

Non-scheme Pipeline Arbitration Guide

National Gas Law and Rules Version 1

September 2017

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GPO Box 3131,
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or publishing.unit@acc.gov.au.

Inquiries about this publication should be addressed to:

Australian Energy Regulator
GPO Box 520
Melbourne Vic 3001

Tel: 1300 585165

Email: AERschemeadministrator@aer.gov.au
AER Reference: 62450

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1 Preliminary matters

1.1 Outline

This guide outlines the provisions for access negotiations and the determination of access disputes under Chapter 6A of the National Gas Law 2008 (NGL) and Part 23 of the National Gas Rules (Rules). It is published by the AER in its capacity as scheme administrator under Chapter 6A of the NGL and Part 23 of the Rules in accordance with r. 584.

The purpose of this guide is to give pool arbitrators, prospective users and service providers for non-scheme pipelines guidance about the process for requesting access and the determination of access disputes under the NGL and the Rules.

Specifically:

- section 2 provides an introduction and overview of the information disclosure and arbitration framework for non-scheme pipelines
- section 3 describes the information published by service providers and available to prospective users when considering whether to seek access to a non-scheme pipeline
- section 4 describes the process for making access requests and access offers
- section 5 describes arrangements for negotiation under Part 23 of the Rules prior to seeking arbitration to resolve an access dispute
- section 6 describes the process for referring an access dispute to arbitration and the arbitration process
- section 7 deals with access determinations and costs.

The guide is not binding on an arbitrator or the parties to an access dispute or on the AER. This guide provides a summary of the operation of the information and arbitration framework in the NGL and Rules and is intended for guidance only. Users of this guide should refer to the terms of the NGL and Rules to understand the full extent of their obligations and should seek their own legal advice about the interpretation and application of the NGL, the Rules and this guide.

All references to legislation in this guide, unless specified otherwise are references to the NGL and Rules. NGL references are denoted with an 's.' for a single section or 'ss.' for more than one section. Rule references are denoted with an 'r.' for a single rule or 'rr.' for more than one rule.

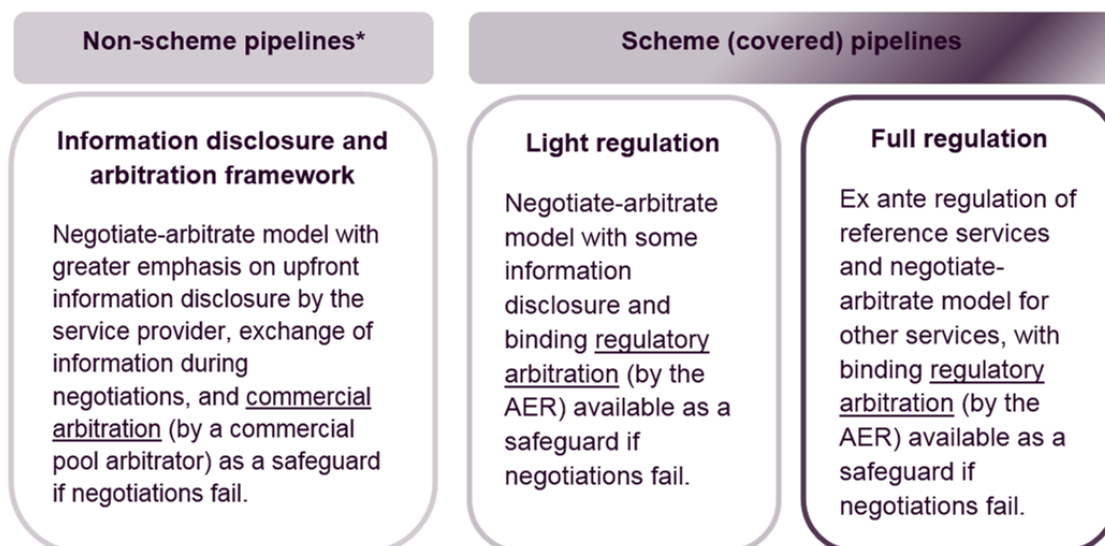
Under r. 584(4) the AER, in its capacity as scheme administrator, may amend this guide from time to time. A date of issue will identify each version of this guide.

1.2 Application of the guide

The information disclosure and arbitration framework for non-scheme pipelines, as reflected in Chapter 6A of the NGL and Part 23 of the Rules, operates alongside the coverage and

regulatory arrangements for other pipelines. Figure 1.1 indicates where the information disclosure and arbitration framework sits within the spectrum of access regimes applying to gas pipelines. Background information on the framework is provided at Appendix A.

Figure 1.1: Spectrum of access regimes applying to pipelines



Notes: * Subject to exemptions.

The information disclosure and arbitration framework only applies to non-scheme pipelines. In practice, non-scheme pipelines are distribution and transmission pipelines¹ that are not subject to either full or light regulation. Some pipelines will qualify for exemptions (see section 2.6 of this guide) and some matters are excluded (see section 6.2 of this guide) from information disclosure or arbitration under the framework.

The following terminology is used in this guide:

- the term 'prospective user' has the meaning in s. 216B² and is used interchangeably with the term shipper in section 2.1;
- the term 'user' has the meaning in s. 216A;³ and
- the term 'service provider' has the meaning in s. 8,⁴ and is used interchangeably with 'pipeline operator' in section 2.1.

¹ Under s. 216A a transmission or distribution pipeline means a pipeline that is classified in accordance with the NGL or Rules as a transmission or distribution pipeline and includes any extension to, or expansion of the capacity of, such a pipeline that, by operation of an access arrangement or access determination, is to be treated as part of the pipeline.

² Under s. 216B a prospective user is a person who seeks or wishes to be provided with a pipeline service by means of a non-scheme pipeline; to avoid doubt, a user is also a prospective user if the user seeks or wishes to be provided with a pipeline service by means of a non-scheme pipeline other than a pipeline service already provided to them under: (a) a contract; or (b) an access determination.

³ Under s. 216A a user means a person who: (a) is party to a contract with a service provider under which the service provider provides or intends to provide a pipeline service that that person by means of non-scheme pipeline; or (b) has a right under an access determination to be provided with a pipeline service by means of a non-scheme pipeline.

⁴ Under s. 8(1) a service provider is a person who - (a) owns, controls or operates; or (b) intends to own, control or operate, a pipeline or scheme pipeline, or any part of a pipeline or scheme pipeline.

2 Introduction

2.1 Objective

The overarching objective of the information disclosure and arbitration framework is to facilitate access to services provided by non-scheme pipelines on reasonable terms, which is taken to mean at prices and on terms and conditions that, so far as practical, reflect the outcomes that would occur in a workably competitive market (see Box 1).⁵ To that end, the framework:

- provides for the publication and exchange of information to facilitate timely and effective commercial negotiations;
- provides for a commercially-oriented arbitration process to resolve disputes about proposed terms and conditions of access in a cost-effective and efficient manner; and
- sets out the principles an arbitrator is required to have regard to when determining disputes, consistent with the outcomes that would be expected in a workably competitive market.

Box 1: Workable competition

The concept of workable competition, which underpins a number of access regimes in Australia, was described by the Independent Committee of Inquiry on National Competition Policy (the Hilmer Committee) in 1993 as follows:⁶

“In markets characterised by workable competition, charging prices above the level of long run average costs will not be possible over a sustained period, for higher returns will attract new market entrants or lead customers to choose a rival supplier or product...”

“Where the conditions for workable competition are absent — such as where a firm has a legislated or natural monopoly, or the market is otherwise poorly contestable — firms may be able to charge prices above the efficient level for periods beyond those justified by past investments and risks taken or beyond a time when a competitive response might reasonably be expected. Such “monopoly pricing” is seen as detrimental to consumers and to the community as a whole.”

It has also been described by the Australian Competition Tribunal (Tribunal) in *Re Queensland Co-operative Milling Association*; *Re Defiance Holdings* (1976) 25 FLR 169 at 188 as follows:

“As was said by the United States Attorney General’s National Committee to Study the Antitrust Laws in its Report of 1955 (at p 320): ‘The basic characteristic of effective competition in the economic sense is that no one seller, and no group of

⁵ See r. 546.

⁶ Independent Committee of Inquiry on National Competition Policy, National Competition Policy Review, 25 August 1993, p. 269.

sellers acting in concert, has the power to choose its level of profits by giving less and charging more. Where there is workable competition, rival sellers, whether existing competitors or new potential entrants into the field, would keep this power in check by offering or threatening to offer effective inducements...’.

More recently it was described by the Tribunal as follows:⁷

“Perhaps the best shorthand description of workable competition is to envisage a market with a sufficient number of firms (at least four or more), where there is no significant concentration, where all firms are constrained by their rivals from exercising any market power, where pricing is flexible, where barriers to entry and expansion are low, where there is no collusion, and where profit rates reflect risk and efficiency.”

In a similar vein, the New Zealand High Court has previously observed that:⁸

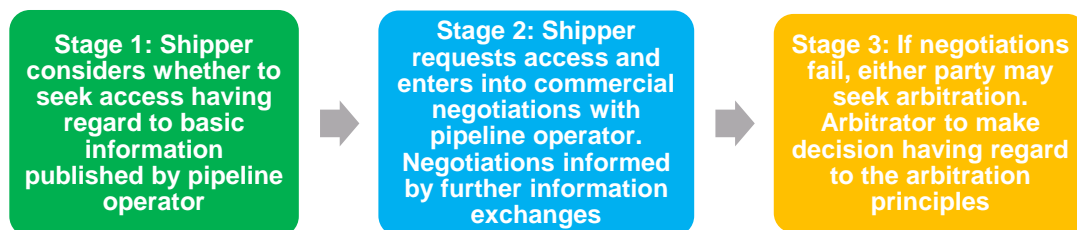
“...the tendencies in workably competitive markets will be towards the outcomes produced in strongly competitive markets. The process of rivalry is what creates incentives for efficient investment, for innovation, and for improved efficiency. The process of rivalry prevents the keeping of all the gains of improved efficiency from consumers, and similarly limits the ability to extract excessive profits”.

Further discussion of the objective and the principles to be applied in arbitration is in the explanatory note published by the GMRG in August 2017 to accompany the initial Rules.⁹

2.2 Stages of the framework

The framework provides for a staged approach. Figure 2.2 depicts the stages at a high level and Figure 2.3 provides an overview of steps associated with each stage, with black arrows depicting a required step and striped arrows depicting an optional or informative step.

Figure 2.2: Stages for information disclosure, negotiation and arbitration

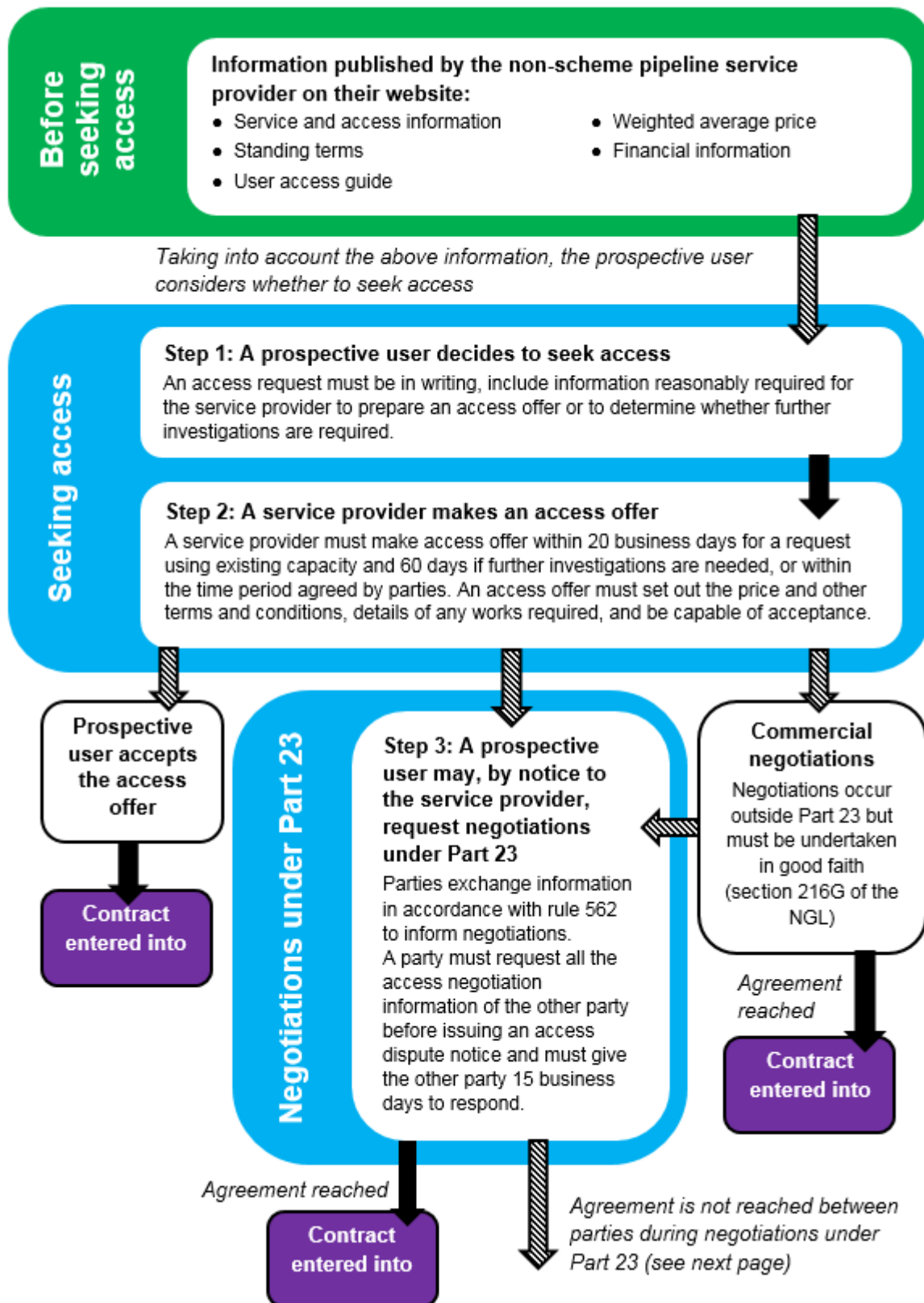


⁷ Application by Chime Communications Pty Ltd (No. 2) [2009] ACompT 2, para 37.

⁸ Wellington International Airport Ltd & Ors v Commerce Commission [2013] NZHC [11 December 2013], para 22.

⁹ GMRG, Gas Pipeline Information Disclosure and Arbitration Framework, Initial National Gas Rules, Explanatory note, 2 August 2017.

Figure 2.3: Steps associated with each stage



Step 4: A party submits an access dispute notice to the AER

The access dispute notice must be in writing, state the matters specified in rule 564(2) and be accompanied by the relevant fee (if any).

Step 5: An arbitrator is appointed

Parties must agree to an arbitrator and notify the AER of the agreed arbitrator within 10 business days or the AER will select an arbitrator. The AER must refer a dispute to a pool arbitrator no later than 15 business days after receipt of the access dispute notice.

Step 6: Parties provide statements

Parties to provide: within 10 days of referral, a statement listing access negotiation information provided to the other parties in negotiations and sought to be relied upon and any further information that a party seeks to rely on; and within 15 business days of referral a statement of the determination sought.

Arbitration procedures

Chapter 6, Part 6 of the NGL applies and the arbitrator has discretion to determine the other procedures to apply. An arbitrator may hold a hearing and/or appoint an independent expert.

The arbitrator must give effect to the obligation to exchange information in negotiations, in so far as doing so is consistent with the proper consideration of the dispute.

Step 7: The arbitrator makes an access determination

The arbitrator may make an interim access determination.

When making a final access determination the arbitrator must take into account:

- (a) the principle that access to pipeline services on a non-scheme pipeline must be on reasonable terms as defined in rule 546(1);
- (b) the pricing principles; and
- (c) the operational and technical requirements necessary for the safe and reliable operation of the pipeline.

The arbitrator must make a final determination in 50 business days, unless extended by agreement between the parties to up to 90 business days, and/or the arbitrator if the advice of an independent expert is sought, or a party is allowed time to prepare access negotiation information. The arbitrator must provide a statement of reasons.

A prospective user wishing to give effect to a final determination must notify the service provider and AER within 10 business days of the determination being made.

Costs of the arbitration will be shared equally between parties unless the arbitrator determines otherwise.

2.3 Legal framework

The NGL is set out in the schedule to the National Gas (South Australia) Act 2008 (SA). The NGL applies in each participating jurisdiction (other than Western Australia) under application legislation of each jurisdiction. Western Australia has its own versions of the NGL and Rules under the National Gas Access (WA) Act 2009 (WA).

The Rules are made under the NGL and have the force of law (s. 26). Interpretation rules in Schedule 2 to the NGL apply to the Rules (s. 20).

The National Gas (South Australia) (Pipelines Access—Arbitration) Amendment Act 2017 introduced a new s. 83A (relating to information) and a new Chapter 6A, amended s. 271 and gave the South Australian Minister power to make the initial rules about, among other things, access proposals, access disputes and arbitrations under Chapter 6A.

The initial Rules made by the Minister comprise a new Part 23 in the Rules and a new Schedule 4 to the Rules. Schedule 4 sets out derogations and transitional provisions including a fast-track arbitration process for non-scheme pipelines situated in Tasmania. The fast-track arrangements expire on 1 August 2018. They are not dealt with in this guide.

2.4 The role of the AER

The AER is an independent statutory authority established under Part IIIAA of the Competition and Consumer Act 2010 (Commonwealth).

The AER has two roles under Chapter 6A of the NGL and Part 23 of the Rules, as both regulator and scheme administrator. This guide is published by the AER in its capacity as scheme administrator.

As regulator, the AER has the monitoring, investigative and enforcement powers conferred on it by the NGL. The enforcement options available to the AER depend, in part, on whether the provisions in the NGL or Rules are designated as civil penalty provisions and/or conduct provisions in the NGL or the regulations made under the NGL (s. 3).

2.5 Exemptions

Under the Rules, a non-scheme pipeline service provider may apply to the AER for an exemption from the information disclosure and arbitration framework where the pipeline satisfies a relevant exemption criteria (r. 585). There are three categories of exemptions for non-scheme pipelines as outlined in Table 2.1.

Table 2.1: Exemptions available under Part 23

Exemption category	Exemption criteria
Category 1: Exemption from arbitration of access disputes	The pipeline does not provide third party access
Category 2: Exemption from information disclosure provisions	Either of the following: The pipeline does not provide third party access.

Category 3: Exemption from publishing service usage information, service availability information and financial information

The pipeline is a single shipper pipeline.
At any time, the average daily injection of natural gas into the non-scheme pipeline calculated over the immediately preceding 24 months is less than 10TJ/day.

The AER determines whether or not an exemption is granted. Exemptions may be time-limited, subject to conditions and varied at the AER's discretion.

Exemptions do not apply automatically. To benefit from an exemption, the service provider for the non-scheme pipeline must apply to the AER under Division 6 of Part 23 and be granted the exemption.

A service provider who wishes to apply for an exemption must complete the application form available on the AER's website. All applications will be assessed by the AER in accordance with the Rules.

Pipelines that hold an exemption will be identified in a public register of exemptions on the AER's website. The public register contains additional information including the location and/or part of the pipeline, the category of exemption, the date the exemption was granted and applicable conditions.

3 Before seeking access

3.1 Introduction

Part 23 requires service providers for non-scheme pipelines to publish information about the services they provide and how to seek access.

Information about services and financial information (referred to in section 3.2) is intended to assist prospective users to carry out a high-level assessment of the reasonableness of the service provider's standing price, as well as the terms and conditions associated with the service.

The user access guide (referred to in section 3.3) is intended to assist prospective users to navigate the access request process.

3.2 Service information and financial information

Division 2 of Part 23 of the Rules requires a service provider of a non-scheme pipeline to publish the following information on its website (or provide a link to the information if it is published on a Gas Bulletin Board):

- service and access information, covering information about the physical configuration of the pipeline, the services offered, available capacity and use of the service (r. 553);
- standing terms for each pipeline service offered including the standing price (r. 554);
- financial information for the non-scheme pipeline, which is to be published annually in accordance with the AER's financial reporting guideline (r. 555); and
- weighted average price information (r. 556).

To facilitate high quality and up-to-date information provision, service providers are required to prepare and maintain the information in accordance with an access information standard in r. 551.

For existing non-scheme pipelines (as at 1 August 2017 or before 1 January 2018), the service and access information and the standing terms are due to be published on 1 February 2018. Under the transitional rules, initial 6-month financial information will be published by either 31 October 2018 or 31 January 2019 depending on the financial year of the service provider (Rules Schedule 4, r. 2).

In its role as regulator, the AER will monitor compliance with the requirements to publish service information and financial information. The service provider's obligation to publish the information outlined above in accordance with rr. 551(1) and (3) and r. 552(1) are expected to be designated as civil penalty provisions for the purposes of the NGL.

The financial information and weighted average prices may not be sufficient for the prospective user to determine whether the price offered is cost reflective as this will depend on the methodology the service provider uses to determine its standing price. Further information is therefore expected to be disclosed during negotiations as described in section 5 of this guide.

3.3 User access guides

A service provider is required to develop, maintain and publish on its website a user access guide for each of its non-scheme pipelines (r. 558). One user access guide can apply to more than one non-scheme pipeline.

The purpose of the user access guide is to provide prospective users with information about the process for applying for access including who to contact and the information prospective users are expected to provide when making an access request.

Before requesting access to a non-scheme pipeline, prospective users should consult the applicable user access guide for information about the service provider's access process. Any questions about the access process or the requirements in a user access guide should be directed to the service provider concerned.

In its role as regulator, the AER will monitor compliance with the requirement to publish user access guides. The service provider's obligation to publish a user access guide is expected to be designated as a civil penalty provision for the purposes of the NGL.

4 Seeking access

4.1 Introduction

Part 23 provides a framework for prospective users and service providers to manage the process for seeking access (rr. 559 and 560). The framework is intended to operate flexibly to accommodate relatively straightforward requests, such as a request for a forward haul service using existing available capacity, through to more complex requests, such as interconnection or expansions.

For straightforward requests, an access request may be all that is required. For other requests, the parties may wish to have preliminary discussions and investigate options and costs before an access request is made.

A prospective user should consider the information about service availability and standing terms published by the service provider and any guidance provided by the service provider in the applicable user access guide. The prospective user may wish to contact the service provider to discuss its requirements and the process to be followed.

4.2 Key concepts

Four key concepts are used in rr. 559 and 560 and can be summarised as follows:

- access request - a request for access made by a prospective user, described in r 559(1);
- access offer - the service provider's response to an access request meeting the requirements in r. 560;
- further investigations - investigations undertaken by a service provider to determine what needs to be done to provide the access sought by a prospective user (r. 549); and
- preliminary enquiry - an enquiry about access made by a prospective user before making an access request.

4.3 Access requests and preliminary enquiries

A prospective user seeking access will make an access request under r. 559(1). The access request triggers the service provider's obligation to respond with an access offer under r. 560.

A prospective user may choose to make a preliminary enquiry before making an access request (r. 559(2)). A preliminary enquiry allows discussions with the service provider or further investigations to take place without triggering the service provider's obligation to give an access offer under r. 560.

Before making an access request, a prospective user should check the applicable user access guide for any guidance about the information to be included with the access request. An incomplete access request may lead to delay in obtaining a response, since the service provider can ask for additional information where the access request is incomplete (r. 559(4)) and must do so within 5 business days. A request for more information will stop

the time period agreed or prescribed by the Rules for the service provider to provide an access offer until the further information requested has been provided (r. 560(2)).

A prospective user can only amend an access request with the consent of the service provider, which must not be unreasonably withheld (r. 559(8)). A service provider can condition its consent on a reasonable extension to the time for making its access offer.

4.4 Further investigations

The service provider may notify a prospective user that further investigations are needed in respect of an access request (r. 559(5)). A service provider can only carry out further investigations in relation to an access request when and to the extent reasonably necessary and must carry out the investigations expeditiously (r. 559(6)). The service provider must notify the prospective user of any further investigations required within 10 business days after the receipt of the access request or, if applicable, information requested by the service provider to complete the access request.

If further investigations are required, the service provider and prospective user must negotiate in good faith regarding the terms and conditions of those investigations, including the reasonable costs to be paid by the prospective user and the timing for those investigations (r. 559(7)).

4.5 Access offers

Following receipt of an access request, a service provider must make an access offer to the prospective user that satisfies the requirements of r. 560(3). These requirements cover the price and other terms and conditions offered by the service provider and details of any works to be undertaken by either party. The access offer must be in a form capable of acceptance by the prospective user so as to constitute a new access contract or form part of an existing access contract.

The access offer must be made within the time agreed by the prospective user and the service provider or if no time is agreed, within:

- 20 business days after receiving the access request or, if applicable, any further information requested by the service provider to complete the access request; or
- if the service provider is required to carry out further investigations in relation to the access request, 60 business days after receiving the access request or, if applicable, any further information requested by the service provider to complete the access request. (r. 560(2)).

The obligation of the service provider in receipt of an access request to provide an access offer under r. 560(1) is expected to be designated as a civil penalty provision and a conduct provision for the purposes of the NGL.

It is expected that the parties will negotiate different time periods for access offers (that is, longer or shorter than the 20 or 60 business day periods that apply by default) on a case by case basis having regard to the nature of the access request and whether issues have been resolved or further investigations undertaken before the access request is made. Parties should also consider the duty to negotiate in good faith in s. 216G.

A service provider is not required to make an access offer in three situations (r. 560(4)).

- (a) The access request has been withdrawn by the prospective user.
- (b) The service provider has concluded that it is not technically feasible or consistent with the safe and reliable operation of the pipeline to provide the pipeline service requested, having used all reasonable efforts to accommodate the reasonable requirements of the prospective user.
- (c) The provision of the pipeline service requested would require the extension of the relevant non-scheme pipeline.

If a service provider does not make an access offer for the second reason described above, it must give the prospective user written reasons explaining why the requested pipeline service cannot be provided and, if there is some prospect that it will become possible to provide the requested pipeline service at some time in the future, details of when the requested pipeline service is likely to become available (r. 560(5)).

5 Negotiations under Part 23

5.1 Introduction

The negotiation framework in rr. 561 and 562 is aimed primarily at ensuring information is exchanged by the parties to the negotiations during negotiations and before a matter is referred to arbitration.

The service provider must, on request, provide *access offer information*, which is information relevant to the principles that an arbitrator will have regard to in determining access disputes, including information about the calculation of the price in an access offer and the costs of providing the service.

Both parties must, on request, provide *access negotiation information* which in summary is the access offer information of that party and any other information that the party may seek to rely on for the determination of an access dispute (including expert reports).

These obligations should be read in light of r. 568 under which:

- a party must seek leave to submit and rely on in an arbitration any access negotiation information that it failed to provide in negotiations;
- the arbitrator may direct a party to provide any access negotiation information that it failed to provide in negotiations; and
- the arbitrator may, among other things, draw adverse inferences in certain circumstances, including a failure to provide access negotiation information.

The service provider's obligation to provide access offer information is expected to be designated as a civil penalty provision and a conduct provision for the purposes of the NGL.

The arrangements for requesting information during negotiations under Part 23 do not prevent a party from providing the required information prior to a request being made.

5.2 Scope

Part 23 is not an exclusive framework for negotiations. A prospective user and service provider are free to negotiate outside the Part 23 framework and deal with a dispute in any other manner they agree (s. 216E). For example, a prospective user and service provider may agree to enter into mediation in an attempt to resolve a dispute about access.

The duty to negotiate in good faith applies to all negotiations (whether or not under Part 23) (s. 216G). Please also refer to the arbitrator's power to terminate an arbitration under s. 216O.

The negotiation framework in Part 23 does not apply to a matter that is excluded from arbitration under Part 23 (r. 561(2)) - refer to section 6.2 of this guide. If the parties agree, negotiations about those matters may take place outside the scope of Part 23.

5.3 Requesting negotiations under Part 23

If a prospective user has made an access request and wishes Part 23 to apply to the negotiations, it will need to notify the service provider under r. 561(1).

The negotiations may cover any aspect of access to the pipeline service sought by the prospective user, including whether access can be granted and the price and other terms of an access offer (r. 561(1)). If an access request is for more than one pipeline service, the prospective user may require a single negotiation process for those pipeline services (r. 561(6)).

A prospective user cannot request negotiations under Part 23 in respect of any matter excluded from arbitration under Part 23 (r. 561(2)).

5.4 Parties to the negotiations

The scheme administrator may join another person to an access dispute where the resolution of the access dispute may involve requiring that other person to do something (s. 216I).

To facilitate the early identification of parties, r. 561(5) requires all parties to the negotiations to use reasonable endeavours to identify any other person who may become a party to an access dispute. The prospective user and service provider may agree to include the other person as a party to negotiations under Part 23 (r. 561(3)).

5.5 Negotiation process

The parties must negotiate in good faith with respect to access to a pipeline service that is or will be provided by means of a non-scheme pipeline (s. 216G).

Each party to the negotiations must also seek to accommodate all reasonable requirements of the other parties regarding the timetable for negotiations (r. 561(4)). This may be regarded as a specific instance of negotiation in good faith and may also be a relevant consideration if leave is sought to submit additional access negotiation information under r. 568.

The Part 23 arbitration mechanism provides for the parties to make requests for information, as described in the following sections. Those requests, negotiations in relation to those requests (such as time limits), and the provision of information in response to those requests, are also subject to the duty to negotiate in good faith (r. 562(1)).

A prospective user may at any time bring the negotiations to an end by giving the service provider notice, whether or not the prospective user also refers or has referred a related access dispute to arbitration (r. 561(7)).

5.6 Access offer information

Access offer information is information relevant to the principles and other matters in r. 569 (refer to section 7.2 of this guide). It includes:

- information about the method used to determine the price in an access offer and the inputs used in the calculation of the price; and

- information regarding the costs associated with the provision of the pipeline services sought by the prospective user.

A prospective user can request access offer information by notice to the service provider (r. 562(2)). A prospective user can make more than one request and can make requests that relate to specific matters in the negotiations. The service provider must provide the access offer information within 15 business days after the request, unless the prospective user agrees a longer period (r. 562(3)).

Access offer information provided in response to a request under r. 562(2) must comply with the access information standard in r. 551(2), must be relevant to the subject matter of the request and must be in a readily readable form (including in electronic file format with all underlying data files and inputs, if requested) (r. 562(4)).

A service provider can request access offer information from the prospective user as part of a request for access negotiation information (r. 549 (1), definition of access negotiation information). Requests for access negotiation information are covered in the following section.

5.7 Access negotiation information

Access negotiation information is defined in r. 549(1) and covers:

- the party's access offer information; and
- other information of the party that the party may seek to rely on for the determination of an access dispute in relation to the subject matter of the negotiations.

Access negotiation information includes information prepared for a party such as expert reports and consultant reports, data sets, models and other documents or materials.

The definition applies to a party only in relation to information of that party. This means, for example, that r. 567 (see section 6.7) does not require a party to list the information of the other party that it seeks to rely on, but only its own information.

The second limb of the definition in r. 549(1) is limited to information that the party may seek to rely on for the determination of an access dispute in relation to the subject matter of the negotiations. This qualification means, for example, that r. 562(7) does not require a party to provide all relevant information but only the information it seeks to rely on. Similarly, the definition limits the operation of r. 568 so that leave is not required for information that is not access negotiation information.

A party to negotiations under Part 23 can request another party to the negotiations to provide that other party's access negotiation information. The request is made by notice and can be made more than once.

A request can be made in relation to a specific matter arising in the negotiations (r. 562(5)(a)). A request can also be made for all the access negotiation information of another party (r. 562(5)(b)). A request under paragraph (b) of r. 562(5) must be made before giving an access dispute notice (r. 562(6)(a)) and, if the request is made, the party making

the request must wait at least 15 business days before giving an access dispute notice (r. 562(7)).

Rule 562 does not require an access dispute to be referred to arbitration after a request is made under r. 562(5)(b).

The access negotiation information must be given within 15 business days after the requesting party gives its notice, unless the requesting party agrees a longer period (r. 562(7)). In making or considering a request for a longer period, the parties need to consider r. 561(4), the obligation to negotiate in good faith (r. 562(1) and the matters that an arbitrator will have regard to if an application is made for leave to submit additional information under r. 568(2)(b).

5.8 Confidentiality and legal professional privilege

A party is not required to disclose access offer information, access negotiation information or the other information described above if (rr. 562(8) and (9)):

- to do so would breach a confidentiality obligation owed in respect of that information to an unrelated third party and the third party has not consented to the disclosure despite reasonable efforts having been made to obtain consent;
- the information is the subject of legal professional privilege; or
- the information is contained in a document the disclosure of which would disclose information subject to legal professional privilege.

All information of a party provided to the other parties during the negotiations is confidential unless that information was already in the public domain at the time it was provided or subsequently entered the public domain in a permissible manner (r. 561(9)). A party must only use or reproduce confidential information for the purpose for which it was disclosed (r. 561(8)) unless one of the exceptions in the rule applies.

6 Arbitration process

6.1 Introduction

Part 23 provides for an arbitration mechanism in the event agreement cannot be reached between parties during negotiations regarding access to a service or services provided by a service provider of a non-scheme pipeline.

As provided for in s. 216E of the NGL, Part 23 does not limit how a dispute about access to a pipeline service can be raised or dealt with.

In practice, there are three requirements that must be satisfied for the arbitration arrangements provided by Part 23 to be used:

- the 'access dispute' must not be a matter which is excluded from arbitration (r. 563(2));
- an access request must have been made (s. 216H(1)); and
- where there are negotiations under Part 23, before an access dispute notice can be given, access negotiation information must have been requested and 15 business days have elapsed since that request (r. 562(6)).

There is no requirement for an access offer to have been made before an access dispute notice can be given.

As explained in this section, in addition to the Rules, arbitration under Part 23 is subject to:

- ss. 216I to 216V in Chapter 6A of the NGL;
- ss. 196 to 205 in Chapter 6 of the NGL, as applied s. 216S of the NGL;
- s. 275 of the NGL, in relation to enforcement; and
- procedures made by the arbitrator under the Rules or the NGL.

6.2 Disputes that can be referred to arbitration

The term 'access dispute' refers to a dispute between a user or prospective user and a service provider about one or more aspects of access to a pipeline provided by means of a non-scheme pipeline (s. 216A, definition of access dispute).

An access dispute can be referred to arbitration under Part 23 after an access request has been made under Part 23 (s. 216H(1)).

A prospective user, user or service provider can refer an access dispute to arbitration under Part 23 (s. 216H(1)). To do so, an access dispute notice must be given to the scheme administrator (s. 216H(1) and r. 564). Refer to section 6.3 below in relation to access dispute notices.

The matters for which an access dispute notice can be given include (r. 563(1)):

- a request for access to a pipeline service under a new access contract;
- a request to add a new pipeline service to an existing access contract;

- a request for a new access contract to take effect on the expiry of an existing access contract; and
- a request for a pipeline service commencing after the expiry of the service term for the same service under an existing access contract.

An access dispute notice cannot be given in respect of any matter which is excluded from arbitration by the Rules (s. 216H(4)). These matters are listed in r. 563(2) and cover:

- a dispute about a pipeline service provided under an existing access contract;
- a variation to the terms and conditions of access applicable to a pipeline service provided under an existing access contract for any part of the current service term for that pipeline service;
- an access request that would require the extension of a non-scheme pipeline;
- access to pipeline services on a non-scheme pipeline to the extent an exemption from the operation of Division 3 and Division 4 of Part 23 of the Rules has been granted in respect of the non-scheme pipeline and that exemption remains in effect; and
- the standard terms and conditions for secondary trading of capacity excluded from the operation of Part 23 of the Rules by the NGL or the Rules.

Even if one of these exclusions does not apply, the arbitrator has power to terminate an arbitration if the arbitrator considers that the terms and conditions on which access is to be granted should be governed by an existing contract or determination (s. 216O(2)(b)).

Where negotiations have taken place under Part 23, a party to the negotiations cannot give an access dispute notice unless the party has requested all access negotiation information under r. 562(b) and 15 business days have elapsed since that request (r. 562(6)).

The AER in its capacity as scheme administrator will not determine whether an access dispute notice relates to a matter excluded from arbitration or has been given before the expiry of the 15 business day period in r. 562(6). This is because s. 216J(1) requires the AER upon being notified of an access dispute to refer the dispute to arbitration. A question about the validity of an access dispute notice may be determined by the arbitrator given the powers of the arbitrator to terminate access disputes under s. 216O.

6.3 Form of access dispute notice

An access dispute notice is a notice given under s. 216H(1) under which a prospective user or service provider gives notice to the scheme administrator that an access dispute exists.

The access dispute notice must be in writing and state (s. 216H(2) and r. 564(2)):

- the pipeline service to which the access dispute notice relates and, if applicable, the access request and the access offer made in response to the request;
- the matters (if any) on which agreement has been reached between the parties to the access dispute and the matters that are in dispute;
- the name and address of the person giving the notice and of each other party involved in the access dispute; and

- if the person giving the notice reasonably believes another person may be joined as a party to the access dispute under s. 216I, the name and address of that person.

While there is no prescribed form, the AER's suggested format for providing the access dispute notice is set out in Appendix B. If the materials included with the notice are lengthy (such as draft forms of agreement) then attachments (with an index) should be used.

The access dispute notice can be sent to the AER by email at AERschemeadministrator@er.gov.au.

The access dispute notice must also be sent to the other parties to the negotiations under Part 23 as soon as practicable (r. 564(3)).

6.4 Parties to the access dispute

The parties to the access dispute will be the parties to the negotiations (s. 216I(a)). As scheme administrator, the AER may include any other person as a party to the access dispute, if the AER is of the opinion that resolution of the access dispute may involve that person doing something and that it is appropriate to join the person (s. 216I(b)).

To assist the AER to identify other parties to the access dispute, the access dispute notice is required to include information about other possible parties (r. 564(2)(e)). The negotiating parties are required to use reasonable endeavours to identify who else might become a party to the access dispute in the negotiation stage (r. 561(5)).

6.5 Reference to arbitration and selection of the arbitrator

As scheme administrator, the AER must refer an access dispute to arbitration (s 216J).

The reference to arbitration must occur within 15 business days after receipt of the access dispute notice. The procedures that will be followed by the AER are in r. 565.

Parties to an access dispute need to be aware of their obligations under r. 565(3) with respect to the identity of the pool arbitrator. The parties to the access dispute have the opportunity to agree to the identity of the person to act as arbitrator, selected from the pool of arbitrators established by the AER under r. 584 (s. 216K(1)). That selection must be made within 10 business days of the access dispute notice being given or the scheme administrator will make the selection (r. 565(2)).

Information about the pool of arbitrators is available on the AER's website. The AER will provide additional information about pool arbitrators, including the arbitrator's indicative schedule of fees, on request (r. 584(7)). This information is confidential. Given the short timeframe for reaching agreement about the identity of the pool arbitrator, parties negotiating access and facing the prospect of a reference to arbitration may wish to consider the identity and availability of the pool arbitrators before the access dispute notice is given.

If the arbitrator does not complete an arbitration, s. 216K and r. 565 provide for the appointment of a replacement arbitrator.

6.6 Independence of the arbitrator

The pool arbitrator selected to determine an access dispute must be independent of the parties to the dispute, properly qualified to act in the resolution of the dispute and have no direct or indirect interest in the outcome of the dispute (s. 216K(3)).

When approached in connection with determining an access dispute, a pool arbitrator must disclose any circumstances likely to give rise to a real danger of bias on their part (r. 577(2)). The arbitrator must without delay after appointment disclose to the parties any circumstances likely to give rise to a real danger of bias which have not previously been disclosed (r. 577(3)).

A party to an access dispute may only challenge an arbitrator if circumstances exist which are likely to give rise to a justifiable doubt as to the arbitrator's impartiality or independence (r. 577(4)) which means a real danger of bias on the part of the arbitrator (r. 577(1)).

Rule 577 sets out the other provisions about the circumstances in which a party can challenge an arbitrator and the process requirements.

6.7 Information for the arbitrator

Parties to arbitration under Part 23 are required to give the arbitrator and the other parties statements about information exchanged by the parties during negotiations and the outcomes sought in the arbitration (r. 567).

The following table sets out the statements to be given under r. 567:

	Timing	Statement
1	Within 10 business days after the access dispute is referred to the arbitrator.	A statement: <ul style="list-style-type: none">• listing the access negotiation information of the party that the party provided to the other parties to the negotiations before the access dispute notice was given; and• identifying with reasonable particularity any other access negotiation information:<ul style="list-style-type: none">• not provided by the party to the other parties to the negotiations before the access dispute notice was given and that the party seeks leave to submit and rely on in the arbitration; and• that the party requested from another party to the negotiations and that has not been provided by that other party.
2	Within 15 business days after the access dispute is referred to the arbitrator.	A statement of the access determination the party claims should be made and the matters supporting the party's claim.
3	Within the time determined by the arbitrator.	A statement in response to the statement mentioned in item 1, which must: <ul style="list-style-type: none">• identify with reasonable particularity any areas of disagreement;

	and	
		<ul style="list-style-type: none"> state whether it consents to the provision of any of the access negotiation information in respect of which leave is sought.
4	Within the time determined by the arbitrator.	A statement in reply to a statement mentioned in item 2.

A party may amend or supplement a statement with the leave of the arbitrator (r. 567(4)). The arbitrator may require a party to verify, by statutory declaration of an appropriate officer of the party, such a statement (r. 567(4)).

The arbitrator may use its other powers in the arbitration to require the parties to the dispute to give statements or information (see section 6.11 of this guide).

6.8 Access negotiation information

The statements under r. 567 give the arbitrator information about the access negotiation information provided by each party in negotiations.

A party to an access dispute can submit and rely on in the arbitration, access negotiation information provided to the other parties prior to the access dispute notice being given.

If a party wishes to submit and rely on any other access negotiation information, it must seek leave of the arbitrator to do so (r. 562(1)). In determining whether to grant leave, the arbitrator must:

- seek to give effect to the obligations in r. 562 insofar as doing so is consistent with the proper consideration of the access dispute; and
- have regard to whether the party seeking leave was given a reasonable opportunity to provide the information prior to the access dispute notice being given (r. 568(2)).

The arbitrator can direct a party to an access dispute to provide access negotiation information that the party did not provide before the access dispute notice was given. The party must comply without undue delay (r. 568(3)).

If the arbitrator is satisfied that there has been inordinate and inexcusable failure by a party to provide access negotiation information or if a party fails to do any other thing necessary for the proper and expeditious conduct of the arbitration, the arbitrator may do any one or more of the following (r. 568(4)):

- direct that the party is not entitled to rely on any specified information or materials;
- draw such adverse inferences from the failure to comply as the circumstances justify; and
- proceed to an access determination solely on the basis of information relied on by that party that has been provided by that party in negotiations.

6.9 Conduct of the parties in arbitration

If an access dispute is with a user, the service provider must not, without the user's consent, alter the rights of the user to use the capacity of the non-scheme pipeline during the dispute (s. 216U).

Other obligations of the parties to an arbitration are in r. 566. Each party to the access dispute must do all things necessary for the proper and expeditious conduct of the arbitration. This includes complying without undue delay with any order or direction of the arbitrator with respect to any procedural, evidentiary or other matter (rr. 566(1) and (2)). A party must not wilfully do or cause to be done any act to delay or prevent an access determination being made (r. 566(3)).

The arbitrator has power to terminate the arbitration if the arbitrator considers that a prospective user or user seeking access is not engaging in the arbitration in good faith (216O(2)(a)).

6.10 Termination of an arbitration

An arbitrator may determine not to proceed with an arbitration (and terminate the proceedings) if the arbitrator considers that the notification of the access dispute was vexatious, the subject matter of the access dispute is trivial, misconceived or lacking in substance, the party who notified the access dispute did not negotiate in good faith, or there is some other good reason why the arbitration should not proceed (s. 216O(1)).

Additionally, the arbitrator may at any time terminate an arbitration without making an access determination if:

- the arbitrator considers that the prospective user or user seeking access is not engaging in the arbitration in good faith (s. 216O(2));
- the terms and conditions on which access is to be granted should be governed by an existing contract or determination (s. 216O(2)); or
- the parties to the access dispute agree on the termination (r. 578(2)).

A decision of an arbitrator to terminate the arbitration must comply with the form requirements in r. 578(3). The decision takes effect from the later of the time specified in the decision and the time it is communicated to the parties to the access dispute (r. 578(4)).

6.11 Procedural requirements for the arbitration

The provisions of Part 6 of Chapter 6 of the NGL set out in the following table, as applied by s 216S, apply to arbitrations under Part 23 (s. 216S).

Section of NGL	Summary of requirement
196	Hearings are to be in private unless the parties agree that a hearing may be conducted in public. The arbitrator may give written directions as to the persons who may be present at a dispute hearing that is conducted in private. In giving such directions, the arbitrator must have regard to the wishes of the parties and the need for commercial confidentiality.

Section of NGL	Summary of requirement
197	A party may appear in person or be represented by another person.
198	<p>The arbitrator:</p> <ul style="list-style-type: none"> • is not bound by technicalities, legal forms or rules of evidence; • must act as speedily as a proper consideration of the access dispute allows, having regard to the need to carefully and quickly inquire into and investigate the access dispute and all matters affecting the merits, and fair settlement, of the access dispute; • may inform itself about any matter relevant to the access dispute in any way it thinks appropriate. <p>The arbitrator may determine the periods that are reasonably necessary for the fair and adequate presentation of the respective cases of the parties in the hearing, and may require that the cases be presented within those periods.</p> <p>The arbitrator may require evidence or argument to be presented in writing, and may decide the matters on which the arbitrator will hear oral evidence or argument.</p> <p>The arbitrator may determine that a dispute hearing is to be conducted by telephone, closed circuit television or any other means of communication.</p>
199	<p>The arbitrator may do any of the following things for the purpose of determining an access dispute:</p> <ul style="list-style-type: none"> • give a direction in the course of, or for the purpose of, a hearing; • hear and determine the access dispute in the absence of a party who has been given notice of the hearing; • sit at any place; • adjourn to any time and place; • refer any matter to an independent expert and accept the expert's report as evidence (but subject r. 575).
200	<p>The arbitrator may give an oral or written order to a person not to divulge or communicate to anyone else specified information that was given to the person in the course of an access dispute unless the person has the arbitrator's permission. A person must not, without reasonable excuse, refuse or fail to comply with such an order.</p>
201	<p>The arbitrator may take evidence on oath or affirmation and for that purpose may administer an oath or affirmation.</p> <p>The arbitrator may summon a person to appear before the arbitrator to give evidence and/or produce such documents (if any) as are referred to in the summons.</p>
202	<p>A person who is served with a summons to appear as a witness before the arbitrator must not, without reasonable excuse, fail to attend as required by the summons or fail to appear and report himself or herself from day to day unless excused, or released from further attendance, by the arbitrator.</p>
203	<p>A person appearing as a witness before the arbitrator must not, without</p>

Section of NGL	Summary of requirement
204	<p>reasonable excuse refuse or fail to:</p> <ul style="list-style-type: none"> • be sworn or to make an affirmation; • answer a question that the person is required to answer by the arbitrator; or • produce a document that the person is required to produce by a summons.
205	<p>A person must not threaten, intimidate or coerce another person, or cause or procure damage, loss or disadvantage to another person, because that other person proposes to produce, or has produced, documents to the arbitrator or proposes to appear, or has appeared, as a witness before the arbitrator.</p> <p>A party to an access dispute may inform the arbitrator that, in the party's opinion, a specified part of a document contains confidential information and request the arbitrator to not give a copy of that part to another party.</p> <p>If such a request is received, the arbitrator must inform the other parties that the request has been made and of the general nature of the matters to which the relevant part of the document relates and ask the other parties whether there is any objection to the arbitrator complying with the request.</p> <p>If there is an objection to the arbitrator complying with the request, the party objecting may inform the arbitrator of the objection and of the reasons for it.</p> <p>After considering a request, any objection and any further submissions that a party has made in relation to the request, the arbitrator may decide:</p> <ul style="list-style-type: none"> • not to give the other parties a copy of so much of the document as contains confidential information that the arbitrator thinks should not be given; or • to give a party a copy of the whole, or part, of the part of the document that contains confidential information subject to a condition that the party gives an undertaking not to disclose the information to another person except to the extent specified by the arbitrator and subject to such other conditions as the arbitrator determines.

Under Part 23, the arbitrator has discretion to determine the procedures for the arbitration, conduct the arbitration in such a manner as the arbitrator considers appropriate and decide whether to hold any hearings (r. 574(1)).

The following provisions are also relevant to the procedures for an arbitration.

- The arbitrator must consult the parties about the procedures and timetable for the arbitration (r. 574(2)) and notify the procedures and timetable to the parties as soon as practicable after the arbitrator's appointment (r. 574(2)).
- The arbitrator may amend the procedures that apply to the arbitration during the course of the arbitration (r. 574(2)).
- The arbitrator must determine the time for delivery of statements required under rule 567(3).
- The arbitrator may take possession of, make copies of, and take extracts from, any document produced to it and may keep such a document for as long as is necessary for the purposes of the arbitration (r. 574(3)).

- Subject to s. 205 of the NGL (see above), all statements, documents or other information supplied to the arbitrator, and any expert report or evidentiary document on which the arbitrator may rely on in making its decision, must be communicated to the parties to the access dispute (rr. 574(4) and (5)).

6.12 Appointment of independent experts

The arbitrator is able to refer any matter to an independent expert and accept the independent expert's report (s. 199(1)(e)). However, before appointing an independent expert the arbitrator must obtain the consent of the parties in relation to costs (r. 575(3)).

Other provisions relating to the appointment of an expert by the arbitrator are in r. 575.

6.13 Confidentiality

Confidentiality protections in the NGL and Rules that apply in relation to arbitrations are:

- provision for the conduct of hearings in private (s.196);
- provision for the arbitrator to give confidentiality orders (s. 200);
- provision for a party to request the arbitrator to make confidentiality orders (s. 205); and
- general confidentiality obligations of the parties to the arbitration and the arbitrator (r. 576), which extend to statements under r. 567, rulings and any access determination (r. 549, definition of confidential information).

7 Access determinations and costs

7.1 Making an access determination

An arbitrator may make an interim access determination (s. 199(2)) and must make a final access determination if the arbitration is not terminated (s. 216L(1)).

Interim access determinations may allow for access before the final access determination is made. If so, the interim access determination will include provision for payment (r. 571(1)) and adjustment for any differences between the interim and final access terms (r. 571(2)). The arbitrator's determination of adjustments must be complied with even if the prospective user declines to take up access under a final access determination (r. 573(6)).

The arbitrator must determine the access dispute as quickly as possible, and in any case must make a final access determination within:

- 50 business days after the date the access dispute was referred to the arbitrator; or
- if agreed by the parties to the access dispute, any greater number of business days, up to a maximum of 90 business days, after the date the access dispute was referred to the arbitrator (r. 572).

The days set out in rule 572(2) of the Rules are to be disregarded in determining the number of business days that have elapsed since the date the access dispute was referred to the arbitrator. These cover the time taken for an independent expert appointed by the arbitrator to report and time allowed by the arbitrator for preparing access negotiation information.

The procedural and form requirements of r. 572(3) must be complied with by the arbitrator in making a final access determination.

The arbitrator must give the parties and the AER a statement of reasons for the arbitrator's final access determination, which must explain how the arbitrator took into account the principles and other matters in r. 569 (r. 572(4)). The reasons must be given with the final access determination or within 20 business days of the final access determination being made.

A final access determination takes effect from the later of the time specified in the access determination and the time it is communicated to the parties to the access dispute (r. 573(1)).

7.2 Pricing and other principles

The following table provides an overview of the pricing and other principles that the arbitrator must have regard to in making an access determination (s. 216M and r. 569(1)).

Provision	Principle
r. 569(1)(a)	Access to pipeline services on a non-scheme pipeline should be at prices, and on other terms and conditions that, so far as practical, reflect the outcomes of a workably competitive market.

Provision	Principle
r. 569(1)(b)	<p>The price for access to a pipeline service on a non-scheme pipeline should reflect the cost of providing the service, including a commercial rate of return that is commensurate with prevailing conditions in the market for funds and reflects the risks the service provider faces in providing the service.</p> <p>For services priced at a premium or discount to the price for firm haulage services, the premium or discount must take into account the opportunity cost or benefit to the service provider and be consistent with the price for a pipeline service providing a reasonable contribution to joint and common costs (r. 569(3)(b)).</p> <p>For the purposes of applying the pricing principle, the value of any assets used in the provision of the service must be determined applying the principles in r. 569(4).</p>
r. 569(1)(b)	The operational and technical requirements necessary for the safe and reliable operation of the non-scheme pipeline.

The arbitrator may also have regard to the following matters (r. 569(2)).

Provision	Matter
r. 569(2)(a)	The legitimate business interests of the service provider.
r. 569(2)(b)	The interests of all persons who have rights to use the pipeline.
r. 569(2)(c)	The value to the service provider of any extension or expansion of the pipeline the cost of which is borne by another person.
r. 569(2)(d)	The value to the service provider of interconnections to the pipeline the cost of which is borne by another person.

Further discussion of the objective and the principles to be applied in arbitration is in the explanatory note published by the GMRG.¹⁰ Please also refer to section 2.1 of this guide.

7.3 Content of access determinations

The matters that may be dealt with in an access determination are specified in s. 216L and r. 570.

An interim access determination or a final access determination may deal with any matter that is the subject of the access dispute (r. 570(1)) subject to the qualifications in r. 570 and the NGL set out in the table below.

A determination must relate to the access sought, although the service term may be different. A determination does not have to require access to be provided.

The following table summarises the restrictions on access determinations that may be made by an arbitrator.

¹⁰ GMRG, Gas Pipeline Information Disclosure and Arbitration Framework, Initial National Gas Rules, Explanatory note, 2 August 2017.

Provision	Restriction
s. 216N(1)(a), NGL	An access determination cannot have the effect of preventing a user obtaining a sufficient amount of a pipeline service under a contract or previous access determination to be able to meet the user's reasonably anticipated requirements, measured at the time that the access dispute was notified.
s. 216N(1)(b), NGL	An access determination cannot have the effect of preventing a prospective user or user from obtaining, by the exercise of a right under a contract, or under an access determination, that was in force at the time when the access dispute was notified, a sufficient amount of a pipeline service to be able to meet the prospective user's or user's actual requirements.
s. 216N(1)(c), NGL	An access determination cannot have the effect of depriving of a right under a contract (other than a relevant exclusivity right) that was in force immediately prior to notification of the access dispute. A relevant exclusivity right is an express contractual right that prevents a service provider supplying pipeline services to persons who are not parties to the contract or limits or controls a service provider's ability to supply pipeline services to persons who are not parties to the contract, but does not include a user's contractual right to obtain a certain amount of pipeline services.
r. 570(5), Rules	An access determination must not require the service provider to provide a pipeline service or carry out any of the works listed in r. 570(2)(d) unless the provision of the pipeline service or those works are technically feasible and consistent with the safe and reliable operation of the pipeline.
r. 570(6), Rules	An access determination must not, unless the service provider agrees, require the service provider to extend the geographical range of the non-scheme pipeline, or carry out the works listed in r. 570(2)(d), unless the prospective user funds the activity in its entirety.
r. 570(7), Rules	An access determination must not provide for a prospective user to acquire an interest in a non-scheme pipeline by funding an expansion of the capacity of the pipeline unless the service provider agrees.

7.4 Giving effect to access determinations

An access determination is enforceable as if it were a contract between the parties to the access dispute. A prospective user is not bound to seek access on the terms of the access determination but if it does seek access, it is bound by the determination (s. 216Q).

A party to an access determination is able to apply for an order of a court under s. 271 of the NGL in the event that another party to the determination has engaged, is engaging, or is proposing to engage in conduct that constitutes a contravention of the determination (s. 271(5)).

If a prospective user wishes to enter into an access contract that gives effect to a final access determination, it must notify the other parties to the access dispute and the AER of that fact in writing within 10 business days after the access determination is made (r. 573(3)). If such a notice is given, the parties to the access dispute must enter into an access contract for the provision of access in accordance with the final access determination (r. 573(4)).

If a prospective user does not give such a notice within the applicable period (r. 573(5)):

- the prospective user and any of its associates must not give an access dispute notice about the same or a substantially similar pipeline service on the non-scheme pipeline the subject of the final access determination for a period of one year from the date of the final access determination; and
- if the prospective user had access under the terms of an interim access determination, that access ends at the end of that period.

7.5 Variations and corrections to access determinations

An access determination can be varied if all parties to the determination agree (s. 216R(1)).

Provisions dealing with the correction of errors are in s. 216T and r. 579 and include time limits within which corrections can be requested or made.

7.6 Fees and costs

The parties to an access dispute referred to arbitration must bear their own costs (s. 216V(4)).

Each party to the access dispute must pay an equal share of the costs of the arbitration, which covers the fees and expenses of the arbitrator, the fees and expenses of any expert retained by the arbitrator, the costs of room hire, and the cost of any additional input agreed by the parties to be necessary to the conduct of the arbitration (r. 580(2)).

However, the arbitrator may, in making a final access determination or within 30 business days after the final access determination is made, direct that the parties must pay the costs and fees of the arbitration outlined above in unequal shares (r. 580(3)). In giving such a direction, the arbitrator must take into account the matters set out in rr. 580(3)(a) to (e).

Costs payable to an arbitrator are a debt due to the arbitrator and may be recovered by an arbitrator in a court of competent jurisdiction (s. 216V).

7.7 Information about access determinations

Information on the existence of any arbitrations that have occurred under Part 23 is required to be published on the AER website (r. 581). The content of the final determination, including the price and other terms and conditions, remains confidential.

Within a reasonable time of a final access determination being made, the AER, as scheme administrator, will publish the information listed in r. 581 on its website.

If a final determination is not made (for example if an arbitrator or prospective user terminates an arbitration), the AER is required to publish on its website information about the number of access disputes referred to arbitration and brought to an end before a final determination is made.

Appendix A: Background

On 19 August 2016, the COAG Energy Council (Council) released a comprehensive Gas Market Reform Package (Package). The Package responded to the findings and recommendations of the Australian Competition and Consumer Commission's (ACCC) Inquiry into the East Coast Gas Market (Inquiry) and the Australian Energy Market Commission's (AEMC) Eastern Australian Wholesale Gas Market and Pipelines Framework Review: Stage 2 Final Report (East Coast Review).

Comprising 15 reform measures across four priority areas (gas supply, market operation, gas transportation and market transparency), the Package is designed to facilitate the achievement of the Council's Australian Gas Market Vision:

"The Council's vision is for the establishment of a liquid wholesale gas market that provides market signals for investment and supply, where responses to those signals are facilitated by a supportive investment and regulatory environment, where trade is focused at a point that best serves the needs of participants, where an efficient reference price is established, and producers, consumers and trading markets are connected to infrastructure that enables participants the opportunity to readily trade between locations and arbitrage trading opportunities".

Reform Measure 4 of the Package directed the Independent Chair of the Gas Market Reform Group (GMRG), Dr Michael Vertigan AC, to examine the current regulatory test for the regulation of gas pipelines, in consultation with stakeholders, and make recommendations on any further actions.

Dr Vertigan undertook the Examination of the current test for the regulation of gas pipelines (Examination) in the latter half of 2016. Two of the key observations from the Examination were that:

- the operators of existing pipelines have market power and, in some instances, the exercise of this power was resulting in inefficient outcomes that did not promote the National Gas Objective (NGO), or facilitate the achievement of the Council's Australian Gas Market Vision;¹¹ and
- the test for regulation (the coverage test) did not appear to be posing a credible threat to pipeline operators.¹²

The Examination recommended that an information disclosure and arbitration framework be introduced, to reduce the information asymmetry and imbalance in bargaining power that shippers can face when negotiating with pipeline operators. Specifically, the Examination recommended that steps be taken to strengthen the bargaining power of shippers by:¹³

¹¹ Vertigan, M., Examination of the current test for the regulation of gas pipelines, 14 December 2016, pp. 9-10.

¹² Ibid, pp. 12-13.

¹³ Ibid, pp. 13-15.

- requiring pipeline operators to publish the information that shippers need to make an informed decision about whether to seek access to a pipeline service and to assess the reasonableness of an offer made by the pipeline operator; and
- introducing a commercially oriented arbitration mechanism into the NGL that would be available to parties if commercial agreement cannot be reached.

These recommendations were endorsed by the Council on 14 December 2016.

In late 2016 Council officials commenced work on the legislative changes required to give effect to the agreed recommendations. The National Gas (South Australia) (Pipelines Access-Arbitration) Amendment Bill 2017 ('Amendment Bill') was agreed by the Council on 17 February 2017. The Act was proclaimed on 1 August 2017 and became operational on proclamation.

Following consultation with stakeholders, the GMRG developed the detailed design of the information disclosure and arbitration framework for non-scheme pipelines. On 1 August 2017, the National Gas (Pipelines Access – Arbitration) Amendment Rule 2017 was made by the South Australian Minister for Mineral Resources and Energy, the Hon Tom Koutsantonis MP, in accordance with s. 294F of the NGL.

Appendix B: Form of access dispute notice

i. Cover letter

<Date>

[General Manager]
Networks Expenditure
Australian Energy Regulator
AERschemeadministrator@aer.gov.au

Dear Sir/ Madam

I enclose an access dispute notice with <name of company> notified under subsection 216H(1) of the National Gas Law (the NGL) on <date>.

Yours faithfully

<Signatory>

Attached: Notification

ii. Notification

AUSTRALIAN ENERGY REGULATOR
Access dispute notice under subsection 216H(1) of the NGL on <date>

Notifying Party

<name of notifying company> of <address of notifying company>

Contact: <name and position of contact>

Telephone: <contact's phone number>; Facsimile: <contact's fax number>;

Email: <email address>

Other Party <insert for each other party involved in the access dispute>

<name of other party> of <address of other party>

Contact: <name and position of contact>

Telephone: <contact's phone number>; Facsimile: <contact's fax number>;

Email: <email address>

User/Prospective user <delete whichever is not appropriate>

<specify which party is the user/prospective user>

Service provider

<specify which party is the service provider>

<the notification should specify the name of the owner(s) of the non-scheme pipeline that is or will be used to supply the pipeline service; where each owner is a legal entity separate from the persons specified above, the notification should separately identify the pipeline owner(s), if known>

Persons who the notifying party believes may be joined to the access dispute <insert for each relevant person>

<name of company> of <address of company>

Details of the pipeline service to which the access dispute relates

<Include all relevant details about the pipeline service the subject of the access dispute. Use an attachment if necessary.>

Details of the access request made

<Specify the details of the access request made by the user/prospective user, if applicable. Use one or more attachments if necessary. >

Details of the access offer made

<Specify the details of the access offer made by the service provider, if applicable. Use one or more attachments if necessary.>

Details of the matters on which agreement has been reached

<Specify the details of access to the relevant pipeline service which have been agreed by the parties to the access dispute. Use one or more attachments if necessary.>

Details of the matters that are in dispute

<Specify the details of access to the relevant pipeline service which have not been agreed by the parties to the access dispute and which are in dispute. Use one or more attachments if necessary.>

To be signed by person notifying dispute

<Name of signatory and position>

<Date>