



Final

**Guideline for the resolution of distribution and
transmission pipeline access disputes under
the National Gas Law and National Gas Rules**

November 2008

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PART A – Preliminary Matters

Outline

This Guideline outlines the provisions for the hearing and determination of access disputes under Chapter 6 of the *National Gas Law 2008* (NGL) and Part 12 of the *National Gas Rules 2008* (NGR).

The Guideline is procedural in nature and provides guidance for parties involved in a dispute. The Guideline also outlines how the AER will run the access dispute process.

In the Guideline, the AER has streamlined and expedited certain processes throughout the hearing process by outlining reasonable and clear timeframes for parties to do certain things. The intention of the AER is to balance its statutory obligation to act speedily to resolve an access dispute while recognising that complex issues may arise during an access dispute process requiring time for consideration. Consequently, the AER may vary set timeframes depending on the circumstances of each access dispute.

From time-to-time, the AER may amend its access dispute process to reflect current best practice and procedures. Where new practices are not reflected in the Guideline, the AER will seek to inform parties, where practical, of any changes to its processes in the context of a particular access dispute.

All references to legislation in the Guideline, unless otherwise specified, are for the NGL and NGR. NGL references are denoted with an ‘s.’ for a single section or ‘ss.’ for more than one section. Rule references will preface a rule number as an ‘r.’ for a single rule or ‘rr’. if the reference relates to more than one rule.

1 Introduction

The NGL and NGR comprise the legislative framework to establish a new cooperative national access regime for the regulation of natural gas distribution and transmission pipeline services.

The national gas objective is stated in s. 23 of the NGL as:

To promote efficient investment in, and efficient operation and use of, natural gas services for the long term interests of consumers of natural gas with respect to price, quality, safety, reliability and security of supply of natural gas.

The importance of regulation in achieving the objective of the NGL and NGR is set out in the Explanatory Memorandum for the Energy Legislation Amendment Bill 2006:

The appropriate regulation of gas and electricity is essential to efficient infrastructure investment, competitive energy markets and lower energy prices for consumers. Energy specific regulatory arrangements are considered necessary to accommodate the technical aspects of service provision in gas and electricity networks and associated market power issues. A co-ordinated approach to energy access is also essential to maintaining consistency with national arrangements for access to essential infrastructure under the TPA and to promote more competitive energy markets.¹

The NGL and NGR largely mirror the previous access disputes framework (National Third Party Access Code for Natural Pipeline Systems) reflecting a negotiate-arbitrate dispute resolution framework. The NGL and NGR procedures for hearing access disputes reflect those in the National Electricity Law. The National Gas (South Australia) Bill 2008 Second Reading Speech outlines that:

These (access dispute) provisions will allow the Australian Energy Regulator to act as arbitrator over parties to an access dispute. They will establish the Australian Energy Regulator's powers and make its access determinations binding on the parties to an access dispute. This access dispute framework is consistent with the 2007 amendments to the National Electricity Law, 1995 Competition Principles Agreement and Parts IIIA and XIC of the Commonwealth *Trade Practices Act*.²

This reinforces the primacy of commercial negotiations as a means to solving issues around access supported by the use of a binding arbitral process in circumstances where these access issues cannot be resolved commercially or between the relevant parties.

This Guideline reflects the AER's general confidentiality and privacy principles set out in the *ACCC/AER Information Policy: The collection, use and disclosure of information*, published on 23 October 2008 (*Information Policy*).

1.1 Revision of this Guideline

The AER may amend and revise this Guideline from time-to-time. A version number and/or an effective date of issue will identify every version of this Guideline.

¹ Commonwealth of Australia, Explanatory Memorandum, Energy Legislation Amendment Bill 2006 (Cth) 2.

² South Australia, *Parliamentary Debates*, House of Assembly, 9 April 2008, 2696 (Patrick Conlon, Minister for Transport, Minister for Infrastructure, Minister for Energy).

2 Application of the Guideline

The NGL covers access disputes between a user or potential user and a service provider about access issues of pipelines for different types of services. The AER can conduct an access dispute hearing for access dispute pipelines.

An access dispute pipeline means a scheme pipeline used or that could be used to provide a pipeline service that is the subject of an access dispute.³

This chapter outlines the characteristics of access dispute pipelines that are subject to the access dispute process under the NGL.

2.1 Access Dispute Pipelines

Access dispute pipelines are scheme pipelines. Under s. 2, scheme pipelines are defined as:

- Covered pipelines, which are pipelines with a coverage determination or are deemed to be covered by operation of s. 126 or s. 127.
- International pipelines with a price regulation exemption

2.1.1 Covered pipelines

Covered pipelines can be broadly categorised as pipelines with coverage determinations and pipelines that are deemed to be covered.

For transition purposes, distribution and transmission pipelines that were covered under the previous Gas Code prior to the commencement of the NGL are deemed to be covered pipelines under the NGL.⁴

2.1.1.1 Pipelines with coverage determinations and full access arrangements

i. Full regulation pipelines

A full regulation pipeline is a pipeline that has been subject to a coverage determination, providing full regulation services.

A covered pipeline providing full regulation services is required to submit a full access arrangement proposal to the AER within three months of becoming a covered pipeline (r. 46).

Covered pipelines with full access arrangements have price or revenue and non-price terms and conditions of access for users and prospective users approved or made by the AER (s. 2).

³ s. 178

⁴ NGL, Schedule 3, ss. 6 & 7.

The AER may approve variations or revisions of the terms and conditions contained in a full access arrangement. This generally happens once every five years or as set out in the access arrangement. Even though an access arrangement for a full regulation pipeline can be revised or varied from time to time, as set out in the access arrangement or under the NGR,⁵ these access arrangements do not expire. However, there may be circumstances where these access arrangements do cease to have an effect, such as if the coverage is revoked or the relevant Minister makes a light regulation determination regarding the relevant pipeline.

Subject to certain specified limitations, the AER can make a determination about any matter relating to the provision of a pipeline service to a prospective user or user (s. 193).

This means the AER can make an access determination about price and non-price elements for pipelines with full access arrangements.

ii. Light regulation pipelines

Light regulation pipelines are a new classification of covered pipelines under the NGL that are not subject to up-front price regulation. Relevant pipelines may seek reclassification as a light regulation pipeline from the National Competition Council (NCC).⁶

Covered pipelines that provide light regulation services (s. 112) are not required to, but may, submit a limited access arrangement to the AER for approval.⁷ A limited access arrangement contains provisions for non-price elements of access to a light regulation pipeline.

One benefit of having a limited access arrangement in place is that it provides certainty to both service providers and access seekers about the non-price terms and conditions of access. In the circumstances of an access dispute, the AER is bound by the terms of access in a limited access arrangement.

Limited access arrangements may include an expiry date⁸. Even without a limited access arrangement in place, the service provider of light regulation services still needs to comply with other obligations under the NGL and NGR.

Under the NGL, the AER can make an access determination for covered light regulation pipelines. It can make an access determination for both price and non-price elements of access. The AER can make an access determination whether an access arrangement is in place or not. It must make a determination consistent with any limited access arrangement that is in place.

⁵ Revisions are amendments to an access arrangement that are made as required by the access arrangement. This could be as scheduled according to the review submission date or as anticipated by a trigger event in the access arrangement (ss. 49-52). Variations are amendments to an access arrangement that are proposed by the service provider voluntarily.

⁶ The National Gas Regulations prescribes Victorian and South Australian distribution pipelines and Victorian transmission pipelines as designated pipelines, which prevents the NCC making a light regulation determination for these pipelines.

⁷ s. 116.

⁸ r. 45(1)(i).

The National Gas (South Australia) Bill 2008 Second Reading Speech explains that:

A limited access arrangement is an access arrangement without provision for price or revenue regulation...Even though limited access arrangements do not provide for price or revenue regulation, in an arbitration the Australian Energy Regulator will be able to set a price between the parties for the purpose of resolving the access dispute. However, the price would only be a price set between the parties to the dispute based upon the application of the revenue and pricing principles.⁹

In this way, the AER can make access determinations about matters such as price and revenue that it does not approve upfront for light regulation pipelines. This is a unique feature of the NGL.

2.1.1.2 Tender approval pipelines

Where a tender process is used for the construction of a pipeline, a proponent of a pipeline may obtain approval for this process as a competitive tender process (CTP) (r. 21).

Pipelines with an approved tender process for their construction (tender approval pipelines), are deemed to be covered under the NGL (s. 126).

One outcome of the CTP is the need to determine the terms and conditions of access. The tender must set out proposed terms and conditions of access and the CTP proponent must document these in a compliance report provided to the AER after the selection process for the tender is complete (r. 24).

The successful tenderer must submit an access arrangement to the AER for approval at least six months before the pipeline is commissioned.¹⁰

An access arrangement approved under a tender process may be amended by the service provider with the AER's approval.¹¹

A CTP access arrangement must include an expiry date of no more than 15 years from the commissioning date of the pipeline (r. 24(2)(c)(vi)).

The AER may make an access determination about price and non-price elements of access for these pipelines, while the voluntary access arrangement is in place.

2.1.1.3 Deemed covered pipelines with approved voluntary access arrangements

Under the NGL, access arrangements may be voluntarily submitted by a service provider. These voluntary access arrangements must be full access arrangements (containing both price and non-price elements of access) and may nominate a submission and an expiry date for the access arrangement.¹² Once the approved full access arrangement takes effect, the pipeline remains a covered pipeline until the full

⁹ South Australia, *Parliamentary Debates*, House of Assembly, 9 April 2008, 2696 (Patrick Conlon, Minister for Transport, Minister for Infrastructure, Minister for Energy).

¹⁰ r. 27(1). The AER must approve the proposed access arrangement if it satisfied that the access arrangement reasonably reflects the provisions of the proposed tender (r. 27(3)).

¹¹ r. 27(5).

¹² r. 49. An expiry date must be nominated if no review submission date is provided.

access arrangement expires or a coverage revocation determination made in respect of that pipeline takes effect (s. 127(3)).

The AER may make an access determination about price and non-price elements of access for these pipelines, while the voluntary access arrangement is in place.

2.1.1.4 International pipelines with limited access arrangements

International pipelines are defined under the NGL as a pipeline for the haulage of gas from a foreign source (s. 2).

International pipelines with a 15 year price exemption from the Minister are required to submit a limited access arrangement to the AER for approval.¹³ Like limited access arrangements for light regulation services, a limited access arrangement for international pipelines need only contain non-price elements of access and is not required to make provision for price or revenue access terms.

The AER can only make an access determination about non-price (revenue) elements of access if a price exemption is in place for services provided by an international pipeline (s. 180).

¹³ s. 168.

Table 1: Summary of type of access determination for different pipelines

Type of pipeline	Access Dispute Pipelines						
	Uncovered	Greenfields with a 15 year price exemption	International with a 15 year price exemption	Limited access arrangements	Tender Process	Voluntary access arrangements	Full access arrangements
What access determination can be made?							
Price terms and conditions	x	x	x	✓	✓	✓	✓
Non-price terms and conditions	x	x	✓ ¹⁴	✓	✓	✓	✓

2.2 Service provider’s obligations during an access dispute

While this Guideline generally outlines how the AER will conduct an access dispute hearing, the service provider has certain obligations under the NGL in respect of the extent of access provided to users during an access dispute.

A service provider who is in an access dispute with a user must not, without the consent of the user, alter the rights that the user has to use the capacity of the access dispute pipeline during the period of the dispute (s. 214).

¹⁴ If it has a limited access arrangement in place and a price exemption.

PART B – Alternative dispute resolution and the access dispute process

3 Alternative means of resolving an access dispute

When a service provider and user or prospective user cannot agree on the terms and conditions of access, there are several ways in which they may resolve disputes including binding dispute resolution by the AER.

Parties are always encouraged to consider whether a dispute may be resolved at an early stage or not notified at all. An access determination made by the AER is not the only method available to parties to resolve a dispute and may not always be the most efficient means for doing so. Moreover, binding access dispute processes involve imposing an arrangement on the parties that the AER has determined rather than one for which they have ‘ownership’.

This Chapter of the Guideline explores the alternative means of resolving an access dispute which includes:

- Improving the quantum and quality of publicly available information about pipeline services can facilitate commercial negotiations and provide a means of achieving a mutually agreed outcome rather than notifying an access dispute.
- Reliance on existing commercial agreements and arrangements which may contain a means for parties to engage in alternative dispute resolution (ADR) processes to avert the need to notify an access dispute.

3.1 Improving publicly available information

A method of facilitating negotiations and resolving matters of access is to improve the level and quality of information that is publicly available.

The lack of information about the wholesale gas market reflects the nature of wholesale commercial arrangements, that is, confidential long term contracts between service provider and user. As part of the national gas regime, the Ministerial Council on Energy established the Gas Market Leaders Group in November 2005 to develop a plan ‘for a competitive, reliable and secure national gas market delivering increased transparency, promoting further efficient investment in gas infrastructure and providing efficient management of supply and demand.’¹⁵

Published information improves transparency about gas supplies, demand and capacity which is useful for existing and potential users. Better informed market participants not only improve commercial negotiations between parties but may also provide a suitable basis or reference point for information that may be used to assist the AER in resolving access disputes, particularly in circumstances where the AER has limited information

¹⁵ Gas Market Options Working Group, National Gas Market Development Options Report to Gas Market Leaders Group, February 2006, p.1.

about the pipelines that are subject to dispute, as is more likely the case for light regulation and international pipeline services.

The national gas regime mandates certain disclosures in relation to access. For instance, a scheme pipeline service provider must ensure that the applicable access arrangement is accessible on the service provider's website (r. 107(1)). In addition, there are more specific rules requiring the relevant service provider to:

- publish an approved CTP access arrangement on its website (r. 27(4))
- publish the prices on offer for light regulation services and the other terms and conditions of access to light regulation services on its website (r. 36), and
- where a price regulation exemption has been granted, publish the prices for the provision of pipeline services by means of the international pipeline on its website (s. 166).

The AER may also contribute to the level and quality of information that is publicly available by publishing:

- reports on the financial and operational performance of service providers in providing pipeline services by means of covered pipelines (s. 27(1)(f))
- reports on the financial or operational performance of scheme pipeline service providers in providing pipeline services by means of a scheme pipeline (s. 64)
- papers on regulatory issues for public information or discussion (Part 2 of the NGR), and
- an assessment of information reported by service providers to the AER about access negotiations relating to light regulation services (r. 37(3)).

In addition, much of the AER's decision-making processes (such as the approval of a full access arrangement) are subject to public consultation and those decisions are generally published on the AER's website.

The NGL and NGR also provide for the legal obligations (Chapter 7 of the NGL) on relevant parties to provide information for the Gas Market Leaders Group Bulletin Board (Bulletin Board). The objective of the Bulletin Board is primarily 'to facilitate trade in gas over the relevant pipeline system through the provision of system and market information, which would be readily available to all users, potential users and other interested parties.'¹⁶ The NGR establishes the information to be provided to the Bulletin Board operator by certain parties (s. 223). The information to be provided as outlined in the NGR (Part 18, Divisions 5 to 7) includes:

- nameplate rating information (production facility operators, storage providers, pipeline operators)
- three day production capacity outlook (production facility operators, storage providers, pipeline operators)

¹⁶ *ibid.*, p. 3.

- actual production or storage production data (production facility operator, storage providers)
- linepack/capacity adequacy (pipeline operators)
- nominated and forecast delivery information (pipeline operators)
- actual pipeline delivery information (pipeline operators)
- spare capacity and gas available for purchase (Bulletin Board participants)
- annual peak demand – forecast demand for May to September and November to March (Bulletin Board operator)
- emergency information (Bulletin Board operator).

Refer also to section 6.1.1.6. about publishing access dispute determinations.

3.2 Contractual arrangements for dispute resolution

The AER prefers parties to come to commercial arrangements and agreements for access to pipelines wherever possible. Other options such as notification of an access dispute under Chapter 6 of the NGL, should only be considered when all other commercial alternatives have been exhausted.

The AER understands that, in some cases, contractual arrangements between the parties may provide for a dispute resolution process.

As a first step, the AER encourages parties to use the alternative dispute resolution (ADR) processes that form part of any commercial contract or agreement between the parties. Consequently, when the parties have not used a dispute resolution process established by contract, the AER may ask them why and whether that process would help resolve the dispute, particularly if such mechanisms are likely to result in an expeditious resolution of any issues of access.

The AER may terminate an access dispute (without making an access determination) if the AER considers that the aspect of access about which there is a dispute is expressly or impliedly dealt with under a contract (s. 186(2)).

3.3 Mediation

While the AER has power to require parties to mediate (s. 185(1)), the AER will generally look to do so with the consent of the parties, to ensure parties are engaged in the process and motivated to achieve a constructive outcome. This is because genuine commitment is usually necessary to guarantee the successful resolution of the issue in dispute via mediation.

An access dispute may actually contain a number of issues some or all of which may be referred for an ADR process. Using ADR processes may provide for a more efficient and satisfactory outcome for resolving some or all issues in a dispute that cannot be achieved by means of commercial negotiation.

Mediation is a consensual process, where the mediator seeks to facilitate agreement between the parties. It usually involves the following characteristics:

- commitment by the parties to participate in the mediation in good faith
- agreement that the contents of the mediation remain confidential
- the ability for private conferencing to occur between the mediator and any party
- agreement to embody the outcome of the mediation in an enforceable contract between the parties.

These matters would generally be set out in a resolution contract between the parties.

However, as indicated, the AER may require parties to mediate (s. 185(1)).

The issues suitable for an ADR process may be identified early after the notification of the dispute such as at an initial case management meeting or following directions given by the AER in the course of a dispute hearing. If the AER requires parties to commence a mediation, conciliation or other ADR process, parties must comply with any instructions given by the AER (s. 185(2)).

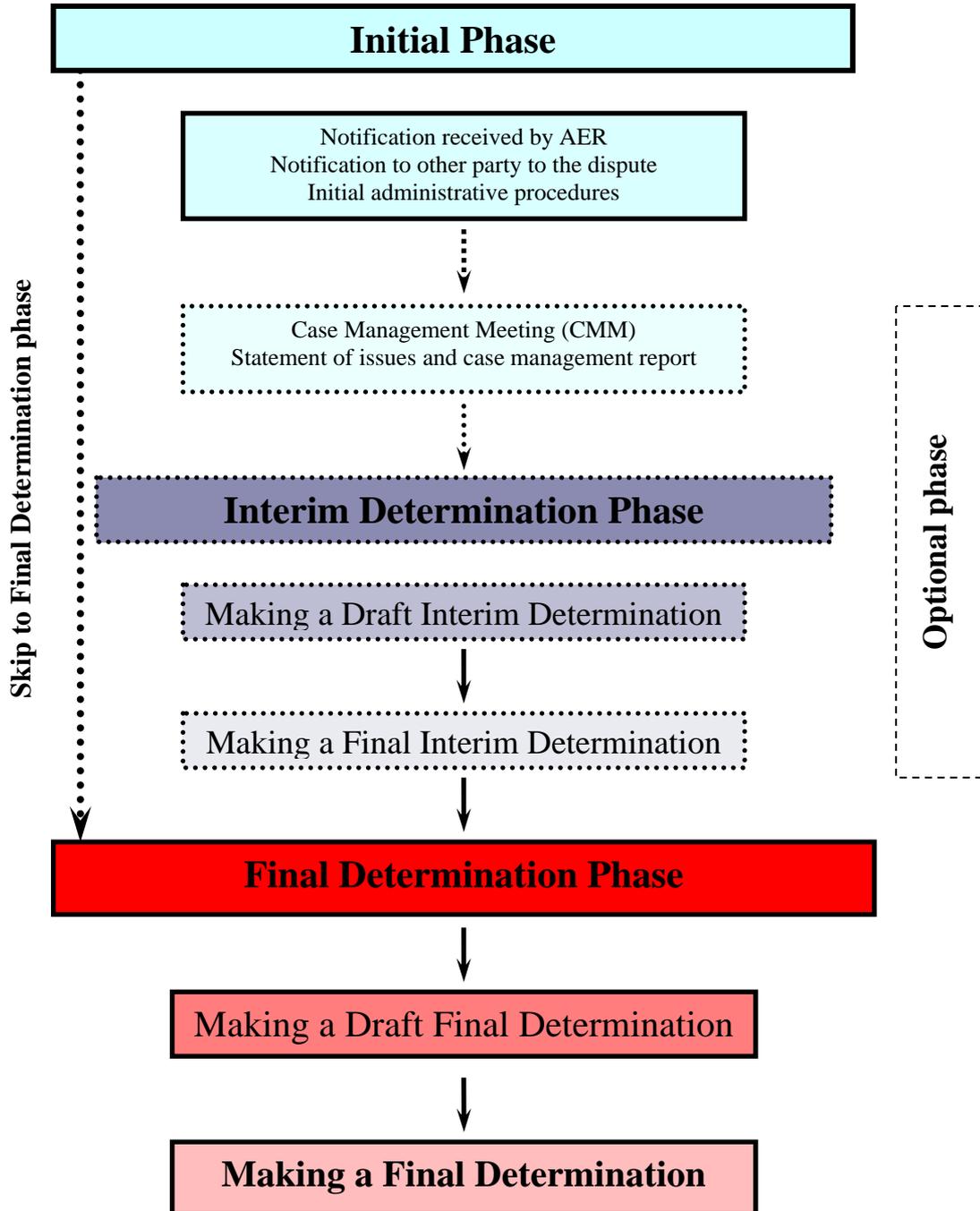
In deciding whether to refer an issue for an ADR process, the AER will generally set a time frame for resolution of that process. If the ADR process is unable to resolve the issue, it will subsequently be determined by the AER along with the other issues in dispute. The discipline imposed by such time limits is, in the AER's view, more likely to result in a timely resolution of these issues.

If issues referred to an ADR process are resolved, the party which notified the dispute is required to inform the AER that the issue has been resolved. It will then need to withdraw that issue from the list of matters originally notified as being in dispute.

In the circumstances that mediation is not successful within the time limit the AER will usually make a determination on the matters not resolved by meditation in the course of making a determination for the access dispute.

4 Access dispute process

Basic schema of the process for hearing an access dispute and making an access determination



Phases of the access dispute process

4.1 Initial phase of the access dispute process

4.1.1 Notification of a dispute

An access dispute can be notified by a prospective user or user who is unable to agree with a service provider; or by a service provider who is unable to agree with a prospective user or user; about one or more aspects of access to a pipeline service provided by a scheme pipeline (s. 181(1)).

Disputes can be notified for price (revenue) and non-price terms and conditions of access for covered pipelines including those subject to limited access arrangements and full access arrangements (s. 181(1)). Disputes can be notified for price (revenue) and non-price terms and conditions of access for deemed pipelines such as pipelines whose access arrangements were subject to tender approval and those for which a voluntary access arrangement has been submitted (s. 181(1) and ss.126-127).

Notifications of an access dispute can be sent to the AER via email to:

AERInquiry@aer.gov.au.

4.1.1.1 Form of a valid notification

The notification must be in writing (s. 181(1)) and accompanied by the fee of \$2750 (s.181(2)).¹⁷

While there is no prescribed form, the AER's preferred format for providing the written notification is set out in Appendix B to this Guideline.

4.1.1.2 Separate Notifications

The AER is of the view that a dispute can only be notified by one prospective user or user against one service provider (or by one service provider against one prospective user or user) in relation to a single pipeline service. There may be multiple users or prospective users and service providers that are connected with a single pipeline service. A separate notification is required for each separate dispute in relation to that pipeline service, for each separate service provider.

Consequently, a separate notification fee is also payable for each separate dispute.

If a person notifies and provides a fee for one dispute, but the notification names multiple legal entities of a particular corporate organisation as either users or prospective users or service providers, the notification may not be valid. To ensure valid notification of a dispute (or disputes) a separate notification fee should accompany each dispute notified by a single legal entity against another legal entity. For administrative ease, it is suggested that a separate notification form for each notification of an access dispute is provided.

¹⁷ Regulation, schedule 5, clause 6. Refer to Chapter 9 of this Guideline on fees and costs for further detail, including GST implications.

4.1.1.3 Notification of other parties to the access dispute and other matters

On receiving a valid notification, the AER must give written notice of the access dispute to:

- the service provider, if a prospective user or user (as the case requires) notified the AER of the access dispute (s. 181(3(a))), or
- the prospective user or user (as the case requires), if the service provider notified the AER of the access dispute (s. 181(3(b))).

The AER will give written notice to the user, prospective user or service provider (as appropriate) by providing a copy of the original notification. The AER may also ask the parties at this stage to identify whether there are any other persons who may have an interest in the dispute.

The AER will also as a matter of course publish on its website that an access dispute has been notified. The public notice will only provide details about the relevant parties to a dispute (usually a service provider and user or potential user), and service, and if appropriate a brief (generic) description of the nature of the dispute.

The AER also maintains an electronic register of people which it notifies of new regulatory issues. People on this electronic register will also be informed by means of the Generating Email and Mail System (GEMS) notice when an access dispute is notified and be provided with a brief description of the nature of a dispute.

Interested parties who wish to be added to this electronic register should contact the AER by sending an email with their name, position, email address and a contact telephone number to:

AERInquiry@aer.gov.au.

4.1.2 Who is a party to a dispute?

In addition to the party that has notified the dispute (s. 181(1)) and the other party to the dispute (s. 181(3)) there may be other parties that are also considered parties to an access dispute, including persons:

- in the AER's opinion who may need to do something to resolve the access dispute (s. 183(c)), and
- who apply in writing to be made a party and are accepted by the AER as having a sufficient interest (s. 183(d)).

Generally, persons who wish to become a party to an access dispute under s. 183(d) should make an application to the AER within five business days of the date of the AER's notice that an access dispute has been notified. While it is not prescribed, the AER suggests that the person seeking to become a party under s. 183(d) should outline the reasons why they consider it is appropriate that they become a party to the relevant access dispute. The AER is conscious of the need to balance the need for sufficient time for parties to consider and, if necessary, obtain advice on whether they should

apply to become a party to an access dispute, against the desirability of commencing the proceedings of an access dispute in a timely manner.

The AER may consider applications of a person seeking to become a party to an access dispute that are received after the indicative timeframe of five business days but it encourages interested parties to indicate their intentions within the timeframe set down.

Once a person becomes party to an access dispute, that person is privy to the dispute hearing and all relevant information received by the AER in the context of the access dispute process,¹⁸ on the same basis as the other parties, and may provide submissions to the AER on relevant issues of access as they consider appropriate.

The AER interprets ‘sufficient interest’ to mean ‘sufficient interest in the determination(s) to be made in the arbitration’. Typically, the determination(s) will create rights and obligations between two people (namely, a particular access provider and access seeker) regarding supply of the access service. The person seeking to become a party will need to demonstrate that it has a sufficient interest in those arrangements.

The Tribunal considered the meaning of ‘sufficient interest’ in its review of two ACCC arbitration determinations under Part XIC of the *Trade Practices Act 1974*.¹⁹ In those reviews the Tribunal drew a distinction between an interest that was ‘direct and immediate’ and an interest that was ‘indirect’. In the Tribunal’s view, an indirect interest could not be characterised as a sufficient interest:

The effect of the Tribunal’s determination, even if it does establish a benchmark for the pricing of the declared services will be an indirect one in common with consequential effect that the price of access to the declared services is likely to have on a wide range of intermediate and end-users of carriage services. Macquarie, like all those other users has an interest, but we do not think the interest is a ‘sufficient interest’ for the purpose of Part XIC. If it were, intervention by numerous users of other carriage services and services supplied by means of carriage services would be permissible under s 152CO. This cannot be the intention of the Act, as to allow the intervention by numerous people would frustrate the arbitration process envisaged by Part XIC, including the object of protecting commercially sensitive information to be achieved by requiring hearings to be in private under s. 152CZ, and for the arbitration procedure to be expeditious: see s. 152DB.²⁰

On the basis of the Tribunal’s decision, it can be said that the precedent effect of a determination is not enough to provide a sufficient interest — something more is required.²¹

¹⁸ This is subject to any decision made by the AER under s. 205 to withhold a document (or part of it) containing confidential information from one or more parties - see section 5.1.4 of this Guideline.

¹⁹ *Telstra Corporation Ltd* [2001] ACompT 1; (2001) ATPR 41–812.

²⁰ *ibid.*, at [40].

²¹ In that instance, the extensive help from Optus in the cost modelling work, which was a central issue in dispute, provided a basis for accepting that Optus had a sufficient interest in the matter. The Tribunal also noted that what may not be a sufficient interest for one purpose may be so for another. In this regard, the ACCC had previously refused Optus’s request to become a party. The tribunal noted that the rehearing differed from the original arbitration in that ‘[u]nlike the arbitration by the ACCC, the re-arbitration by the tribunal will directly raise for consideration the ACCC’s analysis

The AER considers that the interests of another party may be directly affected if, for instance:

- the party is contractually bound to take a price that would be determined in the access dispute
- the other party has agreed to acquire a controlling interest in one of the parties to the access dispute.

The other parties to a dispute will be determined by the AER on a case-by-case basis.

In practice, the most likely persons to have a sufficient interest in an access dispute are:

- the user or prospective user of the access dispute pipeline, and
- operators, owners or controllers of a pipeline (depending on which party the dispute was notified to, if there is a separation of ownership, control and operation of a pipeline).

Other related service providers may also be able to demonstrate a sufficient interest.

Sometimes other interested persons, such as government bodies, industry organisations or consumer groups, may wish to make their views known to the AER. The AER may decide to accept submissions from such persons. If the person's interest is sufficiently strong to warrant the AER's exercise of its discretion under s 198(1)(c), it may be more appropriate for the person to seek admission as a party to the access dispute first.²²

Although it is less likely that a representative body or an industry organisation will be able to demonstrate sufficient interest to be joined as a party to a dispute, this will be decided on a case-by-case basis.

While the precedent effect or commonality of issues may not always provide a basis for joining parties to the same access disputes, in appropriate cases it may provide a basis for holding a joint hearing for these issues - see section 4.1.8 for further details. This means the AER can maintain privacy between the parties for issues that only concern them, while enabling common issues to be considered in a multilateral process. Alternatively, these parties which have some indirect interest in issues subject to the access dispute, may, by written direction of the AER be permitted to be present at a dispute hearing that is conducted in private (s. 196(3)).

4.1.3 Who conducts and determines an access dispute?

The NGL provides that the AER conducts a hearing (s. 178 and s. 2) for the purposes of making an access determination (s. 184(1)). The AER is the body corporate established under 44AE of the *Trade Practices Act 1974*, which consists of a Commonwealth member and two State/Territory members (s. 44AG of the *Trade Practices Act 1974*).

A delegate of the AER may make the access determination and hear an access dispute. Under s. 29 of the NGL and s. 44AAH of the *Trade Practices Act*, a delegation by the

contained in the ACCC's public documents, and is intended, at least by Telstra to set an industry benchmark' (at [39]).

²² Section 198(1)(c) provides that the AER may inform itself about any matter relevant to the access dispute in any way it thinks appropriate.

AER allows the AER to delegate all or any of its functions and powers to an AER member or an SES employee or an acting SES employee.

For the purpose of hearing an access dispute and making an access dispute determination, the AER as the dispute resolution body can comprise the following:

- one or all of the AER members,
- one or all of the SES employees or acting SES employees, or
- a combination of the above.

The composition of the AER as the dispute resolution body will be determined at the outset of a dispute but may change during the course of a dispute. The AER will notify parties appropriately if the composition of the AER as the dispute resolution body changes during the course of a dispute.

4.1.4 Hearings

A hearing is the process by which the parties can present their submissions and evidence to the AER in relation to the access dispute.

Hearings can be held using a variety of methods including written (on the papers) or oral submissions, or a combination of both.

4.1.4.1 Who assists the AER when it is conducting an access dispute hearing?

While the AER is responsible for hearing the dispute and making the substantive decisions or determinations in an access dispute, they are supported by AER staff members that make up the case management team (CMT).

The CMT for an access dispute is usually comprised of a case manager, a contact officer and a legal adviser but can also include other staff members as appropriate. The role of the CMT is twofold:

- to facilitate or encourage alternative dispute resolution or mediation processes of particular issues which are the subject of the access dispute, and
- to undertake process work and provide administrative support for the AER during the hearing.

The CMT also provides advice to the AER to assist them in considering the substantive issues in dispute.

The AER recognises that the processes involved in case management are not necessarily comparable with those associated with the consideration and approval of an access arrangement. Consequently, staff assigned to a case management team might not have direct experience with the operation of the terms and conditions of the access arrangement under dispute. The composition of the case management team is a matter for the AER but it will consult with the parties to a dispute as to the composition of the team.

4.1.4.2 How and when can hearings be held?

In the context of an access dispute, the AER may require evidence or argument to be presented in writing, and may decide the matters on which the AER will hear oral evidence or argument (s. 198(3)).

Hearings can be held using a variety of means in whole or in part, including:

- by telephone,
- by video conferencing, or
- by any other means of communication (s. 198(4)).

In practice, the AER's preference is to hold hearings 'on the papers' by way of written submissions. It may in some circumstances be appropriate to hear the access dispute by some other means. The means by which an access dispute is heard will depend on the complexity and nature of the issue in dispute and the AER's view on the appropriateness of an alternative means of hearing the dispute other than 'on the papers'.

The AER considers hearings by way of written submissions and correspondence i.e. 'on the papers' provides a means of documenting the substantive and administrative issues throughout the course of the dispute, limiting the opportunity of conduct which is exclusive to one party or another, and a convenient method to communicate with all parties simultaneously.

Detailed written submissions are particularly appropriate in disputes involving:

- complex questions of NGL
- methodology of calculating costs/charges
- analysis of detailed or extensive information that has been presented in evidence, or
- resolution of apparent or actual conflicts in the evidence on which an argument is based or facts about the case (for instance, evidence about the availability of capacity or the state of competition).

The AER encourages parties to make submissions or provide correspondence by electronic means and conforming with the requirements as outlined above and in sections 5.1.2 and 5.1.3 of this Guideline.

The AER may decide to hold joint hearings

When the AER is conducting two or more access disputes involving one or more common issues, it may decide to hold a joint hearing (s. 209).

See section 4.1.8 of this Guideline for further detail about the conduct of joint hearings.

4.1.4.3 Privacy of hearings

In general, access disputes are determined in private and only the parties, their legal representatives, and nominated staff members are privy to the full extent of the proceedings (s. 196(1)). The AER may give written directions as to the parties that may be present at a dispute hearing that is being conducted privately (s. 196(3)). In giving such directions, the AER must have regard to the wishes of the parties and the need for commercial confidentiality (s. 196(4)).

As outlined in section 4.1.2 of this Guideline, this may be appropriate if a person or third party has some indirect interest in the outcome of an access dispute proceeding and the determination made.

Alternatively, a dispute hearing, or part of it, may be conducted in public if the parties agree (s. 196(2)). As also outlined in section 6.1.1 of this Guideline, there may be times when the content of an access dispute hearing may be or is required to be made public.

4.1.4.4 Improper conduct in hearings

Parties are reminded that certain conduct during a dispute hearing may be subject to penalties, for example, failing to attend as a witness, failing to answer questions, intimidation, and disclosure of confidential information. A penalty of \$2000 applies for the failure to comply with each relevant provision (ss. 200-204).

4.1.5 Obtaining evidence and information

When conducting an access dispute process, the AER is not merely choosing between competing points of view expressed by the parties but must form its own view about the appropriate outcome. To do this, the AER needs to undertake its own analysis and may seek material in addition to that provided by the parties (for example, it may refer any matter to an independent expert). In doing so, the AER is not bound by technicalities, legal forms or rules of evidence and may inform itself of any matter relevant to a dispute in any way it thinks appropriate (s. 198(1)(c)).

The parties in an access dispute may provide information voluntarily to the AER or the AER may make use of its statutory powers²³ (as outlined below, including its general information gathering powers) to compel the disclosure of information.

The AER may also obtain evidence or information in other ways, including:

- parties supplying information voluntarily
- referring a matter to an expert for their opinion and accepting the expert report as evidence (s. 199 (1)(e))
- requiring a party to provide evidence or argument to be presented in writing and deciding the matters which it will hear oral evidence or argument (s. 198 (3))
- taking evidence on oath or affirmation (s. 201(1)), or

²³ ACCC/AER, *Information Policy*, October 2008, p. v. and p. 4.

- issuing a summons to a person to give evidence and/or produce documents (s. 201(2)).

Information is crucial to the AER's ability to determine access disputes. It will sometimes be possible to identify the type of information required at the outset of an access dispute, but in other cases it may be necessary to resolve particular issues before it is clear what information will be required.

The AER may draw on sources of information including existing contracts. In some cases service providers are required to publicly disclose and make certain information available under the NGL (for example access arrangements for full access arrangements, competitive tendering processes and light regulation services and pipelines are publicly available). Even in cases where an access arrangement does not exist or does not cover revenue and price terms for access, service providers are required to publicly disclose the terms and conditions of access including prices.

The AER may give a direction in the course of, or for the purpose of, a dispute hearing for parties to provide information (s. 199(1)(a)). This is an express power and will be the usual means of obtaining information in an access dispute hearing. Before issuing these directions the AER will often (but not always) seek the parties' views on the information being requested. This may be done in the context of a case management meeting, a conference with the AER, through submissions to support a party's position about the content of a determination or by hearing (oral or on the papers). It is ultimately the AER that must determine what information the parties must provide.

In addition, nothing precludes the AER from using its general information gathering powers (s. 42) for obtaining information or documentation from a person or using information instruments (orders or notices made or served under s. 48) to obtain information from service providers, if the AER considers it appropriate. If information is sought using the AER's information powers, then where relevant the AER will undertake consultation processes outlined in the NGL and NGR to do so.

This is consistent with the ACCC/AER *Information Policy*, which outlines that the AER will use its statutory powers to obtain information where appropriate.²⁴ Restrictions of use cannot be placed on information collected under its information powers.²⁵

Other processes or issues that may be relevant for the initial phase

Once a dispute has been notified and the AER is satisfied that the notification is not vexatious (s. 186(1)(a)) or the subject matter of the dispute is not trivial, misconceived or lacking in substance (s. 186(1)(b)), there are several steps that need to be taken before an access dispute proceeds. These initial steps in an access dispute proceeding are outlined below.

²⁴ *ibid.*

²⁵ *ibid.*

4.1.6 Establishing the confidentiality regime

Dispute hearings are to be held in private unless parties otherwise agree (ss. 196(1)-(2)). To support the private nature of dispute hearings, the AER will usually, at the outset of a dispute, give a written order (but this can also be oral) to the parties not to divulge or communicate to anyone specified information given to it during the course of the access dispute process without the AER's permission (s. 200).

This is a general confidentiality order that will remain in force for the length of the access dispute process until the AER revokes it or makes another order. The reason for the general confidentiality order is to maintain the private nature of the access dispute process. In addition, there may be information which is provided by one party to the other party that is confidential and which should not be disclosed to persons outside the dispute hearing (s. 196 and s. 200).

The purpose of issuing a general confidentiality order at the commencement of an access dispute process is to encourage a more open environment in which the parties can discuss issues concerning the dispute with each other and the AER. The use of a general confidentiality order throughout the dispute proceedings is common and standard practice in dispute resolution processes, and can be complemented by other directions and undertakings during the course of the dispute if required.

Following the making of a general confidentiality order, parties will be given five business days to raise any concerns they have regarding the order. If parties do not raise any concerns, the confidentiality order will continue to operate over the course of the dispute.

The AER envisages that the confidentiality order it initially makes for parties is broad enough to cover most circumstances arising during an access dispute in which confidential information will be provided by the parties and to protect the interests of parties. The AER also recognises that some degree of flexibility may be required in the use of commercially confidential information in the context of an access dispute. This is because not all circumstances in which commercial-in-confidence material will need to be provided are necessarily known at the commencement of the process for determining an access dispute. If this is the case, it may be appropriate to make a new confidentiality order to account for these changes in circumstances or contemplate other confidentiality arrangements.

If a general confidentiality order needs to be complemented by an undertaking between parties to an access dispute, the AER is amenable to these additional confidentiality undertakings being arranged.

If additional arrangements are necessary, the AER requires the relevant parties to make these arrangements between themselves in an expeditious manner. Parties will be given a set period (no more than 15 business days) to agree and execute these confidentiality undertakings. Once this time has elapsed and if no agreement has been reached about a form of a confidentiality undertaking acceptable to both parties, the AER will direct the parties to sign the standard form confidentiality undertaking contained in Appendix 1.

Without a reasonable excuse, the penalty for non-compliance with the general confidentiality order is \$2000 for an individual and for an entity \$10 000 (s. 200(2)).

4.1.7 Case management meeting

A case management meeting is a discretionary step in the access dispute process with the purpose of considering procedural and administrative issues for the smooth and effective operation of dispute hearings. These meetings will not consider substantive issues and can consequently be coordinated and heard by the case management team rather than the AER. The case management team can then provide advice to the AER in respect of these issues and on how best to conduct the access dispute hearing. However, this does not preclude the AER from conducting or being involved in any aspect of the case management meeting.

Case management meetings will generally be held early in the access dispute process. It may be appropriate to revisit or consider procedural matters at later stages of the access dispute hearing. The AER has the discretion to conduct these meetings by any means of communication including by written submission, or oral submissions in person or by telephone and closed circuit television. However, the AER's preference, in consideration of what is convenient for all parties, is to streamline and expedite the process by conducting case management meetings 'on the papers' through requests for, and replies by, written submissions from parties. The CMT will generally prepare a list of relevant procedural and administrative issues (agenda items) that it would like the parties to address in their submissions. The AER will give parties five business days to make submissions on the agenda items. In some cases, the AER may propose or decide certain procedural matters without consultation with parties beforehand. If this is the case, the AER will give parties five business days to raise any objections to the AER's proposal or decision.

The relevant issues that the AER may invite parties to submit on (either orally or 'on the papers') for a case management meeting include:

- the issue(s) in dispute
- whether any parties should be joined to the access dispute. Note: this is a matter to be decided by the AER and not the case management team conducting the case management meeting (s. 183)
- dispute resolution measures parties have participated in with respect to the dispute
- possible forms of ADR measures parties consider may promote resolution of the dispute and/or particular issues in dispute (s. 185)
- the jurisdiction of the AER. That is, whether the prospective user or user is 'unable to agree' with the service provider
- if relevant, the AER's decision to conduct a joint access dispute hearings (s. 209)
- any issues relevant to any proposed confidentiality orders (s. 196(3) and s. 200(1)) , and/or
- if the AER should consider making an interim determination (s. 199(2)).

The case management team will distil these issues and provide them to the AER for consideration.

Depending on the circumstances of a dispute, it may not always be necessary to hold a case management meeting either in person or ‘on the papers’. The decision to hold a case management meeting as outlined above is at the discretion of the AER. The AER will decide whether to hold or dispense with a case management meeting on a case-by-case basis, taking into account the circumstances relevant to the particular dispute.

For guidance, a case management meeting may not be necessary in some of the following circumstances:

- if the parties are well practised and familiar with the access dispute process
- if the parties have experience from previous access disputes with each other so that issues such as joint hearings and confidentiality matters have already been addressed between the parties
- if procedural issues usually discussed at a case management meeting are already settled and agreed between the parties or are not relevant to the dispute hearing, or
- if issues that may otherwise be dealt with during a case management meeting, such as a confidentiality regime, have already been addressed by the parties.

The contact point for **all inquiries** for an access dispute, including any correspondence to the parties is the contact officer or officers nominated at the outset of an access dispute who will be part of the CMT. The AER retains its discretion to vary the composition and resourcing of the CMT without consultation as appropriate. These changes will be communicated in writing, usually by email, as appropriate during the course of an access dispute. The CMT will provide parties with a relevant email address to which all correspondences and submissions are to be sent.

The case management team for a particular dispute will generally write to the parties to advise them whether a case management meeting will take place. If a case management meeting is to take place, parties will be informed of whether the case management meeting will be heard ‘on the papers’ or in person. The AER will also generally provide parties with the list of procedural issues to be addressed by the case management meeting. If the case management meeting is to be held ‘on the papers’, or not at all, the AER will provide parties with at least five business days to make submissions on relevant procedural issues for the access dispute hearing. The AER will consider any submissions made and notify parties of the outcomes.

In addition, if a party is of the view that any procedural issues need to be addressed (including if a case management meeting should be held) during the course of a dispute, it may direct a written request to the nominated contact officer for the dispute. The request should outline the procedural matters the party wishes to be addressed. Nevertheless, it is within the AER’s discretion to decide whether these matters will be considered and the form in which these matters will be conducted (s. 198).

4.1.8 Joint hearings

The AER has discretion to decide if it will hold a joint hearing (s. 209(2)). The decision of whether to conduct joint hearings for two or more disputes will generally be decided prior to or during a case management meeting.

The AER may decide to hold a joint hearing if it is conducting two or more access disputes involving one or more common issues (s. 209). This means the common issues in two or more separate disputes (i.e. nominated disputes per s. 208) can be considered together in a joint hearing or single process rather than multiple hearings for each nominated dispute.

It may, for instance, be appropriate to hold a joint hearing where the two disputes concern the same pipeline service, with either the same service provider and different users or prospective users or different service providers (different but common controlled entities) and the same user or prospective user. It may be also appropriate to join hearings for common issues in dispute for different pipeline services.

If the AER decides to hold a joint hearing because it considers that a joint hearing, rather than two separate hearings, is likely to result in the disputes being resolved in a more efficient and timely manner (s. 209(3)), it is required to provide written notice of its intention.

The AER will notify each party to each separate dispute (nominated dispute per s. 208) in writing that it is proposing to hold a joint hearing and when it does so it will seek written submissions from the parties. The NGL requires parties to provide written submissions within 10 business days of being given the notice by the AER (s. 210(1)(b)). The AER will endeavour to consult with parties about the appropriateness of holding a joint hearing at the earliest possible stage of each dispute. This matter may be considered directly after a dispute has been notified, along with other matters such as the establishment of the confidentiality regime.

The AER may conduct the joint hearing as it would for a particular dispute hearing (s. 211). This infers that all the processes and procedures for the conduct of a dispute as set out in the Guideline apply equally to the hearing of an individual dispute or a joint hearing.

The AER, as constituted for the purposes of the joint dispute may have regard to any record of the proceedings of any nominated dispute (s. 212(1)). Also, the AER as constituted for the purposes of the dispute hearing of each nominated dispute may, for the purposes of making an access determination, have regard to any record of the proceedings of the joint dispute hearing and adopt any findings of fact made by the AER as constituted for the purposes of the joint dispute hearing (s. 212(2)).

Even if the AER conducts joint hearings of nominated disputes, in which all the conduct and procedures of the nominated disputes are undertaken by joint hearings, it will make a separate determination for each nominated dispute. This does not preclude the AER from providing to each party involved in a joint hearing for nominated disputes a common statement of reasons to support the access determination made in each nominated dispute.

4.2 Interim determination phase

The AER may make an interim determination (s. 199(2)).

Interim determinations may be used as an important means for ensuring a user or prospective user obtains timely access to pipeline services. This is because service

providers may see the access dispute process as a way of delaying access to a pipeline service in the circumstances where the processes are lengthy because of the need for a consideration of the parties' views presented to the AER.

The AER will generally make an interim determination when one or more of the issues in dispute are relevant terms and conditions of an approved (and current) access arrangement that are not expressly or impliedly dealt with under a contract. The purpose in making an interim determination in these circumstances is to provide an expeditious outcome for some matters of access in which the AER has already considered and determined these issues.

The AER may consider requests for the making of an interim determination, particularly when the process to make a final determination is likely to take a considerable amount of time and the making of an interim determination can be expedited. Assessing a request for an interim determination does, however, divert resources from considering the substantive issues in dispute and this is something that parties requesting an interim determination should bear in mind.

Sometimes timeframes for making interim determinations may not result in a speedy resolution of an access dispute compared to proceeding directly to making a final determination. Therefore one factor in deciding whether to make an interim determination may be the anticipated timeframe for making an interim determination. If the AER decides to make an interim determination, it is expected that it will be able to do so well before the indicative timeframe set down for the making of a final determination.

The making of an interim determination is discretionary, and the AER may or may not decide to make an interim determination.

4.2.1 Relevant matters for making an interim determination

In deciding whether to make an interim determination, the AER may choose to consider any matters it considers are relevant.

Interim determinations enable the AER to strike a balance between conducting a thorough examination of all the matters it must take into account when making a final determination and ensuring timely access to those pipeline services subject to a dispute.

Generally, the AER has found it useful to focus on two matters in making interim determinations:

- whether the AER is satisfied that it has sufficient information on which to make an interim determination, and
- whether the AER is satisfied that, in all the circumstances, it is appropriate to make an interim determination.

The AER prefers that parties to a dispute to negotiate their own alternative interim commercial agreements pending a final determination. This is particularly important because the AER will generally base its interim determination on less information than it will use in arriving at its final determination. Even if an interim determination is in

place, parties to a dispute should not be discouraged from reaching such agreements of their own volition.

4.2.1.1 Sufficient information

In terms of sufficient information, the AER considers that it does not need to have all the information necessary for making the final determination, nor does it need to have reached a view on all outstanding issues between the parties when making an interim determination. To set the information threshold at that level would seem to restrict unnecessarily the AER's ability to make interim determinations. Rather, the AER considers that the information should provide a reasonable basis for the terms and conditions set out in the interim determination.

4.2.1.2 Appropriate in all the circumstances

In considering whether an interim determination is appropriate in all the circumstances, the AER may consider a range of matters, depending on the circumstances of the access dispute. These may include but are not limited to: the nature of any existing contractual arrangements between the parties; the likely impact of an interim determination on a user and/or prospective user of the pipeline service subject to the access dispute; and how quickly all the matters in the access dispute can be resolved and a final determination can be made.

4.2.2 Making an interim determination

The decision to make an interim determination is at the AER's discretion. The AER generally tries to ensure there is sufficient information available to the parties and the AER before making an interim determination.

In most circumstances, the AER will choose to proceed to a final determination as there will generally be insufficient information to make an interim determination and the AER is obligated to act as speedily as proper consideration of the access dispute allows. Alternatively, the AER may decide to make an interim determination if the issues in dispute are addressed or contained in a current, approved access arrangement.

If the AER decides to issue an interim determination, it may first give the parties a draft interim determination (including a statement of reasons) and seek submissions and submissions-in-reply from parties about the content of the interim determination. If the AER issues a draft interim determination, a written direction will be made outlining the issues that the party should address in their submissions and submissions-in-reply on the content of the draft interim determination. Parties will be provided with a reasonable period at the discretion of the AER to make their submissions, which will be similar to the submission timeframes for making final determinations (no less than 10 and generally no more than 20 business days). These timeframes may be altered at the discretion of the AER depending on the complexity and number of issues in dispute.

Parties are referred to the guidance provided in sections 5.1.2 and 5.1.3 when making submissions on the draft interim determination and particularly when the AER will and may consider submissions.

Once the consultation period for submissions has ended and the AER has considered the relevant submissions, the AER will make an interim determination.

The principles outlined in section 4.3.3.1 of this Guideline provide for a basis to consider aspects of revenue and pricing in an interim determination, and may be applied equally to the making of an interim determination about revenue and price.

Parties should be aware that an interim determination does not terminate an access dispute. In the circumstances where the AER makes an interim determination in an access dispute, it will still make a final determination unless the access dispute is terminated (s. 184(1)) or the dispute is withdrawn (s. 182).

4.2.3 Duration of an interim determination

An interim determination remains in force until it expires unless one of the following events occurs:

- a final determination is made and takes effect (s.184)
- the interim determination is repealed by the AER either at the request of the parties or at the AER's discretion (Schedule 2, s.20)
- the AER terminates the access dispute (s. 186), or
- the notification of the dispute is withdrawn (s. 182).

4.2.4 Amendment of an interim determination

The AER may amend an interim determination, as appropriate in the circumstances. The power to amend an interim determination is exercisable in the same way, and subject to the same conditions, as the power to make the interim determination (Schedule 2, s. 20).

4.3 Final determination phase

The final determination phase relates to consideration of all the substantive issues for the making of the final decision. Generally not all of the substantive issues are considered for the purposes of making an interim determination. The following section outlines the procedures that may and must be undertaken in making a final determination.

4.3.1 Conference with the AER

As part of the making of a final determination the AER will generally issue a direction and seek written submissions from parties as detailed in section 4.3.2. As an intermediate but discretionary step, the AER may consider a conference with parties to discuss substantive issues of access in dispute on which it needs to make a determination. The decision to hold a conference with parties as part of an access dispute hearing is at the discretion of the AER.

The purpose of a conference is for the AER to provide views on certain issues to assist parties to narrow the focus on the substantive areas of dispute in making written submissions. These views as expressed by the AER during the substantive phase are to provide guidance as to the basis for the determination that the AER is likely to make.

In deciding whether to hold a conference, the AER will consider, among other things, whether there are benefits in getting the parties together to better understand the other's point of view or to identify and obtain better focus for the technical or substantive issues.

Conferences may take any form including a workshop or meeting as appropriate and could also involve technical experts and legal representatives of parties and the AER. In the circumstances that a conference is held, the AER will generally issue written instructions by correspondence or direction. These instructions will include details about the time and location of the conference and other persons that may attend. These instructions may also contain directions concerning the privacy of the conference and relevant confidentiality orders. The AER will consult with parties prior to making a direction about the appropriateness of other persons being present at the conference.

The AER may require a written summary to supplement the oral submissions made by parties at the conference.

4.3.2 Making a final determination

This section of the Guideline provides an outline of how the AER will proceed in making a final determination in an access dispute. The following sections of the Guideline provide details about the content of a final determination.

The AER is not required to issue a draft determination to the parties, but the AER considers that providing a draft final determination and an accompanying statement of reasons to parties affords them an opportunity prior to the making of a final determination to correct any factual matters relating to the issues of access in dispute. The draft final determination is not the final determination, but will generally set out the AER's proposed approach to the determination accompanied by a statement of reasons.

Before making a draft determination the AER will issue directions to the parties seeking submissions and submissions-in-reply on the content of the final determination for the dispute. Parties will generally be given no less than 10 business days and generally no more than 20 business days to provide submissions on the content of a final determination and at least a further 10 business days to reply to each other's initial submissions (i.e. the submissions-in-reply). These indicative timeframes may vary depending on the complexity of the issues involved in a particular access dispute. After receiving and considering the submissions of the parties, the AER will issue a draft determination and a supporting statement of reasons for comment by the parties.

Parties will be invited to comment on the draft determination and supporting statement of reasons; a submission period of no less than 10 and no more than 20 business days will generally be provided. Again, these timeframes are indicative and may be altered on a case-by-case basis as required.

Even after a draft determination is given to the parties, there may be an additional opportunity to allow commercial negotiations to resume and for a commercial resolution of the dispute. The access dispute can be withdrawn by the parties at any stage until a final determination is made (s. 182). The AER may also terminate an access dispute if the issues of access have been dealt with under a contract between the

parties (s. 186(2)). For details about withdrawal of a dispute notification by a party or termination of a dispute by the AER refer to section 4.4 of this Guideline.

After receiving and considering any submissions of the parties on the draft determination the AER will proceed to make a final determination, including a supporting statement of reasons. Under s. 184, the AER must make a final determination on access by the prospective user or user. In the circumstances that two access disputes have been heard jointly in a joint hearing process (refer to section 4.1.8 for details about joint hearings) a final determination will be made for each dispute notified. If appropriate, a single statement of reasons for both disputes may be issued to parties.

Once the AER makes a final determination and provides it to the parties, the access dispute process is complete.

The AER provides an indicative timeframe of six months from the date of notification of the dispute for the making of a final determination, but this indicative timeframe will take into consideration the complexity of issues in an access dispute and is intended to exclude time for:

- parties engaging and receiving reports from experts or independent consultants that are mandated under the NGL or NGR or directed by the AER
- undertaking alternative dispute resolution processes, and
- making submissions on any matter during an access dispute hearing.

4.3.3 Content of a final determination

The content of a final determination may deal with any matter about the provision of a pipeline service to a prospective user or user (s. 193). The access dispute provisions are not to be taken to limit how an access dispute may be raised or dealt with (s. 179).

In making an access determination, the AER is required to take into account the value of any past capital contribution made by a party to the dispute and the extent the party has recouped any such past capital contribution (r. 117).

Sections 4.3.3.3 to 4.3.3.5 outline specific limitations about what the AER can make determinations about. Section 4.3.3.6 outlines other matters the AER must take into consideration in making an access determination.

4.3.3.1 Revenue and pricing principles

In making a determination for revenue and price terms the AER needs to take into consideration the relevant revenue and pricing principles under the NGL (s. 24). These are:

- To provide the service provider with an ability to recover at least the efficient costs the service provider incurs in providing the reference service and complying with a regulatory obligation or requirement or making a regulatory payment.
- To provide the service provider with effective incentives in order to promote economic efficiency with respect to reference services the service provider

provides, including: efficient investment in, or connection with, a pipeline with which the service provider provides a reference service; and the efficient provision of pipeline services and the efficient use of the pipeline.

- To have regard to the capital base of a pipeline adopted, in any previous full access arrangement decision or decision under the s. 2 of the code, or in the rules.
- Setting a reference tariff that should allow for a return commensurate with the regulatory and commercial risks involved in providing the reference services.
- To have regard to the economic costs and risks of the potential under and over investment by a service provider in a pipeline providing pipeline services.
- To have regard to the economic costs and risks of the potential under and over utilisation of a pipeline providing pipeline services.

The National Gas (South Australia) Bill 2008, Second Reading Speech, explains that the requirement to take into account the revenue and pricing principles will ensure that service providers are appropriately compensated for providing access.²⁶

Other requirements such as the consistency of an access determination with an applicable access arrangement as outlined in section 4.3.3.4, will also need to be considered when applying the revenue and pricing principles in making a determination about revenue and price.

4.3.3.2 No access to a pipeline service

Access disputes may be notified by a prospective user, but this does not mean that the AER needs to make an access determination requiring the service provider to provide a pipeline service to a prospective user (s. 192).

There may be some instances in which technical and economic feasibility, existing capacity constraints, and consistency with the safe and reliable operation of the pipeline would affect whether the AER makes a determination requiring access to a pipeline service.

4.3.3.3 Restrictions on what the AER can make access determinations about

There are certain restrictions on what the AER can make a determination about. The AER must not make an access determination that would have any of the following effects:

- preventing a user from 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 the access dispute was notified
- preventing a prospective user or user from obtaining, by the exercise of a pre-notification right, a sufficient amount of a pipeline service to be able to meet the prospective user's or user's actual requirements, and/or
- depriving a person of a relevant protected contractual right (s. 188).²⁷

²⁶ South Australia, *Parliamentary Debates*, House of Assembly, 9 April 2008, 2696 (Patrick Conlon, Minister for Transport, Minister for Infrastructure, Minister for Energy).

4.3.3.4 Consistency with applicable access arrangement

Another limitation on the content of a determination concerns the applicable access arrangement. In the circumstances that an applicable access arrangement exists at the time for the pipeline service (subject to s. 191 and the NGR), the AER must in making an access determination, give effect to that access arrangement (s. 189). The AER must give effect to the access arrangement even if it was not in place at the time the access dispute was notified.

4.3.3.5 Circumstances in which there is genuine competition

The AER may refuse to make an access determination for the service provider to provide the pipeline service to a prospective user or user if the AER considers that the pipeline service could be provided on a genuinely competitive basis by a person other than the service provider (or an associate of the service provider) (s. 187).

4.3.3.6 Other matters for consideration in making a determination

This section outlines the matters relevant for making a determination about developing capacity of a pipeline carrying services subject to a dispute as outlined.

The NGL and NGR provide for the circumstances in which an access determination is made to expand capacity of a pipeline and a contribution is made by the user to contribute some or all of the capital to fund the installation or construction of a new facility (s. 191 and rr. 118-119).

The AER may make an access determination that requires the service provider to carry out an expansion of the capacity of the access dispute pipeline (r. 118(1)(a)). In doing so, the AER may not make an access determination that requires the service provider to extend the geographical range of the access dispute pipeline (r. 118(1)(b)).

The determination made by the AER to expand capacity cannot require the service provider:

- to carry out an expansion of the capacity of a light regulation pipeline unless the prospective user funds the capacity expansion in its entirety, and
- to fund, in whole or part, an expansion of the capacity of a standard regulation pipeline unless the extension and expansion requirements of the applicable access arrangement provide for the relevant funding.

Additionally, an expansion of capacity required under an access determination must be technically and economically feasible; and consistent with the safe and reliable operation of the pipeline (r. 118(2)(c)).

²⁷ This means a right under contract (other than a relevant exclusivity right) that was in force immediately before the notification of an access dispute. A relevant exclusivity right means a right that arose on or after 30 March 1995 that (a) prevents a service provider supplying pipeline services to persons who are not parties to the contract or (b) limited or controls a service provider's ability to supply pipeline services to persons who are not parties to the contract. A relevant exclusive right does not include a user's contractual right to obtain a certain amount of pipeline services.

A user or prospective user acquires no interest in a pipeline by funding an expansion of capacity of the pipeline in accordance with an access determination unless the service provider agrees (r. 118(3)).

In the circumstances that an access determination is made to expand capacity of a pipeline and a contribution is made by the user to contribute some or all of the capital to fund the installation or construction of a new facility, the AER may include consequential amendments to the applicable access arrangement in the access determination made.

Any consequential amendments to the access arrangement must provide for one or more of the following:

- a mechanism to roll some or all the capital costs of the expansion into the capital base, or
- consequential adjustments to reference tariffs, or
- a surcharge to be levied on incremental users, or
- the establishment of a speculative capital expenditure account and regulation of its operation (r. 119(2)-(3)).

If a prospective user of incremental capacity is to contribute some or all of the cost of the capacity expansion, the access determination (and the consequential amendments to the access arrangement) must set out the terms and conditions of access for that user (r. 119(4)). The terms and conditions of access must reflect the value to the service provider of the capital contribution (r. 119(5)).

4.3.4 Effect of a final determination and other matters

4.3.4.1 When does it come into effect?

A final determination takes effect on, and from, the date specified in the access determination (s. 184(4)).

4.3.4.2 Duration of determination

Although not specified in the NGL, the AER would usually make a determination for the duration of an applicable access arrangement for the pipeline service in effect at the time a determination was made. There may be reasons why an access determination is made for a period for less or more than the applicable access arrangement of the pipeline service, including meeting the national gas objective.

4.3.4.3 To whom does the determination apply?

The access determination made applies to the parties named in the determination when the determination is made. However, under the NGL an access determination also applies to every subsequent service provider²⁸ as if it was a party to the access dispute for which the access determination was made (s. 215).

²⁸ A subsequent service provider means a service provider (other than a service provider to whom the access determination applies) who provides pipeline services that are the subject of the access dispute for which the access determination has been made (s. 215 (2)).

4.3.4.4 Compliance with an access determination

A party to an access dispute for which an access determination is made must comply with the access determination (s. 195).

4.3.4.5 Variation of an access determination

Any party to a determination may apply to the AER for a variation of the determination. On receiving an application for a variation, the AER must notify and seek the consent of all other parties to the access dispute. If any party objects to the proposed variation, the AER cannot vary the final determination (s. 194(1)). In this circumstance, where the parties cannot agree on a variation, a new access dispute may be notified under s.181.

The restrictions that apply to the AER making an access determination under s. 188 also apply to making a variation to an access determination. That is, the AER must not make a variation that would have any of the effects specified under s. 188.

4.3.4.6 Corrections to access determinations made for clerical mistakes

If an access determination contains a clerical mistake, or an error arising from an accidental slip or omission or material miscalculation of figures or a material mistake in the description of any person, thing or matter referred to in the determination, or a defect in form, the AER may correct the access determination for these issues (s. 213).

In the circumstances that any corrections need to be made, the AER will inform parties of the issue in writing and will provide a corrected final determination to both parties. The notice in writing may be by way of providing an updated version of the final determination. The updated final determination does not in any way alter the date in which the determination took effect.

4.3.5 Enforcement of access determinations

Parties should be aware that access determinations are court enforceable. The relevant court may make all or any of the following orders in relation to a contravention, or proposed contravention, of an access determination (s. 271):

- an order granting an injunction:
 - (i) restraining a person from engaging in the conduct; or
 - (ii) requiring a person to do a specific thing;
- an order directing a person to compensate the other party for loss or damage suffered as a result of the contravention;
- any other order that the Court thinks appropriate (s. 271(1)).

Other orders will generally be made for a party to the dispute but can include any other person engaged in the contravention as defined in s. 271(4) (s. 271(3)).

The revocation of an access determination does not affect any remedy if the contravention of the determination occurred when the determination was in force (s. 271(2)).

On an application for an injunction under s. 271, the court may grant an injunction by consent of all of the parties to the proceedings (s. 272). The court may also grant an interim injunction (s. 273).

4.4 Withdrawal and termination of an access dispute

4.4.1 Withdrawal of a notification of an access dispute

The person who notified the AER of an access dispute may withdraw that notification at any time before the AER makes an access determination for that access dispute (s. 182).

A notice of withdrawal must be made in writing to the AER (s. 182(2)) and takes effect when it is received as if the notification of the dispute was never given to the AER (s. 182(3)).

For ease of reference by the AER, the notice of withdrawal should include the following information:

- the name of the party withdrawing the notification
- whether the party withdrawing the notification is the service provider, or the user/prospective user, and
- a short description of the access dispute to which the notification relates, including any reference number provided by the AER in connection with the access dispute.

The party providing the notice of withdrawal should also in accordance with section 5.1.1 of this Guideline, provide a copy of its notice of withdrawal to the other party.

The AER will usually provide a notice on its website and by means of the GEMS notice, advising that the dispute has been withdrawn.

4.4.2 Termination of an access dispute by the AER

The AER may at any time terminate an access dispute (without making an access determination) if the AER considers that:

- the notification of the access dispute was vexatious
- the subject matter of the dispute is trivial, misconceived or lacking in substance, or
- the party who notified the access dispute had, but did not avail itself of, an opportunity to engage in negotiations in good faith with the other party before that notification (s. 186(1)).

Subject to s. 188 regarding the restrictions on access determinations, the AER may also terminate an access dispute (without making an access determination) if the AER considers that the aspect of access about which there is a dispute is expressly or impliedly dealt with under a contract between either the prospective user or user and the service provider as relevant to the particular access dispute (s. 186(2)). A specified

dispute termination circumstance means a circumstance specified by the NGR (s. 186(3)).²⁹

Generally, parties whose interests may be affected by a decision to terminate an access dispute will be notified of the AER's intention to terminate and may be provided with an opportunity to make submissions about whether the AER should continue with the access dispute if the AER considers this is appropriate.

4.5 AER publication of determination and reasons for a determination

The AER has no obligations to publish the access determination that it makes in writing or the statement of reasons under s.184 (3).

To improve transparency of processes and inform users and prospective users of relevant information about a scheme pipeline and pipeline service, the AER may consider it appropriate to publish an interim or final determination and the reasons for making the determination (in whole or part).

Before publishing the determination and reasons, the AER will provide parties with a marked copy showing those parts which the AER intends to publish. If the access determination and statement of reasons contains no confidential information the AER may decide to publish the information in its entirety. Prior to deciding to do so, the AER will consult with the parties and allow them an opportunity to provide written submissions identifying any parts that should not be published, together with their reasons.

In deciding whether to publish a determination and reasons (in whole or in part), the AER will consider the following matters:

- any objections from the parties
- whether publication would be likely to promote the national gas objective and the operation of the NGL, and
- any other matter that the AER considers relevant.

Publishing a determination can promote competition where it will assist in establishing conditions to mirror an environment of competition.³⁰ For instance, when there are difficulties in negotiating the terms and conditions of access because of the lack of cost or price information, then publication of a determination setting out this information may help parties to commercially agree outcomes that result in the promotion of efficient operation and use of natural gas services for the long term interests of consumers in relation to price, quality, safety, reliability and security of supply of natural gas.

²⁹ The NGR does not currently provide for any 'specified dispute termination circumstances'. The Guideline will be updated from time-to-time to reflect any change in the NGR for specified dispute termination circumstances.

³⁰ See *Sydney International Airport* [2000] ACompT 1, at [106]; (2000) ATPR 41-754.

These matters will generally indicate that the determination and the accompanying reasons should be published. However, when the objections of the parties establish grounds for not publishing the determination and the statement of reasons for the determination (or particular parts of those documents) the AER will consider whether those grounds outweigh the benefits of publication.

Part C Procedural and other matters for determining an access dispute

5 Procedural Matters

The AER has great scope for flexibility when conducting a dispute hearing. The AER is not bound by technicalities, legal forms or rules of evidence (s 198(1)(a)), and it may inform itself in anyway it considers appropriate (s. 198(1)(c)).

In practice, the AER prefers to conduct an access disputes through correspondence and procedural and substantive decisions are made ‘on the papers’ by way of written submissions from the parties and written responses from the AER. This method of conducting an access dispute will, in most cases, assist in:

- improving transparency for both parties
- achieving speedy resolution, and
- providing a means to properly consider complex issues as they arise.

The following chapter outlines issues relevant to an access dispute hearing that will assist parties participating in this process.

5.1 Conduct of parties

The AER considers parties adherence to the following will assist in making an access dispute hearing effective and efficient, resulting in a speedy resolution of the dispute.

5.1.1 General correspondence and liaison

All general correspondence and inquiries should be directed, in writing, to the nominated contact officer of the CMT for the dispute and sent to the email address specified by the CMT. Parties must ensure they copy any correspondence and inquiries to the nominated contact officer and the other party to the dispute.

5.1.1.1 Nominating a contact person and providing contact details

Parties will be required to provide their contact details at the outset of a dispute. Parties should refer to the prescribed form for providing their relevant contact details to the AER, which is included in this Guideline (Appendix 2). The form requires the contact details for a general contact person for the dispute, and the details for a contact person to whom inquiries regarding access to confidential material can be directed, if this is not the general contact person.

5.1.2 Making submissions

There may be circumstances in which the AER will make orders, issue directions or serve notices to request parties to make submissions and provide information during the course of an access dispute process. Sections 5.1.2 and 5.1.3 are consistent with the ACCC/AER’s *Information Policy* about providing information to the AER.³¹

³¹ ACCC/AER, *Information Policy*, October 2008, pp. 5-6.

Parties should observe the requirements for submissions and the provision of information as outlined below:

- a. Submissions should be succinct, logically structured, outlining key issues in dispute and the party's position in respect of these issues.
- b. As with general correspondence and inquiries, submissions and supporting documents should be directed to the nominated contact officer of the CMT for the dispute and sent to the email addressed specified by the CMT. In general parties should not direct correspondence to the AER Board unless directed to do so. Relevant contact officers will be notified at the commencement of an access dispute and any changes to the nominated contact officers will be communicated as appropriate during the course of a dispute.
- c. All correspondence, submissions and supporting documents should be copied to the other party to the dispute and any claims for confidentiality over information provided should comply with this Guideline (and the NGL and NGR). Failure to do so may mean that those documents may not be relied upon by the submitting party to support its position in an access dispute.
- d. The AER has the discretion to set the timeframes for accepting submissions under s. 198(2). While indicative timeframes are provided, these timeframes will be set on a case by case basis, in consideration of the scope and complexity of the issues in dispute.
- e. Parties should observe the timeframes which the AER sets during the course of a dispute; in particular submissions should be provided within the timeframe communicated by the AER when it first seeks or invites parties to make submissions in order for the submission to be given due consideration. The AER will consider the submissions it receives within the submission periods it sets down during a dispute about the making of an access determination (s. 65(a)). The AER will exercise its discretion as to whether it takes into consideration submissions it receives outside of the specified submission period about the making of an access determination (s. 65(b)).³² Timeframes may be communicated via correspondence or in the form of directions, orders made, notices served or correspondence issued by the AER.
- f. Parties are reminded that in the circumstances that the AER makes or serves regulatory information instruments (under s. 48) which are not complied with, the AER may institute civil proceedings to compel compliance (s. 229) or in the case that false and misleading information is provided penalties may apply (s. 60). The AER may also serve an infringement notice for failure to comply with a regulatory information instrument (s. 277).
- g. The AER prefers the electronic delivery of information and documents by email over other forms of delivery. Information provided by electronic means should preferably be emailed to the AER using an email address advised by the CMT. Other arrangements can also be made such as delivering the information to an office of the AER. Text documents should be provided electronically in one of the three following formats: a .doc or .rtf file format supported by Microsoft Word or a .pdf format. Spreadsheets should be in tab delimited format,

³² Also refer to the ACCC/AER's *Information Policy*, p. 5.

compatible with Microsoft Excel. Electronic documents should also be capable of: being printed; having text and images copied from the document and inserted into another document; and being fully text searchable without requiring the use of any additional software.

- h. Non-electronic documents may be provided to the AER by delivering the documents to the office of the nominated AER contact officer.
- i. Parties should ensure that their submissions are both relevant and complete and correctly reference or attribute third party information. To ensure completeness of submissions, parties should place all the relevant information before the AER, as part of their submissions. In circumstances where parties wish to rely on material from, for example, websites, consultants' or experts' reports, the AER's or other regulators' papers, a court or tribunal decision, they should include a copy of the relevant documentation and information with their submission. The AER's preference is for parties to observe the following when referencing sections of extraneous material:
 - i. If the document is publicly available they should submit the relevant part of the document which is relied on (for example, this may be a relevant paragraph, page or section) and the relevant text should be identified (such as by highlighting the text).
 - ii. If the document has been provided in a previous submission for the same or a different dispute or regulatory process, the entire document should be submitted. If the information was created or submitted from another party and is not in the public domain the submitting party should be cognisant of its obligations under the NGL and any confidentiality agreements or orders in place for the purposes of the dispute in maintaining confidential information. The relevant passage, page or section of the document which is relied on or which is of particular relevance to the submission may be highlighted for ease of reference, but will need to be accurately referenced.
 - iii. It is suggested for ease of reference, parties should also provide an index to the extraneous material provided as part of its submission.

5.1.3 Further requirements for submitting confidential information

Parties wishing to submit commercial-in-confidence material should submit two versions of the document or information: a confidential version and a non-confidential version. Documents which contain confidential information should be marked appropriately. This is consistent with the ACCC/AER *Information Policy*, which outlines that a party providing information to the AER should clearly identify the part of the information that it regards as confidential.³³ The AER suggests that each page of the confidential version of the information or document which contains the confidential information is marked in the following way: inserting 'Contains confidential information' in the header, footer and as a watermark; and underlining the parts of the information that is confidential.

³³ ACCC/AER, *Information Policy*, October 2008, p. v. and p. 5.

The ACCC/AER *Information Policy* also requires that unless otherwise indicated, reasons should be provided in support of this claim and that the information must be of a genuinely confidential nature and not otherwise publicly available.³⁴ A blanket claim for confidentiality over the entirety of the information provided should not be made unless all such information is genuinely confidential. Parties should also note that it is not appropriate to provide the ACCC/AER with documents that contain information that is redacted or blacked-out which they do not consider relevant. The AER's position is that confidential submissions should not contain redacted information.³⁵

The non-confidential version of the document or information should be provided to the AER so that the confidential information is replaced with the text “[c-i-c]” or “Confidential”³⁶. The pagination for the non-confidential version of the document should be the same as it appears in the confidential version. In the circumstances where a confidential document is submitted but not accompanied by a non-confidential version of the document the AER may give the confidential part of the submission less weight without substantiation of the confidential nature of the material.³⁷

Unless agreed otherwise, the use and handling of any confidential information by the parties will be governed by the general confidentiality order made by the AER for the access dispute (see section 4.1.6 of this Guideline for further detail).

In circumstances where the parties have agreed that a separate undertaking must be signed by one party prior to the release of information or documentation to that party, parties should nominate a contact person to arrange the confidentiality undertaking and obtain the confidential submission or document (once the relevant undertaking is signed). The AER will direct any queries to that contact person. Parties should arrange access as soon as practical and keep the AER fully informed of the progress and outcomes of the arrangements for any additional confidentiality undertaking. Parties should provide a copy of the relevant undertaking to the AER, once signed. See Appendix 2 for the AER's preferred notification of general and confidential contacts form which should be used to supply contact details and should accompany any document or submission containing confidential information provided to the AER in the course of a dispute.

5.1.4 Request by a party to the AER to treat material as confidential that it is submitting

Given that the issue of confidentiality should already have been addressed at the outset of an access dispute process (by the AER issuing a general confidentiality order and by parties choosing whether to enter into their own confidentiality undertakings), the AER will generally expect that all information relevant to an access dispute, including confidential information, will be made available to all the parties involved.

Nevertheless, the NGL allows a party in a dispute hearing to request the AER to treat certain information that the party has provided as confidential (s. 205). That is, the

³⁴ *ibid.*

³⁵ *ibid.*, p. 6.

³⁶ *ibid.*, p. 5

³⁷ *ibid.*, p. 5.

party may request the AER not to disclose to the other party certain parts of a document which the requesting party considers contains confidential information. The party should provide a statement of the reasons why the information should be treated as confidential with its request.³⁸ The AER is required to follow certain procedures when such a request is made.

The AER is required to inform the other party that a request has been made to treat certain material as confidential and in doing so outline the general nature of the matters that are in the confidential part of the document.

The AER will seek a submission from the other party as to whether it has an objection to the AER complying with the request. The AER will generally provide five business days for the other party to make its submission. If there are any objections to the AER complying with the request, these will need to be stated in writing to the AER and copied to the party seeking to treat the material as confidential.

The AER notes that courts have generally balanced three factors when considering whether to grant access to confidential information. Where a party has demonstrated that information is confidential commercial information the AER will consider the following:

- any harm to the legitimate commercial interests of the information provider
- any harm to the interests of the other party who does not have access to the information, and
- any hindrance to the ability of the AER to perform its functions (that is, in this context, to assess the veracity of the information).

These general principles do not preclude the AER from the necessity to make an assessment on a case-by-case basis, but rather an indication of the likely matters the AER would consider.

After considering the request for confidentiality, any objections raised, the factors outlined above and any further submissions that any party has made in relation to the request, it is at the AER's discretion as to whether or not it gives some or all of the confidential part of the document to the other party.

If the AER does decide to provide the confidential information to the other party in a dispute, it will likely require that parties agree between themselves a suitable arrangement or undertaking for the non-disclosure of the confidential information, except as directed by the AER or subject to conditions for release as determined by the AER.

5.2 Failure to attend as a witness

A person who is served as prescribed with a summons to appear as a witness before the AER must not, without reasonable excuse:

³⁸ ACCC/AER's *Information Policy*, October 2008, p. v. and p. 5.

- fail to attend as required by the summons, or
- fail to appear and report from day to day unless excused, or released from further attendance, by the AER (s. 202).

5.3 Failure to answer questions

A person appearing as a witness before the AER must not without reasonable excuse:

- refuse or fail to be sworn or to make an affirmation
- refuse or fail to answer a question that he/she is required by the AER to answer, or
- refuse or fail to produce a document that he/she was required to produce by a summons properly served on him/her (s. 203).

The NGL contemplates that it is a reasonable excuse for an individual to refuse or fail to answer a question or produce a document on the grounds that this might tend to incriminate them or expose them to a penalty. This definition does not limit what constitutes a reasonable excuse (s. 203(3)).

5.4 Intimidation

A person must not:

- a) threaten, intimidate, or coerce another person; or
- b) cause or procure damage, loss, or disadvantage to another person, because that other person -
- c) proposes to produce, or has produced, documents to the AER; or
- d) proposes to appear, or has appeared, as a witness before the AER (s. 204).

6 Use and handling of information

6.1 Use of information

The AER's use of information in, or arising from, an access dispute is subject to the NGL and NGR and any other policy guidelines.

The NGL contemplates that the AER may inform itself about any matter relevant to an access dispute in any way it thinks appropriate (s. 198(1)(c)). This provides for a very wide power to use information it obtains from a variety of sources in the course of an access dispute process.

6.1.1 Disclosure and publication of information by the AER

The AER has certain obligations to publicly disclose information during the course of an access dispute. These are outlined below.

6.1.1.1 Publicising that a dispute has been notified

The AER is required to communicate that an access dispute has been notified to the service provider if a prospective user or user has notified a dispute or to the prospective user or user if the service provider has notified a dispute (s. 181(1)).

It will also usually publicise that a dispute has been notified by a GEMS notice so that other persons that are required by the AER to do something (s. 183(c)) or other persons that may consider they have sufficient interest in the dispute to become a party are aware that a dispute has been notified (s. 183(d)). The public notice will only provide details about the relevant parties to a dispute (usually a service provider and user or potential user), and service, and if appropriate a brief (generic) description of the nature of the dispute.

For a full discussion of the notification of an access dispute process see sections 4.1.1 and 4.1.2 of this Guideline.

6.1.1.2 Giving information to parties in another access dispute

The AER may receive information relevant to a dispute in the context of other disputes, for example, disputes concerning, or in performance of its other functions or exercise of its powers that relate to, the same scheme pipeline and pipeline service.

Before using this information in a dispute the AER will consider among other things:

- any objections from the person who provided the information or documents to the AER
- whether the information is confidential and if for example the information has been provided under an oral or written order under s. 200 or has been subject to a confidentiality claim under s. 205, and
- any other matter that the AER considers relevant.

If the AER provides information and documents to the parties, the AER can make an oral or written order under s. 200 or a direction under s. 199(1)(a) limiting the use and disclosure of the information.

6.1.1.3 Information received by the AER outside disputes

The AER may receive information relevant to a dispute in the context of performing other regulatory processes. This could occur, for example, when it is assessing an access arrangement, or if the AER is carrying out compliance activities that relate to the particular scheme pipeline and pipeline service. The ACCC/AER *Information Policy* outlines that information obtained in the course of one matter which is relevant to another matter, will in general be used in the context of the other matter unless there is a specific legal requirement to the contrary. This may also relate to information collected by the ACCC and used by the AER and vice versa.³⁹

The AER may use information provided under the general information powers or a regulatory information instrument in compliance with other matters for any purpose connected with the performance or exercise of a function or power of the AER under the NGL or NGR (s. 66), including access disputes.

6.1.1.4 Restrictions on the use of information

In addition to the restrictions set out in NGL, the AER and staff assisting it are subject to a number of general limitations in the use of information:

- Staff cannot make improper use of information,⁴⁰ and
- There are restrictions on the use of confidential information by the AER. Refer to section 6.2 of this Guideline for details.

The AER recognises that it is critical to adopt sound information handling practices to maintain the confidence of all parties to an access dispute. However, it takes the view that if it has legitimately obtained information using its powers for one purpose, and that material discloses information relevant to another of its statutory functions, it is under no general duty to disregard the information in the context of that other statutory function.⁴¹

Where information is provided voluntarily, the AER will not generally accept conditions that seek to limit the use of that information to a particular matter unless there is a legal requirement to do so. Further, information collected by the AER may be viewed by the AER Board, staff and consultants (including external economic, legal or other relevant industry advisers).⁴²

As outlined above, no conditions can be placed on information provided under compulsory powers.⁴³

³⁹ ACCC/AER *Information Policy*, October 2008, p. v. and p. 7.

⁴⁰ See Public Service Regulations 1999 r. 2.1, *Crimes Act 1914* s. 70 and the *Privacy Act 1988*.

⁴¹ ACCC/AER *Information Policy*, October 2008, p. v. and p. 8.

⁴² *ibid.*, p. 7.

⁴³ *ibid.*, p.8.

6.1.1.5 Information used in joint dispute hearings

When the AER conducts a joint hearing under Part 6.7 of the NGL as outlined in section 4.1.8, the disclosure of information that relates to a hearing also applies to joint hearings (s. 211).

The AER as constituted for the purposes of the joint hearing may have regard to any record of the proceedings of any dispute that is subject to the joint hearing (s. 212(1)) and the AER may have regard to the proceedings of a joint hearing and findings of fact in the joint hearing for the purposes of any relevant dispute to the joint hearing (s. 212(2)).

In doing so, the AER may consider it appropriate to disclose information in one dispute that is subject to a joint hearing to all parties to the joint hearing.

6.1.1.6 AER publication of determination and reasons for a determination

The AER has no obligations to publish the access determination that it makes in writing or the statement of reasons under s. 184(3). However, the AER may consider it appropriate to publish an interim or final determination and the reasons for making the determination (in whole or part), to improve transparency of processes and inform users and prospective users of relevant information about a scheme pipeline and pipeline service.

As outlined below in section 6.2, notwithstanding the private nature of an access dispute hearing, there may be reasons for disclosure of some confidential information or outcomes from this private process because of the substantial affect on other parties such as access seekers for open and transparent decision-making.⁴⁴

6.1.1.7 Specific obligations on the AER to disclose information

The AER may be legally required to produce confidential material given to it during the conduct of an access dispute. Such as:

- in response to a request under the Freedom of Information Act⁴⁵
- part of its duty to provide discovery or to comply with a notice to produce in proceedings commenced by or against the AER
- in response to a subpoena in relation to proceedings between third parties, and/or
- in response to statutory disclosure obligations or its obligations as a government body.⁴⁶

In these circumstances, the AER may consult with a party who has provided confidential information but will not consult about the disclosure of non-confidential information.

⁴⁴ *ibid.*, p. vi. and p. 12.

⁴⁵ Freedom of Information Act, 1982, ss. 27-27A.

⁴⁶ ACCC/AER *Information Policy*, October 2008, p. v. and., p. 11.

Courts and tribunals understand the need to protect the confidentiality of information where appropriate and the AER may, in consultation with the information provider, ensure that the disclosure of information is subject to a court-imposed confidentiality regime.

6.2 How the AER handles confidential information

The AER is committed to treating confidential information responsibly and in accordance with the relevant laws.⁴⁷ The AER recognises that the disclosure of confidential information may have substantial adverse effect on the interests of that business. However, the AER understands that the disclosure of some information may be necessary for open and transparent decision making in performance of its functions.⁴⁸

This section outlines the AER's obligations under the law and other general policy considerations.

Section 44AAF of the Act, dealing with confidentiality, forms part of the NGL requirements for confidentiality (s. 30). Consequently, the AER must take all reasonable measures to protect from unauthorised use or disclosure information that it has:

- (a) received in confidence or in connection with the performance of its functions or exercise of its powers, or
- (b) obtained by compulsion in the exercise of its powers.

Disclosure of the information as required or permitted by law is taken to be an authorised use and disclosure.⁴⁹ This includes disclosure to the ACCC, the AEMC, the National Electricity Market Management Company Ltd, any consultants assisting these bodies, and any other person or body as prescribed.

In addition, subject to certain conditions, Chapter 10 of the NGL provides that confidential information may be disclosed by the AER in the following circumstances:

- if it is already in the public domain⁵⁰
- where it is has prior written consent (s. 325)
- if it is being used for the purposes of court and tribunal proceedings and to accord natural justice (s. 326)
- if a redacted form of the documentation is provided by a party and excised of all confidential information, the redacted version of the document can be released (s. 327)

⁴⁷ ACCC/AER *Information Policy*, October 2008, p. v. and p. 11.

⁴⁸ *ibid.*, p. vi. and p. 12.

⁴⁹ ACCC/AER's *Information Policy*, October 2008, p. v.

⁵⁰ *ibid.* The AER will need to be satisfied that identified information is genuinely confidential and not otherwise publicly available.

- if the identity of the person is not discernable from the information (s. 328). Information disclosed under this section may be combined or arranged with other information so that the party to whom the information relates cannot be identified, and
- in circumstances where the public benefit of disclosing the information outweighs the detriment (s. 329).

In disclosing material that a party has requested to be treated as confidential to the other party, the AER must follow the process set out in s. 205. See section 5.1.4 of this Guideline for further detail.

Other factors may come into play when the AER assesses whether to disclose confidential information or not, including: the validity of the harm that may be caused to legitimate business interests; how current or relevant the information is to the commercial operations; the materiality or importance of the information to the matter it is determining; if the confidential information relates to competing operations of the parties or not; whether the confidentiality directions made at the start of the access dispute process are adequate to prevent or minimise the likelihood of harm; and whether information could be disclosed to a confined number of staff or external advisers or both.

These considerations need to be weighed up against the private nature of a hearing and the need to resolve access disputes in a timely manner and in consideration of relevant policy.⁵¹

⁵¹ *ibid.*, p. vi and p. 12.

7 The right to representation and the use of experts

Both the AER and parties to an access dispute may engage subject matter experts such as engineers, economists, accountants, lawyers or persons experienced in an industry or trade relevant to the issues subject to the dispute. This chapter distinguishes between the right to representation and the use of experts in an access dispute process.

Section 9.3 of this Guideline provides details about who will bear the cost relating to representation and the use of experts.

7.1 Parties' rights to representation

Parties have the right to be represented by another person in a dispute hearing (s. 190). This right is distinguishable from the engagement of experts which is considered below.

Typically parties in an access dispute may engage legal representatives to act on their behalf and/or manage part or all of the access dispute process for them. Legal representatives may be the primary point of contact for parties in a dispute, or may represent parties in a hearing, including providing written submissions as part of a hearing 'on the papers', for their clients.

7.2 Use of experts in an access dispute

Experts can be used in an access dispute process by the AER or parties. The relevant circumstances in which experts may be used in an access dispute are outline below.

Experts will generally be subject to the general confidentiality orders and relevant directions that the AER may make during the course of an access dispute. If required, the AER may make orders and directions to cover experts engaged for the purpose of an access dispute.

7.2.1 Use of independent experts by the AER

The AER may refer any matter to an independent expert when making a determination. The expert's report can be used as evidence (s. 199(e)).

In certain circumstances a service provider will be required to nominate an independent expert, and after the AER's approval, engage the expert (r. 115).

7.2.2 Experts appointed by a party

The following section of this Guideline outlines:

- the general procedures parties need to follow in relation to the use of an expert's report in a dispute hearing, and
- the special circumstances in the rules where an expert is required to be engaged by service providers after that service provider has refused access to a pipeline service, resulting in an access dispute, and subsequently the service provider gives a safety

operation notification and the relevant procedures that must be followed (rr. 113-115).

7.2.2.1 General procedures for the reporting of expert findings by a party

This section outlines the general procedures for how an expert report should be provided in the context of an access dispute. This does not relate to the specific requirements arising from the engagement of an expert connected with a safety operation notification.

When a party provides the expert's report to the AER, it should also give a copy to all relevant parties to the access dispute, consistent with the process for providing submissions as outlined in section 5.1 of this Guideline.

If, after providing the report, the expert changes its view on a material matter (for example, because the expert has read another expert's report, or because the expert receives more reliable or robust information), the change should be communicated without delay to the AER and to each party to whom the expert's report has been provided.

Any confidential information submitted by an expert should be submitted in accordance with section 5.1.3 of this Guideline. If a party wants to withhold a copy of the expert's report, or particular parts of the report, from other parties because it contains confidential commercial information, it should make a request under s. 205 as discussed in section 5.1.4 of this Guideline.

Experts providing written reports may be required to attend an access dispute conference or similar forum as 'expert witnesses' to answer questions by parties and/or the AER about their advice. The AER will generally give written directions about the time and location of the forum if this is the case. It may also at this time make a general confidentiality order to cover any experts in attendance.

The evidence of an expert should be set out as a report comprising the following matters:

- the qualifications and experience in support of the expert's expertise
- the questions or issues that the expert has been asked to address
- the factual material considered by the expert
- the assumptions made by the expert
- the process used by the expert to consider those issues (such as, whether it involved industry consultations, and if so with whom)
- the expert's conclusions about those issues, along with full reasons
- when the expert is aware that other people (including other experts) have expressed conflicting views on those issues, the reasons should explain why the expert believes the other views to be incorrect

- additional information necessary to resolve particular issues or to provide a firm conclusion, what that information is and how it is relevant to the issues or conclusion, and
- whether any question or issue falls outside their field of expertise.

The expert's report should contain the following declaration:

(Name of expert inserted here) made all the inquiries which I believe are desirable and appropriate and that no matters of significance which I regard as relevant have, to my knowledge, been withheld.

The expert should also attach to the report or summarise within it:

- all oral and written instructions (original and supplementary) given to the expert that define the scope of the report, and
- the documents and other materials that the expert has been asked to consider.

Any calculations (including those set out in spreadsheets), photographs, plans or other reports referred to in the report must be provided along with the report.

7.2.2.2 Procedures for engagement of an expert arising from a safety operation notification

As outlined in r. 114, if a service provider refuses to provide a requested pipeline service and an access dispute arises as a consequence of that refusal, the service provider may, on or before the submissions lodgement date, give a safety of operation notification to the AER and the other parties to the dispute.

A safety of operation notification must set out the grounds on which the notification is based, including a statement of any facts and assumptions relevant to those grounds.

When a service provider gives a safety of operation notification, the service provider must also provide the AER with the name of an independent expert that might be engaged to provide an expert safety report.

The AER may approve the person nominated by the service provider or some other person as the independent expert to provide an expert safety report.

The service provider must, on receiving notice of the AER's approval, immediately engage the independent expert approved by the AER to provide an expert safety report on the requested pipeline service to which the access dispute relates.

Rule 115(4) stipulates that an independent expert must have regard to all relevant statutory or regulatory requirements or restrictions (including those imposed under the conditions of a licence) in investigating issues.

When the independent expert provides the service provider with the expert safety report, the service provider must immediately give copies of the report to the AER and the other parties to the dispute.

The AER is bound by the approved independent expert's findings in the expert safety report (r. 116). Where relevant the AER is required to incorporate these findings into the access determination itself or the reasoning supporting the access determination.

8 Procedural fairness and other matters

8.1 Procedural fairness

The elements of procedural fairness (or natural justice) depend on the circumstances of the access dispute and the requirements under the NGL. There are two key considerations that have a bearing on the manner in which access disputes are conducted:

- the parties to an access dispute should have a reasonable opportunity to present their case to the AER
- the AER should be free from bias or the perception of bias.

8.1.1 Reasonable opportunity to present the case

The AER considers that it should disclose all relevant matters to the parties to an access dispute. If the AER does not give other parties an opportunity to comment on information it has received from one party, this may impair the ability of the other parties to present their case and it may affect the weight that the AER should give to that information.

This Guideline provides an outline of how the AER will deal with certain issues that may arise in hearing an access dispute such as the submission, handling and public release of confidential information; and specific suggestions about the conduct of parties to ensure all parties are aware of their responsibilities in an access dispute hearing. This Guideline also provides parties with a description of the key steps in an access dispute hearing, whether these steps are mandatory and what parties can expect the AER to do at each stage of the access dispute.

In doing so this Guideline illustrates the phases in an access dispute process and when parties will be provided with a reasonable opportunity to present their case, even if this is not mandated by the NGL. The AER has included additional steps in the access dispute process to afford parties additional means to provide submissions on administrative and substantive matters before the AER make its access determination. Where appropriate, these steps may be reviewed on a case by case basis.

In resolving procedural issues and providing this Guideline the AER must balance several competing considerations including the likely detriment to the party raising the issue and the desirability of resolving disputes in a timely manner. Specifically, parties should bear in mind the AER's obligations under the NGL to act as speedily as 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 (s. 198(1)(b)).

8.1.2 Bias

Another element of procedural fairness is the question of bias or the perception of bias.

A perception of bias can arise when public comments are made about the issues in dispute. To avoid this perception, the AER will not usually provide public comment on

specific issues in an access dispute until it has been completed and, only if relevant, after the final determination has been published.

Nevertheless, parties must also be aware that the AER performs other functions in the regulation of the energy industry and the AER must continue to undertake, and where appropriate, provide public comment on these matters.

8.1.3 Probative evidence

The AER's decisions should also be based on some evidence of probative value – that is, there should be some material that logically supports the final factual conclusions. That said, if certain information is capable of having probative value, the weight to be attached to that information is a matter for the AER. The AER would be looking to the parties to substantiate their own arguments with material so that AER may consider the weight to be given to such arguments and supporting information.

8.2 Judicial review of the legality of decisions made in access disputes

A person who is adversely affected by a decision of the AER may seek reasons for that decision and a review of the legality of the decision by the Federal Court under the *Administrative Decisions (Judicial Review) Act 1977*. Applications for review must be made within 28 business days of a decision being made, or reasons for the decision being furnished, or within such period as the court allows.

9 Fees and costs

9.1 Fee for notification of access dispute

The fee for notification of an access dispute under s. 181(2) is \$2750 as prescribed in the Regulations (reg. Schedule 5, clause 6). This fee is not subject to GST.⁵²

9.2 Hearing costs and fees

Each party is required to bear its own costs in a dispute hearing unless otherwise ordered by the AER (s. 206(1)).

The AER may order a party to pay some or all of the costs of another party in a dispute hearing having regard to certain issues before making the order (ss. 206(2)-(3)). The party ordered to pay costs is required to comply with the order (s. 206(4)).

The AER can also order a representative of a party to pay costs but must first give the representative a reasonable opportunity to be heard (s. 206(5) and (6)). If directed to do so, the representative of the party to a dispute must comply with an order (s. 206(7)).

Costs can be ordered during a dispute hearing and the AER may require that the order is complied with before the hearing is continued (s. 206(8)). The AER can fix the amount of costs itself (s. 206(9)) and can apply the order to costs incurred for a dispute that has been withdrawn (s. 206(10)).

Costs payable under these orders are a debt and can be recovered in a court of competent jurisdiction (s. 207).

The NGL also contemplates that parties may be charged for certain costs in relation to an access dispute process (s. 216). The Regulations provide that the AER may charge parties to an access dispute for its costs in the access dispute and apportion those costs between the parties (reg. 9).

The AER will seek to be reimbursed by parties for any out-of-pocket expenses and external costs associated with experts or consultants it engages for the access dispute hearing.

9.3 Representatives' and Experts' costs

Section 206 requires each party to bear their own costs unless subject to an order by the AER. This extends to the costs of representatives of the parties and any experts engaged by the party during the access dispute process. Refer to Chapter 7 of this Guideline for further details on the right to representation and the use of experts.

⁵² Pursuant to *A New Tax System (Goods and Services Tax) (Exempt Taxes, Fees and Charges) Determination 2008 (No. 2)*, the Treasurer has determined that this fee not subject to GST.

Glossary

Term	Explanation
ACCC	The Australian Competition and Consumer Commission established by section 6A of the Act
Act	Trade Practices Act 1974 (Cth)
Access arrangement	An arrangement setting out terms and conditions about access to pipeline services provided or to be provided by means of a pipeline (s. 2)
Access determination	A determination of the AER under Chapter 6 Part 3 of the NGL and includes a determination varied under Part 4 of that Chapter.
Access dispute	A dispute between a user or prospective user and a service provider about 1 or more aspects of access to a pipeline service provided by means of a scheme pipeline (s. 178)
Access dispute pipeline	A scheme pipeline used or that could be used to provide a pipeline service that is the subject of an access dispute (s. 178)
Access dispute process	The processes and procedures that the AER undertakes to hear an access dispute and make an access determination under Chapter 6 of the NGL
Access provider	The party (service provider) who provides the pipeline service provided by means of an access dispute pipeline
Access seeker	The party (user or prospective user) who is seeking access to the pipeline service provided by means of an access dispute pipeline
ADR	Alternative dispute resolution
AER	The Australian Energy Regulator established by section 44AE of the Act. The AER is the

Term	Explanation
	dispute resolution body (s. 2) for the purpose conducting the access dispute process
Dispute hearing	A hearing conducted by the AER for the purpose of making an access determination (s. 178)
Dispute resolution body	The dispute resolution body is the AER (s. 2)
GEMS	Generating Email and Mail System, which is the AER's general electronic mailing system
Guideline	Guidelines for the resolution of distribution and transmission pipeline access disputes under the National Gas Law and National Gas Rules
NGR	National Gas Rules 2008: (a) the initial National Gas Rules; and (b) Rules made by the AEMC under this Law (s. 2)
NGL	<i>National Gas Law 2008</i>
Nominated disputes	Access disputes that have 1 or more matters in common such that the AER has decided it will hold a joint dispute hearing in respect of such access disputes (s. 209(2))
Regulations	National Gas Regulations 2008
Party	In relation to an access dispute, has the meaning given by section 183 (s. 178)
Scheme pipeline	A pipeline that is: (a) a covered pipeline; or (b) an international pipeline to which a price regulation exemption applies (s. 2)
Service provider	A person who:

Term	Explanation
	<ul style="list-style-type: none"> (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 (s. 8)
Tribunal	The Australian Competition Tribunal referred to in the <i>Trade Practices Act 1974</i> of the Commonwealth and includes a member of the Tribunal or a Division of the Tribunal performing functions of the Tribunal (s. 2)
User	<p>A person who:</p> <ul style="list-style-type: none"> (a) is a party to a contract with a service provider under which the service provider provides or intends to provide a pipeline service to that person by means of a scheme pipeline, or (b) has a right under an access determination to be provided with a pipeline service by means of a scheme pipeline (s. 2)

Appendix 1: Confidentiality Order and Undertaking

A. General Confidentiality Order

Access dispute between

<Party seeking access> (User or Prospective user) and

<Party providing access> (Service Provider)

Notified under subsection 181(1) of the National Gas Law (NGL) 2008

on <date of notification of dispute>

<ACCESS DISPUTE PIPELINE SERVICE>

Orders

1. Pursuant to section 200 of the NGL, the Australian Energy Regulator (the AER) orders <service provider> and <user or prospective user> including their servants, consultants, independent contractors and agents (the parties) not to:
 - i) use or disclose any information obtained from another party or the AER in the course of the access dispute;
 - ii) disclose the content of an interim determination made by the AER under subsection 199(2) of the NGL; or
 - iii) disclose the content of a final determination made by the AER under subsection 184(1) of the NGL;except to the extent that the use or disclosure is:
 - iv) necessary for the purpose of the dispute;
 - v) required by law (including any rules of a securities exchange); or
 - vi) permitted by the AER or the provider of the information.

B. Confidentiality Undertaking

Access dispute between

<Party seeking access> (User or Prospective user) and

<Party providing access> (Service Provider)

Notified under subsection 181(1) of the National Gas Law (NGL) 2008

on <date of notification of dispute>

<ACCESS DISPUTE PIPELINE SERVICE>

CONFIDENTIALITY UNDERTAKING

I, < > of <employer's company name> (<undertaking company>") undertake to [full name of person who owns or is providing the confidential information as the case requires] ("owner/provider") that:

- 1 Subject to the terms of this Undertaking, I will keep confidential at all times the information listed in Attachment 1 to this Undertaking ("the <owner/provider> Confidential Information") that is in my possession, custody, power or control.
- 2 I acknowledge that:
 - (a) this Undertaking is given by me to <owner/provider> in consideration for <owner/provider> making the <owner/provider> Confidential Information available to me for the Approved Purposes (as defined below);
 - (b) all intellectual property in or to any part of the <owner/provider> Confidential Information is and will remain owned by <owner/provider>; and
 - (c) by reason of this Undertaking, no licence or right is granted to me, or any other employee, agent or representative of <undertaking company> in relation to the <owner/provider> Confidential Information except as expressly provided in this Undertaking.
- 3 I will:
 - (a) only use the <owner/provider> Confidential Information for:

- (i) the purposes of the conduct of the Access Dispute before the Australian Energy Regulator (“**AER**”) (or any related proceedings or appeals); or
 - (ii) any other purpose approved by <owner/provider> in writing;
- (“**the Approved Purposes**”);
- (b) comply with any reasonable request or direction from <owner/provider> regarding the <owner/provider> Confidential Information;

Include the following only if required

- (c) except as expressly stated in this Undertaking, not manipulate any part of (including without limitation the code, data queries, table structures, report definitions, user interfaces or structure of) a cost model which appears in any part of the <owner/provider> Confidential Information (“<owner/provider> **Model**”) including, without limitation, any part of the network dimensioning and costing model called the [the Model];
- (d) not copy or reproduce all or any part of the <owner/provider> Model for any purpose, other than the Approved Purposes, without <owner/provider>’s prior express written approval;

Without limiting the generality of paragraph (c), I acknowledge that I may review the code, data queries, table structures, report definitions, user interfaces and structure of the <owner/provider> Model, and vary the assumptions or variables used in the <owner/provider> Model in order to obtain various outputs from the <owner/provider> Model, provided in each case that this is done solely for the Approved Purposes.

- 4 Subject to paragraph 5 below, I will not disclose any of the <owner/provider> Confidential Information to any other person without the prior written consent of <owner/provider>.
- 5 I acknowledge that I may disclose the <owner/provider> Confidential Information to which I have access to:
 - (a) ACCC or AER employees for the Approved Purposes; and
 - (b) any employee, external legal advisors, independent experts, internal legal or regulatory staff of <company>, for the Approved Purposes provided that:
 - (i) the person to whom disclosure is proposed to be made (“**the person**”) is notified in writing to <owner/provider> and <owner/provider> has approved the person as a person who may receive the <owner/provider> Confidential Information, which approval shall not be unreasonably withheld;

- (ii) the person has signed a confidentiality undertaking in the form of this Undertaking or in a form otherwise acceptable to <owner/provider>; and
- (iii) a signed undertaking of the person has already been served on <owner/provider>; and
- (c) if required to do so by law; and
- (d) to any secretarial, administrative and support staff, who perform purely administrative tasks, and who assist me or any person referred to in paragraph 5(b) for the Approved Purpose.

6 I will establish and maintain security measures to safeguard the <owner/provider> Confidential Information that is in my possession from unauthorised access, use, copying, reproduction or disclosure and use the same degree of care as a prudent person in my position would use to protect that person's confidential information.

7 Except as required by law and subject to paragraph 11 below, within a reasonable time after whichever of the following first occurs:

- (a) finalisation of the arbitration;
- (b) my ceasing to be employed or retained by <company> (provided that I continue to have access to the Confidential Information at that time); or
- (c) my ceasing to be working for <company> in respect of the Approved Purposes (other than as a result of ceasing to be employed by <company>),

I will destroy or deliver to <owner/provider> the <owner/provider> Confidential Information and any documents or things (or parts of documents or things), constituting, recording or containing any of the <owner/provider> Confidential Information in my possession, custody, power or control.

Note: For the purpose of paragraph 7(a) above, this arbitration may be finalised where:

- (a) the notification is withdrawn under section 182 of the National Gas Law 2008 (**NGL**);
- (b) the AER terminates the arbitration under section 186 of the National Gas Law; or
- (c) the AER makes a final determination under section 184 of the National Gas Law.

8 Nothing in this Undertaking shall impose an obligation upon me in respect of information:

- (a) which is in the public domain; or

(b) which has been obtained by me otherwise than from <owner/provider> in relation to the Access Dispute;

provided that the information is in the public domain and/or has been obtained by me by reason of, or in circumstances which do not involve any breach of a confidentiality undertaking or a breach of any other obligation of confidence in favour of <owner/provider> or by any other unlawful means, of which I am aware.

- 9 I acknowledge that damages may not be a sufficient remedy for any breach of this Undertaking and that <owner/provider> may be entitled to specific performance or injunctive relief (as appropriate) as a remedy for any breach or threatened breach of this Undertaking, in addition to any other remedies available to <owner/provider> at law or in equity.
- 10 The obligations of confidentiality imposed by this Undertaking survive the destruction or delivery to <owner/provider> of the <owner/provider> Confidential Information pursuant to paragraph 7 above.
- 11 I acknowledge that this Undertaking is governed by the law in force in the State of <relevant State> and I agree to submit to the non-exclusive jurisdiction of the court of that place.

Signed: _____ Dated: _____

Print name: _____

Appendix 2: Pro forma templates

A. Form of contact details

Access dispute between

<Party seeking access> (User or Prospective user) and

<Party providing access> (Service Provider)

Notified under subsection 181(1) of the National Gas Law (NGL) 2008

on <date of notification of dispute>

<ACCESS DISPUTE PIPELINE SERVICE>

CONTACT DETAILS FORM FOR [NAME OF PARTY]

The contact officers for this dispute are:

General Contact 1	Name
	Position
	Company
	Fax
	Phone
	Email
	Delivery address

General Contact 2	Name
	Position
	Company
	Fax
	Phone
	Email
	Delivery address

The contact officers for queries in relation to confidentiality requests are:

Confidential Information Contact 1

Name
Position
Company
Fax
Phone
Email
Delivery address

Confidential Information Contact 2

Name
Position
Company
Fax
Phone
Email
Delivery address

DATED: <day><month><year>

B. Notification of a dispute

i. Cover letter

<Date>

General Manager
Network Regulation North Branch
Australian Energy Regulator

aer inquiry@aer.gov.au

Dear Sir/ Madam

I enclose a notification of access dispute with <Name of company> notified under subsection 181(1) of the National Gas Law (the NGL) on [date]

A cheque for the dispute notification fee is enclosed.

Yours faithfully

<Signatory>

Attached: Notification

ii. Notification

AUSTRALIAN ENERGY REGULATOR

Notified under subsection 181(1) of the NGL on [date]

[PIPELINE SERVICE]

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

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

Contact: <name and position of contact – if known>

Telephone: <contact's phone number – if known>; Facsimile: <contact's fax number – if known>; Email: <email address – if known>

Notifying party's contact person and address for delivery of documents

<specify street address>

Service provider and user/prospective user <delete whichever is not appropriate>

<specify which party is the user/prospective user and which party is the service provider>

<the notification should specify the name of the owner(s) of the pipeline 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 facility owner(s), if known.>

Details of the pipeline service, and terms and conditions of any access arrangement currently in place to which the dispute relates>

<Specify the pipeline service, and terms and conditions of any access arrangement access to which the dispute relates>

Details of the dispute and dispute resolution efforts

<Specify in detail the nature of the dispute>

<You should address the following issues>

Contractual arrangements

<Include a description of the supply arrangements (for example, contract date and term, key terms and conditions>

<Whether the dispute is about varying those arrangements or about future arrangements>

Terms and conditions in dispute

<The terms and conditions, or aspects of access, on which the user/prospective user and service provider are "unable to agree", including details of the most recent offers put forward by each of them>

Efforts made to reach agreement

< Efforts that have been made to reach agreement. This should include a history of negotiations (particularly details, and evidence, of when negotiations commenced) and indicate whether the parties have used dispute resolution mechanisms (for example, conciliation, mediation). A table summarising the main correspondence and meetings, and position of each party, during the negotiations may be useful>

Proposed solutions put forward during negotiations

< Details of any options or proposed solutions put forward during negotiations, or in the context of dispute resolution mechanisms, and the parties' responses >

Terms and conditions not in dispute

<The terms and conditions of supply, or aspects of access, on which the user/prospective user and service provider have agreed.>

Outcome sought

<Detail the outcome sought by the notifying party (e.g. the price for supply of the access dispute pipeline service), the period for which the outcome is sought and the justification for that outcome >

Nature of dispute

<specify in detail the nature of the dispute >

To be signed by person notifying dispute

<Name of signatory and position >

<Date >

Appendix 3: Examples of directions that can be used in an access dispute

A. Direction for submissions on an interim determination

Access dispute between

<Party seeking access> (User or Prospective user) and

<Party providing access> (Service Provider)

[Note: If a joint dispute hearing is conducted, multiple parties may be named in the direction]

Notified under subsection 181(1) of the National Gas Law (NGL) 2008

on <date of notification of dispute>

<ACCESS DISPUTE PIPELINE SERVICE>

Directions

Pursuant to subsection 199(1)(a) of the NGL, and subject to any future Directions that may be inconsistent with these Directions, the Australian Energy Regulator (the AER) makes the following directions:

1. The <Service Provider and User or Prospective User> [*delete whichever is not appropriate*] (the parties) are to provide submissions to the AER (copy to the other party) by E.S.T <time> on <insert date> on the content of the interim determination to be made by the AER, under subsection 199(2) of the NGL on access by the User or Prospective User to the <access dispute pipeline service> specifically:
 - (a) <the aspect of access to a pipeline service for which an interim determination is being made for example price or non-price terms and conditions in dispute> which the Service Provider is to provide access to the Pipeline Service to the User or Prospective User <delete whichever is not appropriate> ; and
 - (b) the time period for which the interim determination should operate.

B. Direction for making a final determination

Access dispute between

<Party seeking access> (User or Prospective user) and

<Party providing access> (Service Provider)

[Note: If a joint dispute hearing is conducted, multiple parties may be named in the direction]

Notified under subsection 181(1) of the National Gas Law (NGL) 2008

on <date of notification of dispute>

<ACCESS DISPUTE PIPELINE SERVICE>

Directions

Pursuant to subsection 199(1)(a) of the NGL, and subject to any future Directions that may be inconsistent with these Directions, the Australian Energy Regulator (the AER) makes the following directions:

1. The Service Provider and User or Prospective User <delete whichever is not appropriate> (the parties) are to provide submissions to the AER (copy to the other party) by E.S.T <time> on <insert date> on the content of the determination to be made by the AER, under section 184 of the NGL on access by the User or Prospective User to the <access dispute pipeline service> specifically:
 - a) <the reference tariff at or other aspects of access in dispute> which the Service Provider is to provide access to the Pipeline Service to the User or Prospective User; and
 - b) <comment here required about existing aa>
 - c) the time period for which the final determination should operate.
2. For the purposes of Direction 1, the parties' submissions are to address the matters in sections 187- 188 and 193 of the NGL, being matters relevant to the making of a determination with reference to the National Gas Objective (section 23 of the NGL) and the Revenue and Pricing Principles (section 24 of the NGL), if these principles are relevant to the terms of access in dispute.
3. The parties are to provide submissions in response to the written submissions made under Direction 1, to the AER (and copied to the other party), via email by 5.00pm, <six weeks> from the date of this direction.

Attachment to directions for making a final determination – Submission Template

Access dispute between

<Party seeking access> (User or Prospective user) and

<Party providing access> (Service Provider)

[Note: If a joint dispute hearing is conducted, multiple parties may be named in the direction]

Notified under subsection 181(1) of the National Gas Law (NGL) 2008

on <date of notification of dispute>

<ACCESS DISPUTE PIPELINE SERVICE>

Submission provided by <Service Provider/User or Prospective User> *[Delete as appropriate]* pursuant to Directions dated <Insert date of relevant Directions>

Matters directed by the AER to be specifically addressed

Issue of Access

<list of aspects of access to the Pipeline Service in dispute>

Time Period

<the time period for which the final determination should operate>

Any other matter relating to the provision of the Pipeline Service (section 193 of the NGL)

<Any other matter>

[At its discretion, the AER may take into account any matters relating to the provision of the Pipeline Service in dispute]

*Note: Submissions must be provided in accordance with the requirements set out in section 5.1 of the Access Dispute Guideline.**

* AER, *Guideline for resolution of distribution and transmission pipeline access disputes under the National Gas Law and National Gas Rules*, [] 2008.