



APGA
50 YEARS 1968-2018

Submission to the Draft Report

Review into the scope of economic
regulation applied to covered pipelines

27/03/2018

1. Introduction

The Australian Pipelines and Gas Association (APGA) welcomes the opportunity to respond to the Australian Energy Market Commission's (AEMC) Draft Report for the Review into the scope of economic regulation applied to covered pipelines.

APGA is the peak body representing Australasia's pipeline infrastructure, with a focus on gas transmission, but also including transportation of other products. Our members include owners, operators, constructors, advisers, engineering companies and suppliers of pipeline products and services.

APGA's members build, own and operate the gas transmission infrastructure connecting the disparate gas supply basins and demand centres of Australia, offering a wide range of services to gas producers, retailers and users. The replacement value of Australia's gas transmission infrastructure is estimated to be \$50 billion.

1.1 Experience of the NGL and NGR

Since 2000, APGA's members have invested in and built over \$10 billion of infrastructure providing 5,000km of coverage across 13 major new gas transmission pipelines and expansions of existing pipelines in Australia. A similar amount of investment has occurred in maintaining existing infrastructure. This investment has occurred to meet the demand of Australia's gas markets, which has experienced unprecedented change in the last five years.

It is this investment that has created the interconnected East Coast gas grid, provides increased options for gas supply for Australian gas users and will now connect the NT market to the broader East Coast market. This investment has all occurred under the framework provided by the National Gas Law 2008 (NGL) and the National Gas Rules (NGR). Most of the investment has occurred on non-scheme pipelines.

The framework has been working well and delivering for the consumers of natural gas.

1.2 Assessment Criteria

In the Draft Report, the AEMC states that its overarching aim in the Review into the scope of economic regulation applied to covered pipelines is to "*determine how the current framework could be improved to better meet the national gas objective (NGO)*" (p.3, Draft Report), which 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"*¹.

In preparing the Draft Report, the AEMC states that it has "*assessed submissions and other relevant information on the potential changes to provisions governing the economic regulation of gas pipelines against the extent to which they are expected to better achieve the NGO*" (p.3, Draft Report). In this report the AEMC makes 33 draft recommendations across six topic areas. These are:

¹ Section 23 of the NGL

1. Framework for pipeline regulation;
2. Reference services;
3. Access arrangements;
4. Determining efficient costs;
5. Negotiation and information; and
6. Arbitration.

APGA notes that in the chapter on *Framework for pipeline regulation*, the AEMC discusses the issue of the coverage test in some detail but does not make any specific recommendations in this regard.

1.3 APGA Submission – Summary of Key Issues

APGA appreciates that the AEMC has covered a broad range of issues in the Draft Report. However, APGA will limit its comments in this submission to a few key priority areas including: the coverage test; the treatment of expansions in pipeline access agreements; the requirements around listing reference services; the methodology for calculating initial capital base valuations; and proposed amendments to the arbitration process. Comments will be grouped according to each of the Draft Report's six topic areas, with a focus on specific recommendations where necessary.

Key issues covered by this submission include:

- The Draft Report calls into question the suitability of the coverage test for pipeline test, raising the possibility that changes to the regime could be made in future. In APGA's view, this unnecessarily introduces new market uncertainty as the report doesn't present any direct evidence of problems with the current framework or recommending any potential solutions.
- The Draft Report recommends a requirement that all pipeline expansions be included in access agreements, and the removal of regulator's discretion to exclude expansions from light regulation pipelines. In APGA's view, this unnecessarily reduces the flexibility of the framework without providing a strong rationale for doing so.
- The recommendation that service providers be required to include a full list of potential pipeline services as reference services in an access agreement is a key area of focus for APGA. It appears to be a cumbersome and unnecessary requirement that runs counter to common commercial practice in the gas transmission market and, in APGA's view, does not take sufficient account of the fact that the regulator already has full discretion whether or not to classify a service as a reference service. APGA would like to suggest that the reference to "potential" pipeline services be removed from recommendation 7 as the reference to "available" pipeline services that is also in the recommendation should be sufficient.
- The recommendations around determining efficient costs are also of interest to APGA. Notably, it is APGA's view that recommendations 16-19 are closely interrelated and, taken cumulatively, have strong practical implications for other recommendations in the report – particularly those related to arbitration. The actual impact of these recommendations will also be largely dependent on how the coverage test is applied and, in APGA's view, should therefore be set aside until the coverage issue raised by AEMC has been clarified.
- Also, with specific regard to recommendation 16 to clarify the term 'depreciation' when it is used in capital base valuations, APGA notes that this recommendation allows the regulator or arbitrator to take previous returns into account when making an initial capital base valuation for a covered pipeline and is therefore problematic in the sense that it has potentially negative implications for

the normal incentive structure for equity holders. A reassessment of the economic basis for this approach may be warranted.

- Finally, with regard to arbitration, APGA is not convinced that substantive amendments to the framework are warranted at this time and the Draft Report does not present any evidence as to why changes are necessary. For example, the report recommends that the trigger for the arbitration process be amended but does not provide evidence of any problems. In APGA's view a proper investigation into who is seeking to use arbitration and why is needed.

2.1 Framework for pipeline regulation

Coverage test

In the Draft Report the AEMC reiterates that it considers negotiate-arbitrate regulation to be the most appropriate form of economic regulation for gas pipelines as it *"balances the direct and indirect costs of regulation with effectively addressing the potential market power of gas transportation asset owners"* (Draft Report, p.19). APGA is in full agreement with this position. However, AEMC goes on to state that:

"...the process to decide the specific form of regulation applied to a pipeline may be inappropriate. This could lead to under-regulation (insufficiently addressing the market failure) or over-regulation (direct and indirect costs) – both of which ultimately result in higher prices for consumers of gas. While over- or under-regulation may in practice be applied on a case-by-case basis, there is reason to believe there may over time be a risk of a reduced application of "stronger" forms of economic regulation" (Draft Report, p.19).

The AEMC also notes that *"the existing regime has only recently been reduced, so the materiality of this issue is not yet clear"* and states that it *"therefore welcomes feedback in this regard"* (Draft Report, p.19).

APGA has a number of concerns with the way the Draft Report calls into question the appropriateness of the coverage test for pipeline regulation but does not present any evidence, draw any policy conclusions or propose any recommendations. In APGA's view, calling into question the efficacy of the coverage test but then drawing no firm conclusions or recommendations only serves to create additional uncertainty. The treatment of this issue in the Draft Report raises the prospect that the AEMC could recommend changes to the coverage test at some point in the future. The uncertainty is then compounded as the Draft Report provides no indication as to why, in relation to what aspects, or when this could occur. This is particularly unwelcome in the context of a market that has been operating in an environment of extreme policy uncertainty for a number of years now, and a topic area that has already been the subject of thorough recent review and policy reform.

If the AEMC believes that under-regulation is a problem under the current regulatory regime, why does the Draft Report contain no evidence or recommendations that address this? In addition, if there is currently no firm evidence to indicate that the coverage test is indeed inadequate, why has the AEMC chosen to re-introduce such open-ended uncertainty into this key aspect of gas transmission regulation?

APGA wishes to note that the uncertainty created by the Draft Report around the coverage test also has implications for other recommendations in the report. For example, issues relating to the coverage test need to be addressed before the capital base setting methodology is set out.

As already mentioned, the coverage test has already been the subject of extensive recent policy review. The coverage test was the focus of the 2016 report *Examination of the current test for the regulation of gas pipelines* by Dr Michael Vertigan. This report was the outcome of the direction from the COAG Energy Council that the Independent Chair of the Gas Market Reform Group ‘*Examine the current regulatory test for the regulation of gas pipelines, in consultation with stakeholders, and provide recommendations on any further actions to the Energy Council, including potentially replacing the test*’.²

APGA notes that the 2016 report by Dr Vertigan found there was little appetite to amend the NGL or NGR or otherwise change the coverage test, presented no direct evidence of problems with it, and recommended a 5-year timeframe before revisiting it. Recommendation 4 of the 2016 report was: “*That no change be made to the current coverage test at this stage. The appropriateness of amending the coverage test should be reviewed within five years after the arbitration framework is operational*”³.

The 2016 report led to the creation of a new parallel arbitration framework under Part 23 of the NGR that applied to uncovered pipelines. This is a major new addition to the NGR and is specifically designed to address concerns of market power in unregulated pipelines.

APGA would also like to note that the recent Federal Court decision in the Port of Newcastle/Glencore case⁴ has again set the test for “criterion (a)” (whether declaration of a service under Part IIIA of the Competition and Consumer Act 2010 would promote a material increase in competition in an upstream or downstream market) to be the “with-or-without access test”. As the AEMC itself notes in the Draft Report, the Federal Court’s interpretation of the “access (or increased access)” issue within criterion (a) of the national access regime (Part IIIA of the Competition and Consumer Act 2010) is that the hurdle for coverage in such cases is now lower (Draft Report, p.42). This is the current judicial interpretation of existing statutes, so to apply a different interpretation for the purposes of the Draft Report seems counter-productive.

The Australian Competition Tribunal’s finding in this matter (in response to Glencore’s application for a merits review of earlier decisions by the National Competition Council and the designated Minister) was that:

“the Service providing access to the shipping lanes is a natural monopoly and PNO exerts monopoly power; the Service is a necessary input for effective competition in the dependent coal export market as there is no practical and realistically commercial alternative; so access to the Service is essential to compete in the coal export market. In the circumstances ... s 44H(4)(a) must have been satisfied.”

As stated by Paul Burton of Clayton Utz:⁵

² Vertigan, Dr Michael; *Examination of the current test for the regulation of gas pipelines*; Report; 14 December 2016, p.9

³ *Ibid*, p.16

⁴ *Port of Newcastle Operations Pty Ltd v Australian Competition Tribunal* [2017] FCAFC 124

⁵ Burton, Paul; *Federal Court confirms access is straightforward in Port of Newcastle case – for now*; Article, Clayton Utz; 25 August 2017; p.2.

*“The Tribunal held that criterion (a) does **not** involve an assessment of the future state of competition of the dependent market (without any right or ability to use the service) by reference to any **pre-existing usage** of the service. That is, consideration of the phrase “access (or increased access)” precludes the comparison with whatever usage or access the service provider **does or will provide voluntarily** or with the terms on which the service provider provides voluntarily such usage or access.*

*This meant that the Minister was **not** required to consider what (if any) access is **already provided** to access seekers. This approach, according to the Tribunal, was consistent with the approach previously set out by the Federal Court in *Sydney Airport Corporation Ltd v Australian Competition Tribunal* (2006) 155 FCR 124.”⁶*

In APGA’s view, the issue of the coverage test has been thoroughly examined over the past 2-3 years. There are now two Federal Court precedents establishing that the ‘with or without access’ test applies to criterion (a). While there are changes in train for the National Access Regime that will set aside these precedents and assert the ‘with or without regulation’ test – these changes are not proposed for the National Gas Law.

It seems premature (at best) for AEMC to reopen this issue in the Draft Report, in the absence of compelling evidence (i.e. multiple failed coverage applications under the NGL) that there is a need for it to do so. APGA also contends that any recommendations in the Draft Report for which a revisit of the coverage test may have implications should be set aside and parked until this issue can be clarified.

Treatment of Expansions

Draft recommendation 1 (Include all expansions in an access agreement) and Draft recommendation 2 (Remove regulator’s discretion to exclude an expansion from light regulation).

In APGA’s view, the recommendations in the Draft Report that all pipeline expansions should be included in an access agreement, and that the discretion of regulators to exclude an expansion from light regulation should be removed, reduce the flexibility of the regulatory framework without providing a strong rationale for doing so. The AEMC states that “*the discretion allowed under the NGR...has led to inconsistent treatment of capacity and assets that are linked to extensions and expansions*” (Draft Report, p.53). It goes on to argue that “*In the cases where the discretion on the regulatory treatment of expansions has resulted in part of the capacity of a covered pipeline being uncovered... the service provider may have market power to monopoly price the uncovered capacity*”; and it can make cost allocation and regulation “*more complex*” (Draft Report, p.54).

APGA notes that with regard to the assertion that an uncovered pipeline expansion may result in a service provider gaining “market power to monopoly price”, there is no evidence presented in the Draft Report of cases where this has actually occurred. With regard to the point about the additional complexity of cost allocation and regulation resulting from part of the capacity of a covered pipeline being uncovered, while this may be true in some cases, it does not appear to APGA to be such a significant problem that it warrants the removal of the regulator’s discretion. This is especially true as there are very few examples of covered pipelines in Australia with a significant proportion of

⁶ Burton, Paul; *Federal Court confirms access is straightforward in Port of Newcastle case – for now*; Article, Clayton Utz; 25 August 2017; p.2.

uncovered expansions or extensions, so the resulting complexity must be of limited impact in terms of overall administration of the regulatory regime.

To take the example of the Goldfields Gas Pipeline – which appears to be the pipeline most affected by Draft Recommendations 1 and 2 – it is not clear that partial coverage of this pipeline impacts on the application of cost allocation and tariff setting rules, or on other aspects of an access arrangement. That said, the regulator has discretion over whether expansions are to be subject to regulation or not. Presumably, if the regulator is concerned a pipeline operator will engage in monopoly pricing on the expanded capacity, it would not allow the expansion to be excluded from regulation.

There are numerous decisions in the NGR that provide the regulator discretion. Where specific guidance is not provided, the National Gas Objective and the Revenue and Pricing Principles should guide the regulator. If the regulator is not confident in exercising discretion, the problem does not lie with the NGR.

2.2 Reference services

Draft recommendation 4 (Clarify the requirements for defining pipeline services... The service provider of a covered pipeline is to provide, as part of an access agreement proposal, a full list of available and potential pipeline services), and Draft recommendation 7 (Introduce a reference service setting process... The service provider submits to the regulator its full list of pipeline services and proposed reference services).

In APGA's view, the requirement for service providers to include a full list of potential pipeline services as reference services in an access agreement seems administratively cumbersome and unnecessary. In the gas transmission industry, it is common practice when establishing an access agreement for a complex contract negotiation process to take place on the basis of an initial list of available services on a given pipeline or section of pipeline. This ability to reach bespoke agreements on the basis of actual market conditions is an underlying strength of the current regulatory arrangements. It makes little sense for transmission service providers to devote resources to providing descriptions of reference services that they are unable to offer for commercial or technical reasons.

APGA notes that the regulator currently has full discretion whether to classify a service as a reference service and faces few constraints when it comes to exercising that discretion. For example, in the case of the DBPNGP, the Economic Regulatory Authority (ERA) insisted on an additional reference service across two access arrangements despite evidence that no market participants had sought the service after its inclusion the first time. Conversely, in the case of the RBPNGP, the Australian Energy Regulator (AER) declined a request from the service provider to classify a service (short-term firm) as a reference service despite evidence of significant market demand.

APGA welcomes the AEMC's statement in the Draft Report that the regulatory framework "has been constructed recognising the importance of contractual negotiations in the pipeline industry" (Draft Report, p.7) and that "the negotiate-arbitrate framework is still appropriate for the regulation of gas pipelines and should remain the core premise of the regulatory framework" (Draft Report, p.8). In keeping with this, APGA notes the AEMC's statement in relation to reference tariff setting that "Reference services and reference tariff and non-tariff terms and conditions inform access negotiation and dispute resolution for services on a full regulation pipeline" (Draft Report, p.77). It is APGA's contention that these two statements from AEMC illustrate that reference services and

reference tariffs, as currently defined, constitute important bulwarks that provide shippers with counterbalancing negotiation power. In other words, shippers can always demand provision of the reference service at the reference tariff from the service provider, and this fact limits the scope of service providers to move too far from that initial standard during negotiations.

One question APGA also wishes to raise relates to the National Gas Objective, which 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.” How can it be considered efficient to force regulated pipelines to list all potential reference services without first requiring an assessment of market demand?

In APGA’s view, it seems counterproductive to move from the current flexible regime whereby the regulator has discretion as to which services are considered reference services, to a prescribed list of services that may or may not be sought by the market. This inefficiency is further exacerbated by the fact the market is going through a period of service evolution. For example, ‘as available’ and ‘interruptible’ services are likely to be used differently once the GMRG’s day-ahead auction process has been implemented. APGA therefore suggests that the implementation of AEMC recommendations requiring all potential services to be included as reference services at least be delayed until the current round of policy reforms (notably the capacity trading reform package) is complete, when it can then be re-evaluated on the basis of the resulting market developments.

In its East Coast Gas Inquiry, the ACCC stated that:

For example, the AER is currently only required by the NGR to approve on an ex ante basis the price of access to the ‘reference service(s)’ offered by the pipeline. In the NGR, a reference service is simply defined as a service sought by a significant portion of the market. By contrast, the electricity regulatory regime identifies regulated services by an assessment of the contestability of the services. The ‘reference service’ approach used in the NGR has resulted in a number of non-contestable services being excluded from the AER’s ex ante review, whereas non-contestable services are arguably a primary target for regulation (because there is no competitive constraint on the pipeline operator’s provision of those services).⁷

Essentially, the ACCC claimed that pipeline service providers are able to sidestep regulation as a large number of services offered are not reference services. Contrary to the ACCC’s statement that a number of non-contestable services are being excluded from the AER’s ex ante review, APGA is not aware of any occasion where access seekers have made representation regarding the inclusion of a particular service as a reference service during an access arrangement process.

Such a view seems inconsistent with the role of reference services in an access arrangement and doesn’t take into account that the regulator can include additional services as reference services at its discretion.

APGA would like to suggest that the reference to “potential” pipeline services be removed from recommendation 7. The reference to “available” pipeline services also in the recommendation should be sufficient.

⁷ ACCC East Coast Gas Inquiry, p.162

2.3 Access Arrangements

APGA views the recommendations in the Access Arrangements chapter of the Draft Report as being relatively straightforward. Comments in this part of the submission will be limited to a few general comments on some of the recommendations.

APGA supports *Draft recommendation 8 (Develop financial models to be used by service providers)* but notes that its implementation will require a thorough and timely consultation process with industry to ensure optimal outcomes. Likewise, APGA generally supports *Draft recommendation 9 (Clarify the operation of revenue caps)*.

APGA also supports *Draft recommendation 11 (Extend the revision period)* as a practical streamlining measure for the negotiation of future access arrangements and *Draft recommendation 13 (Remove the limited and no discretion regulatory framework)*, noting that it largely reflects that already happens in practice.

2.4 Determining efficient costs

APGA agrees with AEMC's statement in the Draft Report that "*The accurate determination of efficient costs is key to the setting of efficient reference tariffs*". This area has significant commercial implications for transmission service providers, which in APGA's view gives the recommendations in the determining efficient costs chapter of the Draft Report added importance.

APGA is comfortable with *Draft recommendation 14 (Clarify the application of the new capital expenditure criteria)* which is quite straightforward. However, recommendations 16-19 require some additional comment.

Draft recommendation 16 (Clarify the term depreciation when used in capital base valuations); Draft recommendation 17 (Require an initial capital base valuation for light regulation pipelines); Draft recommendation 18 (Enable the addition of existing extensions and expansions to the opening capital base); and Draft recommendation 19 (Require allocation of expenditure between covered and uncovered parts of a pipeline).

Although recommendations 16-19 are standalone initiatives, in APGA's view these should ideally be treated as a single group. Recommendations 16-19 are strongly interconnected and, taken cumulatively, have practical implications for recommendations in other parts of the Draft Report such as arbitration and in valuing previously uncovered pipeline expansions.

APGA also notes that the implications of recommendations 16-19 are strongly dependent on how the coverage test is applied – which has become an issue now that AEMC has reopened the question of coverage criteria. As it is difficult to be sure what will and won't be included in the coverage provisions in future, and due to the importance of these aspects of the regulations, it is APGA's strong contention that the AEMC should park recommendations 16-19 until the coverage issue has been clarified.

With specific reference to *Draft recommendation 16 (Clarify the term depreciation when used in capital base valuations)* APGA notes that this recommendation allows the regulator or arbitrator to take previous returns into account when making an initial capital base valuation for a covered

pipeline. In APGA's view, the application of past revenue to current valuation is problematic in the sense that it has potentially negative implications for the normal incentive structure for equity holders. A reassessment of the economic basis for this approach may be warranted.

2.5 Negotiation and information

APGA is in general agreement with recommendations 21-23 and 25-26 but would like to see more policy detail when possible.

With regard to *Draft recommendation 21 (Require transmission pipeline service providers to disclose Bulletin Board information)* APGA agrees with this recommendation in principle but notes that its implementation will be disproportionately more expensive for smaller pipelines as they do not currently supply this information.

With regard to *Draft recommendation 24 (Introduce a financial and offer information disclosure regime for light regulation pipelines)*, which proposes "That light regulation pipeline service providers publish the same set of financial and offer information as non-scheme pipeline service providers," APGA does have some concerns here. In APGA's view the recommendation potentially conflicts with some of the compliance implications of s136 of the NGL, which stipulates that "A covered pipeline service provider must not engage in price discrimination when providing light regulation services" except for when it is "conducive to efficient service provision" to do so. The problem arises due to the requirement under s36 of the NGR for service providers to publish "the prices on offer for light regulation services" on their website.

Where a service provider concludes that it is efficient to price discriminate (an assessment they must make on a case-by-case basis), the published tariff would differ from the standard posted tariff - thereby disclosing the commercial tariff paid by a specific shipper. This disclosure of confidential information runs counter to the spirit of s137 of the NGR which prohibits scheme pipeline service providers from disclosing relevant confidential information. Although s137, (3)c of the NGR states that "this rule does not, however, prevent...disclosure or use of relevant confidential information...as required or authorised by or under the NGL...or related rules or procedures...", it still runs counter to common commercial confidentiality practices and is unlikely to be welcomed by either affected service providers or shippers.

2.6 Arbitration

APGA supports the current arbitration framework for covered pipelines under the NGL and NGR and agrees, as the AEMC states in the draft report that an "efficient and effective dispute resolution framework is integral in providing a credible threat to stakeholders to engage in successful access negotiations" (Draft Report, p.140). However, APGA is not convinced that substantive amendments to the framework are warranted at this time, and notes that the Draft Report does not present any substantive evidence of problems with the current arrangements. A key case in point is draft recommendation 27.

Draft recommendation 27 (Amend trigger for dispute resolution process). In the Draft Report the AEMC has identified the trigger for the existing dispute resolution process as a "key issue" (Draft Report, p.146). The report states:

“Section 181 of the NGL defines the trigger for arbitration as the inability of parties to agree. However, a trigger such as the inability to agree may raise some ambiguity. While it may be easy to establish that the parties have not agreed, it is another matter to prove that they are unable to agree. An ambiguous trigger for dispute resolution may mean that even where parties are disputing access, it would be difficult to establish a dispute and start the dispute resolution process. This extends the timeframe for negotiations and reduces the credibility of the threat of arbitration, as it minimises the likelihood that dispute resolution would be triggered. This lessens the constraint on market power and increases the probability of inefficient consumer outcomes.

It would be more appropriate to enable a dispute to be triggered if parties have not agreed within a prescribed timeframe. The NGL gives the dispute resolution body the right to terminate an arbitration if it considers that the party that notified the dispute had, but did not avail itself of, an opportunity to engage in negotiations in good faith with the other party prior to notifying the dispute resolution body of a dispute. Guidance on the process for negotiation and agreement between the parties would allow the dispute resolution body to make such a decision” (Draft Report, p.146).

Rather than seeking to address these points individually, APGA notes that the report does not present any evidence or analysis that the current dispute resolution process does not work or that there is an inherent problem with the framework. The fact that *“there have not been any disputes under the dispute resolution framework for scheme pipelines under the NGL and NGR in its entirety,”* as stated by AEMC (Draft Report, p.141), does not constitute evidence that the mechanism is inaccessible or impractical to use. Claims by some stakeholders that they can’t trigger the arbitration process do not in themselves constitute evidence of a problem, it may simply reflect the necessarily complex nature of such a process or an incomplete or unrealistic understanding as to what is involved. A fundamental problem with recommendation 27 and the tone of the arbitration chapter in general is a lack of proper investigation into who is seeking to use arbitration and why.

To take another example, in its East Coast Gas Inquiry, the ACCC stated that:

While the threat of arbitration should in principle impose a constraint on the pipeline operator’s behavior when determining the prices of these services, the Inquiry has been informed by market participants that the costs and resources associated with an access dispute, coupled with the uncertainty surrounding the final outcome, can discourage shippers from triggering these provisions. Information asymmetries may also be contributing to this reluctance to trigger these provisions because shippers are unable to determine how much they are being ‘overcharged’. One market participant also noted that there is little utility in being able to trigger a dispute in relation to an existing contract, because any access determination would be bound by the pre-existing contractual rights between the parties, which are protected under the NGL. These limitations mean that operators of full regulation pipelines may still be able to engage in monopoly pricing when setting the price of non-reference services, which is what has been observed in this Inquiry⁸

APGA is not certain how such concerns can be managed. Any dispute resolution process will create costs for participants. An effective dispute resolution process must also have uncertainty, if the outcome from such a process is certain then it will always be used by the party that benefits. The idea that a regulatory dispute resolution process would be used to override existing pre-existing contracts is problematic.

⁸ ACCC East Coast Gas Inquiry, p.163

In the Draft Report the AEMC states that it is seeking to lower the arbitration threshold by specifying a particular process. However, because there is no analysis of what problem the new process is intended to resolve, it is not clear how the new recommendations will resolve it.

The implications of amending the regime to lower the arbitration process without an analysis of evidence to the existence of a problem are magnified by the fact that the dispute resolution section is effectively the linchpin of the whole report. It is here that the practical consequences of several recommendations in other sections of the draft report start to emerge. For example, it is through the arbitration process that the capital base set by recovered capital will feed through to tariffs. Overall, this situation adds up to significant change and unwelcome ongoing uncertainty for transmission service operators.