

Pipeline Regulatory Determinations and Elections Guide

Final Guide

September 2023



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1 Introduction

This Regulatory Determinations and Elections Guide (Guide) is published under rule 29H of the National Gas Rules (NGR). The Guide sets out the:

- functions and powers of the Australian Energy Regulator (AER) under Part 4 of the NGR and Chapter 3 of the National Gas Law (NGL)
- process to be followed by persons when making an application or an election under Part 4 of the NGR
- process that the AER will follow when assessing an application under Part 4 of the NGR and Chapter 3 of the NGL.¹

Chapter 3 of the NGL and Part 4 of the NGR set out the regulatory framework for gas pipelines. Specifically, they set out how the level of regulation (i.e., whether a pipeline is a scheme or non-scheme pipeline) is determined, how new (or greenfields) pipelines may be regulated, and how pipelines are classified or reclassified as distribution or transmission pipelines. Under these parts, we are responsible for making several different determinations or decisions. These include:

- scheme pipeline determinations and scheme pipeline revocations (form of regulation determinations)
- greenfields incentive determinations and greenfields price protection determinations (greenfields determinations)
- pipeline classification and reclassification decisions.

Most of the Guide relates to how the level of regulation of gas pipelines is determined. Form of regulation determinations relate to changing the level of regulation of existing gas pipelines, while greenfields determinations relate to how new pipelines can be regulated in the future. The Guide is not binding and does not place obligations on service providers or other parties. However, it does explain the processes that a person should follow when making an application under Part 4 of the NGR or Chapter 3 of the NGL. It also outlines how the AER will approach making assessments under these parts.

We encourage stakeholders to engage with us before applying for determinations or decisions dealt with in the Guide. This will help to ensure that parties are making the right type of application, and that they understand the information that should be included in the application.

1.1 Treatment of confidential information

This Guide discusses information that must be provided to the AER under the regulatory framework, either when making an application or responding to an AER notice. When a party provides us with information, they can claim confidentiality over any part of the information. To make a claim for confidentiality over any information provided, we ask that the confidential information is clearly identified and reasons are provided to support the confidentiality claim. Any such information must be of a genuinely confidential nature and not otherwise publicly

¹ As required under rule 29H of the NGR.

available. We encourage parties to limit confidentiality claims to the extent possible, so that the AER is able to conduct reviews as transparently as possible.

Further details on how service providers should make confidentiality claims over information they submit to us is provided in the [AER's Confidentiality Guideline](#). Further guidance on how the AER collects, uses and discloses confidential information is available in the [ACCC/AER Information Policy](#).

1.2 Structure of the Guide

The Guide is structured as follows:

- **Chapter 2 – Regulatory framework for gas pipelines:** provides an overview of how gas pipelines are regulated and our powers and functions under Chapter 3 of the NGL and Part 4 of the NGR.
- **Chapter 3 – Process for form of regulation determinations and elections:** outlines the process for making scheme pipeline determinations, scheme pipeline revocation determinations, and pipeline elections.
- **Chapter 4 – Process for greenfields determinations:** outlines the process for making greenfields incentives determinations and greenfields price protection determinations.
- **Chapter 5 – AER approach to assessing determinations:** outlines the approach we will take to assessing whether to make form of regulation and greenfields determinations, and how we will apply the relevant statutory tests.
- **Chapter 6 – Pipeline classification and reclassification:** outlines the process for making classification and reclassification applications and decisions.

2 Regulatory framework for gas pipelines

This chapter outlines the regulatory framework that applies to gas pipelines under Chapter 3 of the NGL and Part 4 of the NGR. It provides an overview of the way that gas pipelines are regulated and how the level of regulation is determined. It also covers our role in form of regulation determinations, scheme pipeline elections, greenfields determinations, and the classification and reclassification of pipelines.

2.1 Forms of regulation

2.1.1 How pipelines are regulated

Under the NGR and NGL, all gas pipelines are classified as either:²

- **Scheme pipelines:** these are subject to a stronger form of regulation, which includes ‘price regulation’ by the AER.
- **Non-scheme pipelines:** these are subject to a lighter form of regulation.

A pipeline will be:

- a **scheme pipeline** if it was a covered, fully regulated pipeline prior to March 2023.³ A pipeline will also be a scheme pipeline if a scheme pipeline determination or election applies to it or if it is a designated pipeline.⁴
- a **non-scheme pipeline** if it is not a scheme pipeline.⁵ All new pipelines are non-scheme pipelines when they are commissioned.

2.1.2 Changing the form of regulation of a pipeline

The form of regulation of a scheme or non-scheme pipeline can change if:

- we make a determination that a scheme pipeline should become a non-scheme pipeline (a scheme pipeline revocation determination), or a non-scheme pipeline should become a scheme pipeline (a scheme pipeline determination)⁶
- a non-scheme pipeline service provider elects for the pipeline to become a scheme pipeline (a scheme pipeline election).⁷

We discuss these processes further in Chapter 3.

2.1.3 Regulatory obligations applying to scheme and non-scheme pipelines

Many of the same regulatory obligations apply to scheme pipelines and non-scheme pipelines, but there are also several differences.

² NGL, s 2.

³ This was the date on which a range of gas pipeline regulatory reforms were introduced via the Statutes Amendment (National Energy Laws) (Gas Pipelines) Bill 2022 (SA).

⁴ NGL, s 2.

⁵ NGL, s 2.

⁶ NGR, rr 15, 19 and 20.

⁷ NGR, r 19 and NGL, s 95(2).

The key characteristics of the regulation that applies to scheme pipelines (full regulation) and to non-scheme pipelines (light regulation) are set out in Table 2.1, and a more detailed summary is at Appendix A.

Table 2.1 –Summary of regulatory obligations for scheme and non-scheme pipelines

Obligation type	Full Regulation	Light Regulation
Access obligations⁸	Scheme and non-scheme pipelines are required to provide third party access to pipelines services.	
Price regulation⁹	We approve prices for reference services provided on scheme pipelines. Service providers must submit to us an access arrangement for approval of both price and non-price terms for reference services.	Prices for services on non-scheme pipelines are not regulated.
Information disclosure¹⁰	Both scheme and non-scheme pipelines must publish the following information: <ul style="list-style-type: none"> • service and access information: this includes information about the pipeline (like its nameplate rating and delivery points), a description of the services provided and service usage and availability information. • standing terms: for scheme pipelines the applicable access arrangement, and for non-scheme pipelines 'standard' price and non-price terms and how standing prices are calculated • historic financial and demand information • actual prices payable information 	
Dispute resolution¹¹	Access disputes are resolved by us.	Access disputes are subject to commercial arbitration.
	<i>Small shipper disputes:</i> If a small shipper (i.e. a small user or prospective user) has an access dispute in relation to access to either a scheme or non-scheme pipeline, it can elect to have the dispute resolved via a mediator.	
Competitive safeguards and prohibitions¹²	Both scheme and non-scheme pipelines are subject to the same competitive safeguard prohibitions and safeguards. In summary, these are: <ul style="list-style-type: none"> • prohibitions from preventing or hindering access, and bundling • interconnection and new capacity requirements • ring-fencing and associate contract provisions 	

2.2 Regulation of greenfields pipelines

There are two types of determinations which are intended to ensure that the threat of regulation does not disincentivise new pipeline development.¹³ These are greenfields incentives determinations and greenfields price protection determinations. A pipeline to which a greenfields determination applies is effectively protected from full regulation.

⁸ NGL, s 133.

⁹ NGL, Pt 5.

¹⁰ NGR, Pt 10.

¹¹ NGR, Pt 12.

¹² NGL, ss 133, 136 and 136B and NGL, Pt 2.

¹³ See, NGL, Chapter 5, Part 3.

A service provider may only apply for a greenfields determination for a ‘greenfields pipeline project’. A greenfields pipeline project is a project for the construction of a pipeline that is structurally separate from any existing pipeline or is a major extension to an existing pipeline.¹⁴ We are responsible for assessing applications for, and deciding whether or not to make, these determinations.¹⁵

2.2.1 Greenfields incentive determinations

A service provider may apply to us for a greenfields incentive determination prior to the commissioning of a pipeline. If we decide to make the determination, the pipeline (once constructed) cannot be made a scheme pipeline for the operative period of the determination (i.e. the length of the determination).¹⁶ That is, once constructed, the relevant pipeline will be a non-scheme pipeline which is subject to the lighter form of regulation, and it cannot be made a scheme pipeline while the greenfields determination is in place.

2.2.2 Greenfields price protection determinations

The second type of greenfields determination is a greenfields price protection determination. A greenfields price protection determination is only available to greenfields pipeline projects that have a greenfields incentive determination.¹⁷ A greenfields price protection determination ‘protects’ certain terms and conditions in the case that there is an access dispute in relation to the pipeline. A price protection determination must set out prices and non-price terms and conditions for pipeline services provided by means of the pipeline. If there is then an access dispute relating to the pipeline, any arbitrator of that dispute must give effect to the terms and conditions that are in the price protection determination.

2.3 Pipeline classification and reclassification

All scheme and non-scheme pipelines must be classified as either distribution or transmission pipelines. We are responsible for determining the classification of pipelines which are not yet classified, and for making decisions about the reclassification of pipelines. In doing this, we must consider the National Gas Objective and the classification criteria (discussed in Chapter 6).¹⁸

In general, transmission and distribution pipelines are subject to the same types of obligations under the NGR and NGL, but there are some differences. For example, there are different requirements relating to the type of information that the service provider must publish under Part 10 of the NGR. There are also additional connection and retail obligations that apply to distribution pipelines but not transmission pipelines.¹⁹

¹⁴ NGL, s 2.

¹⁵ NGL, ss 100 and 109.

¹⁶ NGL, ss 100(1), 102(2) and 102(3).

¹⁷ NGL, s 110(1)(a).

¹⁸ See NGL, Pt 6.

¹⁹ See Pts 12A and 21 of the NGR.

3 Process for pipeline determinations, revocations, and elections

This chapter provides guidance on:

- when we may initiate a proposal to make a form of regulation determination (an AER-initiated review)
- the process for a service provider to make an application for a scheme pipeline determination or a scheme pipeline revocation determination²⁰
- the process we will follow when considering whether to make a form of regulation determination
- the process for making a scheme pipeline election.²¹

The chapter will primarily deal with **process issues** relating to scheme pipeline determinations and scheme pipeline revocation determinations (form of regulation determinations). How we will approach assessing whether to make a form of regulation determination is set out in Chapter 5.

3.1 When we will initiate a form of regulation review

We will consider whether to make a form of regulation determination in two circumstances:²²

- First, if we receive an application to make a form of regulation determination, we will assess the application and then decide whether to make the determination.
- Second, we may consider whether to make a form of regulation determination for a pipeline without an application. That is, we may decide to examine whether the form of regulation of a gas pipeline should change without receiving an application to do so (we refer to this as an ‘AER-initiated review’).

This section outlines when we may decide to commence an AER-initiated review. The process for conducting such a review, including notice requirements and how we will consult, is discussed in section 3.3.

We can conduct an AER-initiated review to either increase or decrease the level of regulation of a gas pipeline. In general, we will consider whether to commence a review where it appears that the level of regulation of a pipeline may not be appropriate, considering the statutory tests outlined in Chapter 5. For example, the AER may consider commencing an AER-initiated review of a non-scheme pipeline where there is evidence to suggest that a service provider may have the ability and incentive to exercise market power, and may be exercising market power, in the supply of pipeline services. This could include evidence that

²⁰ There are two types of form of regulation determinations. Scheme pipeline determinations and scheme pipeline revocations. A scheme pipeline determination makes a non-scheme pipeline a scheme pipeline. A scheme pipeline revocation determination makes a scheme pipeline a non-scheme pipeline. See, NGR, rr 15,19 and 20.

²¹ A scheme pipeline election is an election by a non-scheme pipeline service provider for a pipeline to be a scheme pipeline. See NGL, s 95 and NGR r 19.

²² See NGL, ss 92(2) and 97(2).

users or potential users are experiencing difficulty in negotiating access to the relevant services or are unable to reach agreement on terms and conditions that they consider reasonable.

In general, we will inform the relevant service provider that we are considering conducting a self-initiated form of regulation review before we commence the review.

3.2 Applying for a form of regulation determination

We must consider whether to make a form of regulation determination if we receive an application from any person to do so.²³ This section outlines the process for making such an application.

3.2.1 Matters to consider before applying for a form of regulation determination

Any person may apply to us for a form of regulation determination.²⁴ We are not required to consider an application for a form of regulation determination if we:

- consider the application is misconceived or lacking in substance, or
- have considered an application or proposal to make a scheme pipeline revocation determination in relation to the pipeline in the previous 12 months.²⁵

The NGL and NGR do not set out any requirements that a person must meet before applying to us to make a form of regulation determination. However, we encourage parties to take the following steps before making an application:

- for a user or potential user considering making an application for a scheme pipeline determination:
 - raise access issues with the service provider and attempt to resolve them via negotiation
 - consider whether any access issues would best be resolved under the access dispute provisions in Chapter 5 of the NGL
- liaise with us and discuss any issues or concerns
- consider how we will approach our assessment of whether to make a form of regulation determination (discussed in Chapter 5).

Some examples of situations where a person may consider making an application include, where negotiations between service providers and users or prospective users have been unsuccessful, a user or potential users is having difficulties in gaining access to pipelines on reasonable terms and conditions, and/or a person considers the service provider is using its market power in dealing with users or potential users.

²³ See NGR, rr 16(1)(a) and 21(a).

²⁴ See NGL, ss 91 and 97.

²⁵ See NGR, rr 17(4) and 22(4).

3.2.2 How to apply for a form of regulation determination

An application for a form of regulation determination must be made to us in writing, be accompanied by the application fee (as prescribed in the Regulations), and must include the following information:²⁶

- the person's name and contact details
- the pipeline to which the application relates
- the person's reasons for the application
- any information the person considers relevant to the application of the principles set out in section 112 of the NGL (i.e. the principles that we must apply in making a form of regulation determination)
- any other information on which the person relies in support of the application.²⁷

Reasons for the application

While it is for an applicant to determine the 'reasons for their application', we consider that these could include (but are not limited to):

- an inability to negotiate access to pipeline services
- an inability to negotiate reasonable price terms and conditions
- an inability to negotiate reasonable non-price terms and conditions
- the person considers the service provider is exercising market power in dealings with pipeline users.

Information relevant to the application

Again, it is for the applicant to determine the information which could be relevant to the application of the principles set out in section 112 of the NGL or otherwise support their application. However, we consider this could include:

- details of agreements with the service provider in relation to the pipeline services
- information about the importance of access to the pipeline for pipeline users or potential users and whether there are any substitutes to the pipeline service
- information and evidence about the bargaining power of the users of the pipeline service (which may include the applicant)
- information and evidence about the negotiations for access to pipeline services
- if making an application for a scheme pipeline determination, any information or evidence to support claims that the service provider is setting or offering unreasonable price terms and conditions
- any evidence to support a claim around the degree of market power that a service provider has, and whether they are constrained in using that market power.

²⁶ See National Gas (South Australia) Regulations, Schedule 5. The fee for a form of regulation determination was \$7500 as at June 2023.

²⁷ See NGR, rr 15 and 20.

Chapter 5 of this Guide provides a detailed explanation of how we will apply the principles set out in section 112 of the NGL. We encourage any person considering making an application to review this information.

3.3 AER process for form of regulation reviews

This section sets out the process for conducting AER-initiated reviews, and for considering applications for form of regulation determinations (together 'form of regulation reviews'). It covers notice requirements, how we may obtain information and how we will consult with stakeholders.

3.3.1 Notice and information requests

If we receive an application for a form of regulation determination or commence an AER-initiated review for a form of regulation determination, we will notify the service provider for the pipeline that we have received the application or that we are commencing such a review.²⁸

After we provide such notice, we may request the service provider to submit certain information about the pipeline. **We may request this information by:**

- sending an information request under rule 16 of the NGR, or
- issuing a compulsory notice to obtain information and documents under section 42 of the NGL.

The time provided to respond to the **information request or notice** will depend on the amount of information and the complexity of the information sought from the service provider. However, we will generally provide at least 20 business days for a service provider to respond to our request.

Request under rule 16 of the NGR

A service provider must provide the information in response to a request issued under r 16 of the NGR, within the time specified. If a service provider considers that it will have difficulty in providing the information requested, it should inform us as soon as possible. We may extend the time to respond to the request if the service provider is able to provide good reasons to do so.

Where we are conducting a form of regulation review in response to an application, and a service provider does not provide the requested information within the specified period, we may draw such adverse inferences from the failure to comply as the circumstances justify.²⁹ To determine this, we will consider the extent of the non-compliance and the effect of the non-compliance on our ability to make a decision on whether to make the form of regulation determination.³⁰

In deciding whether to draw an adverse inference, we will consider the circumstances of any non-compliance in determining whether to draw any adverse inferences on a case-by-case

²⁸ NGR, rr 16(1) and 21.

²⁹ NGR, rr 16 and 21.

³⁰ NGR, rr 16(4)(a).

basis. However, some examples of where we are more likely to draw an adverse inference include:

- where a service provider refuses to provide the information requested, and does not provide any reasons for its refusal
- where a service provider fails to provide information that it should readily have access to
- where information is important to make the form of regulation determination, such as price, costs or capacity information.

The type of 'adverse inference' that we may draw because of non-compliance will also depend on the circumstances of the non-compliance. The inference could include that information that was not provided supported us making a scheme pipeline determination.

Further, if we do not receive a response to an information request, we may make a form of regulation determination based on information that is available and which we consider to be relevant.³¹

Content of a rule 16 information request

Information we may seek in a rule 16 information request includes:³²

- the capacity of the pipeline and the extent to which that capacity is currently utilised
- for a **transmission pipeline**, a description of:
 - all locations served by the pipeline
 - all other pipelines that currently serve the same locations
 - all pipelines the service provider is aware of that pass within 100 km of any location served by the pipeline
- for a **distribution pipeline**, a description of:
 - the geographical area served by the pipeline
 - the points at which natural gas is, or is to be, injected into the pipeline
- any other sources of energy available to consumers of gas from the pipeline of which the service provider is aware
- the parties with an interest in the pipeline and the nature and extent of each interest
- a description of the following relationships:
 - any relationship between the owner, operator and controller of the pipeline (or any 2 of them)
 - any relationship between the owner, operator or controller of the pipeline and a user, supplier or end user in a location or geographical area served by the pipeline
 - any relationship between the owner, operator or controller of the pipeline and the owner, operator or controller of any other pipeline serving any one or more of the same locations or the same geographical area

³¹ NGR, rr 16(4)(b) and 21(6).

³² NGR, rr 16(2) and 21(4).

- an estimate of the annual cost to the service provider of regulation as a scheme pipeline and as a non-scheme pipeline
- if we are conducting a review in response to an application for a scheme pipeline determination, any other information that we consider to be relevant to the application.

Compulsory notice under section 42 of the NGL

We may also issue a compulsory notice under section 42 of the NGL to obtain information and documents to assist us in conducting a form of regulation review. We will use section 42 notices if we are not able to obtain the relevant information under rule 16, or if we require documents.

A person must comply with the compulsory notice by the due date unless there is a reasonable excuse or a variation is granted. Penalties apply for non-compliance with a compulsory notice.

Further information and guidance about compulsory notices is available in [the AER's Compulsory Notice Guidelines](#).

3.3.2 Consultation process

We must follow the standard consultation procedures set out in the NGR when considering whether to make a form of regulation determination (as part of an AER-initiated review or following an application).³³ The following summarises the steps for a form of regulation review:³⁴

- We receive an application for a form of regulation determination or decide to commence an AER-initiated review.³⁵
- We provide the service provider with notice of the application or our decision to conduct an AER-initiated review).³⁶
- We will publish information about the application or AER-initiated review on our website, which describes the form of regulation determination being considered.³⁷ Stakeholders will be **given 15 business days** to make written submissions on whether or not we should make the determination.³⁸
- After considering relevant submissions made within the timeframe allowed, we will make a draft decision and publish it, including any relevant explanatory documents and our reasons, on our website.³⁹ We will give stakeholders at least 15 business days to make submissions on our draft decision.⁴⁰

³³ NGR, r 17(1).

³⁴ NGR, r 8.

³⁵ NGR, rr 16(1) and 21(1).

³⁶ NGR, rr 16(1), 21(2) and 21(3)(a).

³⁷ NGR, r 8(2)(a)(i).

³⁸ NGR, r 8(2)(a)(ii).

³⁹ NGR, r 8(2)(d)(i).

⁴⁰ NGR, r 8(2)(d)(iii).

- We will publish our final decision on whether to make the form of regulation determination within 20 business days of submissions on the draft decision closing.
- We will provide the final decision to the service provider and publish it on our website.⁴¹

The total time in which we must conclude the above process depends on whether we are reviewing an application for a form of regulation review or conducting an AER-initiated review. When we receive an application for a form of regulation determination, we must make a decision on whether or not to make the determination within 6 months of receipt, unless we decide to extend the time (for up to an additional 2 months).⁴²

The NGR does not prescribe a timeframe in which we must complete an AER-initiated review. However, we will aim to complete an AER-initiated review within 6 to 8 months, but there may be circumstances where additional time will be required.⁴³

3.3.3 Content and effect of a form of regulation determination

Following consultation, and the assessment of the form of regulation application or proposal (as described in Chapter 5), we will either make a form of regulation determination or decide not to make a form of regulation determination.⁴⁴ If we decide not to make the determination, the pipeline will retain its current classification as a scheme or non-scheme pipeline. We will also provide a copy of the decision or determination to the service provider and the Australian Energy Market Commission (AEMC).⁴⁵

The determination or decision not to make a determination will identify the pipeline to which the determination or decision relates and can also include any other information that we consider to be appropriate.⁴⁶ This will generally include:

- a summary of views received from stakeholders during consultation and our consideration of these views
- any other matters we considered in making the determination or decision
- the reasons for our decision to make or not make the determination including how we made the assessment under section 112 of the NGL.

Effect of a scheme pipeline determination

If we decide to make a scheme pipeline determination (i.e. we decide that a non-scheme pipeline should become a scheme pipeline), the determination must specify the date on which the determination will take effect. This must be at least 6 months, but not more than 12 months, after the determination is made.⁴⁷ When the determination takes effect, the pipeline

⁴¹ NGR, r 8(4).

⁴² NGR, rr 17(2), 17(3), 22(2) and 22(3).

⁴³ NGR, rr 17(2), 17(3), 22(2) and 22(3).

⁴⁴ See NGL, ss 93 and 98.

⁴⁵ See NGR, rr 18 and 23.

⁴⁶ See NGR, rr 18 and 23(1). Where the AER decides to make a scheme pipeline determination, the determination must also include the classification of the pipeline (i.e. whether it is a transmission or distribution pipeline).

⁴⁷ NGL, s 93(2).

which is the subject of the determination will become a scheme pipeline.⁴⁸ If we decide not to make a scheme pipeline determination, the regulatory status of the pipeline will remain unchanged.

Effect of a scheme pipeline revocation determination

If we decide to make a scheme pipeline revocation determination (i.e. we decide that a scheme pipeline should be a non-scheme pipeline), the determination must specify the date on which the revocation determination takes effect.⁴⁹ The relevant pipeline will cease to be a scheme pipeline on this date, and the pipeline will become a non-scheme pipeline.⁵⁰

3.4 Scheme pipeline elections

A service provider of a non-scheme pipeline may elect that the pipeline be dealt with as a scheme pipeline under the NGL and the NGR and be subject to the stronger form of regulation.⁵¹ This is known as a scheme pipeline election.

3.4.1 Making a scheme pipeline election

Where a service provider of a non-scheme pipeline wishes to make a scheme pipeline election, it must make the election in writing to us that:

- includes the name and contact details of the service provider
- identifies the pipeline to which the election relates
- sets out the pipeline's classification
- specify the date on which the service provider wishes the election to take effect.⁵²

Note, the election may also require a service provider to include any other information the AER considers relevant to the election. If the AER considers that the election should include any additional information, we will discuss this with the service provider.

3.4.2 Process for making a scheme pipeline election

We do not make any assessment of whether a non-scheme pipeline will become a scheme pipeline where a service provide makes a scheme pipeline election. The only decision we can make in relation to the election is the day on which the election will take effect.⁵³ This date must be at least 6 months after, but not more than 12 months after, we receive the election.⁵⁴ If we do not make specify a date, the election will take effect on the day that is 12 months after we receive the election.⁵⁵

⁴⁸ NGL, s 94.

⁴⁹ NGL, s 98.

⁵⁰ NGL, s 99.

⁵¹ NGR, r 19 and NGL, s 95(2).

⁵² NGR, r 19(1).

⁵³ NGR, r 19(2)(a).

⁵⁴ NGL, s 96(1).

⁵⁵ NGL, s 96(2).

The effect of an election is that the non-scheme pipeline will become a scheme pipeline.⁵⁶ We will publish on our website, a notice of the election and the day on which it will take effect. We will also give a copy of the notice and state the day on which the election takes effect to the AEMC and the service provider.⁵⁷

⁵⁶ NGL, s 96(3).

⁵⁷ NGR, r 19(2).

4 Process for greenfields determinations

This chapter provides guidance on process issues for greenfields determinations. It covers how to make an application for a greenfields incentive determination or a greenfields price protection determination and the process we will follow when considering such applications. How we will assess these applications is discussed in Chapter 5.

4.1 Greenfields incentive determinations

A pipeline that holds a greenfields incentive determination cannot be made a scheme pipeline for the duration of the determination.

4.1.1 How to apply for a greenfields incentive determination

A service provider for a greenfields pipeline project (which is a project to construct a new pipeline, or make a major extension to an existing pipeline) may apply to us for a greenfields incentive determination.⁵⁸ Such an application must be made before the pipeline is commissioned and be accompanied by the application fee as set out in the National Gas Regulations.⁵⁹ This application may be combined with a greenfields price protection determination (which is discussed in section 4.2).

An application for a greenfields incentive determination must contain the following information:⁶⁰

- a detailed description of the pipeline (see Appendix B for the full list of information to be provided for a transmission and distribution pipeline)
- the name and contact details of the service provider⁶¹
- an explanation as to why the relevant project to construct the pipeline is a greenfields pipeline project
- the amount of expenditure already made on the construction, and an estimate of the expenditure yet to be made
- the services to be provided by means of the pipeline
- the locations to be served by the pipeline and, for each for downstream location, the other sources of natural gas available⁶²
- any existing pipelines, and any proposed pipelines of which the applicant is aware, that serve (or will serve) any of the same locations as will be served by the relevant pipeline, or that pass (or will pass) within 100 km of any of these locations

⁵⁸ NGL, s 100.

⁵⁹ NGL, s 100(2)(f). As of 1 May 2023, the application fee for a greenfields incentive determination was \$7500 (see Schedule 5 of National Gas (South Australia) Regulations).

⁶⁰ NGR, r 25(1).

⁶¹ NGR, r 25(1).

⁶² Downstream location has the definition given in r 3 of the NGR. It means 'a location to which natural gas is delivered by means of a pipeline and includes a location to which natural gas from the pipeline is delivered through a branch pipeline (a lateral)'.

- where relevant, an estimate of the reserves of natural gas available at any upstream location to be served by the pipeline and an estimate of the rate of production from that location
- for the proposed operative period of the determination, an estimate of expected demand at each downstream location to be served by the pipeline including, for each location, a description of the expected customer base and an indication of the revenue expected from each location
- the identity of all parties with an interest in the proposed pipeline and the nature and extent of each interest
- a description of the following relationships:
 - any relationship between the owner, operator and controller of the pipeline (or any 2 of them)
 - any relationship between the owner, operator or controller of the pipeline and a user, supplier or end user in any of the locations served by the pipeline
 - any relationship between the owner, operator or controller of the pipeline and the owner, operator or controller of any other pipeline serving any one or more of the same locations
- whether it would be feasible to expand the capacity of the pipeline and, if so, an explanation of how the capacity might be expanded and an estimate of the cost
- an estimate of the annual cost to the service provider of regulation as a scheme pipeline and as a non-scheme pipeline
- any information the service provider considers relevant to the application of the principles set out in section 112 of the NGL
- any other information on which the service provider relies in support of the application.

Information which we consider could be relevant to the application of the principles set out in section 112 include, or otherwise support an application includes:

- information or evidence relating to how regulating the pipeline as a scheme or non-scheme pipeline will impact the promotion of access to the pipeline
- information and evidence about the types of potential users of the pipeline service, and their likely bargaining power
- information about the importance of the pipeline to users and/or potential users
- any other information that relates to whether the service provider has market power, the extent of that power, and whether there are any factors that will constrain the use of that power.

We also encourage service providers to consider the description of how we will assess an application for a greenfields incentive determination in Chapter 5, to determine what information they should include in support of the application.

4.1.2 Consultation process

The AER must use the standard consultative procedure when considering whether to make a greenfields incentive determination and adhere to the timeframes set out under the NGR.⁶³ The consultation process will run in the same way as for a form of regulation determination consultation process, which is explained in section 3.3.2.

We must decide whether to make a greenfields incentives determination within 6 months of receiving an application but may extend this to 8 months if required.⁶⁴

4.1.3 Content and effect of a determination

Following consultation, and our assessment of the application (described in Chapter 5), we will publish our decision on whether to make the greenfields incentive determination on our website.⁶⁵ We will also provide the determination or decision not to make a determination to the service provider and the AEMC.⁶⁶

The determination or decision will identify the pipeline to which the determination or decision relates, the operative period of the determination, and include any other information we consider appropriate.⁶⁷ This will generally include:

- a summary of submissions we received during consultation and how we have considered these views
- the matters we considered in reaching its decision
- the reasons for our decisions, including how we have applied the statutory test.⁶⁸

The period during which a greenfields incentive determination continues in force (the operative period) is usually 15 years from the commissioning of the pipeline unless we decide on a period that is less than 15 years, considering the matters outlined in section 112.⁶⁹

A greenfields incentive determination will take effect on, and from, the date specified in the determination.⁷⁰ When the determination takes effect, the pipeline the subject of the determination cannot become a scheme pipeline during the operative period of the determination.⁷¹ If we decide not to make a determination, once constructed, the pipeline will

⁶³ NGR, r 26(1).

⁶⁴ NGR, rr 26(2) and 26(3).

⁶⁵ NGL, s 101(1)(d).

⁶⁶ NGR, r 27(3).

⁶⁷ NGR, r 27(1).

⁶⁸ NGR, r 27(2).

⁶⁹ NGL, ss 101 and 102.

⁷⁰ NGL, s 102(1).

⁷¹ NGL, s 102(3).

be a non-scheme pipeline.⁷² However, it could become a scheme pipeline in the future if a scheme pipeline determination or scheme pipeline election was made.

4.1.4 Requirements following the construction of a pipeline

A greenfields incentive determination will only apply to a greenfields pipeline if the pipeline (once constructed) is substantially the same as the pipeline described by the service providers in its greenfields incentive determination application.⁷³ If the constructed pipeline is materially different from the description in the application, the greenfields incentive determination will not apply to the pipeline.⁷⁴

In determining whether the constructed pipeline is materially different from the pipeline as described in the relevant pipeline description, we will not take any differences in ‘excluded infrastructure’ into account. Excluded infrastructure includes tanks, reservoirs, machinery, equipment or any other part of a pipeline that is classified as excluded infrastructure under the NGL.⁷⁵ That is, a greenfields determination still applies even if excluded infrastructure is different from what was included in the relevant pipeline description.⁷⁶

4.1.5 Amendments to the pipeline description

If the pipeline description changes *before* the construction of the pipeline commences, a service provider of a pipeline that has a greenfields incentive determination may apply for an amendment to the pipeline description.⁷⁷ In deciding whether to amend the pipeline description, we have regard to the same criteria that were relevant to making the greenfields incentive determination for the pipeline, including the criteria under section 112 of the NGL.⁷⁸

4.1.6 Early termination of greenfields incentive determinations

A greenfields incentive determination lapses if the pipeline to which it applies is not built and used for the haulage of **covered** gas within 3 years of the determination taking effect.⁷⁹ However, we may extend the determination for a 3 year period, depending on the circumstances.⁸⁰ Some cases where we may consider extending include where there are still plans to construct the pipeline, and there has not been a material change in the circumstances since the determination was made.

A greenfields incentive determination can also be revoked by consent or for misrepresentation.⁸¹ Specifically, a service provider for a pipeline which has a greenfields

⁷² Note that while a pipeline with a greenfields incentive determination cannot be made a scheme pipeline during the period the determination is in force, a person can apply for make an application for a scheme pipeline determination during this period. However, if this is this case, the determination cannot have a start date before the expiry of the greenfields incentive determination.

⁷³ This is the description of the pipeline required to be included in the application for a greenfields incentive determination under section 100 of the NGL.

⁷⁴ NGL, s 103(1).

⁷⁵ NGL, s 103(2).

⁷⁶ NGL, s 103(1).

⁷⁷ NGL, s 104(1).

⁷⁸ NGL, s 104(3).

⁷⁹ NGL, s 105(1).

⁸⁰ NGL, s 105(2).

⁸¹ NGL, ss 105, 106 and 108.

incentive determination may request us to revoke the determination.⁸² We may also revoke the greenfields incentive determination if the service provider misrepresented a material fact in its application, or if the service provider failed to disclose material information which it was required to provide to us in its application for the determination.⁸³

Material information could include: the identity of all parties with an interest in the proposed pipeline and the nature and extent of each interest and significant relationships (e.g. relationships between the owner, operator and controller of the pipeline and relationships between the owner, operator or controller of the pipeline and a user, supplier or end user in locations served by the pipeline).

4.2 Greenfields price protection determinations

The second type of greenfields determination is a greenfields price protection determination for pipelines. These determinations are only available to a pipeline which has a greenfields incentive determination and must also be made before the pipeline is commissioned.⁸⁴

4.2.1 How to apply for a greenfields price protection determination

A service provider for a greenfields pipeline project may apply to us for a greenfields price protection determination. An application for a greenfields price protection determination can be made after, or combined with, an application for a greenfields incentive determination.⁸⁵ We will only consider making a price protection determination for a pipeline if we have made a greenfields incentive determination in relation to the pipeline.

A price protection determination application must include the following:⁸⁶

- the name and contact details of the service provider
- the following information about the services, and terms and conditions which the service provider is applying to be 'protected':
 - the price and non-price terms and conditions that will be available to prospective pipeline users
 - the pipeline services in relation to which those terms and conditions apply (or will apply)
 - any price escalation mechanism that will apply to prices for the term of the determination
 - how long the price and non-price terms and conditions will be made available to prospective users
- information about whether the pipeline is being developed following a competitive process

⁸² NGL, s 106.

⁸³ NGL, s 107.

⁸⁴ NGL, s 109(1).

⁸⁵ NGR, r 28.

⁸⁶ NGR, r 29.

- if the pipeline is being developed following a competitive process, a description of the competitive process
- if the pipeline is not being developed following a competitive process:
 - a description of the form of regulation factors that the service provider considers operated to constrain its exercise of market power when the price and non-price terms and conditions that will be made available to prospective users of the pipeline were determined
 - the reasons why the grant of the determination will, or is likely to, contribute to the achievement of the National Gas Objective
- any other information on which the service provider relies in support of its application.

We encourage service providers to consider the matters we will take into account in deciding whether to make a price protection determination, as discussed in Chapter 5.

4.2.2 Consultation process

This section explains consultation processes where a service provider:

- applies for a greenfields price protection determination **after** a greenfields incentive determination for the pipeline has been made
- makes a **combined application** for a greenfields incentive and price protection determination.⁸⁷

Separate greenfields applications

If a service provider decides to make a greenfields price protection determination application after a greenfields incentives determination has been made (i.e. to make separate applications), the consultation process for considering the price protection determination is as follows:

- We receive an application for a greenfields price protection determination from a service provider.⁸⁸
- We may consult with stakeholders on the application.⁸⁹ Consultation may include targeted stakeholder meetings or seeking written submissions. Where we undertake consultation, it will generally not be longer than 15 business days.
- We will publish a draft decision on whether or not to make the determination, generally within 3 months, of receiving the application.⁹⁰ Our draft will outline the reasons for the decision including our consideration of stakeholder submissions, the protected terms

⁸⁷ NGR, r 29A(1).

⁸⁸ NGL, s 109.

⁸⁹ NGR, r 9(2)(a).

⁹⁰ NGL, s 109(1) and NGR, r 9(2)(c).

and conditions, and explain the effects of the decision.⁹¹ The service provider will receive copies of the draft decision.⁹²

- Stakeholders will have 15 business days to make submissions on our draft decision.⁹³
- We will then make our final decision on whether to make a greenfields price protection determination within 20 business days of submissions closing.⁹⁴ We will also provide copies of the final decision to the service provider and publish the final decision on our website.⁹⁵

Combined greenfields determination applications

A service provider may make a combined application for a greenfields incentive and price protection determination. If a service provider decides to make a combined application, the standard consultative procedures will apply, and we will follow the process outlined for making a greenfields incentives determination.⁹⁶

4.2.3 Content and effect of a determination

Once we have consulted on and assessed the applications (see Chapter 5), we publish our decision on whether to make a greenfields price protection determination or not.⁹⁷ The decision will identify the pipeline to which it relates and may also include any other information we consider appropriate.⁹⁸ This will generally include:

- a summary of views provided by stakeholders during consultation and how we have considered these
- the matters we took into account in reaching our decision
- the reasons for our decision, including how we have applied the statutory test.

We will also provide a copy of the determination or a decision to the AEMC and the service provider which made the application.⁹⁹

If we make a greenfields price protection determination, the determination will include the following:

- the date the determination takes effect¹⁰⁰
- the operative period of the determination¹⁰¹

⁹¹ NGR, r 9(2)(c).

⁹² NGR, rr 8(2)(a) and (b).

⁹³ NGR, r 9(2).

⁹⁴ NGR, r 9(2)(d).

⁹⁵ NGR rr 9(4)(b) and (c).

⁹⁶ NGR, rr 29A(3) and 26.

⁹⁷ NGL, s 110(3)(d).

⁹⁸ NGR, r 29B.

⁹⁹ NGR, r 29B(4) and NGL, s 110(3)(c).

¹⁰⁰ NGL, s 110(3)(e).

¹⁰¹ NGL, s 110(3)(e).

- This is the period during which the price and non-price terms and conditions specified in the determination will be made available to prospective users.
- The period cannot be longer than the operative period for the greenfields incentive determination in relation to the pipeline.¹⁰²
- the price and non-price terms and conditions that will be available to prospective users in connection with the determination¹⁰³
- the pipeline services to which the terms and conditions will apply¹⁰⁴
- any price escalation mechanisms that will apply to prices during the operative period for the determination (which will be based on information provided to us as part of the application process under rule 29(B)(iii) of the NGR)¹⁰⁵
- any assumptions about how capital will be recovered over the economic life of the pipeline such as on an accelerated or deferred basis (which will be based on information provided to us as part of the application process under rule 29(B)(iii) of the NGR).¹⁰⁶

Effect of a determination

A greenfields price protection determination, will take effect on, and from, the date specified in the determination and continue for the operative period of the determination.¹⁰⁷ The determination means that if there is an access dispute:¹⁰⁸

- involving a pipeline with a greenfields price protection determination that has been referred to arbitration, and
- relates to a pipeline service that is the same or substantially the same as a pipeline service for which prices and non-price terms and conditions are specified in the determination
- any access determination made by the arbitrator must reflect the price and non-price terms and conditions and any price escalation mechanism specified in the determination.¹⁰⁹

Finally, service providers should be aware that the greenfields price protection determination will cease if the greenfields incentive determination to which the determination relates ceases to apply to the pipeline.¹¹⁰

¹⁰² NGL, s 110(4).

¹⁰³ NGR, r 29B(2)(a).

¹⁰⁴ NGR, r 29B(2)(a).

¹⁰⁵ NGR, r 29B(2)(c).

¹⁰⁶ NGR, r 29B(2).

¹⁰⁷ NGL, s 111(1).

¹⁰⁸ NGR, r 29C.

¹⁰⁹ NGR, r 29C.

¹¹⁰ NGL, s 111(2).

5 The AER's approach to assessing form of regulation and greenfields determinations

This chapter sets out our approach to assessing whether to make form of regulation and greenfields determinations:

- Section 5.1 provides an overview of the test we must apply in making these determinations under section 112 of the NGL.
- Section 5.2 discusses the elements of the test in detail.
- Section 5.3 discusses the form of regulation factors, and how we will consider these when applying the regulatory determination test.
- Section 5.4 discusses how we will approach assessing matters that are specific to greenfields determinations.

5.1 Overview

5.1.1 The regulatory determination test

Section 112 of the NGL sets out the principles that we must apply in making form of regulation determinations and greenfields incentive determinations (the regulatory determination test).¹¹¹ In deciding whether to make a relevant determination, we must consider the effect of regulating the pipeline as either a scheme or non-scheme pipeline on:

- the promotion of access to pipeline services
- the costs that are likely to be incurred by an efficient service provider and efficient users of pipeline services, and
- the likely costs of end users.¹¹²

In doing so, we must have regard to:

- the National Gas Objective
- the form of regulation factors
- for a greenfields incentive determination:
 - the extent to which the form of regulation factors or competition to develop the pipeline (whether formal or informal) between 2 or more unrelated prospective service providers will, or is likely to, pose an effective constraint on the exercise of market power in respect of services provided by means of the pipeline for the period the determination is in operation, and
- any other matters we consider to be relevant.

The National Gas Objective is currently.¹¹³

¹¹¹ NGL, s 112(2).

¹¹² NGL, s 112(2).

¹¹³ NGL, s 23.

'to promote efficient investment in, and efficient operation and use of, covered gas services for the long-term interests of consumers of covered gas with respect to:

- (a) price, quality, safety, reliability and security of supply of covered gas; and
- (b) the achievement of targets set by a participating jurisdiction –
 - (i) for reducing Australia's greenhouse gas emissions; or
 - (ii) that are likely to contribute to reducing Australia's greenhouse gas emissions.¹

The form of regulation factors are:¹¹⁴

- 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 covered gas service provided by a service provider and any other covered gas service provided by the service provider
- c) the presence and extent of any network externalities (that is, interdependencies) between a covered 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).

5.1.2 Applying the regulatory determination test

The regulatory determination test requires the AER to consider how effective each form of regulation (i.e. full and light regulation) will likely be in promoting access to pipeline services and to weigh this against the likely costs of each form of regulation to service providers, users and end users. We will compare how effective and costly each form of regulation is likely to be to reach a conclusion about which form of regulation should apply to the pipeline and whether we should make the determination. In making the comparison, we will consider the key differences between full and light regulation, and the likely impact that these will have on promoting access and costs. This is a **qualitative**, and **not a quantitative** assessment. We will not attempt to quantify the full value of the benefits and costs under each form of regulation. However, we will consider quantitative data where relevant.

There are several matters the AER must have regard to in making this assessment. We must consider whether making the relevant determination is consistent with achieving the National Gas Objective. This will involve considering the impact that each form of regulation will have on the efficient investment in, and operation and use of, gas services for the long-term interests of consumers of covered gas.

¹¹⁴ NGL, s 16.

We must also consider the form of regulation factors. This will help us to assess the level of market power of the service provider, and how effective each form of regulation will be in promoting access to the service.

We can also have regard to any other matters we consider relevant. What these matters may be will depend upon the circumstances of the determination that we are considering. However, they must be relevant to our consideration of how effective each form of regulation will be in promoting access to the pipeline, and the impact that making the determination will have on the costs to the service provider, users of the pipeline and end users.

In making our assessment under the regulatory determination test, we will also consider the strength of evidence provided on the likely benefits and costs of each form of regulation.

There are also additional matters we must consider when assessing a greenfields incentive determination, discussed in section 5.4.

5.2 Elements of the regulatory determination test

This section looks at how we will assess each element of the regulatory determination test in detail. In conducting the assessments outlined below, we will have regard to the National Gas Objective and the form of regulation factors.

5.2.1 Promotion of access to pipeline services

The first element of the regulatory determination test is considering the likely effect that full and light regulation will have on the ‘promotion of access to pipeline services’. In assessing whether access is promoted, we will look at:

- the ability of users and potential users to negotiate access to pipeline services
- price terms that may be offered or negotiated
- non-price terms and conditions of access that may be offered or negotiated.

In making the comparison between the likely outcomes under full and light regulation, we will focus on the key differences between full and light regulation (see section 2.1.3).

5.2.2 Effect on costs

The second element of the regulatory determination test is to compare the costs incurred by an efficient service provider, an efficient user or prospective users of the pipeline services, and end users (or consumers of gas), under the full and light forms of regulation. The costs under this part of the test are the regulatory costs incurred by each type of participant in the market for gas pipeline services, as well as end users, due to the pipeline being subject to full or light regulation.

Costs incurred by an efficient service provider

The first type of costs we must consider are the likely costs to the service provider of each form of regulation. In our assessment, we will consider the costs that would likely be incurred by a service provider acting in an *efficient manner*. A service provider acting in an efficient manner will take steps to minimise its transaction and regulatory costs.

As many of the obligations under full and light regulation are the same (e.g. ring-fencing requirements and information disclosure requirements), we will focus our assessment on the

regulatory costs to a service provider which are likely to differ under the two forms of regulation. Examples where regulatory costs may differ include:

- for light regulation:
 - the costs involved in commercial arbitration if an access dispute were to arise.¹¹⁵
- for full regulation:
 - the costs involved in participating in the access arrangement approval process with the AER
 - the costs of complying with a reference tariff variation mechanism.

We may request a service provider to submit an estimate of the costs of full and light regulation. If we do this, we will consider such information in making our assessment, but will also take other information into account to make an independent assessment of the level of likely costs to a service provider.

Costs likely to be incurred by efficient users and prospective users

The second type of costs we must consider are the costs to users and prospective users. We will consider the costs that would be incurred by a user or prospective user acting in an *efficient manner*, who will seek to minimise their own regulatory and transaction costs.

We expect that the largest costs incurred by users and prospective users will be the costs of negotiating access, and potentially resolving access disputes. We will consider the likely costs on a case-by-case basis, taking into account the specific circumstances of users and prospective users of the pipeline in question. However, generally we would expect that costs to users or prospective users will be lower where a pipeline is fully regulated.

The likely costs of end users

Finally, we must consider the costs to end users of **covered gas** likely to be incurred under the different forms of regulation. Generally, the end users of gas will not directly face any regulatory costs. However, the regulatory costs incurred by service providers, and users of the service, may be passed on to end users. For example, a service provider may pass on their regulatory costs to a gas retailer who uses their service. The retailer may then pass these costs on to end users (gas consumers) in the form of higher retail gas prices. We will also consider any other burdens which may be felt by end users under the two forms of regulation.

5.3 Form of regulation factors

As discussed above, we must have regard to the form of regulation factors in applying the regulatory determination test. Considering these factors helps us to assess the level of market power held by a service provider and the extent to which it may exercise that market power. This is particularly important to our assessment of how effective full or light regulation will be in promoting access to the pipeline.

¹¹⁵ For non-scheme pipelines, access disputes are referred to commercial arbitration for resolution. In contrast, for scheme pipelines, access disputes are resolved by the AER with reference to the access arrangement.

While we 'must have regard to' all the form of regulation factors, we do not need to give equal weight to all factors in considering whether to make a form of regulation or greenfields determination. The significance of, and the interaction between, each factor will vary on a case-by-case basis.

We discuss each of the form of regulation factors below.

5.3.1 Barriers to entry

The first of the form of regulation factors is:

the presence and extent of any barriers to entry in a market for pipeline services;

Barriers to entry are any factors or features of a market that prevent, deter, or hinder new entry by a new service provider that would otherwise effectively compete with incumbent service providers. Barriers to entry are a primary determinant of the existence of market power. When barriers to entry are high, new players are less likely to enter the market and impose a competitive constraint on the degree of market power the incumbent can exercise. Types of barriers to entry include, but are not limited to:

- legal or regulatory barriers (e.g. licensing and government regulations)
- structural or technological barriers (e.g. existence of sunk costs, economies of scale and scope)
- strategic barriers (e.g. risk of retaliatory action by incumbents against new entrants).

The market for the supply of gas pipeline services will generally have high barriers to entry given the substantial costs associated with building a gas pipeline. However, the extent of barriers can differ depending on the pipeline, and we will consider the circumstances of each pipeline on a case-by-case basis.

5.3.2 Network externalities

Market power held by service providers, and the degree to which they can exercise market power in negotiations with users of prospective users, is influenced by the presence of network externalities. There are two form of regulation factors which address this and are discussed below.

'Network externalities' as discussed here does not relate to the economic meaning of the term (i.e. referring to how the benefit an agent derives from a good changes as the number of other agents consuming the same kind of good changes). In this context, 'network externalities' refers to the way in which a service provider's market power is affected by other services it provides.

In assessing network externalities, we will consider the effect of the ring-fencing provisions in the NGL that are intended to prevent cross-subsidisation and discrimination in favour of related parties. These provisions may mean that the provision of other gas pipeline services by the service provider has little impact on the provision of the pipeline service in question. However, we will consider the circumstances of each pipeline on a case-by-case basis.

Network externalities between gas services provided

The second form of regulation factors is:

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

This factor will be relevant where the service provider provides any other covered gas service, such as other gas pipeline services, or related services such as production or storage.¹¹⁶ Where this is the case, we will consider how the provision of these other services impacts the level of market power of the service provider, its ability to exercise this market power, as well as the incentives it has to provide access to pipeline services. How this factor will impact our assessment will vary on a case-by-case basis and depend upon the type of services supplied.

However, providing other services can be a source of market power. This is because it is usually more efficient to have one service provider provide a pipeline service to a given geographical area. Additionally, it may be more efficient to have the same company provide other pipeline services to the same geographical area. Some examples of interdependencies (network externalities) include:

- **Storage services:** Where a service provider also owns or provides access to storage facilities, or provides storage on the pipeline, it can result in economies of scope and potentially strengthen the pipeline owner's degree of market power or reinforce its ability to exercise market power. This is because storage provides a service provider with flexibility in providing pipeline services and can make their services more attractive to users or potential users.
- **Provision of other pipeline services:** An independency may also arise when a pipeline owner also owns other pipelines, especially if they are connected into a 'meshed' network. The ownership of a network of pipelines may provide the pipeline owner with efficiencies and affect its incentives in terms of access provision relative to an owner of a single pipeline.

Network externalities between services provided in another market

The third form of regulation factor is:

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

This factor is relevant where the service provider operates in any market other than a market for a covered gas service. These services could include retail gas services and/or other utility services (e.g. water and electricity). Where this is the case, we will consider how this impacts the degree of market power of the service provider, and its ability to exercise such market power.

5.3.3 Countervailing market power

¹¹⁶ A covered gas service means a pipeline service, the supply of natural gas, or a service ancillary to the supply of covered gas (NGL, s 2).

The fourth form of regulation factor is:

the extent to which any market power possessed by a service provider is, or is likely to be, mitigated by any countervailing market power possessed by a user or prospective user;

Countervailing market power can occur where one or more users have negotiating power which constrains a service provider's ability to exercise their market power in negotiation of the terms and conditions of access.

Countervailing market power may arise from users having credible alternatives to using the pipeline. Other factors which can give rise to countervailing market power in relation to gas pipeline services include size and number of users of a pipeline service. For example, where users are sufficiently large and concentrated, a service provider may risk full or partial stranding of assets if these users do not purchase supply from them. In this scenario, if the users or potential users have credible alternatives to using the pipeline, they may be able to credibly threaten to withdraw their demand for pipeline services. In this case, the countervailing market power of the users may mitigate the market power of the service provider.

5.3.4 Substitutes and the elasticity of demand

Market power held by service providers, and the degree to which they can exercise market power in negotiations with users or prospective users, is influenced by the range of available or potentially available substitutes. There are two form of regulation factors which address this.

Substitutes and demand for pipeline services

The fifth of form of regulation factors is:

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;

Under this factor we will consider the substitutes, and elasticity of demand for the pipeline service. The extent of market power held by service providers is constrained by competing gas pipeline services in a specified area. These competing pipelines may be in the form of:

- another pipeline which allows gas to be transported from the same gas source to the same point(s) as the pipeline in question, or
- another pipeline which allows gas to be transported to the same point(s) as the pipeline question, but from a different gas source.

When assessing these alternatives and the degree to which they are substitutes, we will consider several factors, such as the following:

- The level of spare capacity on any alternative pipelines and the level of gas reserves at basins being connected by the pipelines: Alternative pipelines will generally be better substitutes if they have available capacity to support additional users and connect to gas sources where there are sufficient reserves of gas to serve additional users. For example, if there is an alternative pipeline which could be used, but this pipeline is

operating at capacity such that it cannot support many additional users, it will not be a strong substitute for the pipeline in question.

- The cost of acquiring alternative pipeline services: While a user or prospective user may have alternative routes for the transportation of their gas, they may not be strong substitutes if using the alternative route is significantly more costly than using the pipeline in question.
- Elasticity of demand for the pipeline service: where the elasticity of demand of a pipeline service is high, a price increase will lead to a greater reduction in demand than when elasticity of demand is low. Where the elasticity of demand for services on the pipeline in question is low, it is less likely that alternative pipelines will be substitutes.

Substitutes and elasticity of demand in a market for electricity or gas

The sixth form of regulation factor is:

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);

Under this factor, we will consider the degree to which the users of the gas transported by the pipeline may be able to use alternative energy sources (e.g. electricity, diesel, or coal). The degree of substitutability between gas and the alternative energy source for end users will affect the service providers market power (i.e. it will likely be greater where the alternative energy source is not a strong substitute for gas).

Electricity, diesel, coal, or LPG may be full or partial substitutes for **covered gas** acquired by the pipeline for some end-users (or customers). The degree to which these other energy sources are substitutes will depend on factors such as the type of end user and their how they use gas.

For example, for some commercial and industrial customers alternative energy sources may not be an effective substitute for **covered gas**, such as where they require **covered gas** as a raw material in production processes, or it is essential for the operation of equipment. Conversely, other commercial and industrial users may use gas as it is 'their preferred fuel' but could use other energy sources. Here, there will be greater substitutability between gas and the alternative fuels.

Retail energy companies are another group of users that may be relevant when considering substitutability. Whether these users will see alternative energy sources as a substitute service will depend on a range of factors such as retail customer (or end-user) demand for gas services, and the costs to the retail service provider of switching between retailing gas and another form of energy service.

5.4 Greenfields determinations

Greenfields incentives and price protection determinations are available to ensure that the possibility of full regulation does not disincentivise new pipeline development. This section looks at the tests the AER must apply in deciding whether to make such a determination.

5.4.1 Greenfields incentive determination

As discussed in section 2.2.1, greenfields incentive determinations can be sought for greenfields pipeline projects (new pipelines or a major extension to existing pipelines) that have not yet been commissioned. This means that the regulatory determination test requires us to take additional matters into account, when considering whether to make a greenfields incentives determination.

As outlined above, when considering whether or not to make a greenfields incentive determination the AER must consider the effects that full and light regulation will likely have on promoting access, and costs. In doing so, we must have regard to the National Gas Objective and the form of regulation factors. We will conduct this part of the assessment as described in sections 5.2 and 5.3.

However, for a greenfields incentive determination, we must also have regard to the following additional matters:

the extent to which:

- the form of regulation factors, or
- competition to develop the pipeline

will, or is likely to, effectively constrain a service provider's ability to exercise market power through the operational period of the determination.

This section outlines how we will assess these additional matters.

How the form of regulation factors may constrain a service provider's market power

Firstly, we will assess each form of regulation factor to determine whether they will, or are likely to, affect a service provider's degree of market power or their ability to exercise market power for the period of the determination. This assessment will be largely the same as that outlined in section 5.3.

How competition to develop the pipeline may constrain a service provider's market power

Second, we will assess the level of competition to develop the pipeline in question, and whether this will constrain the service provider's ability to exercise market power in the future.

In looking at these criteria, we will consider whether competition to develop the pipeline has resulted in competitive terms and conditions of access being offered to prospective users of the pipeline, such that the ability of the service provider to exercise market power in the future is constrained. Factors that we may consider in assessing whether the development of the pipeline is occurring under competitive conditions and whether this may constrain a service providers market power, include:

- the number of prospective service providers seeking to develop the pipeline
- the credibility of the proposals to develop the pipeline service
- the extent to which contracts, and agreement of terms and conditions, were reached
- the areas and customers that each prospective service provider was intending to service.

5.4.2 Greenfields price protection determination

A greenfields price protection determination is available to a pipeline that has a greenfields incentives determination and has not yet been commissioned. It effectively 'protects' the terms and conditions specified in the determination if there is an access dispute.

The test for making a greenfields price protection determination differ to those for making form of regulation or greenfields incentives determination. Instead of the regulatory determination test applying, we may make a greenfields price protection determination if we are satisfied that one of two sets of conditions are met.

Pipeline developed following a competitive process

First, we may make a greenfields price protection determination if we are satisfied that:

- a) the pipeline was developed following a competitive process, and
- b) the price and non-price terms and conditions for pipeline services that will be available to prospective users (as set out in the service provider's application) during the operative period have been set because of that competitive process.¹¹⁷

Under the NGR, we must find that the criterion (a) is met if we are reasonably satisfied that there was competition (whether formal or informal) to develop the pipeline between two service providers that:

- they were not related bodies corporate of each other, and
- did not include a body corporate of the service provider.

That is, we may find (a) is satisfied, if there was competition between two unrelated service providers to develop the pipeline. This competition could be the result of a 'formal' competitive process such a tender process to which potential service providers submit bids. It could be less formal, where two or more service providers made credible proposals to develop new pipeline services that were largely substitutes (e.g. they served the same areas and customers). This may occur where service providers are proposing to build pipelines which connect the same areas but have different routes, or where one service provider proposes to expand the capacity of a pipeline, while another proposes to build a new pipeline to meet an increase in demand for pipeline service.¹¹⁸

For criterion (b) to be met, we must be satisfied that the terms and conditions of access to the pipeline that will be offered were set as a result of the competition identified in part (a).

Constrained market power and the promotion of the National Gas Objective

Second, we may make a greenfields price protection determination if we are satisfied that:

- c) one or more form of regulation factors effectively constrained the exercise of market power of the service provider when the prices and other terms and conditions that will be made available to prospective users for the duration of the greenfields price protection determination were determined, and

¹¹⁷ NGL, s 110.

¹¹⁸ See NGL, s 110(2).

- d) the making of the determination will contribute to the achievement of the National Gas Objective.¹¹⁹

As discussed above, the form of regulation factors assists us in making an assessment of the market power of a service provider. In considering whether criterion (c) is met, we will look at each of the form of regulation factors to determine whether the market power of the service provider was likely constrained at the time they set the price and other terms and conditions. For example, we may consider that the countervailing market power of users or prospective users, or the fact that there were substitutes placing competitive pressure on the service provider, constrained its market power. Each of the form of regulation factors, and how these may constrain a service providers maker power is discussed in section 5.3.

In considering criterion (d) we assess whether a determination will contribute to the achievement of the National Gas Objective. We will primarily look at whether making the determination will promote the efficient investment in, and operation and use of, **covered gas services**.

¹¹⁹ See NGL, s 110(1).

6 Classification and reclassification of pipelines

This chapter sets out guidance on making an application for classification or reclassification of a pipeline, and how we will approach and assess these applications.

6.1 What is pipeline classification?

All pipelines, whether scheme or non-scheme pipelines, are either classified as a transmission or distribution pipeline. Whether a pipeline is a transmission or distribution pipeline depends on its primary function. A distribution pipeline reticulates gas within a market. A transmission pipeline conveys gas to a market.¹²⁰

If a newly commissioned pipeline is not classified as a distribution or transmission pipeline, the service provider must apply to the AER for it to be classified within 20 business days after the commissioning of the pipeline.¹²¹

Where a pipeline is classified as a transmission or distribution pipeline, a service provider may apply for it to be reclassified as a distribution or transmission pipeline respectively if it considers that the pipeline is wrongly classified.¹²² We may also decide to reclassify a pipeline at our own initiative.¹²³

6.2 Applying for pipeline classification or reclassification

A service provider may apply for a classification and reclassification decision to us in writing and accompanied by the respective application fee (as specified in the National Gas Rules).¹²⁴

Any application for a classification and reclassification decision must:¹²⁵

- include the service provider's name and contact details
- identify the pipeline to which the application relates
 - specify the nature of the classification sought by the service provider and **for reclassification applications**, why this classification is more consistent with the National Gas Objective than the current classification
- demonstrate that the classification or reclassification would be consistent with the pipeline classification criterion (discussed below)
- include any other information and materials on which the service provider relies in support of the application.

¹²⁰ NGL, s 13(1).

¹²¹ NGL, ss 117(1) and 117(2).

¹²² NGL, s 118(1).

¹²³ NGL, s 118(1).

¹²⁴ NGR, r 29D. The application fee is specified in schedule 5 of the National Gas (South Australian Regulations). As at May 2023, the fee for an application for a pipeline classification or reclassification was \$2000.

¹²⁵ NGR, rr 29D and 29E.

Other information and materials that could be relied upon could include relevant technical and market information such as the markets served by the pipeline, injection points and the diameter and pressure of the pipeline.¹²⁶

We encourage parties to consider these matters in deciding whether to make a pipeline classification or reclassification application.

6.3 Process for assessing classification and reclassification applications

6.3.1 Timing and consultation process

Once we receive an application for a pipeline classification or reclassification decision or initiate a review of a pipeline reclassification, we will commence our consideration of, and consultation, on the application, in accordance with the expedited consultative procedure.¹²⁷ The consultation process is as follows:

- We receive an application for a pipeline classification or reclassification decision from a service provider.¹²⁸
- If we decide to reclassify a pipeline at our own initiative, we will notify the service provider as soon as possible that this is under consideration.¹²⁹
- We may consult with stakeholders on the application.¹³⁰ Consultation may include targeted stakeholder meetings or us seeking written submissions. Where we undertake consultation, it will generally not be longer than 15 business days.
- We will publish a draft decision on whether or not to make a pipeline classification or reclassification, generally within 6 to 8 weeks, of receiving the application.¹³¹ Our draft will outline the reasons for the decision, how we considered and addressed stakeholders' views, and explain the effects of the decision.¹³²
- Stakeholders will have 15 business days to make submissions on our draft decision.¹³³ The service provider will receive copies of the draft decision.¹³⁴
- Prior to making our decision, we will consult with:
 - Australian Energy Market Operator
 - the AEMC
 - the relevant jurisdictional safety and technical regulator¹³⁵

¹²⁶ NGL, s 13.

¹²⁷ NGR, rr 9 and 29F(1).

¹²⁸ NGR, rr 29D and 29E.

¹²⁹ NGR, rr 29F(2).

¹³⁰ NGR, r 9(2)(a).

¹³¹ NGR, r 9(2)(c).

¹³² NGR, r 9(2)(c).

¹³³ NGR, r 9(2).

¹³⁴ NGR, rr 9(2)(a) and (b).

¹³⁵ NGR, rr 29F(3)(c) and 29F(3)(d).

- the Minister of the participating jurisdiction, if a pipeline is wholly situated within a participating jurisdiction, or
 - the Minister of each participating jurisdiction in which the pipeline is situated, if a pipeline is partly situated in the jurisdictional areas of two or more participating jurisdictions.¹³⁶
- We will then make our final decision on whether to make a pipeline classification or reclassification within 20 business days of submissions closing.¹³⁷ We will also provide copies of the final decision to the service provider and publish it on our website.¹³⁸
 - Generally, we will aim to make a decision on the classification or reclassification application within 3 months of receiving it or initiating a review for pipeline reclassification.

6.3.2 Assessment approach for classification or reclassification applications

In making a classification or reclassification decision, we must have regard to the National Gas Objective (discussed in section 5.1.1) and the pipeline classification criterion, which is set out in section 119(2) of the NGL.¹³⁹

National Gas Objective

In having regard to the National Gas Objective, we must consider whether making the classification or reclassification decision is consistent with the objective. We will therefore consider whether the change in classification is likely to affect the efficiency of pipeline access, the operation of gas markets and the rights of third parties.

Pipeline classification criterion

The pipeline classification criterion requires us to consider whether the primary function of a pipeline is to:

- reticulate gas within a market (the primary function of a distribution pipeline), or
- convey gas to a market (the primary function of a transmission pipeline).¹⁴⁰

The primary function of the pipeline

In determining the primary function of a pipeline, we must have regard to whether the characteristics of the pipeline are those of a transmission pipeline or distribution pipeline.¹⁴¹ The general characteristics of a transmission pipeline and a distribution pipeline are summarised in Table 6.1 below.

¹³⁶ NGR, rr 29F(3)(a)(i) and 29(3)(a)(ii).

¹³⁷ NGR, r 8.

¹³⁸ NGR, r 29G.

¹³⁹ NGL, s 13.

¹⁴⁰ NGL, s 13(1).

¹⁴¹ NGL s 13(1).

Table 6.1 – Characteristics of distribution and transmission pipelines

Criteria	Distribution Pipeline	Transmission Pipeline
Diameter	<ul style="list-style-type: none"> Smaller diameter than transmission pipelines 	<ul style="list-style-type: none"> Greater in diameter than distribution pipelines (usually 300mm or more)
Pressure	<ul style="list-style-type: none"> Lower pressure 	<ul style="list-style-type: none"> Higher pressure to optimise shipping capacity
Area served	<ul style="list-style-type: none"> Operates in a network, delivering gas from points along transmission pipelines to industrial customers, and from gate stations to customers in cities and towns 	<ul style="list-style-type: none"> Operates in various separate markets in a linear market Gas is transported over long distances from processing or storage facilities to domestic markets
Pipeline configuration	<ul style="list-style-type: none"> Usually has more injection points 	<ul style="list-style-type: none"> Usually has less injection points Can have a range of off-take points to transport gas to different areas (e.g. the Victorian Principal Transmission System)

Further, in considering the primary function, we must have regard to:¹⁴²

- the characteristics and classification of, as the case requires, an old scheme transmission pipeline or an old scheme distribution pipeline (that is, we may consider how a pipeline was classified prior to the introduction of the NGL)
- the characteristics of, as the case requires, a transmission pipeline or a distribution pipeline classified under the NGL
- the characteristics and classification of pipelines specified in the NGR (if there are any)
- the diameter of the pipeline
- the pressure at which the pipeline is or will be designed to operate
- the number of points at which gas can or will be injected into the pipeline
- the extent of the area served or to be served by the pipeline
- the pipeline's linear or dendritic configuration
- the type of pipeline licence or authorisation that has been obtained in respect of the pipeline under jurisdictional gas legislation (that is, if a pipeline is classified as a transmission pipeline or distribution pipeline).

6.4 Content and effect of a classification or reclassification decision

If we make a classification or reclassification decision, our decision will identify the pipeline or part of the pipeline to which the decision relates.¹⁴³

¹⁴² NGL, s 13.

¹⁴³ NGR, r 29G(1).

The decision may also include any other information that we consider to be appropriate, such as:

- the date the decision takes effect
- a summary of views provided by stakeholders during consultation and how we have addressed these views in our decision
- the matters we took into account in reaching our decision
- the reasons for our decision, including how we applied the statutory test.

If we decide to make a classification or reclassification decision, the decision will take effect upon the making of the decision.¹⁴⁴ Therefore, on the making of a classification or reclassification decision, the following applies:¹⁴⁵

- if we classify a pipeline as a distribution pipeline in a classification decision, the pipeline will be a distribution pipeline
- if we classify a pipeline as a transmission pipeline in a classification decision, the pipeline will be a transmission pipeline
- if we classify a pipeline as a distribution pipeline in a reclassification decision, the pipeline will be a distribution pipeline, or
- if we classify a pipeline as a transmission pipeline in a reclassification decision, the pipeline will be a transmission pipeline.

If we decide not to make a classification or reclassification decision, the classification or reclassification of the pipeline will remain unchanged.

A classification or reclassification decision or a decision not to make a classification or reclassification decision will be made publicly available (e.g. on the AER's website).¹⁴⁶ We will also provide a copy of the classification or reclassification decision or a decision not to make a classification or reclassification decision to the service provider and the AEMC.¹⁴⁷

¹⁴⁴ NGL, s 120.

¹⁴⁵ NGL, s 120.

¹⁴⁶ NGL, s 119(2)(d).

¹⁴⁷ NGR, r 29G(2).

Appendix A – Summary of scheme and non-scheme pipeline regulation

Obligation type ¹⁴⁸	Scheme pipeline	Non-scheme pipeline
Access obligations ¹⁴⁹	<ul style="list-style-type: none"> • Must submit detailed access arrangement information and keep this information available (rules 42 and 43). • This includes detailed financial and operational information (rule 72). • There may also be additional information requirements to enable the AER to assess an access arrangement as a regulatory information instrument (section 48). 	<ul style="list-style-type: none"> • Not required to submit or have approved access arrangement information.
Price regulation ¹⁵⁰	<ul style="list-style-type: none"> • Price discrimination is recognised in prudent discount provisions (rule 96) and principles for distribution services (rule 94) • Service providers can offer other discounts, which are not reflected in reference tariffs (rule 96). 	<ul style="list-style-type: none"> • Prohibition on price discrimination unless it is conducive to the provision of efficient services (section 228L).
Information disclosure ¹⁵¹	<ul style="list-style-type: none"> • Required to publish information in accordance with the access information standard (rules 101 and 101A). • Must provide certain information about service and access information, standing terms, financial information and actual prices payable information in accordance with the NGL and the pipeline information disclosure guidelines (rule 101A). 	
Dispute resolution ¹⁵²	<ul style="list-style-type: none"> • A user or prospective user can notify the dispute resolution body of the access dispute (section 152(2)(a)). The dispute resolution body means the AER (except WA, where the body is the Western Australian Energy Disputes Arbitrator). • Can be dealt with in accordance with a fast track resolution process under the NGR (section 173). • Any other person who applies in writing in accordance with the NGR can be made a party if the dispute resolution body accepts it 	<ul style="list-style-type: none"> • A user or prospective user can notify the AER of the access dispute (section 152(2)(b)). • The AER will refer the dispute to arbitration (section 159(2)) in accordance with section 160. • An access determination may deal with any matter relating to access by the user or prospective user to the pipeline services specified by the Rules (section 161(3)). • Restrictions on access determinations apply (section 163).

¹⁴⁸ Table references to 'section' refer to provisions under the NGL while references to 'rule' to provisions under the NGR.

¹⁴⁹ NGL, s 133.

¹⁵⁰ NGL, Pt 5.

¹⁵¹ NGR, Pt 10.

¹⁵² NGR, Pt 12.

Obligation type ¹⁴⁸	Scheme pipeline	Non-scheme pipeline
	<p>as having a sufficient interest (section 154(1)(d)).</p> <ul style="list-style-type: none"> • Parties may be required to engage in alternative dispute resolution (section 155). • Small shippers may elect to have the dispute mediated (section 156). • An access determination may deal with any matter relating to access by the user or prospective user to the pipeline services specified by the Rules (section 161(3)). • Restrictions on access determinations apply (section 163). • The access determination can be varied on the application of any party to the determination but the final determination cannot be varied if any other party objects (section 167(2)). • Parties bear their own costs except to the extent that an order under Part 10 specifies otherwise (section 185). • The dispute resolution body must take into account the National Gas Objective and revenue and pricing principles in resolving a dispute (section 28). 	<ul style="list-style-type: none"> • The access determination can be varied by agreement between all parties to the access determination (section 168(2)). • Parties bear their own costs for arbitration, which is shared equally (sections 188(2) and 188(3)).
Competitive safeguards and prohibitions	<ul style="list-style-type: none"> • Pre-existing contractual rights are protected (section 114) for scheme pipelines. • There is a prohibition on service providers for the bundling of services (section 136B). 	<ul style="list-style-type: none"> • There is a prohibition on service providers for the bundling of services (section 136B).

Appendix B – Required information on pipeline descriptions for greenfields incentive determination applications

The pipeline description that a service provider must include in a greenfields incentive determination differs for proposed transmission and distribution pipelines as set out below.

Transmission pipeline

The description for a proposed transmission pipeline must include:

- a description which identifies the pipeline and its route
- the end points of the trunk of the pipeline (i.e. the points defining the extremities, where the trunk begins and ends)
- if a lateral forms part of the pipeline – the point where the lateral interconnects with the trunk and the end point of the lateral
- the range of diameters for the principal pipes (including laterals)
- an estimate of the pipeline's capacity and an estimate of the extent to which the pipeline's capacity is likely to be utilised by the applicant or associates, and
- a website address at which a map of the route of the pipeline may be inspected.

Distribution pipeline

The description for a proposed distribution pipeline must include:

- a description sufficient to identify the pipeline and its route
- the geographical area to be served by the pipeline
- the points at which natural gas is to be injected into the pipeline
- an estimate of the pipeline's capacity and an estimate of the extent to which the pipeline's capacity is likely to be utilised by the applicant or associates of the applicant, and
- a website address at which a map of the route of the pipeline may be inspected.