

Jemena Gas Networks (NSW) Ltd

2012-20 Access Arrangement

Response to the AER's draft decision and revised proposal

Appendix 1.5 - Response to the draft decision on JGN's revised RSA

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SUMMARY

In its November 2014 draft decision, the AER required a number of changes to the RSA included in JGN's initial proposal. JGN's response to the AER in relation to its RSA is set out in this Annexure, which is in two parts:

Part A: Table setting out JGN's further revisions and justification; and

Part B: Supporting material in relation to JGN's position on the Consequential Damage exclusion.

Note: JGN has also prepared a further version of the RSA, which has been marked up from the version provided in JGN's initial proposal, to show changes made in the AER's draft decision and subsequently in this response. This is provided separately as part of JGN's revised proposal.

PART A: FURTHER REVISIONS AND JUSTIFICATIONS

JGN accepts all of the AER's revised RSA amendments, other than as outlined in the Table below, which sets out for each clause:

- the form of the clause as proposed by JGN in its initial proposal;
- the (marked-up) amended form of the clause as specified by the AER in its draft decision;
- JGN's response to the AER's draft decision; and
- JGN's justification for its response position.

No	RSA Clause	JGN's June 2014 initial proposal RSA	AER draft decision's proposed amendment (November 2014)	JGN's position in response (February 2015)	Justification for JGN's revised position
1	CI 1.1 (Definition of Agreement)	Agreement means this Agreement, the Annexures, and any document, or part of a document, incorporated into this Agreement by reference, including (without limitation): (a) the Relevant Customer List; (b) clauses 3 and 4 of the Access Arrangement; (c) the Reference Tariff Schedule; and (d) the Operational Schedules, each as amended or replaced from time to time;	Agreement means this Agreement, the Annexures, and any document, or part of a document, incorporated into this Agreement by reference, including (without limitation): (a) the Relevant Customer List; (b) clauses <u>2</u> , 3 and 4 of the Access Arrangement; (c) the Reference Tariff Schedule; and (d) the Operational Schedules, each as amended or replaced from time to time;	Delete the reference to clause 2 of JGN's AA that the AER inserted in subclause (b) of the definition (i.e. revert to the position in JGN's initial proposal).	Clause 2 of JGN's AA should not be incorporated into the definition of "Agreement" (i.e. the definition of RSA) within the RSA. This is because the RSA itself deals with the specific contract terms on which the Reference Service is provided, once they have been contracted for under the AA, whereas clause 2 of the AA (Services Policy) operates outside of the contracted Reference Services under the RSA. In other words, clause 2 of the AA explains the different services available (i.e. both Reference Services and Non-Reference Services), the eligibility criteria for

PART A: FURTHER REVISIONS AND JUSTIFICATIONS

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					each of these and the processes to be followed by users in applying for each of them. Those external process matters for applying for and being offered the different types of services available have nothing to do with the actual terms on which one of those types of services (i.e. the Reference Service) will be provided under the RSA. Accordingly, to include a reference to clause 2 within the definition of "Agreement" in the RSA itself, introduces legal uncertainty as to the scope of the RSA. By contrast, clauses 3 and 4 of the AA (Reference Tariff variation mechanism and Tariff Classes) address the Reference Tariffs (and variations to them) for Reference Services and are referenced directly by the RSA as an alternative to duplicating the charges payable in a separate contractual schedule. These AA clauses should therefore be incorporated by reference in the RSA, as JGN proposed in its initial proposal.
2	CI 1.1 (Definition of "Consequential Damage")	Consequential Damage means any of the following, however caused or arising whether under common law, equity, contract, any fiduciary duty, tort (including negligence) or delict as	No changes proposed.	Consequential Damage means any of the following, however caused or arising whether under common law, equity, contract, any fiduciary duty, tort (including	This definition was originally drafted to apply within the liability framework set by the RSA in JGN's initial proposal (and the current 2010-15 RSA). As such, the definition of

PART A: FURTHER REVISIONS AND JUSTIFICATIONS

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		<p>a consequence of breach of any duty (statutory or otherwise) or under any other legal doctrine or principle whatsoever, irrespective of whether recoverable in law or equity and whether the same arise directly or indirectly:</p> <p>(a) loss of revenue, reputation or profit;</p> <p>(b) cost, loss, liability, penalty, expense or damage associated with business interruption (including overheads incurred during business interruption);</p> <p>(c) punitive or exemplary damages;</p> <p>(d) cost, loss, liability, penalty, expense or damage incurred, or liquidated or pre-estimated damages or penalties of any kind whatsoever, borne or payable under any contract for the sale, exchange, transportation, processing, storage or other disposal of Gas (other than this Agreement);</p> <p>(e) cost, loss, liability, penalty, expense or damage arising in connection with a Third Party Claim;</p> <p>(f) loss of bargain, contract,</p>		<p>negligence) or delict as a consequence of breach of any duty (statutory or otherwise) or under any other legal doctrine or principle whatsoever, irrespective of whether recoverable in law or equity and whether the same arise directly or indirectly:</p> <p>(a) loss of revenue, reputation or profit;</p> <p>(b) cost, loss, liability, penalty, expense or damage associated with business interruption (including overheads incurred during business interruption);</p> <p>(c) punitive or exemplary damages;</p> <p>(d) cost, loss, liability, penalty, expense or damage incurred, or liquidated or pre-estimated damages or penalties of any kind whatsoever borne or payable under any contract for the sale, exchange, transportation, processing, storage or other disposal of Gas (other than this Agreement);</p> <p>(e) cost, loss, liability, penalty, expense or damage arising in</p>	<p>"consequential damage" was deliberately very broadly framed and arguably could even extend to some types of damage or loss that would usually be classed as direct loss rather than consequential loss.</p> <p>Given the changes made by the AER to clauses 26.4 and 26.5, which seek to exclude all liability for Consequential Damage, with no carve outs for either party, JGN considers that it is appropriate to adjust the drafting of the definition of "Consequential Damage" to make it absolutely clear that Consequential Damage is intended to cover indirect/consequential damage or loss only (and therefore the Consequential Damage exclusion in clause 26.4 operates to exclude indirect/consequential loss and does not inadvertently exclude liability for any direct losses). This is consistent with the AER's draft decision, which indicates its concern is with potential exposure to consequential damage, not direct damage.</p> <p>We have therefore amended this definition to make it clear that, consistent with the position at general law, damage or loss resulting directly from a breach</p>

PART A: FURTHER REVISIONS AND JUSTIFICATIONS

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		<p>expectation or opportunity; and</p> <p>(g) any indirect or consequential loss or damage;</p>		<p>connection with a Third Party Claim;</p> <p>(f) loss of bargain, contract, expectation or opportunity; and</p> <p>(g) any indirect or consequential loss or damage,</p> <p><u>but excluding, for the avoidance of doubt, loss or damage arising directly as a result of any breach of this Agreement, negligent act or omission or breach of duty (statutory or otherwise) such as loss or damage to property or personal injury.</u></p>	<p>(such as property damage or personal injury caused directly by a breach of contract):</p> <ul style="list-style-type: none"> is not "Consequential Damage" (and, therefore, each party's liability for direct damage is not excluded under clause 26.4), and does fall within the definition of "Direct Damage" (for which either party can be made liable under clause 26.3).
3	CI 1.3 Amendments to this Agreement due to Change in Law)	<p>(a) The Service Provider may amend the terms and conditions set out in this Agreement to accommodate a Change in Law.</p> <p>(b) The Service Provider will consult the User in respect of the amendments the Service Provider proposes to make to the terms and conditions set out in this Agreement and will take into account any reasonable comments made by the User.</p> <p>(c) The Service Provider will provide notice to the User of any such amendments, along with an</p>	<p>(a) The Service Provider <u>and the User</u> may <u>seek to</u> amend the terms and conditions set out in this Agreement to accommodate a Change in Law.</p> <p>(b) The Service Provider <u>Party seeking to amend the terms and conditions set out in this Agreement to accommodate a Change in Law (in this clause 1.3, the First Party)</u> will consult the User <u>other Party (in this clause 1.3, the Second Party)</u> in respect of the amendments the Service Provider <u>First Party</u> proposes to make to the terms</p>	<p>Delete clause 1.3 in its entirety.</p> <p>Revise the RSA table of contents and renumber clauses 1.4, 1.5 and 1.6 to 1.3, 1.4 and 1.5 respectively.</p> <p>Note that this amendment results in a consequential change to clause 25 which is separately addressed below.</p>	<p>Clause 1.3, as framed by JGN in its initial proposal, was a new clause inserted to provide an administratively simple mechanism to deal with amendments to individual user RSAs that are specifically required as a consequence of changes in law, so that these amendments may be consistently applied across all users' RSAs.</p> <p>However, as explained to AER staff on 14 January 2015, JGN is concerned that the AER's proposed changes to new clause 1.3 introduce the potential for significant uncertainty in its intended application</p>

PART A: FURTHER REVISIONS AND JUSTIFICATIONS

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		<p>explanation of why the amendments are required and an analysis of their impact on the Agreement.</p> <p>(d) The User agrees that such amendments will vary the terms of this Agreement, effective 20 Business Days from the date of the notice or such later date as agreed between the Parties, unless the User gives a notice of dispute under clause 30.2 before that date, in which case the provisions of clause 30 will apply.</p>	<p>and conditions set out in this Agreement and will take into account any reasonable comments made by the User <u>Second Party</u>.</p> <p>(c) The Service Provider <u>First Party</u> will provide notice to the User <u>Second Party</u> of any such amendments, along with an explanation of why the amendments are required and an analysis of their impact on the Agreement.</p> <p>(d) The User <u>Second Party</u> agrees with such agreement not to be <u>unreasonably withheld</u>) that such amendments will vary the terms of this Agreement, effective 20 Business Days from the date of the notice or such later date as agreed between the Parties, unless the User <u>Second Party</u> gives a notice of dispute under clause 30.2 before that date, in which case the provisions of clause 30 will apply.</p>		<p>across multiple users' RSAs. This is because the AER's proposed changes give each individual user a separate right to notify JGN of the user's own specifically sought changes, with the risk of JGN receiving multiple inconsistent RSA amendment requests for Changes in Law. This has the potential to create multiple, separate negotiations and dispute resolution processes, potentially resulting in various different RSA terms for different users.</p> <p>Taking this into account, and noting the various submissions raised by retailers, JGN considers it preferable to simply revert back to the position reflected in its current RSA by deleting the proposed new clause 1.3 altogether. This will leave JGN and each user free to seek to negotiate changes on a bilateral case by case basis by mutual agreement (as is the case now), without either party being compelled to proceed with a potentially time consuming and costly contract amendment and dispute resolution process of uncertain outcome.</p>

PART A: FURTHER REVISIONS AND JUSTIFICATIONS

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4	CI 9.4(b) (Responsibility for Gas)	(b) The Service Provider will not be liable for, and the User will indemnify and hold the Service Provider harmless from and against, any and all Damages or claims in connection with or arising as a result of any matter or thing which may be done, happen or arise with respect to Gas prior to the receipt of Gas by the Service Provider at a Receipt Station or after its delivery at a Delivery Station at a Delivery Point.	(b) The Service Provider will not be liable for, and the User will indemnify and hold the Service Provider harmless from and against, any and all Damages or claims in connection with or arising as a result of any matter or thing which may be done, happen or arise with respect to Gas prior to the receipt of Gas by the Service Provider at a Receipt Station or after its delivery at a Delivery Station at a Delivery Point.	(b) The Service Provider will not be liable for, <u>and the User will indemnify and hold the Service Provider harmless from and against,</u> any and all Damages or claims in connection with or arising as a result of any matter or thing which may be done, happen or arise with respect to <u>anything which may arise with respect to</u> Gas prior to the receipt of Gas by the Service Provider at a Receipt Station or after its delivery at a Delivery Station at a Delivery Point.	<p>The AER's proposed amendment to clause 9.4(b) in its draft decision mark-up do not reflect the AER's comments in its draft decision, in that:</p> <ul style="list-style-type: none"> the AER's deletion of the user indemnity is not consistent with the AER's comments (on pages 12-15 and 12-16 of the AER's draft decision) to the effect that user-specific indemnities relating to matters within the user's control (and which are not within JGN's control) correctly allocate risk to the party best able to manage the risk. This includes circumstances associated with gas prior to its receipt into or after its delivery from JGN's network being manageable through a user's contractual arrangement with its upstream suppliers or downstream customer; and the AER also commented (on page 12-18 of its draft decision) that the words "or arising as a result of any matter or thing which may be done, happen or arise with respect to" in this

PART A: FURTHER REVISIONS AND JUSTIFICATIONS

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					<p>clause are "unnecessarily broad" – however JGN notes the deletion of these words was not reflected in the AER's draft decision mark-up.</p> <p>We raised this issue with AER staff on 14 January 2015, and subsequently received confirmation on 3 February 2015 that the draft decision mark-up did not reflect the AER's desired amendment to clause 9.4(b) (i.e. the wrong words were deleted).</p> <p>We have therefore:</p> <ul style="list-style-type: none"> reinstated the user indemnity wording to align this provision with the AER's comments and JGN's original drafting; and substantially deleted the words "or arising as a result of any matter or thing which may be done, happen or arise with respect to" in this clause (and inserted a minor clarifying consequential drafting change to fit the context), <p>to properly reflect the AER's stated position in its draft decision.</p>
5	CI 10.1(d), (e), (f) and (g) (Gas	(d) The Service Provider will not be liable for, and the User will	(d) The Service Provider will not be liable for, and the User will	(d) <u>The Service Provider will not be liable for any and all</u>	Taking into account the feedback received in relation to this clause,

PART A: FURTHER REVISIONS AND JUSTIFICATIONS

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	quality)	indemnify and hold the Service Provider harmless from and against, any and all Damages or claims in connection with or arising as a result of the delivery of Gas at any Receipt Point which does not meet the Specification unless and to the extent that the negligent act or omission or wilful misconduct of the Service Provider caused that Damage or claim.	indemnify and hold the Service Provider harmless from and against, any and all Damages or claims in connection with or arising as a result of the delivery of Gas <u>on behalf of the User</u> at any Receipt Point which does not meet the Specification unless and to the extent that the negligent act or omission or wilful misconduct of the Service Provider caused that Damage or claim.	<p><u>Damages or claims in connection with or arising as a result of the delivery of Gas at any Receipt Point which does not meet the Specification unless and to the extent that the negligent act or omission or wilful misconduct of the Service Provider caused that Damage or claim.</u></p> <p>(e) <u>Subject to clause 10.1(f), The Service Provider will not be liable for, and the User will indemnify and hold the Service Provider harmless from and against, any and all Damages or claims in connection with or arising as a result of the delivery of Gas on behalf of the User</u> at any Receipt Point which does not meet the Specification unless and to the extent that the negligent act or omission or wilful misconduct of the Service Provider caused that Damage or claim.</p> <p>(f) <u>For the purpose of clause 10.1(e), the quantity of Out-of-Specification Gas delivered to a Receipt Point</u></p>	<p>we propose to separate the indemnity and release so that clause 10.1(d) becomes two sub-clauses, a release in subclause (d) and indemnity in subclause (e). In addition, new subclauses (f) and (g) are needed to enable the allocation of gas delivered on behalf of the User (to accommodate the AER's amendment).</p> <p>Accordingly, clause 10.1(d) now solely deals with a release for the Service Provider for liability for any gas delivered into a network receipt point. It is identical to clause 10.1(d) in JGN's initial proposal, except that the user indemnity (now addressed in subclause (e)) is deleted. Without this change, the release would not apply to losses sustained by a user as a result of the gas delivered on behalf of another user. While JGN accepts that the user's liability to JGN under the user indemnity (in subclause (e)) should only apply to gas delivered on behalf of the user (subject to our comments below), JGN's release from liability to the user for gas delivered into its network should apply regardless of the identity of the user for whom the gas was</p>

PART A: FURTHER REVISIONS AND JUSTIFICATIONS

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				<p><u>on behalf of the User will be determined by the Service Provider as follows:</u></p> <p><u>(i) where Out-of-Specification Gas is delivered to a Receipt Point on a Network Section and the User is the only Network User withdrawing Gas from that Network Section, then all Out-of-Specification Gas delivered to that Receipt Point will be taken to have been delivered on behalf of the User; or</u></p> <p><u>(ii) where Out-of-Specification Gas is delivered to a Receipt Point on a Network Section and there is more than one Network User withdrawing Gas from that Network Section, then the proportion of that Out-Of-Specification Gas (the User's Proportion) delivered to the Receipt Point on behalf of the User will be determined as follows:</u></p> <p><u>(A) if the Network Section is part of an STTM distribution system, then the User's Proportion of that</u></p>	<p>delivered. As indicated previously, JGN has no control over the quality or other characteristics of gas that is delivered into its network by or on behalf of users and accordingly should not be liable to any user for such gas.</p> <p>New clause 10.1(e) (being old clause 10.1(d) - with amendments) now deals solely with the user indemnity for out-of-specification gas delivered to a receipt point. JGN accepts the AER's amendment limiting the scope of this user indemnity so that it only applies to out-of-specification gas delivered "<u>on behalf of the User</u>", provided machinery provisions are also included in the clause to establish the method for JGN to use to determine, in practice, how to allocate responsibility for gas delivered to its network among users in a manner which gives effect to the intent of the AER's change. This is because JGN does not have visibility of user quantities at an individual receipt point level and, without such machinery provisions, there is a high risk to JGN that it will not be able to determine (with sufficient legal</p>

PART A: FURTHER REVISIONS AND JUSTIFICATIONS

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				<p><u>Out-Of-Specification Gas will be the same as that proportion of the total Gas delivered at the hub for that Network Section (on the Days during which the Out-Of-Specification Gas was delivered) which is allocated to the User under the STTM distribution system allocations under the National Gas Rules; or</u></p> <p><u>(B) if the Network Section is not part of an STTM distribution system, then the User's Proportion of that Out-Of-Specification Gas will be the same as that proportion of the total Gas withdrawn from that Network Section (on the Days during which the Out-Of-Specification Gas was delivered) which is withdrawn by the User,</u></p> <p><u>provided that, if information is obtained by the Service Provider from, or provided to the Service Provider by, AEMO, the AER, the AEMC, a transmission pipeline service provider, the User,</u></p>	<p>certainly) the users for whom off-specification gas is delivered and as a result the user indemnity would never be able to operate. This means that:</p> <ul style="list-style-type: none"> JGN would be afforded no protection at all under this clause (i.e. JGN would have no means of transferring to any user any of its cost consequences of an upstream gas specification problem); and the user would have reduced accountability for the management of gas quality risks faced by the network and its customers (a fundamental operational principle for the NSW network is that, as between JGN and users, users take responsibility for the quality of gas delivered to the network - JGN relies on this principle for the safe and reliable supply of gas to customers). In the NSW jurisdiction users have this responsibility as they are best placed to manage this issue through their upstream contractual arrangements.

PART A: FURTHER REVISIONS AND JUSTIFICATIONS

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				<p><u>another Network User or some other source acceptable to the Service Provider, and the Service Provider considers, acting reasonably, that the information so obtained or provided:</u></p> <p><u>(C) is accurate and reliable; and</u></p> <p><u>(D) enables the Service Provider to determine the User's Proportion of that Out-Of-Specification Gas more accurately than if the User's Proportion is determined under subclause (A) or (B) (as the case may be).</u></p> <p><u>then the User's Proportion determined under subclause (A) or (B) (as the case may be) may be adjusted by the Service Provider to take into account that information.</u></p> <p>(g) <u>In clause 10.1(f) above, STTM distribution system, STTM distribution system allocation and hub have the meanings given to those terms in rule 364 of the</u></p>	<p>JGN's difficulties in ascertaining which user has had out-of-specification gas delivered into JGN's network (in the absence of contractual machinery provisions to facilitate this) arises because of market changes which occurred with the introduction of the Sydney STTM which meant that JGN no longer has access to information about gas that is injected into its network for or on behalf of a particular user or at a particular receipt point.</p> <p>To explain further, to facilitate the establishment of the Sydney STTM hub in 2010, it was necessary for JGN to make fundamental changes in its services, transportation contracts and operations to mitigate contractual and operational risks for JGN and users. In particular:</p> <ul style="list-style-type: none"> JGN's reference services changed from "point to point" transportation services (i.e. from a single receipt point to a single delivery point), to a "hub to point" service (ie: from any/all of the multiple receipt points in Sydney STTM Hub to a delivery point.) This changed JGN's approach to network planning

PART A: FURTHER REVISIONS AND JUSTIFICATIONS

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				<u>National Gas Rules.</u>	<p>and operation, but was required so that users could deliver gas to any/all receipt points in the Wilton Network Section.</p> <ul style="list-style-type: none"> JGN stopped performing network gas balancing operations within the Wilton Network Section to avoid inefficiencies for users caused by conflicts between these procedures and STTM operations. This change meant that JGN became reliant on the STTM for information concerning user's deliveries to the network, however, as the design of the STTM transfers custody of gas to users across a single notional "hub" (covering all receipt points) rather than at individual receipt points, it also meant that the information available to JGN no longer included the quantity of gas each user receives at each receipt point. <p>The Sydney STTM is operated by AEMO, and JGN does not have access to the information it would need to determine which user has brought particular gas into the network at a receipt point on a</p>

PART A: FURTHER REVISIONS AND JUSTIFICATIONS

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					<p>specific day. For example, under STTM operations:</p> <ul style="list-style-type: none"> • there is no linkage of a gas molecule supplied by a shipper, and the molecule received and delivered by the user into the network; • JGN is not provided with any information about the identities of shippers supplying gas at a receipt point, or the amount of gas they are supplying, which is all pipeline allocation information which is confidential to pipelines and shippers. JGN does not have a contractual relationship with shippers as this commercial gas supply relationship is the role of users. JGN is generally prohibited from buying or selling gas under the National Gas Law; and • network users are allocated a share of the aggregated gas delivered at the Sydney STTM hub using the daily withdrawals calculated under NSW/ACT Retail Market Procedures but the market does not provide any information about which users received gas from a

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					<p>particular receipt point (an allocation per user by receipt point used to be done under the gas balancing regime which applied prior to the STTM, but this information is not determined under the STTM arrangements which replaced network gas balancing).</p> <p>This issue was also present during the AER's consideration and approval of JGN's 2010 AA when the current RSA was approved and commenced operation. JGN provided various submissions to the AER at that time (including in its proposal justifications) to explain the impacts of the STTM on the reference services that JGN provides users. The design of the STTM and the design of changes to JGN's reference services in the 2010 AA occurred concurrently, and the governing groups of the STTM design process were informed and consulted on the potential impacts to JGN's services, and so the final design of the risk treatment in the RSA (approved by the AER in 2010) for gas supplied through the STTM represents a market outcome that is balanced taking into account the</p>

PART A: FURTHER REVISIONS AND JUSTIFICATIONS

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					<p>benefits to users from the establishment of the STTM in Sydney. Circumstances have not changed since then.</p> <p>Nevertheless, in the interests of resolving this to the satisfaction of all key stakeholders, JGN proposes to accept the AER's limitation on the user indemnity so that it applies only in respect of out-of-specification gas delivered "on behalf of the User" provided the machinery provisions included in JGN's proposed subclauses 10.1(f) and (g) are also included. These provisions provide an operationally certain procedure to determine the allocation proportions of gas "delivered on behalf of a User" based on the information that is available to JGN at the relevant time.</p>
6	CI 12(a) (Deletion of Delivery Points)	(a) Where the supply of gas to a Small Volume Customer Delivery Point is disconnected under this Agreement or under the terms of a Customer Connection Contract in force at the Delivery Point, it will be deleted from the Relevant Customer List upon the expiry of 10 Business Days following disconnection (or any longer	(a) Where the supply of gas to a Small Volume Customer Delivery Point is disconnected under this Agreement or under the terms of a Customer Connection Contract in force at the Delivery Point, it will be deleted from the Relevant Customer List upon the expiry of 10 Business Days following disconnection (or any longer	(a) Where the supply of gas to a Small Volume Customer Delivery Point is disconnected under this Agreement or under the terms of a Customer Connection Contract in force at the Delivery Point, it will be deleted from the Relevant Customer List <u>from the date</u>	<p>JGN discussed this clause with AER staff on 14 January 2015, and following further consideration will accept the AER's change.</p> <p>In the context of B2B harmonisation working groups with AEMO and retailers, JGN has continued to engage with retailers to develop new business and market processes concerning disconnection requests.</p>

PART A: FURTHER REVISIONS AND JUSTIFICATIONS

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		<p>period as agreed with the User) , subject to the following:</p> <p>(i) the Service Provider's obligations to provide Services for that Delivery Point and the User's obligation to pay Charges in respect of those Services will cease with effect from the date of disconnection (but without extinguishing or otherwise affecting any rights or obligations in respect of Services provided prior to the date of disconnection or the Charges payable for those Services); and</p>	<p>period as agreed with the User), subject to the following:</p> <p>(i) the Service Provider's obligations to provide Services for that Delivery Point and the User's obligation to pay Charges in respect of those Services will cease with effect from the date of disconnection (but without extinguishing or otherwise affecting any rights or obligations in respect of Services provided prior to the date of disconnection or the Charges payable for those Services); and</p>	<p><u>agreed between the Service Provider and the User (both acting reasonably) upon the expiry of 10 Business Days following disconnection (or any longer period as agreed with the User),</u> subject to the following:</p> <p>(i) the Service Provider's obligations to provide <u>relevant</u> Services for that Delivery Point and the User's obligation to pay Charges in respect of those Services will cease with effect from the <u>date it is deleted from the Relevant Customer List of disconnection</u> (but without extinguishing or otherwise affecting any rights or obligations in respect of Services provided prior to the date of <u>deletion</u> disconnection or the Charges payable for those Services); and</p>	<p>Key aspects of these discussions, concerning the need for ongoing JGN services to retailers after disconnection are:</p> <ul style="list-style-type: none"> retailers want to retain delivery points in business systems until such time as they no longer have a commercial relationship with the customer (so that the same delivery point ID will apply in market and business systems for that connection if the customer seeks re-energisation under its existing retail contract), and during this time retailers want JGN to continue to provide meter readings, meter maintenance and other related services under the RSA. <p>The development of the harmonised standard NSW business processes JGN and retailers will use for small customer delivery points is ongoing, but to ensure that JGN's contractual obligations under the RSA complement those business processes that are being settled with retailers and AEMO, JGN has proposed further minor amendments to clause 12 to:</p>

PART A: FURTHER REVISIONS AND JUSTIFICATIONS

No	RSA Clause	JGN's June 2014 initial proposal RSA	AER draft decision's proposed amendment (November 2014)	JGN's position in response (February 2015)	Justification for JGN's revised position
					<ul style="list-style-type: none"> • modify clause 12(a) to make it clear that deletion of a DP from the RSA will occur based on a timing agreed between JGN and each retailer. In practice this agreement will be represented in the standard business processes and system workflows established between JGN and retailers for disconnection of small customers; and • modify clause 12(a)(i) so that it is clear that JGN's and each retailer's respective obligations under the RSA continue until the agreed date of deletion from the relevant customer list rather than ceasing on the date of disconnection. <p>JGN believes these minor amendments:</p> <ul style="list-style-type: none"> • reflect JGN's discussion with AER staff on 14 January 2015 – that any ambiguity in the interpretation of NECF model contracts is a matter that is better left to be addressed commercially by JGN and retailers; • complement the collaborative development of business

PART A: FURTHER REVISIONS AND JUSTIFICATIONS

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					<p>processes by JGN and retailers; and</p> <ul style="list-style-type: none"> provide a workable means for clarifying the ambiguity of the termination clauses in the NECF model terms and conditions for customer contracts with respect to B2B processes.
7	CI 14.2(b) (New Receipt Points)	<p>(b) The User must ensure that a Receipt Station referred to in clause 14.2(a):</p> <ul style="list-style-type: none"> (i) complies with specifications approved by the Service Provider from time to time; and (ii) conforms with the technical requirements for such facilities set out in Annexure 4 or as published from time to time by the Service Provider, which requirements will be in accordance with good industry practice for this type of facility and conform to appropriate Australian and internationally recognised standards and codes (including AS2885). 	<p>No specific drafting amendments were proposed to this clause by the AER, however, the AER seems to infer (on page 21-12 of the draft decision) that the clause would benefit from a requirement for JGN to act reasonably.</p>	<p>JGN does not propose any change to the drafting of this clause.</p>	<p>This clause remains the same as in the current RSA. JGN notes that as drafted, it already requires any technical requirements published by JGN to accord with good industry practice and appropriate industry standards, so this is not a clause which provides JGN with a broad discretion.</p>

PART A: FURTHER REVISIONS AND JUSTIFICATIONS

No	RSA Clause	JGN's June 2014 initial proposal RSA	AER draft decision's proposed amendment (November 2014)	JGN's position in response (February 2015)	Justification for JGN's revised position
8	CI 19.1(d) (Applicable Charges)	(d) any charges payable from time to time under any NGR Part 12A Connection Contract or connection application for a Delivery Point or under any Customer Connection Contract in force at a Delivery Point, such payment to be made for and on behalf of any Customer who is a party to any such agreement (unless paid directly to the Service Provider by a Customer).	(d) any charges payable from time to time under any NGR Part 12A Connection Contract or connection application for a Delivery Point or under any Customer Connection Contract in force at a Delivery Point, such payment to be made for and on behalf of any Customer who is a party to any such agreement (unless <u>that contract provides for the charges to be</u> paid directly to the Service Provider by a Customer).	(d) any charges payable from time to time under any NGR Part 12A Connection Contract or connection application for a Delivery Point or under any Customer Connection Contract in force at a Delivery Point, such payment to be made for and on behalf of any Customer who is a party to any such agreement (unless <u>that contract provides for the charges to be</u> paid directly to the Service Provider by a Customer <u>in accordance with rule 119O of the National Gas Rules</u>).	JGN accepts the AER's amendment in principle, but following further consideration of the wording prompted by submissions received from retailers, we propose to further revise this clause to specifically refer to rule 119O of the NGR. This rule sets out the three circumstances when connection charges under Part 12A of the NGR must be paid directly to the Service Provider by a customer.
9	CI 20.3(a) (Service Provider to issue invoices)	(a) The Service Provider will render invoices at regular intervals but not less frequently than monthly.	(a) The Service Provider will render invoices at regular intervals <u>in accordance with rule 506(1) of the National Gas Rules</u> but not less frequently than monthly .	Reinstate clause 20.3(a) (as per the June 2014 version).	There are two important reasons why JGN cannot accept the change proposed by the AER. (1) From a legal perspective, it needs to be understood that this clause 20.3 applies only to self-contracting users (who have no retailer) and not to users who are themselves retailers (see clause 20.1(b) and clause 20.2 which clearly state this). As a matter of law, Part 21 of the NGR (which includes

PART A: FURTHER REVISIONS AND JUSTIFICATIONS

No	RSA Clause	JGN's June 2014 initial proposal RSA	AER draft decision's proposed amendment (November 2014)	JGN's position in response (February 2015)	Justification for JGN's revised position
					<p>rule 506) does not apply to self-contracting users who have no retailer – it applies only to retailers (see rule 501(a) as well as the express reference to “retailer” in rule 506(1) NGR). Invoices for self-contracting users therefore cannot be invoiced “in accordance with rule 506” as it does not apply to them.</p> <p>Therefore, the AER’s proposed change will create legal uncertainty and confusion as to the invoicing requirements for self-contracting users under clause 20.3, which to date has generally functioned smoothly (we note, for example, no self-contracting user has raised any issues relating to RSA clause 20 in their submissions on JGN’s initial proposal).</p> <p>(2) From a financial credit risk perspective, the Part 21 NGR retailer invoicing provisions need to be considered as part of a carefully designed package along with the other provisions in NGR Part 21 which deal with credit support and a the insolvent retailer cost pass</p>

PART A: FURTHER REVISIONS AND JUSTIFICATIONS

No	RSA Clause	JGN's June 2014 initial proposal RSA	AER draft decision's proposed amendment (November 2014)	JGN's position in response (February 2015)	Justification for JGN's revised position
					<p>through mechanism under rule 531 of the NGR. In other words, under these Part 21 distributor/retailer "retail support" obligations considered as a whole:</p> <ul style="list-style-type: none"> • A level of credit risk exposure to defaulting retailers is placed on distributors via fixed monthly invoicing, fixed time for payment, fixed default interest and restrictive (from a distributor's perspective) credit support provisions all set by Part 21. • However, this credit risk exposure placed on distributors is balanced by an important credit risk protection afforded to distributors under rule 531, which provides distributors with a mechanism to apply to the AER for approval to vary reference tariffs so as to pass through increased costs arising as a consequence of a retailer insolvency event. <p>It is important to understand that</p>

PART A: FURTHER REVISIONS AND JUSTIFICATIONS

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					<p>this cost pass through mechanism under rule 531 applies only to retailer insolvency <u>not</u> to self-contracting user insolvency. Accordingly to place upon distributors a fixed and non-variable set of invoicing and security provisions in the same terms as those set out in Part 21, which the distributor has no discretion to vary for less credit worthy users, when distributors do not have any back up cost pass through mechanism such as applies in relation to retailers under rule 531, poses an unacceptable and unreasonable credit risk exposure to JGN. In the absence of a cost pass through mechanism for insolvent self-contracting users, JGN would have no means of managing its level of risk exposure to less credit worthy or defaulting self-contracting users by (for example) issuing invoices more frequently than monthly to limit the size of its bill exposure, or varying the amount of security required or the circumstances for which it will be required.</p>

PART A: FURTHER REVISIONS AND JUSTIFICATIONS

No	RSA Clause	JGN's June 2014 initial proposal RSA	AER draft decision's proposed amendment (November 2014)	JGN's position in response (February 2015)	Justification for JGN's revised position
10	CI 20.6(b) (Interest on overdue payments)	<p>(b) Interest will be calculated from the Due Date to the actual date of payment (both inclusive) at an annual percentage rate equal to the aggregate of:</p> <p>(i) the corporate overdraft reference rate (monthly charging cycle) applied by the Commonwealth Bank of Australia (Bank) as at the Due Date (or if the Bank ceases to quote such a rate, then the rate which in the opinion of the Bank is equivalent to such rate in respect of similar overdraft accommodation) expressed as a percentage; plus</p> <p>(ii) 2 per cent per annum.</p>	<p>(b) Interest will be calculated from the Due Date to the actual date of payment (both inclusive) at an annual percentage rate equal to the aggregate of 2 per cent above:</p> <p>(i) <u>the most recent 1 month Bank Bill Swap Reference Rate mid rate determined by the Australian Financial Markets Association, as identified by AEMO on its website; or the corporate overdraft reference rate (monthly charging cycle) applied by the Commonwealth Bank of Australia (Bank) as at the Due Date (or if the Bank ceases to quote such a rate, then the rate which in the opinion of the Bank is equivalent to such rate in respect of similar overdraft accommodation) expressed as a percentage; plus</u></p> <p>(ii) <u>if the above rate ceases to exist, or that rate becomes, in AEMO's reasonable opinion, inappropriate, the interest rate determined and</u></p>	<p>Reinstate clause 20.6(b) (as per the June 2014 version).</p>	<p>We have reinstated this clause to the form of the June 2014 version because:</p> <ul style="list-style-type: none"> it applies only to self-contracting users (who are large corporate entities); as originally drafted by JGN it accords with normal commercial practice; no self-contracting user has ever raised any concern with this clause; and in any event, AEMO does not appear to have published a relevant interest rate on its website. <p>Additionally, as explained in the justification for item 9 above, JGN's credit risk exposure to self-contracting users is not subject to regulatory cost pass through and remains JGN's commercial risk – hence practical and reasonable commercial mechanisms should remain available to JGN to manage that risk.</p>

PART A: FURTHER REVISIONS AND JUSTIFICATIONS

No	RSA Clause	JGN's June 2014 initial proposal RSA	AER draft decision's proposed amendment (November 2014)	JGN's position in response (February 2015)	Justification for JGN's revised position
			<u>published by AEMO on its website</u> 2 per cent per annum.		
11	CI 20.7(c) (Disputed payments)	<p>If the User disputes part or all of an invoice given by the Service Provider to the User under clause 20.3:</p> <p>(a)...</p> <p>(b)...</p> <p>(c) the User must pay the full aggregate amount of the invoice (except any amount which is manifestly wrong) in accordance with clause 20.5 and if the User fails to do so, the Service Provider may require the User to pay interest on the amount outstanding (excluding any amount which is manifestly wrong) in accordance with clause 20.6.</p>	<p>If the User disputes part or all of an invoice given by the Service Provider to the User under clause 20.3:</p> <p>(a)...</p> <p>(b)...</p> <p>(c) the User must pay the full aggregate amount of the invoice (except any amount which is manifestly wrong) in accordance with clause 20.5 and if the User fails to do so, the Service Provider may require the User to pay interest on the amount outstanding (excluding any amount which is manifestly wrong <u>or is disputed by the User acting reasonably</u>) in accordance with clause 20.6.</p>	Reinstate clause 20.7(c) (as per the June 2014 version).	<p>Clause 20.7 only applies to self-contracting users (i.e. large customers who do not have a retailer and therefore contract directly with JGN on an RSA). These are substantial commercial entities and it is fair and reasonable that, barring manifest error, they should pay:</p> <ul style="list-style-type: none"> the full amount of an invoice in dispute; and (should they fail to pay it) interest on the unpaid amount. <p>This position is fair and reasonable because:</p> <ul style="list-style-type: none"> the RSA provides that if the self-contracting user is subsequently successful in dispute resolution, JGN must refund both the full amount successfully disputed plus interest on it, so the user is not out of pocket at all; and the RSA is the contractual vehicle under which the substantial majority of JGN's regulated revenue is collected, to run its essential infrastructure for customers in NSW. The

PART A: FURTHER REVISIONS AND JUSTIFICATIONS

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					<p>AER's proposed change effectively gives the user the right to not pay any disputed amount on the basis that they claim to be acting "reasonably" which, as a practical matter, means that they can simply dispute an invoice and not pay it at all until it is resolved at dispute resolution. The risk to JGN of significant cash flow and revenue losses on substantial disputed amounts across several self-contracting users is a proportionally much greater one for JGN to bear at a cost to all customers (if these self-contracting Users are ultimately held to be wrong), than the risk to an individual user of a temporary cost increase in having to pay an overcharged business expense which (if JGN is ultimately held to be wrong) will be refunded in full with interest, such that the user will not be out of pocket at all.</p> <p>JGN also notes that this provision is in its 2010-15 RSA and no self-contracting user has raised any issue with it in any submission to the AER.</p> <p>Lastly, again, as explained in the</p>

PART A: FURTHER REVISIONS AND JUSTIFICATIONS

No	RSA Clause	JGN's June 2014 initial proposal RSA	AER draft decision's proposed amendment (November 2014)	JGN's position in response (February 2015)	Justification for JGN's revised position
					justification for item 9 above, JGN's credit risk exposure to self-contracting users is not subject to regulatory cost pass through and remains JGN's commercial risk – hence practical and reasonable commercial mechanisms should remain available to JGN to manage that risk.
12	CI 22.2(a) (Suspension by Service Provider)	<p>(a) The Service Provider may suspend the delivery of Gas to any Delivery Point (at the Service Provider's sole discretion) and is not obliged to provide the Service where:</p> <p>(i) the Service Provider considers that a Delivery Point or the Network poses an immediate threat of injury or material damage to any person, property or the Network, including where the Service Provider has not received sufficient Gas at a Relevant Receipt Point to meet Gas withdrawals from the part of the Network servicing that Delivery Point;</p> <p>(ii) AEMO has instructed the Service Provider to suspend the delivery of Gas to the</p>	<p>(a) The Service Provider may suspend the delivery of Gas to any Delivery Point (at the Service Provider's sole discretion, <u>acting reasonably</u>) and is not obliged to provide the Service where:</p> <p>(i) the Service Provider considers that a Delivery Point or the Network poses an immediate threat of injury or material damage to any person, property or the Network, including where the Service Provider has not received sufficient Gas at a Relevant Receipt Point to meet Gas withdrawals from the part of the Network servicing that Delivery Point;</p> <p>(ii) AEMO has instructed the Service Provider to suspend</p>	<p>(a) The Service Provider may suspend the delivery of Gas to any Delivery Point (at the Service Provider's sole discretion, acting reasonably) and is not obliged to provide the Service where:</p> <p>(i) the Service Provider considers that a Delivery Point or the Network poses an immediate threat of injury or material damage to any person, property or the Network, including where the Service Provider has not received sufficient Gas at a Relevant Receipt Point to meet Gas withdrawals from the part of the Network servicing that Delivery</p>	<p>JGN wishes to clarify that this clause is only intended to operate in the circumstances described by sub-clauses (a)(i)–(iii), and not more generally. As such, we think it preferable to delete the reference to the Service Provider discretion entirely (i.e. the suspension of delivery of gas is not a fully discretionary matter for JGN – it may only occur in circumstances prescribed in (i) to (iii) of this sub-clause). This should address the issue raised by the AER in relation to this clause, as well as providing further clarity as to intended scope.</p>

PART A: FURTHER REVISIONS AND JUSTIFICATIONS

No	RSA Clause	JGN's June 2014 initial proposal RSA	AER draft decision's proposed amendment (November 2014)	JGN's position in response (February 2015)	Justification for JGN's revised position
		Delivery Point; or (iii) the User is not a Registered Participant.	the delivery of Gas to the Delivery Point; or (iii) the User is not a Registered Participant.	Point; (ii) AEMO has instructed the Service Provider to suspend the delivery of Gas to the Delivery Point; or (iii) the User is not a Registered Participant.	
13	CI 23.4(d) and (e) (Load Shedding)	<p>(d) At the same time as or following notification to the User under clause 23.4(c), the Service Provider at its sole discretion will determine the Load Shedding Priority up to which Load must be reduced or cease and notify the User as soon as practicable of the Load Shedding Priority and Load Types that must be reduced or cease (at the direction of the Service Provider).</p> <p>(e) The Service Provider may at any time and at its absolute discretion change the Load Shedding Priority up to which Load must be reduced or cease and notify the User as soon as practicable of any such change.</p>	<p>(d) At the same time as or following notification to the User under clause 23.4(c), the Service Provider at its sole discretion will, <u>acting reasonably</u>, determine the Load Shedding Priority up to which Load must be reduced or cease and notify the User as soon as practicable of the Load Shedding Priority and Load Types that must be reduced or cease (at the direction of the Service Provider).</p> <p>(e) The Service Provider may at any time and at its absolute discretion, <u>acting reasonably</u>, change the Load Shedding Priority up to which Load must be reduced or cease and notify the User as soon as practicable of any such change.</p>	<p>(d) At the same time as or following notification to the User under clause 23.4(c), the Service Provider at its sole discretion will, <u>acting reasonably</u>, determine the Load Shedding Priority up to which Load must be reduced or cease and notify the User as soon as practicable of the Load Shedding Priority and Load Types that must be reduced or cease (at the direction of the Service Provider).</p> <p>(e) The Service Provider may at any time and at its absolute discretion, <u>acting reasonably</u>, change the Load Shedding Priority up to which Load must be reduced or cease and notify the User as soon as practicable of any such</p>	<p>Having considered these clauses further, JGN proposes removal of the "sole discretion" wording entirely, so that the clause now simply obliges JGN to determine the load shedding priority.</p> <p>Considering (d) and (e) in the context of clause 23.4 more generally, JGN's decision-making in a load shedding context is sufficiently qualified by the following provisions benefiting the user:</p> <ul style="list-style-type: none"> clause 23.4(a) already requires JGN to have a '<i>reasonable belief or anticipation that there is a threat to the network</i>' before being entitled to exercise its load shedding rights under clause 23.4; and clause 23.4(b) acknowledges that JGN's load shedding is to occur in accordance with the

PART A: FURTHER REVISIONS AND JUSTIFICATIONS

No	RSA Clause	JGN's June 2014 initial proposal RSA	AER draft decision's proposed amendment (November 2014)	JGN's position in response (February 2015)	Justification for JGN's revised position
				change.	Operational Schedules, which provide a clear process for load shedding and which also effectively requires JGN to load shed in good faith (see clause 1.5 of the Operational Schedules set out in Schedule 7 of the AA).
14	CI 25.2(b) (Right of Service Provider to terminate)	(b) The Service Provider may only exercise its right to terminate under clause 25.2(a)(ii) if the Service Provider and the User, negotiating in good faith, have been unable to agree on a way to deal with the impact of the relevant Change in Law to each Party's reasonable satisfaction within 10 Business Days of the Service Provider notifying the User of the relevant Change in Law.	(b) The Service Provider may only exercise its right to terminate under clause 25.2(a)(ii) if the Service Provider and the User, negotiating in good faith, have been unable to agree on a way to amend this Agreement in accordance with clause 1.3 to deal with the impact of the relevant Change in Law to each Party's reasonable satisfaction within 10 Business Days of the Service Provider notifying the User of the relevant Change in Law.	(b) The Service Provider may only exercise its right to terminate under clause 25.2(a)(ii) if the Service Provider and the User, negotiating in good faith, have been unable to agree <u>on a way to amend this Agreement in accordance with clause 1.3 to or otherwise</u> deal with the impact of the relevant Change in Law <u>to each Party's reasonable satisfaction within 4020 Business Days of the Service Provider notifying the User of the relevant Change in Law.</u>	Given JGN's proposed deletion of the change in law provision in clause 1.3 (see above), clause 25.2(b) should be consequentially amended to remove the reference to clause 1.3 and to substantially revert to the position reflected in the June 2014 version, subject to: <ul style="list-style-type: none"> • some proposed minor drafting improvements; and • an increase (for the user's benefit) in the period allowed for the parties to reach agreement before JGN would be entitled to terminate.
15	CI 25.3 (Failure to pay)	If the User defaults in payment of any moneys payable under this Agreement, excluding payments disputed under clause 20.7, for a period of 5 Business Days after	If the User defaults in payment of any moneys payable under this Agreement, excluding payments disputed under clause 20.7, for a period of 5 Business Days after	Reinstate the clause 25.3 (as per the June 2014 version).	JGN's right to call on security under this clause 25.3 does not apply in the case of retailer users. It only applies to self-contracting users (by virtue of the definition of "Security" and

PART A: FURTHER REVISIONS AND JUSTIFICATIONS

No	RSA Clause	JGN's June 2014 initial proposal RSA	AER draft decision's proposed amendment (November 2014)	JGN's position in response (February 2015)	Justification for JGN's revised position
		notification of the default then the Service Provider may, at the Service Provider's sole discretion, call on the Security and/or either terminate this Agreement or cease to provide Services to the User under this Agreement in respect of any one or more Delivery Points by notice in writing, such termination or cessation to take effect 48 Hours after delivery of the notice or after such longer period as specified in the notice.	notification of the default then the Service Provider may, at the Service Provider's sole discretion, <u>acting reasonably</u> , call on the Security and/or either terminate this Agreement or cease to provide Services to the User under this Agreement in respect of any one or more Delivery Points by notice in writing, such termination or cessation to take effect 48 Hours after delivery of the notice or after such longer period as specified in the notice.		<p>clause 28). It is, in any event, consistent with the corresponding right given to JGN under NGR Part 21 in respect of credit support provided by retailer Users. In fact, rule 528 of NGR only requires 3 business days' notice of default before the distributor may draw down on retailer credit support, whereas clause 25.3 allows a self-contracting user 5 business days' notice.</p> <p>An unfettered right to call on <u>security once a monetary default has been clearly established</u> (i.e. the amount is not in dispute, a final demand to pay has expired and the debt just is not paid) is an essential aspect of a security for payment remedy and is standard commercial legal practice where a security for payment obligation is included in a contract. A security for payment remedy is essentially there to guard against credit risk posed to a creditor by defaulting and insolvent debtors whose liability for the debt is not in dispute. To make recourse to security (once a default for an undisputed debt is established and a final opportunity to pay has expired) subject to a further "reasonableness" qualification for the debtor's benefit,</p>

PART A: FURTHER REVISIONS AND JUSTIFICATIONS

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					<p>which the debtor can exercise to seek to restrain a creditor from having recourse to its security, while the debtor's credit and solvency situation worsens, undermines the whole purpose and effect of the security remedy.</p> <p>Lastly, again, as explained in the justification for item 9 above, JGN's credit risk exposure to self-contracting users is not subject to regulatory cost pass through and remains JGN's commercial risk – hence practical and reasonable commercial mechanisms should remain available to JGN to manage that risk.</p>
16	CI 26.4 (Exclusion of Consequential Damage)	<p>(a) Subject to clauses 26.4(b) and 26.5, the First Party is not liable for, and does not indemnify the Second Party in respect of, any Consequential Damage howsoever caused (including by the negligence of the First Party), suffered by the Second Party in connection with this Agreement.</p> <p>(b) Clause 26.4(a) does not limit a Party's liability in respect of liability for Consequential Damage, to the extent that, ignoring the application of those</p>	<p>(a) Subject to clauses 26.4(b) and 26.5, The First Party is not liable for, and does not indemnify the Second Party in respect of, any Consequential Damage howsoever caused (including by the negligence of the First Party), suffered by the Second Party in connection with this Agreement.</p> <p>(b) Clause 26.4(a) does not limit a Party's liability in respect of liability for Consequential Damage, to the extent that, ignoring the application of those</p>	<p>Reinstate clause 26.4(b) and accordingly make clause 26.4(a) subject to it (in each case as per the June 2014 version).</p> <p>Clause 26.4(a) is also to be subject to a new clause 26.5 (discussed in item 17 below).</p>	<p>JGN proposes that clause 26.4(b) be reinstated. The effect of this clause is simply to provide that each party's exclusion of liability for the other party's consequential damage caused by the first party should not apply to any such consequential damage which the first party is able to recover from its insurer and to pass the proceeds on to the other party who has suffered that consequential damage. It does not apply where there is no insurance recovery.</p>

PART A: FURTHER REVISIONS AND JUSTIFICATIONS

No	RSA Clause	JGN's June 2014 initial proposal RSA	AER draft decision's proposed amendment (November 2014)	JGN's position in response (February 2015)	Justification for JGN's revised position
		clauses, the Party is indemnified for that liability under a policy of insurance.	clauses, the Party is indemnified for that liability under a policy of insurance.		This provision applies mutually for the benefit of both parties and is fair and reasonable. A provision to this effect is often included in commercial agreements between commercial parties with even bargaining power.
17	CI 26.5 (Circumstances in which limitations and exclusions do not apply)	<p>(a) The limitations of liability referred to in clauses 26.3(a) and 26.4 do not apply in respect of the User's liability for the Damage in connection with or arising as a result of:</p> <ul style="list-style-type: none"> (i) an Unauthorised Overrun; (ii) delivery of Gas into the Network which does not meet the Specification; (iii) delivery of Gas to a Receipt Point which does not comply with the minimum and maximum pressure specifications for that Receipt Point set out in Annexure 5; (iv) the failure by the User to ensure the cessation of the delivery of Gas to a Receipt Point as required under this Agreement; <p>(b) The limitations of liability referred to in clauses 26.3(a) and 26.4 do</p>	Delete the whole of clause 26.5.	<p>Insert new clause 26.5 as follows:</p> <p>(a) <u>The limitations of liability referred to in clauses 26.3(a) and 26.4 do not apply in respect of the User's liability for Damage comprising the Service Provider's loss of revenue or relating to the interruption of Services (including Damage associated with cessation of Services, purging relevant parts of the Network and re-commencing Services) arising as a result of delivery of Gas:</u></p> <ul style="list-style-type: none"> <u>(i) into the Network which does not meet the Specification; or</u> <u>(ii) to a Receipt Point at a pressure which is not within the minimum and maximum pressure specifications for that Receipt Point set out in</u> 	<p>JGN proposes a new clause 26.5(a) which seeks to carve out from the consequential damage liability exclusion (under clause 26.4(a)) any:</p> <ul style="list-style-type: none"> • loss of revenue, or • service interruption costs, <p>suffered by JGN for delivery of out-of-specification gas, or gas outside the pressure requirements, by the user or on behalf of the user.</p> <p>Having regard to the position set out in the AER's draft decision, JGN has re-considered its position – focusing on risks, categories of loss and available mitigations in each of the circumstances specified in its June 2014 RSA clause 26.5(a)(i) to (iv). JGN now proposes a more limited consequential damage carve out arrangement than that included in its initial proposal RSA – which substantially limits user consequential damage exposure to two important upstream circumstances over which JGN has</p>

PART A: FURTHER REVISIONS AND JUSTIFICATIONS

No	RSA Clause	JGN's June 2014 initial proposal RSA	AER draft decision's proposed amendment (November 2014)	JGN's position in response (February 2015)	Justification for JGN's revised position
		not apply in respect of the Service Provider's liability for Damage caused by the delivery to a Delivery Point of Gas which does not meet the Specification, to the extent that the delivery was caused by the negligence or wilful default of the Service Provider.		<p><u>Annexure 5.</u></p> <p>(b) <u>The limitations of liability referred to in clauses 26.3(a) and 26.4 do not apply in respect of the Service Provider's liability for any loss of revenue by the User caused by the delivery to a Delivery Point of Gas which does not meet the Specification, to the extent that the delivery was caused by the negligence or wilful default of the Service Provider.</u></p>	<p>no control - and in those cases user exposure is limited to JGN's loss of revenue and the costs JGN incurs in responding to the service interruption arising from these upstream issues, to the extent they are consequential damage (i.e. not to "Consequential Damage" more generally).</p> <p>To ensure this clause is balanced, JGN has also re-inserted former clause 26.5(b), in relation to the user's loss of revenue arising from damage arising from out of specification gas caused by JGN's negligence.</p> <p>Further detail on our justification for this new clause 26.5 is set out in Part B of this Appendix, which follows.</p>

PART B: USER LIABILITY FOR JGN REVENUE LOSS AND SERVICE INTERRUPTION COSTS CAUSED BY UPSTREAM ISSUES

On pages 12-16 to 12-18 of Annexure 12 of the AER Draft Decision, the AER sets out its reasons for excluding all user liability for consequential damages under the RSA.

We set out below:

- a summary of the AER's reasons; and
- JGN's response and its justification for a revised clause 26.5 (providing for a User to be liable for a very limited subset of consequential damage, namely JGN's loss of revenue and service interruption costs caused by the User's out-of-specification gas, or gas that is not within JGN's required pressure range, that is delivered to JGN's network).

THE AER'S STATED REASONS FOR ITS POSITION

The AER's stated reasons for the exclusion of all user liability for consequential damage under the RSA (and therefore for its rejection of JGN's clause 26.5 which, as initially proposed, sought to carve a broader range of liability out of the consequential damage exclusion) are essentially that:

- there is nothing that would distinguish JGN from Envestra¹ in South Australia (SA) – which has in place a reference service agreement which contains an unqualified exclusion of consequential damage - to justify making a user liable for consequential damage; and
- nor would it be consistent with the NGO.

The AER states that, like JGN's network, Envestra's SA network is a large contract-carriage distribution network and that under Envestra's SA access arrangement, the liability of both the service provider and a user is limited to direct damages only.

The AER advances the following specific reasons in support of the above position:

"Firstly, the risks associated with JGN not having control over the gas that enters its network are addressed by the specific user indemnities that JGN requires over these circumstances.

Secondly, although the consequences for consumers may be significant, they can be mitigated either through the user's contractual arrangements with upstream suppliers or by obtaining adequate insurance.

Thirdly, we are not convinced of the JGN's submission that it faces a potential exposure greater than that of an individual user justifies the inclusion of consequential damages. This submission goes to the question of who is better placed to insure against that exposure. But it assumes that consequential damages are appropriate in the first place. In itself it does not support the case for the user being liable for consequential damages.

Finally, these are all issues which Envestra faces in South Australia as well.

¹ Now known as Australian Gas Networks, following a recent re-branding.

PART B: USER LIABILITY FOR JGN REVENUE LOSS AND SERVICE INTERRUPTION COSTS CAUSED BY UPSTREAM ISSUES

We therefore see no reason why JGN should differ to that of Envestra in respect of consequential damages."

JGN'S RESPONSE AND JUSTIFICATION FOR ITS NEW CLAUSE 26.5

1 JGN's risk position is substantially different to Envestra's position in SA and JGN is therefore more reliant on placing revenue loss and service interruption cost liability risk on Users to manage and mitigate JGN's risk

JGN's financial risk exposure to loss of revenue and service interruption costs resulting from out-of-specification gas and gas that is not within JGN's required pressure range that is delivered to its network on behalf of a User, and the insurance options currently available to JGN for managing it, are substantially different to those faced by Envestra in SA.

Accordingly JGN is necessarily more reliant on being able to require its users to contractually bear liability for this risk, as a means of incentivising users to pass on and contractually manage this risk with the upstream producers and transmission operators who are best placed to control gas control quality and pressure (and with whom JGN has no contractual or commercial relationship).

More specifically:

- a) JGN has three times the number of customers connected (approximately 1.3 million for JGN and 423,462² for Envestra in SA) and transports three times the volume of gas annually (98,856 TJ for JGN³ and 32,144 TJ⁴ for Envestra in SA).
- b) This means that JGN's financial risk exposure to network tariff revenue losses and service interruption costs losses (due to out-of-specification gas deliveries from having to shut down and purge the network, re-introduce gas and then re-light individual premises on a premises-by-premises basis) is approximately three times larger than those faced by Envestra in SA.
- c) Additionally, Envestra in SA has a less critical dependency on the operation of its contracts to manage gas quality and related regulatory compliance risk exposures than JGN. This is because in SA, the state government, which regulates technical requirements for gas quality and network safety, also has licensing and regulatory jurisdiction over the gas producers located in that State. In contrast, in NSW, the primary gas quality regulatory burden (for the benefit of gas consumers and public safety) is placed on JGN by the NSW technical regulator, as most of the gas in NSW is sourced interstate from interstate producers who are beyond the regulatory jurisdiction of NSW.
- d) The physical configuration of transmission pipeline connections with the Envestra SA network are significantly different to the transmission pipeline connection configuration with JGN's Wilton network section (which represents 90% of JGN's customers and gas throughput). For example:
 - i) The pressure range required by the Envestra SA network for safe and reliable operations is substantially less than the normal minimum operating pressures for the connecting transmission pipelines. Hence, under normal operating scenarios, Envestra is much less dependent on users procuring a minimum pressure at network receipt points as the principal control for safe and effective network operation.

² See page 82 of Envestra's 2014 Annual Report.

³ See JGN, *Access Arrangement Information*, June 2014, section 4.

⁴ See page 82 of Envestra's 2014 Annual Report.

PART B: USER LIABILITY FOR JGN REVENUE LOSS AND SERVICE INTERRUPTION COSTS CAUSED BY UPSTREAM ISSUES

- ii) However JGN's trunk main in the Wilton network section operates at the *same* pressure range as the Moomba-Sydney Pipeline (MSP) and therefore JGN must rely solely on users to procure the operation of the MSP to a minimum pressure of 3800 kPa in order to ensure safe and reliable supply of the Wilton network section. At times of peak demand, even minor drops below this pressure by the transmission pipeline will have consequences for reliability of supply within JGN's Wilton network section. JGN relies solely on the transfer of responsibility and risk under the RSA to achieve the necessary operational support via the delegation of responsibility to users to procure the necessary pipeline performance as part of their gas supply arrangements.

e) Consequently, when compared to JGN, Envestra in SA is faced with:

- i) a less substantial network tariff revenue loss and service interruption cost risk (which is also mitigated to a better degree by SA technical regulation and by the physical configuration of transmission pipeline interconnections); and
- ii) a smaller individual network than JGN with lower maximum loss from any one event,

and Envestra therefore has a substantially lower and different risk to seek to mitigate through insurance or other strategies, compared to JGN.

f) In this regard we note:

- i) In its response to the AER's draft decision on its access arrangement, Envestra did not accept the consequential damage exclusion that the AER required in its draft decision, and made substantial submissions as to why an unqualified consequential loss exclusion was *not* appropriate for the Envestra network.
- ii) The AER, while deciding to require Envestra in SA to provide its users with an exclusion of liability for all consequential losses, allowed Envestra an increase in its opex to cover its additional costs of obtaining business interruption insurance to better cover itself for these types of losses.⁵
- iii) However, currently JGN's business interruption insurance only provides cover for loss of revenue and service interruption costs arising as a result of property damage, and not more generally – for example there would be no coverage where JGN suffers no damage to its assets but nevertheless must suspend services for safety reasons, or to minimise the risk of flow on impacts to customers (or indeed where impurities in gas cause JGN's equipment to malfunction, resulting in a supply outage – but malfunctioning equipment is not property damage per se).

As discussed in section 2 below, financial exposure for loss of revenue and the costs of managing a service interruption can be the primary and most significant losses JGN could potentially suffer as a result of the delivery of out-of specification gas or gas at the wrong pressure. As discussed further in section 3(a) below, JGN would have significant difficulties in obtaining such an insurance product to cover this risk more generally - it may in fact not be possible to obtain full cover. So at this stage, an approach similar to that taken by the AER with Envestra in SA will not facilitate JGN being in a position to manage this risk with a suitable insurance product.

- g) In section 3 below, we consider further the potential alternative options for JGN to attempt to manage this financial risk exposure. As indicated below, these options are not economically or technically feasible, particularly in the timeframe currently available for the AER's final decision on JGN's RSA for the 2015-20 AA period.

⁵ See pages 254-356 of the AER's Final Decision on Envestra's SA gas network (June 2011).

PART B: USER LIABILITY FOR JGN REVENUE LOSS AND SERVICE INTERRUPTION COSTS CAUSED BY UPSTREAM ISSUES

Accordingly JGN is necessarily reliant on a revised clause 26.5 placing some contractual consequential loss liability exposure on the user for JGN's loss of revenue and service interruption costs, where these impacts arise from the user's out-of-specification gas or delivery of gas that does not meet the required pressure. However, after carefully analysing the different types of upstream risk events and their potential consequences, we have significantly reduced the scope of clause 26.5 so that it now covers only:

- this limited subset of Consequential Damage (i.e. loss of revenue and service interruption costs); and
- these 2 specific types of upstream gas delivery failures (i.e. delivery of out-of-specification gas or gas which is above or below the applicable pressure range).

Furthermore, we have also sought to balance this by re-inserting a corresponding provision in the user's favour for any delivery by JGN of out-of-specification gas to the user's delivery points caused by JGN's negligence or wilful default.

2 Limiting Users' liability to Direct Damage effectively places no real liability risk on them at all (for out-of-specification or off pressure gas)

It needs to be clearly understood that placing only "Direct Damages" liability exposure on a user for delivery of the user's out-of-specification and off pressure gas to JGN's network:

- a) imposes only very limited liability risk on users;
- b) significantly reduces the current incentive on users to procure upstream parties (through their gas supply and transportation contracts) to manage and control matters which are necessary for safe and reliable network operation; and
- c) accordingly provides little or no real risk mitigation protection for JGN or customers.

This is because a primary loss (and in many cases the only loss) that would be suffered by JGN for out-of-specification gas (or gas at the wrong pressure) delivered to it by a user is precisely consequential losses in the form of revenue loss and service interruption costs from having to shut down operations as a result of out-of-specification gas or gas supplied at the wrong pressure. See further section 12.2.1.3 of JGN's response, in which we have set out a detailed illustration of the supply failure consequences of upstream events which are beyond JGN's control (such as insufficient availability of gas resulting in a drop in gas pressure – noting that gas quality can also result in a similar widespread loss of supply scenario).

As set out in that section, given the safety issues that flow from a loss of positive gas pressure in the network and the time required to achieve physical load reductions through load shedding (>24 hours) and to mobilise large scale emergency responses, JGN needs to act quickly in these circumstances to take preventative measures to manage the issue, well before a significant pressure drop is experienced within the network (in keeping with its statutory obligation to operate a safe and reliable network). If the network is shut down due to lack of supply, there will be significant disruption for those impacted. Even if the upstream supply issue is resolved relatively quickly after such a shut-down, supply within the network could be impacted for days and possibly weeks.

Yet in these circumstances material Direct Damage, such as physical damage to the network itself, will not necessarily occur and is generally less likely to arise.

This means that (contrary to the AER's reasoning set out in its "Firstly" point noted above) – if the AER's full consequential damage exclusion applies, none of the user-specific indemnities in the RSA relating to the user's delivery of out-of-specification gas or gas at the wrong pressure are likely to expose the user to liability in the core areas in which JGN is potentially exposed, and therefore they will not provide JGN with any substantial protection.

PART B: USER LIABILITY FOR JGN REVENUE LOSS AND SERVICE INTERRUPTION COSTS CAUSED BY UPSTREAM ISSUES

If the user indemnities in the RSA for out-of-specification gas are to have any effect, it is imperative that the user bear liability for JGN's revenue loss and service interruption costs arising from the delivery of the User's out-of-specification gas (or gas at the wrong pressure). This will also properly incentivise users to use upstream contractual mechanisms to require their upstream counterparties to properly manage gas quality.

3 JGN's only other potential options for managing its risk exposure require the investment of significantly more time and cost, with a less effective outcome

If users are not exposed contractually to the limited categories of consequential damage that JGN is proposing then there are really only two other alternatives potentially available to JGN to try to mitigate its exposure to this risk and to ensure safe operation of the network for customers. Each of these are considered below.

a) Obtaining a new insurance product

JGN currently holds business interruption insurance as part of its general property cover for its business. Under this cover, certain business interruption losses (such as loss of revenue) are covered where they arise as a result of material property damage (subject to certain exceptions).

However this business interruption insurance does not cover loss of revenue or service interruption costs which arise purely from loss of supply caused by an upstream problem with gas but where there is no damage to the network. An example of this is where JGN has to shut down and purge the network because of the delivery of a user's out-of-specification gas or a pressure drop in a user's gas delivered to the network. As indicated above (and as discussed in more detail in section 12.2.1.3 of this response) for these incidents JGN may need to pre-emptively shut down the network and then purge it, to ensure safe network operation is maintained for all customers across the network. There is no property damage but the resulting service interruption may have potentially significant financial consequences for JGN. Alternatively, impurities in gas originating upstream can cause JGN's equipment to malfunction, resulting in supply outages – but as that equipment may be cleaned of the accumulated impurities, there is no property damage as such. Once again, in this situation JGN may have a significant exposure (as explained in section 12.2.1.3 if an outage occurs a process of purging, re-introducing gas and then re-lighting is required – simply fixing the malfunctioning equipment will not resolve such an issue).

As also indicated above, these purely economic loss of revenue and supply interruption costs are the main losses that would be suffered by JGN if there was a gas specification or gas pressure failure in the user's delivered gas which interrupts supply (property damage to JGN's network is unlikely to be a significant issue in these loss of supply scenarios).

JGN's insurance underwriters expect us to manage these risks commercially and contractually. Our advice is that if we were to try to obtain cover for these risks from the insurance market, then that cover – assuming it is available at all – would take the form of a custom-designed bond or derivative product. These tailored types of products would first require an underwriter to conduct a risk profiling review. To obtain an appropriate derivative or bond we would need detailed modelling to establish and quantify the correct parameters, trigger responses and the risk profile for the relevant insurers or financiers.

JGN has been advised that if this option is pursued, the actuarial modelling required would take up to 6 months. On completion of that work, JGN together with its underwriters would work to design a product with specific coverage, limits, trigger clauses and the like to suit the determined risk profile.

Depending on the type of product which is ultimately required, the marketing and capacity building exercise could extend the length of the overall process to secure coverage beyond 12 months. In some cases the product may need to be financially rated, which adds further time and complexity to the process.

Any resulting tailored derivative or bond product would require significant expense, which JGN would need to pass onto customers through higher network tariffs. Clearly such an exercise cannot be

PART B: USER LIABILITY FOR JGN REVENUE LOSS AND SERVICE INTERRUPTION COSTS CAUSED BY UPSTREAM ISSUES

effectively and successfully achieved in the 3 month period between the AER's draft decision and JGN's response (or indeed the period between the AER's draft decision and its final decision).

We also submit that imposing such an additional expense on all users and end use customers through increased network tariffs could be avoided completely (as it is currently) by:

- i) continuing to require individual users to bear potential liability for JGN's revenue and service interruption cost losses caused by the user's out-of-specification gas or gas at the wrong pressure (as per JGN's proposed new clause 26.5, which exposes users to a much more limited scope of consequential loss than the equivalent clause in the 2010-15 RSA as well as the version submitted to the AER by JGN in June 2014); and
- ii) thereby incentivising each user to pass this risk onto the upstream producers and transmission pipeline operators who are best placed to manage these issues, as per the existing responsibilities of users in NSW under the RSA.

b) JGN assumes direct responsibility for gas testing and for controlling network gas pressures

In the absence of having effective recourse against users under the RSA, then faced with no other means of controlling gas quality and supply pressures for safe and reliable network operations, JGN would have to take a much greater level of direct responsibility for managing the quality and pressure of gas in its network.

To put this in context:

- i) For safe and reliable supply in the interest of customers, the public and JGN's regulatory compliance with NSW distributor obligations, gas quality must be tested and controlled before it enters the network.
- ii) Currently, this is achieved by all gas quality being managed upstream under gas shippers' gas supply contracts with producers/transporters at each point where gas quality is actually controlled (such as sales gas production facilities). The consequence of this is that all gas in the transmission system upstream of the network should meet the specification. JGN's RSA with users (who either are shippers themselves or contract with shippers for supply) currently seeks to transfer the responsibility and risk for the quality of gas received by the network to the upstream producers via shipper's commercial supply arrangements. This avoids the need for the gas to be re-tested further down the supply chain, with no duplication or wastage of resources and testing. If gas is out-of-specification, producers and transporters⁶ have options to change the processing and selection of gas to rectify deviations in quality, well upstream of JGN's network.
- iii) If JGN no longer has any recourse to its users and has to take direct responsibility for managing the quality of gas coming into its distribution network to ensure customer and network safety, then:
 - (A) Gas quality testing and control equipment would need to be installed and maintained in JGN's network (e.g. at many, if not all, network receipt points). This would occur at users' and customers' cost, which would be substantial. We estimate that this could be approximately \$1 million per location, with more than 20 separate networks to test within the JGN network. JGN would need to pass through all of this additional cost to all users and their end use customers via significant increases in network tariffs.
 - (B) If out-of-specification gas is detected at this late location in the supply chain (as opposed to being detected and rectified further upstream by the producer), the only remedy available to JGN

⁶ Producers and transporters control different quality characteristics of the gas. Producers control gas against parameters of the sales specification. In NSW practice, transmission service providers have control over odourisation of gas received by the network.

PART B: USER LIABILITY FOR JGN REVENUE LOSS AND SERVICE INTERRUPTION COSTS CAUSED BY UPSTREAM ISSUES

to prevent the imminent flow of the gas into the network would be to refuse receipt of the gas. With one or two exceptions, termination of supply at any network receipt point will result in significant (if not total) loss of supply within the downstream network. Such termination would also result in significant quantities of off-specification gas within the transmission pipelines, which represents a further significant cost for the market to bear.

Accordingly, the direct management of gas quality by JGN is not a more efficient outcome for the market than current arrangements, which pass risk and responsibility upstream in the supply chain via user's commercial gas supply and transportation arrangements.

- iv) Similarly in order to take greater operational responsibility for gas pressures within the network, JGN would need to install, operate and maintain gas compressors to control network pressures independently of the transmission pipelines. This would occur at considerable cost for construction and ongoing maintenance which would result in increased tariffs for users and customers. There is no value created for customers by transferring the risk and responsibility for management of receipt point pressures from users to JGN.
- v) Here again, we submit that all of these additional costs and network tariffs (for a solution that is more likely to result in supply interruptions for all users and their customers) can be avoided completely (as it is currently) by:
 - (A) allowing JGN to require that individual users bear potential liability for JGN's revenue and service interruption cost losses caused by the user's out-of-specification gas or gas at the wrong pressure (as per JGN's proposed new clause 26.5); and
 - (B) thereby incentivising each user to ensure that responsibility for gas quality and gas pressures are transferred onto the upstream producers and transmission pipeline operators who are best placed to manage these issues.

4 Consistency with the NGO

As set out in sections 7-9 of Appendix 1.2 of JGN's 2015-20 Access Arrangement Information, submitted by JGN with its June 2014 Access Arrangement proposal:

- (a) Rule 100 of the NGR provides that the provisions of an access arrangement must be consistent with the NGO, stated in section 23 of the NGL as follows:

"The objective of this Law is to promote efficient investment in, and efficient operation and use of, natural gas services for the long term interests of consumers of natural gas with respect to price, quality, safety, reliability and security of supply of natural gas."
- (b) In seeking to apply the NGO in recent assessments of access arrangements for other gas distributors, the AER has emphasised the importance of achieving an appropriate allocation of risk between service providers, network users and customers.⁷
- (c) In relation to the allocation of risk, the AER has indicated that risk should be borne by the party best able to manage it, and that this promotes the NGO by "providing the opportunity to minimise the risk, which can lead to greater efficiency and lower prices".

The NGO therefore clearly requires that there be economically efficient and effective investment in, and use of, the gas network (and the upstream facilities connected to it) so as to ensure gas is supplied to consumers which both:

⁷ See page 433 of the AER's Access Arrangement Draft Decision for Envestra (Victoria) 2013-2017.

PART B: USER LIABILITY FOR JGN REVENUE LOSS AND SERVICE INTERRUPTION COSTS CAUSED BY UPSTREAM ISSUES

- meets legal specification requirements for gas quality; and
- avoids unnecessary costs and minimises interruptions to gas supply in doing so.

For all of the reasons set out in sections 1 to 3 above (and contrary to the AER's stated reasons as also set out above), JGN submits that requiring the user to indemnify JGN for JGN's loss of revenue and service interruption costs arising from the delivery of the User's out-of-specification gas (or User delivery of gas to the network at the wrong pressure) is clearly:

- the most cost efficient method available to JGN to assist it to ensure gas quality specifications and pressure requirements are met; and
- the least likely to result in gas supply interruptions,

for the benefit of all gas consumers connected to JGN's network, consistent with the NGO.

JGN's proposed new clause 26.5 effectively places just such a requirement on the user and should therefore be approved by the AER.