

Standing Committee of Officials of the
Ministerial Council on Energy

2006 Legislative Package:
Gas Legislative Framework

November 2006

Table of Contents

Glossary	1
Abbreviations	1
Relevant Publications	2
Part 1: Overview	3
Introduction	3
The Legislative Structure	3
Part 2: National Gas Law (NGL)	5
Chapter 1: Preliminary	6
Chapter 2: Functions and Powers of Gas Market Regulatory Bodies.....	11
Chapter 3: Coverage and Classification of Pipelines	14
Chapter 4: Access to Pipeline Services	17
Chapter 5: Greenfields Pipeline Incentives	24
Chapter 6: Proceedings under the National Gas Law.....	28
Chapter 7: The Making of the National Gas Rules	31
Chapter 8: General	33
Schedules to the NGL.....	35
Part 3: Western Australia's Complementary Gas Law	36
New Legislative Arrangements.....	36
Western Australia's Participation in the National Gas Access Regime.....	36
National Gas Rules and Regulations	37
Differences between Western Australia's Legislation and the National Gas Law	37
Part 4: Regulations for the NGL	40
National Gas (South Australia) Bill 2007.....	40
Key regulations to be made for the National Gas Law	40
Part 5: National Gas Rules	44
Initial National Gas Rules	44
Rule-making Power of the AEMC	44
Content of National Gas Rules	45
Part 6: Comparison of the NGL and GPAL	48

Glossary

Abbreviations

ACCC	Australian Competition and Consumer Commission
ACT	Australian Competition Tribunal
AEMA	Australian Energy Market Agreement - the intergovernmental agreement between the Commonwealth and all of the States and Territories first made in 2004 and amended in 2006
AEMC	Australian Energy Market Commission
AER	Australian Energy Regulator
Expert Panel	Panel established by MCE in December 2005 to advise on a model to achieve a common approach to transmission and distribution revenue and network pricing across electricity and gas (Final Report delivered April 2006– see below for internet link to the report)
GPAL	Gas Pipelines Access Law – Schedules 1 and 2 to the <i>Gas Pipelines Access (South Australia) Act 1997</i> , including "Third party access to natural gas pipelines" (Schedule 1) and the National Third Party Access Code for Natural Gas Pipeline Systems (the Gas Code – Schedule 2)
MCE	Ministerial Council on Energy
NCC	National Competition Council
NEL	National Electricity Law, Schedule to the <i>National Electricity (South Australia) Act 1996</i>
NER	National Electricity Rules – Statutory Rules made under Part 7 of the NEL
NGL	National Gas Law, Schedule to the new <i>National Gas (South Australia) Act 2007</i>
NGR	National Gas Rules – Statutory Rules made under Chapter 7 of the NGL
SCO	Standing Committee of Officials reporting to MCE

Relevant Publications

MCE Statement of Approach – A New Legislative Framework for Gas, September 2005 (Statement of Approach)

<http://www.mce.gov.au/index.cfm?event=object.showContent&objectID=51EB99E6-FE2A-8D19-FF72A7C97121A7AD>

MCE "Response to Key Issues Raised in Submissions to the Statement of Approach to the Development of the New National Gas Laws and Rules"

<http://www.mce.gov.au/index.cfm?event=object.showContent&objectID=409F0422-D257-A8DF-34E3098CCCE679B4>

Productivity Commission Review of the Gas Access Regime, June 2004

<http://www.pc.gov.au/inquiry/gas/finalreport/index.html>

MCE Response to the Productivity Review of the Gas Access Regime, May 2006 (PC Response)

<http://www.mce.gov.au/index.cfm?event=object.showContent&objectID=1657B707-AD38-B43A-5CE8B8C11AFBE8E2>

MCE Decision on Review of Decision-Making in the Gas and Electricity Regulatory Frameworks, June 2006

<http://www.mce.gov.au/index.cfm?event=object.showContent&objectID=839F2DC1-AE13-142E-8425FEF5F2E8C822>

Final Report of the MCE Expert Panel on Energy Access Pricing, April 2006

<http://www.mce.gov.au/index.cfm?event=object.showContent&objectID=B0F3AD4C-A1C6-28DB-CB9CC594D2B88090>

MCE Arrangements for Consumer Advocacy in the Energy Sector, December 2005

<http://www.mce.gov.au/index.cfm?event=object.showContent&objectID=2CB6A5A9-EDA6-E716-FD118AA822DD7665>

Energy Market Reform Bulletin No 68 – Release of MCE Statement of Scope – A National Legislative Framework for Gas and Electricity

<http://www.mce.gov.au/index.cfm?event=object.showContent&objectID=C1CF57E4-D8A3-3039-E47E5E40C3F58B8A>

Part 1: Overview

Introduction

This document seeks to explain the new legislative framework proposed by the Ministerial Council on Energy (MCE) which will replace the existing gas access regime. The Australian Energy Market Agreement (AEMA) commits Australian governments to implement a series of reforms to deliver fairer, more effective access regimes for both gas and electricity, achieving commonality where appropriate and focusing on economically efficient outcomes that are in the long term interests of consumers.

This reform process will involve two key stages: the "2006 legislative package", with a primary focus on the economic regulation of network access, and the "2007 legislative package" focusing on non-price retail regulation.

The present stage of the reform program has seen the development of the 2006 legislative package to achieve the following objectives:

- Transfer the governance and institutional arrangements for the gas access and electricity regimes to a national framework with the Australian Energy Regulator (AER) as the independent industry regulator and the Australian Energy Market Commission (AEMC) as the rule maker and market development body;
- Transfer of electricity distribution economic regulation to the national framework;
- Implement policy changes to the gas access regime developed from the Productivity Commission's *Review of the Gas Access Regime* (PC Review);
- Implement a common framework for revenue and network pricing building on the advice of an MCE established Expert Panel;
- Implement an effective merits review mechanism for economic regulatory decisions in the gas access and electricity regimes; and
- Strengthen consumer advocacy arrangements for both gas and electricity, including a long term funding model to facilitate consumer engagement with industry.

This document is designed to explain the nature of the legislative changes proposed in the new National Gas Law (NGL), and facilitate meaningful consultation on the NGL exposure drafts released by the MCE Standing Committee of Officials. It also contains a high level description of what will be in the Regulations and the Rules. There will be a separate explanatory document for the National Gas Rules (NGR) when they are released as an exposure draft during the next month.

The MCE intends to have the new NGL and NGR in place by 1 July 2007.

The Legislative Structure

The current gas regime is established by a co-operative legislative scheme involving the Commonwealth and all the States and Territories. The current gas access regime works through "lead" legislation established by South Australia, namely the *Gas Pipelines Access (South Australia) Act 1997* and its two Schedules, "Third party access to natural gas pipelines" (Schedule 1) and the National Third Party Access Code for Natural Gas Pipeline Systems (the Gas Code – Schedule 2).

This lead legislation is then applied as law in the other States and Territories, with the exception of Western Australia, through "application Acts" which pick up the Schedules to the South Australian Act and apply them in their jurisdiction. Western Australia currently enacts its own complementary gas legislation that corresponds to, and applies the Schedules of, the South Australian legislation.

The MCE has decided that the most appropriate mechanism to implement the new governance framework for gas access would be a new South Australian Act called the *National Gas (South Australia) Act 2007*. This Act will contain a Schedule called the 'National Gas Law'. Consistent with the electricity regime, the NGL will be supplemented by the NGR and a limited number of regulations dealing with minor matters and the prescription of civil penalties, merits reviewable decisions and conduct provisions. This new framework will take the place of the current gas access regime.

The new gas regime will give functions and powers to the AEMC established by the South Australian *Australian Energy Market Commission Establishment Act 2004*, and to the AER established by Part IIIAA of the *Trade Practices Act 1974*.

New laws are required to apply the NGL in each jurisdiction. The Commonwealth will amend its *Australian Energy Market Act 2004* in early 2007 for this to occur for the offshore area and to ensure the AER, Australian Competition Tribunal, National Competition Council and Commonwealth Minister can take up their relevant functions under the NGL. Amendments will also be made to the *Trade Practices Act 1974*, the, the *Administrative Decisions (Judicial Review) Act 1977* and the *Petroleum (Submerged Lands) Act 1967* to give effect to these changes. The *Gas Pipelines Access (Commonwealth) Act 1998* will be repealed. States and Territories are expected to progress application Acts before 1 July 2007. The NGL regime cannot be implemented until all application Acts have been passed and are ready to be proclaimed.

Western Australia will continue to implement complementary ("mirror") legislation consistent with the NGL. In Western Australia, the gas access regime will differ only in respect to institutional arrangements, where its local regulator, the Economic Regulation Authority will be retained and the Independent Arbitrator. Western Australia's complementary legislation will only cover gas pipeline access provisions and will not include future changes in respect to national retail and distribution functions. Western Australia will apply the sections of the National Gas Rules relating to gas access as made by the South Australian Minister.

The MCE intends that the new State and Territory gas access regimes created by the application of the NGL will be effective access regimes under section 44N of the *Trade Practices Act 1974* and submitted for certification in a coordinated and concurrent manner.

Part 2: National Gas Law (NGL)

This paper describes the main features of the exposure draft of the NGL. The Ministerial Council on Energy (MCE) will consider submissions on the draft NGL before making a final decision on the legislation in the first half of 2007 and introducing the required legislation for passage in South Australian Parliament by 1 July 2007. The following table sets out at a high level the different categories of pipeline and the key obligations the NGL applies to each.

Table 1: Structure of the NGL

Duties/process Type of pipeline	Coverage (Part 3.2)	Overriding duties and ring-fencing (Part 3.5 and 3.6)	Access Arrangements (Part 4.3)	Request for Access (Part 4.4)	Access Disputes (Part 4.5)
	Coverage is the process where pipelines are examined to determine whether or not regulation should be applied. This is determined by Ministers on recommendation of NCC. (s 1 of the Gas Code)	These are obligations not to prevent or hinder access, protect confidential information, restrictions on associate contracts, keeping of accounts etc. (s. 4 and 7 of the Gas Code.)	An access arrangement is a document that is approved or made by the AER setting out terms and conditions of access to a pipeline. It is enforceable in an arbitration. (s 2 and 3 of the Gas Code)	These are obligations relating to information provision, requests for access and registers of capacity. (s 5 of the Gas Code)	This is a binding arbitration framework for access disputes. The AER is the arbitrator. (s 6 of the Gas Code + GPAL)
Uncovered pipelines (No regulation)	Coverage can be sought.	N/A	N/A	N/A	N/A
Greenfields pipelines with 15-year no-coverage determinations (Ch5) (No regulation)	Immune from this process for 15 years	N/A	N/A	N/A	N/A
International Pipelines to which a price regulation exemption applies (Ch5) (Monitoring)	Immune from this process for 15 years	These apply as if the pipeline is a covered pipeline.	A limited access arrangement <i>is required</i> which does not include price or revenue regulation. (s 251)	These apply as if the pipeline is a covered pipeline.	The process applies but the AER cannot arbitrate on price.
Light Regulation Pipelines (Part 4.2) (Negotiate/arbitrate regulation)	Can apply to be uncovered.	These apply. Some additional duties in Part 4.2.	A limited access arrangement <i>may</i> be approved which does not include price or revenue regulation (s 155)	These apply.	The access dispute process applies. The AER must give effect to the terms of a limited access arrangement (if any). The AER can arbitrate on price.
Pipelines covered as the result of a competitive tender process (Part 3.3) (Full control regulation)	Can apply to be uncovered.	These apply.	An access arrangement is required but it cannot be inconsistent with the tender approval decision.	These apply.	The access dispute process applies. Access determinations must give effect to the access arrangement.
Covered pipelines to which an access arrangement applies. (Full control regulation)	Can apply to be uncovered. Uncovered pipelines can also voluntarily submit an access arrangement and become covered. (Part 3.4)	These apply.	A full access arrangement is required.	These apply.	The access dispute process applies. Access determinations must give effect to the access arrangement.

Chapter 1: Preliminary

This chapter outlines the main purpose and framework of the new NGL, provides definitions, and establishes several key concepts and principles to apply throughout the NGL.

Part 1.1: Citation and Interpretation

The NGL begins with an overview of how the gas access regime is intended to work (s 2 and 3). This is designed to assist readers in understanding the concepts in the law and does not have substantive legal effect.

Definitions

Part 1.1 replicates a number of definitions and concepts from the GPAL and the Gas Code, for example:

- associate;
- end user;
- natural gas;
- pipeline;
- pipeline classification criteria;
- pipeline coverage criteria;
- users and prospective user.

The Gas Code definition of 'associate' is replicated in the NGL. Its meaning may, however, be expanded by regulations. The purpose of this change is to provide flexibility as the gas industry continues to use recently developed 'related party arrangements' falling outside the Gas Code meaning of associate that may impede the effectiveness of aspects of the regulatory regime, including ring-fencing.

The definition of end user has also been updated to more accurately reflect end users as consumers of natural gas.

Coverage Criteria

Section 11 establishes the pipeline coverage criteria in the NGL. These criteria are replicated from s 1.9 of the Gas Code, with one amendment. Where the Gas Code required coverage of a pipeline if access to the pipeline would promote competition in at least one market other than that for the services provide by means of the pipeline, the NGL requires access to promote a "material increase in competition" in at least one market. This implements a key recommendation of the Productivity Commission in its Review of the Gas Access Regime and is consistent with recent relevant amendments to the Commonwealth *Trade Practices Act 1974*. It will ensure that, for coverage to be granted, the perceived increase in competition must be non-trivial.

Section 12 sets out a principle that where the NCC and relevant Minister, in giving effect to the pipeline coverage criteria, have regard to the costs that may be incurred by a service provider in providing pipeline services, they must give effect to the criteria on the basis that the least costly form of regulation should apply to the services provided by means of the pipeline. The availability of a light-handed form of regulation in addition to the control form of regulation makes the NCC and the relevant Minister's task of assessing the cost to the service provider of giving effect to the coverage criteria (and in particular criterion (d)) more complex. The costs to the service provider of these different options may vary significantly. Section 12 ensures that the NCC and Minister may determine to grant coverage even if the costs of the

more costly form of regulation outweigh the benefits of coverage. The purpose of section 12 is to guarantee the benefits of introducing a light-handed form of regulation.

Form of Regulation Factors

Section 13 is a new section that establishes the 'form of regulation factors' recommended by the Expert Panel to be used as part of a 'market power test' when determining the form of regulation to apply to a covered pipeline. These factors are relevant to the AEMC making light regulation determinations and in relation to determining reference services by the AER. The Expert Panel's recommendation translates to the NGL so that 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 a prospective user or user has adequate information to enable them to negotiate on an informed basis with a service provider for the provision of a pipeline service to them by the service provider.

The 'other factors' criteria that the Expert Panel recommended are not included in the enumeration of the form of regulation factors in s.13, but are separately included each time as considerations each time the form of regulation factors are referred to (eg. s 308).

Extensions and Expansions

Section 15 effectively provides that an extended or expanded pipeline is part of the covered pipeline if, by operation of the extension and expansion requirements under an access arrangement that arrangement will apply to pipeline services provided by means of the expanded or extended pipeline. Section 16 also establishes the principle that any extension or expansion of a light regulation pipeline is part of the covered pipeline unless exempted by the AER. This is necessary because, for these pipelines, there is no 'full' access arrangement. It follows that there will be no access arrangement detailing applicable expansion or extension requirements.

Part 1.2: Participating Jurisdictions

Part 1.2 outlines the participating jurisdictions in the new gas access regime established by the NGL, and the responsible Ministers in the participating jurisdictions.

Part 1.3: National Gas Objective and Principles

Part 1.3 outlines three key concepts that underpin the operation of the new gas access regime and provide guidance to decision makers operating within the regime.

Of particular significance is the objective of the new NGL set out in section 20:

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.

The primary focus of the NGL objective is economic efficiency. The ultimate purpose is expressed in terms of the long-term interests of consumers. The promotion of efficient investment and efficient operation will encourage productive efficiency, allocative efficiency and dynamic efficiency, and will maximise the long term interests of consumers.

The objective refers to “effective investment in, and efficient operation and use of, natural gas services”. These services include pipeline haulage and interconnection services. The objective emphasises that a long term perspective is taken with respect to consumer interests, and that a critical factor in such a long term perspective is the impact of decisions on investment in gas infrastructure and services.

The national gas objective and definition of natural gas services (s 5) are also drafted to encompass the broader issues of upstream and downstream supply which will become more relevant when the NGL is expanded in the future to encompass non-economic distribution and retail functions.

The MCE sees alignment between the objectives of the gas and electricity regimes as being an important foundation for the regimes (see above for further commentary on the MCE’s response to the recommendations of the Expert Panel on Energy Access Pricing). The objects clause of the NGL is drafted as an objective of the Law, rather than an objective of the market (and the National Electricity Law objective will similarly be amended to make the current market objective an objective of that Law).

A common objective for both the NGL and NEL will provide a uniform guiding principle in relation to all aspects of the regime where discretions are required to be exercised or interpretations to be made. Administrative bodies (including Ministers) will have to ensure that their regulatory decisions are consistent with the objectives of the NGL and NEL, and the AEMC will have to test any future Rule changes against the objectives of the NGL and NEL when making Rules. Courts and other review bodies will also be guided in their application of both regimes by the common objective.

Revenue and Pricing Principles

Section 21 is a new section that establishes the revenue and pricing principles. These principles guide the AER in its determinations of appropriate revenue and pricing outcomes when exercising an AER economic regulatory function or power. They have been developed from the Expert Panel's recommended principles and have been drafted with gas specific wording. They are that:

- A service provider should be provided with a reasonable opportunity to recover at least the efficient costs the service provider incurs in—
 - providing reference services; and
 - complying with a regulatory obligation or instrument.
- A service provider should be provided with effective incentives in order to promote economic efficiency with respect to reference services the service provider provides. The economic efficiency that should be promoted includes—
 - efficient investment in a pipeline with which the service provider provides reference services; and
 - the efficient provision of pipeline services; and
 - the efficient use of the pipeline.
- Allowance should be made for the value of a pipeline by means of which a service provider provides reference services.
- Regard should be had to any valuation of a pipeline set out in any previous—
 - access arrangement final decision; or
 - decision of a relevant Regulator under section 2 of the Gas Code.
- Regard should be had to the economic costs and risks of the potential for under and over investment by a service provider in a pipeline with which the service provider provides pipeline services.
- Regard should be had to the economic costs and risks of the potential for under and over utilisation of a pipeline with which a service provider provides pipeline services.

Note that in an access dispute, the words 'reference service' is taken to be a 'pipeline service' (see s 27(3)). The concept of a 'regulatory obligation or instrument' is defined in s 5 in a similar way to the equivalent term in the NEL. The drafting of the principles is also consistent with the National Access Regime pricing principles in s 44ZZCA of the *Trade Practices Act 1974* which start with the word 'should'. The principles are accordingly drafted to work consistently with the overriding national gas objective in guiding both the AEMC in amending NGR and the AER in interpreting and applying the NGL and NGR.

Governance

The governance model established in the NEL will also apply in respect of the NGL. This means that the MCE will not be engaged in day-to-day operational matters: rather, its function will be to give high level policy direction to the AEMC through directed reviews and statements of policy principles. Section 22 provides for the MCE to issue statements of policy principles in relation to any matters that are relevant to the exercise by the AEMC of its functions.

Part 1.4: Operation and effect of National Gas Rules

Section 23 makes clear that the NGR have force of law in those jurisdictions where the NGL is applied. The NGR are currently being drafted and will be released for consultation shortly (see Part 5 below).

Western Australia will apply the NGR relating to access as in force under SA legislation as a law of Western Australia.

Part 1.5: Miscellaneous Matters

Section 24 gives effect to the Expert Panel's conclusion that the Law should not embody a presumption in favour of accepting a regulated entity's proposed access arrangement. However, the provision that nothing in the NGL is to be taken as requiring the AER to apply a "propose-respond" decision making approach is subject to the proviso that the Rules do not provide otherwise. In other words, the discretion of the AEMC to make Rules for where aspects of a regulatory decision are closer to a 'propose-respond model' has not been limited by the Law. This section ensures that the MCE's decision, accepting the Expert Panel's recommendation that a fit-for-purpose model be adopted in the NGL, is not excluded by the text of the NGL.

Section 25 removes any doubt that the application of or operation of a methodology or formula in an access arrangement is not taken to be a variation of that access arrangement.

Chapter 2: Functions and Powers of Gas Market Regulatory Bodies

The 2006 legislative package will transfer responsibility for economic regulation of gas transmission and distribution networks from the Australian Competition and Consumer Commission (ACCC) and local regulators (excluding Western Australia) to the AER. Western Australia may elect at a later time to be subject to AER regulation for natural gas, but in the meantime will empower its own regulator, the Economic Regulatory Authority.

Chapter 2 of the new NGL sets out the functions and powers of the AER and the AEMC and has been developed from the equivalent provisions in the NEL.

Chapter 2 provides that the AER, the AEMC and the ACCC will be able to share information relevant to their functions (see ss 29 and 65).¹ Any information provided on a confidential basis to one regulatory body (including information provided on a “commercial-in-confidence” basis) may only be shared if the receiving body similarly protects that information from unauthorised use or disclosure.

Part 2.1: Functions and Powers of the Australian Energy Regulator

Part 2.1 confers economic regulatory functions and powers on the AER relating to pipeline services provided by means of, or in connection with, a covered pipeline. These functions and powers include:

- Approval or making an access arrangement;
- Making access determinations in relation to access disputes;
- Preparing service provider performance reports;
- Imposing or waiving ring-fencing requirements;
- Approving associate contracts; and
- Approving or voiding competitive tendering arrangements; and
- Approving compliance programs.

The AER is required to perform its economic regulatory functions and powers in a way that will or is likely to contribute to the national gas objective (s 27(1)). Consistent with the recommendation of the Expert Panel, the AER is also required to take the revenue and pricing principles (s 21) into account when setting reference tariffs or making an access determination on price matters (s 27).

The AER will monitor, investigate and enforce compliance with the NGL and NGR. Service providers may, but need not, submit compliance programs to the AER, for the purposes of Parts 3.5 and 3.6, for approval. AER approved compliance programs are relevant considerations for the purpose of determining the amount of a civil penalty payable by a service provider found to have breached a Part 3.5 or Part 3.6 provision of the NGL (see s 264).

Division 2 of Part 2.1 allows a person authorised by the AER to apply for, and execute, a search warrant where there are reasonable grounds for believing that there is, has been or will be a breach of the new NGL or NGR or that person reasonably suspects that there may have been a breach. To ensure this power is being used properly, only ‘authorised persons’ may execute warrants (issued by a magistrate) and these people are required to carry identity cards.

¹ See *Australian Energy Market Commission Establishment Act 2004* (SA), s.24, and ss.44AAF and 157A of the *TPA*.

Division 3 of Part 2.1 (s 41) allows the AER to require the provision of information and documents where that information is, or those documents are, relevant to the performance of the AER's functions. Persons are not required to provide information where they have a "reasonable excuse" for not doing so (for example, the person is not capable of complying with a relevant request) or if the information is subject to legal professional privilege. This matches s 28 of the NEL. It also makes clear that, consistent with current case law, any duty of confidence is not a reasonable excuse.

Division 4 of Part 2.1 establishes the framework for the AER to obtain the information required for enforcement and general regulatory reporting. This Division creates the concepts of a 'general regulatory information order' and a 'regulatory information notice', and outlines the processes by which these instruments may be used by the AER.

The AER can only relevantly serve a regulatory information notice or make a general regulatory information order if it considers it reasonably necessary for the performance or exercise of its functions and can only be applied to service providers and their associates.

The AER must, before issuing a regulatory information instrument, take into account the comments received, including the likely costs of compliance (s 47(3) and (4)). Consultation is intended to ensure the AER does not exercise its powers without regard to why it requires the information and taking into account the regulatory burden that may be imposed.

Section 49 is crucial as it allows the AER, through a regulatory information instrument, to require information be kept and provided in a manner such that it can verify whether a service provider is complying with the ring-fencing provisions of the Law.

These instruments are intended to clearly set out the information requirements on service providers to report annually and at a revenue reset (access arrangement approval). By creating clear obligations regulators, users and service providers will be able to more clearly ascertain compliance with the law and the efficiency of prices for services. This addresses the concerns of the Productivity Commission (see recommendations 10.3 and 10.4) and is consistent with the views of the Expert Panel.

Section 59 provides that the AER may also publish performance reports on the financial or operational performance of one or more service providers. However, the AER will not be able to issue regulatory information instruments solely for the purpose of collecting information for these reports (see s 45(4)).

Part 2.2: Functions and Powers of the Australian Energy Market Commission

By Part 2.2 the AEMC assumes similar functions to the National Gas Pipelines Advisory Committee (NGPAC) and Code Registrar under the GPAL. Rule making functions in relation to gas access are also conferred on the AEMC.

The AEMC must, in performing its functions, have regard to the NGL objective and must also, when making a Rule or conducting a review, have regard to any relevant MCE statements of policy principles.

The AEMC may seek the provision of such information as it needs for the purpose of its rule-making function or for the purpose of monitoring and reporting on the

effectiveness or operation of the NGR. But the AEMC will only have the power to compulsorily acquire information for the purpose of making a light regulation determination (s 154). In carrying out reviews, the AEMC is expected to rely on voluntary participation by interested parties, information sharing and established industry relationships. This is consistent with its role as a rule-making and market development body.

As under the NEL, the subject matter over which the AEMC will have rule-making powers will be limited. The subject matter for the NGR are prescribed in section 68 and Schedule 1 of the NGL.

Consistent with the NEL, section 68 sets out what the rules are able to do: including providing for further guidelines, test, standards, procedures or other documents to be developed which may or may not be of a binding nature.

Section 69 ensures that the rules will always provide for a detailed structure and guidance to the AER in carrying out price and revenue regulation under an access arrangement (see s. 36 of the NEL).

Section 70 ensures that total factor productivity (TFP) will not be prescribed by the rules as a stand-alone economic regulatory methodology until the MCE has considered the matter further and made a regulation allowing TFP. It also makes clear that benchmarking can still be used to assist the building block approach.

The NGL requires the AEMC to manage the rule change process (including consultation) and decide on rule changes that are proposed by any person, or the MCE. The AEMC itself will not be empowered to initiate any change to the NGR other than where the proposed change seeks to correct a minor error or is non-material. This is dealt with in Chapter 7 of the NGL.

Division 4 of Part 2.2 requires the AEMC to conduct reviews as directed by the MCE into any matter relating to:

- a market for gas;
- access to pipelines or services provided by means of pipelines;
- the NGR or the operation and effectiveness of the NGR; and
- into the effectiveness of competition in retail gas markets (except in Western Australia).

In reporting to the MCE on a review, the AEMC may recommend such changes to the NGR as it considers appropriate, but it will then be for the MCE or any other interested party to decide whether to actually initiate a rule change proposal.

The NGL does not confer any ability on the AEMC or MCE to make new rules regarding non-access distribution and retail matters. This issue will be addressed separately by MCE in the 2007 legislative package.

Chapter 3: Coverage and Classification of Pipelines

Coverage of pipelines is a process for determining whether or not regulation should or should not be applied to the services provided by a particular pipeline. This decision is made by the relevant State or Commonwealth Minister, on the recommendation of the NCC. The decision of whether or not to regulate is based upon all of the following conditions being satisfied (the coverage criteria):

- access to the service would promote a material increase in competition in and upstream or downstream market;
- that the pipeline is uneconomic to duplicate;
- that access can be provided safely; and
- that regulation is in the public interest.

The NGL does not regulate pipelines that do not meet these criteria. Any person can apply to bring a pipeline under the regime or for a pipeline to be uncovered at any time (unless the pipeline is in receipt of a greenfields pipeline incentive).

This chapter also deals with overriding duties for pipelines that are determined to be covered as well as structural and operational separation requirements (ring-fencing).

Part 3.1: Interpretation

Part 3.1 provides definitions for use in the coverage and classification of pipelines. The definitions mirror those in the Gas Code.

The definition of relevant confidential information has been updated from the Gas Code to more accurately capture information that is confidential. A definition of 'gas supply information' has also been developed to more precisely implement the existing confidentiality and disclosure restrictions in the Gas Code (ie ss 4.1 and 7.20). These definitions are used in ss 112 – 116.

Part 3.2: Coverage

Consistent with the MCE Statement of Approach and the Expert Panel recommendations, Part 3.2 streamlines the pipeline classification and coverage process. The present provisions of the GPAL create an unnecessarily complex process whereby the classification and coverage of a pipeline is determined in two separate stages.

Under Part 3.2, classification and coverage will be dealt with simultaneously. In this process the NCC will make draft and final recommendations on coverage at the same time as making draft and final decisions on the classification of the pipeline. That final classification decision will therefore determine who is to be the relevant Minister for making the decision on whether the pipeline should be covered or uncovered under the regime. As in the GPAL and Gas Code, the relevant Minister so determined will make the final coverage determination based on the advice of the NCC.

Further details relating to the process for coverage applications are in Part 8.5.

Part 3.3: Coverage of Pipelines the subject of Tender Process

Part 3.3 simplifies existing Gas Code provisions applying to pipelines built under competitive tendering arrangements. The new arrangement allows the regulator to

grant prior approval to a tender process as a competitive tender process, and subsequently verify (with the power to revoke approval) that the tender process was conducted competitively. A pipeline constructed through an approved competitive tender process automatically becomes a covered pipeline, with the terms and conditions of the access arrangement applying to that covered pipeline being those specified during the tender process. The provisions in ss 3.21 – 3.36 of the Gas Code are thereby captured and streamlined in the NGL. These provisions are based on the new Division 2B of Part IIIA of the *Trade Practices Act 1974*.

New pipeline developments may also be entitled to the greenfields pipeline incentives in Chapter 5.

Part 3.4: Coverage following approval of Voluntary Access Arrangement

Part 3.4 outlines the processes by which a pipeline that submits a voluntary access arrangement may become a covered pipeline. This derives from s 2.3 of the Gas Code.

Part 3.5: Overriding duties for the provision of pipeline services by covered pipelines

Part 3.5 is consistent with a number of important obligations found in the current gas access regime, with which all service providers of covered pipelines need to comply. Some of the obligations replicated in Part 3.5 are ring-fencing requirements from Chapter 4 of the Gas Code, whilst other Gas Code ring-fencing requirements are replicated in Part 3.6.

Section 109 requires the service provider of a covered pipeline be a specified legal entity; other than for the Crown that entity must be a corporation. This is consistent with s 4.1(a) of the Gas Code. The general public accountability and legal framework for corporations is a core safeguard for the protection of user interests.

Section 110 replicates section 13 of the GPAL, which prohibits a service provider and others from preventing or hindering of access to a covered pipeline. Similarly, section 111 replicates section 40 of the GPAL, protecting certain rights of access seekers to be offered terms and conditions for the supply or haulage to the exit flange of a pipeline.

Section 112 obliges a service provider to comply with an applicable queuing policy in an applicable access arrangement, substantially capturing s 3.15 of the Gas Code.

Sections 113 -115 replicate ss 4.1 (f) and (g) of the Gas Code, relating to the disclosure of confidential information by a service provider to an associate or related business. These provisions were previously part of the ring-fencing requirements, but are now applied generally as over-riding duties of covered pipelines. The concepts in the Gas Code have been simplified in the NGL.

Section 116 replicates the obligation in s 7.20 of the Gas Code relating to the disclosure of gas supply information to users, prospective users and end users.

Part 3.6: Structural and Operational Separation requirements (Ring-fencing)

Ring-fencing

Part 3.6 replicates many of the key structural and operational separation requirements (otherwise known as ring-fencing requirements) contained in the current gas access regime. These requirements are an important part of both the current and new gas access regimes, having the effect of promoting competition in upstream and downstream markets and limiting the ability of a service provider to unfairly favour its associates. The obligations help to ensure all service providers provide pipeline services to associates as if the pipeline services being provided by the service provider are being provided to an entity different from, and unrelated to, the service provider. This should ensure that the services are provided in a manner that does not unfairly discriminate in favour of an 'associate' user or prospective user as against any other user or prospective user.

Section 119 requires accounts be maintained in accordance with any applicable regulatory information instruments, which allows the AER to require accounts to be maintained in a way to ensure that the ring-fencing requirements can be monitored and enforced. The detail of account keeping and cost allocation requirements will be specified through regulatory information instruments.

The existing Gas Code ability for the regulator to impose additional or waive ring-fencing obligations is replicated in ss 120 and 121 respectively, but the procedural requirements for the AER will be in the NGR. The Productivity Commission recommendations (10.3 and 10.4) about information provision from associates are implemented. Additional ring-fencing requirements may be imposed on service providers and their associates as long as the costs of compliance are taken into account and the obligation is consistent with the underlying principles for ring-fencing in the NGL (see s 120).

Associate Contracts

Sections 122 – 128 replicate the essential elements of associate contract approvals from the Gas Code, with revisions consistent with concerns expressed by the Productivity Commission. It will no longer be mandatory for associate contracts to be pre-approved by the AER, but pre-approval may still be sought to remove any doubt about whether the substantive prohibitions have been infringed. The AER will have thirty days to approve a contract and will be deemed to have approved one if it makes no decision. This is subject to limited stop the clock arrangements. Even if pre-approval is not sought, all associate contracts must be notified to the AER.

Chapter 4: Access to Pipeline Services

This chapter is designed to set out the key ways in which access is obtained from covered pipelines. The chapter sets out:

- the light regulation regime (previously called monitoring) which is a negotiate/arbitrate framework without any prior price or revenue regulation;
- access arrangement process for determining the terms and conditions of access (including price) for covered pipelines without a light regulation determination;
- how requests for access are made and general disclosure obligations about access arrangements and spare capacity; and
- an access arbitration framework for when disputes arise.

Part 4.1: Interpretation

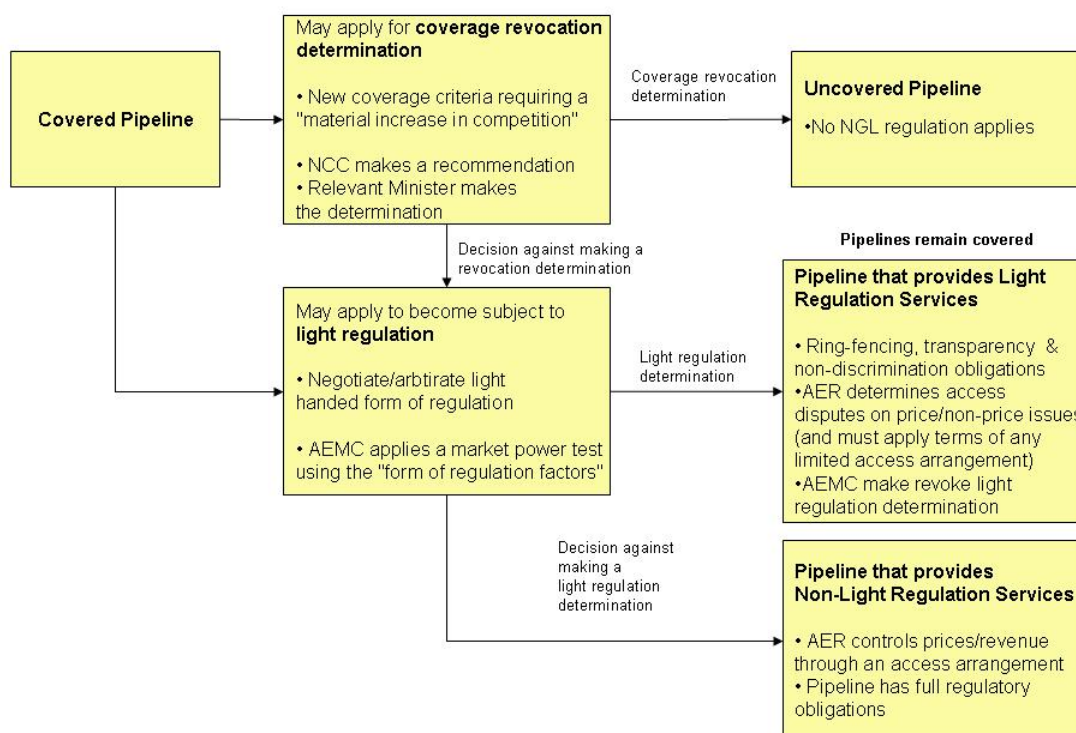
Part 4.1 provides definitions for use in giving access to pipeline services. Definitions have largely been replicated from the Gas Code.

Part 4.2: Light regulation of services provided by means of covered pipelines

The Productivity Commission recommended that a light-handed form of regulation be introduced into the gas access regime which does not involve upfront setting of reference tariffs through the access arrangement approval process. In its response to the review, the MCE largely accepted the thrust of the Productivity Commission's proposals and adapted them to be consistent with the new governance framework. It should be noted that both the Productivity Commission and the MCE have recognised that binding arbitration, as a core requirement for certified effective access regimes, needs to be applied to pipelines under this form of regulation. This essentially makes this form of regulation a "negotiate-arbitrate" framework, as understood by the Expert Panel.

The following diagram sets out at a high level how light regulation fits into the NGL for existing covered pipelines.

Covered Pipelines



Part 4.2 provides that a service provider operating a covered pipeline may apply for the services offered by means of that pipeline to be "light regulation services". The AEMC is the body charged with the responsibility of deciding whether or not to make a "light regulation determination" in regard to a covered pipeline. A light regulation determination means that services provided by a pipeline are light regulation services (the effect of which is discussed below), and has effect until it is revoked.

In deciding whether or not to make a light regulation determination, the AEMC must have regard to the form of regulation factors provided in Chapter 1, and any other matters it considers relevant (including submissions to the NCC as part of the coverage determination process).

For pipelines offering light regulation services, any person, including the AER, may apply to the AEMC for the revocation of the light regulation determination. The AEMC will have discretion to reject incomplete, frivolous or vexatious applications. The same decision making process for making a light regulation determination will apply to its revocation. If a pipeline's light regulation determination is revoked by the AEMC, the service provider will be obliged to submit an access arrangement for approval by the AER in accordance with the NGL. The terms and conditions for light regulation services will continue to apply until that access arrangement is approved. The Rules will contain additional principles in relation to the streamlining of this approval process, having regard to any previously approved access arrangement.

Service providers offering light regulation services are not required to, but may, submit a limited access arrangement to the AER for approval under section 155 in Part 4.3. A limited access arrangement is an access arrangement without provision for price or revenue regulation. Service providers may wish to submit such an arrangement as it gives certainty over terms and conditions applicable to their

pipeline services. Further, a limited access arrangement also means the AER, in resolving an access dispute, must apply the limited access arrangement terms and conditions. Even though limited access arrangements do not provide for price or revenue regulation, in an arbitration the AER will be able to set a price between the parties for the purpose of resolving the access dispute. However, the price would only be a price set between the parties to the dispute based upon the application of the revenue and pricing principles (s 27). Detailed rules for using a full building blocks analysis for approving an access arrangement (such as in s 8 of the Gas Code) will not apply in an access dispute. The service provider's published prices and the prices being paid by other users are expected to be considered in the arbitrator's decision.

Service providers will, however, be required to make public the terms and conditions of access, including prices for provision of those services (s 140). A service provider is also required to give an undertaking not to engage in price discrimination unless that price discrimination is conducive to efficient service provision or justified on some other rational economic basis. This is designed to be consistent with the National Access Regime pricing principles (in Part IIIA of the *Trade Practices Act 1974*) that discrimination should only be allowed where it aids efficiency.

Section 154 gives the AEMC the ability to require any person to provide information reasonably necessary for making its regulatory decisions under Part 4.2. This compulsory information gathering power matches the AER's powers in s 41 and s 28 of the NEL.

Part 4.3: Access Arrangements

Taking account of the concerns expressed by the Expert Panel that regulatory decisions must be made in a timely and predictable manner (p59), the NGL clarifies timelines for the assessment and/or revision of access arrangements.

The core elements of the access arrangement approval process and fundamental requirements of an access arrangement previously in Chapters 2 and 3 of the Gas Code are included in the NGL. However, the detailed requirements for components of an access arrangement and all of the detail on how to determine prices (reference tariffs and reference tariff methodologies) will be in the NGR.

The current s 2.24 of the Gas Code sets out a number of general requirements for the regulator to consider in deciding whether to approve an access arrangement. In particular, the access arrangement must satisfy the content and principles in Chapter 3 and the regulator's assessment should be guided by seven principles. Both the Productivity Commission and Expert Panel recommended that all but two of the principles be deleted in light of the inclusion of an overarching objective clause for the regime. MCE now considers that the remaining two factors are also covered by the objective and the prohibition on depriving anyone of protected contractual rights other than exclusivity rights (s 2.25 of the Gas Code). Accordingly, none of the paragraphs in s 2.24 of the Gas Code will be replicated in the NGL. The prohibition on an applicable access arrangement or variation to such an arrangement depriving a person of a relevant protected contractual right in s 2.25 of the Gas Code is enshrined in s 330.

Process

Part 4.3 outlines the process by which access arrangements must be made for covered pipelines not subject to a light regulation determination.

Section 159 maintains the existing right, established by s 2.3 of Gas Code, for any pipeline to voluntarily submit an access arrangement with reference tariffs. Section 160 streamlines the existing rights, established by s 2.4 and s 2.4A of the Gas Code, of the regulator and service provider in submitting consolidated or separate access arrangements.

Section 161 is a new provision in the NGL requiring the AER to, at the request of a service provider, meet prior to the submission of an access arrangement. The AER will also be expected to set out information requirements in advance of the pre-submission conference to give further guidance as to the type and quality of information required through regulatory information instruments. These may include requirements to generate information derived from information or records held by the service provider to allow appropriate and effective analysis of the access arrangement.

Minimum Content and Reference Services

Section 165 sets out the minimum content of an access arrangement. This section explicitly allows the Rules to require further detail in an access arrangement.

Section 166 maintains the existing requirement that reference tariffs should be submitted for all services likely to be sought by a significant part of the market. Further, the Rules may specify what types of service should be regarded as a reference service based on the form of regulation factors. This will mean that a service provider will also be required to provide in its access arrangement a reference tariff for those reference services. The AER must also have regard to the form of regulation factors in specifying additional services to be reference services (s 171 and see also the definition in s 7).

Section 167 replicates the capacity trading requirements in s 3.10 of the Gas Code along with a minimum requirement for delivery and receipt point notification requirements defined in s 130.

Consultation

The AER will be required to publish the relevant documents for a minimum 21 day consultation period but, in the event that the access arrangement submitted is inadequate for meaningful consultation, the AER will be given 45 days to seek additional information from the service provider by way of regulatory information notice before publication (ss 162 and 163).

Similar to s 2.13 of the Gas Code, section 170 requires the AER to make an access arrangement draft decision. If the submitted access arrangement does not contain the required access arrangement information, or if it deprives someone of an existing protected contractual right, it cannot be approved. The AER must set out reasons for its decision and specify revisions the AER considers necessary if it does not approve the access arrangement in its draft decision.

Where a pipeline has been built under an approved competitive tender process, the AER will not be able to make an access arrangement draft or final decision inconsistent with the approved terms and conditions of a tender approval decision (see ss 170(4) and 178(6)). This essentially captures the effect of ss 3.21ff of the Gas Code taking into account the streamlined competitive tender approval process adopted from the national access regime amendments to the *Trade Practices Act 1974* made in 2006.

Section 172 requires the AER to seek submissions publicly on its draft decision, for a period of between 5 and 8 weeks.

If the AER does not approve an access arrangement in the draft decision, section 173 allows the service provider to submit revisions to its access arrangement to address matters raised by the AER. The AER may specify a time period of between 21 and 42 days within which these revisions must be made. Unless there has been a material change in circumstances, the service provider will not be able to submit revisions to its access arrangement outside the period after the draft decision after the first publication (s 168).

Section 176 is similar to s 107 of the NEL and allows persons to request the AER hold a pre-final decision hearing.

Final decisions

Sections 177 and 178 requires the AER, where its draft decision was not to approve an access arrangement, to consider revisions made to an access arrangement following the draft decision, and then to make an access arrangement final decision. As with the draft decision phase, the AER must not approve the revised access arrangement if it does not contain the required access arrangement information. The AER will be required to make its final decision within 6 months of receiving the access arrangement but that period will not include time when:

- judicial review proceedings are on foot;
- a notice is running, e.g.:
 - information has been sought from the service provider;
 - submissions have been sought from interested persons; and
 - during the consultation period after the draft decision is published (including extensions to a consultation period after a service provider submits revisions to its access arrangement).

Unlike s 2.19 of the Gas Code the NGL makes no provision for a "further final decision". This reflects the recommendations of both the Productivity Commission and Expert Panel.

Instead, Division 3 of Part 4.3 allows the AER to make an access arrangement where its access arrangement final decision is not to approve the revised access arrangement. In making an access arrangement, the AER should give effect to its proposed revisions.

The above framework is considered to give all parties – the regulator, stakeholders and the service provider – the information and ability to have the terms and conditions of access set in a timely, fair and efficient manner having regard to the nature of covered pipelines.

Part 4.4: Facilitation of and Request for Access

Part 4.4 facilitates access, and requests for access, through various provisions, including requiring pipeline service providers to provide, on request or as directed by the AER, information contained in an applicable access arrangement, and, on request, information about unutilised capacity. Section 191 replicates s 5.9 of the Gas Code and requires a transmission pipeline service provider to establish and maintain a register of spare capacity. This will improve transparency in the market.

Part 4.5: Access Disputes

Part 4.5 replicates the central elements of the access dispute process in Part 4 of the GPAL and Chapter 6 of the Gas Code.

The NGL provides that, if a user or prospective user is unable to agree with a service provider about one or more aspects of access to a pipeline service provided by means of a relevant covered pipeline, the user, prospective user or service provider may notify the AER, in writing, that an access dispute exists. This does not stop users and service providers from using other dispute resolution mechanisms outside of the NGL to resolve disputes about access, but is essentially a formal fall back mechanism to give users a legally enforceable right to access. The AER will be the arbitrator of all access disputes under the NGL. Accordingly, these disputes (other than for pipelines with a price regulation exemption) may deal with both price and non-price terms and conditions of access that are in disagreement between the parties.

The only parties to an access dispute will be the service provider and the user or prospective user who is in disagreement with the service provider (s 196). There is no ability for additional parties to be added to a dispute.

The NGL incorporates the Productivity Commission and Expert Panel's recommendations that s 6.15 of the Gas Code not be adopted in the new gas access regime. Section 6.15 provided multiple factors to be taken into account by an arbitrator in arbitrating an access dispute. The AER now simply has the national gas objective and revenue and pricing principles to guide it in making an access determination.

Section 201 requires the AER to make an access determination unless it terminates an access dispute under certain conditions prescribed in s 203. Section 204 also provides that the AER has discretion not to make an arbitration decision where it considers there is substantial competition in the market for the provision of the service in question. This captures existing s 6.17 of the Gas Code.

Replicating s 6.18 of the Gas Code, the AER cannot make an access dispute decision that deprives a service provider of protected contractual rights other than exclusivity rights (s 205). It is important to recognise that the access dispute process is not about the resolution of contractual disputes between service providers and users. These are properly dealt with by a court. Access disputes are an administrative decision setting prospectively the terms and conditions of access between disputing parties in a way that does not deprive them of their existing contractual rights. While this is primarily achieved by s 205, s 203(2) also is an additional power for the AER to terminate access disputes where the issue is impliedly or explicitly dealt with under a contract.

The AER must also give effect to the applicable access arrangement applying at the time of the access dispute decision. These may be full access arrangements, whereby the reference tariff must be awarded to a prospective user who seeks a reference service, or limited access arrangements which only deal with non-price matters. All light regulation pipelines (whether or not they have a limited access arrangement) are subject to the arbitration regime on price and non-price matters. However, the price would only be a price set between the parties to the dispute based upon the application of the revenue and pricing principles (s 27). Detailed rules for using a full building blocks analysis for approving an access arrangement (such as in s 8 of the Gas Code) will not apply in an access dispute. The service

provider's published prices and the prices being paid by other users are expected to be considered in the arbitrator's decision. Additionally, for international pipelines with a price regulation exemption, an arbitration can only be about non-price matters (see s 249(6)).

Access determinations, consistent with the certification criteria in clause 6(4)(j) of the Competition Principles Agreement, may require the expansion of a pipeline's capacity. However, consistent with the s 6.22 of the Gas Code, a service provider cannot be directed to extend the geographical range of the pipeline or require the service provider to fund an expansion unless the extension and expansion requirements of the access arrangement provide differently (s 209). For light regulation pipelines it is made clear that they will not be forced to fund any capacity expansion (s 209(2)).

Replicating s 10.3 of the Gas Code, s 228 provides that access determinations will be binding on subsequent owners of a pipeline.

The current process of drawing up a draft contract to give effect to the determination (ss 6.26 and 6.27 of the Gas Code) will be replaced by a simple decision by the AER. Access determination will bind both parties but may be varied by the AER on the application of the parties to the dispute (s 211). The AER cannot vary the final determination if a party objects.

Division 6 of Part 4.5 deals with the procedure for conducting arbitrations and is broadly consistent with the current GPAL and also Part IIIA of the *Trade Practices Act 1974*.

Chapter 5: Greenfields Pipeline Incentives

Chapter 5 gives effect to the MCE's decision that the current energy sector reforms must create an appropriate climate for investment in greenfields pipeline projects.

Consistent with this decision, the MCE has agreed to adopt Recommendation 9.1 of the Productivity Commission's *Review of the Gas Access Regime*, which allows the relevant Minister to make, following a recommendation by the NCC, 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. The previously called 'binding no-coverage rulings' have been renamed 15-year no-coverage determinations to better reflect their purpose.

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 MCE has 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.

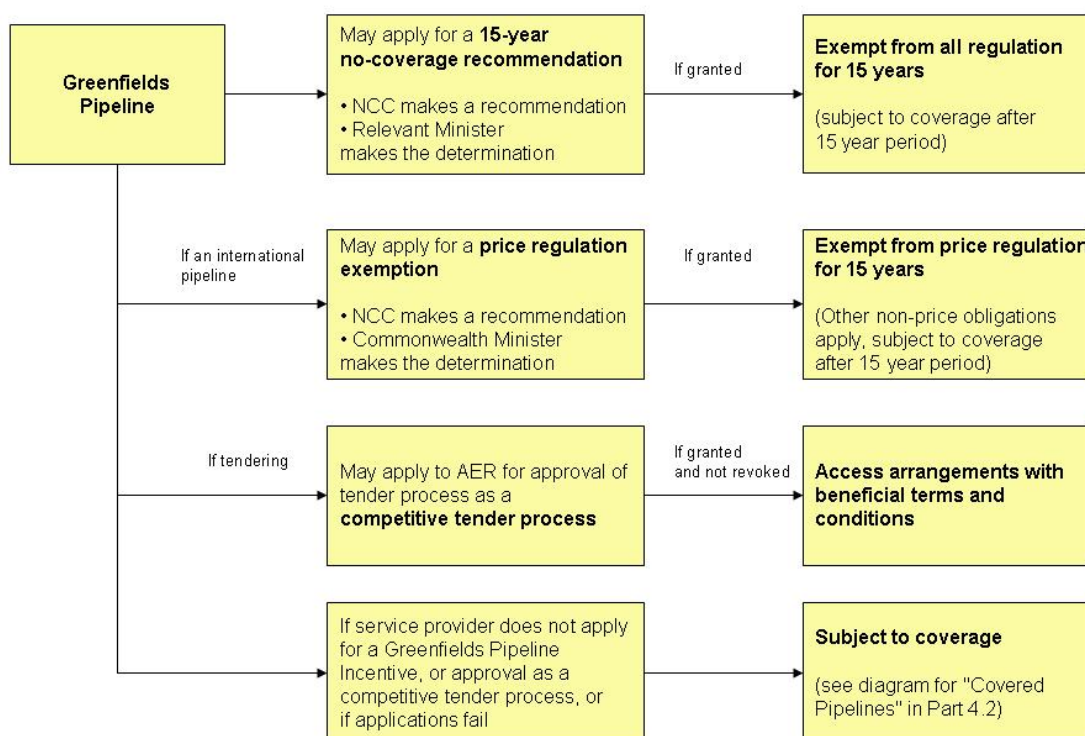
The MCE implemented these two measures in the existing gas access regime in June 2006 and the relevant provisions (set out in Part 3A of the GPAL) are replicated in Chapter 5, with the necessary drafting amendments to incorporate the terms and structure of the NGL.

The process under the NGL whereby a pipeline becomes subject to one of the greenfields pipeline incentives is fundamentally the same as that provided by the GPAL. A pipeline owner must apply for either a 15-year no-coverage determination or a price regulation exemption. The NCC considers the application and makes a recommendation to the relevant Minister. The relevant Minister then considers the application and the NCC's recommendation, and makes a decision on the matter (which may or may not be in accordance with the NCC's recommendation).

Additionally, however, the NGL consolidates the NCC's procedures for classifying a pipeline and making a recommendation on a 15-year no-coverage application, to avoid dual processes. Only a transmission pipeline may apply for a price regulation exemption so the NCC is not required to undertake a classification.

New pipeline developments may also take advantage of the competitive tendering arrangements in Part 3.3. The following flow diagram sets out the options for new pipeline developments in the National Gas Law.

Greenfields Pipelines



Part 5.1: Interpretation

Part 5.1 provides definitions for use in providing greenfields pipelines incentives to pipeline service operators.

Part 5.2: 15-year no-coverage determination

Part 5.2 provides the proponent of a proposed greenfields gas transmission pipeline or distribution network may apply, before the pipeline is commissioned, to the NCC for a 15-year no-coverage determination.

The NGL requires the application to be considered by the NCC in the first instance. The NCC must follow the procedure outlined in Division 1 of Part 8.5. The NCC must make a recommendation on the matter within 4 months (s 235) and be guided by the pipeline coverage criteria. Following an assessment of the pipeline against the pipeline coverage criteria, the NCC must make a recommendation to the relevant Minister to exempt a pipeline from regulation for 15 years if it is not satisfied that all the pipeline coverage criteria are satisfied, and must not make a recommendation if it considers that all the criteria are met.

The relevant Minister must then decide whether or not to make a 15-year no-coverage determination within 42 days (s 238). In deciding whether to make a 15-year no-coverage determination the relevant Minister is bound to give effect to the pipeline coverage criteria and to have regard to the objective of the NGL, the recommendation of the NCC and any relevant submissions and comments. A 15-year no-coverage determination has the effect of exempting the pipeline from

regulation, and takes effect from the date specified in the Minister's determination, remaining in force for a period of 15 years from the commissioning of the pipeline (s 239).

At the end of the 15 year period, the pipeline would continue to be uncovered, subject to any coverage application.

Part 5.3: Price regulation exemption

Part 5.3 establishes the price regulation exemption for international greenfields gas pipelines. Section 241 allows a service provider to make, prior to the commissioning of the pipeline, an application to the NCC for a price regulation exemption. The process by which the NCC considers a price regulation exemption is streamlined in comparison to that for a 15-year no-coverage determination, to reflect the concerns of MCE that such a process should be undertaken in a timely manner. Section 243 requires the NCC to make a recommendation to the Commonwealth Minister within 42 days, and s 245 requires the NCC to invite submissions.

Section 244 requires the NCC, in making its recommendation to the Commonwealth Minister, to weigh the benefits to the public of granting the exemption against the detriment to the public and, in doing so, must have regard to the national gas objective with particular reference to the implications of the exemption for relevant markets (including the effect on market power) and other possible effects on the public interest. The NCC may have regard to any other relevant matter. The public interest considerations for granting this exemption are broader than the existing coverage criteria in the present gas access regime.

Upon receipt of the NCC's recommendation, the Commonwealth Minister must decide, within 14 days, whether or not to make a price regulation exemption (s 246). The Commonwealth Minister must have regard to, but is not bound to follow, the recommendation of the NCC. The effect of the granting of a price regulation exemption is that the services provided by the pipeline are not subject to price or revenue regulation for a period of 15 years from the commissioning of the pipeline.

It is possible for a proponent who has been granted a price regulation exemption to apply for, and gain, a 15-year no-coverage determination for the same pipeline. If this occurs, the 15-year no-coverage determination supersedes the price regulation exemption, the price regulation determination is terminated and the 15-year no-coverage determination remains in force for the balance of the period for which the price regulation exemption was granted.

Section 248 requires an international pipeline proponent, if a price regulation exemption is granted, to submit a limited access arrangement to the AER, which governs regulation of non-price access provisions and meets certain transparency requirements. A limited access arrangement must contain an undertaking from the service provider not to engage in price discrimination unless this is conducive to efficient service provision or can be justified on some other rational economic basis. Section 250 requires a service provider of a price regulation exemption pipeline to publish indicative prices on its website for services provided by the international pipeline.

At the end of the 15 year price exemption period, the pipeline would be uncovered, and therefore could be subject to any coverage application.

Part 5.4: Extended or Modified Application of Greenfields Pipeline Incentives

Part 5.4 allows the relevant Minister to amend the relevant pipeline description prior to the commissioning of the pipeline. The relevant Minister may refer an application for an amendment to the pipeline description to the NCC for advice, but must do so when the amendment sought involves a substantial change to the pipeline description. These provisions are necessary because s 252 provides that a price regulation exemption does not apply to a pipeline if the pipeline, as constructed, differs from the pipeline as described in the application for the greenfields pipeline incentive.

Part 5.5: Early Termination of Greenfields Pipeline Incentive

Part 5.5 allows the early termination of a greenfields pipeline incentive under four limited conditions. These include by consent of the service provider (s 255) and if a price regulation exemption breaches a condition of that exemption (s 257). Section 254 provides that a greenfields pipeline incentive will lapse if the pipeline for which it was granted is not commissioned within three years of the granting of the incentive. Section 256 provides that the relevant Minister may, on application by the AER, revoke a greenfields pipeline incentive on the ground that the applicant misrepresented a material fact on the basis of which the incentive was granted or the application failed to disclose material information that the applicant was required to disclose.

Chapter 6: Proceedings under the National Gas Law

The enforcement model established in Part 6 of the NEL has been adopted in the new NGL. Therefore, the new NGL in this respect has, in large part, been developed from the equivalent provisions in the NEL.

Part 6.1: Proceedings Generally

Part 6.1 allows the AER to institute civil proceedings under this Law for a breach of a provision of the Law, but also creates a 6 year time limit from the date of the breach within which it must institute proceedings.

Part 6.2: Proceedings for Breaches of this Law, Regulations or the Rules

Part 6.2 replicates the concept of a "conduct provision" from Part 5 of the GPAL. This is an addition to the NEL enforcement mechanisms. Any person can take action in a court to enforce compliance with a provision of the access regime that is listed as a conduct provision (see s 10.7 of the Gas Code). Part 6.2 allows the particular conduct provisions in the NGL and NGR to be prescribed by regulation. The significance of a provision being a conduct provision is that in addition to the remedies mentioned above, a person who suffers loss or damage as a result of a breach of a conduct provision can obtain an award of damages (See s 36 of the GPAL.)

Part 6.3: Matters relating to Breaches of this Law, the Regulations or the Rules

Under Part 6.3, the AER will be empowered to enforce the new NGL, Regulations and NGR by application to a Court² for an order declaring that a person is in breach of the NGL, Regulations or NGR. If the Court makes such a declaration, the Court may also order the person to pay a civil penalty (for civil penalty provisions), to desist from the breach, to remedy the breach or to implement a compliance program. The AER may also apply to the Court for an injunction where a person has engaged in, is engaging in or is proposing to engage in conduct in breach of the new NGL, regulations or NGR. Because the simpler NEL enforcement framework has been adopted, there is no longer any need for the concept of a 'regulatory provision'.

Criminal offences in the GPAL and Gas Code will generally be carried over into the new NGL and NGR. The prosecution of these offences will be within the general prosecution regimes of the Commonwealth, States and Territories. The AER will also be able initiate criminal prosecutions which can be taken over by the relevant Director of Public Prosecutions under the usual State or Territory arrangements.

Part 6.4: Judicial Review of Decisions of the AEMC under this Law, the Regulations and the Rules

Part 6.4 provides for judicial review of decisions and associated conduct of the AEMC under the new NGL and NGR. Any 'person aggrieved' by a particular decision may apply for judicial review of that decision. Decisions of the AER, Commonwealth Minister and NCC are subject to judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth), and decisions of relevant State Ministers are subject to judicial review in accordance with relevant State administrative law regimes.

² Either the Federal Court or the Supreme Court of a participating jurisdiction.

Part 6.5: Merits Review

Part 6.5 provides a limited form of merits review for specified economic regulatory decisions. Under the NGL and the Regulations, merits review proceedings may be brought before the Australian Competition Tribunal (ACT) in respect of the following decisions:

- Ministerial decisions in relation to coverage of gas pipelines (including 15-year no-coverage determinations but not price regulation exemptions – ss 89, 96 and 238);
- decisions by the AEMC on the form of regulation for individual covered pipelines (price regulation by access arrangement or light regulation – ss 135 and 148);
- AER decisions to draft and approve (or revise) access arrangements (ss 178 and 183); and
- AER ring fencing decisions including approval of associate contracts (ss 120, 121 and 125); and
- Ministerial decisions to revoke greenfields pipeline incentives for misrepresentation (s 256)

These decisions have been identified by the MCE as being suitable for a form of merits review on the basis that (i) they may have a substantial impact on the economic viability of network and service providers and (ii) the decision-making power may involve the exercise of significant amounts of discretion.

The decisions subject to merits review will not be listed in the NGL, but will instead be prescribed by the Regulations.

The merits review will be on limited grounds, with restrictions placed on the evidence which may be brought to establish any ground of review. The grounds for review will be as follows:

- the original decision maker made an error of fact in its findings of facts, and that error of fact was material to the making of the decision;
- the original decision maker made more than one error of fact in its findings of facts, and that those errors of fact, in combination, were material to the making of the decision;
- the exercise of the original decision maker's discretion was incorrect, having regard to all the circumstances;
- the original decision maker's decision was unreasonable, having regard to all the circumstances.

These grounds will provide a limited merits review that enables correction of errors. An applicant for merits review will need to seek leave from the ACT to bring an action for review and, amongst other things, will need to meet a materiality threshold. The ACT must be satisfied that there is a serious question to be tried. In addition, for revenue-related errors, the amount at issue must exceed \$5m or 2% of average annual regulated revenue, or if quantification is not readily possible, the amount in issue must be material in terms of an entity's regulated revenue. In all other cases (ie non-revenue errors) the ACT will have to be satisfied that the error is a material one.

Persons able to commence a merits review action will be network service providers, users (including prospective users) and end users whose commercial interests are materially affected by a decision, and user and consumer associations (ie organisations such as Energy Users Association of Australia, Energy Action Group

and Major Energy Users). However, in the case of coverage decisions, any person adversely affected by the decision will be able to commence a review. There will be a relatively wide scope for persons and groups to intervene in merits review proceedings, once commenced. Persons with a sufficient interest in the original decision are able to intervene, as well as jurisdictions, and user and consumer associations and interest groups with leave of the ACT.

The NCC will not be a party to merits review proceedings but may be requested by the Tribunal to give assistance or reports to the ACT on direction (s 289).

The ACT will have wide powers. It will be able to affirm or vary the original decision, or set the decision aside and either substitute a new decision or remit the matter to the AER, AEMC or Minister for reconsideration (s 285). The ACT will not, however, be able to vary an access arrangement decision or remit such a decision to the AER in a manner that would have the effect of backdating the decision (s 286).

There will also be strict requirements as to the presumption that indemnity costs are to be awarded by the ACT unless exceptional circumstances exist (s 291).

Part 6.6: Infringement Notices

Under Part 6.6, the AER will be able to issue an infringement notice for breach of any civil penalty provision (to be prescribed by the Regulations). A person who receives a notice may either pay the infringement penalty or defend any formal proceedings in respect of the breach (if the AER decides to initiate them after a notice period has expired). The amount of an infringement penalty will be \$20,000, or a lower amount prescribed for the particular civil penalty provision.

Part 6.7: Further Provision for Corporate Liability for Breaches of this Law etc.

Part 6.7 makes further provisions for offences and breaches by corporations under the NGL. These are consistent with ss 85 and 86 of the NEL.

Chapter 7: The Making of the National Gas Rules

Chapter 7 is consistent with the NEL such that the process for making and changing the NGR and the National Electricity Rules (NER) will be the same, and the AEMC's functions and powers under the NGR and NER will be the same. Similarly, the NGR will have the force of law where the NGL applies, in the same manner as the NER having force of law where the NEL applies.

The power of the AEMC to make rules is expressed generally in Part 2.2 and in Schedule 1, which lists specific matters about which the AEMC may make rules. Chapter 7 provides more guidance and limitation on the powers of the AEMC with regard to rule-making.

Additional modifications to the rule change process will be made following MCE's decision in October 2006 on modifications to the NEL rule change process in light of the AEMC's experiences to date. These changes are explained in another MCE bulletin and will be incorporated into the final NGL subject to any comments received in consultation.

Part 7.1: The Making of the National Gas Rules

Part 7.1 provides some general interpretive provisions for this purpose. Section 307 is important, as it provides that, in making a decision on a rule change proposal, the AEMC may only amend the NGR if it is satisfied that the amendment will, or is likely to, contribute to the achievement of the national gas objective. The AEMC may give the various aspects of the national gas objective such weight as is appropriate in all the circumstances having regard to any relevant MCE statement of policy principles. In making rules on certain matters (and in one case in revoking a Rule) outlined in sections 308 and 309, the AEMC must also take into account the form of regulation factors, and the revenue and pricing principles.

Part 7.2: Initial National Gas Rules

Part 7.2 provides that the South Australian Minister administering the *National Gas (South Australia) Act 2007* may make the initial Rules, and gazette them in the *South Australian Government Gazette*.

Part 7.3: Procedure for the Making of a Rule by the AEMC

Part 7.3 outlines the detailed procedure by which the AEMC may make a rule. Section 311 provides that, any person, including the MCE, may apply for a rule change. It also provides that the AEMC will not be able to initiate a rule change proposal, unless the change is to correct a minor error or involves a non-material change to the NGR. Section 312 provides that the AEMC may make Rules that are consequential to a requested Rule change as part of that Rule change process.

Section 315 provides that the AEMC will be able to reject an application for a Rule change where the application:

- does not contain the information prescribed by the regulations; or
- is misconceived or lacking in substance; or

where the AEMC would, if it were to make the proposed new rule, be acting beyond its powers under the NGL.

A further feature of the AEMC's gatekeeper role is that, while a person lodging a rule change proposal may include a suggested rule wording under s 313, the AEMC must publish a draft of the proposed Rule under s 316. This provision ensures that the AEMC can uphold the workability and integrity of the NGR.

For all proposed Rule changes not rejected under s 315 or handled according to s 317, the AEMC is required to undertake public consultation. The AEMC will be required to invite submissions on the proposal and subsequently on its draft determination and draft rule change. It will be able to convene working groups and will decide whether or not to hold public hearings (s 319). These steps provide a number of opportunities for interested parties to contribute to the rule making process.

Section 317 allows the AEMC to expedite a rule change proposal if it considers the change to the NGR to be:

- non-controversial (that is, the proposed new rule is unlikely to have a significant effect on a market for gas); or
- urgent (that is, the proposed new rule relates to any matter or thing that, if the rule is not made urgently, will result in that matter or thing imminently prejudicing or threatening the supply of gas).

The capacity to expedite a rule change process is a key component in achieving a more streamlined rule making regime. However, s 317(3) requires the AEMC to undertake public consultation in accordance with the usual rule change process if a legitimate objection is made to the rule change proposal being expedited.

The AEMC must publish its final Rule determination on a rule change proposal within 4 weeks of the close of written submissions (s 323). Section 324 requires the AEMC to publish a notice of a change to the NGR in the *South Australian Government Gazette*. Similarly, s 326 requires that any new Rule will be published on the AEMC's website and copies made available at its office.

A Rule as made by the AEMC commences on the day notice of the making of the Rules is published in the *South Australian Government Gazette* (s 325).

Finally, s 327 provides that a document purporting to be the NGR is such a copy if it is endorsed with a certificate carrying the seal of the AEMC and certifying that the document is such a copy.

Part 7.4: Miscellaneous Provisions relating to Rule Making by the AEMC

Part 7.4 clarifies several miscellaneous matters relating to the making of Rules by the AEMC.

Chapter 8: General

Chapter 8 provides general provisions that have effect in various parts of the NGL.

Part 8.1: Provision relating to Applicable Access Arrangements

Part 8.1 makes three provisions relating to applicable (i.e. approved) access arrangements that apply throughout the NGL. These are outlined below.

Section 330 protects pre-existing contractual rights: an access arrangement cannot have the effect of depriving a person of a contractual right established before the submission of the access arrangement, other than a "relevant exclusivity right". This mirrors s 2.25 of the Gas Code.

Section 331 clarifies that nothing in the NGL prevents a service provider and a user or prospective user entering into an agreement on different terms than those provided in an approved access arrangement. The only exception to this applies to queuing requirements established under s 112.

Section 332 clarifies that an approved access arrangement continues to apply to a pipeline even if the ownership of that pipeline changes (s 10.3 of the Gas Code).

Part 8.2: Handling of Confidential Information

Part 8.2 outlines various restrictions on the disclosure of confidential information by the AER, AEMC, the relevant Minister and the NCC. Division 1 outlines particular circumstances under which the AER can release confidential information (with or without omissions). These provisions are based on s 42 of the GPAL. Division 2 outlines provisions applying to the release of confidential information by the Minister as part of a coverage decision, the NCC as part of a recommendation or decision under the NGL, or the AEMC as part of a light regulation determination or revocation or review.

Part 8.3: Reclassification and Variation of Classification of Pipelines

Part 8.3 provides for a service provider to apply to the NCC for a pipeline's classification (i.e. as a transmission pipeline or as a distribution pipeline) to be changed. Under this part, the NCC must make a decision within 4 months and have regard to the national gas objective and the pipeline classification criterion.

Part 8.4: Scheme Register

Part 8.4 requires the AEMC to maintain a publicly accessible "scheme register" containing details of all:

- coverage determinations;
- coverage revocation determinations;
- greenfields pipeline incentives;
- tender approval decisions;
- light regulation determinations;
- covered pipelines;
- pipelines providing light regulation services; and
- international pipelines,

as well as information on determinations and pipelines covered under the current gas access regime. This takes over the functions of the Code Registrar under the old regime.

Part 8.5: Procedural Provisions for Making of Regulatory Scheme Decisions under this Law

Part 8.5 clarifies the procedural requirements for decision makers for a variety of decisions made under the NGL.

Division 1 of Part 8.5 sets out, for 'regulatory scheme decisions', the procedure for making a draft and final decision. Decisions made under the NGL that are required to follow the process outlined in this Division include:

- NCC coverage recommendations (Division 1 of Part 3.2);
- NCC coverage revocation recommendations (Division 2 of Part 3.2);
- AEMC light regulation determinations (Division 1 of Part 4.2);
- AEMC light regulation revocation determinations (Division 3 of Part 4.2);
- NCC 15-year no-coverage recommendations (Part 5.2); and
- NCC reclassification decisions (Part 8.3).

Provision is also made in the Part for the operation of time periods under this Law, and miscellaneous procedural provisions relating to the coverage and classification of pipelines. Key decisions may be extended by one two month period where the decision is of sufficient complexity or difficulty, or there is a material change in circumstances that it is necessary that the period of time be extended (s 359). Decision makers who fail to meet their timelines are required to report to the MCE on their conduct of the matter and when they will be able to make a decision (s 360). Nonetheless, failure to make a decision within the period specified by the law does not make that decision invalid (s 361).

Part 8.6: Miscellaneous

Part 8.6 refers to Schedule 3, where the savings and transitional provisions will be located. These provisions are not yet drafted and will be finalised following the completion of consultation on the exposure draft of the NGL.

Schedules to the NGL

Schedule 1 – Subject matter for the National Gas Rules

This Schedule to the NGL lists specific matters about which the AEMC may make rules.

Schedule 2 – Miscellaneous provisions relating to interpretation

This Schedule to the NGL sets out interpretation provisions for the purposes of the NGL and NGR which will take the place of local (state or territory) interpretation laws. It is modelled on Schedule 2 to the NEL.

Schedule 3 – Savings and transitionals

To ensure a smooth, efficient and equitable transition to the NGL and NGR, savings and transitional provisions will be included in the NGL and in regulations to be made under the lead South Australian legislation. The exposure draft of the NGL does not include these provisions, but broadly, they are likely to include:

- continuation of current investigations into, or current proceedings in relation to, possible breaches of the GPAL or Gas Code;
- continuation of current processes for determinations by regulators;
- continuation of current merits appeal processes, including those currently being undertaken by state review bodies;
- provision for construction of references in documents to the Gas Code;
- preservation of documents issued or published under the Gas Code; and
- general saving of rights and liabilities accrued under the GPAL and Gas Code, including that the repeal of the GPAL is not to be regarded as a change of law (however defined) under any agreement or deed, and generally ensuring that things done under or for the GPAL and Gas Code are taken to continue for the NGL and NGR.

Part 3: Western Australia's Complementary Gas Law

New Legislative Arrangements

In accordance with the amended Australian Energy Market Agreement, Western Australia is to implement its own complementary gas legislation to give effect to the institutional arrangements and energy reforms being undertaken by the MCE.

Western Australia is developing its complementary gas legislation to replace the current GPAL to provide for the new institutional and regulatory arrangements as set out in the NGL.

Western Australia is to apply the national legislation through the *National Gas Access (Western Australia) Act 2007*. Schedule 1 to this Act will be the National Gas Access Law, which will regulate covered pipelines situated within Western Australia.

In respect to pipelines originating in the adjacent offshore area of Western Australia and terminating in Western Australia, the Commonwealth will apply Western Australia's National Gas Access Law as a law of the Commonwealth. WA's National Gas Access Law, when applied as a law of the Commonwealth, will be referred to as the *Offshore Western Australian Pipelines (Commonwealth) Law*.

Western Australia's Participation in the National Gas Access Regime

Western Australia's complementary gas law will substantially correspond to the access related provisions of the NGL, including the functions, powers, obligations and processes of the regulator, the AEMC and Ministers. The rights and obligations of the regulated industry will be equivalent to the provisions in the NGL.

At this stage, Western Australia will retain the Economic Regulation Authority as the relevant regulator in Western Australia. However, for a pipeline originating in Western Australia, or the adjacent offshore area of Western Australia, that transports gas to or from another State or Territory, the relevant regulator will be the AER.

Western Australia will continue to have an Independent Arbitrator (the WA Gas Disputes Arbitrator) who is independent from the ERA.

Western Australia will confer functions and powers on the AEMC in respect of gas pipeline access. This means Western Australia's complementary legislation will confer rule-making and gas market development functions on the AEMC as it relates to gas access.

At this point in time, Western Australia is not participating in the national framework for electricity and gas distribution (other than gas distribution pipeline access) and retail regulation. However, Western Australia may elect to legislatively adopt aspects of the national framework for distribution and retail regulation.

National Gas Rules and Regulations

Western Australia's complementary gas legislation will apply the initial set of NGR, as made by the South Australian Minister, to the extent they relate to gas access.

Western Australia will make its own Gas Regulations relating to gas pipeline access and any other functions it confers on the AEMC. Western Australia's Gas Regulations are expected to substantially correspond to the South Australian Regulations.

Differences between Western Australia's Legislation and the National Gas Law

WA's complementary gas legislation and any subsequent changes will be consistent with the NGL, and differ only in respect to conferring functions and powers on its own institutions: the Economic Regulation Authority and the Independent Arbitrator.

The table below shows the key differences between Western Australia's complementary gas legislation and the exposure draft of the NGL. This is provided to assist stakeholders to understand the nature of Western Australia's complementary gas legislation relative to the NGL.

Table 2: Differences between Western Australia's Complementary Gas Legislation and the National Gas Law

NGL REFERENCE	DIFFERENCES BETWEEN WESTERN AUSTRALIA'S LEGISLATION AND THE NGL
<p>Chapter 1: Preliminary</p> <p>Part 1.1 – Citation and Interpretation</p> <p>Part 1.4 – Operation and Effect of NGR</p>	<p>Western Australia will generally adopt the NGL provisions in Chapter 1</p> <p>A few minor changes are required to the definitions. This includes providing a definition for WA's Economic Regulation Authority and Independent Arbitrator.</p> <p>Western Australia's legislation will provide scope for the NGR to apply in Western Australia in relation to gas access matters.</p>
<p>Chapter 2: Functions and Powers of Gas Market Regulatory Bodies</p> <p>Part 2.1 – Functions and Powers of the AER</p> <p>Part 2.2 – Functions and Powers of the AEMC</p>	<p>Western Australia will generally adopt the NGL provisions in Chapter 2 except the relevant functions and powers will be conferred on the Economic Regulation Authority (ERA) and not the AER.</p> <p>The ERA will not have the functions and powers to hear and determine access disputes in regard to pipeline services of covered pipelines. This instead will be undertaken by the Independent WA Gas Disputes Arbitrator.</p> <p>The ERA will rely on its existing delegation powers set out in s 29 of the <i>Economic Regulation Authority Act 2003</i>.</p> <p>The ERA will be subject to similar confidentiality provisions as the AER by adopting an equivalent section to 44AAF of the <i>Trade Practices Act 1974</i>.</p> <p>The ERA will be authorised to share information with the AER and AEMC (to be provided through Regulations).</p> <p>Western Australia's legislation will also confer functions and powers on the AEMC.</p> <p>Western Australia will adopt the subject matter for the NGR as set out in Schedule 1 of the NGL. Schedule 1 currently contains matters relating to gas access only. Western Australia will not adopt proposed future provisions in the NGL dealing with non-economic distribution and retail regulation.</p> <p>Western Australia is committed to phase out retail price regulation where effective competition exists. In Western Australia, the ERA will carry out the proposed independent review of energy retail markets. This review will not be initiated through an MCE directed review, and will instead be carried out in accordance with the inquiry functions in the <i>Economic Regulation Authority Act 2003</i>.</p>
<p>Chapter 3: Coverage and Classification of Pipelines</p>	<p>Western Australia will adopt the NGL provisions in Chapter 3.</p>

<p>Chapter 4: Access to Pipeline Services</p> <p>Part 4.5 – Access Disputes</p>	<p>Western Australia will generally adopt the NGL provisions in Chapter 4.</p> <p>Notification of an Access Dispute will be to the ERA. The ERA will then appoint a person to conduct the arbitration.</p> <p>The Office of the Western Australian Gas Disputes Arbitrator will hear access disputes in Western Australia. The ERA can only delegate this function to another person if the Office of Western Australian Gas Disputes Arbitrator ceases to exist.</p> <p>The WA Gas Disputes Arbitrator will have confidentiality and disclosure of information requirements similar to those of the ERA (i.e. based on s 44AAF of the <i>Trade Practices Act 1974</i>).</p>
<p>Chapter 5: Greenfields Pipelines Incentives</p>	<p>Western Australia will adopt the NGL provisions in Chapter 5.</p>
<p>Chapter 6: Proceedings under the NGL</p> <p>Part 6.2 – Proceedings for breaches of this Law, Regulations or the Rules.</p> <p>Part 6.3 – Matters relating to breaches of this Law, the Regulations or the Rules</p> <p>Part 6.5 – Merits Review</p>	<p>Western Australia will generally adopt the NGL provisions in Chapter 6.</p> <p>The ERA can make an application on behalf of the State of Western Australia to the Supreme Court of Western Australia to commence proceedings for persons in breach of a provision in the Law, Regulations or the Rules.</p> <p>Civil penalties awarded by the Supreme Court of Western Australia are payable to the State of Western Australia.</p> <p>Western Australia’s legislation will provide for the Australian Competition Tribunal to undertake merits review in respect to the reviewable regulatory decisions.</p>
<p>Chapter 7: The Making of the NGR</p>	<p>Western Australia will adopt the NGL provisions in Chapter 7.</p>
<p>Chapter 8: General</p>	<p>Western Australia will adopt the NGL provisions in Chapter 8.</p>
<p>Schedules</p>	<p>Western Australia will generally adopt the NGL provisions set out in the Schedules</p>

Part 4: Regulations for the NGL

National Gas (South Australia) Bill 2007

It is intended that the *National Gas (South Australia) Bill 2007*, including the NGL as the Schedule, will be introduced into the South Australian Parliament in early to mid 2007.

When passed by Parliament, the South Australian Governor will be empowered, pursuant to Part 3 of the *National Gas (South Australia) Act 2007* (the Act), to make such regulations as are contemplated by, or necessary or expedient for the purposes of, the NGL.

Regulations made under Part 3 of the Act may be of general or limited application or vary according to the persons, times, places or circumstances to which they are expressed to apply. The regulation making powers will support the making of a civil penalty regime and also enable the making of specific regulations, for example, any matters of a transitional nature necessary to save existing arrangements as part of the new gas access regime.

The regulations will be made only on the unanimous recommendation of the Ministers of the participating jurisdictions and will not be subject to disallowance by the South Australian Parliament.

The above scheme essentially maintains the current regulation making powers currently in the *Gas Pipelines Access (South Australia) Act 1997*.

Key regulations to be made for the NGL

Definition of "pipeline" (s 5)

It is proposed that the new Regulations will prescribe those parts of a pipeline that are not to be included as part of the gas access scheme as with the existing *Gas Pipelines Access (South Australia) Regulations 1999*.

Civil Penalty Scheme (s 5)

The new Regulations will contain a civil penalty scheme, as is the case in the existing regulations. The Regulations will prescribe certain provisions of the NGL or NGR as a civil penalty or conduct provisions. The proposed civil penalty and conduct provisions are as follows:

Table 3: Conduct provisions and Civil Penalty provisions in the NGL

NGL Section	Description	Conduct Provision	Civil Penalty Provision	GPAL or Gas Code Section
s 51	Compliance with regulatory information notice that is served		Y	2.9
s 52	Compliance with general regulatory information order		Y	2.9
s 109	Service provider must be a legal entity of a specified kind to provide pipeline services by covered pipeline		Y	4.1
s 110	Preventing or Hindering Access	Y	Y	GPAL s 13

NGL Section	Description	Conduct Provision	Civil Penalty Provision	GPAL or Gas Code Section
s 111	Supply and Haulage of Natural Gas	Y	Y	GPAL s 40
s 112	Service provider must comply with queuing requirements	Y	Y	3.15
s 113	Disclosure of confidential information prohibited	Y	Y	4.1
s 114	Use of relevant confidential information for purpose other than purpose for which it's given prohibited	Y	Y	4.1
s 116	Service provider must disclose gas supply information in certain cases	Y	Y	7.20
s 117	Carrying on a related business prohibited		Y	4.1
s 118	Marketing staff and the taking part in related businesses		Y	4.1
s 119	Accounts that must be prepared, maintained and kept		Y	4.1
s 120(6)	AER ring fencing determinations		Y	4.3
s 122	Associate contracts inconsistent with Part 3.5 and minimum and additional ring fencing requirements prohibited.	Y	Y	7.1
s 123	Service provider must not enter into associate contracts that have anti-competitive effect	Y	Y	7.1
s 124	Service provider must not enter into associate contracts inconsistent with ring fencing principle	Y	Y	7.1
s 128	AER must be notified of, and given, all associate contracts entered into	Y	Y	7.1
s 140	Service provider must publish terms and conditions for access to light regulation services		Y	New
s 141	Service provider must give undertaking and comply with price discrimination undertaking	Y	Y	New
s 142	Service provider must provide information about access negotiations for light regulation services		Y	New
s 155	Submission of limited access arrangement for light regulation services		Y	New
s 157	Submission of access arrangement in respect of pipeline services provided by means of covered pipeline		Y	2.2
s 160	AER may require submission of separate access arrangement for parts of a covered pipeline		Y	2.4
s 164	Submission of access arrangement information		Y	2.9
s 189	Availability of applicable access arrangement and other information	Y	Y	5.1
s 190	Requests for information about unutilised contracted capacity	Y	Y	5.8
s 191	Public registers of spare capacity	Y	Y	5.9
s 192	Requests for access	Y	Y	5.4
s 199	Service provider to obtain independent expert report	Y		New
s 212	Compliance with access determination	Y	Y	6.16

NGL Section	Description	Conduct Provision	Civil Penalty Provision	GPAL or Gas Code Section
s 248(1)(a)	Limited access arrangements for pipeline services provided by international pipelines to which price regulation exemptions apply		Y	2.2
s 250(3)	Other obligations to which service provider is subject		Y	GPAL s 13V(3)

Definition of Associate (s 5)

The NGL defines an “associate” to have the meaning under the *Corporations Act 2001* but also allows that definition to be extended in the Regulations.

Total Factor Productivity (s 70)

Section 70 provides that the AEMC must not make a rule that provides for or requires the application of the methodology known as “total factor productivity” as an alternative to the “building blocks approach” for the making of a price determination, unless the Regulations specifically allow for this approach to be taken by the AER. However, the AEMC will be empowered to make a Rule that provides for the application of “total factor productivity” as a regulatory economic methodology to inform and assist the application of the “building blocks approach” by the AER for the purpose of making, approving or approving a variation an access arrangement or making an access determination. It is not intended that a regulation will be made allowing TFP until the MCE has directed the AEMC to review its viability and considered its views.

Merits Review (s 274)

Section 274 provides that a “reviewable regulatory decision”, i.e. a decision of a Minister, the AER or the AEMC that is subject to merits review, will be prescribed by the Regulations to be such a decision.

Transitional Provisions

It is intended that the Regulations contain transitional provisions to enable existing documents, instruments and arrangements to be transitioned from the current regime into the new regulatory scheme.

Additional Regulations

Among other things, the Regulations may also contain the following matters:

- Additional matters upon which the AEMC may make a Rule on its own initiative (s 312(2)(c));
- Provide for an extension of time to avoid the lapsing of a greenfields pipeline incentive (s 256(2));
- Provide for an order, in addition to those specified in the NGL, that may be made by a court once a person has been declared to be in breach of a provision of the NGL, the Regulations or the NGR (that is not an offence provision) (s 263(2)(e));
- Provide for the AER to charge parties to an access dispute for its costs in that dispute and apportion those costs between the parties (s 232A);

- Provide for fees and additional requirements for applications and recommendations, including coverage applications, coverage revocation determinations, light regulation determinations, greenfields pipeline incentives, requests for a rule and notification of an access dispute.

Part 5: National Gas Rules

Similar to the NEL regime, there will be statutory rules sitting underneath the NGL. These will be called the National Gas Rules (NGR). The new NGR will, to some extent, take the place of the current Gas Code.

The Gas Code was previously a law of Parliament as a schedule to the *Gas Pipelines Access (South Australia) Act 1997* but, unlike most other legislation, could be amended by an executive process of Ministerial agreement. For the new governance arrangements to take effect, a new split between NGL and NGR has been necessary.

This was discussed in the Statement of Approach released by SCO in September 2005 (Statement of Approach) and the Statement of Scope released by SCO in July 2006, and is further elaborated on in this paper.

To the extent that an obligation is not in the NGL, the Rules will largely be based on the current Gas Code but will be made consistent with the new governance and institutional arrangements. Additionally, important policy changes resulting from the MCE Response to the Productivity Commission *Review of the Gas Access Regime* and the Expert Panel will be incorporated.

Initial National Gas Rules

The initial NGR will be made by the South Australian Minister on the recommendation of the MCE. The initial NGR are currently being developed and will be released for consultation prior to the introduction of the NGL into the South Australian Parliament. They will be formally made by the South Australian Minister when all the new Commonwealth, State and Territory application Acts for the gas access regime are brought into force.

Rule-making Power of the AEMC

After making the initial NGR, the Rules may be amended by the AEMC only in response to a rule change proposal or on its own initiative where the change is to correct a minor error or involves a non-material change to the NGR.

The power of the AEMC to make rules is expressed both generally (s 68) and in Schedule 1 to the new NGL which lists specific matters about which the AEMC may make rules.

In making a decision on a rule change proposal, the AEMC may only amend the NGR if it is satisfied that the amendment will, or is likely to, contribute to the achievement of the national gas objective. Further, if the AEMC is satisfied that a rule will, or is likely to, contribute to the achievement of the national gas objective the AEMC must make the rule.

The AEMC may give the various aspects of the national gas objective such weight as is appropriate in all the circumstances having regard to any relevant MCE statement of policy principles. Further information on the NGL rule change process is in Part 2 of this package discussing the NGL.

The current version of the NGL only allows Rules to be made about access issues. The MCE intends to make further legislative changes in 2007 to allow, consistent

with the AEMA, the NGL and NGR to cover other aspects of distribution and retail. The MCE has also agreed to further reforms for gas markets through the Gas Market Leaders Group which will be implemented from 2007.

Content of National Gas Rules

The format of the NGR is still being finalised. The content of the NGR will be based on the empowering provisions of Schedule 1 of the NGL. These provide for the following heads of power:

Classification and Coverage of Pipelines

1. Applications for the approval by the AER of a tender for the construction of a pipeline by means of which pipeline services will be provided as a competitive tender process.
2. The procedure for the making and the content of a tender approval decision.
3. Reports on the conduct of tender processes approved under tender approval decisions.

Access to Pipeline Services and Access Arrangements

4. The disclosure to the AER of information relating to light regulation services.
5. Access to pipeline services provided or that may be provided by means of a covered pipeline or an international pipeline.
6. The content of access arrangements including—
 - (a) the description of pipeline services provided or that may be provided by means of a covered pipeline, including reference services; and
 - (b) the content of expansion and extension requirements; and
 - (c) the content of capacity trading requirements; and
 - (d) the content of queuing requirements.
7. Access arrangement expiry dates and review submission dates of applicable access arrangements.
8. The regulatory economic methodologies (including the use of the methodology known as the "building block approach") to be applied by the AER in—
 - (a) making or approving an access arrangement (other than a limited access arrangement); or
 - (b) approving a variation to an applicable access arrangement (other than a limited access arrangement); or
 - (c) making an access determination.
9. If the Rules provide for the regulatory economic methodology known as the "building block approach" to be applied by the AER for the purpose of—
 - (a) making or approving an access arrangement (other than a limited access arrangement); or
 - (b) approving a variation to an applicable access arrangement (other than a limited access arrangement); or
 - (c) making an access determination,
the determination by the AER of allowances for—

- (d) depreciation;
- (e) the operating costs of a service provider;
- (f) if the service provider is a corporation, the income tax payable by corporations;
- (g) a rate of return on assets.

10. The methodology known as "total factor productivity"—

(a) as a regulatory economic methodology to be applied by the AER for the purpose of—

(i) making or approving an access arrangement (other than a limited access arrangement); or

(ii) approving a variation to an applicable access arrangement (other than a limited access arrangement); or

(iii) making an access determination;

Note: Under section 70, the AEMC must not make a Rule under item 10(a) unless the Regulations provide otherwise.

(b) as an economic regulatory tool to inform and assist the AER in applying, or analysing the application of the methodology known as the "building block approach" by the AER for the purpose of—

(i) making or approving an access arrangement (other than a limited access arrangement); or

(ii) approving a variation to an applicable access arrangement (other than a limited access arrangement); or

(iii) making an access determination.

11. The valuation of assets forming part of a covered pipeline, and of a new facility for the purposes of—

(a) making or approving an access arrangement (other than a limited access arrangement); or

(b) approving a variation to an applicable access arrangement (other than a limited access arrangement); or

(c) making an access determination.

12. The assessment, or treatment, by the AER, of investment in covered pipelines and new facilities for the purposes of—

(a) making or approving an access arrangement (other than a limited access arrangement); or

(b) approving a variation to an applicable access arrangement (other than a limited access arrangement); or

(c) making an access determination.

13. The economic framework and methodologies to be applied by the AER for the purposes of item 12.

14. Incentives for service providers to make efficient operating and investment decisions, including, where applicable service performance incentive schemes.

AER Economic Regulatory Function or Powers

15. The way in which the AER performs or exercises an AER economic regulatory function or power, including the basis on which AER makes an access arrangement final decision.

16. Principles to be applied, and procedures to be followed, by the AER in exercising or performing an AER economic regulatory function or power.

Access Disputes

17. The procedure for the making of access determinations.
18. Time limits for the making of access determinations.
19. Appointment of persons by the AER to inquire into and report on the safe operation of pipelines for the purpose of enabling the AER to make an access determination.

Ring Fencing Requirements

20. The content of a minimum ring fencing requirement.
21. AER ring fencing determinations.
22. Exemptions from a minimum fencing requirement.
23. Declaration or specification of pipeline services as reference services.
24. Reviews by or on behalf of—
 - (a) the AER or the AEMC; or
 - (b) any other person appointed, in accordance with the Rules.
25. Reporting and disclosing information to the AER.
26. Confidential information held by service providers, users, prospective users, end users, the AER, the AEMC and other persons or bodies conferred a function, or exercising a power or right, or on whom an obligation is imposed, under the Rules, and the manner and circumstances in which that information may be disclosed.
27. Any other matter or thing that is the subject of, or is of a kind dealt with by, a provision of the Gas Code as in operation and effect immediately before the commencement of section [] of the *National Gas (South Australia) Act 2007* of South Australia.
28. Any matter or thing relating to gas prescribed by the Regulations.

Part 6: Comparison of the NGL and GPAL

The current gas access regime is built on the Gas Pipelines Access Law or GPAL, which consists of Schedules 1 and 2 to the *Gas Pipelines Access (South Australia) Act 1997*. Schedule 1 is entitled "Third party access to natural gas pipelines". Schedule 2 is the National Third Party Access Code for Natural Gas Pipeline Systems (the Gas Code).

The tables below outline where existing provisions of the Gas Code, and of Schedule 1 of the GPAL, may be found in the NGL or if they will be included in the initial National Gas Rules.

Table 4: Location of Gas Code provisions in the NGL

Clauses	Element of Gas Code	Location in NGL	Included in Initial NGR
	Introduction	Pt 1.3	
1	Coverage	Chap 3	
1.1	Pipelines in Schedule A are covered	Savings and transitionals	
1.2 - 1.12	NCC to Recommend on application for Coverage	ss86 & 87 and Pt 8.5 div 1	
1.13 - 1.19	Relevant Minister to Decide on Coverage Recommendation	s89	
1.20	Pipelines subject to access arrangements submitted under section 2.3 are covered	s107	
1.21	New pipelines subject of an approved competitive tender are covered	s100	
1.22 - 1.23	Opinion of NCC in respect of proposed pipelines	see Chap 5	
1.24 - 1.33	Revocation of Coverage	ss91-95	
1.34 - 1.39	Relevant Minister to Decide on Revocation Recommendation	s96	
1.40 - 1.41	Extensions/Expansions of a Covered Pipeline	ss15, 16 & 350	
2	Access Arrangements	Pt 4.3	
2.1 - 2.8	Submission of Access Arrangements	ss157-161	
2.9 - 2.27	Public Consultation and Approval	ss162-184	
2.15A	Re-submission	173	
2.20	Regulator to make access arrangement where it does not approve that submitted	183	
2.23	Regulator to draft access arrangement where none submitted	183	
2.24	Approval	178	
2.25	Protection of pre-existing rights	330	
2.28 - 2.48	Review of an Access Arrangement	ss157-184	
2.49	Changes to an Approved Access Arrangement between Reviews	ss185-187	
2.50	Access Arrangements not to limit Access	s331	
2.51 - 2.52	Previous Access Arrangements	N/A	
3	Content of an Access Arrangement	Pt 4.3 div 2 sub 2	
3.1 – 3.2	Services to be offered	165	
3.3 – 3.5	Reference Tariffs	166 & 171	

3.6	Terms and Conditions	165	
3.7 – 3.8	Capacity Management Policy	165	
3.9 – 3.11	Trading Policy	130, 165 & 167	
3.12 – 3.15	Queuing Policy	165	Y
3.16	Extensions/Expansions Policy	16 and 165	Y
3.17 – 3.20	Review and Expiry	157 & 165	Y
3.21 – 3.36	Competitive Tendering	Pt 3.3 and 178(6)	
4	Ring Fencing Arrangements	Pt 3.6	
4.1 - 4.2	Ring Fencing Minimum Obligations	109, 113, 114, 115, Pt 3.6 div 1	
4.3 - 4.4	Additional Ring Fencing Obligations	120	
4.5 - 4.11	Procedures for Adding Ring Fencing Obligations	Pt 3.6 div 2	Y
4.12 - 4.14	Compliance Procedures and Compliance Reporting	ss26(1)(g) and 49(c)	
4.15 - 4.15A	Waiver of Ring Fencing Obligations	ss121-122	Y
4.16 - 4.24	Procedure for Waiving Ring Fencing Obligations		Y
5	Information and Timelines for Negotiation		
5.1 - 5.3	General Requests from Prospective Users	s189	
5.4 - 5.7	Specific Requests from Prospective Users	s192	Y
5.8	Information Provided by Users to the Market	s190	
5.9	Public Register of Capacity	s191	Y
6	Dispute Resolution		
6.1 - 6.3	Notification of a Dispute	ss194 – 196 and 202	
6.5 - 6.6	Withdrawal and Termination of a Dispute	ss195 & 203	
6.7 - 6.14	The Arbitration	ss201 & 213-225	
6.15	Guidance for the Arbitrator	s27	
6.16	Determination binding	212	
6.17	No determination where substantial competition	204	
6.18	Restrictions on Decisions	ss200, 205, 206 & 207	
6.19	Effect of Surcharge	s210	
6.20.	Prior Capital Contributions	s210	
6.21	Safe Operation of a Covered Pipeline	ss198 - 200	
6.22 - 6.23	Obligation to Develop Capacity	ss209 & 210	
6.24	Prospective User May Decide Not to Take a Service	N/A	
6.25	Reservation of Capacity During an Access Dispute	s227	
6.26 - 6.27	Obligations to Reflect the Decision in a Draft Contract	N/A	
7	General Regulatory and Miscellaneous Provisions		
7.1 - 7.6	Approval of Associate Contracts	Pt 3.6 div 4	

7.7 - 7.9	Decisions by the NCC, Relevant Minister, Relevant Regulator and Arbitrator	Pt 8.4 & 8.5	
7.10.	Public Register	Pt 8.4	
7.11 - 7.14	Treatment of Confidential Information	Pt 8.2	
7.15	Operational Guidelines	s22	
7.16 - 19	Extensions of Time Limits	s359	
7.20 - 7.22	Disclosure of End User Information	s116	
8	Reference Tariff Principles		Y
8.1	General Principles	ss21, 27 & 309	
8.2 – 8.49	Revenue and Pricing		Y
9	Code Change	Chap 7 & Pt 8.5	
10	Interpretation		
10.1 - 10.2	How this Code applies to Multiple Service Providers	s332	
10.3	How this Code applies to successor Service Providers	s228	
10.4 - 10.5	Overviews	s4	
10.6	Notices	Various sections	
10.7	Regulatory and Conduct Provisions	s261 and Regulations	
10.8	Definitions	ss5, 82, 129 & 230	Y
	Attachment A: Information Disclosure by a Service Provider to Interested Parties	s84, 133, 233 & Pt 4.3 div 2 sub 2	
	Schedule A: Pipelines to be Covered from Commencement of this Code	Savings and Transitional	

Table 5: Location of GPAL Schedule 1 provisions in the NGL

Section	Element of GPAL Schedule 1	Location in NGL
Part 1	Preliminary	s5
Part 2	National Third Party Access Code for Natural Gas Pipeline Systems	Chap 7
Part 3	Pipelines	
s9	Definitions	s5, 82, 129 & 230
s10	Application for classification and determination of a close connection for purposes of coverage under Code	s9 and Pt 8.3
s11	Classification when Ministers do not agree	N/A
s12	Code Registrar to record classification etc	ss 348 & 349
s13	Preventing or hindering access	s110
Part 3A	Greenfields pipeline incentives	Chap 5
Part 4	Arbitration of access disputes	Pt 4.5 div 6
Part 5	Proceedings for breach of law	Chap 6
Part 6	Administrative Appeals	Pt 6.5
Part 7	General	
s40	Supply and haulage of natural gas	s111
s41	Power to obtain information and documents	s41
s42	Restrictions on disclosure of confidential information	Pt 8.2
s43	Application for review of disclosure notice	N/A
	Appendix	Schedule 2