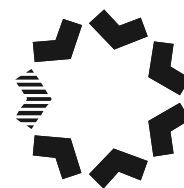


# National Gas Law - overview

A guide to the function and powers  
of the National Competition Council  
under the National Gas Law  
Part A – Overview



NATIONAL  
COMPETITION  
COUNCIL



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

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

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

**May 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](http://www.ncc.gov.au) or by contacting the Council on (03) 9981 1600 or via email to [info@ncc.gov.au](mailto:info@ncc.gov.au).

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## **Foreword**

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

The Guide is in four parts. Each part is available on the Council's website at [www.ncc.gov.au](http://www.ncc.gov.au). The Guide will be updated periodically as required.

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

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## Version history

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

## 1 Introduction

- 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.<sup>1</sup>
- 1.2 The National Competition Council is established by s 29A of the *Competition and Consumer Act 2010* (Cth) (CCA) and is conferred a number of functions and powers under the NGL. In particular it:
  - (a) classifies pipelines (ie as transmission or distribution pipelines)
  - (b) recommends to the relevant Minister whether or not a particular pipeline should be, or remain, covered (ie subject to access regulation under the NGL)
  - (c) makes decisions on the form of regulation that should apply to a pipeline (ie light regulation or full regulation through an access arrangement), and
  - (d) makes recommendations on exemptions from regulation for new pipeline projects (greenfields pipeline incentives).
- 1.3 The purpose of this Guide is to explore those functions in the context of the reform of the gas access regime. Part B of the Guide focuses on the first two functions, Part C on the third and Part D on the fourth. This Part A provides an overview which:
  - (a) looks at the rationale and process for reform of the gas access regime
  - (b) outlines the structure of the NGL, and
  - (c) provides an overview of the content of Parts B, C and D of the Guide.
- 1.4 It should also be noted that the application of the NGL itself by each State and Territory constitutes an individual State/Territory access regime which applies to the provision of pipeline services. In the Australian Energy Market Agreement 2004 as amended in 2006 (AEMA) Minister's agreed that these access regimes would be submitted to the Council for certification under Part IIIA of the CCA. Accordingly, the Council also has a role in relation to assessing the application of the NGL against the criteria in clause 6 of the Competition Principles Agreement. That role is not discussed in this Guide. Further information on certification is available from the Council's *Certification of State and Territory Access Regimes: A guide to Certification under Part IIIA of the Competition and Consumer Act*, which is available for download from the Council's website.

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<sup>1</sup> 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).

## 2 Rationale for reform

2.1 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.<sup>2</sup> The increased consistency between electricity and gas regulation is expected to strengthen the national character of the governance and economic regulation of the energy sector.<sup>3</sup>

### Competition policy reform and gas access

2.2 The current gas access regime needs to be considered in the context of its genesis in the competition policy reforms of the 1990s. In April 1995, all Australian governments reached agreement on an ambitious plan to promote enhanced competition in Australia. The resulting National Competition Policy (NCP) was based on the recommendations of the independent inquiry into a national competition policy, chaired by Professor Frederick Hilmer, which reported in August 1993.<sup>4</sup> The NCP is underpinned by three intergovernmental agreements:

- the Competition Principles Agreement
- the Conduct Code Agreement, and
- the Agreement to Implement the National Competition Policy and Related Reforms (Implementation Agreement).

2.3 The three agreements outline the reforms that governments undertook to put in place under the NCP process. Related reforms in the electricity, gas, water and road transport industries also form part of the package. In particular, the gas reforms were summarised in the Natural Gas Pipelines Access Agreement 1997, which was the central intergovernmental agreement, which supported the Gas Pipelines Access Law.

2.4 Significantly, clause 6 of the Competition Principles Agreement establishes the framework for third party access both under Part IIIA of the CCA and State and Territory access regimes (which include the NGL). The Competition Principles

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<sup>2</sup> The National Electricity Law is set out in the Schedule to the *National Electricity (South Australia) Act 1996* (SA).

<sup>3</sup> 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 (AEMA).

<sup>4</sup> Report by the Independent Committee of Inquiry into National Competition Policy (Chair: Prof F G Hilmer) 1993 (Hilmer Report)

Agreement, including clause 6, was amended by COAG on 13 April 2007, although the intent remains the same. The amended clause 6(1)-(3) provides as follows:

**Access to Services Provided by Means of Significant Infrastructure Facilities**

6. (1) Subject to subclause (2), the Commonwealth will put forward legislation to establish a regime for third party access to services provided by means of significant infrastructure facilities where:
- (a) it would not be economically feasible to duplicate the facility;
  - (b) access to the service is necessary in order to permit effective competition in a downstream or upstream market;
  - (c) the facility is of national significance having regard to the size of the facility, its importance to constitutional trade or commerce or its importance to the national economy; and
  - (d) the safe use of the facility by the person seeking access can be ensured at an economically feasible cost and, if there is a safety requirement, appropriate regulatory arrangements exist.
- (2) The regime to be established by Commonwealth legislation is not intended to cover a service provided by means of a facility where the State or Territory Party in whose jurisdiction the facility is situated has in place an access regime which covers the facility and conforms to the principles set out in this clause unless:
- (a) the Council determines that the regime is ineffective having regard to the influence of the facility beyond the jurisdictional boundary of the State or Territory; or
  - (b) substantial difficulties arise from the facility being situated in more than one jurisdiction.
- (3) For a State or Territory access regime to conform to the principles set out in this clause, it should:
- (a) apply to services provided by means of significant infrastructure facilities where:
    - (i) it would not be economically feasible to duplicate the facility;
    - (ii) access to the service is necessary in order to permit effective competition in a downstream or upstream market; and
    - (iii) the safe use of the facility by the person seeking access can be ensured at an economically feasible cost and, if there is a safety requirement, appropriate regulatory arrangements exist; and
  - (b) reasonably incorporate each of the principles referred to in subclause (4) and (except for an access regime for: electricity or gas that is developed in accordance with the Australian Energy

Market Agreement; or the Tarcoola to Darwin railway) subclause (5).

There may be a range of approaches available to a State or Territory Party to incorporate each principle. Provided the approach adopted in a State or Territory access regime represents a reasonable approach to the incorporation of a principle in subclause (4) or (5), the regime can be taken to have reasonably incorporated that principle for the purposes of paragraph (b).

2.5 In accordance with these principles, Part IIIA of the CCA provides a statutory right of access to services which meet the declaration criteria based upon clause 6(1) of the Competition Principles Agreement. However, consistent with clause 6(2) of the Competition Principles Agreement, declaration under Part IIIA is not available where there is in place a State or Territory access regime which conforms with clause 6 of the Competition Principles Agreement. The Gas Pipelines Access Law and NGL were both intended to be such a State and Territory access regime. In accordance with the AEMA, the States and Territories are soon expected to formally submit their applications of NGL to the Council for certification under Part IIIA of the CCA to ensure that this is the case.

2.6 The objectives of the 1997–1999 reform process and Gas Pipelines Access Law were set out in clause 2.1 of the Natural Gas Pipelines Access Agreement 1997 and the preamble to the Gas Pipelines Access Law as follows:

2.1 The objective of this agreement is to establish a uniform national framework for third Party access to natural gas pipelines that:

- (a) facilitates the development and operation of a national market for natural gas;
- (b) prevents abuse of monopoly power;
- (c) promotes a competitive market for natural gas in which customers may choose suppliers, including producers, retailers and traders;
- (d) provides rights of access to natural gas pipelines on conditions that are fair and reasonable for both Service Providers and Users; and
- (e) provides for resolution of disputes.

2.7 These objectives were used to guide the application of the Gas Pipelines Access Law throughout its operation from 1998–2008.

## **Reform of the gas access regime**

2.8 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)

- MCE Report to COAG<sup>5</sup> on Reform of Energy Markets (11 December 2003)
- Productivity Commission Inquiry Report No. 31, Review of the Gas Access Regime, 11 June 2004 (the Productivity Commission Report)
- Expert Panel on Energy Access Pricing, Report to the Ministerial Council on Energy, April 2006 (the Expert Panel Report), and
- Ministerial Council on Energy, Review of the National Gas Pipelines Access Regime – Decision May 2006 (the MCE Decision).

2.9 This policy background is recognised in the Second Reading Speech for the National Gas (South Australia) Bill 2008<sup>6</sup> (the Second Reading Speech). COAG confirmed the governance structure for the reform program with the AEMA.

2.10 The MCE Report to COAG on Reform of Energy Markets summarised the beginning of the new reform agenda from June 2001:

At the CoAG meeting on 8 June 2001, all Australian Governments recognised that effective operation of an open and competitive national energy market contributes to improved economic and environmental performance, and delivers benefits to households, small business and industry, including in regional areas. CoAG agreed to a set of core national energy policy objectives and principles, as outlined at Appendix 1. At the same time, CoAG charged the MCE to address a series of priority tasks, specifically:

- likely energy use (supply and demand) scenarios facing Australia over the next decade and possible policy issues to be addressed;
- existing and potential gas and electricity market regulatory structures and institutional mechanisms, including the extent to which they facilitate an efficient and competitive energy sector with adequate investment and benefits to users;
- the potential for harmonising regulatory arrangements, removing inconsistencies and integrating networks;
- opportunities for and impediments to increasing interconnection and system security in gas and electricity; and
- ways of accelerating the delivery of improved consumer choice, providing better information and enhancing cooperative energy efficiency activities and decision making for demand side participation.

CoAG also agreed in June 2001 to an independent review of energy market directions, to identify the strategic issues for Australian energy markets and the policies required from Commonwealth, State and Territory governments. CoAG requested that the MCE oversee the review process. The final report of the review (the CoAG Review) was published on 20 December 2002.

2.11 The key element of the MCE Report to COAG on Reform of Energy Markets, which responded to the Parer Review, was the division of responsibilities between, and

<sup>5</sup> Council of Australian Governments (COAG)

<sup>6</sup> South Australian Hansard, Legislative Assembly, 9 April 2008, pp 2696 - 2728.

conferral of functions upon, the MCE, Australian Energy Regulator (AER), Australian Energy Market Commission (AEMC) and Australian Competition and Consumer Commission (ACCC). This decision of itself necessitated a reform of the Gas Pipelines Access Law to incorporate the new governance arrangements and implement a transfer of additional regulatory responsibilities to the national regulators and agreed framework.

2.12 The inquiry commenced by the Productivity Commission in June 2003 was a parallel means by which the detail of the gas access regime was reviewed. The Productivity Commission made a series of recommendations for improvement in its report released in June 2004. Central to the Productivity Commission Report were recommendations about:

- (a) the objects of the regime
- (b) coverage criteria
- (c) light handed regulatory options
- (d) incentives for greenfields pipeline investment, and
- (e) revisions to the revenue and pricing framework, particularly to provide greater certainty and facilitate investment.

2.13 The Productivity Commission Report also included a number of findings in relation to the gas access regime. Some of its general findings were as follows:

The market conditions facing the gas transmission and distribution sectors have changed since the Gas Access Regime was developed. In the transmission sector participants are increasingly having to respond to new opportunities that arise in an emerging competitive market. Competition in this sector is expected to increase further through even greater connectivity. The gas distribution sector is also facing more competitive market conditions arising, in particular, from a more competitive electricity sector. Notwithstanding these changes, the gas market is still in transition. In this environment, some form of a gas access regime is still warranted.

...

An industry-specific access regime is appropriate for gas transmission pipelines and distribution networks because of its advantages over the negotiate-arbitrate model of the national access regime.

...

The Gas Access Regime has delivered benefits through determining the terms of third party access to pipelines and facilitating competition in upstream and downstream markets.

...

The existing Gas Access Regime has deficiencies. Improvements are possible.<sup>7</sup>

<sup>7</sup> Productivity Commission Report at pp XLI – XLIII.

2.14 Furthermore, the desire for greater consistency in gas and electricity regulation lead the MCE to commission an Expert Panel to analyse the access pricing issues raised by the Productivity Commission in the context of both electricity and gas access regimes. As the MCE Response to the Productivity Commission Report was agreed prior to the consideration of the Expert Panel Report, care needs to be taken in determining what the final policy position of the MCE was on a number of matters. In particular, the Expert Panel was critical of the Productivity Commission's approach to regulatory discretion in pricing.<sup>8</sup>

2.15 Additionally, while the issues associated with the Productivity Commission review and Expert Panel review were still being finalised, in 2006 the AEMA was amended to confirm the intention to implement a more consistent access regime between electricity and gas and to minimise jurisdictional variations from that framework. Accordingly, clauses 13.1 and 13.2 provide as follows:

13.1 The Parties note that third parties have legal rights for access to energy infrastructure services at transmission and distribution levels on reasonable terms and conditions that promote the economically efficient operation of, use of and investment in the infrastructure by which services are provided, thereby promoting effective competition in upstream and downstream markets.

13.2 The Parties confirm their commitment to a national approach to energy access whereby:

- (a) there is national consistency within the gas access regime and within the NEM access regime, in accordance with this agreement; and
- (b) to the extent feasible and where effective regulation is not impeded, there should be consistency and harmonisation between electricity and gas access regimes such that investment in, and use of, energy is not distorted by differing regulatory regimes.

2.16 The MCE meeting in May 2005 also agreed to consider the review arrangements in the gas and electricity regimes and in June 2006 the MCE also agreed to a new approach to merits review in gas and electricity access matters. The greenfields pipeline incentive recommendations were also implemented in the Gas Pipelines Access Law in June 2006 to ensure that new pipeline investment was not deterred by the length of the reform process.<sup>9</sup>

2.17 From 2005–2008 the MCE's Standing Committee of Officials (SCO) undertook an extensive range of consultation upon the policy associated with the reform of the gas

<sup>8</sup> See p 78 where the Expert Panel stated that the 'propose-respond' approach recommended by the Productivity Commission might lead to a 'systemic increase in the returns of regulated entities relative to the receive-determine model'.

<sup>9</sup> See the *Gas Pipelines Access (South Australia) (Greenfields Pipeline Incentives) Amendment Act 2006 (SA)* and *Energy Legislation Amendment Act 2006 (Cth)*.

access regime and the creation of the NGL. This included two exposure drafts of the NGL, Regulations and National Gas Rules. The SCO also released extensive policy documents setting out the basis of the reforms and responding to individual stakeholder comments on both the policy documents and exposure draft legislation. These materials also indicate a range of policy refinements to the original policy decisions.

- 2.18 Furthermore, at the end of 2007 it was decided to include the Natural Gas Services Bulletin Board within the initial NGL.

### **National gas objective**

- 2.19 A centre piece of the NGL is the national gas objective<sup>10</sup> in s 23 which states:

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.

- 2.20 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; provide greater certainty to service providers and access seekers about possible regulatory intervention; and promote national consistency (both across jurisdictions and between access regimes). Further, the consistency achieved between the national gas objective and the national electricity objective, contained in s 7 of the National Electricity Law, is intended to promote a seamless approach to energy access across the energy sector.<sup>11</sup>

- 2.21 The Hon. Minister Conlon MP in the second reading speech to the NGL set out the key principles underlying the insertion of the objective as follows:

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

The long term interest of consumers of gas requires the economic welfare of consumers, over the long term, to be maximised. If gas markets and access to pipeline services are efficient in an economic sense, the long term economic interests of consumers in respect of price, quality, reliability, safety and security of natural gas services will be maximised. By the promotion of an economic efficiency objective in access to pipeline services, competition will be promoted in upstream and downstream markets.<sup>12</sup>

- 2.22 In *Re: Application by ElectraNet Pty Limited (No 3)* [2008] ACompT 3 (30 September 2008) the Australian Competition Tribunal (Tribunal) interpreted the national electricity objective consistently with this intention as follows:

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<sup>10</sup> That aligns with the national electricity objective.

<sup>11</sup> See Ministerial Council on Energy, *Review of the National Gas Pipelines Access Regime – Decision May 2006* at p 7.

<sup>12</sup> p 2697.

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, ie 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.<sup>13</sup>

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<sup>13</sup> At [15]. And reaffirmed by the Tribunal in *Application by Energy Australia and Others (includes corrigendum dated 1 December 2009) [2009] ACompT 8* (12 November 2009) at [18].

### 3 Structure of the National Gas Law

3.1 The following table provides an overview of the key aspects of the NGL

<p><b>Chapter 1 - Preliminary</b> <i>(Note many definitions are common to Gas Pipelines Access Law and Gas Code. Compare also Part 1 of the National Electricity Law.)</i></p>	<p>Sets out key definitions for the regime, in particular:</p> <ul style="list-style-type: none"> <li>• pipeline (s 2)</li> <li>• service provider (s 8)</li> <li>• coverage criteria (s 15), and</li> <li>• form of regulation factors (s 16).</li> </ul> <p>Determines the relationship between an access arrangement and a covered pipeline (ss 17 - 19).</p> <p>Sets out the participating jurisdictions and Ministers (ss 21 - 22).</p> <p>Sets out the national gas objective and revenue and pricing principles (ss 23 and 24).</p> <p>Establishes the power for the MCE to issue Statements of Policy Principles (s 25).</p> <p>Provides that the Rules have force of law (s 26).</p>
<p><b>Chapter 2 - Functions and powers of gas market regulatory entities</b> <i>(Compare Parts 3, 4, 5A and 5B of the National Electricity Law)</i></p>	<p>Part 1 establishes the functions and powers of the AER under the NGL and the requirements to have regard to the national gas objective and revenue and pricing principles (ss 27 - 28)</p> <p>Provides the AER with information gathering powers, notably search warrants (Division 2), a general information gathering power (Division 3) and regulatory information instruments (Division 4).</p> <p>Establishes the AER power to issue service provider performance reports (s 64) and enforcement guidelines (s 68).</p> <p>Part 2 establishes the AEMC's functions and powers under the NGL and the requirements to have regard to the national gas objective and MCE Statements of Policy Principles (Division 1).</p> <p>Establishes the statutory rule making power of the AEMC (s 74) and provides for AEMC reviews and associated matters.</p> <p>Parts 3 - 6 deal briefly with the functions and powers of Ministers, the Council, the Australian Competition Tribunal and the Australian Energy Market Operator (AEMO). In particular:</p> <ul style="list-style-type: none"> <li>• the Council has the power to do all things necessary and convenient to be done for or in connection with the performance of its functions (s 89(2)), and</li> <li>• the Council is obliged to keep certain information confidential in accordance with s 90.</li> </ul>

<p><b>Chapter 3 - Coverage and classification of pipelines</b></p> <p><i>(Note classification requirements are similar to Gas Pipelines Access Law and coverage requirements are similar to s 1 of the Gas Code)</i></p>	<p>Part 1 deals with the coverage of pipelines. Division 1 empowers any person to apply to regulate a pipeline as a covered pipeline and Division 2 empowers any person to apply to revoke coverage of a pipeline.</p> <p>Part 2 deals with the form of regulation to apply to a covered pipeline. Division 1 concerns how to become a light regulation pipeline and Division 2 concerns the revocation of light regulation.</p> <p>Parts 3 and 4 deal with how pipelines may become covered by a tendering process and voluntarily submitting an access arrangement.</p> <p>Part 5 deals with the reclassification of pipelines (ie as transmission or distribution).</p>
<p><b>Chapter 4 - General requirements for provision of covered pipeline services</b></p> <p><i>(Compare ss 13 and 40 of the Gas Pipelines Access Law and ss 4 and 7 of the Gas Code. Note also s 157 of the National Electricity Law)</i></p>	<p>Part 1 establishes the overarching duties including:</p> <ul style="list-style-type: none"> <li>• service providers being a particular legal entity (s 131)</li> <li>• requirement to submit an access arrangement (s 132)</li> <li>• obligation not to prevent or hinder access (s 133)</li> <li>• obligations relating to the supply and haulage of natural gas (s 134)</li> <li>• requirements to comply with queuing requirements (s 135), and</li> <li>• prohibition on price discrimination for light regulation pipelines (s 136).</li> </ul> <p>Part 2 establishes ring-fencing requirements and requirements relating to contracts with associates.</p>
<p><b>Chapter 5 - Greenfields pipeline incentives</b></p> <p><i>(Compare Part 3A of the Gas Pipelines Access Law)</i></p>	<p>Part 2 establishes a power to grant 15-year no-coverage determinations in respect of a greenfields pipeline project.</p> <p>Part 3 establishes the power to grant a price regulation exemption in respect of a proposed international pipeline.</p> <p>Part 4 deals with the modification of a project granted an exemption and Part 5 deals with the early termination of a greenfields pipeline incentive.</p>
<p><b>Chapter 6 - Access Disputes</b></p> <p><i>(Compare Part 4 of the Gas Pipelines Access Law and s 6 of the Gas Code and Part 10 of the National Electricity Law)</i></p>	<p>This chapter establishes a framework for the notification and arbitration of access disputes by the dispute resolution body (the AER, other than in Western Australia).</p>
<p><b>Chapter 7 – The Natural Gas Services Bulletin Board</b></p>	<p>This Chapter establishes the Natural Gas Services Bulletin Board, requires the provision of information to the Bulletin Board and establishes the governance arrangements surrounding the Bulletin Board operator—AEMO.</p>

<p><b>Chapter 8 - Proceedings under the NGL</b></p> <p><i>(Compare Part 5 of the Gas Pipelines Access Law and Part 6 of the National Electricity Law)</i></p>	<p>This Chapter deals with various proceedings under the NGL, including:</p> <ul style="list-style-type: none"> <li>• civil enforcement proceedings by the Regulator (s 231), including civil penalties</li> <li>• general enforcement of conduct provisions (ss 232 and 233)</li> <li>• judicial review of decision making (Part 4)</li> <li>• merits review of coverage, form of regulation and other economic regulatory decisions (Part 5)</li> <li>• enforcement of access determinations (Part 6), and</li> <li>• infringement notices and corporate liability (Parts 7 &amp; 8).</li> </ul>
<p><b>Chapter 9 - The making of the National Gas Rules</b></p> <p><i>(Compare Part 7 of the National Electricity Law)</i></p>	<p>This Chapter empowers the making of the initial National Gas Rules and their subsequent amendment by the AEMC according to the statutory rule change process. Any person may propose a rule change which is then considered by the AEMC against the national gas objective.</p>
<p><b>Chapter 10 - General</b></p>	<p>This Chapter:</p> <ul style="list-style-type: none"> <li>• protects certain pre-existing contractual rights (s 321)</li> <li>• ensures terms and conditions of access can be different to an access arrangement (s 322)</li> <li>• provides that access arrangements continue regardless of who the service provider is (s 323)</li> <li>• makes provision for the protection of confidential information (Part 2)</li> <li>• provides for the validity of late decisions (s 332), and</li> <li>• allows withdrawal of coverage and reclassification applications, provides for notification to Ministers of coverage applications and provides for the Council to assist Ministers in relation to coverage issues (ss 333 - 335).</li> </ul>
<p><b>Schedule 1 - Subject matter for the National Gas Rules</b></p>	<p>This establishes in detail the matters for which the Rules may provide.</p>
<p><b>Schedule 2</b></p> <p><i>(Compare Appendix to Schedule 1 of the Gas Pipelines Access Law and Schedule 2 of National Electricity Law)</i></p>	<p>This establishes interpretative provisions applicable to the NGL, Regulations, Rules and other legislative instruments.</p>
<p><b>Schedule 3</b></p>	<p>This provides transitional provisions relating to the transfer from the Gas Pipelines Access Law to the NGL.</p>

## Regulations

3.2 The NGL is supplemented by a limited number of regulations which deal with machinery matters including:

- (a) the designation of pipelines ineligible for light regulation (r 4 and Schedule 1)
- (b) the exclusion of certain parts of pipelines from the definition of a pipeline (r 5 and Schedule 2)
- (c) the listing of civil penalty and conduct provisions (rr 6 and 7 and Schedules 3 and 4), and
- (d) the prescription of fees (r 14 and Schedule 5).

## National Gas Rules

3.3 The National Gas Rules are made under the NGL. The initial rules were made by the South Australian Minister and the rules may be amended by the AEMC. Section 26 of the NGL provides that the National Gas Rules have force of law in the jurisdiction in which they are applied. Their content is summarised below.

<b>Part 1 Preliminary</b>	Sets out key definitions for the Rules.
<b>Part 2 AER to provide information, and promote informed discussion, on regulatory issues</b>	Sets out a role for the AER to consult upon regulatory issues.
<b>Part 3 Decision-making under the Law</b>	Sets out the standard consultative procedure and expedited consultative procedure which are used to make decisions under the National Gas Rules. Contains general provisions regarding time limits, the calculation of time and rejecting non-compliant or frivolous proposals.
<b>Part 4 Coverage</b>	Contains further detail about the process for coverage and revocation of coverage under Part 1 of Chapter 3 of the NGL.
<b>Part 5 Competitive tendering</b>	Contains further detail about the process for competitive tendering under s 126 of the NGL.
<b>Part 6 Ring fencing</b>	Contains additional detail on ring fencing requirements under Chapter 4 of the NGL.
<b>Part 7 Light regulation determinations</b>	Contains further detail about the process for light regulation determinations under Part 2 of Chapter 3 of the NGL.
<b>Part 8 Access arrangements</b>	Sets of the process for submitting and reviewing access arrangements including: <ul style="list-style-type: none"> <li>• overall decision making rules (rr 40 and 41)</li> <li>• access arrangement information (rr 42 - 44), and</li> <li>• the basic requirements for access arrangements (rr 45 and 48).</li> </ul>

<b>Part 9 Price and revenue regulation</b>	Sets out the detail of the regulatory oversight of reference tariffs in an access arrangement and the details of the building block approach.
<b>Part 10 Other provisions of and concerning access arrangement</b>	Contains detail surrounding other (non-price) requirements of an access arrangement including: <ul style="list-style-type: none"> <li>• queuing requirements (r 103)</li> <li>• extension and expansion requirements (r 104)</li> <li>• capacity trading requirements (r 105), and</li> <li>• requirements surrounding receipt and delivery points (r 106).</li> </ul>
<b>Part 11 Facilitation of, and request for, access</b>	Sets out a process for requesting access to pipeline services and also places additional obligations on both service providers and users.
<b>Part 12 Access disputes</b>	Provides further details on access disputes under Chapter 6 of the NGL.
<b>Part 13 Greenfields Incentives</b>	Contains further detail about the process for greenfields pipeline incentives under Chapter 5 of the NGL.
<b>Part 14 Reclassification of pipelines</b>	Contains further detail about the process for the reclassification of pipelines under ss 128 and 129 of the NGL.
<b>Part 15 Scheme register</b>	Creates obligations on the AEMC to establish a scheme register and an obligation on service providers to notify the AEMC of extensions and expansions that are recorded on the register.
<b>Part 16 Confidential information</b>	Places obligations on covered pipeline service providers with regard to confidentiality and an obligation to disclose gas supply information in certain circumstances.
<b>Part 17 Miscellaneous</b>	Places additional procedural requirements on the AER for issuing general regulatory information orders and preparing service provider performance reports.
<b>Part 18 Natural Gas Services Bulletin Board</b>	Contains the detail of the National Gas Services Bulletin Board under Chapter 7 of the NGL.
<b>Schedule 1 Transitional provisions</b>	Contains transitional provisions principally concerning access arrangements.
<b>Schedule 2 Initial BB facilities</b>	Lists the initial Bulletin Board facilities.

## 4 Overview of classification, coverage, light regulation and greenfields pipeline incentives

### Classification

- 4.1 Part B of this Guide sets out the arrangements for classifying pipelines. The NGL applies to pipelines for the haulage of natural gas which is of consumption quality.<sup>14</sup> Pipelines are further classified into transmission pipelines-whose primary function is to convey gas to a market-and distribution pipelines-whose primary function is to reticulate gas within a market.<sup>15</sup> The classification of a pipeline affects some of the obligations to which the service provider of the pipeline is subject and who is the relevant Minister to determine whether the pipeline should be regulated (ie covered). The classification of a cross-boundary distribution pipeline will also specify which jurisdiction the pipeline is most closely connected with.
- 4.2 There are a few differences in obligations imposed upon pipelines depending upon whether they are transmission or distribution. Distribution pipelines are not part of the Natural Gas Services Bulletin Board, have different pricing rules in access arrangements and do not necessarily need a queuing policy or register of spare capacity.
- 4.3 Unlike the Gas Pipelines Access Law, classification is now done as part of the coverage process. The classification decision is made at the same time the Council makes its recommendation on whether or not to cover a pipeline. In accordance with ss 128 and 129 of the NGL service providers can also apply to have their pipelines reclassified.

### Coverage

- 4.4 The NGL only applies access regulation to covered pipelines. These are pipelines which meet the coverage criteria which mirror the declaration criteria under Part IIIA of the CCA. The coverage criteria are 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;

<sup>14</sup> See definitions of pipeline and natural gas in s 2. Note also that s 6A of the *National Gas Access (WA) Act 2009* (WA) allows the Western Australian law to extend to LPG distribution systems as well as natural gas.

<sup>15</sup> See classification criteria in s 13 of the NGL.

- (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.
- 4.5 Under the NGL a pipeline may be a covered pipeline in a number of ways. In particular:
- (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)<sup>16</sup>
- (b) Any person may apply to the Council for the coverage of a particular pipeline under s 92 of the NGL and the relevant Minister<sup>17</sup> 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)<sup>18</sup>
- (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)<sup>19</sup>, 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).
- 4.6 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,<sup>20</sup> but all other pipelines remain covered until a coverage revocation decision is made under s 106 of the NGL.

<sup>16</sup> 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.

<sup>17</sup> 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 Minister in all other circumstances.

<sup>18</sup> The exception is 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 their exemption period (see s 167(4)).

<sup>19</sup> Note that coverage through a competitive tendering process was previously recognised under the Gas Code (ss 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.

<sup>20</sup> See ss 126(2) and 127(2).

- 4.7 Further information on coverage, classification of pipelines and revocation of coverage can be found in Part B of the Guide, available for downloading on the Council's website.

## Light regulation

- 4.8 Unlike the Gas Pipelines Access Law, the NGL is intended to operate so that not all covered pipelines will necessarily be subject to 'full' regulation under the access arrangement process. Rather, eligible pipeline service providers, operating covered pipelines, will be able to apply for a 'light regulation determination' to avoid the upfront setting of reference tariffs (price regulation) under the full regulation regime. The Council is responsible for making light regulation determinations on the request of a service provider or as part of the coverage process and considering applications to revoke a light regulation determination.
- 4.9 The principles for the Council to apply in making and revoking light regulation determinations are set out in s 122 of the NGL in the following terms:

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

- (1) In deciding whether to make a light regulation determination under Division 1 or to revoke a light regulation determination under Division 2, the NCC must consider—
- (a) the likely effectiveness of the forms of regulation provided for under this Law and the Rules to regulate the provision of the pipeline services (the subject of the application) to promote access to pipeline services; and
  - (b) the effect of the forms of regulation provided for under this Law and the Rules on—
    - (i) the likely costs that may be incurred by an efficient service provider; and
    - (ii) the likely costs that may be incurred by efficient users and efficient prospective users; and
    - (iii) the likely costs of end users.
- ...
- (2) In doing so, the NCC—
- (a) must have regard to the national gas objective; and
  - (b) must have regard to the form of regulation factors; and
  - (c) may have regard to any other matters it considers relevant.

- 4.10 The form of regulation factors referred to in these principles are as follows:

### **16—Form of regulation factors**

The form of regulation factors are—

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

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

4.12 Further information on light regulation can be found in Part C of the Guide, available for download on the Council's website.

### **Greenfields pipeline incentives**

4.13 Chapter 5 of the NGL establishes a regime for granting greenfields pipeline incentives in respect of pipeline projects which have not yet been commissioned. All projects are eligible to apply for a 15-year no-coverage determination which, if granted, means that the pipeline cannot be covered for 15 years from the commissioning of the pipeline. A service provider for a greenfields pipeline project may apply to the Council for a 15-year no-coverage determination and the Council must make a recommendation to the relevant Minister on the matter similar to the coverage process. The Council and relevant Minister's decision making criteria are based upon

whether or not the coverage criteria are satisfied having regard to the national gas objective.

- 4.14 International pipeline projects which bring gas from a foreign source to Australia also have the option of applying for a price regulation exemption. Service providers of these pipelines must apply to the Council for a recommendation to the Commonwealth Minister who may then make a price regulation exemption. The Commonwealth Minister's decision making criteria focus around the benefits to the public of granting the exemption against the detriments with regard to the national gas objective (including effects on market power and the public interest). A pipeline with a price regulation exemption must have a limited access arrangement and comply with other rules but is not subject to price or revenue regulation.
- 4.15 Further information on the greenfields pipeline incentives is available in part D of the Guide.