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**EnergyAustralia Retail
Jemena Gas Networks (NSW) Ltd's
Revised 2010 – 2015
Access Arrangement & Reference Services Agreement**

April 2010

Submission on JGN's Revised Access Arrangement

April 2010

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1 Executive Summary

EnergyAustralia welcomes the opportunity to make the following submission to the Australian Energy Regulator (AER) in response to the AER's Draft Decision on Jemena Gas Networks (NSW) Ltd (JGN) Revised Access Arrangement Proposal for 2010 to 2015 and JGN's Access Arrangement (revision in response to AER Draft Decision).

EnergyAustralia is a substantial retailer of gas to large and small customers in NSW and a significant User of the services provided by JGN via its NSW gas network. Therefore AER's review of JGN's Revised Access Arrangement in the context of its impact on EnergyAustralia and our gas customers is a key process for EnergyAustralia to engage in.

The Reference Services Agreement

JGN's Revised Access Arrangement and Reference Services Agreement (RSA) outline the Reference Services and the Terms and Conditions under which JGN propose to provide those services for the next 5 years. Both the services and the terms and conditions under which JGN will provide these services differ from the current Access Arrangement.

While high level terms and conditions have previously been included as part of previous JGN's (and prior to that AGL Gas Networks') Access Arrangements the move to include a full set of Terms and Conditions is new. EnergyAustralia is pleased to see that JGN have included the full Terms and Conditions, however, urge the AER not to approve the RSA in its current format. EnergyAustralia considers a number of amendments are required to the RSA before it can be approved. These amendments are covered in Section 2 and Section 3.

Key among the amendments considered essential by EnergyAustralia are amendments to the liability and indemnity clauses. The proposed RSA is unreasonable and at a minimum the balance of risks and liabilities under the 2005 Access Arrangement should be reinstated.

Reference Tariff Policy

EnergyAustralia remains unsupportive of the introduction of a minimum aggregate charge for demand customers. The justification used by JGN for its introduction is, in EnergyAustralia's opinion, flawed. The AER should continue to require the removal of the minimum aggregate charge.

For the purposes of this submission, capitalised terms have the same meaning as they are given in the Revised Access Arrangement and the RSA.

2 The Reference Services Agreement

JGN has made it clear that in order to receive a Reference Service, Users will need to sign the Reference Services Agreement (RSA) approved by the AER under the Access Arrangement. This stance leaves little room for negotiation between the User and JGN. Therefore, it is critical that the RSA as submitted by JGN is not approved by the AER. EnergyAustralia submits that a more balanced RSA is required.

It is essential that both the Reference Services Agreement (RSA) and JGN's Access Arrangement include a requirement for the RSA to be updated to be consistent with the outcome of the National Energy Customer Framework (NECF) and other changes in Law. While Rule 65 of the NGR allows for variation of applicable access arrangements, as drafted, any variation to the RSA is at the request of JGN with no obligation on JGN to ensure consistency with obligations under NECF or changes in gas Law.

Clause 1.4 Amendments to this Agreement

EnergyAustralia submits JGN should be obligated to lodge, in a timely manner, amendments to the RSA in order to ensure the RSA remains consistent with changes in Law and with obligations under NECF. Without such an obligation JGN has absolute discretion whether or not to lodge amendments and discretion as to the timing of any amendments. This lack of obligation may potentially leave Users exposed to obligations and liabilities that were intended to sit with the Service Provider.

Clause 4.2 MDQ, MHQ and Chargeable Demand

While JGN have introduced the concept of Chargeable Demand they have maintained the concept of MDQ. Under Clause 4.2(f) JGN's maximum obligation to deliver gas is the MDQ rather than the Chargeable Demand which the customer is paying for. EnergyAustralia submits JGN's obligations to deliver should be in line with the greater of the Chargeable Demand (as that is what is being paid for) and the MDQ. In the absence of such an obligation, in order to contractually ensure delivery of the Chargeable Demand a User would be required to submit a request for service to increase the MDQ whenever the Chargeable Demand is increased. Such a requirement significantly offsets the administrative benefits to both the Users and JGN of the changes in the Reference Tariffs proposed by JGN.

Clause 4.5 Chargeable Demand

EnergyAustralia continues to have concerns regarding JGN's requirement under Clause 4.5 that any customer who's MHQ has varied (either up or down) since 1 July 2005 is required to have a Chargeable Demand that is at least ten times the MHQ for that Delivery Point. The introduction of this requirement for existing customers means some customers will be required to have a Chargeable Demand in excess of their MDQ and their current withdrawals. For example a customer may have decreased their MHQ on 5 July 2005 and currently have an MDQ seven times the MHQ. Under Clause 4.5 they will be required to have a Chargeable Demand of at least 10 times their MHQ and will therefore be paying for additional capacity which they may not require. In the case of one existing EnergyAustralia customer the Chargeable Demand under this clause will represent an approximately 60% increase on their current MDQ and an over 100% increase on their ninth highest withdrawal over the most recent 12 months. EnergyAustralia submits Clause 4.5 (c) and (d) should be deleted.

Clause 4.6 Increases in Chargeable Demand

JGN's ability under Clause 4.6 (b) to "increase the Chargeable Demand to be equal to the ninth-highest actual Quantity of Gas withdrawn at the Delivery Point in any one Day over any 12 month period" should be limited immediately preceding 12 month period rather than being *any* 12 month period. Further EnergyAustralia submits that any increase in Chargeable Demand should be automatically accompanied by an equal increase in MDQ.

Clause 4.7 Decreases in Chargeable Demand

While EnergyAustralia is supportive of the move towards a forward facing charging mechanism rather than the current retrospective overrun methodology we believe that it needs to be easier to access a reduction in Chargeable Demand.

While JGN have made a number of amendments to this clause, it is in effect equivalent to that in the Proposed Access Arrangement. Regardless of when the request is made, either before a reduction as in the Proposed Access Arrangement or after 12 months as in the Revised Access Arrangement, the Chargeable Demand is still at least 10% higher than required for a period of at least 13 months, any reduction in demand less than 10% can't be reflected and it remains difficult for customers to access.

JGN's argument that the arrangement currently in place is comparable to that proposed is disingenuous. Under the current arrangements there are regular opportunities for customers to decrease their MDQ by any amount. The Revised Access Arrangement gives no such opportunity unless strict criteria are met. EnergyAustralia remains concerned that reductions

in demand, for example, due to a decrease in hours of operation, will not be reflected in a reduction in Chargeable Demand as it will not be considered permanent and that the non-recognition of “small” permanent reductions may result in charges up to an additional 10% above the true requirements of a customer. While JGN may consider that a reduction of less than 10% in Chargeable Demand and therefore charges does not have a meaningful impact on the charge payable by a customer, most customers would beg to differ.

Further EnergyAustralia notes that Clause 4.2(h) gives JGN the ability to decrease the MDQ if they become aware of a reduction in MDQ requirements. The ability for Jemena to decrease MDQ exists whether or not the customer's Chargeable Demand is reduced.

Clause 6.1 Unauthorised Overruns

Under the Revised Access Arrangement and RSA the Chargeable Demand automatically increases if a customer's daily usage increases. This increase occurs without a corresponding increase in MDQ and thus Capacity Entitlement and means a customer may be paying for demand but at the same time overrunning. As currently drafted JGN has the ability to install flow control mechanisms on the customer's meter at the customer's expense if an unauthorised overrun occurs. This flow control mechanism would limit withdrawals to the Capacity Entitlement despite the fact that the customer may be paying (and will continue to have to pay) for a higher Chargeable Demand. EnergyAustralia submits JGN should not have the right to install flow control mechanisms on the customer's meter without giving the User an adequate opportunity to revise the MDQ and that in the event of any flow control equipment being installed then the Chargeable Demand should be reduced to reflect the restricted quantity of gas the customer is able to take. Alternatively a direct link between the Chargeable Demand and MDQ as proposed by EnergyAustralia in response to Clause 4.6 would address EnergyAustralia's issues on Clause 6.1.

Clause 7.4

EnergyAustralia notes that JGN have not implemented the amendments to this Clause required by the AER. While the Clause has been amended JGN still retain an “approval” role for any industry scheme. EnergyAustralia submits Clause 7.4 needs to be amended with an obligation on JGN to implement any industry scheme.

Clause 7.5

EnergyAustralia submits the amendments required by the AER to Clause 7.5 should be implemented in full.

Clause 22.1 Service Provider to issue invoice

While several parties made submissions on Clause 22.1, the AER has not required any amendments to the clause on the basis that it is a continuation of the current commercial obligations. Under the 2005 standard Agreements, JGN were required to issue an invoice either as soon as possible after the first Day of the Calendar month (under the Multiple Delivery Point Reference Agreement) or as soon as possible after the end of the billing period (under the Tariff Service Agreement). The move to a period at the absolute discretion of JGN is not a continuation of the current commercial obligations. EnergyAustralia submits that the RSA need to be amended to ensure that JGN's current obligations with regards to the issuing of invoices are continued.

EnergyAustralia also notes that the current Multiple Delivery Point Agreement places an obligation on JGN to provide details of total quantities delivered to each Delivery Point (for the equivalent of Demand Delivery Points) in the preceding month. This obligation is missing from the Proposed and Revised RSA and EnergyAustralia submits that it should be reinserted.

Clause 25 Curtailment and Interruptions

Under the existing agreements a User had to use "best endeavours" to cease delivery or the taking of gas in the event of a scheduled interruption or curtailment. Under the RSA included in the Revised Access Arrangement, a User is now "solely responsible" (Clauses 25.2(d) and 25.4(c)) for ensuring there is a cessation or reduction in taking of gas and "must ensure" (Clauses 25.4(h) and (i)) that not only they but also their Customers comply with any direction given. EnergyAustralia is not sure how this clause would work in operation as short of physically limiting supply (which is not permitted under the Network Code unless the User is certified by the Network Operator) it is unclear as to how a User can actually comply with this clause and submits the previous obligations of using best endeavours should be reinstated.

Clause 26 Force Majeure

EnergyAustralia is concerned about the one-sided nature of changes to the definition of Force Majeure. Under the RSA if there are changes in market condition for the transportation and/or purchase and sale of Gas, then a User is unable to call a Force Majeure event but if the same event affects the operation of the Network then JGN is able to call a Force Majeure event. EnergyAustralia submits 26.1(b)(iv) should be deleted from the RSA.

Clause 27.2 Right of Service Provider to Terminate

EnergyAustralia has concerns about the operation of this clause and in particular of JGN's ability to terminate the agreement for a change of Law where the commercial position of JGN is "materially adversely affected". This ability to terminate the agreement exists whether or not the operation of the Agreement itself is affected.

EnergyAustralia submits this clause goes beyond the current Agreement in two aspects. Under the current agreements negotiation/amendment was only applicable where Law changes were such that the agreement did not comply and secondly parties were obligated to negotiate in good faith to agree amendments to agreement so that it complied with the changes. Under the proposed RSA, JGN has the ability to walk away from the agreement if negotiations fail and absolute discretion whether or not to lodge amendments to the agreement and also when to do so. The amendment clause proposed places Users in a position where they would need to agree with any amendments proposed by JGN as otherwise if they don't agree with JGN's demands (within 14 days) JGN could walk away from the agreement. EnergyAustralia submits the JGN's ability to terminate the agreement should be deleted from the Agreement.

3 Liability under the Reference Services Agreement

EnergyAustralia submits that the liability regime in the proposed RSA, even if amended as required in the Draft Decision, is unreasonable and should not be approved by the AER. At the least, the balance of risks and liabilities applicable under the 2005 Access Arrangement should be reinstated.

3.1 Draft Decision

In the Draft Decision, the AER requires two amendments on the basis that either:

- (a) the provisions as proposed by JGN remove JGN's liability and impose indemnity liability on a user for JGN's negligent conduct, which is "clearly beyond users' control"; or
- (b) JGN is in the "best position to be able to manage the risk and so should accept liability for its actions in relation to the service".

Otherwise, the Draft Decision proposes to accept the liability regime on the basis that:

- 1. the proposed liability terms "are similar to the terms in the [2005-2010] Access Arrangement approved by IPART", the provisions were the subject of detailed analysis by IPART and Allen Consulting and both of these "considered the liability and indemnity terms and conditions were reasonable"¹; and
- 2. the most efficient way to manage risk is assign to party best placed to manage it and "most of specific liability provisions are appropriate when viewed in the context of assigning risk to the party best able to manage it" ².

EnergyAustralia submits that significant further amendments are required to ensure that the liability regime is reasonable³, places risk with the party best able to manage it and does not place risk with a party which is not able to manage it.

¹ AER, Draft decision – *Public Jemena Access arrangement proposal for the NSW gas networks*, February 2010, p341 and 342

² AER, Draft decision – *Public Jemena Access arrangement proposal for the NSW gas networks*, February 2010, p342

³ Or at least as reasonable as the regime approved by IPART in 2005

3.2 Proper approach to reviewing proposed RSA

At the Round Table on 27 November 2009, the AER acknowledged that it is generally sensible for contractual terms to be settled in commercial negotiation and that review of these terms and conditions is not normally one of core activities undertaken by AER⁴. However, the consequence of JGN including the full RSA as part of its Access Arrangement proposal is that the AER is being asked to establish a standard agreement and to therefore exclude the opportunity for users to negotiate with JGN, including negotiating the detail of the liability regime which is to apply to any negligence, breach or failure under the RSA. EnergyAustralia submits that in undertaking this task, the AER must not make a decision which is inconsistent with the general law in Australia on the nature or extent of liability of a party. Further, the AER should not, through approval of the RSA, impose on users a liability regime which is unreasonable or unbalanced – put simply, the AER should not impose liability on a party beyond the levels which would normally apply in a commercially negotiated arrangement.

Further, even if the 2005 Access Arrangement is the preferable starting position for an assessment of the reasonableness of the RSA, it is important to note that the 2005 Access Arrangement established general principles which provided the framework for negotiation of reference service agreements. IPART did not consider or approve a detailed contract, but high-level terms and conditions (these formed Schedule 2A and 2B to the Access Arrangement). For example:

- the Access Arrangement did not establish a comprehensive, exhaustive liability regime – the terms and conditions did not, for example, include detailed definitions of key terms such as “Consequential Damages”, “Damage”, “Direct Damage”, “Force Majeure” or “Third Party Claims”;
- Schedules 2A and 2B were 14 pages long compared to the RSA's 91 pages⁵.

It is incorrect to regard IPART or Allen Consulting as having undertaken an analysis of the terms and conditions at the level of specificity or detail reflected in the proposed RSA. Accordingly, in considering whether to approve the a detailed agreement which will remove from users the ability to negotiate the terms on which JGN will provide reference services, the AER is undertaking a significantly different task to that undertaken by IPART.

In respect of downstream risks, a User's only means to manage the risk and liability regime under the RSA will be to mirror the relevant provisions in their gas supply agreements with customers. Approval of the RSA is therefore tantamount to pre-determination of the key liability provisions which will apply between Users and customers. However, it is not apparent

⁴ Round Table Minutes p2

from the Draft Decision that this consequence has been recognised in the assessment of the proposed RSA.

EnergyAustralia submits that the relevant question is not whether a particular clause in the RSA will discourage people from entering into, or operating in, the market⁶. Rather, the question is whether the Access Arrangement, including the RSA, provides for access on terms and conditions that are reasonable. At the very least, a significant imbalance in the parties' relative exposure to liability is indicative that the agreement is not reasonable and should not be approved.

3.3 Proposed RSA requires substantial amendments

EnergyAustralia submits that the conclusion in the Draft Decision that the risk and liability regime in the proposed RSA, if amended as required in the Draft Decision, will be acceptable is erroneous for the following reasons:

1. The regime is significantly different to the regime in the 2005 Access Arrangement – and all changes have reduced JGN's obligations and imposed greater liability on Users;
2. Taken as a whole, the RSA is unreasonable and unbalanced – JGN bears limited liability whereas Users have extensive liability;
3. Many risks are allocated to users when users are not able to manage the risk; and
4. The regime is inconsistent with the proposed National Energy Customer Framework (NECF) and the regimes applicable under other regulated assets.

These matters are discussed in detail below.

3.3.1 The regime in the proposed RSA is significantly different from that in the 2005 Access Arrangement

JGN's stated intention is that the existing terms and conditions approved as part of the 2005 Access Arrangement should substantially continue:

“While the essential elements of the terms of [sic] conditions in this AA are substantially the same as those in the current AA, there have been some changes made in response to market

⁵ The definitions in the RSA alone are 14 pages

⁶ Round Table Minutes p19

*development and the changing nature of the gas distribution business. Some of the more significant changes made to the terms and conditions are outlined below.”*⁷

The changes discussed are simplified reference services, rolling contract term, customer churn, transitional provisions and gas balancing. No mention is made to changes to the liability regime.

It also appears from the Draft Decision that the AER was proceeding on the basis that the RSA was consistent with the terms and conditions approved by IPART:

*“the AER understands that JGN is not proposing to introduce a term or condition which is significantly different from current arrangements”*⁸

Further, there was a suggestion at the Round Table that users had already accepted the regime⁹.

At the Round Table, JGN asserted that “there is recognition that there is a class of issues of unlimited liability events like off-spec gas and overruns. Jemena] does not see how continuing this approach should cause problems”¹⁰. The fact is that JGN has not “continued” the approach, but has significantly altered it in 4 ways –

- (a) expanded the circumstances or events where a User is expressly made liable;
- (b) expanded the potential scope of a User’s liability, including enlarging the list of events where users may be exposed to unlimited liability;
- (c) excluded various events from the operation of the force majeure provision, even where the user’s non-compliance arose from a force majeure; and
- (d) reduced scope and extent of JGN’s liability.

Regardless of whether or not IPART’s approval is decisive of whether the regime under the 2005 Access Arrangement was reasonable, the proposed RSA does not continue that regime and requires substantial amendment if it is to do so.

⁷ JGN, *Access Arrangement Information 25 August 2009*, p223

⁸ AER, Draft decision – *Public Jemena Access arrangement proposal for the NSW gas networks*, February 2010, p340

⁹ Round Table Minutes p19. What users may have generally accepted is the “standard” agreement developed by Jemena (for example, the Multiple Delivery Point Services Agreement available on JGN’s website). However, this agreement does not reflect the RSA regime, so Users’ general acceptance of that standard agreement does not indicate acceptance of the liability regime under the RSA.

Expanded circumstances or events where user is expressly made liable

The 2005 Access Arrangement provided that a user was liable only for loss or damage arising from:

- (i) personal injury to JGN's employees/agents/contractors arising from the user's acts or omissions under the agreement¹¹;
- (ii) damage to JGN's property arising from the user's acts or omissions¹²;
- (iii) any breach of the agreement by the user which caused JGN loss or damage¹³;
- (iv) an Unauthorised Overrun¹⁴ and
- (v) any claim by a third party arising out of JGN's actions to suspend supply of gas in specified circumstances¹⁵.

However, under the proposed RSA the User is also expressly made liable for loss or damage in a number of additional circumstances, even where the User has complied with all relevant contractual obligations, including the following:

- (vi) revocation by JGN of an authorised overrun¹⁶
- (vii) commingling of gas or delivery of gas by JGN in a commingled state¹⁷
- (viii) any matter or thing done or happening or arising with respect to gas prior to receipt by JGN or after delivery by JGN¹⁸
- (ix) delivery of non-specification gas by another user at any Receipt Point or delivery of non-specification by JGN to a delivery point (including where the Director-General has issued an exemption to JGN)¹⁹
- (x) cessation of delivery of gas by JGN in response to non-specification gas being delivered into the network by another User²⁰
- (xi) delivery of gas by another User at any Receipt Point outside the specified pressure limits²¹
- (xii) installation/operation etc of measuring equipment by a person other than JGN²²

¹⁰ Round Table Minutes p17

¹¹ 2005 Access Arrangement Schedule 2A, clause 53 and 56; reflected in RSA clause 28.2(a)(i)

¹² 2005 Access Arrangement Schedule 2A, clause 53 and 56; reflected in RSA clause 28.2(a)(ii)

¹³ 2005 Access Arrangement Schedule 2A, clause 53 and 56; reflected in RSA clause 28.2(a)(iii)

¹⁴ 2005 Access Arrangement Schedule 2A, clause 19; reflected in RSA clause 6.2

¹⁵ 2005 Access Arrangement Schedule 2A, clause 50; reflected in RSA clause 24.3

¹⁶ RSA, clause 5.6(b)

¹⁷ RSA, clause 9.2(b)

¹⁸ RSA, clause 9.4(b)

¹⁹ RSA, clause 10.1(e)

²⁰ RSA, clause 10.3(d)

²¹ RSA, clause 14.9(b)

- (xiii) suspension of supply where JGN responds to the actions of other Users²³
- (xiv) implementation of load shedding²⁴ or where JGN requires a reduction in usage by a customer, including as a result of JGN undertaking emergency repairs to network assets²⁵
- (xv) imbalance in the network caused by other users²⁶.

In addition, in many of these situations, the user is liable even where JGN has failed to act as a reasonable and prudent network operator to avoid or minimise the impact of a particular event – for example, where JGN fails to respond after becoming aware that non-specification gas has been delivered into network or where JGN fails to implement load shedding in a timely manner resulting in greater than necessary curtailments etc²⁷. This is contrary to the position in the 2005 Access Arrangement – and the usual position in commercially negotiated agreements – where liability was reduced to the extent to which JGN contributed to the liability²⁸.

Expanded scope of user's liability, including events with unlimited liability

The 2005 Access Arrangement provided that a user's liability was limited, and specifically did not extend to loss of revenue, economic loss, loss of profits etc except in 4 specific instances of action or inaction by the user:

- (i) delivery by the user of non-specification gas into the network²⁹;
- (ii) failure by the user to cease taking gas as required under the agreement³⁰;
- (iii) an Unauthorised Overrun³¹; and
- (iv) act or omission of the user or their agent regarding measuring equipment³².

In all other instances, a user's liability was limited.

However the RSA establishes a very different regime. First, it appears to replicate the 2005 Access Arrangement regime by stating that except for specified circumstances, a party's

²² RSA, clause 18.5

²³ RSA, clause 24.2 and 24.3

²⁴ RSA, clause 25.4(k)

²⁵ RSA, clause 25.7(a)

²⁶ RSA, clause 28.6(a)(v)

²⁷ This occurs due to the operation of RSA clause 28.7(a) which effectively means that clause 28.7(b) has virtually no operation in respect of a User's liability.

²⁸ Schedule 2A, clause 60

²⁹ Schedule 2A, clause 59(a); reflected in RSA clause 28.2(a)(i)

³⁰ Schedule 2A, clause 59(c); reflected in RSA clause 28.2(a)(ii)

³¹ Schedule 2A, clause 59(d); reflected in RSA clause 6.2

liability is limited³³. One of those circumstances is where the user has given an indemnity³⁴. The consequence of this is that because the RSA contains an express indemnity by the user in relation to every relevant clause, the user's liability is in fact unlimited in relation to every one of the 15 circumstance listed above³⁵. This is even more offensive given that the RSA purports to make the user liable in circumstances where it is not in breach of the agreement, and also does not provide the usual adjustment where JGN's negligence or act/omission contributed to the loss/damage.

Apart from representing a significant change from the regime approved by IPART, JGN's explanation – that the risk is best dealt with at the user level rather than by the service provider³⁶ – is not persuasive. This is discussed in Section 3.3.2 below.

Exclusion of events from the operation of the force majeure provision

The 2005 Access Arrangement did not have a definition of Force Majeure. However, it is accepted that a "force majeure event" is generally described as an event beyond a party's ability to control. The significance of force majeure is that where a party is unable to comply with a contractual obligation due to an event of force majeure, then that party is relieved from liability for that non-performance³⁷.

However, the RSA adds new exclusions to the definition of Force Majeure³⁸. The result of this is that, contrary to the 2005 Access Arrangement, even if a User fails to comply with certain obligations due to events beyond its control, the User is in breach of the agreement and JGN can recover fully against the User notwithstanding the User may be "faultless". This substantially alters the risk allocation in the 2005 Access Arrangement as it means that the User is exposed to liability for more breaches which occur due to factors beyond its control, and therefore removes much of the protection afforded to Users by the force majeure provisions. No similar amendment in relation to JGN's position has been included.

³² Schedule 2A, clause 59(e) ; reflected in RSA clause 24.3

³³ RSA clause 28.5(a)

³⁴ RSA clause 28.6(a)(vi)

³⁵ This is because RSA clause 28.6(a)(vi) provides that the limitation does not apply where the user has given an indemnity. The 2005 Access Arrangement did not provide for such extensive indemnities by the user.

³⁶ Round Table, p17

³⁷ For example, 2005 Access Arrangement Schedule 2A, clause 40; RSA clause 26.2

Reduced scope and extent of JGN liability.

In contrast to a User's greater liability JGN's potential liability under the RSA is significantly reduced compared to that under the 2005 Access Arrangement, both in relation to the events for which it is potentially liable and the extent of its liability if one of those events does occur.

Fundamentally, the obligations of the network owner are to receive, transport and deliver gas at certain pressures/volumes; to manage the network including the issues arising from gas being delivered into the network from several sources; to keep the network in good order and repair; to respond in a prudent and timely manner to emergencies; and to respond in a prudent and timely manner to failures by one user which may affect the ability of the network to meet its obligations to other users.

Under the RSA, many of these obligations are qualified, meaning that even where JGN fails to act in accordance with good operating practice, JGN will not be in breach of the RSA and the User may therefore have no remedy (and JGN no accountability). For example:

- (i) Clause 3.4(b): the obligation to receive and deliver gas depends on aggregate deliveries from all users being equal to aggregate withdrawals from all Users on a day – even if the imbalance would not affect the ability of a prudent and efficient service provider to provide the service;
- (ii) Clause 9.2: JGN is not liable for any claim in connection with the commingling of gas – even where all gas delivered into the network complies with the specification;
- (iii) Clause 10.1(a): JGN is not obliged to provide services if any gas delivered at any Receipt Point by any User does not comply with the specifications – even if the delivery of non-specification gas would not affect the ability of a prudent and efficient service provider to provide services.
- (iv) Clause 14.9(a): JGN is not obliged to provide services if gas delivered at the relevant Receipt Point does not comply with the pressure requirements – even if the delivery at other pressures would not affect the ability of a prudent and efficient service provider to provide services.

EnergyAustralia submits that the RSA contains such qualified obligations on JGN that it is not accountable for many matters for which it would have borne responsibility under the 2005 Access Arrangement.

³⁸ RSA, paragraph (b)(iii) of the definition of Force Majeure

The only matter in which JGN does take full responsibility for negligent conduct is, according to JGN, where JGN negligently delivers non-specification gas³⁹. This is not quite accurate – the relevant clause only operates to impose full liability on JGN where the delivery of that non-specification gas “would not have occurred ... but for the delivery of Gas which does not meet the Specification to a Receipt Point.”⁴⁰ In other words, in the most likely situation where non-specification gas may be delivered to a delivery point – being where a user delivers non-specification gas to a receipt point which is then on-delivered by JGN – then the clause will not apply and JGN’s liability will be limited. This is the case even if JGN has failed to act in accordance with good operating practice in responding to the receipt of non-specification gas.

3.3.2 Taken as a whole, the RSA is unreasonable and unbalanced

There are two inter-related concepts that need to be considered in determining whether the proposed RSA is reasonable and should be imposed on Users:

- Firstly, for what events should JGN or a user be responsible (ie. liable); and
- Secondly, where a party is liable, what is the extent of their liability – for what losses or damages should they be liable.

EnergyAustralia submits that on both aspects the RSA is unbalanced and unreasonable. The RSA is drafted so that JGN has very limited exposure to liability for almost any event that could affect the network, Users or end-customers. In contrast, a User is made liable for numerous events beyond its individual control including the actions or inactions of other Users. Additionally, in almost all circumstances a User’s liability is essentially unlimited.

For example, under the RSA, JGN has no accountability in relation to the commingling of gas or changes by the network after it has approved an overrun, even though these are both core functions of a network operator. On the other hand, an individual User is potentially liable to unlimited damages for matters which it cannot control or manage such as the consequences of other Users failing to comply with specification/pressure/balancing requirements, the actions of a third party which has an impact on the network or the actions of JGN (eg. commingling, revoking approval of an overrun, implementing load-shedding).

Further evidence of imbalance and unreasonableness is demonstrated by one-sided nature of key provisions. For example:

³⁹ Round Table Minutes p20

⁴⁰ RSA, clause 28.6(b)

- (a) JGN can elect to terminate or cease providing services (and continue to invoice the User) where there is a default by the User⁴¹; a User has no such choice;
- (b) JGN has a unilateral right to terminate the agreement if as a result of a Change in Law JGN's commercial position is "materially adversely affected"⁴²; a User has no comparable rights;
- (c) JGN's liability is limited to the amount which is recovered under its insurances⁴³ but there is no obligation on JGN to hold the level of insurances that a reasonable and prudent operator would hold⁴⁴; a User's liability is uncapped;
- (d) JGN's liability is reduced to the extent that the User's negligent act or omission caused the damage⁴⁵, but in most instances the User's liability is not similarly reduced;
- (e) JGN has the benefit of "usual" force majeure provisions; a user's relief is substantially limited in connection with key areas of potential liability.

To be consistent with the 2005 Access Arrangement and the outcomes which would be expected in a balanced commercial negotiation, the RSA should be amended so that:

- (i) The rights of the parties in respect of key obligations are more balanced;
- (ii) JGN is liable for matters within its control; and
- (iii) a User is not liable for matters beyond its individual control.

Further, even where JGN breaches the agreement or is negligent, the RSA provides for limited if any compensation to a user. In the event of a breach or negligence, the damage/loss suffered by the user will typically be "economic loss" – such as foregone revenue, compensation paid to customers or producers, lost profits etc, payment of reference charges to JGN even where services are not delivered. However, while the RSA provides that JGN is liable for all "Damage" suffered by the user⁴⁶, the effect of the definitions proposed

⁴¹ RSA clause 27.1

⁴² RSA clause 27.2(a)(ii)

⁴³ Note that JGN having to hold insurances under its reticulator's authorisation provides no rights to users – if JGN fails to hold such insurances, then its liability under clause 28.4(b) will be zero and users will have no remedy against JGN. For this reason it is usual in comparable agreements for the asset owner to have a contractual obligation to hold certain levels of insurance.

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⁴⁵ RSA clause 28.7(b)

⁴⁶ RSA clause 28.2

by JGN is that it is not liable for these categories losses. “Consequential Damage”⁴⁷ – which as defined includes the very categories of loss which the User would typically suffer.

In contrast, the User is liable to JGN for unlimited amounts: while it is also the case that JGN would typically suffer “economic loss”, rather than physical loss or damage, the User is liable to JGN for all such loss – this is because the exclusion regarding Consequential Damage (including economic loss) does not apply to any of the circumstances where the user has provided an indemnity⁴⁸, which is in respect of almost every circumstance in which the User could be liable under the RSA⁴⁹.

Accordingly, in both aspects of the question – the events for which a party is liable, and the limitations on a party’s liability – the proposed RSA is unbalanced and unreasonable.

3.3.3 Many risks are wrongly allocated to users

The discussion at the Round Table indicates that JGN relies on three key assumptions in justifying the RSA:

- (a) it is appropriate that an individual User should be responsible for the actions of all other Users;
- (b) JGN has no relationship with end-customers;
- (c) capping a User’s liability would not be efficient.

From the RSA and from JGN’s statements at the Round Table, JGN’s position seems to be that unless it has complete control over a matter, then it is incapable of managing the risk and therefore the risk must be borne by Users.

Further, even in instances where JGN does have control, the RSA does not impose accountability on them, such as the decision to revoke an approved overrun.

Accordingly, except for a few specified risks, all risks arising from the operation of the network and the provision of transportation services are borne by all network users.

⁴⁷ RSA clause 28.5(a) and the definition of “Consequential Damage” in clause 1.1. Additionally, the definition of “Consequential Damage” may well be wider than would generally be regarded as the case in Australia. However, the meaning and extent of “consequential damage” is generally a matter of much contention, and EnergyAustralia does not rely on this point to support its submission.

⁴⁸ RSA clause 28.6(a)(vi)

⁴⁹ See discussion above regarding RSA clause 28.6(a)(vi)

Every user is responsible for every other user

Because a risk may be created by, or could be managed by, an individual user, JGN's response is to spread across all users the risk of events that may be caused by one user. For example:

- “we cannot control commingling. Therefore we need to look at the most efficient way of managing it. Users as opposed to the network are better placed to manage risk”⁵⁰
- “a number of users could have brought gas in and the network should not bear the risk”⁵¹
- “if you have multiple users, you have multiple users who can manage the risk”.⁵²

It is then asserted that

*“If the network operator deals with the risk, then the network operator is the insurer for the market and is not able to mitigate the risk to the market”.*⁵³

JGN gives no justification for its position other than effectively saying “a user could create or manage this risk so all users must be responsible for it”.

Similarly, it is akin to saying “a user might create a risk, we don't want to bear the consequences of that user's action, so even where we would have a contractual remedy against that user all users must jointly indemnify us against the consequences.”

In other words, all users are a co-operative who must fully share all risks and liabilities relating to the behaviour of any one of them. This is an extraordinary proposition. It also fails to demonstrate a proper understanding of the respective abilities of JGN, Users and customers to manage or respond to risks.

Merely because a risk may be created by one User (such as failing to balance its deliveries and withdrawals on a day) does not mean that any other User is able to manage that risk. With risks caused by the actions or omissions of its customer (such as unauthorised overruns, failure to curtail when directed), the risk may be able to managed by the User through provisions in the gas supply agreement providing for the customer to bear all liability arising from the customer's actions. Similarly, a user might be able to pass-through in its upstream

⁵⁰ Round Table Minutes p17

⁵¹ Round Table Minutes p17

⁵² Round Table Minutes p18

⁵³ Round Table Minutes p18

contracts the consequences of the producer failing to comply with its contractual obligations to the User. Otherwise, however, a User will have no means of managing the risks imposed on it under the RSA.

How, for example, is it contemplated that one User can manage the risk created by another User's failure to balance on a day: surely JGN is best placed to manage that risk through communication with the offending user and, if necessary, exercise of its curtailment/interruption rights as against that user's customers? The same analysis applies to a User's failure to deliver gas within the specified pressure limits.

Similarly, a User has no means of managing the risks of another User's delivery of non-specification gas into the network. In this case, while perhaps not perfectly able to manage the risk, JGN is better able to manage it than are other Users – including through refusing to continue to receive non-specification gas at the Receipt Point, curtailment of deliveries to Delivery Points where customers are highly sensitive to the gas specification and recovery of compensation from the offending User. In contrast to JGN which would have clear rights to recover all of its losses from the offending User, it is not clear that other Users or end-customers would be able to recover.

However, where JGN's response is "we can't manage the risk so we won't take liability" – the same does not apply to users.

The imposition on a user of liability for the actions of other parties with whom that User has no contractual or business relationship is unreasonable and unprecedented. Additionally, it is inconsistent with the terms and conditions approved by IPART in 2005 and inconsistent with the allocation of risk that would be expected in a commercially negotiated arrangement.

JGN does not have a relationship with end- customers

At the Round Table, JGN referred several times to the argument that it does not have a relationship with customers, and users are better placed to communicate with customers. Accordingly, JGN is not able to manage relevant risks and the User must bear liability for those risks⁵⁴.

⁵⁴ Round Table Minutes p16, 17 and 19

This concept was also referred to in the AER's Draft Decision, which contains no apparent consideration of whether the absence of a contractual relationship between JGN and customers means that users are better placed to manage risks along the supply chain.

The example given is the revocation by JGN of a previously authorised overrun. In this instance, JGN says that the User must be liable for the consequences of JGN's decision to revoke the authorised overrun because the User is best placed to communicate to the customer the fact that the authorisation can be revoked⁵⁵. In other words, JGN says that because the User is better placed to inform its customer of JGN's right to revoke an authorisation, the User should therefore be liable for the consequences of JGN's decision to revoke. The second proposition does not automatically flow from the first and the argument confuses communication with the end-customer with liability for the actions of JGN.

While it may be correct that the User is better placed to communicate to the customer that JGN can revoke its prior approval, this does not mean that the User should be liable for all consequences of JGN's decision to do so. Even if it were appropriate that the User "stands between" JGN and the customer in this instance, it is not appropriate that the User must indemnify JGN for all consequences of the revocation of the authorisation, including claims made by persons other than the User's customer. Further, if JGN is to be protected for liability for its decision to revoke the authorisation, it should be subject to a stronger obligation than "reasonable endeavours"⁵⁶ to notify the user.

Further, for the majority of the matters under the RSA for which a User is made liable, the risk is not able to be managed merely by virtue of the fact that the User can communicate with the customer. The awareness of certain matters does not, of itself, mean that either the User or the customer can manage that risk. JGN has not provided any evidence or explanation of how the User's (presumed) greater communication justifies making a user liable for the acts of other users (such as non-specification gas, deliveries to a receipt point outside the pressure range, failure to balance deliveries and withdrawals etc) or the actions or omissions of JGN (such as curtailment, load shedding, suspension of services at the direction of AEMO).

Typically, communication with the customer will be a means of managing the risk arising from customer behaviour – for example, unauthorised overruns, failure to respond to implementation of load shedding in the event of an emergency, etc. Otherwise, communication will not provide a meaningful mechanism to manage the other risks imposed on a user under the RSA.

⁵⁵ Round Table Minutes p17

⁵⁶ The 2005 Access Arrangement did not contain the right for JGN to revoke an authorised overrun

Capping user's liability would not be efficient

JGN asserted at the Round Table that capping user's liability would not be efficient as it isolates the User's ability to manage risk at their customer level and does not make that accessible to the market⁵⁷. JGN gives no support for this assertion. Further, JGN has given no reasons why, in contrast, it is efficient to cap JGN's liability.

The erroneous nature of JGN's argument that it is efficient to impose unlimited liability on Users is demonstrated in relation to gas specification – JGN say that requiring all Users to be liable in relation to non-specification gas spreads the risk – “effectively diluting the risk effect across the market, rather than having it sit with the network”⁵⁸. EnergyAustralia submits that this statement presents an inaccurate perspective on the issue:

- the risk would not sit with JGN, it would sit with the non-compliant User;
- in any event, if it is considered appropriate or necessary to spread the risk across the market, this may be more efficiently done by having JGN bear the damages which it cannot recover from the non-compliant User and recover that amount through a pass-through mechanism. Alternatively, to the extent that a risk is covered under JGN's insurances, then given that the premiums for those insurances are recovered through Reference Tariffs, it is unclear why it is more efficient to impose the risk on all Users.

3.3.4 Inconsistency with the proposed NECF and other regulated assets

EnergyAustralia recognises that the National Energy Customer Framework (“NECF”) is not yet settled, and that it may be some time until that regime is finalised. However, EnergyAustralia submits that the AER should have regard to the liability concepts of that regime in considering the proposed RSA. In particular, the liability regime under draft 2 of the NECF (“NECF 2”) has the following key elements which are directly contradicted by the proposed RSA:

1. a party will incur a liability where the person has acted negligently or in bad faith;
and
2. a party does not incur liability except where it has so acted.

According to the Explanatory Memorandum issued in relation to NECF 2:

⁵⁷ Round Table Minutes p18

⁵⁸ Round Table Minutes p17

“by not extending immunity to liability for actions attributable to negligence and/or bad faith, the immunity provisions retain appropriate accountability and economic incentives for network service reliability”⁵⁹

While the statement relates to liability for network service standards, EnergyAustralia submits that the same approach is appropriate in relation to the general provision of network transportation services – being that parties should bear reasonable responsibility for their own non-compliances or negligence, but should not be liable otherwise.

Other access arrangements

As well as being significantly different from the 2005 Access Arrangement, the risk and liability regime under RSA also differs substantially from regimes for other networks which regulators have previously considered to be reasonable. EnergyAustralia has not undertaken an exhaustive review of the liability regime applying under all other network Access Arrangements. However, a review of the Access Arrangements for the ActewAGL distribution network as approved by the AER in 2010 and the Envestra South Australia distribution system approved by ESCOSA in 2007 has been undertaken. The liability regime under the proposed RSA is significantly different from both of these, as shown by the following analysis in Appendix 1.

EnergyAustralia submits that the AER cannot approve such a substantially different liability regime in the absence of compelling justification. JGN has not provided any such justification.

⁵⁹ Explanatory Material, November 2009, paragraph 72

4 Reference Tariff Policy

EnergyAustralia submits a number of changes are required to the Reference Tariff Policy under the Access Arrangement. These changes include the removal of any Minimum demand bill as well as a requirement for any structural changes to tariffs to be submitted in advance of the Annual Variation of Reference Tariffs.

4.1 Minimum Demand Bills

EnergyAustralia was pleased to see that the AER required JGN to remove the requirement for a minimum bill for demand customers⁶⁰ but notes that in their revised Access Arrangement JGN have retained it.

JGN state “JGN’s proposed minimum bill applies to demand customers that transition from the volume to the demand classes and who in doing so would otherwise experience a price decrease due to the regional cost allocation constraint previously imposed on JGN’s demand tariffs”⁶¹. EnergyAustralia notes that the proposed minimum charge applies to all demand customers not just those that transition from the volume to the demand classes. Further, the location cost allocation approach of the demand tariffs is arguably more cost reflective than the postage stamp approach that applies to volume based customers. It should also be remembered that the volume based customers pay based on volume, irrespective of their demand profile, rather than a more cost reflective demand based pricing.

While JGN argue that the “correct assessment of customers near to, on, or just over the 10TJ threshold” is that for all these instances the minimum bill proposal is the only way to support efficient consumption signals. However, as previously stated⁶² the introduction of the minimum bill distorts efficient consumption signals for another set of customers. The application of a minimum bill affects more than just customers “just over 10TJ”. An extension of post-transition portion of Table 12.3 of JGN’s “*Initial response to the draft decision*” shows that for some locations the minimum bill will apply to 100TJ customers – in other words customers who are 90TJ over 10TJ threshold.

⁶⁰ AER, Draft decision – *Public Jemena Access arrangement proposal for the NSW gas networks*, February 2010, p274

⁶¹ JGN, *Initial response to the draft decision*, 19 March 2010, p228

⁶² EnergyAustralia submission on Jemena Gas Networks (NSW) Ltd’s Proposed 2010 – 2015 Access Arrangement & Reference Services Agreement, p22

Tariff	Post Transition						
	9.5TJ	10TJ	12TJ	20TJ	50TJ	75TJ	100TJ
DC-1	\$ 4,891	\$ 5,180	\$5,180	\$ 5,180	\$5,180	\$5,943	\$ 7,276
DC-2	\$ 4,891	\$5,180	\$5,180	\$5,180	\$5,180	\$6,526	\$ 7,996
DC-3	\$ 4,891	\$5,180	\$5,180	\$5,180	\$6,644	\$8,598	\$10,551
DC-4	\$ 4,891	\$5,180	\$5,180	\$5,180	\$10,588	\$13,744	\$16,900
DC-5 (DT)	\$ 4,891	\$5,180	\$5,576	\$8,916	\$19,016	\$26,079	\$33,141
DC-6	\$ 4,891	\$5,180	\$5,180	\$5,180	\$5,180	\$5,180	\$ 5,180
DC-7	\$ 4,891	\$5,180	\$5,180	\$5,180	\$7,288	\$9,513	\$11,739
DC-8	\$ 4,891	\$5,180	\$5,180	\$6,189	\$14,406	\$18,726	\$23,046
DC-9	\$ 4,891	\$5,180	\$5,180	\$5,180	\$5,180	\$5,180	\$ 5,180
DC-10	\$ 4,891	\$5,180	\$5,180	\$5,180	\$5,180	\$5,180	\$ 5,915
DC-11 (DT)	\$ 4,891	\$5,180	\$5,576	\$8,916	\$9,016	\$26,079	\$33,141
DC-Country	\$ 4,686	\$5,180	\$5,180	\$5,180	\$5,180	\$ 5,180	\$ 5,180
DT	\$ 4,891	\$5,180	\$5,576	\$8,916	\$9,016	\$26,079	\$33,141

JGN further argue that the minimum bill seeks to manage the transition between the two different billing classes where demand customers pay a charge that reflects their position in the network while volume tariffs are averaged across the entire NSW network. They go on to say that “(A)sserting that a customer should pay less when they move from volume to a capacity charge ignores this important location cost reflectivity feature of JGN’s tariff structure”⁶³. These two arguments are contradictory as it is the demand customers who have the “important location cost reflectivity feature” while the volume customers don’t, so it makes sense that customers should pay less when they move from a non-cost reflective pricing structure to a cost reflective structure. Further the introduction of a minimum bill distorts the cost reflective nature of the demand customers as it is imposing a minimum that has no cost reflective basis.

EnergyAustralia maintains its position that the logic of applying a minimum bill on demand customers due to the level of volume charges is flawed. It is the application of a minimum bill that creates a “perverse” pricing signal rather than the existence of disconnect between two pricing systems as currently exists. Further, the application of a minimum bill runs counter to the principle of cost reflective pricing which existed in the previous location based pricing and which could continue to underlie the demand based prices.

EnergyAustralia is strongly of the opinion that the AER should continue to require JGN to remove the minimum bill requirements.

⁶³ JGN, *Initial response to the draft decision*, 19 March 2010, p231

4.2 Terms and Conditions

EnergyAustralia is pleased to see that the AER has required amendments to Section 2.2 C of the Access Arrangement regarding the RSA Terms and Conditions. However, as previously covered in Section 2, EnergyAustralia submits JGN should be required to make further amendments to Section 2.2 C of the Access Arrangement to include an obligation on JGN to make amendments to the RSA during the Access Arrangement Period to reflect changes in Law and to reflect obligations under the National Energy Customer Framework.

4.3 Variation of a Tariff Class

Where a Haulage Reference Tariff or Haulage Reference Tariff Component is being introduced or withdrawn or a Tariff class is being introduced or withdrawn JGN should be required to give additional notice over and above that required for the Annual Variation of Reference Tariffs. The Revised Access Arrangement allows for the submission of structural changes at the same time as Annual Variation. Depending on the nature of the structural changes this may not leave Users with enough time to implement the necessary changes to their systems to reflect the structural changes and thus Users may be exposed to additional administrative costs. EnergyAustralia submits that any structural changes should be notified to the AER and to Users well in advance of the Annual Variation of Reference Tariff submission.

Consistent with what applies in some other jurisdictions, EnergyAustralia submits JGN should be required to supply proposed Network Tariffs to Users shortly after they have been submitted to the AER and be further required to notify Users of the approved tariffs in a timely manner.

4.4 Tariff Variation Mechanism

EnergyAustralia notes that despite Amendment 13.3 of the AER's Draft Decision the Revised Access Arrangement continues to apply a WACC factor as part of the tariff variation adjustments. EnergyAustralia submits that under recovery should not be escalated by WACC and supports the AER Draft Decision on this matter.

EnergyAustralia also notes that a number of other Amendments concerning the Annual tariff variation mechanism have also been ignored. Our comments regarding the Other Events Adjustment and the Weather Variation Adjustment made as part of our original submission continue to apply.

4.4.1 Calculation of UAG Adjustment

EnergyAustralia is pleased to see that the concept of a UAG Tolerance has been removed from JGN's Revised Access Arrangement.

5 Other

5.1 ACIL Tasman Report

In their report, ACIL Tasman makes the comment “that under the proposed access arrangement, chargeable demand will be directly replated to the ninth highest withdrawal of an end customer”⁶⁴. This is not correct for all customers as under Clause 4.5(c) of Reference Services Agreement there is a requirement that the Chargeable Demand be greater than the MDQ for the Delivery Point and ten times the MHQ for that Delivery Point, with the latter requirement not applying to all sites. Therefore for any sites subject to this latter requirement (which is wider than the current application) the Chargeable Demand will be in excess of the historical MDQ. Further as liabilities for overruns relate to MDQ rather than Chargeable Demand it is possible that the Chargeable Demand will be at a level higher than the 9th highest withdrawal.

⁶⁴ ACIL Tasman, *Review of Demand Forecasts for Jemena Gas Networks NSW*, February 2010, p17

Appendix 1 Comparison of Contractual Risk/Liability Regime Under RSA with Other Network Access Arrangement

ENVESTRA 2007 ACCESS ARRANGEMENT FOR SOUTH AUSTRALIAN GAS DISTRIBUTION SYSTEM, September 2007

EVENT	JGN's RSA	OTHER AA (Env SA 2007)
Delivery of non-specification gas by User	Breach of agreement. Indemnity by user.	Breach of agreement Indemnity by user.
Delivery into network of non-specification gas by other party	Indemnity by user extends to this.	User not liable. If Service Provider delivers non-specification gas to customer, this is breach of agreement.
Service provider reacts negligently to delivery of non-specification gas into network	JGN liable for damage to property of user. JGN liability limited. Indemnity given by user may mean that user has to compensate JGN for claims brought by customers.	Service Provider liable for damage caused to property of user or customer. Service Provider liability limited. User would not be liable to compensate Service Provider if customer brought claim against Service Provider
Revocation of authorised overrun	JGN may revoke. User gives full indemnity.	No provision entitling Service Provider to revoke approval once given
Commingling of gas	User indemnifies JGN.	Service Provider entitled to commingle. No liability of user.
Balancing	JGN obligations to deliver qualified.	User endeavour to balance deliveries and withdrawals.
Indemnity by user	Numerous situations, including where user has complied with agreement.	Breach of agreement Network damage arising from breach of agreement or negligence of user & customer etc Death or personal injury caused by user & customer Negligent act or omission of customer Curtailement as a result of negligent or wrongful act or user or customer

EVENT	JGN's RSA	OTHER AA (Env SA 2007)
Extent of liability of user – breach or negligence by user	User has unlimited liability in all provisions where indemnity is given, so that liability is unlimited in respect of almost all operative provisions of RSA.	No limitation expressed – general law would apply to determine extent of user's liability.
Extent of liability of user – user not in breach or negligent	User gives numerous indemnities not related to its breach or negligence (eg. non-specification gas delivered by other parties; revocation of overrun by JGN; curtailment by JGN; delivery of gas outside pressure limits by other parties; imbalance etc)	No liability
Effect of negligence by Service Provider on user's liability	No reduction in user's liability – does not apply where user has given indemnity	Proportionate reduction in user's liability to service provider

ActewAGL Distribution: ACCESS ARRANGEMENT FOR ACT, Queanbeyan & Palerang Distribution System, April 2010*

*The AER approved the Access Arrangement drafted by the AER in April 2010. The terms and conditions in that Access Arrangement are reflective of the terms and conditions in the proposed Access Arrangement lodged by ActewAGL in January 2010

EVENT	JGN's RSA	OTHER AA (ActewAGL 2010)
Delivery of non-specification gas by User	Breach of agreement. Indemnity by user.	Breach of agreement Indemnity by user.
Delivery into network of non-specification gas by other party	Indemnity by user extends to this.	User not liable. If Service Provider delivers non-specification gas to customer, Service Provider liable for breach of agreement. Service Provider liability limited
Service provider reacts negligently to delivery of non-specification gas into network	JGN liable for damage to property of user. JGN liability limited. Indemnity given by user may mean that user has to compensate JGN for claims brought by customers.	Service Provider liable Service Provider liability unlimited. User would not be liable to compensate Service Provider if customer brought claim against Service Provider
Revocation of authorised overrun	JGN may revoke. User gives full indemnity.	No provision entitling Service Provider to revoke approval once given
Commingling of gas	User indemnifies JGN.	Service Provider entitled to commingle. No liability of user.
Balancing	JGN obligations to deliver qualified.	No specific liability provisions
Indemnity by user	Numerous situations, including where user has complied with agreement.	Non-specification gas delivered by user Interruption or curtailment by Service Provider Breach of Privacy Act Unauthorised overruns

EVENT	JGN's RSA	OTHER AA (ActewAGL 2010)
Extent of liability of user – breach or negligence by user	User has unlimited liability in all provisions where indemnity is given, so that liability is unlimited in respect of almost all operative provisions of RSA.	No limitation expressed – general law would apply to determine extent of user's liability. Broad indemnity given in relation to unauthorised overruns and delivery by user of non-specification gas
Extent of liability of user – user not in breach or negligent	User gives numerous indemnities not related to its breach or negligence (eg. non-specification gas delivered by other parties; revocation of overrun by JGN; curtailment by JGN; delivery of gas outside pressure limits by other parties; imbalance etc)	No liability
Effect of negligence by Service Provider on user's liability	No reduction in user's liability – does not apply where user has given indemnity	Proportionate reduction in user's liability to service provider