of the exemption from coverage.

4.38 Furthermore, in the context of whether or not to grant a 15-year no-coverage determination, this criterion provides further opportunities for the service provider of the pipeline project to demonstrate that the new entry into the markets sufficiently mitigate market power issues and that the costs and risks of coverage to the investment going ahead are sufficient to make coverage contrary to the public interest. The effect of granting or not granting the 15-year no-coverage determination on promoting and committing investment in the greenfields pipeline project (and greenfields pipeline projects similar to the proposed project) is a matter that is likely to be relevant to this analysis. Accordingly, greenfields pipeline projects may have additional arguments to make in respect of this criterion than existing pipelines.

5 Principles governing recommendations on price regulation exemptions

Principles governing recommendations

5.1 Where a person applies to the Council for a price regulation exemption, the Council must make a recommendation on whether or not a price regulation exemption should be granted. The general principles are set out in s 163 as follows:

163—General principle governing NCC's recommendation

- (1) In making its recommendation on an application for a price regulation exemption, the NCC must weigh the benefits to the public of granting the exemption against the detriments to the public.
- (2) In doing so, the NCC—
 - (a) must have regard to the national gas objective with particular reference to—
 - (i) the implications of the exemption for relevant markets (including the effect on market power); and
 - (ii) other possible effects on the public interest; and
 - (b) may have regard to any other relevant matter.

5.2 It is clear that the test for granting a price regulation exemption is intended to be broader than the coverage criteria. In particular, if an international pipeline project could qualify for a 15-year no-coverage determination it is also highly likely to be granted a price regulation exemption.³¹ A 15-year no-coverage determination would mean that the service provider of the pipeline would be free of all regulatory oversight whereas a price regulation exemption still involves significant non-price regulatory oversight by the AER. In some circumstances a service provider who could qualify for a 15-year no-coverage determination may wish to apply for a price regulation exemption because it could be determined in a shorter time period (see paragraph 6.66 below). The service provider would then have the option of applying for a 15-year no-coverage determination which would supersede the price regulation exemption (s 167(3)).

5.3 The analysis should focus on the effect of granting the price regulation exemption to the particular greenfields pipeline project, including the impact on public benefits and detriments compared to the effect of not granting the price regulation

³¹ Of course an international pipeline project may qualify for a price regulation exemption without meeting the requirements for a no-coverage determination.

exemption. If a price regulation exemption is granted the key effect is that no price regulation will be applicable for 15 years from commissioning, but other protections of non-price regulation and facilitating access will apply. If the price regulation exemption is not granted the pipeline could be subject to coverage and this possibility may provide a disincentive for the investment to take place.

- 5.4 This approach is confirmed by looking at the extrinsic materials to the exemptions, in particular the Second Reading Speech to the 2006 amendments which first introduced the price regulation exemption stated as follows:

The proposed greenfields amendments will aid the development of a strong, interconnected gas transmission network which is essential to the reliable supply of gas and improving competition in the gas market. Reliable supply of gas at efficient prices is essential to the community and to the ongoing competitiveness of South Australian businesses, small and large. Links with more remote gas fields will become essential over the medium term as demand grows and supply from closer fields diminishes.

...

Under the current gas regime, a new pipeline is not subject to any regulation under the Gas Pipelines Access Act unless an application for coverage is made and assessed in accordance with the coverage criteria. An application can, however, be made at any point in time by a third party, which, in effect, creates regulatory uncertainty for investors in new pipelines.

...

Price regulation exemption

The coverage assessment process for Ministerial decision on a binding no-coverage ruling may not be a sufficiently timely process to provide regulatory certainty for some gas pipeline projects.

To ensure that the regulatory regime does not inhibit new international pipelines proceeding to financial close, the Ministerial Council on Energy decided to implement the option of a 15 year price regulation holiday for greenfields gas pipelines.

Price regulation exemptions would only apply to international transmission pipelines which originate in another country and bring gas from a source outside Australia. ...The public interest considerations for granting this exemption are broader than the existing coverage criteria.³²

³² Second Reading Speech, South Australian Hansard, House of Assembly, 11 May 2006, pp 276 - 277.

- 5.5 The MCE Response also stated explicitly that '[t]he additional incentive for overseas gas accords with Australia's long term energy security needs.'³³ Accordingly, long term security of supply considerations are a relevant consideration in the public benefits that may flow from an international pipeline project. This is also consistent with the national gas objective.
- 5.6 The tenor of the extrinsic material places considerable emphasis on the granting of the exemption to allow investment to proceed in international pipeline projects. This is consistent with the Tribunal's comments in *Re: Application by ElectraNet Pty Limited (No 3)* [2008] ACompT 3 (30 September 2008) which emphasised at [201] that minimising regulatory risk to promote efficient investment is a central part of the regulatory framework:

Efficient investment in the long term interests of consumers will not be promoted if investors perceive a significant risk that the rules will change and they will not be able to recover the opportunity cost of capital reasonably invested. The minimisation of regulatory risk, consistent with the promotion of efficient investment, is one of the tenets that has driven the development of regulatory regimes in Australia. That tenet is reflected in the objective of the Law and in the revenue and pricing principles embodied in the Law.

(a) National gas objective

- 5.7 The national gas objective is central to the public benefit and detriments to be examined. It emphasises that an economic efficiency focus needs to be a central part of the benefits and detriments being examined. Accordingly, productive, allocative and dynamic elements of efficiency are relevant to the granting of the exemption. These are explored elsewhere in this Guide and in particular in Part B which concerns the relevance of the national gas objective to coverage decisions.

(a)(i) Implications for the exemption on relevant markets

- 5.8 This requirement emphasises that the relevant markets to be served by the pipeline need to be examined and the potential for the abuse of market power in those markets needs to be examined. The national gas objective would focus this assessment of the market power of the service provider on efficiency considerations and the long term interests of consumers. The same considerations in defining relevant markets and assessing market power that are considered in applying the coverage criteria would apply to this factor. These are explored in Part B of this Guide.

³³ MCE Response, p 16. For the full text of the MCE Response relevant to the greenfields pipeline incentives see Appendix A.

(a)(ii) Public interest

5.9 As with coverage and Part IIIA of the CCA, the Council also considers that public interest factors may include:

- (a) ecologically sustainable development
- (b) social welfare and equity considerations, including community service obligations
- (c) government legislation and policies relating to matters such as occupational health and safety, industrial relations, access and equity
- (d) economic and regional development, including employment and investment growth
- (e) the interests of consumers generally or of a class of consumers
- (f) the competitiveness of Australian businesses, and
- (g) the efficient allocation of resources.

5.10 The particular circumstances of each international pipeline project and the relevant markets it may serve need to be analysed to make recommendations about price regulation exemptions. By way of example, the following types of public interest benefits may relate to granting an exemption to a particular project and increase the likelihood that it will proceed:

- (a) it may bring natural gas to areas not previously served by natural gas
- (b) it may increase security of supply for existing markets by adding a new source of gas
- (c) it may increase competition in the downstream markets for the supply of natural gas
- (d) it may promote regional development
- (e) it may facilitate the expansion of industries and electricity generation facilities which rely on natural gas in the areas served by the pipeline
- (f) it may facilitate the investment in facilities which liquefy natural gas for export, and
- (g) the regulatory burden of price regulation would be avoided by the service provider and may be passed on to users of the pipeline.

5.11 Possible public interest detriments could include:

- (a) the risk that the pipeline may have market power in relation to the supply of particular markets and the service provider may have an incentive to take advantage of that market power

- (b) the risk that other sources of natural gas will decline in the 15 years of the exemption leaving the international pipeline with substantial market power, and
- (c) the existing market power of a pipeline service provider serving a market may be increased where it will also be the service provider of the pipeline with the price regulation exemption.

5.12 In considering the extent of possible detriments the extent to which the obligations placed on a service provider with a price regulation exemption may mitigate the likelihood of the detriments eventuating or having a severe impact on the public interest needs to be considered.

6 Procedural requirements of no-coverage and price regulation exemption recommendations

Applications

- 6.1 The service provider for a greenfields pipeline project may apply to the Council for a 15-year no-coverage determination before a pipeline has been commissioned (s 151). If the greenfields pipeline project is for the construction of an international pipeline, a service provider may apply for a price regulation exemption (s 160). Additionally, a service provider with a price regulation exemption may also apply for a 15-year no-coverage determination during the period of their price regulation exemption for the duration of the period for which that exemption applies (s 151(2)(b)). In all cases the applications:
- (a) must be made to the Council
 - (b) must include a description of the pipeline which meets the requirements specified in the Rules
 - (c) must contain the information required by the Rules
 - (d) need not describe excluded infrastructure,³⁴ and
 - (e) must be accompanied by the fee prescribed in the Regulations.
- 6.2 The information and requirements for making applications for coverage and revocation of coverage are contained within rules 122 and 125 of the National Gas Rules respectively.
- 6.3 The Regulations currently prescribe a fee³⁵ of \$7500 for each 15-year no-coverage determination and each price regulation exemption application. The fee must be paid by cheque at the time an application is lodged with the Council. Cheques are to be made payable to the National Competition Council.
- 6.4 Applications can be made to the Council by mailing a hard copy of the application and payment of the application fee to:

National Competition Council
GPO Box 250
Melbourne VIC 3001

³⁴ Defined by r 120 as 'all tanks, reservoirs, machinery and equipment that form part of a pipeline'.

³⁵ Regulation 14 and Schedule 5 of the *National Gas (South Australia) Regulations 2008*. Fees under the NGL are prescribed by *A New Tax System (Goods and Services Tax) (Exempt Taxes, Fees and Charges) Determination 2008 (No.2)* to not be consideration for a supply pursuant to *A New Tax System (Goods and Services Tax) Act 1999*. Refer subsection 81-5(2) of *A New Tax System (Goods and Services Tax) Act 1999*.

and emailing an electronic copy of the application to:

gas@ncc.gov.au.

Requirements for applications for greenfields pipeline incentives

6.5 The requirements for making applications for 15-year no-coverage determinations and price regulation exemptions are largely consistent. This section will discuss the requirements together, noting the minor differences where they exist.

Pipeline description

6.6 A central requirement for the applications is the 'pipeline description'. This is provided for in ss 151(3) and 160(2) of the NGL. As discussed in the following section, should the pipeline as constructed differ materially from that described in the pipeline description, the greenfields pipeline incentive does not apply to the pipeline. While there is a limited opportunity to amend a pipeline description before the pipeline is commissioned, it is important that the pipeline description be as accurate as possible for the initial application. This will enable the market power issues with the pipeline project to be properly analysed.

6.7 The concept of a pipeline description is defined by r 121 as follows:

- (1) A pipeline description for a proposed transmission pipeline (including an international pipeline) for which a greenfields pipeline incentive is sought must contain the following information:
 - (a) the route of the pipeline; and
 - (b) the end points of the trunk of the pipeline (i.e. the points defining the extremities, where the trunk begins and ends); and
 - (c) if a lateral forms part of the pipeline – the point where the lateral interconnects with the trunk and the end point of the lateral; and
 - (d) the range of diameters for the principal pipes (including laterals).
- (2) A pipeline description for a proposed distribution pipeline for which a greenfields pipeline incentive is sought must contain the following information:
 - (a) the geographical area to be served by the pipeline; and
 - (b) the points at which natural gas is to be injected into the pipeline.

6.8 As should be noted from the above requirements, the 'pipeline description' is intended to be in general terms. Subsections 151(3)(d) and 160(2)(d) of the NGL also makes clear that it need not include details of excluded infrastructure (i.e. all tanks, reservoirs, machinery and equipment that form part of a pipeline). The pipeline

description should be in general terms such that a minor deviation in the route would not be seen as a variation of the pipeline description.

- 6.9 For a transmission pipeline, the range of pipeline diameters should be disclosed. While precise diameters depend upon final demand, the range of potential diameters that are possible should be disclosed. For instance, it could be stated that the pipeline will have a diameter between 90cm and 110cm. Accordingly, if the pipeline as constructed had a diameter between 90 and 110cm (say 98 cm) it would comply with its pipeline description and maintain its 15-year no-coverage determination or price regulation exemption. However, if it was built with a diameter outside of this range the incentive would lapse unless the pipeline description had been amended before the commissioning of the pipeline in accordance with s 172 of the NGL. Applicants should resist including excessively broad ranges in applications as this may make assessing the implications of an application problematic and prevent an application being approved.

Requirements of rules 122 and 125

- 6.10 The other requirements that are provided for in r 122 and r 125 are as follows:

(a) name and contact details of the applicant

- 6.11 An application should clearly identify the legal person who is seeking the greenfields pipeline incentive, the name of the contact person in respect of the application and relevant contact details (including mailing address, phone numbers and email).

(b) a short description sufficient to identify the pipeline and its route together with a website address at which a map of the route, and a description, of the pipeline can be inspected

- 6.12 The application should describe where the pipeline will be constructed. There also needs to be a link to a website where a map of the pipeline route and its description can be inspected. This should be drafted to allow parties to clearly understand competition issues with the pipeline. Detailed network diagrams and street by street analysis of a distribution network are not required.

(c) a statement of the basis on which the project for the construction of the pipeline is to be regarded as a greenfields pipeline project

- 6.13 The application should set out how the project is a greenfields pipeline project. Note that the term greenfields pipeline project is defined by s 149 of the NGL as follows:

greenfields pipeline project means a project for the construction of—

- (a) a pipeline that is to be structurally separate from any existing pipeline (whether or not it is to traverse a route different from the route of an existing pipeline); or
- (b) a major extension to an existing pipeline that is not a covered pipeline; or
- (c) a major extension to a covered pipeline by means of which light regulation services are provided if that extension is exempted by the AER under section 19.

6.14 The applicant should also ensure that the pipeline will be a 'pipeline' within the meaning of s 2 of the NGL.

(d) a statement of expenditure already made on the construction of the pipeline and an estimate of the expenditure yet to be made together with a statement of the basis on which the estimate has been made

6.15 The application should state the overall costs of the pipeline project. If regulated under the NGL, these costs would be the key inputs to the calculation of the pipeline's capital base which is a central determinant of reference tariffs. Costs are also relevant to the ability for others to duplicate the project and the efficiency of such duplication.

6.16 Applicants may note that the wording of r 125(1)(d) differs slightly from r 122(1)(d) but the intended effect is the same.

(e) an estimate of the pipeline's capacity and an estimate of the extent to which the pipeline's capacity is likely to be utilised by the applicant or associates of the applicant

6.17 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 likely to be utilised. There is also a particular focus upon the applicant's own use of the pipeline and its associate's use of the pipeline.

6.18 Where pipeline usage is likely to be relatively stable and just varies with the seasons, average projected utilisation in summer and winter may be sufficient. Where pipeline usage is likely to be more erratic and driven by peaks (such as high electricity prices), some discussion of the utilisation in those peak periods may be necessary.

6.19 The information should be focused upon capacity which prospective users are likely to seek access to. Applicants would also be advised to provide information about the extent to which the capacity of the pipeline could be extended or expanded to accommodate prospective users and the potential costs of such extensions and expansions.

(f) a statement of the services to be provided by means of the proposed pipeline

6.20 This requirement can be satisfied by setting out the basic parameters of each pipeline service 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. The applicant should describe each service in sufficient detail for the Council to analyse the consequences of applying the access regime to these services.

(g) a statement of the locations to be served by the proposed pipeline and, in relation to each downstream location, a statement of other sources of natural gas available at the relevant location

6.21 The application should set out clearly the locations where natural gas is being delivered (either to users or other pipelines). The application needs to outline the other sources of natural gas that are available at those locations. This may be delivered through other pipelines or generally available at those locations (such as gas storage facilities or gas production facilities directly linked to the location). The applicant should set out which of those sources are currently delivering gas to the locations and which would be able to deliver gas to the location in the future.

6.22 An applicant may also wish to outline 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 understanding the extent to which the other sources of energy are a realistic option for those consumers.

(h) a statement of any existing pipelines, and any proposed pipelines of which the applicant is aware, that serve (or will serve) any of the same locations or that pass (or will pass) within 100 km of any of the same locations

6.23 The application must set out all existing and proposed pipelines within 100km of locations to be served by the pipeline. The purpose of this is to examine potential competition from those pipelines and the effect such competition may have on the market power of the pipeline project.

(i) an estimate of the reserves of natural gas available at any upstream location to be served by the pipeline and an estimate of the rate of production from that location

6.24 The application should set out in general terms the available natural gas reserves in any upstream location served by the pipeline and the estimated rate of production from those upstream locations. This would best be presented with respect to the

point at which gas is intended to be, or could be, injected into the pipeline. Accordingly, if several fields are served by a single production facility which will inject gas into the pipeline, the aggregate reserves of those fields and the daily production capacity of the production facility would be sufficient.

(j) an estimate of expected demand at each downstream location to be served by the pipeline including for each location a description of the expected customer base and an indication of the revenue expected from each location

6.25 The application should set out the demand at each downstream location for the pipeline and what customers are likely to make up this demand. This will be used to assess market power associated with the pipeline, including the potential countervailing power of the users of the pipeline. A general indication of potential revenue from each location is required. Where a location consists of only one user the Council understands that the revenue figures would be likely to include confidential information pertaining to that user. Where this is the case, the information should be clearly labelled as confidential so that the Council can protect that information in accordance with ss 90(1) and 331 of the NGL.

(k) the identity of all parties with an interest in the proposed pipeline and the nature and extent of each interest

6.26 This requirement relates to the structure of each pipeline service provider for the pipeline project and other persons with an interest in the pipeline project, such as ownership interests in a service provider. As a matter of practicality, where the shares of a pipeline service provider 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, shareholders owning a shareholding of five per cent or more of a service provider would be expected to be declared. The need to explain the interests involved may differ depending upon the ability of the person 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.

(l) *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 any of the locations 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, and*

6.27 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 measures have been put in place to mitigate the likelihood of that occurring.

6.28 The Council notes that provisions in r 125(1)(l) for applications for price regulation exemptions differ from these in that 'controllers' are not referred to. This appears to be the result of earlier drafts of the NGL where controllers were not listed as service providers. In terms of the competition issues involved, the Council would be interested in any relationships involving controllers of a pipeline who are not operators or owners in respect of price regulation exemptions and applicants would be advised to include this information in their applications even though not specifically required by r 125(1)(l).

(m) *a statement of whether it would be feasible to expand the capacity of the pipeline and, if so, an explanation of how the capacity might be expanded and an estimate of the cost*

6.29 This requirement relates to the feasibility of expanding the pipeline's capacity and the cost of those expansions. This is in the context of providing access to prospective users of the pipeline. The ability to utilise cheaper capacity expansions (such as compression as opposed to more expensive looping) is relevant to a pipeline's market power and likelihood of access being granted in the future.

6.30 It is noted that this requirement does not appear in r 125(1) in respect of applications for a price regulation exemption but the Council considers this information is likely to be relevant to the granting of an exemption. Accordingly, applicants are encouraged to include this in their applications, rather than waiting for a subsequent request from the Council.

(n) an estimate of the annual cost to the service provider of regulation

6.31 This requirement is designed to allow the Council to clearly understand the differential costs involved in regulation under the NGL to assist in applying the public interest criterion of the coverage criteria and price regulation exemption criteria. To make the cost estimate meaningful, a breakdown on how it was arrived at (including relevant assumptions, such as the level of access disputes or cost of access arrangement approvals) 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.

6.32 Note that applicants for a price regulation exemption are required to base these estimates on the costs of full access arrangement regulation (noting that there are some similarities in the costs of regulation for light regulation and for the requirements for pipelines with a price regulation exemption).

(o) any other information the applicant considers relevant, in the circumstances of the present case, to the application of the National Gas Objective or the pipeline coverage criteria

6.33 This allows the applicant to bring forward other relevant material to assist the consideration of the criteria in light of the national gas objective. The applicant should ensure that the application as a whole contains all relevant information to 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 project in question or other pipelines in the area.

(p) any other information or materials on which the applicant relies in support of its application

6.34 The applicant should submit to the Council the key factual and evidential materials which are necessary to support the claims presented in relation to the criteria and rebut potential arguments against its application. This may include confidential information which the Council is obliged to keep confidential in accordance with s 90 and s 331 of the NGL. Applicants are reminded that all confidential information must be clearly identified.

6.35 The Council also notes that the more relevant information about the pipeline project and markets in question that can be presented with the application, the quicker and more efficiently the Council can deal with the application. The Council does not have information gathering powers to compel information and so relies on affected persons to present the necessary evidence to establish their position. As the Council and relevant Minister need to be satisfied that one or more of the coverage criteria

are not met to recommend and grant a 15-year no-coverage determination, a lack of essential information may mean that the Council and relevant Minister are unable to be satisfied on the information provided. Similarly, a number of matters need to be adequately considered in granting a price regulation exemption and weighing up the public benefits and detriments of such an exemption. Additionally, the restrictions on new information in merits review (s 261 of the NGL) mean that information which may have been able to satisfy the Council or relevant Minister cannot subsequently be used to make out a ground of review.

Estimates and supporting facts and assumptions

6.36 Applicants should note that rules 122(2) and 125(2) require that '[i]nformation in the nature of an estimate must be supplemented by a statement of the facts and assumptions on which the estimate is based.' Accordingly, for each of the above requirements appropriate facts and assumptions must be disclosed where an estimate is involved. This will allow the Council to test the veracity of those facts and assumptions and determine the likelihood that the estimate will reflect what has or will actually take place.

Pipeline classification

6.37 Applicants should note that the application requirements differ in some respects concerning distribution and transmission pipelines. As the pipeline project will not have been formally classified, part of the Council's role is to classify the pipeline when making a no-coverage recommendation. This is provided for in s 155 of the NGL. Accordingly applicants should set out their reasoning as to how a pipeline should be classified and, if the pipeline is a cross-boundary distribution pipeline, which jurisdiction the pipeline is most closely connected with in accordance with the jurisdictional determination criteria.³⁶ These requirements are discussed in Part B of this Guide.

False or misleading information

6.38 Persons submitting information to the Council are advised that the giving of false or misleading information is a serious offence. In particular, s 137.1 of the Commonwealth Criminal Code³⁷ 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).

³⁶ Section 14 of the NGL.

³⁷ *Criminal Code Act 1995* (Cth)

How the Council deals with applications

6.39 The Council is required to deal with applications in accordance with the Rules (ss 152 and 161). The requirements in relation to dealing with applications can be found in rr 123 and 126 of the National Gas Rules. Section 153 then governs the no-coverage recommendations as follows:³⁸

153—No-coverage recommendation

- (1) The NCC must recommend to the relevant Minister that the pipeline the subject of the application—
 - (a) be exempted from being a covered pipeline for a period of 15 years; or
 - (b) not be exempted from being a covered pipeline for a period of 15 years.
- (2) A recommendation under this section must—
 - (a) be made in accordance with this Law and the Rules; and
 - (b) be made within the time specified by the Rules; and
 - (c) contain the information required by the Rules; and
 - (d) be given to the persons specified by the Rules; and
 - (e) be made publicly available in accordance with the Rules.
- (3) A recommendation under this section may recommend an outcome different from the outcome sought in the application under section 151.

Example—

An applicant may apply for a 15-year no-coverage determination in relation to the whole pipeline. The NCC may recommend that only a part of the pipeline the subject of the application be subject to a 15-year no-coverage determination.

- (4) A recommendation under this section must be delivered to the relevant Minister without delay.

³⁸ Note this is equivalent to coverage recommendations in s 95 of the NGL.

6.40 Section 162 sets out equivalent provisions for recommendations about price regulation exemptions as follows:

162—NCC's recommendation

- (1) The NCC must make a recommendation to the Commonwealth Minister as to whether the Minister should grant a price regulation exemption for the pipeline the subject of the application.
- (2) A recommendation under this section must—
 - (a) be made in accordance with this Law and the Rules; and
 - (b) be made within the time specified by the Rules; and
 - (c) contain the information required by the Rules; and
 - (d) be given to the persons specified by the Rules; and
 - (e) be made publicly available in accordance with the Rules.
- (3) A recommendation under this section must be delivered to the Commonwealth Minister without delay.

6.41 Note that no-coverage recommendations (and 15-year no-coverage determinations) may differ from the application sought in the sense that more or less of the pipeline may be granted the exemption. Accordingly, it may be recommended that only part of a larger pipeline receive a 15-year no-coverage determination leaving the rest of the pipeline subject to potential coverage applications. This principle is discussed further in Part B of this Guide. However, for price regulation exemptions the decision only relates to the pipeline project as described in an application and no power exists to only apply the exemption to part of the pipeline.

Applications that do not comply with the Rules

6.42 An application received by the Council that does not comply with the requirements set out in rr 122 or 125 will not enable compliance with the requirements in ss 153(2) and 162(2) of the NGL that recommendations 'be made in accordance with this Law and the Rules'. The Council is not obliged to consider an application that has not been made in accordance with 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 a 15-year no-coverage determination or price regulation exemption)³⁹ on the ground that:

³⁹ 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 NGL (see r 7).

- (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.

6.43 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)).

Applying the standard consultative procedure for no-coverage recommendations

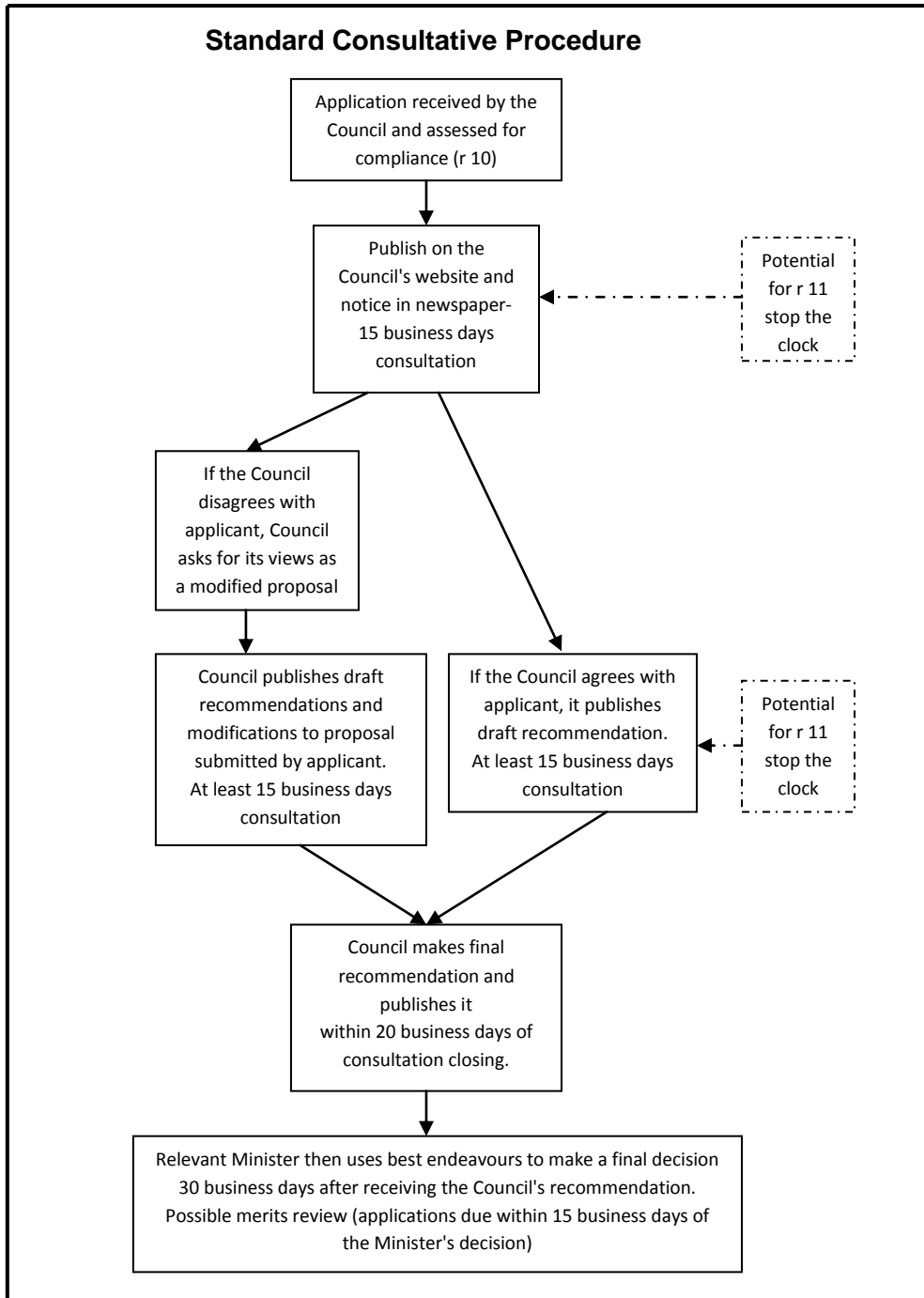
6.44 The central requirement in relation to dealing with valid applications for a no-coverage recommendation is r 123(1) which provides that such applications must be dealt with in accordance with the 'standard consultative procedure'. The 'standard consultative procedure' is defined in r 3 to mean the procedure for consultative decision making laid down in r 8. Rule 8(1) provides that if the NGL (which includes the Rules) 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.

6.45 Rules 8(2)-(4) set out the procedure to be followed when making no-coverage recommendations, 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.

6.46 In brief, the standard consultative procedure works as follows:



Further details about the standard consultative procedure

- 6.47 It should be noted that the consultation on the original proposal is set 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.⁴⁰
- 6.48 After consultation ends, the Council will consider all of the issues raised and make its draft recommendation. 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 no-coverage recommendations, 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 recommendation first to the applicant and ask them if they wish to submit a revised proposal in light of the Council's draft recommendation. 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 recommendation, r 8(2)(d) requires the Council to publish on its website both the draft recommendation and any modification to the proposal made by the applicant in light of the draft recommendation. The Rules do not contemplate the Council considering the revised proposal or modifying its draft recommendation in light of what has been put before publication.
- 6.49 Once a draft recommendation 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 draft recommendation raises particularly difficult or complex issues.
- 6.50 The final recommendation 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)).
- 6.51 It may be necessary for confidential information to be shared between the AER, ERA and Council to ensure that a proper consideration of all the issues is undertaken. This is possible under ss 30 and 90 of the NGL and s 44AAF of the CCA.⁴¹

⁴⁰ See clause 10 of Schedule 2 to the NGL.

⁴¹ 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.

Requirements for a no-coverage recommendation– r 123(4)

6.52 Further to the requirements of the standard consultative procedure, r 123(4) provides that Council's recommendations must:

- (e) be in writing⁴²
- (f) identify the pipeline to which the recommendation relates
- (g) include a reference to a website at which a description of the pipeline can be inspected
- (h) state the terms of the recommendation and the reasons for it, and
- (i) if the pipeline is not an international pipeline - include the Council's initial pipeline classification decision and the reasons for it.

6.53 The Council's recommendation must be given to the relevant Minister without delay (s 153(4)). The relevant Minister is then required to use their best endeavours to make a final decision within 30 business days (see s 156(2)).

6.54 Section 155 of the NGL also requires that the Council's no-coverage recommendation must contain an initial classification decision of the pipeline as a transmission or distribution pipeline and, if it is a cross-boundary distribution pipeline, determine which jurisdiction (and therefore relevant Minister) is most closely connected with the pipeline. The criteria for these decisions are discussed in Part B of this Guide.

Time limits for the recommendation

6.55 Subrule 123(2) provides that no-coverage recommendations are to be made within four months of receiving the application. However, this period needs to be understood in the context of the provisions below.

Calculating time

6.56 Rule 11 assists in calculating time. It allows a decision-maker, when calculating elapsed time (such as the four months provided for in r 123(2)), to disregard any of the following periods:

- (a) any period allowed 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

⁴² Note 'writing' is broadly defined in clause 10 of Schedule 2 to the NGL as including 'any mode of representing words in a visible form'.

- (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, and
- (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.

6.57 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

6.58 Under r 12(1) the Council has the power to extend time limits, such as the four months in which it is required to make a no-coverage recommendation. However, under r 12(2) the power to extend the four 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.

6.59 If the Council decides to extend this four 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)). However, in relation to no-coverage recommendations, the four month time limit cannot be extended by more than 2 months (r 123(3)).

Decisions made out of time

6.60 Rule 14 operates so that where the Council fails to make a 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.

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

Summary of requirements for no-coverage recommendations

6.62 For the purposes of s 153(2) a no-coverage recommendation is:

-
- (a) 'made in accordance with this Law and the Rules' if it follows the standard consultative procedure and other requirements set out above
 - (b) 'made within the time specified by the Rules' if it is made within the four month period (taking into account extensions and stop the clock requirements)
 - (c) 'contain(s) the information required by the Rules' if it is in writing, identifies the pipeline to which the recommendation relates, includes a reference to a website at which a description of the pipeline can be inspected, states the terms of the recommendation and the reasons for it and includes a classification decision
 - (d) 'given to the persons specified by the Rules' if it is given to the applicant and all other persons involved in the administrative process of making the recommendation, and
 - (e) 'made publicly available in accordance with the Rules' if it is published on the Council's website and made available for inspection at the Council's offices.

Process for dealing with applications for a price regulation exemption

6.63 The process for dealing with applications for a price regulation exemption is intended to be shorter and quicker than that involved in making a no-coverage recommendation. It is governed by rr 126 and 127 which are discussed below.

6.64 Subrule 126(1) requires that the Council on receiving an application for a price regulation exemption:

- (a) notify the Commonwealth Minister of the application, and
- (b) publish notice of the application on its website and in a newspaper circulating generally throughout Australia.

6.65 In accordance with r 126(2) this notice must:

- (a) state the nature of the application, and
- (b) identify the international pipeline to which the application relates, and
- (c) include a reference to a website at which a description of the pipeline can be inspected, and
- (d) invite submissions and comments within a specified period from the date of the notice.

6.66 The Council is required to make its recommendation to the Commonwealth Minister within 30 business days after receiving an application (r 127(1)). This time limit cannot be extended (r 127(2)). Accordingly, the Council's process will not include the release of a draft recommendation. All stakeholders will, therefore, need to submit

their responses to the Council's invitation for submissions when the application is first received.

- 6.67 The Council envisages allowing around 15 business days for submissions on an application. In accordance with r 11(1)(c), the Council may treat this period of time as a 'stop the clock' period which is not counted in the 30 day time limit. If the Council does so, it will notify the applicant accordingly and publish this fact on its website in accordance with r 11(2).
- 6.68 Applicants should also be aware that the powers relating to rejecting non-compliant or frivolous proposals in r 10 discussed above (see paragraphs 6.42 - 6.43) also apply to applications for price regulation exemptions.
- 6.69 A recommendation relating to a price regulation exemption must:
- (a) be in writing, and
 - (b) identify the pipeline to which the recommendation relates, and
 - (c) include a reference to a website at which a description of the pipeline can be inspected, and
 - (d) state the terms of the recommendation and the reasons for it (r 127(3)).
- 6.70 As soon as practicable after delivering the recommendation to the Commonwealth Minister, the Council must:
- (a) give copies of the recommendation to the:
 - (i) applicant, and
 - (ii) AEMC, and
 - (iii) AER, and
 - (b) publish the recommendation on the Council's website, and
 - (c) make copies of the recommendation available for inspection at the office of the Council during business hours (r 127(4)).
- 6.71 The general provisions regarding late decisions also operate such that if the Council fails to make a decision within 'an overall time limit', it must report on its failure to the MCE (r 14(1) and 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 decision by the Council to 'stop the clock' pursuant to r 11. Non-compliance with a time limit does not, however, invalidate a decision made by the Council (see s 332).

Where 15-year no-coverage determination is not granted for an international pipeline

6.72 There is a special provision for the situation where a service provider for a proposed international pipeline has applied for and been rejected for a 15-year no-coverage determination. In this circumstance s 159 provides as follows:

159—Consequences of Minister deciding against making 15-year no coverage determination for international pipeline

- (1) If—
 - (a) the Commonwealth Minister decides against making a 15-year no coverage determination for an international pipeline; and
 - (b) the applicant asks the Commonwealth Minister to treat the application as an application for a price regulation exemption,

the Commonwealth Minister may treat the application as an application for a price regulation exemption under Chapter 5 Part 3.
- (2) If the Commonwealth Minister decides to treat an application for a 15-year no-coverage determination as an application for a price regulation exemption, the Commonwealth Minister may—
 - (a) refer the application to the NCC for a recommendation under Chapter 5 Part 3; or
 - (b) proceed to determine the application without a recommendation under Chapter 5 Part 3.

6.73 Accordingly, where requested by the service provider, the Commonwealth Minister has the discretion to decide whether to make a price regulation exemption without advice from the Council or refer the matter back to the Council for advice as a price regulation exemption application. Where the matter is referred back to the Council for advice the Council will apply the ordinary rules for making a recommendation on whether or not to grant a price regulation exemption discussed above (see paragraphs 5.1 to 5.12 above).

Applications for a 15-year no-coverage determination by a service provider with a price regulation exemption

6.74 Subsection 151(2) of the NGL allows a service provider who has been granted a price regulation exemption to apply for a 15-year no-coverage determination up to the point at which the price regulation exemption is due to end. These applications need to meet the ordinary form and process requirements specified above. If granted, in this situation, a 15-year no-coverage determination would only apply for the balance

of the period for which the price regulation exemption would otherwise have been in force (s 167(3)).

7 Modification and termination

Conformity of pipeline description and pipeline as constructed

- 7.1 Part 4 of Chapter 5, and s 171 in particular, outlines the central requirement for conformity between the pipeline description provided as part of the application and the pipeline which is actually constructed. A pipeline description is further defined by r 121 of the Rules.⁴³ Should the pipeline as constructed differ materially from that described in the pipeline description, the greenfields pipeline incentive will not apply to the pipeline.
- 7.2 In determining conformity with the pipeline description, excluded infrastructure is not to be taken into account. Rule 120 defines excluded infrastructure to be 'all tanks, reservoirs, machinery and equipment that form part of a pipeline'.

Amendment of pipeline descriptions

- 7.3 To reflect the realities that pipeline projects may be modified while they are being built, s 172 of the NGL allows a pipeline description to be amended before the pipeline is commissioned. Commissioning is defined by s 12 of the NGL as the point at which the pipeline is 'first used for the haulage of natural gas, on a commercial basis'.
- 7.4 Applications can be made by a service provider to the relevant Minister to amend the pipeline description.⁴⁴ These applications can be referred to the Council for advice in all cases and must be referred in cases where there is a substantial change to the pipeline description.⁴⁵ The Council's advice must have regard to the relevant criteria for granting the 15-year no-coverage determination or price regulation exemption.⁴⁶ The relevant Minister must also have regard to those criteria and the Council's advice in making a decision on whether to allow the pipeline description amendment sought (s 172(5)).

Early termination of greenfields pipeline incentives

- 7.5 Generally a service provider has three years to commission the pipeline after the greenfields pipeline incentive was granted.⁴⁷ Regulations under the *National Gas*

⁴³ See the discussion with regard to applications for greenfields pipeline incentives in the previous section.

⁴⁴ Prior to the pipeline being commissioned.

⁴⁵ Subsection 172(3).

⁴⁶ Subsection 172(4).

⁴⁷ Subsection 173(1).

(South Australia) Act 2008 can extend this date in a particular case.⁴⁸ These regulations require unanimous MCE agreement.

Revocation

- 7.6 Under s 174, a service provider can also ask the relevant Minister to revoke a greenfields pipeline incentive.
- 7.7 Section 175 provides that the AER may apply to the relevant Minister to revoke the greenfields pipeline incentive on the ground that:
- (a) the applicant misrepresented a material fact on the basis of which the application was granted, or
 - (b) the applicant failed to disclose material information that the applicant was required to disclose under Chapter 5 of the NGL.
- 7.8 This accords with the discussion by the Productivity Commission and Parer Review that a power is needed to deal with misrepresentation, but other subsequent changes of facts should not impact on the incentive. This is confirmed by s 177 which provides that the list of termination circumstances in Part 5 of Chapter 5 is intended to be exhaustive.
- 7.9 Section 176 allows the Commonwealth Minister to terminate a price regulation exemption on the application of the AER where a condition on which the exemption has been granted has been breached. These conditions are outlined in s 166 to include the publication of prices for pipeline services, the publication on its website of the service provider's limited access arrangement and register of spare capacity and the provision of information to the AER and the Commonwealth Minister on access negotiations.

⁴⁸ Subsection 173(2).

8 Merits review of greenfields pipeline incentive decisions

- 8.1 Merits review is available under Part 5 of Chapter 8 of the NGL for reviewable regulatory decisions, including:
- (a) a 15-year no-coverage determination, or a decision not to make a 15-year no-coverage determination, and
 - (b) a price regulation exemption or a decision not to grant a price regulation exemption.⁴⁹
- 8.2 Accordingly, the decision of the relevant Minister on the Council's recommendation is merits reviewable, but the recommendation itself is not subject to merits review.
- 8.3 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.⁵⁰ This would include the Council's classification decisions and recommendations though, of course, whether any particular decision is reviewable will depend on the circumstances.

Application for review

- 8.4 An application for merits review of one of the above reviewable regulatory decisions, may be made to the Australian Competition Tribunal (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, or
 - (d) the original decision maker's decision was unreasonable, having regard to all the circumstances (see s 246(1) of the NGL).⁵¹

⁴⁹ See s 244 (definition of 'reviewable regulatory decision'), s 2 (definition of 'Ministerial coverage decision') and s 245 of the NGL. Note also the additional procedural provisions in s 44ZZR of the CCA and Regulation 7B of the Competition and Consumer Regulations.

⁵⁰ See Schedule 3 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth).

⁵¹ See discussion of these grounds in *Re: Application by ElectraNet Pty Limited (No 3)* [2008] ACompT 3 (30 September 2008) at [64] - [79].

Time limitations and leave

- 8.5 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)).
- 8.6 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 the following decision - *Re: Application by ElectraNet Pty Ltd* [2008] ACompT 1 (23 June 2008) at [39] - [42] and [58] - [63]. In particular, s 250 of the NGL 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 no-coverage and price regulation exemption recommendations). 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 its recommendation (s 251(2)(b)(ii)).

New information and matters that can be raised

- 8.7 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. The effect of subsections 261(7)(d) and (g) is that submissions to the Council are 'review related matter' and can therefore be material before and considered by the Tribunal. Subsection 261(2) specifically provides that the Tribunal must have regard to any document prepared and used by the Council and that the Council has made publicly available.
- 8.8 Subsection 258(2) limits parties from raising issues not raised in submissions in relation to the making of the decision. 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.

Appendix A Ministerial Council on Energy, Review of the National Gas Pipelines Access Regime: Response to the Productivity Commission Review of the Gas Access Regime – Decision May 2006 (the MCE Decision) (extract).

Greenfields incentives

4.4 Enhancing regulatory certainty for gas pipeline projects

Consistent with the MCE's objective to encourage the penetration of natural gas, the MCE considers that the creation of an appropriate climate for maximising the potential for investment in gas pipeline projects is a priority issue for the energy sector reforms. A strong, interconnected gas transmission network is essential to the reliable supply of gas and links with more remote gas fields will become essential over the medium term as demand grows and supply from closer fields diminishes.

The MCE accepts the findings of the PC review of the Gas Access Regime that greater certainty about the coverage status of a proposed pipeline would reduce the regulatory risk for proposed gas pipelines and therefore encourage further investment. The MCE notes the concerns that the cost associated with regulatory compliance could affect investment, and also that regulation (or its possibility) could complicate the negotiation of foundation contract arrangements, and possibly create incentives for pipelines to be undersized or deferred.

The MCE has therefore decided to implement two measures specifically to improve regulatory certainty and encourage investment in gas pipelines.

Measure 1: Binding No Coverage Ruling

The MCE has agreed to adopt recommendation 9.1 of the Commission's review of the Gas Access Regime. The proponent of a proposed gas transmission pipeline or distribution network will be able to apply to the NCC for an up-front coverage assessment. The NCC will be empowered to conduct such assessments and make a timely recommendation to the designated Minister in respect of a proposed gas pipeline. Upon receiving an NCC recommendation that the proposed pipeline does not meet the coverage criteria, the designated Minister may provide a binding 15 year no coverage ruling in respect of the pipeline.

The process for the NCC to arrive at its recommendation will be the same as the present coverage process. The binding ruling would preclude coverage of the pipeline over the initial 15 year period from the commencement of commissioning, irrespective of whether market conditions change (except in the limited circumstances as recommended by the Commission).

If the designated Minister decides the proposed pipeline meets the coverage criteria taking into account the recommendation of the NCC and therefore does not provide a binding no coverage ruling, the pipeline proponent may:

- seek guidance on the form of regulation to be applied and progress coverage in response to that advice; or
- build and operate the pipeline in the market uncovered (in this case, the pipeline may be subject to a future coverage application); or
- make an application under Measure 2 (if the proposed pipeline is an international transmission pipeline).

Measure 2: Price Regulation Exemption

The MCE recognises that the coverage assessment process followed by Ministerial decision on a binding ruling may not be a sufficiently timely process in the context of projects that might bring gas to the Australian energy market from international sources, such as from East Timor, Indonesia or Papua New Guinea. To ensure that the regulatory regime does not inhibit such pipelines proceeding to financial close, the MCE has decided to make available a mechanism for a 15 year price regulation exemption for proposed international gas pipelines which originate in another country and bring gas from a source outside Australia as an additional option to the first measure described above. The MCE believes that Measure 1 and the light handed form of regulation provide sufficiently timely and appropriate mechanisms to promote investment in new pipelines from domestic gas sources when balanced against the concerns of users about potential abuse of market power. The additional incentive for overseas gas accords with Australia's long term energy security needs.

An international pipeline qualifying for the additional option of a price regulation exemption would not be subject to the existing coverage assessment process. It would be subject to the Gas Code requirements except in respect of price regulation. That is, the proposed pipeline would still be subject to regulation, but only in respect of the non-price access provisions. This would maintain the price regulation exemption within the framework of the gas access regime.

The proponent of a proposed international gas pipeline would apply directly to the Commonwealth Minister for a 15 year price regulation exemption. If granted, the price regulation exemption would also apply from the date on which gas commences to flow.

Consistent with the above, a pipeline granted a 15 year price regulation exemption would be required to meet certain transparency requirement. These would include:

- establishing a public, non-discriminatory, access policy setting out procedures for negotiating third party access;

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- offering non-discriminatory pricing for similar reference services;
 - publishing indicative prices and how prices are calculated for what would otherwise be reference services;
 - maintaining a register of actual spare capacity; and
 - general annual reporting on access negotiations.

These must be published on the company's website. Further details on reporting access negotiations to the regulator will be considered as part of the drafting of the National Gas Law.

The pipeline would also be required to comply with the non-price provisions of the current Gas Code (as converted into the National Gas Law and Rules), including:

- Content of an Access Arrangement (except Reference Tariffs and Reference Tariff Policy, and Determining Reference Tariffs through a Competitive Tender Process);
- Ring Fencing Arrangements;
- Information and Timelines for Negotiation;
- Dispute Resolution in relation to non-price matters;
- The prohibition on preventing or hindering access in s. 13 of the GPAL;
- General Regulatory and Miscellaneous Provisions to the extent that they do not relate to pricing matters.

Once a price regulation exemption is granted, the service provider would be required to submit to the AER an access arrangement covering the above non-price access provisions. The AER would exercise its compliance powers and functions in respect of the non-price access provisions.

At any time during the 15 year price regulation exemption period, the service provider could apply for a coverage assessment and binding no coverage ruling from the designated Minister (Measure 1 above). If the assessment recommended no coverage and such a ruling were granted, it would apply for the balance of the 15 years from the date on which gas flow first commenced, and the non-price access obligations would cease to apply. If the assessment recommended coverage and such a ruling was therefore not granted, the 15 year price regulation exemption would continue.

At the end of the 15 year price regulation exemption period, the pipeline would continue to be uncovered, subject to any subsequent coverage application. As well as at any time after the 15 year period, such applications could be made in the period leading up to the end of the 15 year price regulation exemption such

that if coverage was recommended, a full access arrangement could be put in place to commence from the end of the price regulation exemption.

A key component of the new greenfields pipeline price regulation exemption regime will be the criteria for determining whether a particular project qualifies for the exemption, and the process under which an application for the exemption is assessed.

Greenfield Criteria for International Transmission Pipelines

A proponent of a transmission pipeline project which has not yet commenced operations and intends to bring gas to Australia from an overseas source through a new pipeline will be able to apply to the Commonwealth Minister and NCC in writing for a decision on whether the pipeline or part of the pipeline is a Greenfield Pipeline. To qualify as a greenfield pipeline, the proposed pipeline could not be covered by an existing access arrangement.

The NCC would conduct a high level assessment of market power and public interest issues with the proposed pipeline (benefits and costs). The NCC would publish non-confidential parts of an application on its website and would be able to consider public submissions on these issues. The NCC would then provide advice on these issues to the Commonwealth Minister within no more than 30 business days.

The Commonwealth Minister would consider the application and NCC advice and make a decision within 10 business days of receiving the advice. The Commonwealth Minister would be able to declare the pipeline to be a Greenfield Pipeline if it meets the criteria unless he or she considers that the advice from the NCC warrants not granting the incentive.

The option for new pipeline proponents to seek a binding ruling that a pipeline does not meet the coverage test will be introduced. The process will mirror the process for coverage. If a pipeline is found not to meet the coverage test, the exemption from coverage will remain for 15 years after the pipeline commences operation, irrespective of whether market circumstances change.

The option of an exemption from price regulation for international greenfield transmission pipelines will be introduced. These pipelines would need to originate in another country and bring gas to Australia from outside of Australian territory and not be covered by an existing access arrangement.

International Greenfield transmission pipelines will remain subject to the non-price elements of the regime (including the requirement to have non-price elements of an access arrangement approved) and also non-discriminatory and pricing transparency principles. At the expiration of the exemption period, the pipeline will continue to be uncovered, but the option of coverage applications will be available.

Appendix B Use of extrinsic material

Use of extrinsic materials to assist interpretation

- B.1 In developing this Guide, a range of relevant extrinsic materials will be 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 NGL 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).⁵² 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

⁵² 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.
- 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'.⁵³ 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 is clear from the policy discussion above that the various reviews have conceived the need for, and nature of, greenfields pipeline incentives differently. Accordingly, care needs to be taken in determining the extent to which the NGL actually incorporates the policy suggested by the various reports and recommendations supporting the introduction of the greenfields pipeline incentives.

⁵³ At 518 per Mason CJ, Wilson and Dawson JJ.