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# RULE

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Australian Energy Market Commission

## **RULE DETERMINATION**

# NATIONAL GAS AMENDMENT (NORTHERN GAS PIPELINE - DEROGATION FROM PART 23) RULE 2019

### **PROPOSERS**

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Institute for Energy Economics and Financial Analysis

4 JULY 2019

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## ABOUT THE AEMC

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## SUMMARY

- 1 The Australian Energy Market Commission (Commission) has decided not to make a rule to remove the Northern Gas Pipeline's (NGP) derogation from regulation under Part 23 of the National Gas Rules (NGR).
- 2 The Commission has determined that the proposed rule, if made, is not likely to offer material benefits in terms of better providing for terms and conditions of access to the NGP's pipeline services than the current arrangements. Instead, making the proposed rule would be likely to lead to an overall increase in complexity and uncertainty of access arrangements for prospective users and the service provider. The Commission is not satisfied that making the rule will, or is likely to, contribute to the national gas objective.
- 3 The Commission's assessment shows that there is currently likely to be an appropriate level of protection against Jemena's ability to exercise market power when negotiating with prospective users for NGP services. This is provided by the NGP access principles that were agreed to be applied by the Northern Territory Government and Jemena as part of the project development agreement, as well as the current market conditions and the ability for any party to apply to have the pipeline classified as a covered pipeline subject to full or light regulation.
- 4 Under the NGP access principles, prospective users are able to seek access to the NGP's key services on terms, conditions and tariffs that have been determined through a competitive tender process carried out by the Northern Territory Government. Revoking the derogation is likely to give rise to increased regulatory complexity, increased uncertainty of outcomes and adverse outcomes such as forum shopping by potential users of the NGP as both the access principles and Part 23 of the NGR would apply concurrently to the NGP. These issues would not arise if the NGP becomes classified as a covered pipeline because the access principles would no longer apply.

## Background

- 5 The Northern Territory Government commenced a tender process seeking to connect the Northern Territory gas market with the east coast gas market in late 2014. In November 2015, Jemena was selected to build, own and operate the NGP to transport gas between Tennant Creek in the Northern Territory and Mt Isa in Queensland. The project development agreement signed between the Northern Territory Government and Jemena also included access principles Jemena must apply to requests for access to firm services provided by the pipeline. These principles include key terms and conditions for third party access to the NGP, including maximum tariffs for key services and a dispute resolution mechanism. The access principles are available on Jemena's website.
- 6 As part of the initial Part 23 rules that were made by the South Australian Minister, a derogation from Part 23 was provided to the NGP. The Part 23 framework and the derogation came into effect on 1 August 2017. The purpose of the Part 23 regime for non-scheme pipelines was to address the market power imbalance between service providers and prospective users identified by the ACCC's East coast inquiry and Dr. Vertigan's Examination

of the current test for the regulation of gas pipelines. In providing the NGP derogation, it was observed that the NGP access principles were intended to address many of the same issues as the Part 23 regime.

## The rule change request

- 7 On July 2018, the Commission received a rule change request from Environmental Justice Australia (EJA) and the Institute for Energy Economics and Financial Analysis (IEEFA) seeking to revoke the derogation from the Part 23 framework applicable to the NGP. The rule change proponents considered that the derogation led to many of the same issues that were intended to be addressed by the Part 23 framework.
- 8 The rule change proponents sought revocation of the NGP derogation on the basis that the derogation would, in their view, lead to several issues including: allowing the NGP to operate as an unregulated monopoly pipeline with no limit on tariffs for 15 years; distortion of market signals for investment; and an uneven regulatory playing field with respect to other pipelines. As noted by the proponents, the derogation relieves Jemena (the NGP service provider) from having to comply with Part 23 of the NGR which was designed to constrain pipeline service provider market power through an information disclosure and arbitration framework. The proponents expected the revocation of the NGP derogation would safeguard the gas market from the negative impacts of monopoly pricing on the NGP, ensure efficient allocation of capital for future expansions or extensions of the NGP and place the NGP on a more level regulatory playing field with other pipelines in Australia.

## Final rule determination

- 9 The Commission has assessed the rule change request, the current arrangements in place for the NGP, information presented to it at a hearing, and submissions from stakeholders. It has found that the current publicly available binding access principles that apply to the NGP under the contract between Jemena and the Northern Territory Government provide a regime under which prospective users are able to seek access to the NGP's key services. This access to the NGP's services can be sought on terms, conditions and tariffs that have been determined through a competitive tender process carried out by the Northern Territory Government. Importantly, the NGP access principles include the tender-derived maximum tariffs for key services on the pipeline and are legally binding on Jemena. It also includes a dispute resolution process.
- 10 There are limits on the tariffs that can be charged by Jemena for NGP's key services, and the NGP access principles and tariffs cannot be unilaterally amended by Jemena. As a result, the derogation does not lead to the NGP operating as an "unregulated monopoly pipeline", as the tariffs and other terms of access to the NGP are effectively regulated by the NGP access principles.
- 11 The Commission also notes the current market conditions for the NGP's services under which only a third of the NGP's capacity is contracted on a longer term basis means Jemena bears the risk of future demand uncertainty. This would encourage Jemena to seek out and accommodate the needs of potential users of its pipeline. That is, the prevailing market

conditions do not lend themselves to Jemena exercising market power when prospective users seek access to the pipeline's services.

- 12 Additionally, any party can at any time apply to the National Competition Council seeking that the NGP be classified as a covered pipeline and be subject to full or light economic regulation under Parts 8 to 12 of the NGR rather than the NGP access principles. This threat of coverage is also likely to place limits on Jemena's ability to exercise market power.
- 13 The Commission also notes that there were no submissions from users or potential users of the NGP that indicate any concern with the level of the published maximum tariffs for the pipeline. Instead, the Energy Users Association of Australia indicated support for the tender outcome tariffs.
- 14 The Commission has also made a high level comparison of tariffs across various transmission pipelines which suggests that the tariffs for the NGP as set in the NGP access principles do not provide evidence of an exercise of market power by Jemena.
- 15 The Commission is satisfied that the application of the NGP access principles (in particular, the maximum tariffs for the key services), the current market conditions and the threat of coverage are likely to be appropriate constraints on Jemena's ability to exercise market power, particularly in negotiations with prospective users of the NGP, during the initial years of the NGP's life.
- 16 The Commission has assessed the impact of making the proposed rule and found that it would likely give rise to increased regulatory complexity, increased uncertainty, and increased costs. Making the proposed rule would lead to the concurrent application of both the NGP access principles and the Part 23 framework for the NGP. This would be expected create complexity for prospective users and the service provider when negotiating access to the NGP and may lead to uncertainty and confusion surrounding what obligations are relevant and the expected outcomes. In addition, the concurrent operation of the two regimes generates the potential for forum shopping.
- 17 The Commission has also considered alternative suggestions made by stakeholders of revoking the derogation for expansions that increase the NGP capacity to greater than 90 TJ/day. It has concluded that the access principles are likely to provide an appropriate constraint on Jemena's ability to exercise market power in the event of such an expansion. Revoking the derogation for expansions would lead to similar issues as revoking the derogation altogether; in both scenarios overlapping regulatory regimes will arise.
- 18 The Commission has also considered the circumstances that gave rise to the NGP access principles and the derogation from Part 23 of the NGR. It has found that the Northern Territory Government's competitive tender process to develop the NGP, its requirements to include a third party access regime, and its timing in relation to the development of the Part 23 are special circumstances that provide support for a different regulatory arrangement for the NGP compared to other non-scheme pipelines.
- 19 In this regard, the Commission notes the NGP tender process pre-dates the Examination of the current test for the regulation of gas pipelines report where the initial policy

recommendations that subsequently resulted in Part 23 of the NGR first emerged.<sup>1</sup> The Northern Territory Government's requirement that the winning tender would include a third party access regime addressed a desire to place some regulatory oversight over the pipeline in lieu of becoming a covered pipeline. Without this action, the NGP would have otherwise been unregulated.

- 20 The Commission does not consider that the particular scenario which arose for the NGP would be likely to re-emerge. The Commission expects future investments in a similar scenario would make use of the competitive tender provisions in the NGR. Accordingly, the credibility and integrity of the overall gas regulatory framework is not undermined by the NGP access principles nor the derogation from Part 23 as applied to the NGP.
- 21 On balance, the Commission considers that the costs associated with the revoking the NGP's derogation from Part 23 of the NGR arising from the increased complexity of arrangements for seeking access to the NGP, potential uncertainty surrounding obligations and outcomes, potential forum shopping and additional regulatory compliance are likely to be greater than any potential benefit of the proposed rule.
- 22 For these reasons, and as explained in further detail in the subsequent chapters of this final determination, the Commission is not satisfied that making the proposed rule will, or is likely to, contribute to the achievement of the national gas objective.

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<sup>1</sup> Dr Michael Vertigan, *Examination of the current test for the regulation of gas pipelines*, 14 December 2016.

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# 1 INTRODUCTION

## 1.1 The rule change request

On 18 July 2018, Environmental Justice Australia (EJA) and the Institute for Energy Economics and Financial Analysis (IEEFA) submitted a rule change request to the Australian Energy Market Commission (Commission) seeking to amend the National Gas Rules (NGR). The rule change request sought to revoke the derogation applicable to the Northern Gas Pipeline (NGP) contained in the NGR which exempts the NGP from application of Chapter 6A of the National Gas Law (NGL) and Part 23 of the NGR.

More specifically, the proponents sought to revoke the derogation set out in rule 3 of Part 2 of Schedule 4 to the NGR which is applicable to the NGP.

The rule change request can be found on the Commission's website.

## 1.2 Current arrangements

Under the current arrangements, the NGP has a different regulatory arrangement from other non-scheme pipelines. It is excluded from the application of the Part 23 framework (the access regime for non-scheme pipelines) through a derogation in the NGR. It is the only pipeline exempt from the Part 23 framework in this manner. The pipeline is subject to the NGP access principles which were agreed to be applied by Jemena (the service provider of the pipeline) as part of the outcome of the tender process carried out by the Northern Territory Government to build the NGP. They were agreed in the North East Gas Interconnector project development agreement.<sup>2</sup>

### 1.2.1 Derogation from the access regime for non-scheme pipelines

The NGP is exempt from the application of Chapter 6A of the NGL (and therefore also from Part 23 of the NGR) for a period of 15 years after commissioning of the pipeline.<sup>3</sup> The derogation was included in Part 2 of Schedule 4 to the NGR by the National Gas (Pipeline access-arbitration) Amendment Rule 2017 which was introduced in August 2017 by the South Australian Minister to give effect to the Part 23 framework.

In its explanation for the inclusion of the derogation in the National Gas (Pipeline access-arbitration) Amendment Rule 2017, the GMRG noted that:<sup>4</sup>

the Project Development Agreement signed by Jemena and the Northern Territory Government sets out the access principles that were agreed to as a result of the competitive process and are intended to address many of the same issues the framework is designed to address.

2 At the time of the Northern Territory Government tender process the proposed pipeline was referred to as the North East Gas Interconnect (NEGI). Upon becoming the successful tenderer, Jemena announced it would name the pipeline the Northern Gas Pipeline (NGP).

3 The pipeline was commissioned on 3 January 2019.

4 GRMG, *Gas pipeline information disclosure and arbitration framework: initial gas rules explanatory note*, August 2017, p. 47.

The derogation has no impact on the ability of any person to seek a coverage determination from the relevant minister under Chapter 3 of the NGL. If a coverage determination was made in relation to the NGP, the pipeline would be subject to regulation either as a full or light regulation pipeline under Parts 8 to 12 of the NGR. The NGP access principles provide that they will cease to apply if the NGP becomes a covered pipeline. However, there is no provision that states that they will cease to apply if the derogation from Part 23 is removed because the access principles pre-date Part 23.

### 1.2.2 Access to the NGP's services

In accordance with an agreement between the Northern Territory Government and Jemena, the NGP is subject to the *Northern Gas Pipeline — access principles* (NGP access principles) which govern access to the firm services offered by the pipeline and the associated nitrogen removal service.<sup>5</sup> The NGP access principles set out and provide for important details regarding access to the NGP such as:

- the pipeline tariffs including prices for firm services and nitrogen removal services
- the dispute resolution procedure including the process for negotiations and arbitration
- arrangements for connecting to the pipeline
- arrangements for extensions and expansions of pipeline
- the process for seeking access to the pipeline (including for as available services)
- terms and conditions of access
- queuing arrangements
- methodology for changes to the firm service tariff over time and as a consequence of certain expansions to the pipeline.

The access principles can be found on Jemena's website:

<https://jemena.com.au/getattachment/industry/pipelines/Northern-Gas-Pipeline/Services/NGP-Access-Principles.pdf.aspx>.

The NGP access principles are not governed by the NGL or NGR. They are required to be applied by Jemena under the project development agreement signed between Jemena and the Northern Territory Government.

## 1.3 Details of the rule change request

Environmental Justice Australia (EJA) and the Institute for Energy Economics and Financial Analysis (IEEFA) (the proponents), claim in the rule change request that the derogation for the NGP leads to several issues including allowing Jemena the ability to exercise market power and set tariffs for its services, distortion of market signals for investment and an uneven regulatory playing field with respect to other pipelines.

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<sup>5</sup> The Project Development Agreement between the Northern Territory Government and Jemena is dated 17 November 2015 and relates to the construction and commissioning of the pipeline. The access principles also require Jemena to supply as available services.

First, according to the proponents, the effect of the derogation applicable to the NGP is to create an unregulated monopoly pipeline, with no limit on tariffs for 15 years.<sup>6</sup> The proponents considered that the derogation allows Jemena an unfettered ability to set tariffs which does not promote the efficient operation of natural gas services with respect to price and security of supply.<sup>7</sup> As the derogation also applies to any extension and expansion to the NGP, the proponents considered that it could result in consumers being affected by the service provider's ability to set prices for flows of up to 700 TJ per day given the expectations for capacity expansion.<sup>8</sup> Furthermore, the proponents considered that the access principles can be changed by Jemena at any time, including the tariffs which can be changed through a notification to the Northern Territory Government.<sup>9</sup>

According to the proponents, the access principles applicable to the NGP as agreed between Jemena and the Northern Territory Government give Jemena considerably more power than is afforded under the NGL.<sup>10</sup> In the proponents' view, this is because the disputes procedure available to Jemena is considerably more favourable to them as it is not overseen by the AER or informed by the NGR.

The proponents also raised concerns that the derogation exempts the NGP from the information disclosure principles of the Part 23 framework designed to create an informed and efficient market. As stated in the rule change request, the proponents regard the tariffs for the NGP as set out in the NGP access principles as high, claiming that this has resulted in the NGP being the most expensive onshore pipeline per unit of gas over a set distance.<sup>11</sup>

In addition, the proponents claimed that the derogation does not provide for efficient investment in gas services. In their view, it "rewards previous inefficient behaviour in a distorted marketplace" and "provides a perverse incentive to expand or extend the NGP".<sup>12</sup>

As a result, the proponents concluded that the NGP is not on a level playing field with other gas pipelines in Australia with respect to the applicable regulatory arrangements. The proponents also regarded the regulatory arrangement applicable to the NGP under the derogation as lacking regulatory oversight and consistency with the NGL.

## 1.4 Solution proposed in the rule change request

In light of the concerns noted above, the proponents sought to revoke the derogation set out in rule 3 of Part 2 of Schedule 4 to the NGR which is applicable to the NGP.

The proponents have claimed that revoking the derogation would prevent the issues associated with the derogation (as noted in section 1.3 above) from occurring.

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6 Rule change request, p. 2. The Commission's assessment of the claims made by the proponents are set out in the relevant chapters of this final rule determination.

7 Rule change request, p. 2.

8 Rule change request, p. 5.

9 Rule change request, pp. 2-3.

10 Rule change request, p. 2.

11 Rule change request, p. 6.

12 Rule change request, p. 8.

According to the proponents, revoking the derogation would prevent Jemena from engaging in unchecked and unreasonable monopoly pricing and thereby safeguard the gas market from the negative impacts of monopoly pricing, such as those highlighted by the ACCC's inquiry into the east coast gas market.<sup>13</sup> The reduction in monopoly pricing power of Jemena is expected to have positive impacts for the retailers and consumers of the gas transported through the NGP or any expansion or extension of the NGP.<sup>14</sup> The proponents expect that as a result of the rule change, tariffs under dispute would be set such that pipeline users and gas consumers are not disadvantaged.

The proponents considered that revoking the derogation would promote an efficient allocation of capital for future expansions or extensions of the NGP. They expect the rule change to remove what they consider to be a perverse incentive to expand or extend the NGP which exists under the current derogation.

According to the proponents, the removal of the current derogation would place the NGP on a more level playing field with other pipelines and ensure that it is subject to the same rules as other pipelines in Australia.

## 1.5 Relevant background

This section provides an overview of the regulatory framework for gas pipelines in Australia and information regarding the NGP.

### 1.5.1 Regulatory framework for gas pipelines

The regulatory framework for gas pipelines in Australia is primarily set out in the NGL and the NGR, which governs access to natural gas pipeline services. The framework has been subject to significant reform recently under the COAG Energy Council's gas market reform package. Under the current regulatory arrangements a pipeline will be in one of two categories:

- **Scheme pipelines:** these are pipelines to which a coverage determination of a relevant Minister applies or which have been deemed to be a covered pipeline. This category also includes international pipelines to which a price regulation exemption applies.<sup>15</sup> Scheme pipelines are regulated by Parts 8 to 12 of the NGR. Regulation under these parts of the NGR includes full regulation, where service providers are required to have a regulator approved access arrangement in place, and light regulation, where service providers publish information to support users in negotiations for pipeline services. In both cases, the AER is the arbitrator for all pipelines except for those in Western Australia (where the Western Australian Energy Disputes Arbitrator is the arbitrator).<sup>16</sup>
- **Non-scheme pipelines:** these are pipelines that are not classified as scheme pipelines. This is the default classification for new pipelines. Non-scheme pipelines are regulated by Part 23 of the NGR. This form of regulation requires service providers to publish certain

<sup>13</sup> Rule change request, p. 8.

<sup>14</sup> Rule change request, pp. 8-9.

<sup>15</sup> There are no pipelines in this sub-category.

<sup>16</sup> Regulation under Parts 8 to 12 of the NGR was the subject of a recent rule change process: <https://www.aemc.gov.au/rule-changes/regulation-covered-pipelines>.

information to assist users in negotiating for pipeline services. Binding arbitration is carried out by commercial arbitrators.

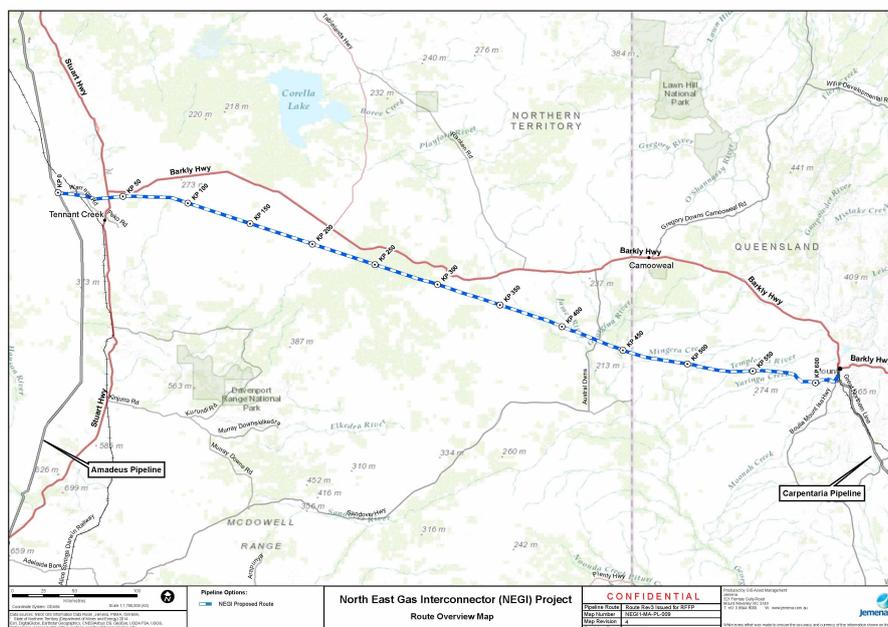
Prior to 1 August 2017, the non-scheme pipelines were not subject to any regulatory obligations but this changed with the introduction of an access regime for non-scheme pipelines under Part 23 of the NGR and Chapter 6A of the NGL.

More information regarding regulatory regime for the scheme pipelines and the introduction of regulatory regime for the non-scheme pipelines can be found in Appendix C.

### 1.5.2 The Northern Gas Pipeline

The Northern Territory Government commenced a tender process seeking to connect the Northern Territory (NT) gas market with the east coast gas market in late 2014. In November 2015, Jemena was selected to build, own and operate the NGP to transport gas between Tennant Creek in the Northern Territory and Mt Isa in Queensland. The pipeline interconnects the existing Amadeus Gas Pipeline in the Northern Territory and the Carpentaria Gas Pipeline in Queensland. Having commenced construction in July 2017, the pipeline was completed by July 2018 and commenced commercial operation in January 2019.<sup>17</sup> The NGP has an initial capacity of 90 TJ/day and spans a length of 622 km, 165 km of which is located in Queensland.<sup>18</sup> The route of the NGP can be seen in Figure 1.1 below.

**Figure 1.1: Northern Gas Pipeline route**



Source: Jemena website, viewed 23 October 2018, <https://jemena.com.au/documents/pipeline/negi/jemena-negi-preferred-route-pipeline-overview-map.aspx>

17 Jemena, *Jemena to build North East Gas Interconnector*, media release, 17 November 2015, viewed 11 October 2018, <https://jemena.com.au/about/newsroom/media-release/2015/jemena-to-build-north-east-gas-interconnector>.

18 Jemena, *Northern Gas Pipeline: Supplement to the Draft Environmental Impact Statement*, November 2016, p. 1.

The first transportation agreement for the pipeline was with the Northern Territory Government owned Power and Water Corporation. It contracted to transport 31 TJ/day to Incitec Pivot Limited's Phosphate Hill facility (located near Mt Isa) for a period of 10 years. This is the main contract on the pipeline, there are other contracts for NGP's services, as discussed in section 3.4.

## 1.6 The rule making process

### 1.6.1 Initiation of the rule change process

On 15 November 2018, the Commission published a notice advising of its commencement of the rule making process and consultation in respect of the rule change request.<sup>19</sup> A consultation paper identifying specific issues for consultation was also published. The Commission received 21 submissions. Issues raised in these submissions were summarised and responded to in the draft rule determination and are also incorporated into this final rule determination.

### 1.6.2 Draft rule determination

The Commission published its draft rule determination on 21 February 2019. It determined to not make a rule.

The Commission received six submissions in response to its draft rule determination. The Commission has considered the issues raised by stakeholders in submissions in making this final rule determination. Issues that are not discussed in the body of this document have been summarised and responded to in Appendix A.

### 1.6.3 Pre-final determination hearing

EJA requested that the Commission hold a hearing prior to making a final rule determination on the rule change request.

The Commission held a pre-final determination hearing, consistent with the requirements of s. 319 of the NGL, on 7 May 2019. Five parties presented their views to the Commission at the hearing.

In addition, a third consultation period was provided to enable stakeholders to respond to any issues arising in the hearing. The Commission received 26 submissions. The points raised in these submissions, as well as those raised at the hearing, have been considered in making this final rule determination. Issues that are not discussed in the body of this document have been summarised and responded to in Appendix A.

A transcript of the hearing, documents provided at the hearing, and subsequent submissions, are available from the Commission's website.

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<sup>19</sup> This notice was published under s. 308 of the NGL.

## 2 FINAL RULE DETERMINATION

### 2.1 The Commission's final rule determination

The Commission's final rule determination is to not make the proposed rule.

The Commission's reasons for making this final rule determination are set out in section 2.4 and discussed further in Chapters 3-6.

This chapter outlines:

- the rule making test for changes to the NGR
- the assessment framework for considering the rule change request
- the Commission's consideration of the proposed rule against the national gas objective.

Further information on the legal requirements for making this final rule determination is set out in Appendix B.

### 2.2 Rule making test

#### 2.2.1 Achieving the NGO

The Commission may only make a rule if it is satisfied that the rule will, or is likely to, contribute to the achievement of the national gas objective (NGO).<sup>20</sup> The NGO is:<sup>21</sup>

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, safety, reliability and security of supply of natural gas.

### 2.3 Assessment framework

The Commission has considered whether the proposed rule is more likely to promote efficient investment in, and efficient operation and use of, natural gas services with respect to price of natural gas than the current arrangements. For this assessment, the Commission compared the expected outcomes for efficient investment in, efficient operation and use of gas services under the current arrangements (with the derogation from Part 23 in place for the NGP) to the expected outcomes under the proposed rule (under which Part 23 would apply to the NGP in addition to the NGP access principles). In carrying out the assessment, the Commission took into account:

- **outcomes for terms and conditions of access:** the extent to which the current arrangements for the NGP can provide for terms and conditions of access to the NGP's services that are not affected by the exercise of market power and whether the proposed rule is likely to better facilitate access to the NGP's services on terms and conditions not affected by the exercise of market power
- **outcomes for regulatory complexity and certainty:** whether the proposed rule is likely to lead to an increase or decrease in the complexity and certainty of the NGR's

<sup>20</sup> Section 291(1) of the NGL.

<sup>21</sup> Section 23 of the NGL.

regulatory arrangements for gas pipelines and the complexity and certainty of the regulatory arrangements for seeking access to the NGP

- **special circumstances impacting the NGP:** whether there are special circumstances regarding or impacting the NGP due to which application of the Part 23 framework may not be appropriate.

In addition, the Commission has considered whether the final rule determination would be robust to climate change adaptation and mitigation risks, as discussed in Chapter 6.

## 2.4 Summary of reasons

Having regard to the issues raised in the rule change request and during consultation, the Commission is not satisfied that the proposed rule will, or is likely to, contribute to the achievement of the NGO. The reasons are set out below and explained in further detail in subsequent chapters.

### **Terms and conditions of access**

Under the current arrangements for the NGP, the key terms and conditions of access to the NGP's services including tariffs have been agreed as part of a competitive tender process carried out by the Northern Territory Government and are set out in the NGP access principles. As a result of the contract (the North East Gas Interconnector Project Development Agreement) between the Northern Territory Government and Jemena, these terms and conditions are legally binding on Jemena and cannot be unilaterally varied.

The NGP access principles provide a different regime under which prospective users are able to seek access to the NGP's services compared to that under Part 23 of the NGR. Under this regime the maximum tariffs for NGP's key services are capped at the levels determined through the competitive tender process. The NGP access principles also provide for a process for seeking access, a binding arbitration regime and provisions for a reduction in the firm tariff following an expansion or extension. The Commission is satisfied that combination of a competitive tender process setting key tariff and non-tariff terms and conditions of access to the NGP, together with the binding NGP access principles, limit Jemena's ability to exercise market power during the initial years of the NGP's life.

The Commission also notes that there were no submissions from users or potential users of the NGP that indicate any concern with the level of the published maximum tariffs for the pipeline. Instead, the Energy Users Association of Australia indicated support for the tender outcome tariffs.

The Commission has also made a high level comparison of tariffs across various transmission pipelines which suggests that the tariffs for the NGP as set in the NGP access principles do not provide evidence of an exercise of market power by Jemena.

The current market conditions for the NGP's services are also likely to place some limit Jemena's ability to exercise market power. Unusually for a new pipeline, only a third of the NGP's total capacity is contracted on a longer term basis, resulting in Jemena facing the risk of future demand uncertainty. The Commission considers that this would encourage Jemena to seek out and accommodate the needs of potential users of its pipeline. That is, the

prevailing market conditions do not lend themselves to Jemena exercising market power when prospective users seek access to the pipeline's services.

Additionally, any party can currently apply to the National Competition Council (NCC) seeking that the NGP be classified as a covered pipeline and be subject to either light or full regulation. If the NGP is determined to be a covered pipeline, then it would be subject to economic regulation under Parts 8 to 12 of the NGR and the access principles would fall away. The threat of coverage and application of economic regulation is also likely to place limits on Jemena's ability to exercise market power.

The Commission considers that due to the application of the NGP access principles (in particular, the maximum tariffs for the key services), the current market conditions and the threat of coverage there are likely to be appropriate constraints on Jemena's ability to exercise market power, particularly in negotiations with prospective users of the NGP, at least during the initial years of the NGP's life.

### **Regulatory complexity and certainty**

The Commission took into consideration the likely impact that making the proposed rule would have on the regulatory arrangements for the NGP. If the proposed rule was made, Part 23 of the NGR would apply to the NGP. However, such a change does not result in the NGP access principles ceasing to apply; Jemena would still be required to comply with the access principles as specified in the project development agreement as well as the requirements set out in Part 23.

The application of two forms of regulation to the one pipeline is generally not desirable. In this case, the two regimes both provide a negotiate-arbitration framework for users and prospective users seeking access to the services provided by the NGP. However, the detail of how the two regimes achieve this differs, which is likely to result in uncertainty for all parties regarding obligations and outcomes when in negotiation or arbitration.

In addition, the concurrent operation of the two regimes generates the potential for forum shopping. For example, it will enable prospective users to initiate an arbitration for a firm NGP service under Part 23 in anticipation that the arbitration may result in a tariff less than that set under the NGP access principles. If the Part 23 arbitration determines a price higher than that set under the NGP access principles, the user may still be able to obtain a service under the terms, conditions and tariff consistent with the NGP access principles. However, the Commission acknowledges that given the costs associated with arbitration, the likelihood of this occurring is low.

Application of both Part 23 and the NGP access principles to the NGP will also generate some additional regulatory compliance costs for Jemena as it will need to meet the Part 23 information provision requirements. However, these additional costs are unlikely to be significant.

The option suggested in submissions of revoking the derogation for capacity greater than 90 TJ/day would lead to similar issues as revoking the derogation altogether; in both scenarios overlapping regulatory regimes will arise. Revoking the derogation for capacity greater than 90 TJ/day would result in the capacity between 90 TJ/day and 300 TJ/day being subject to

both the NGP access principles and the Part 23 framework. This could lead to the NGP being subject to three different regulatory arrangements.

Having considered the potential impacts of applying both the Part 23 and the NGP access principles to the NGP at various capacity levels, the Commission considers that the costs arising from the increased complexity of arrangements for seeking access to the NGP, potential uncertainty surrounding obligations and outcomes, potential forum shopping and additional regulatory compliance are likely to be greater than the potential benefit of publishing certain financial information and enabling users and prospective users to seek access to the NGP via Part 23 of the NGR and aligning the regulatory arrangements of the NGP with other non-scheme pipelines.

### **Special circumstances**

As indicated by the assessment framework noted above, the Commission has also considered whether there are special circumstances regarding and impacting the NGP that are relevant to considering the proposed rule. In this regard, the Commission notes the timing of the various relevant processes.

The Northern Territory Government concluded its competitive tender process for the construction and operation of the NGP in November 2015. This pre-dates the Examination of the current test for the regulation of gas pipelines report (dated 14 December 2016) where the concept of what has become Part 23 of the NGR first emerged.<sup>22</sup> In this context, the Northern Territory Government's requirement that the winning tender of its process would include a third party access regime addressed a desire to place some regulatory oversight over the pipeline without requiring it to become a covered pipeline. This regulatory oversight in the form of the NGP access principles was put in place to impose access and pricing obligations in relation to key services of a pipeline that, at the time, may have otherwise been unregulated. As the access principles contemplated and provided access arrangements for the NGP's expanded capacity of up to 300 TJ/day, the derogation applicable to the NGP aligns with the capacity of the NGP covered under the access principles.

Related to this, the Commission notes some stakeholder concerns regarding the impact that the proposed rule may have on future pipeline investment. The regulatory framework under the NGL and NGR provides options to manage the regulatory risk for new pipelines. These options are:

- Carrying out a competitive tender process in accordance with the NGR, which would require the use of a regulator-approved tender process. A successful process would then result in an access arrangement for the new pipeline where the tender process outcomes become part of that access arrangement without any assessment by the regulator. Under this option the pipeline would not be subject to the Part 23 framework as competitive tender pipelines are classified as covered pipelines.
- Seeking a 15-year no coverage determination from the NCC, preventing the application of regulation under Parts 8 to 12 of the NGR applying to the pipeline for the period.

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<sup>22</sup> Dr Michael Vertigan, *Examination of the current test for the regulation of gas pipelines*, December 2016.

Regulation under Part 23 would apply to such pipelines, subject to the Part 23 exemptions.

- Voluntarily lodging an access arrangement with the regulator, resulting in the pipeline becoming a covered pipeline for the duration of that access arrangement period. Under this option, the pipeline would not be subject to Part 23.

Absent of any action taken by a pipeline proponent or service provider, a new pipeline would fall under Part 23 of the NGR, subject to a successful application for an exemption from certain provisions as provided by that part.

In light of these provisions within the NGL and NGR, the Commission considers that the overall regulatory framework accommodates investment in new pipelines and enables prospective service providers or proponents of new pipelines to select an arrangement that best suit their needs and circumstances. For this reason, the Commission does not consider that making the proposed rule would impact on future pipeline investment. Nor does it consider that the particular scenario which arose for the NGP would be likely to re-emerge. Accordingly, the credibility and integrity of the overall gas regulatory framework is not undermined by the NGP access principles nor the derogation from Part 23 as applied to the NGP.

### **Other issues**

The Commission has also considered the points raised by stakeholders in regard to climate change. The Commission considers that the final rule determination is robust in light of climate change adaptation risk and mitigation risk.

Some stakeholders have also expressed the view that the Commission should have regard to an audit on Jemena being carried out by the Australian Taxation Office (ATO). However, potential breaches of laws by corporations are dealt with according to the applicable legislation by the relevant authority administering those laws. In this instance, potential breaches of transfer pricing regulations are a matter for the ATO. The Commission considers that the existence of the audit is not relevant to the issues in this rule change process.

## 3 CURRENT CONSTRAINTS ON MARKET POWER

This chapter provides an assessment of the current arrangements in place over the NGP and the current market outlook for the NGP's services. Through this assessment the Commission aims to determine whether the current arrangements are likely to provide an effective constraint on Jemena's ability to exercise market power, particularly when prospective users are negotiating access to the NGP.

The chapter considers and provides an assessment of each aspect of the current NGP arrangements:

- how the NGP's terms of access and tariffs can be changed
- whether the NGP access principles are likely to be an effective constraint on monopoly pricing
- the ability of users to negotiate efficient non-tariff terms and conditions for access under the NGP access principles
- the current market outlook for the NGP's services and the implications for the likely extent of Jemena's market power
- the threat of coverage.

### 3.1 Jemena's ability to change terms of access and tariffs

#### 3.1.1 The proponents' view

According to EJA and IEEFA, Jemena is able to change the NGP access principles unilaterally.<sup>23</sup> The proponents' conclusion was drawn from the definition of NGP access principles which refers to "these access principles as amended by Jemena from time to time".<sup>24</sup> The proponents claimed that "There is no restriction on when, or how often, Jemena can change the principles".<sup>25</sup> In addition, the proponents claimed that under clause 24 of the NGP access principles, Jemena is also able to change the tariffs under the access principles by providing notification to the Northern Territory Government. As a result of Jemena's apparent ability to set and change NGP access principles and tariffs unencumbered, the proponents concluded that the effect of the derogation applicable to the NGP is to create an unregulated monopoly with no limit on tariffs for 15 years.<sup>26</sup> The proponents suggested that Jemena's ability to change the NGP access principles and tariffs is likely to promote its market power.<sup>27</sup>

23 Rule change request, p. 3.

24 *Northern Gas Pipeline — Access Principles*, p. 1.

25 Rule change request, p. 3.

26 Rule change request, p. 2.

27 Rule change request, pp. 2-3.

### 3.1.2 Stakeholder views on the request

#### Jemena's ability to amend the NGP access principles

Similar to the proponents, ProtectNT and the Arid Lands Environment Centre (ALEC) raised concerns that the NGP access principles can be unilaterally amended by Jemena.<sup>28</sup> However, Jemena stated that the assertion that the NGP access principles enable unilateral change by Jemena is incorrect. Jemena stated that the NGP access principles are an annexure to the confidential project development agreement between Jemena and the Northern Territory Government. According to Jemena, "Under the PDA, Jemena does not have the ability to unilaterally change the NGP access principles".<sup>29</sup> The submission from the Northern Territory Government outlined that the NGP access principles are legally binding and provide for prospective users to gain access to NGP's services on a non-discriminatory basis.<sup>30</sup>

#### Jemena's ability to change the NGP tariffs

The ALEC, Beyond Zero Emissions and three private individuals including Kate Muir, Geralyn McCaron and another<sup>31</sup> raised concerns that Jemena is able to raise its prices by merely notifying the Northern Territory Minister.<sup>32</sup>

Some stakeholders, including Jemena and the Northern Territory Government who are parties to the project development agreement, highlighted that the NGP access principles set maximum tariffs for the NGP's firm forward haul and firm nitrogen removal services which escalate at CPI each year. Jemena considered the proponents' assertion that the derogation leads to the NGP becoming an unregulated monopoly pipeline was incorrect because "an unregulated monopoly is conceptually able to increase tariffs without any constraints".<sup>33</sup> Specifically, Jemena stated that it cannot charge users firm tariffs that exceed the rates published in the NGP access principles.<sup>34</sup> The Northern Territory Government commented that in inviting tenders for the NGP, it required the development of access principles for the benefit of all access seekers. Under the access principles Jemena is legally bound to providing access seekers with access to the NGP's firm services and nitrogen removal services at tariffs no higher than those set out in the NGP access principles.<sup>35</sup> The Australian Pipeline and Gas Association (APGA) commented that the NGP access principles provide assurance that the tariffs will not increase at a rate higher than the rate of inflation.<sup>36</sup>

Jemena stated that the claim that it can change the published tariffs by merely notifying the Northern Territory Government "is not consistent with Jemena's understanding of how the access principles will operate".<sup>37</sup> It highlighted that clause 24 of the NGP access principles

28 Submissions to the consultation paper: ProtectNT, p. 1; Arid Lands Environment Centre, p. 2.

29 Jemena submission to the consultation paper: Jemena response, pp. 10-11.

30 Northern Territory Government submission to the consultation paper, p. 2.

31 The name of this private individual has been withheld from publication at their request.

32 Submissions to the consultation paper: Arid Lands Environment Centre, p. 1; Geralyn McCaron, p. 1; Kate Muir, p. 1; private individual, p. 1.

33 Jemena submission to the consultation paper: Jemena response, p. 9.

34 As escalated by CPI. Jemena submission to the consultation paper: Jemena response, p. 9.

35 Northern Territory Government submission to the consultation paper, p. 2.

36 APGA submission to the consultation paper, p. 3.

37 Jemena submission to the consultation paper: Jemena response, p. 10.

which relates to notification to the Northern Territory Government of proposed increases or decreases of the tariffs must be read in the context of clauses 23 to 26. Specifically, the requirement for Jemena to notify the Northern Territory Government of changes in tariffs relates only to tariff changes that are otherwise permitted by the access principles — indexation according to CPI or following an expansion or extension of the pipeline. Where the NGP is expanded up to 300 TJ/day, a formula in the access principles applies which does not permit these tariffs to rise, but provides for them to fall if the expansion reduces the average cost of the pipeline.<sup>38</sup>

### 3.1.3 Draft rule determination assessment

#### Jemena's ability to amend the NGP access principles

In the draft rule determination, the Commission noted that the proponents did not have access to the confidential project development agreement in preparing the rule change request. The NGP access principles, when read without the context of the project development agreement, could suggest they are subject to unilateral change by Jemena.

The Commission received a confidential copy of the project development agreement between Northern Territory Government and Jemena. Having regard to both the NGP access principles and the project development agreement, the Commission agreed with Jemena's submission that the project development agreement does not allow for Jemena to unilaterally amend the NGP access principles. The project development agreement requires Jemena to apply the access principles (as agreed) and there are significant consequences for non-compliance.

#### Jemena's ability to change the NGP tariffs

The access principles are an annexure of the project development agreement signed between the Northern Territory Government and the Jemena subsidiary responsible for the NGP. Under the project development agreement and the NGP access principles maximum tariffs are set for the NGP's firm services. These are set at \$1.40/GJ for the firm forward haul transportation service and \$0.72/GJ on a 10-year term for the accompanying nitrogen removal service.<sup>39</sup>

Given the objective of the NGP access principles, clauses 23 to 26 of NGP access principles and relevant sections of the project development agreement, the Commission concluded in the draft rule determination that the NGP access principles legally bind Jemena to providing access to NGP's firm forward haul and firm nitrogen removal services at prices no higher than those prescribed in the NGP access principles. Clause 24 of the NGP access principles does not enable Jemena to change tariffs simply by notification to the Northern Territory Government as claimed by the proponents. Instead, that clause provides that Jemena must notify the Northern Territory Government of any proposed tariff change. Other clauses make it clear that the prescribed maximum firm tariff under the access principles can only change under two circumstances: it escalates by CPI and it can decrease following an expansion or

<sup>38</sup> Jemena submission to the consultation paper: Jemena response, p. 10.

<sup>39</sup> The maximum tariff for the nitrogen removal service for a 15-year term is \$0.54/GJ. All tariffs are expressed in 2015 dollars. Users of the NGP's firm transport service are required to enter into an agreement with Jemena for nitrogen removal services.

extension of the pipeline up to a maximum total capacity of 300 TJ/day. In regard to the second of these, the methodology in the access principles provides for a reduction in the firm tariff following an expansion or extension to share the savings from incremental cost of the investment across all users. The effect of these clauses is that any other change to the published tariffs would require agreement with the Northern Territory Government as a variation to the project development agreement.

Consequently, the Commission concluded that the NGP access principles in their current form, or the derogation from Part 23 of the NGR, did not provide for Jemena to be able to set NGP tariffs for firm forward haul and firm nitrogen removal services that are higher than those set out in Annexure 1 to the NGP access principles by simply notifying the Northern Territory Government.

#### **3.1.4 Stakeholder views on the draft rule determination**

No stakeholders commented further on the issue of Jemena's ability to amend the access principles and ability to change the NGP tariffs.

#### **3.1.5 Final rule determination assessment**

No further information has been raised in relation to this issue. The Commission is satisfied that its assessment made in the draft rule determination remains appropriate.

## **3.2 Tariffs under the access principles**

### **3.2.1 The proponents' views**

The proponents considered that the tariffs for the NGP set out in annexure 1 of the NGP access principles are high and this would result in the NGP being the most expensive Australian onshore pipeline per unit of gas over a set distance.<sup>40</sup> Based on findings from a report prepared by Core Energy Group for AEMO for the 2015 Gas statement of opportunities (GSOO), the proponents considered that the current NGP tariffs allow Jemena to charge twice the reasonable amount.<sup>41</sup> The proponents claimed that over the 15-year term of the derogation and with the current pipeline capacity of 90 TJ/day Jemena will be able to earn \$354 million "more than reasonable".<sup>42</sup> In addition, given the expectations to augment the NGP for capacity of up to 700 TJ/day, with this capacity fully utilised over 15 years, Jemena would be in place to "benefit over and above \$2.76 billion".<sup>43</sup>

### **3.2.2 Stakeholder views on the request**

Several stakeholders voiced concerns similar to those raised in the rule change request: that the derogation allows Jemena to overcharge consumers by \$2.76 billion.<sup>44</sup>

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<sup>40</sup> Rule change request, p. 6.

<sup>41</sup> Core Energy Group, *Gas production and transmission costs — eastern and south eastern Australia*, February 2015, p. 10.

<sup>42</sup> Rule change request, p. 7.

<sup>43</sup> Rule change request, pp. 7-8.

<sup>44</sup> Submissions to the consultation paper: Environment Justice, p. 1; Environment Council of Central Queensland, p. 1; Beyond Zero Emissions, p. 1; Arid Lands Environment Centre, p. 1; Environment Centre NT, p. 1; Lock the Gate Alliance, p. 1; Original Power, p. 2; Kate Muir, p. 1.

Some stakeholders including Jemena, the Northern Territory Government and industry representative bodies disagreed with this view. These stakeholders stated that the terms and conditions that apply to the NGP under the access principles, including the maximum tariffs, were developed through a competitive tender process and reflect a competitive outcome.<sup>45</sup>

Expanding on this point, Jemena outlined that the maximum tariffs in the NGP access principles were determined through a multi-stage and highly competitive tender process conducted by the Northern Territory Government.<sup>46</sup> It faced strong competition to become the successful tenderer for the project, as the process included consideration of 14 expressions of interest, nine initial proposals and four final proposals from Jemena, APA, DUET and China National Petroleum Corporation.<sup>47</sup> In addition, the Northern Territory Government continued negotiations with Jemena and another competitor after the closing date of the final proposal submission and up to 24 hours before the announcement of the tender outcome.<sup>48</sup> The maximum tariffs were a key outcome of the competitive tender process and the Northern Territory Chief Minister of the time noted that Jemena was selected because it had offered cheaper tariffs than its competitors.<sup>49</sup> Jemena also considered that the prices established under the competitive tender process should be presumed to be reflective of efficient costs and similar to that expected under Part 23 of the NGR.<sup>50</sup>

The Northern Territory Government noted that the overarching objective of the Part 23 framework is to facilitate access to a non-scheme pipeline's services on reasonable terms which is taken to mean at prices and terms and conditions that, so far as practical, reflect the outcomes that would occur in a workably competitive market. According to the Northern Territory Government "The information available, both at the time the derogation was made and at present, indicates that the binding prices set out in the Access Principles reflect a competitive market outcome and therefore do achieve the same objective as the Part 23 Framework".<sup>51</sup> The Northern Territory Government also commented that through the tender process it "leveraged the Power and Water Corporation as the foundation gas transportation customer for the benefit of all future gas shippers" of the NGP and that the access principles implement tariffs, terms and conditions of access for the NGP that reflect the outcome of the competitive tender process to construct and operate the NGP.<sup>52</sup>

The submission from the Northern Territory Government and the Houston Kemp report commissioned by Jemena referred to findings of the ACCC's Inquiry into the east coast gas market with regard to competition for the market providing effective constraint on the behaviour of the pipeline.<sup>53</sup> The Houston Kemp report highlighted the following ACCC statement:<sup>54</sup>

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45 Submissions to the consultation paper: Northern Territory Government, p. 5; Jemena response, p. 7.

46 Jemena submission to the consultation paper: Jemena response, p. 8.

47 Jemena submission to the rule change request: Houston Kemp report, p. 4.

48 Jemena submission to the rule change request: Houston Kemp report, p. 4.

49 Jemena submission to the consultation paper: Jemena response, p. 9.

50 Jemena submission to the consultation paper: Jemena response, pp. 7-9.

51 Northern Territory Government submission to the consultation paper, pp. 4-5.

52 Northern Territory Government submission to the consultation paper, p. 6.

53 Jemena submission to the consultation paper: Houston Kemp report, p. 20.

54 ACCC, *Inquiry into the east coast gas market*, April 2016, p. 96 in Jemena submission to the rule change request: Houston Kemp

If there is effective competition to develop and build a pipeline ('competition for the market'), then the market power of the ultimate pipeline owner is likely to be limited for a period of time. By negotiating prior to the pipeline being built, foundation shippers will usually be able to use competitive tension between prospective pipeline owners to negotiate long-term contracts that are not affected by the exercise of market power.

The Northern Territory Government and Jemena also noted the ACCC's comments regarding the rate of return adopted for the NGP project. According to Houston Kemp, the ACCC's inquiry report regarded the rate of return underpinning Jemena's successful bid as a competitive benchmark against which to assess other pipeline owners.<sup>55</sup> The Northern Territory Government highlighted the ACCC's statement that "The rate of return adopted in the winning bid suggests that there was a reasonable level of competition between these bidders."<sup>56</sup>

The Northern Territory Government's submission outlined that potential users of the NGP endorsed the outcomes of the NGP tender process. For this purpose, it referenced a submission from Central Petroleum (a prospective user of the NGP) made to the Examination of the current test for the regulation of gas pipelines,<sup>57</sup> which noted that "Whilst the NGP tariff is a significant cost for NT production (17% of delivered cost), Central believes it is reasonable given the cost of the NGP development and the fact it was derived through a competitive process."<sup>58</sup> The Northern Territory Government similarly highlighted Santos' submission (another prospective customer of the NGP) made to the examination process, which in relation to the NGP noted that "The competitive tension to tender for the right to secure pipeline rights elicits competitive market results."<sup>59</sup>

The Energy Users Association of Australia commented that given the NGP tariff structure was the outcome of the competitive tender process, it was not unreasonable to assume the access principles including the tariffs are an accurate reflection of an efficient cost level. Although given the limited information available, the Energy Users Association of Australia acknowledged it was not certain of this. Nevertheless, it noted that market power issues were generally less of a concern where a merchant pipeline has been built as a result of an open competitive tender.<sup>60</sup>

Some stakeholders also responded to the proponents' assessment of overcharging by Jemena. The Energy Users Association of Australia considered the proponents' assessment to be "seriously flawed, overly simplistic and inconsistent" on the basis that the analysis

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report, p. 20.

55 Jemena submission to the consultation paper: Houston Kemp report, p. 18.

56 ACCC, *Inquiry into the east coast gas market*, April 2016, p. 97 referenced in NT Government submission to the consultation paper, p. 5.

57 This was a review carried out by Dr Vertigan on direction from the COAG Energy Council to examine the regulatory test for the regulation of gas pipelines and make recommendations on any further actions.

58 Central Petroleum, submission to the Examination of the current test for the regulation of gas pipelines, October 2016, p. 21 in NT Government submission to the consultation paper, p. 5.

59 Santos, submission to the Examination of the current test for the regulation of gas pipelines, October 2016, p. 3 in NT Government submission to the consultation paper, p. 5.

60 EUAA submission to the consultation paper, p. 1.

assumed gas from the Northern Territory would become LNG exports.<sup>61</sup> Jemena commented that the proponents' claim that the derogation applies for expansion of the NGP up to and including capacity of 700 TJ/day is incorrect. It stated that neither the access principles nor the derogation applies beyond an expanded NGP capacity of 300 TJ/day.<sup>62</sup>

Jemena also stated that the NGP access principles provide certainty that the tariffs for the NGP only increase at CPI. As a result, in its view, the NGP access principles provide a greater degree of tariff certainty than the Part 23 regime.<sup>63</sup> Jemena also commented that the access principles provide for tariffs to decrease as "the access principles are designed so that reductions in average cost achieved through expansions or extensions are shared with existing shippers in lower tariffs."<sup>64</sup> Similarly, APGA noted that the NGP access principles effectively offer long-term assurances that tariffs will not increase at a rate higher than the rate of inflation, and could even decrease if expansion leads to an overall reduction in the average cost.<sup>65</sup>

### 3.2.3

#### Draft rule determination assessment

In the draft rule determination, the Commission considered that, having regard to the information available and submissions from stakeholders, there was competition to develop and build the NGP. The NGP's tariffs are one outcome of this competitive process. In forming this view, the Commission noted:

- The NGP competitive tender process was an open process conducted by the Northern Territory Government in which several serious contenders took part over multiple rounds. In relation to the NGP tender process, the ACCC has noted that "Under the proposal process, bidders were free to compete by offering different combinations of construction timing, capacity, pricing, routes and other terms and conditions".<sup>66</sup>
- The proposals offered to the Northern Territory Government were evaluated in regard to tariffs and tariff structure (among other aspects). The Northern Territory Government's announcement of the winning tender noted that Jemena's bid was compelling because "it offered cheaper tariffs, cheaper gas processing costs and the option to increase the capacity".<sup>67</sup>
- The Northern Territory Government had a financial incentive to achieve lower tariffs as it is the sole shareholder of Power and Water Corporation, the foundation shipper for the NGP.<sup>68</sup>

61 EUAA submission to the consultation paper, pp. 1; 3.

62 Jemena submission to the consultation paper: Jemena response, p. 13.

63 Jemena submission to the consultation paper: Jemena response, p. 7.

64 Jemena submission to the consultation paper: Jemena response, p. 9.

65 APGA submission to the consultation paper, p. 3.

66 ACCC, *Inquiry into the east coast gas market*, April 2016, p. 97.

67 "NT announces Jemena to build gas pipeline to east coast", NT Government Newsroom 2015, viewed 19 January 2019, <http://newsroom.nt.gov.au/mediaRelease/16962>.

68 Power and Water, *Annual Report*, 2018, p. 2; Jemena submission to the consultation paper: Jemena response, p. 4.

- The potential users of the NGP have previously endorsed the tender process with Central Petroleum noting that "It was a very competitive tender" and Santos noted that it elicited competitive market results.<sup>69</sup>
- During the rule change process, AEMC staff have engaged with another participant of the tender process carried out by the Northern Territory Government who has confirmed the competitiveness of the process.
- No submissions from users or potential users of the NGP have been provided to the Commission that indicate any concern with the level of the published maximum tariffs for the pipeline.

The Commission also noted the ACCC's comments regarding the rate of return used to underpin the successful tender of the NGP project. The ACCC noted that "The rate of return adopted in the winning bid suggests that there was a reasonable level of competition between these bidders."<sup>70</sup>

The Commission considered that effective competition to develop and build the pipeline is likely to limit the market power of the service provider for a certain period immediately following commissioning. As stated by the ACCC:<sup>71</sup>

By negotiating prior to the pipeline being built, foundation shippers will usually be able to use competitive tension between prospective pipeline owners to negotiate long-term contracts that are not affected by exercise of market power.

When there is competition to build a pipeline, a foundation shipper or proponent of a potential pipeline is usually able to use the competitive tension between prospective service providers to negotiate terms of access that are less affected by the exercise of market power by a service provider. In the case of the NGP, it was built through a competitive tender process and the maximum tariffs were an outcome of a competitive process conducted by the Northern Territory Government who was also the only shareholder of the foundation shipper. Accordingly, it is reasonable to conclude that the current tariff and non-tariff terms and conditions of access for the NGP under the access principles that were negotiated as part of the competitive tender process are unlikely to reflect an exercise of market power by Jemena.

In relation to cost reflectivity of the NGP tariffs, the Commission understands that some stakeholders were of the opinion that the maximum tariffs are cost reflective because they are an outcome of a competitive tender process. Jemena has also made this suggestion. However, the Commission noted that it does not have access to the necessary financial information to be able to carry out its own assessment of the cost reflectivity of the maximum tariffs to enable it to form a view on this particular point.

In comparison to the Part 23 regime, the NGP access principles are likely to provide more certainty of tariffs for firm forward haul and nitrogen removal services as maximum tariffs

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69 Santos, submission for the Examination of the current test for the regulation of gas pipelines, October 2016, p. 3; Central Petroleum, submission for the Examination of the current test for the regulation of gas pipelines, October 2016, p. 16.

70 ACCC, *Inquiry into the east coast gas market*, April 2016, p. 97.

71 ACCC, *Inquiry into the east coast gas market*, April 2016, p. 96.

that can be charged have been specified in a legally binding and publicly available manner. This contrasts to Part 23, where tariffs are determined through a confidential negotiation and arbitration process.

Submissions and the rule change request have included a number of comments about the level of the published NGP tariffs, and the potential revenue these tariffs may generate over time.

In regard to the level of the tariffs, the Commission's draft rule determination noted the proponents' claim that the NGP's tariffs are high in comparison to most other onshore pipelines in Australia, but observed that:

- No current or potential user of the NGP has expressed concerns through submissions into the rule change process that the maximum tariffs for NGP services were inappropriately high or that the derogation should be removed.
- Based on data available at the time of the draft rule determination, the NGP published tariff for firm transport appeared to place it as one of the more expensive major transmission pipelines in Australia on a \$/GJ basis.<sup>72</sup> However, the fact that a pipeline's tariffs are high in comparison to other pipelines does not establish that those tariffs reflect the service provider's ability to use market power nor that the tariffs are in excess of what would prevail in a workably competitive market. One pipeline's tariffs could be higher than another's because it faces higher costs of providing its services. The cost of providing services can be expected to vary depending on a range of factors such as location of the pipeline, size, cost of capital (which is a function of the capital invested and the age of the pipeline), cost of construction and technical specifications.
- The scope of the report by Core Energy Group, which has been used by the proponents, is to provide broad cost estimates for east coast transmission pipelines modelled from public data. It does not include information on transmission costs for a pipeline in northern Australia. As a result, there is uncertainty regarding how applicable the estimated costs of new transmission build outlined in the report may be to the NGP.
- The proponents have derived disparate estimates of NGP tariffs required under a reasonable return. In one estimate, IEEFA's analysis of the tariffs structure of the NGP carried out in 2016 estimated that for the NGP to earn a 5.2 per cent return on asset, it needs to charge a tariff of at least \$2.01/GJ at almost full utilisation levels.<sup>73</sup> This IEEFA report is an annexure to the rule change request. In the second tariff estimate calculation, the proponents have estimated that based on a reasonable rate of return of seven per cent, the NGP's tariff should be approximately \$0.68/GJ.<sup>74</sup> These two tariff estimates made by the proponents for the NGP differ by almost a factor of three. The maximum tariffs for the NGP firm forward haul service are lower than the tariffs estimated by IEEFA based on rate of return of 5.2 per cent.

72 Oakley Greenwood, *Gas price trends review 2017*, February 2018, pp. 139-140; Core Energy Group, *Gas production and transmission costs, eastern and south eastern Australia*, February 2015, p. 10.

73 IEEFA, *Pipe Dream: A financial analysis of the Northern Gas Pipeline*, May 2016, p. 30.

74 Rule change request, p. 6.

- Given that the ACCC had obtained information about the rate of return underpinning the NGP project and noted that the "rate of return adopted in the winning bid suggests that there was a reasonable level of competition between these bidders", it is likely that the resulting tariffs are not materially affected by the exercise of market power and do reflect the competition for constructing and operating the pipeline.<sup>75</sup>

The proponents have also made statements regarding the potential revenue that the NGP may generate for Jemena over time. There are numerous variables to such estimates such as capital costs, operating costs and utilisation levels. The proponents' estimates for these variables have made some assumptions, for example:

- IEEFA's assessment of the tariff structure of the NGP estimated the capital cost of the NGP to be \$650 million
- an assessment based on the Core Energy Group report used in the rule change request provides a capital cost for a pipeline like the NGP of approximately \$386 million.<sup>76</sup>

The Commission observed in the draft rule determination that references to the construction of the NGP have often used an estimate of \$800 million.<sup>77</sup>

### 3.2.4

#### Stakeholder views on the draft rule determination

##### Competitiveness of the tender process

Several stakeholders expressed their views regarding the competitiveness of the tender process.

EJA have asserted that the tender process was not competitive because the Northern Territory Government was at a negotiating disadvantage during the process and "industry" had sway over the Northern Territory Government.<sup>78</sup> According to EJA, the Northern Territory Government was at a negotiating disadvantage because it had purchased excess gas and without a pipeline to transport the excess gas to market, the Northern Territory Government would incur losses.<sup>79</sup> EJA noted that "We query how it is possible to have a 'competitive' tender process when the NT, the initial proponent of the pipeline, is already at a negotiating disadvantage as it needed to ship unused gas it was forced to pay for as a result of a 2006 contract, and is now making a loss."<sup>80</sup> In addition, EJA claimed that the draft rule determination "supports a process driven by extreme financial mismanagement by the NT government".<sup>81</sup>

EJA, The Australia Institute and David Barnden have stated that Jemena refused to bid to build a covered pipeline even though the Northern Territory Government actively sought to

<sup>75</sup> ACCC, *Inquiry into the east coast gas market*, April 2016, p. 97.

<sup>76</sup> Calculated using the reference capital costs for 14 inch for pipeline of length 622 km.

<sup>77</sup> "\$800 million gas pipeline to bring Northern Territory gas to the east coast", Jemena news release, 12 July 2017, <http://jemena.com.au/about/newsroom/media-release/2017/gas-pipeline-to-bring-northern-territory-gas-to-th>.

<sup>78</sup> EJA submission to the draft determination, p. 2; David Barnden statement at pre-final determination hearing, p. 6; Equity Generation Lawyers submission to the hearing, p. 3.

<sup>79</sup> EJA submission to the draft determination, p. 3; Equity Generation Lawyers submission to the hearing, p. 3.

<sup>80</sup> EJA submission to the draft determination, p. 3.

<sup>81</sup> EJA submission to the draft determination, p. 2.

have the pipeline subject to the NGR.<sup>82</sup> In relation to this claim, David Barnden said that, "it's pretty difficult to see how that's a competitive tender process when you have industry having so much sway over a government".<sup>83</sup>

At the pre-final rule determination hearing, IEEFA stated that:<sup>84</sup>

There were only four people that tendered. Four people is not competition. There were only two that had serious propositions, according to you, and were allowed to proceed, so you effectively have a duopoly setting the price.

Other stakeholders including Jemena, the Energy Users Association of Australia and the APGA asserted that the process to build the NGP was competitive. In response to EJA's comments regarding the NT Government being at a negotiating disadvantage during the tender process, Jemena stated that as highlighted in the submission provided by Houston Kemp in the first round of consultation, "the Northern Territory Government was not 'at a disadvantage' in those negotiations, as it was actively negotiating with more than one potential developer until the end of the process."<sup>85</sup>

In relation to EJA's comments regarding Jemena's unwillingness to build a pipeline on the basis that it be a covered pipeline, Jemena said that after initially seeking proposals to develop the NGP as a covered pipeline, the Northern Territory Government "required a set of principles outlining the terms on which access to the NEGI would be provided in lieu of coverage" and these principles placed significantly more obligations on Jemena in relation to the NGP than applied at that time to other uncovered pipelines.<sup>86</sup>

The Energy Users Association of Australia recognised that "the NGP tariff structure was the outcome of a competitive tender process".<sup>87</sup>

APGA highlighted that there was generally fierce competition to build new gas pipeline infrastructure in Australia. It stated that the costs of building a pipeline were largely inflexible and project proponents were left to compete with each other on capital risk which came down to how slowly a proponent was willing to recover its costs and how much re-contracting risk a proponent was willing to take on. APGA said that "There is no doubt that that process secured the best possible access conditions for the NT Government and the access principles agreed to by Jemena ensure other users of the NGP will enjoy the same efficient service conditions."<sup>88</sup>

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82 EJA submission to the draft determination, p. 2, David Barnden statement at pre-final determination hearing, p. 6; The Australia Institute submission to the hearing, p. 1.

83 David Barnden statement at pre-final determination hearing, p. 6.

84 IEEFA statement at pre-final determination hearing, p. 4.

85 Jemena submission to the hearing, p. 2.

86 Jemena submission to the hearing, p. 2. At the time of the Northern Territory Government tender process the prospective pipeline was referred to as the North East Gas Interconnect (NEGI). Upon becoming the successful tenderer, Jemena announced it would name the pipeline the Northern Gas Pipeline (NGP).

87 EUAA submission to the draft determination, p. 1.

88 APGA submission to the hearing, p. 3.

### Reasonableness of costs and tariffs

The Energy Users Association of Australia expressed support for the draft rule determination and noted:<sup>89</sup>

We recognise that the NGP tariff structure was the outcome of a competitive tender process and that it is not unreasonable to assume that the access principles, including tariffs, are an accurate reflection of an efficient cost level.

However, IEEFA raised concerns that the NGP's tariffs were unreasonably high and the draft rule determination did not include a thorough assessment to establish the reasonableness of the NGP's tariffs (including the nitrogen removal service tariff) and costs. In addition, IEEFA stated that it appeared that the Commission had made "no attempt" to determine the tariff paid by Power and Water Corporation.<sup>90</sup>

At the hearing, IEEFA reiterated views expressed in the rule change request, stating:<sup>91</sup>

The Northern Gas Pipeline is by far the most expensive pipe in Australia. It is 27 per cent more expensive per kilometre than the next pipe and 575 per cent more expensive than the Moomba to Sydney pipe, just to take one example.

Similarly, Equity Generation Lawyers claimed that the Commission should have consulted the ACCC in regard to the NGP tariffs and taken into account its Gas inquiry 2017-2020 interim report which commented that the cumulative tariffs for transporting gas from the Northern Territory to the east coast gas market across multiple pipelines are significant and may result in the gas being uncompetitive.<sup>92</sup>

Equity Generation Lawyers also referred to reports of the contractual arrangements in place to supply the Incitec Pivot plant at Gibson Island (near Brisbane). It surmised from these reports that the gas supplied via the NGP was "unaffordable".<sup>93</sup>

The Australia Institute also suggested that the NGP transport tariffs are excessive.<sup>94</sup>

Jemena responded to IEEFA's tariff comparisons across pipelines, stating that a "simplistic analysis of cost per km" is "misleading and inaccurate". It noted that there are numerous factors that impact the cost of construction and operation of pipelines.<sup>95</sup>

IEEFA also considered that the Commission had not carried out sufficient work on international or domestic benchmarking of costs, stating at the hearing:<sup>96</sup>

The Northern Gas Pipeline, that one little bit of pipe from Tennant Creek to Mount Isa,

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89 EUAA submission to the draft determination, p. 1.

90 IEEFA submission to the draft determination, p. 3.

91 IEEFA statement at pre-final determination hearing, p. 3.

92 Equity Generation Lawyers submission to hearing, p. 3. Note Equity Generation Lawyers lodged a submission on behalf of the Institute for Energy Economics and Financial Analysis (IEEFA).

93 Equity Generation Lawyers submission to the hearing, p. 4.

94 The Australia Institute submission to the hearing, p. 3

95 Jemena submission to the hearing, p. 3.

96 IEEFA statement at pre-final determination hearing, pp. 4-5

which is not even going to connect a source of gas with a consumer because the end consumer will be the LNG plants as we know from the plans down in Gladstone if this goes ahead to its full extent, that little bit of pipe is costing the equivalent of 60 per cent of the cost of gas delivered in the US.

In regard to international benchmarking, APGA commented that a comparable pipeline would be difficult to identify:<sup>97</sup>

I'm not sure if there's another 660-kilometre 12-inch pipeline that exists anywhere in the world. That is an incredibly narrow pipeline for that length of distance. If there is one it's certainly not 1000 kilometres from the closest international port or 2000 kilometres from the closest city of above 1 million people.

#### Cost reflectiveness of the tariffs

Several stakeholders expressed views regarding the costs of the NGP in relation its tariffs provided in the NGP access principles.

Jemena stated that in its view, that unless shown otherwise, tariffs resulting from a competitive tender process should be presumed to be cost reflective.<sup>98</sup>

Other stakeholders considered that the Commission should carry out an assessment of costs of the NGP in relation to the tariffs in order to determine if the tariffs constrain the NGP's market power. In relation to this, EJA suggested that the Commission should "have regard to the actual cost of the NGP with regard to tariffs".<sup>99</sup> Equity Generation Lawyers claimed that the Commission had not acquired data on costs and "forecasts of the NGP" from the Northern Territory Government or Jemena to enable an assessment of consumer over charge.<sup>100</sup>

Similarly, IEEFA commented:<sup>101</sup>

The AEMC should do independent investigations if the costs claimed are indeed the costs incurred. It does not appear, for example, that the AEMC has sighted the contract for the physical construction of the NGP and the expense incurred.

The Australia Institute commented that the Commission's draft rule determination had not considered in detail the prices that Jemena will charge relative to the costs.<sup>102</sup> Similarly, IEEFA stated that the Commission should do "independent investigations if the costs claimed are indeed the costs incurred".<sup>103</sup>

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97 APGA statement at pre-final determination hearing, p. 13.

98 Jemena submission to the hearing, pp. 3, 5.

99 EJA submission to the draft determination, p. 10.

100 Equity Generation Lawyers submission to the hearing, p. 2.

101 IEEFA submission to the draft determination, p. 3. Similar comments were made in EJA submission to the draft determination, p. 10.

102 The Australia Institute submission to the draft determination, p. 2.

103 IEEFA submission to the draft determination, p. 3.

### **Nitrogen removal service tariff**

IEEFA also claimed that the Commission had not considered the “massive” nitrogen removal service tariff, which is compulsory for users of the NGP. It suggested that tariff benchmarking use a total tariff of \$2.10/GJ (representing both the transportation and nitrogen removal services).<sup>104</sup>

Following the hearing, IEEFA made additional comments on the nitrogen removal service. It stated that NGP users would be charged the nitrogen removal service tariff regardless of whether that service is required by the user. IEEFA commented that the recent banking royal commission had taken task with the charging of “fees for no service”, and that it “would appear that in the gas pipeline industry this is standard practice”.<sup>105</sup>

Subsequent comments regarding tariffs were also made by Equity Generation Lawyers, who asserted that the Commission had not asked Jemena what the rate of return for the NGP is, whether is it based on the firm tariff or whether it also includes the “fee for no service” nitrogen removal service tariff, CPI increases, or if CPI increases are compounded and annualised.<sup>106</sup>

## **3.2.5**

### **Final rule determination assessment**

#### **Competitiveness of the tender process**

The Commission considers that it was in the interest of the Northern Territory Government to achieve the best possible outcome regardless of their financial position at the time of the tender. Any reduction in the NGP tariffs would have resulted in a net gain (in the form of increased revenue or reduced loss from the over-contracted gas) for the Northern Territory Government. Therefore, the Northern Territory Government would have had an incentive to achieve lower tariffs.

In relation to the level of participants in process, the Commission notes that tender process began with 14 competitors lodging expressions of interest, 11 proponents were then short-listed to proceed, nine initial proposals were received, and four of these were then invited to make a final proposal which they did. These bidders were Jemena, APA Group, DUET and China National Petroleum Corporation.<sup>107</sup> The level of participation in the tender process suggests that the process was competitive.

The Commission notes that the Northern Territory Government “sought proposals to develop the NGP as a covered pipeline, or asked respondents to propose alternative arrangements”.<sup>108</sup> In response to Jemena’s proposal to build the pipeline on an uncovered basis, the Northern Territory Government ensured that the NGP was subject to alternative arrangements under the NGP’s access principles as a substitute for coverage. Furthermore, nothing in the arrangements between Jemena and the Northern Territory Government prevents any party

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104 IEEFA statement at pre-final determination hearing, pp. 4-5.

105 IEEFA submission to the hearing, pp. 2-3.

106 Equity Generation Lawyers submission to the hearing, p. 2.

107 Jemena submission to the consultation paper: Houston Kemp Report, p. 4.

108 Jemena submission to the consultation paper: Houston Kemp Report, p. 5.

from applying to seek the NGP to be classified as a covered pipeline. This demonstrates that the Northern Territory Government's bargaining position during the tender process was not compromised as suggested by some stakeholders.

Therefore, the Commission's final assessment is that there was competition to develop and build the NGP and the NGP's tariffs are one outcome of this competitive process.

### **Reasonableness of costs and tariffs**

As stated in the draft rule determination, a simple comparison of tariffs between different pipelines that may have very different underlying costs and usage levels, does not establish that those tariffs reflect the service provider's ability to use market power and exceed the cost of providing the pipeline service. Nor does a comparison of tariffs for different pipelines for a single year indicate that the tariff exceeds what would prevail in a workably competitive market.<sup>109</sup>

IEEFA has relied on a c/GJ/km (in 2014 dollars) comparison of tariffs for its analysis. However, reliance on such a metric will not lead to a robust comparison to conclude whether a particular pipeline's tariffs are reasonable or cost reflective because this metric does not provide information about the relationship between prices and efficient costs of providing the service.

There are several factors that affect the cost of providing a pipeline service (and hence the cost reflective level of tariffs). These cost factors include the initial capital cost of the pipeline (which will be a function of the pipeline length and capacity, but will also factor in a range of other matters such as its location, as terrain crossed has cost implications), configuration of the pipeline (such as use of compressors and looping), age (which impacts how much the pipeline has been depreciated, and hence the return of capital) and the cost of capital. Comparing the per kilometre tariffs of pipelines without accounting for the other variables will not lead to a robust comparison.<sup>110</sup>

Nevertheless, IEEFA's assertion that the NGP is the most expensive pipeline in Australia on a c/GJ/km basis does not align with current published tariff data. Even adding the nitrogen removal service charge to the NGP's tariff for firm forward haul, as suggested by IEEFA, would not make NGP the most expensive pipeline in Australia on a c/GJ/km basis.<sup>111</sup>

The table below provides the tariffs per GJ per kilometre for firm forward haul capacity of most transmission pipelines across Australia that are regulated under either Parts 8-12 or Part 23 of the NGR.

The table is arranged in descending order of c/GJ/km with the NGP highlighted in blue. Many of these transmission pipelines have higher tariffs than the NGP, including some that are regulated under Part 23 of the NGR.

<sup>109</sup> AEMC, *Northern Gas Pipeline — derogation from Part 23*, draft rule determination, 21 February 2019, p. 19.

<sup>110</sup> Oakley Greenwood, *Gas prices trends review 2017*, p. 144; Jemena submission to the hearing, p. 3.

<sup>111</sup> Adding the nitrogen removal service charge to firm forward haul tariff results in a total charge of approximately \$2.25 per GJ, which is approximately 0.362 c/GJ/km.

**Figure 3.1: Transmission pipeline tariffs**

PIPELINE	STATE	REGULATORY STATUS	CAPACITY (TJ/DAY) FORWARD HAUL	LENGTH (KM)	2019 TARIFF (C/GJ/KM)	IEEFA TARIFF (C/GJ/KM)
Central West Pipeline	NSW	Light regulation	10	255	1.418	
Eastern Goldfields Pip	WA	Part 23	20.6	293	1.228	
Central Ranges Pipeline	NSW	Full regulation	7	294	1.221	
Kalgoorlie Kambalda Pipeline	WA	Light regulation	20	44	0.944	
Port Campbell to Iona Pipeline (SEA Gas)	SA	Part 23	400	11	0.727	
Mid West Pipeline	WA	Part 23	10.6	353	0.606	
Telfer Gas Pipeline	WA	Part 23	29	443	0.587	
South East South Australia	SA	Part 23	40	45	0.370	
Murrin Murrin Lateral	WA	Part 23	45.6	85	0.363	
Goldfields Gas Pipeline	WA	Part 23	93.5	1378	0.320	
Tasmanian Gas Pipeline	Tas	Part 23	129	740	0.257	
Pilbara Pipeline System	WA	Part 23	166	320	0.254	
Northern Gas Pipeline	NT	NGP access principles	90	622	0.239	0.23
Berwyndale Wallumbilla Pipeline	Qld	Part 23	164	112	0.214	
Roma Brisbane Pipeline	Qld	Full regulation	233	438	0.165	0.13
Eastern Gas Pipeline	NSW	Part 23	352	797	0.163	0.15
Darling Downs (segment 2 - DDP 134)	Qld	Part 23	275 - 540	131	0.163	
Queensland Gas Pipeline	Qld	Part 23	143	627	0.163	0.15
Darling Downs (segment 3 - DDP 90 - Spring Gully)	Qld	Part 23	155	87	0.154	
Carpentaria Gas Pipeline	Qld	Light regulation	119	840	0.144	0.18
Darling Downs (segment 1 - DDP 133)	Qld	Part 23	275 - 540	69	0.142	
Port Campbell to Adelaide Pipeline (SEA Gas)	SA	Part 23	269	680	0.132	
South West Queensland Pipeline	Qld	Part 23	340	937	0.129	0.13
Parmelia Gas Pipeline	WA	Part 23	50	416	0.119	
Goldfields Gas Pipeline	WA	Full regulation	109	1,378	0.094	
Wheatstone Ashburton West Pipeline	WA	Part 23	337	123	0.082	
Dampier Bunbury Pipeline	WA	Full regulation	845	1,854	0.074	
Moomba Adelaide Pipeline System	SA	Part 23	246	1,184	0.067	0.06
Moomba Sydney Pipeline	NSW	Light and Part 23	423	2,081	0.053	0.04
Amadeus Gas Pipeline	NT	Full regulation	104	1,512	0.038	

Source: IEEFA and EJA submission to consultation paper, p. 2; AEMC Pipeline Register; AER website; service provider websites (<https://www.apa.com.au/our-services/gas-transmission/current-tariffs-and-terms/current-tariffs-and-terms/>; <https://seagas.com.au/services/access-to-services/>; <https://www.tasmaniangaspipeline.com.au/part-23-publication-and-information/>; <http://jemena.com.au/pipelines/>; <https://www.agig.com.au/pipelines/>; <https://www.epicenergy.com.au/moomba-to-adelaide-pipeline-system/>).

Note: For AEMC 2019 tariffs, CPI adjustments have been made where required to report all tariffs at 2019. In addition, some assumptions have been made to report a tariff on a c/GJ/km basis where pipelines have a capacity charge. For pipelines subject to regulation under Part 23 the published standing tariff for a firm forward haul service (or equivalent) has been used. Where the pipeline is subject to full regulation, the reference tariff for the firm forward haul service (or equivalent) has been used. Different segments of the Darling Downs Pipelines have been reported separately as they have different tariffs. Similarly, for the Goldfields Gas Pipeline.

The information collated by the Commission differs to that reported by IEEFA during this rule change process. There are a number of reasons for this:

- IEEFA relied upon information calculated and reported by Core Energy Group to AEMO. The tariffs were reported in 2014 dollars and the number of pipelines used by Core Energy Group was limited.<sup>112</sup>
- Since the report from Core Energy Group, new information has become available. Service providers of pipelines regulated under Part 23 of the NGR now publish tariffs for various pipeline services (subject to exemptions granted by the relevant regulator).<sup>113</sup>
- The Commission has collated information across a broader selection of transmission pipelines. Using the pipeline register, the Commission has included all covered (full and light regulation) pipelines across Australia (except for the Victorian Declared Transmission System) and many of those subject to Part 23 that are required to publish tariffs.<sup>114</sup>

Of interest to note, there are no pipelines that are directly comparable to the NGP either in capacity (of 90 TJ/day) or in length (of 622 km).

IEEFA particularly compared the NGP with the Carpentaria Gas Pipeline. The Commission has identified two factors that would lead to a lower tariff for the Carpentaria Gas Pipeline than the NGP, all else being equal:

- As indicated by the table, the Carpentaria Gas Pipeline is longer and has a greater capacity than the NGP. Both of these factors are consistent with it having greater economies of scale than the NGP may be able to achieve.
- The Carpentaria Gas Pipeline was constructed in 1998, providing APA Group (the service provider) the opportunity to have already recovered some capital costs.

As previously noted, making tariff comparisons should acknowledge the different features of the pipelines. For example, the capacity of a pipeline impacts on the cost of providing

<sup>112</sup> Core Energy Group, *Gas production and transmission costs, eastern and south eastern Australia*, February 2015. This report was prepared as input into AEMO's 2015 Gas statement of opportunities. Core Energy Group modelled cost estimates based on public information for key transmission pipelines in the east coast gas market.

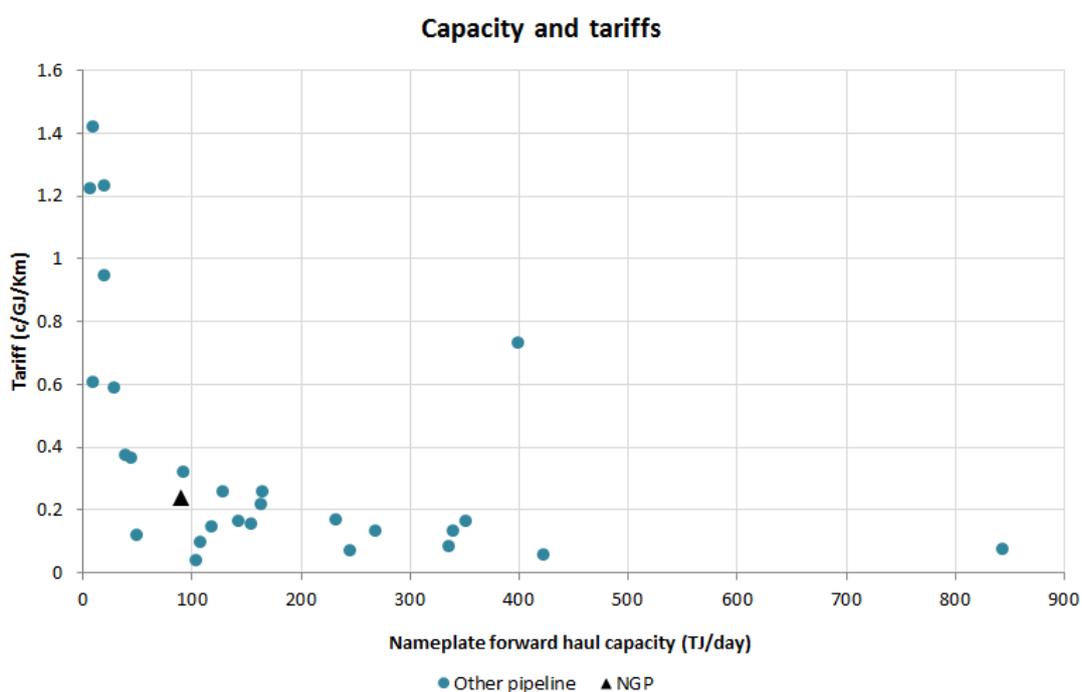
<sup>113</sup> The AEMC acknowledges that some service providers were already publishing tariff information voluntarily.

<sup>114</sup> The Victorian DTS has been excluded because the network nature of the pipeline and its tariff methodology are not amenable to comparisons with point-to-point style contract carriage pipelines. The AEMC notes that at the time of publication, the Pipeline Register does not include all non-scheme pipelines across all jurisdictions.

pipeline services because pipelines (particularly transmission pipelines) demonstrate economies of scale, which will affect the tariffs.<sup>115</sup>

The chart below shows the firm transport tariffs per kilometre against the nameplate forward haul capacity of the transmission pipelines reported in the previous table.

**Figure 3.2: Capacity and tariffs**



Source: AEMC analysis

Note: The data point for capacity 400 TJ represents SEA Gas Pipeline (Port Campbell to Iona (PCI)) which has a length of only 11 km.

The figure illustrates that transmission pipeline tariffs generally appear to be impacted by the capacity of the pipeline and as such, capacity should be a relevant consideration when comparing tariffs across different pipelines.

The dispersion of points in the figure indicate that holding other factors constant, the NGP's tariffs are broadly in line with tariffs of other pipelines of similar capacity as the mark indicating the NGP is within a cluster of marks for a number of pipelines. The figure does not indicate that the NGP tariffs are symptomatic of significant exercise of market power by Jemena.

In conclusion, the Commission's final assessment is the same as that indicated in its draft rule determination: that the NGP's tariffs do not establish that Jemena has had the

<sup>115</sup> For example, construction costs of a 12-inch pipeline are not double the costs of building a 6-inch pipeline. Core Energy Group cost estimates for a new transmission pipeline were \$0.11/GJ for an 8-inch pipeline and \$0.10/GJ for a 14-inch pipeline. Core Energy Group, *Gas production and transmission costs, eastern and south eastern Australia*, February 2015, p. 10.

opportunity to exercise a significant degree of market power in the competitive tender process which set the initial tariff for the pipeline.

#### **Cost reflectiveness of the tariffs**

In relation to the assessment of cost reflectivity of NGP's tariffs, the Commission again notes that it does not have access to the necessary financial information to be able to carry out its own assessment of the cost reflectivity of the maximum tariffs to enable it to form a view on this point.<sup>116</sup>

Furthermore, an approach to assessing the cost reflectivity of the NGP's tariffs involves a determination of the value of the NGP's capital base, an assessment of the forecast costs, and the determination of efficient tariff and their forward trajectory for the NGP's key services. In other words, all that would be carried out by the AER if the pipeline were subject to full regulation. In effect, operation of such an assessment would be to apply a degree of regulatory oversight that is part of a heavier form of regulation to the NGP than currently applies to it.<sup>117</sup> As suggested by some stakeholders, such a task is not likely to be appropriate in the circumstances where a competitive tender process was carried out and the tariffs for the key services of the pipeline were a tender outcome.

In addition, it should be noted that even if Part 23 of the NGR was to apply to the NGP at this time, the Part 23 framework does not involve a pipeline's published tariffs being determined or assessed by the regulator; Part 23 simply requires service providers to publish tariffs.

#### **Nitrogen removal service tariff**

As noted above, some stakeholders have commented that:

- the tariff for the nitrogen removal service is excessive
- the nitrogen removal service is mandatory for all users of the NGP, even if not required.

In regard to the first of these points:

- The nitrogen removal service tariffs (of \$0.72/GJ for a 10-year term or \$0.54/GJ for a 15-year term) are part of the tender outcomes and are consequently included in the NGP access principles. As previously discussed, the Commission is satisfied that the tender process carried out by the Northern Territory Government was competitive and that the government was incentivised to seek out the best outcome it could. Accordingly, it considers that the resulting tariffs reflect competition between prospective service providers to build the pipeline.
- Inclusion of the nitrogen removal service tariff in the NGP access principles limits these maximum tariffs to escalate by CPI. Under the access principles, Jemena will not be able to unilaterally increase these charges.

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<sup>116</sup> Nor does the AEMC have information gathering powers to require the provision of information as the regulators do.

<sup>117</sup> To change the form of regulation and apply full regulation to the NGP, coverage of the pipeline should be sought from the NCC. The NCC will then make a recommendation to the relevant minister.

As noted previously by the Commission in its draft rule determination, some stakeholders have observed that users of the NGP's firm transport service are required to enter into an agreement with Jemena for nitrogen removal services.

As stated in the access principles, the need for performing the service will be assessed with reference to the overall volume and composition of gas in the pipeline.<sup>118</sup> This approach is consistent with the objective of supplying natural gas into the Carpentaria Gas Pipeline that meets the gas specifications for that pipeline.<sup>119</sup>

Under the current configuration of the NGP, the flow of gas is from west to east (from Tennant Creek to Mt Isa) and the Carpentaria Gas Pipeline (at Mt Isa) is the only withdrawal or delivery point for the NGP. As a result, gas sourced from the Northern Territory will require processing (specifically, the removal of excess nitrogen) to enable it to be used in the east coast gas market. Accordingly, under the current configuration of the NGP all users of firm forward haul transport services on the NGP will also need the nitrogen removal service.

The nitrogen processing arrangement on the NGP is unusual: gas producers usually undertake gas processing activities. Producers supply natural gas within the required specifications to the inlet of a pipeline. Payments made to a producer for gas will also include the cost of processing the gas as needed. Pipeline users, who have purchased the processed gas from the producer, arrange transport services as needed. Consequently, a direct comparison of the NGP tariff inclusive of the nitrogen removal service charge with the transport tariffs of other pipelines (without such a service) would be misleading.

In the case of the NGP, gas is moving from the Amadeus Gas Pipeline (rather than a production facility) into the NGP, for delivery in another state with different gas specification requirements. This particular circumstance has resulted in the need for additional processing to occur to the gas prior to it reaching Mt Isa and flowing into the interconnected transmission pipelines in the east coast gas market. Under the current arrangements, Jemena provides this processing service and so users of the NGP contracting for the firm forward haul service are also required to pay a tariff to Jemena for this additional processing.

In any event, the NGP nitrogen removal service may not be covered by the Part 23 framework as it is not a pipeline service and is not likely to be considered as a service ancillary to the main services provided by a pipeline. Accordingly, removal of the derogation may not provide any benefit to users in relation to access to, and prices for, the nitrogen removal service.

## 3.3

### Non-price terms and conditions under the access principles

#### 3.3.1

##### The proponents' views

The proponents assert that the derogation leads to the NGP becoming an unregulated monopoly pipeline. In their view, the NGP access principles provide Jemena with considerably more power than is afforded by the NGL and the NGR. The proponents have suggested that the requirements under the NGP access principles are more favourable to Jemena than the

<sup>118</sup> Clause 20(b), NGP access principles.

<sup>119</sup> Clause 19, NGP access principles.

Part 23 requirements and that the derogation relieves Jemena from having to comply with the more stringent requirements of Part 23 of the NGR. The proponents raised several concerns regarding the access principles and the derogation including that:

- There is no oversight of pipeline access by the AER.<sup>120</sup> The proponents imply that the third party access provisions for the NGP are weaker than the under the Part 23 access regime for non-scheme pipelines.
- The dispute resolution procedures under the NGP access principles are considerably more favourable to Jemena because it is not overseen by the AER or informed by the NGR. For example, the NGP access principles allow Jemena to terminate negotiations and arbitration with seven days' notice, with no recourse.<sup>121</sup> The proponents also claim that the NGP access principles do not offer "similar protections" as Part 23 and that Jemena has "complete control" over any arbitration. The proponents also stated that the derogation deprives consumers of the expected benefits of the Part 23 reforms.<sup>122</sup> They noted that Central Petroleum expected to be able to benefit from "easier access to faster and clearer arbitration" under Part 23 as reported in Central Petroleum's quarterly report published in January 2017.
- The requirements for information disclosure under Part 23 of the NGR are significantly more stringent than those under the NGP access principles which requires "the publication and exchange of information to facilitate timely and effective commercial negotiations". The proponents commented that under Part 23, Jemena would have greater financial information reporting requirements.<sup>123</sup>
- The proponents also commented that the Part 23 regime provides benefits for all pipeline services available on a relevant pipeline. They noted Central Petroleum's statement that "The reforms include establishing appropriate economic parameters for all pipeline services (not just point-to-point forward haul) reflecting appropriate cost of services parameters."<sup>124</sup>

### 3.3.2

#### Stakeholder views on the request

Some stakeholders raised concerns regarding the NGP's dispute resolution mechanism and information disclosure requirements. They considered these elements of the NGP access principles to be significantly weaker than what would be applicable under Part 23 of the NGR. The Lock the Gate Alliance, Environment Centre NT and Environment Justice considered that the derogation leads to the avoidance of rules specifically designed to soften service providers' market power.<sup>125</sup>

In contrast, other stakeholders considered that the NGP access principles would achieve similar or the same outcomes as the Part 23 regime and would reflect the outcomes of a workably competitive market. The Northern Territory Government highlighted that the NGP

120 EJA and IEEFA submission to the consultation paper, p. 1.

121 EJA and IEEFA submission to the consultation paper, p. 1.

122 EJA and IEEFA submission to the consultation paper, p. 6.

123 EJA and IEEFA submission to the consultation paper, p. 3.

124 EJA and IEEFA submission to the consultation paper, p. 5.

125 Submissions to the consultation paper: Lock the Gate Alliance, p. 2; Environment Centre NT, p. 1; Environment Justice, p. 1.

access principles implement terms and conditions for the NGP that reflect the outcome of a competitive tender process while Jemena considered the NGP access principles contribute to the NGO.<sup>126</sup> Similarly, APGA stated that the arrangements applicable to the NGP under the access principles were intended to address many of the same issues addressed by Part 23.<sup>127</sup>

The following sections summarise stakeholder comments in relation to each of the issues raised by the proponents.

### Third party access

The Jemena and APGA submissions assert that the NGP access principles provide for an obligation on Jemena to negotiate in good faith to enter into an access agreement with prospective users and to supply firm forward haulage and as available haulage services on a non-discriminatory basis.<sup>128</sup> Houston Kemp highlighted that the NGP access principles set out a procedure to process an access application, a timeline under which Jemena must advise a prospective user of its ability to meet their requirements, and the requirement on Jemena when it can't meet the access request to advise the prospective user access seekers what capacity Jemena could provide and when it could provide it.<sup>129</sup>

Jemena also noted that it is required to connect lateral pipelines to the NGP at reasonable rates where it is technically feasible to do so.<sup>130</sup> According to the Northern Territory Government, the NGP access principles require Jemena to provide access to the NGP on a non-discriminatory basis and that the principles include policies on the arrangements for queuing, connections, extensions and expansions.<sup>131</sup>

### Dispute resolution mechanism

Several stakeholders including Protect NT, Beyond Zero Emissions, Arid Lands Environment Centre and Geryllyn McCaron considered the dispute resolution provisions under the NGP access principles to be insufficient. These stakeholders claimed that under the NGP access principles Jemena is able to unilaterally terminate the arbitration process without recourse.<sup>132</sup>

In contrast, Jemena described the NGP access principles as containing a dispute resolution mechanism culminating in binding arbitration by an independent party in accordance with the Arbitration Rules of the Institute of Arbitrators and Mediators if the parties are unable to agree. Jemena added that "the arbitration provisions under Part 23 do not add anything material in relation to the ability to seek binding arbitration of an access dispute by an independent party."<sup>133</sup> However, Jemena did note that a key difference between the dispute resolution provisions under the two regimes is the inclusion of pricing (and associated principles) within the scope of arbitration under Part 23 of the NGR. However, Jemena

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126 Submissions to the consultation paper: Jemena response, p. 1; NT Government, p. 6.

127 APGA submission to the consultation paper, p. 2.

128 Submissions to the consultation paper: Jemena response, p. 4; APGA, p. 3.

129 Jemena submission to the consultation paper: Houston Kemp report, p. 13.

130 Jemena submission to the consultation paper: Jemena response, p. 4.

131 NT Government submission to the consultation paper, p. 6.

132 Submissions to the consultation paper: ProtectNT, p. 2; Beyond Zero Emissions, p. 1; Arid Lands Environment Centre, p. 2.

133 Jemena submission to the consultation paper: Jemena response, p. 5.

considered that arbitration pricing principles are not required under the NGP access principles because the maximum tariffs and their trajectory are determined by the NGP access principles themselves.<sup>134</sup>

The Northern Territory Government similarly commented that the NGP access principles require that any dispute between an access seeker and Jemena arising out of or in connection with the access principles, including a failure to negotiate the terms of a contractual access agreement, must be submitted to arbitration under the Institute of Arbitrators and Mediators Australia Arbitration Rules, which are binding.<sup>135</sup>

### Information disclosure requirements

Some stakeholders highlighted that current arrangements for the NGP do not provide for the same level of information disclosure as the Part 23 regime for non-scheme pipelines.<sup>136</sup> For example, the Arid Lands Environment Centre considered that the current arrangements do not provide for an adequate level of information disclosure while Geralyn McCaron considered that measures for information disclosure are not as strong as under Part 23 of the NGR. Protect NT commented that the derogation exempts Jemena from having to comply with information disclosure requirements designed to create an informed and efficient market.<sup>137</sup> Several other stakeholders including Environment Council of Central Queensland, Environment Justice, Lock the Gate Alliance, Environment Centre NT and Original Power considered that if the derogation was removed, then Jemena would be required to publish pricing information under the law.<sup>138</sup>

However, APGA, Jemena and the Northern Territory Government considered that the NGP access principles will give rise to similar outcomes with respect to information asymmetry as the Part 23 regime for non-scheme pipelines.<sup>139</sup> The Northern Territory Government commented that:<sup>140</sup>

**Under the NGP Access Principles, the publication of financial information as required by the Part 23 Framework to enable access seekers to determine the reasonableness of price offers is made redundant by the establishment of competitively determined binding access prices.**

Similarly, Jemena noted that information disclosure under the Part 23 regime is valuable to shippers to the extent it assists them to effectively negotiate pipeline services on reasonable terms and conditions and at prices that reflect costs. Jemena considered that the "NGP access principles provide certainty that shippers can achieve these conditions".<sup>141</sup> Houston Kemp considered that the information provided under the NGP access principles appears to

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134 Jemena submission to the consultation paper: Jemena response, p. 5.

135 Northern Territory Government submission to the consultation paper, p. 6.

136 Submissions to the consultation paper: Lock the Gate Alliance, p. 2; Arid Lands Environment Centre, p. 2.

137 Protect NT submission to the consultation paper, p. 1.

138 Submissions to the consultation paper: Environment Council of Central Queensland, p. 1; Environment Justice, p. 1; Lock the Gate Alliance, p. 2; Environment Centre NT, p. 1; Original Power, p. 2.

139 Submissions to the consultation paper: APGA, p. 4; Northern Territory Government, p. 7; Jemena response, p. 7.

140 Northern Territory Government submission to the consultation paper, p. 7.

141 Jemena submission to the consultation paper: Jemena response, p. 7.

provide a sufficient basis for shippers to negotiate. It suggested that the additional information required under Part 23 of the NGR was proposed in the context of pipelines constructed substantially before the NGP to enable shippers to be able to negotiate a cost reflective charge.<sup>142</sup>

### Scope of services

The stakeholder submissions did not explicitly address the scope of services covered by the NGP access principles and the Part 23 regime for non-scheme pipelines.

## 3.3.3

### Draft rule determination assessment

#### Third party access

In the draft rule determination, the Commission concluded that the high level approach and the intent of the two processes is similar. Both the regimes have similar key features including:

- non-discriminatory access to pipeline services
- a requirement to negotiate in good faith
- process for seeking access
- process for offering access
- negotiations under the framework.

However, there are some differences in the details of the arrangements for seeking access to pipeline services under the NGP access principles and the Part 23 of the NGR. For example:

- User access guide: Part 23 of the NGR requires a service provider to develop, maintain and publish a user access guide for a non-scheme pipeline, to provide prospective users timely information about what they must do to make an access request and their rights and duties if there is an access dispute.<sup>143</sup> The NGP access principles do not require the publication of a user access guide, however some information required to be published under the guide is contained in the NGP access principles document.
- Process for access requests: Both regimes provide a process to be followed for requests for access to a non-scheme pipeline's services. The provisions under Part 23 give a greater level of prescription, cover a broader range of scenarios and have different time frames. The Part 23 regime also provides for a potential user to be able to make preliminary inquiries.
- Access offer: Both regimes require a service provider to make an offer in response to an access request or provide reasons why the requirements of the prospective user cannot be met. Part 23 provides clearer and more detailed requirements, and has different timing requirements to the NGP access principles.
- Access negotiations and negotiation information: Part 23 provides for a prospective user who has made an access request to be able to request negotiations under the Part 23

<sup>142</sup> Jemena submission to the consultation paper: Houston Kemp report, p. 21.

<sup>143</sup> GMRG, *Gas pipeline information disclosure and arbitration framework, initial gas rules explanatory note*, August 2017, p. 25.

regime. Part 23 does not require negotiations for access to be undertaken under Part 23, it acknowledges that commercial negotiations can occur and are only subject to Part 23 if elected by the prospective user.<sup>144</sup> Part 23 also requires parties to exchange information to inform negotiations. A prospective user is able to request access information which is expected to include more detailed cost information. Any party to the negotiations can also request from another party to provide access negotiation information that the other party is seeking to rely on in relation to a matter arising in the negotiations. If negotiations under Part 23 are carried out, then this provides a clear process that can result in the triggering of a dispute and arbitration under the regime can be sought. The NGP access principles also include a negotiation process as part of a dispute resolution process. However, the negotiation process under the NGP access principles do not require any specific for exchange of information. Nor is the negotiation process as specific as under Part 23. Nevertheless, the NGP access principles do provide that Jemena and a prospective user must negotiate in good faith and Jemena must use all reasonable endeavours to enter into an access agreement that satisfies the reasonable requirements of the prospective user.

Although there are differences in the processes and requirements in seeking access under the two regimes, they are both likely to place some constraint on the use of market power by a service provider during negotiations for access to a pipeline's services. The Part 23 regime provides a more comprehensive and prescriptive process for seeking access which serves as a mechanism to constrain the use of market power by service providers during access negotiations although it does not provide users with any upfront certainty as to the tariff. While the NGP access principles are less prescriptive in relation to a negotiation process, the principles do include set maximum tariffs and a tariff methodology, removing the need for users to negotiate those important aspects of access.

#### Dispute resolution mechanism

The NGP access principles provide for a dispute resolution process, which culminates in binding arbitration under the Institute of Arbitrators and Mediators Australia arbitration rules for any disputes which remain unresolved after the access process is followed. The following table provides a comparison of some features of the arbitration provisions under the NGP access principles and Part 23 of the NGR.

**Table 3.1: Arbitration provisions**

FEATURE	PART 23 FRAMEWORK	NGP ACCESS PRINCIPLES
Arbitration principles	Part 23 includes pricing principles and non pricing principles to guide the arbitrator's decision on the final access determination. The pricing principles require the price for access to pipelines services to reflect the	The NGP access principles do not outline any arbitration principles that need to be applied by an arbitrator in coming to a final determination. Instead, they set a

<sup>144</sup> GMRG, *Gas pipeline information disclosure and arbitration framework, initial gas rules explanatory note*, August 2017, p. 28.

FEATURE	PART 23 FRAMEWORK	NGP ACCESS PRINCIPLES
	cost of providing the service, including a commercial rate of return.	cap on tariffs and a pricing methodology for expansions.
Information used	The arbitration process is carried out on the basis of information exchanged between the parties during the negotiation stage. The parties do not have the right to introduce information on their own violation.	Under the IAMA rules, the parties are allowed to supplement their claim during the proceedings provided the arbitration tribunal considers it appropriate.
Time for decision	The arbitrator is required to determine the access dispute as quickly as possible and must make a final determination within 50 business days.	Under IAMA's rules the arbitration tribunal is required to use its best endeavours to deliver within 365 days.
Role of the AER	As the scheme administrator of the Part 23 regime, the AER is required to provide oversight and administration of the arbitration mechanism. Some of its duties include establishing a pool of arbitrators, referring access disputes to arbitration and others.	There is no AER involvement under the NGP access principles.
Costs of arbitration	The costs of arbitration are to be shared equally among the parties.	Under the IAMA rules, the costs of arbitration will be borne by the unsuccessful party.

There are several differences between the dispute resolution process contained in the NGP access principles and Part 23 of the NGR. The purpose of the arbitration mechanism under Part 23 is to provide a credible threat of intervention to constrain the exercise of market power by non-scheme pipeline service providers during commercial negotiations and to serve as a backstop or last resort for overcoming disputes that cannot be settled through negotiations.<sup>145</sup> According to the GMRG, for arbitration to pose a credible threat, the party seeking arbitration must have reasonable certainty about the costs of arbitration, the time taken to reach a decision and the principles to be applied in making the determination.<sup>146</sup>

The arbitration provisions in the NGP access principles do not provide the prescription regarding the arbitration process that is provided under Part 23 of the NGR. However, the NGP access principles do include maximum tariffs for firm services which are binding on Jemena. As a result, the NGP access principles also provide a constraint on the exercise of market power by a service provider, although through a different approach to that utilised by Part 23.

<sup>145</sup> GMRG, *Gas pipeline information disclosure and arbitration framework, initial gas rules explanatory note*, August 2017, p. 5.

<sup>146</sup> GMRG, *Gas pipeline information disclosure and arbitration framework, final design recommendation*, June 2017, p. 79.

Contrary to the proponents' assertion, the Commission does not consider that clause 2(f) of annexure 2 of the NGP access principles allows for Jemena to block arbitration. Under the NGP dispute resolution procedure, parties must try to first resolve the dispute using the dispute negotiation process in clause 2 before going to arbitration. The negotiation framework provides for escalating steps if the dispute remains unresolved. For example, first an authorised officer must try to resolve it under clause 2(c), failing that it is then referred to the CEO under clause 2(d) which is followed by mediation under clause 2(e). Clause 2(f) provides for a party that has complied with the negotiation process to be able to terminate the dispute resolution process by notice to the other party at any time after seven days of referring the matter to the CEO. It allows for termination regardless of whether the matter was resolved or not. If the matter was unresolved, then under clause 3 of the dispute resolution procedure each party is required to refer the unresolved dispute to arbitration.

#### Information disclosure requirements

In the draft rule determination, the Commission noted stakeholder concerns that the current arrangements for the NGP do not require Jemena to provide as extensive information as it would be required to do if Part 23 of the NGR applied to the NGP. Under Part 23, information under the following key categories is required to be published by the service provider of a non-scheme pipeline:

- service and access offer information
  - pipeline information
  - pipeline service information
  - service usage information
  - service availability information
- standing terms
- financial information
- weighted average price information

In comparison, the NGP access principles only require the publication of terms and conditions for access to firm services on Jemena's website. However, some information required under the service and access offer information subcategory specified in Part 23 (such as queuing arrangements) is included in the NGP access principles document. In addition, the NGP access principles include maximum tariffs for the firm services.

The Commission also noted that the NGP will soon be required to report certain information to AEMO for publication on the Bulletin Board in accordance with Part 18 of the NGR.<sup>147</sup> As part of the Commission's assessment for the Review into the scope of economic regulation applied to covered pipelines, the Commission found that there was significant overlap between the Bulletin Board reporting requirements and the capacity and usage information falling under the service and access offer information category.<sup>148</sup> It also found that the

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<sup>147</sup> AEMO, "Notice of NT application date", Bulletin Board notice, 3 January 2019.

<sup>148</sup> AEMC, *Review into the scope of economic regulation applied to covered pipelines*, final report, 3 July 2018, p. 171.

capacity and usage information publication requirements under the Bulletin Board were arguably more comprehensive than the Part 23 requirements.

Consequently, the Commission considered that the Bulletin Board reporting requirements combined with the information already published in the NGP access principles and the publication requirements under NGP access principles are likely to provide a set of useful service access information and standing terms information for users and prospective users. However, it noted these arrangements will not require the provision of financial and weighted average price information.

The Commission noted the rationale for the Part 23 information disclosure requirements for service providers was that the information provided would allow users and prospective users to make an informed decision about whether to seek access to a pipeline and to carry out a high level assessment of whether the service provider's standing offer is reasonable, having regard to financial and weighted average price information and methodology used to calculate a standing price.<sup>149</sup> This was considered relevant to all non-scheme pipelines, not only for newly constructed pipelines. This is reflected in the near-universal application of Part 23 of the NGR to non-scheme pipelines, subject to the specific exemptions provided.

In the draft rule determination, the Commission considered that current information disclosure requirements for the NGP resulting from the combination of the NGP access principles and the Bulletin Board requirements are likely to assist users and prospective users in making informed decision about whether to seek access to a pipeline. Financial and weighted average price information of the nature required under Part 23 of the NGR appears to be of lesser benefit for the NGP users and prospective users because the NGP's firm tariffs have been determined through a competitive tender process for the 15-year life of the access principles. As a result of these pre-determined tariffs, prospective users will not need to consider the reasonableness of a tariff offer in order to carry out access negotiations with Jemena during this period.

The Commission also noted that users and prospective users have not expressed concern in submissions regarding the level of the firm tariffs specified in the NGP access principles.

Accordingly, the Commission concluded in the draft rule determination that placing additional information provision requirements (such as those in Part 23 of the NGR) on Jemena in regard to the NGP would be likely to provide little benefit during the initial 15 years of the pipeline's life.

### **Scope of services covered**

The NGP access principles specifically govern access to firm forward haul and the nitrogen removal services of the NGP and not all services that may be provided by the NGP. Clause 1(a) of the NGP access principles state that the principles only apply where an access seeker requires access to firm services. The standard NGP gas transport agreement published by Jemena indicates that the NGP may also provide:<sup>150</sup>

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<sup>149</sup> GMRG, *Gas pipeline information disclosure and arbitration framework*, August 2017, p. 7.

<sup>150</sup> Jemena, Northern Gas Pipeline gas transportation agreement, p. 19.

- as-available forward haul transportation service
- firm back haul transportation service
- as-available back haul transportation service
- as-available park and lend service
- other services agreed between the service provider and shipper.

Clause 9 of the NGP access principles state that Jemena must provide as-available services on a non-discriminatory basis. However, if a prospective user only requires access to as-available services, it is not clear how the negotiation process will be governed by the NGP access principles. The NGP access principles specify that the tariff for as-available forward haul is the firm forward haul tariff multiplied by 1.3. However, no other non-firm tariffs are listed in annexure 1 of the NGP access principles and so these tariffs, and their trajectories, are uncertain.

In contrast, the Part 23 access regime is not limited to specific pipeline services: the requirements relate to all pipeline services including service provided by the means of a pipeline or an ancillary service. This means that as available and back haul services would be covered by the Part 23 regime. However, the NGP nitrogen removal service may not be covered by the Part 23 framework as it is not provided by the means of a pipeline and may not be considered as a service ancillary to the main services provided by a pipeline. As discussed above, the Commission understands that nitrogen removal service would be needed by potential users to ensure that gas sourced from the Northern Territory meets the required specifications of the *Petroleum and Gas (Production and Safety) Act 2004 (Qld)*.

While this is a significant difference in scope between the NGP access principles and the application of Part 23, the Commission understands that firm forward haul and nitrogen removal services are likely to be the key services that most users and prospective users of the NGP will seek for the foreseeable future. As a result, the scope of the NGP access principles, while limited in some respects, does appropriately cover the services that users and prospective users are expected to seek from Jemena over the initial period of the NGP's life.

### **3.3.4 Stakeholder views on the draft determination**

No stakeholders commented further on the issue of the non-price terms and conditions under the access principles.

### **3.3.5 Final rule determination assessment**

No further information has been raised in relation to this issue. The Commission is satisfied that its assessment made in the draft rule determination remains appropriate.

## **3.4 Current market conditions**

### **3.4.1 The proponent's views**

The rule change request noted there is currently a lack of demand for the NGP's services. The Northern Territory Government entity Power and Water Corporation is the foundation

shipper but has contracted only a third of the NGP's current capacity for a duration of 10 years. A second contract has been signed with Incitec Pivot to supply 32 TJ/day for the period of one year with an option to extend. The rule change request highlighted that the two contracts "fall far below the NGP's capacity".<sup>151</sup>

### 3.4.2

#### Stakeholder views on the request

Jemena and APGA highlighted that the NGP has been constructed even though the contracted capacity is at a lower level than usually expected for new pipelines.<sup>152</sup> Houston Kemp commented that unlike most new pipelines, a relatively low proportion of the pipeline capacity is contracted under long term arrangements.<sup>153</sup> According to Houston Kemp, the only contract certain to extend beyond 2021, is the agreement with Power and Water Corporation for firm forward haul of 31 TJ/day to Incitec Pivot Limited's Phosphate Hill facility, which has a term of 10 years. It noted two other contracts in place on the NGP:

- a contract with Incitec Pivot for firm forward haul of 32 TJ/day to Mt Isa (from which the gas will then be forwarded to its Gibson Island plant near Brisbane) until 31 December 2019 (with an option to extend)
- a third contract with Santos for firm forward haul of 8.3 TJ/day to end in December 2021.

Houston Kemp considered that "the demand for the remaining capacity is subject to considerable uncertainty".<sup>154</sup> It was highlighted that the tariffs reflected in the access principles were "based on assumptions that NGP would become fully contracted" and that a failure to achieve full contracting of the NGP capacity puts at risk cost recovery for Jemena.

In addition to the excess capacity currently on the NGP, Houston Kemp highlighted that the NGP currently faces material demand risks as usage of the NGP is linked to the development of the Northern Territory onshore shale gas reserves. Changes in government policy towards hydraulic fracking (which is required to bring shale gas to market) will therefore impact on the use of the NGP. According to Houston Kemp, the market served by the NGP on the east coast including Mt Isa and elsewhere is "already served by sources of gas from the east coast using the existing interconnected network of pipelines".<sup>155</sup> APGA also suggested that the NGP faced competition from other pipelines on the east coast of Australia.<sup>156</sup>

According to APGA, the possibility of monopoly behaviour by the NGP is "reduced due to the market context in which the pipeline is operating".<sup>157</sup> APGA noted that relative to other transmission pipelines, the NGP is a higher risk investment because only a third of the pipeline's capacity has been contracted under firm long term arrangements. Consequently, APGA considered that "rather than seeking to exercise monopolistic market power, the

<sup>151</sup> Rule change request, p. 5.

<sup>152</sup> Submissions to the consultation paper: Jemena response, p. 3; APGA, p. 3.

<sup>153</sup> Jemena submission to the consultation paper: Houston Kemp report, pp. 5-6.

<sup>154</sup> Jemena submission to the consultation paper: Houston Kemp report, p. 5.

<sup>155</sup> Jemena submission to the consultation paper: Houston Kemp report, p. 6

<sup>156</sup> APGA submission to the consultation paper, p. 3.

<sup>157</sup> APGA submission to the consultation paper, p.3.

commercial incentives of the NGP are quite the opposite — to offer competitive rates that support customers and encourage utilisation."<sup>158</sup>

### 3.4.3 Draft rule determination assessment

In the draft rule determination, the Commission acknowledged that only a small proportion of the NGP's capacity is currently contracted on a longer term basis and the NGP faces uncertain demand in the future due to the current uncertainties regarding the development of the Northern Territory gas industry. With a lower than desirable level of capacity under contract for Jemena and uncertainty of demand, the Commission considered that Jemena would not be likely to be in a position to exercise significant market power. Instead, it should be incentivised to offer tariffs that encourage greater utilisation of the NGP. As a result, the Commission considered that these current and expected market conditions are likely to reduce Jemena's ability to exercise market power in negotiating terms and conditions of access to NGP's services over the 15-year term of the derogation.

As suggested by stakeholders, the NGP may face some competition from the APA Group-owned Carpentaria Gas Pipeline to supply the Mt Isa region. However, the Commission does not have enough information to determine the level of competition that currently exists and whether it can provide for an effective constraint on the use of market power.

### 3.4.4 Stakeholder views on the draft rule determination

Some stakeholders expressed further views regarding the demand risks faced by the NGP.

EJA highlighted that publications from Jemena state that the NGP was sized to match the Northern Territory's surplus production without including any gas sourced from unconventional onshore gas reservoirs.<sup>159</sup>

The Energy Users Association of Australia recognised the risks taken by Jemena to build the NGP given "the uncertainty on the availability of gas supply from the Northern Territory at the time."<sup>160</sup>

According to the Northern Territory Department of Treasury and Finance (DTF), the current market conditions in which a majority of the NGP's capacity is uncontracted long term act as a further constraint on Jemena's market power in the short to medium term. DTF considered that in the case where market conditions change in the future, the project development agreement, NGP access principles and threat of coverage would be sufficient to constraint Jemena's market power.<sup>161</sup>

### 3.4.5 Final rule determination assessment

The NGP is not fully contracted over the longer term. In fact, only a small proportion of the NGP's current capacity is contracted for 10 years. As a result, Jemena does face some

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<sup>158</sup> APGA submission to the consultation paper, p. 3.

<sup>159</sup> EJA submission to the draft determination, p. 10.

<sup>160</sup> EUAA submission to the draft determination, p. 1.

<sup>161</sup> Northern Territory Department of Treasury and Finance submission to the draft determination, p. 2.

demand risk during the 15-year period of the derogation as well as risk of whether it will be able to increase the capacity of the pipeline in the future.

Any pipeline facing such market conditions is likely to be incentivised to seek out transportation contracts to improve the pipeline's revenue stream rather than use market power to withhold capacity and not earn revenue from services it could easily provide.

The Commission's conclusion is consistent with that expressed in its draft rule determination. That is, the current and expected market conditions for the NGP are likely to reduce Jemena's ability to exercise market power in negotiating with prospective users over terms and conditions of access to the NGP's services.

## 3.5

### Coverage of pipelines

#### 3.5.1

##### Draft rule determination assessment

In the draft rule determination, the Commission noted that one of the key concerns expressed by the proponents in regard to the derogation from Part 23 that applies to the NGP is that the NGP has become "an unregulated monopoly pipeline".<sup>162</sup> The proponents and other stakeholders have also noted the NGP access principles and the derogation result in no regulatory oversight over the NGP by the AER.

The Commission acknowledges that under the derogation and the NGP access principles, there is no economic regulatory oversight of the NGP by the AER. However, the Commission explained that, as noted in Table 3.1 of the draft rule determination, the application of Part 23 to the NGP would result in only limited "regulatory oversight" by the AER in its role as scheme administrator of Part 23 rather than a decision maker with regard to tariffs or non-tariff terms and conditions.<sup>163</sup>

The Commission noted that greater regulatory oversight is applied to covered pipelines, in particular pipelines subject to full regulation. Service providers of full regulation pipelines are required to periodically submit a proposed access arrangement for approval by the regulator. A full access arrangement sets out the tariff and non-tariff terms of conditions of access to the pipeline. Full regulation pipelines are also subject to an arbitration regime to resolve disputes arising in negotiations for access to the pipeline.

As specified in clauses 36 and 37 of the NGP access principles and the derogation, any party can apply to the NCC seeking that the NGP be classified as a covered pipeline and be subject to either light or full regulation. If the NGP is determined to be a covered pipeline, then it would be subject to economic regulation under Parts 8 to 12 of the NGR. In addition, as specified by the NGP access principles, if coverage were applied to the NGP then the access principles would no longer apply. The threat of coverage of a pipeline was designed to place a constraint on the use of market power by service providers.

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<sup>162</sup> Rule change request, p. 2.

<sup>163</sup> Table 3.1 of the draft rule determination is replicated as Table 3.2 of this final rule determination. See also Appendix C of this final rule determination.

### 3.5.2 Stakeholder views on the draft rule determination

Following the draft rule determination, further comments on the regulatory oversight applied to the NGP under the access principles in comparison to Part 23 of the NGR were made.

Specifically, Equity Generation Lawyers stated:<sup>164</sup>

The effect of the Derogation is that it locks in the tariffs in the Access Principles. In effect, it prevents customers from negotiating better prices for transportation, as can occur under the Part 23 framework, with oversight by the Australian Energy Regulator (AER), independent arbitrators, and without the pipeline owner having the final decision.

### 3.5.3 Final rule determination assessment

The Commission considers that some stakeholders may misunderstand the differences between the regulatory regimes that can apply to gas pipelines.

It is important to note that all the existing forms of regulation, including that established by the Northern Territory Government with the NGP access principles, are negotiate-arbitrate regimes. Under a negotiate-arbitrate regime, prospective users are able to negotiate different tariffs, terms and conditions for pipeline services compared to those published. To assist such negotiations, each of the regimes requires certain information be published and provides a negotiation and arbitration framework.<sup>165</sup>

Under Part 23, the AER does not have any role in determining or overseeing the setting of tariffs or non-tariff terms for access to pipelines that are subject to Part 23. Only covered pipelines that are subject to full regulation under Parts 8-12 of the NGR have regulator-approved tariffs for reference services.

In essence, all prospective users have the opportunity to negotiate conditions that better suit their needs under each regime. However, it is only the NGP access principles and full regulation that provide enforceable tariffs to users. Accordingly, removal of the derogation (and consequently application of Part 23 of the NGR to the NGP) would not result in a greater role for the regulator in overseeing or setting tariffs.

Overall, the Commission is satisfied that its assessment regarding the operation of the regulatory regimes made in the draft rule determination remains appropriate.

## 3.6 Conclusion

The Commission's conclusion remains that the key terms and conditions of access to the NGP's services including tariffs have been determined through a competitive tender process carried out by the Northern Territory Government. These key terms and conditions are included in the NGP access principles which are legally binding on Jemena through the project development agreement, with significant consequences for non-compliance.

<sup>164</sup> Equity Generation Lawyers submission to the hearing, p. 3.

<sup>165</sup> Only covered pipelines have an arbitration framework where the regulator is the arbitrator. Under Part 23, arbitration is carried out by a commercial arbitrator.

In general, the Commission considers that effective competition to develop and build a pipeline is likely to limit the market power of the service provider for a period immediately following commissioning. In the case of the NGP, this was built following a competitive tender process and was commissioned earlier this year. It is therefore likely that the outcomes of that tender process — specifically the NGP access principles and the firm tariffs — reflect the competitive tensions that would have arisen during the tendering process.

The Commission considers that the combination of a competitive tender process setting key tariff and non-tariff terms and conditions of access to the NGP with the contractual obligations placed on Jemena to apply the access principles (under the project development agreement) limit the ability of Jemena to exercise significant market power during the initial years of the NGP's life.

In addition, further assessment of the NGP's tariffs carried out by the Commission suggests that the tariffs for the NGP as set in the access principles do not provide evidence of an exercise of market power by Jemena as suggested by some stakeholders.

Limitations on Jemena's ability to exercise market power over users and prospective users, particularly in negotiations for access to the pipeline, are also likely to arise from:

- the legally binding NGP access principles that set out the key terms and conditions of access to the NGP
- the fact that currently only a third of the NGP's capacity is contracted on a longer term basis and the NGP faces the risk of future demand uncertainty after this 10-year contract expires
- the threat of coverage of the NGP, with the potential for heavier regulation to be applied, remains in place.

Given these factors, the Commission considers that Jemena's ability to exercise market power over users and prospective users of the NGP, particularly during access negotiations, is likely to be constrained for the immediate period. The Commission also notes that no users or potential users of the NGP have expressed concerns through submissions into the rule change process regarding Jemena's ability to exercise market power during negotiations of access to NGP's services.

While there are several differences in the features and operation of the Part 23 regime for non-scheme pipelines and the NGP access principles, the Commission considers that both are intended to constrain the use of market power by service providers. Relevantly, the NGP access principles are enforced through a contract. In light of the market conditions the NGP currently faces and the development of the NGP access principles through a competitive tender process, the Commission considers that these work to limit the exercise of market power by Jemena by specifying maximum tariffs for NGP's key services, how tariffs are impacted by augmentations to the pipeline and a dispute resolution process that results in binding arbitration.

On balance, having regard to the particular circumstances of the NGP, the Commission has concluded that applying Part 23 to the NGP in addition to the existing NGP access principles provides users and prospective users with little benefit during the term of the derogation and

is not likely to contribute to the achievement of the NGO. It is satisfied that any ability to exercise market power by Jemena is sufficiently constrained by the NGP access principles put in place by the Northern Territory Government.

## 4 EXPECTED OUTCOMES OF REVOKING THE DEROGATION

This chapter provides an assessment of the likely outcomes of the revocation of the derogation applicable to the NGP.

### 4.1 Proponents' views

The proponents claimed that the revocation of the NGP's derogation would provide several benefits including preventing the NGP from operating as unregulated monopoly, reduced complexity of the regulatory regime and increased certainty, efficient investment in gas pipeline services and oversight of the future prices and augmentations by the AER.

According to the proponents, revoking the derogation would prevent Jemena from engaging in "unchecked and unreasonable monopoly pricing" and thereby safeguard the gas market from the negative impacts of monopoly pricing, such as those highlighted by the ACCC's inquiry into the east coast gas market.<sup>166</sup> The reduction of Jemena's monopoly pricing power is expected to have positive impacts for the retailers and consumers of the gas transported through the NGP or any expansion or extension of the NGP.<sup>167</sup> The proponents expected that as a result of the rule change, tariffs under dispute would be set such that pipeline users and gas consumers would not be disadvantaged.

The rule change request and the proponents' submission to the consultation paper suggested that revoking the derogation would lead to reduction in complexity of the gas regulatory framework. They advocated that the removal of the current derogation would place the NGP on a more level playing field with other pipelines and ensure that it is subject to the same rules as other pipelines in Australia.<sup>168</sup> The proponents also suggested revocation of the derogation would provide certainty to the NGP and other market participants through consistency of framework.<sup>169</sup>

In addition, the proponents claimed that the revocation of the derogation would go towards ensuring an efficient allocation of capital for future expansions or extensions of the NGP.<sup>170</sup> The proponents expect the rule change to remove what they consider to be a perverse incentive to expand or extend the NGP which exists under the current derogation.

The removal of the derogation was also claimed to ensure that future pricing for access to the NGP, and any extension or expansions is overseen by the AER.<sup>171</sup>

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166 Rule change request, p. 9.

167 Rule change request, pp. 8-9.

168 Rule change request, p. 2.

169 EJA and IEEFA submission to the consultation paper, p. 6.

170 Rule change request, p. 2.

171 Rule change request, p. 2.

## 4.2 Stakeholder views on the request

### 4.2.1 Monopoly pricing

Some stakeholder, including ProtectNT and the Arid Lands Environment Centre, agreed with the proponents that revoking the derogation would prevent Jemena from monopoly pricing.<sup>172</sup> Similarly, the Environment Council of Central Queensland and the Environment Centre NT considered that revocation of the derogation would prevent overcharging by Jemena and save the consumers over \$2.6 billion.<sup>173</sup>

Jemena considered the proponents' initial assertion that the derogation leads to the NGP becoming an unregulated monopoly pipeline was incorrect because "an unregulated monopoly is conceptually able to increase tariffs without any constraints".<sup>174</sup> Jemena noted that it cannot charge users firm tariffs that exceed the rates published in the NGP access principles.<sup>175</sup>

Similarly, the Northern Territory Government highlighted that the access principles legally bind Jemena to providing access seekers with access to the NGP's firm services and nitrogen removal services at tariffs no higher than those set out in the NGP access principles, and that these tariffs had been set as a result of a competitive tender process.<sup>176</sup>

### 4.2.2 Regulatory complexity

Several stakeholders claimed that revocation of the derogation would lead to a reduction in the complexity of the overall regulatory regime for non-scheme pipelines. This is because removal of the derogation would result in the application of the same rules across the board and put the NGP on a level playing field.<sup>177</sup> The Arid Lands Environment Centre (ALEC) considered that the revocation of the derogation would not only reduce complexity of the regulatory arrangements but would also "improve public confidence in the enforceability and integrity of gas transmission". ALEC's view that Jemena is able to amend the NGP access principles, led it to expect that the removal of the derogation would also reduce uncertainty in the market as it would prevent regulatory volatility arising out of Jemena amending the NGP access principles to suit its circumstances.<sup>178</sup>

In contrast, Jemena, the Northern Territory Government and AGPA raised concerns that the removal of the derogation would lead to overlapping regulatory arrangements for the NGP resulting in increased regulatory complexity and uncertainty surrounding access to the NGP. Jemena noted that if the derogation was revoked, the NGP access principles would continue to apply while the Part 23 regime would also be available to potential access seekers.<sup>179</sup> It claimed that the Part 23 framework significantly overlaps with the NGP access principles.

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172 ProtectNT submission to the consultation paper, p. 2.

173 Submissions to the consultation paper: Environment Council of Central Queensland, p. 2; Environment Centre NT, p. 2.

174 Jemena submission to the consultation paper: Jemena response, p. 9.

175 Jemena submission to the consultation paper: Jemena response, p. 9.

176 Northern Territory Government submission to the consultation paper, p. 2.

177 Submissions to the consultation paper: Environment Justice, p. 1; Environment Council of Central Queensland, p. 2; Lock the Gate Alliance, p. 1; Environment Centre NT, p. 1; Original Power, p. 2.

178 ALEC submission to the consultation paper, p. 3.

179 Jemena submission to the consultation paper: Jemena response, p. 5.

Jemena considered that this would give rise to substantial additional complexity about how to resolve potentially conflicting requirements of the two regimes. Concern regarding specific aspects of dispute resolution were identified:<sup>180</sup>

- differences in the required procedures for seeking and granting access
- difference in the basis for pricing, with the NGP access principles relying on formulas set out in the access principles while Part 23 relies on pricing principles
- separate avenues for seeking arbitration.

Similarly, the Northern Territory Government highlighted that application of the Part 23 framework in addition to the NGP access principles amounts to regulatory duplication which would lead to confusion among prospective NGP users and increased regulatory uncertainty.<sup>181</sup> APGA expressed similar views, noting that the application of both regimes would result in additional administrative complexity and would be likely to introduce a significant amount of conflict and confusion arising from the overlapping obligation under the two arrangements. As an example, APGA commented that it is unclear what would happen if an arbitration sought under the Part 23 framework resulted in a different price to that specified in the NGP access principles.<sup>182</sup>

Jemena and the Northern Territory Government raised concerns the application of the Part 23 framework to the NGP would lead to additional compliance costs. Houston Kemp highlighted that subjecting the NGP to the Part 23 framework could be expected to give rise to additional compliance costs and overlapping regulatory obligations. According to the Northern Territory Government, the revocation of the derogation may lead to an additional administrative burden for both users and Jemena, including information disclosure costs for the service provider.<sup>183</sup>

#### 4.2.3

#### Forum shopping

Jemena and the Northern Territory Government argued that the revocation of the derogation could lead to "forum shopping" by the users and prospective users of the NGP. Jemena commented that although both sets of arrangements are likely to provide similar pricing outcomes in the short term, over the longer term the arrangements are unlikely to have the same pricing outcomes as market conditions may change. According to Jemena, the application of both the regimes to the NGP "opens the prospect that access seekers may be able to engage in 'forum shopping' by being able to select the access regime that gives them the most favourable terms and conditions at any point in time."<sup>184</sup> As users would be able to switch between the two arrangements where it lowered their costs, it would reduce the prospect of recovering of the reasonable cost of the NGP investment.<sup>185</sup> Jemena considered that it was generally inappropriate to apply "two schemes of regulation to the NGP with the

<sup>180</sup> Jemena submission to the consultation paper: Houston Kemp report, p. 23.

<sup>181</sup> Northern Territory Government submission to the consultation paper, p. 6.

<sup>182</sup> APGA submission to the consultation paper, p. 4.

<sup>183</sup> Northern Territory Government submission to the consultation paper, p. 7.

<sup>184</sup> Jemena submission to the consultation paper: Jemena response, p. 3.

<sup>185</sup> Jemena submission to the consultation paper: Jemena response, p. 6.

effect that a Part 23 price determination can only be equal to or less than the price cap set in the access principles".<sup>186</sup>

The Northern Territory Government also suggested that revoking the derogation could lead to frivolous or speculative arbitrations under the Part 23 regime which would result in additional costs for users and service providers.<sup>187</sup>

#### 4.2.4 Efficient investment

Several stakeholders suggested that the regulatory arrangements applicable to the NGP under the access principles did not promote efficient investment. They considered that the current arrangements allow Jemena to overcharge for NGP's services to enable the construction of a new pipeline to expand the NGP.<sup>188</sup>

The Northern Territory Government, EUAA, APGA and Jemena raised concerns that revocation of the derogation would not provide for future efficient investment in gas pipelines generally and the NGP in particular as it would lead to increased sovereign and regulatory risk, and a reduction in the credibility of the regulatory framework. APGA claimed that it would make investment in greenfield pipelines riskier, while Jemena similarly expected the revocation of the derogation to make new risky investments in greenfield pipelines less attractive. According to APGA and Jemena, this would occur because revoking the derogation soon after it was granted removes a mechanism for overcoming the effect of regulatory risks and incentivising investments in new greenfield pipelines and leads to a reduced credibility of the overall regulatory framework.<sup>189</sup>

Jemena claimed that the derogation for the NGP is consistent with an established practice of providing incentives to new pipelines in the form of a holiday period from regulation in order to promote efficient investment in natural gas services and that this practice has previously been held to contribute to the NGO.<sup>190</sup> Jemena implied that obligations under the Part 23 framework were onerous by noting the AEMC's findings from the Review into scope of economic regulation applied to covered pipelines interim report that obligations under Part 23 are arguably heavier-handed than those that apply to lightly regulated pipelines. Jemena raised concerns that removal of the derogation would revoke the regulatory holiday that it provides to the NGP and remove a mechanism that would be able to provide similar incentives invest in other greenfields pipelines in the future. APGA and Jemena considered that removal of the derogation only one year into the derogation agreement would affect the credibility of the NGR regulatory framework.<sup>191</sup> The Northern Territory Government also commented that it was important to preserve the commercial incentives underpinning the NGP to ensure certainty for future investment in the expansion of the NGP.<sup>192</sup>

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186 Jemena submission to the consultation paper: Jemena response, p. 5.

187 NT Government submission to the consultation paper, p. 7.

188 Submissions to the consultation paper: Original Power, p. 2; Lock the Gate Alliance, p. 2; Environment Centre NT, p. 1; Environment Justice, p. 1; Environment Council of Central Queensland, p. 1.

189 Submissions to the consultation paper: Jemena response, p. 5; APGA, p. 1.

190 Jemena submission to the consultation paper: Jemena response, p. 5.

191 Submissions to the consultation paper: APGA, p. 4; Houston Kemp report, p. 22.

192 Northern Territory Government submission to the consultation paper, p. 5.

Similarly, the EUAA stated that it was generally not in favour of "retrospective application of new rules to a recently committed project due to the potential of sovereign risk".<sup>193</sup>

## 4.3 Draft rule determination assessment

### 4.3.1 Monopoly pricing

In the draft rule determination, the Commission noted the concerns expressed by the proponents and a number of stakeholders that Jemena will be able to monopoly price NGP services, which appear to stem from a view that the NGP will operate as an "unregulated monopoly" and that Jemena can change the tariffs under the NGP access principles at its discretion.<sup>194</sup>

As discussed in Chapter 3, the Commission concluded in the draft rule determination that the NGP access principles do not provide Jemena the ability to charge tariffs for the NGP's firm forward haul and nitrogen removal services that are higher than those prescribed in the NGP access principles. Nor does Jemena have discretion to change tariffs at will. Accordingly, Jemena's ability to exercise monopoly pricing for the 15-year term of the access principles and derogation is constrained. For expansions of capacity up to 300 TJ/day, the rolled in tariffs formula in annexure 1 of the access principles can lead to a reduction in tariffs.

In this context, the derogation does not enable Jemena to act as an unregulated monopoly. These access principles apply to Jemena with or without the derogation from Part 23 of the NGR. As a result, removal of the derogation as proposed would be likely to have only a limited impact on NGP tariff setting. It would open the possibility of the Part 23 regime impacting on the tariffs set for non-firm services that may be available on the NGP. However, for the initial years of the NGP's life, users and prospective users are much more likely to seek the firm services identified in the access principles rather than any non-firm services.

### 4.3.2 Regulatory complexity

The revocation of the derogation as proposed would lead to the NGP being subject to the Part 23 framework. This would result in the Part 23 regime consistently applying to all pipelines in Australia that are not covered pipelines or exempt under the Part 23 framework itself, in line with the intent of the Part 23 regime.

In the draft rule determination, the Commission noted that from one perspective, this could be seen as reducing the overall complexity of the NGR's regulatory arrangements for gas pipelines in Australia. Users and prospective users of non-scheme pipelines would be able to seek access under the same framework, potentially resulting in reduced transaction costs for seeking access for users that are familiar with Part 23. The application of Part 23 to the NGP would also result in greater consistency of availability of information for gas pipeline services such as pipelines' financial information.

However, the Commission also commented that revoking the derogation would lead to the NGP being subject to both the Part 23 regime for non-scheme pipelines and the NGP access

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<sup>193</sup> EUAA, submission to the consultation paper, p. 1.

<sup>194</sup> Northern Gas Pipeline access principles, p. 5.

principles. There are no provisions in the project development agreement for the NGP access principles to cease to apply if the NGP became subject to the Part 23 framework, primarily because the Part 23 was introduced after the project development agreement was signed.<sup>195</sup> As a result of two regimes applying concurrently to the NGP, there would be two different avenues for users and prospective users to select how to seek access to the NGP's services and resolve disputes.

In the draft rule determination, the Commission commented that this scenario would lead to an increase in the complexity of arrangements for seeking access to the NGP. Application of both arrangements may lead to uncertainty and confusion among prospective users and Jemena regarding the outcomes for obligations arising out of application of both regimes. It may also lead to users having to carry out assessments to determine the likely outcomes for terms and conditions of access under either of the regimes. For example, a prospective user may have to assess whether it can secure better terms and conditions under the access principles that provide limits on nitrogen removal and firm forward haul tariffs than under the Part 23 framework which governs all pipeline services (not just firm services) but may not cover the nitrogen removal services.<sup>196</sup>

In addition to complexity, the application of Part 23 to the NGP would be likely to involve additional compliance costs. However, the additional regulatory compliance costs including those associated with further information disclosure are not likely to be significant. Jemena has the benefit of being familiar with the compliance requirements of Part 23 as the regime already applies to other Jemena-owned pipelines.

In the draft rule determination, the Commission suggested that if the derogation for the NGP was revoked, it may be possible that the parties to the project development agreement could seek to amend it so that there was no difference between the NGP access principles and the requirements of Part 23 of the NGR. Alternatively, the parties could amend the agreement such that the NGP access principles no longer applied to the NGP. Under this scenario, there would be no pre-set limits on tariffs of the NGP's firm services. This could result in tariffs for the NGP's services that are higher than those prescribed in the NGP access principles. The possibility of the NGP access principles ceasing to apply may add further uncertainty surrounding access to the NGP's services.

The Commission noted that it was not aware of any conflicting obligations arising out of application of the both arrangements even though there are some differences in the requirements. In relation to the APGA example of a Part 23 arbitration process resulting in different tariffs than those set out in the access principles, the Commission acknowledged that this scenario may lead to uncertain outcomes. If the resultant tariff is lower than that prescribed in the NGP access principles, then Jemena would not be in breach of the principles. However, if the tariff determined under Part 23 was higher, then the prospective

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<sup>195</sup> In contrast, the NGP access principles and the project development agreement do acknowledge the potential for the NGP to become a covered pipeline at any time.

<sup>196</sup> The Part 23 regime is unlikely to apply to nitrogen removal services that can be provided by the NGP affiliated nitrogen removal skid. This is because Part 23 only applies to "pipeline services" which are defined in the NGL as services provided by means of a pipeline or services ancillary to the provision of a service provided by means of a pipeline.

user may have the choice of not taking that higher tariff and could elect to accept the tariff set under the NGP access principles.

However, given that the NGP access principles pre-date the commencement of Part 23, it is evident that both regulatory regimes were not designed to work together. As a result, concurrent application would create unintended adverse outcomes such as regulatory complexity and confusion. As discussed further below, forum shopping by users and prospective user may also arise. There may also be other unintended adverse outcomes resulting from the concurrent application of both the arrangements.

### 4.3.3

#### Forum shopping

In its draft rule determination, the Commission observed that as the revocation of the derogation will lead to both Part 23 and the NGP access principles applying to the NGP, a prospective user would be able to choose either regime to seek access to the NGP. The tariff outcomes under both the regimes could differ over the lifetime of the derogation and a prospective user would have the option of choosing the regime that provides it with the more preferable outcome at that point in time. The ability to select regulatory regimes in this manner has been referred to as "forum shopping". Specifically, a prospective user would be able to use the Part 23 arbitration provisions to try to secure a lower tariff. If this is not successful and the arbitration results in a higher tariff then the prospective user may be able to opt for the tariffs under the NGP access principles. The Commission acknowledged in the draft rule determination that this outcome is not certain as the final access determination under Part 23 is binding on both parties unless access is not sought. As such, the application of both regimes is likely to result in an outcome for the NGP where its tariff can only be equal to or less than the tariff set in the access principles.

The Commission considered that as the terms and conditions of access, including tariffs, prescribed in the NGP access principles are an outcome of a competitive tender process, then forum shopping is unlikely to promote the NGO. In this case, forum shopping is likely to be an unintended adverse outcome of overlapping arrangements with similar objectives. Nevertheless, the Commission did not consider there to be a high likelihood of frivolous or speculative arbitrations arising from forum shopping because arbitration processes can involve high costs. However, there is a risk that it could lead to unnecessary and inefficient costs for both potential users and Jemena if a user triggers a Part 23 arbitration process that result in a higher price than under the NGP access principles.

The Commission acknowledged that in some instances, providing choice for parties within a regulatory framework has a purpose of empowering parties to select arrangements that best suit their needs. However, in this case, forum shopping is an unintended adverse outcome of overlapping regimes with similar objectives that were designed under different circumstances.

On balance, the Commission considered that the removal of the NGP's derogation would result in the concurrent application of two frameworks to the NGP and permit forum shopping to occur.

#### 4.3.4 Efficient investment

The draft rule determination noted that stakeholders provided varying views on the impact of the proposed rule on future investment in the NGP and pipelines generally.

Further investment by Jemena to expand or extend the NGP has been anticipated in the NGP access principles. It provides a methodology to determine the expansion tariff and the impact of the expansion on the original pipeline.<sup>197</sup> This methodology applies to the NGP as expanded up to a total capacity of 300 TJ/day and an extension up to KP622 (the end point of the pipeline near Mt Isa).

The derogation from Part 23 of the NGR was sought by the Northern Territory Government in the context of uncertainty regarding merits of applying Part 23 to the NGP at the time the Part 23 regime was about to come into effect. The derogation was not sought in the context of providing incentives for investment in the future.<sup>198</sup> Notably, the Northern Territory Government did not seek to provide relief from all economic regulation; the derogation only applies to Part 23 not regulation under Parts 8 to 12 of the NGR. As a result, regulatory risk surrounding coverage still applies to the NGP.

The Commission's view in the draft rule determination was that the removal of the derogation soon after it has been introduced into the NGR is unlikely to have a significant impact on future investment decisions regarding the NGP as other considerations such as gas production in the Northern Territory and developments in the gas market, will have a more significant business impact.

In relation to investment in pipelines generally, the Commission did not consider the NGP derogation from Part 23, or its possible removal, to be likely to have a material impact on future efficient investment in the pipeline sector. In response to Jemena's claim that removal of the derogation would be inconsistent "with an established practice of providing incentives to new pipelines",<sup>199</sup> the Commission observed in the draft rule determination that revocation would not remove a mechanism for overcoming the effect of regulatory risks and incentivising investments because a recognised mechanism to incentivise greenfield investment through regulatory relief from the Part 23 framework does not exist under the NGR. The exclusion of the NGP from the Part 23 regime through the NGR itself is an anomaly, reflecting the timing of the Northern Territory Government tender process compared to the development of the Part 23 regime.

For investment in new pipelines, the regulatory context is now that the Part 23 framework applies to all pipelines that are not covered pipelines. This includes those that have obtained a 15-year no coverage determination from the NCC, unless they meet the specific exemption criteria set out in Part 23 itself.

The alternative to the default application of Part 23 of the NGR is for the pipeline to be a covered pipeline. The options for covered pipelines are:

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<sup>197</sup> NGP access principles, pp. 5-6, annexure 1. While extensions and connections to the NGP are acknowledged, the tariff implications are not specified in relation to extensions.

<sup>198</sup> Northern Territory Government submission to the consultation paper, p. 4.

<sup>199</sup> Jemena submission to the consultation paper: Jemena response, p. 5.

- The proponent of a pipeline, such as a jurisdictional or local government, employs the competitive tender process set out in the NGR in seeking potential service providers to build and operate a pipeline. The tender process itself is assessed against certain NGR criteria by the regulator. This route results in the pipeline becoming a covered pipeline (and so Part 23 will not apply) with a full access arrangement of which parts are not determined by the regulator but are instead determined by the outcomes of the competitive tender process itself.
- The service provider voluntarily submits a full access arrangement to the regulator. This results in the pipeline becoming a covered pipeline (and so Part 23 will not apply) for the duration of that access arrangement. In this scenario, all aspects of the proposed full access arrangement would be subject to regulatory approval.
- The service provider, or any other party, applies to the NCC for coverage of the pipeline and a determination on whether full or light regulation should apply to that pipeline.

Of these, the NGR competitive tender process is most similar to the circumstances of the NGP and would be a more preferable route to managing what form of regulation would apply to a new pipeline compared to making a specific derogation from Part 23 in the NGR.

It was suggested by some stakeholders that an avenue for exempting a pipeline from Part 23 through a derogation like that which applies to the NGP is desirable. This argument implies that Part 23 has a dampening effect on investment in pipelines which should be avoided. The Commission noted that while significant pipeline investment tends to be lumpy, there have been some investment decisions made, suggesting that Part 23 has not had a dampening effect on investment in pipelines generally. These include:

- APA Group's Reedy Creek Wallumbilla Pipeline (commissioned in June 2018)<sup>200</sup>
- APA Group and AGL agree to build and develop the Crib Point Pakenham Pipeline in connection with AGL's proposed floating LNG facility<sup>201</sup>
- Jemena to build, own and operate the Atlas Gas Processing Plant and Pipeline for Senex, connecting the Atlas gas field to the Darling Downs Pipeline<sup>202</sup>
- Jemena to work with Galilee Energy on developing the Glenaras Gas Project and a pipeline to connect the field to east coast market.<sup>203</sup>
- Environmental approval for the construction of the Pluto North West Shelf Interconnector by DDG Operations.<sup>204</sup>

200 "APA opens Reedy Creek Wallumbilla Pipeline", *The Pipeliner*, 27 June 2018, <https://www.pipeliner.com.au/2018/06/27/apa-opens-reedy-creek-wallumbilla-pipeline/>

201 "APA to develop Crib Point pipeline", *The Pipeliner*, 12 June 2018, <https://www.pipeliner.com.au/2018/06/12/apa-to-develop-crib-point-pipeline/>

202 "Jemena and Senex partner to fast-track new gas supply to market", Jemena news release, 2018. <https://jemena.com.au/about/newsroom/media-release/2018/jemena-and-senex-partner-to-fast-track-new-gas-supply-to-market/>

203 "Jemena fast-tracks plans to connect Galilee Basin to the east-coast gas market" Jemena new release, 2017. <https://jemena.com.au/about/newsroom/media-release/2017/jemena-fast-tracks-plans-to-connect-galilee-basin-to-east-coast-gas-market/>

204 "WA EPA approves Burrup pipeline", *The Pipeliner*, 12 June 2019, <https://www.pipeliner.com.au/2019/06/12/wa-epa-approves-burrup-pipeline/>

## 4.4 Stakeholder views on the draft rule determination

This section outlines the feedback received regarding issues of monopoly pricing, regulatory complexity, forum shopping and efficient investment after the draft rule determination.

### 4.4.1 Monopoly pricing

Submissions received after the draft rule determination did not elaborate on the concerns already expressed regarding the potential for monopoly pricing to occur on NGP services. However, Equity Generation Lawyers did reiterate some concerns previously raised.<sup>205</sup>

### 4.4.2 Regulatory complexity and forum shopping

Some stakeholders raised concerns that the application of the derogation beyond the current capacity led to the increased complexity of seeking access to an expanded pipeline and opportunities for Jemena forum shop.

EJA raised concerns that the draft rule determination ignored the “complexity of arrangements for seeking access to the proposed 700 TJ/day new parallel pipeline to the NGP.”<sup>206</sup> In a similar vein, The Australia Institute suggested that “It would also seem that complexity would be reduced, rather than increased, by removing a derogation where the pipeline has not yet even been built.”<sup>207</sup>

According to EJA, as the derogation applied to “some of the proposed expansion volume, not all” it meant that Jemena is “free to determine whether or not it applies the Access Principles to certain customer of any 700 TJ expansion of extension”. EJA further claimed that the derogation “leads to two regimes applying concurrently to a parallel pipe, and therefore there are two different avenues for Jemena, and prospective users, to select how to seek access to the expanded NGP’s services and resolve disputes” and that this may “allow Jemena to forum shop to resolve access disputes over its new pipeline and arbitrarily discriminate against its customers.”<sup>208</sup>

EJA suggested that if the derogation should apply at all it “should only apply to the NGP that was constructed, and not any new pipeline.”<sup>209</sup>

The Northern Territory Department of Treasury and Finance commented that in the event the derogation for the NGP was removed, the revocation of the NGP access principles would not be a viable option to overcome the regulatory duplication.<sup>210</sup>

### 4.4.3 Efficient investment

The Commission has received varying views on the impact that the derogation (or its revocation) may have on future investment in the NGP and the broader pipeline sector.

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205 Equity Generation Lawyers submission to the hearing, p. 3.

206 EJA submission to the draft determination, p. 6.

207 The Australia Institute submission to the hearing, p. 2

208 EJA submission to the draft determination, p. 6.

209 EJA submission to the draft determination, p. 7.

210 Northern Territory Department of Treasury and Finance submission to the draft determination, p. 2; Northern Territory Government statement at pre-final determination hearing, p. 16.

First, The Australia Institute reflected comments made previously in this process that the regulatory arrangements for the NGP would result in inefficient investment in the future. The Australia Institute opined that the derogation would allow Jemena to “exploit its market position in further extending its pipeline capacity under the derogation”. It also suggested that excessive transport charges by Jemena for the NGP could subsidise otherwise uncommercial gas production in the Northern Territory.<sup>211</sup>

In contrast, APGA raised concerns that the revocation of the derogation would not support future investment in gas pipelines. It noted that “changing the NGR as a result of this rule change proposal would damage the environment for future investment, which may well be the proponents intention”.<sup>212</sup>

Furthermore, APGA considered that:

*A stable and robust regulatory framework, immune from frivolous and vexatious change, is essential to support efficient investment and the AEMC’s draft decision, in maintain the stability and robustness of the NGR, achieves this also and thus further achieves the NGO.*

Similarly, the Energy Users Association of Australia reiterated that it was generally not in favour of “retrospective application of new rules to a newly committed project due to the potential of sovereign risk”.<sup>213</sup>

## 4.5 Final rule determination assessment

### 4.5.1 Monopoly pricing

No new information has been raised in relation to this issue. The Commission is satisfied that its assessment made in the draft rule determination remains appropriate.

### 4.5.2 Regulatory complexity and forum shopping

If the NGP’s capacity is expanded (by either compression or looping or both) up to 300 TJ/day, the access principles apply and provide a methodology to determine the tariffs and the sharing of reductions in cost achieved due to economies of scale for expansions between 90 TJ/day and 300 TJ/day. If the expanded NGP exceeds a capacity of 300 TJ/day, then Part 23 of the NGR will apply to that capacity resulting from a large expansion as defined in the NGP access principles.

Large expansions that increase the NGP’s capacity above 300 TJ/day are unlikely to present Jemena opportunities to forum shop as suggested. This is because capacity of up to 300 TJ/day will be subject to the NGP access principles and capacity over that amount will be subject to Part 23. While the regimes differ in detail, the Commission considers that both are comparable in their effectiveness at restraining Jemena’s market power.

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211 The Australia Institute submission to the draft determination, p. 3.

212 APGA submission to the hearing, p. 3.

213 EUAA submission to the draft determination, p. 2.

Revoking the derogation for capacity greater than 90 TJ/day would lead to similar issues to revoking the derogation altogether arising from the overlapping regulatory regimes. Revoking the derogation for capacity greater than 90 TJ/day would mean that capacity between 90 TJ/day and 300 TJ/day would be subject to both the access principles and the Part 23 framework. It would also make the NGP subject to three different regulatory arrangements:

- the current capacity of the NGP (90 TJ/day) would be subject to the access principles only
- capacity between 90 TJ/day and 300 TJ/day would be subject to both the access principles and the Part 23 framework, and
- any large capacity expansions of the NGP subject to the Part 23 framework only.

This would not lead to a reduction in the complexity of regulatory arrangements for the NGP.

The Commission notes that as the access principles contemplated and provided access arrangements for the NGP's expanded capacity of up to 300 TJ/day, the derogation aligns with the capacity of the NGP covered under the access principles.

#### 4.5.3

#### Efficient investment

The Commission's conclusion in regard to the impact of its decision on future investment has not changed from the draft rule determination.

The Commission considers that the access principles for the NGP place sufficient constraints on Jemena's ability to exercise market power in negotiating with prospective users for services provided by the NGP, including for expansions that are covered by the access principles and the derogation. Accordingly, the Commission does not consider that removal of the derogation would result in more efficient investment in pipeline services.

## 4.6

### Conclusion

The Commission's conclusion remains that some costs and benefits of the revocation of the derogation claimed by stakeholders are not likely to arise or be as significant as suggested.

In particular, the revocation of the derogation would not provide the benefit of preventing Jemena from engaging in monopoly pricing as Jemena's ability to set key tariffs for firms services is limited by the NGP access principles which apply regardless of the derogation.

In addition, revoking the derogation is not likely to have significant ramifications for investment in the NGP or in gas pipelines generally. This is because the derogation does not remove a mechanism to manage regulatory risk and incentivising investment as claimed by some stakeholders. Other mechanisms remain available for the managing the form of regulation that may apply to new pipeline investment, including the NGR's competitive tender process.

Revoking the derogation could provide a small benefit in reducing the overall complexity of the NGR's regulatory arrangements for gas pipelines in Australia. It would allow prospective users of non-scheme pipelines to be able to seek access to all non-scheme pipelines under the same framework. Some users may also benefit from the publication of financial

information under Part 23 that could assist them to negotiate access to the NGP's other services including as-available services.

However, there are also likely to be costs arising from the revocation of the derogation. The concurrent application of the NGP access principles and the Part 23 framework would give rise to increased complexity of arrangements for seeking access to the NGP. It would also be likely to lead to uncertainty and confusion among prospective users and Jemena surrounding obligations resulting from application of both arrangements and likely outcomes for terms and conditions of access under either of the arrangements. Increased complexity and uncertainty surrounding access can be reasonably expected to give rise to increased transaction costs. The concurrent application of both arrangements will permit forum shopping by prospective users by allowing them the option of choosing the arrangement that provides them a more favourable outcome. Forum shopping for access to the NGP is not likely to promote the NGO, although the likelihood of forum shopping occurring would be limited.

The Commission's view remains that the overall costs associated with increased complexity and uncertainty surrounding arrangements for seeking access to the NGP, additional compliance costs and forum shopping are likely to be greater than the benefits of consistent application of Part 23 to non-scheme pipelines.

## 5 SPECIAL CIRCUMSTANCES IMPACTING THE NGP

This chapter discusses the issues raised by stakeholders on whether there are particular, or special, circumstances about the development of the NGP that impact on what regulatory regime should be applied to the pipeline.

### 5.1 Proponents' views

In their submission to the consultation paper, the proponents stated that there was no special circumstances regarding or impacting the NGP due to which application of the Part 23 framework may be inappropriate for the NGP.<sup>214</sup> However, in their view there were special circumstances in favour of revocation of the derogation as the basis on which the derogation was granted is not valid. Specifically, the proponents considered that the derogation was granted on the basis of the dispute process under the NGP access principles providing similar protections to those provided under the Part 23 framework. The proponents argued that current arrangements do not provide for similar protections and that claims to the contrary are "inaccurate and arguably misleading".<sup>215</sup>

### 5.2 Stakeholder views on the request

Several stakeholders expressed views in line the proponents' views that there were no special circumstances regarding or impacting the NGP due to which application of the Part 23 framework may be inappropriate for the NGP. However, like the proponents, these stakeholders considered that there were special circumstances justifying its revocation as the exemption distorts the market and avoids rules specifically designed to soften monopoly power of pipeline operators.<sup>216</sup>

In contrast, the Northern Territory Government and Jemena considered that there were special circumstances impacting the NGP which means that a different regulatory arrangement for the NGP other than Part 23 of the NGR which applies to other non-scheme pipelines is justifiable. The relevant circumstances include:<sup>217</sup>

- the NGP is a new pipeline connecting a new source of gas to an established market
- there is the risk of uncertain future demand for the NGP
- a competitive tender process to build the NGP was carried out by the Northern Territory Government
- the derogation provides Jemena the ability to continue to develop this pipeline on the terms agreed under the tender process
- implementing the proposed rule change would remove an appropriate "regulatory holiday" for the NGP.

214 EJA and IEEFA submission to the consultation paper, p. 3.

215 EJA and IEEFA submission to the consultation paper, p. 3.

216 Submissions to the consultation paper: GERALYN McCARRON, p. 2; Arid Lands Environment Centre, p. 2; Environment Justice, p. 1; Lock the Gate Alliance, p. 1; Environment Centre NT, p. 1; Original Power, p. 1; Environment Council of Central Queensland, p. 1.

217 Jemena submission to the consultation paper: Jemena response, p. 8.

Furthermore, Jemena commented that there is an "established practice of providing incentives to new pipelines in order to promote efficient investment in natural gas services" that has been held to contribute to the NGO as it helps manage regulatory risk for investment.<sup>218</sup> Jemena considered that "new gas pipelines to connect further sources of gas to the interconnected grid are likely to require similar exemptions or derogations from regulatory obligations imposed under the NGR."<sup>219</sup> The revocation of the derogation, exposing the NGP to Part 23 of the NGR, was therefore expected to have chilling effect on new investment in gas pipelines generally.

The Northern Territory Government noted that the existence of the binding NGP access principles negotiated by the Northern Territory Government for the benefit of all access seekers was a special circumstance due to which the application of the Part 23 framework may be inappropriate for the NGP. Furthermore, the Northern Territory Government expected that the application of the Part 23 framework would result in regulatory duplication, confusion among users and prospective users, additional regulatory compliance costs and the cost of frivolous or speculative arbitrations.<sup>220</sup>

### 5.3 Draft rule determination assessment

In the draft rule determination, the Commission noted that the economic regulatory framework of the NGL and NGR accommodates a variety of circumstances that may be relevant to pipelines. This includes different forms of regulation — competitive tender access arrangements, full access arrangements, light regulation and regulation under Part 23 of the NGR. Relevantly, the NGL and NGR framework includes avenues to provide greater regulatory certainty for new pipelines that parties can elect to use.

The Commission considered that to warrant a derogation from the framework provided by the NGL and NGR, there needs to exist sufficient justification including special circumstances for the service provider or the pipeline due to which the application of the NGR may not be appropriate. Importantly, the application of an alternative arrangement for regulation, that intends to provide similar outcomes as those expected from the rules from which the derogation is sought, does not provide sufficient justification for the derogation on its own. There may be many regulatory arrangements that could be developed with the purpose of managing the issues addressed by the NGR. Providing derogations from an established framework in the NGR for pipeline-specific arrangements allows parties to undermine the integrity and credibility of the overall national gas regulatory framework. Numerous forms of regulation can themselves create cost and complexity for service providers, pipeline users, regulatory agencies and policy bodies.<sup>221</sup>

The Commission noted that the current regulatory framework provides recognised avenues to manage regulatory risk and incentivise investment in greenfield pipeline developments

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218 Jemena submission to the consultation paper: Jemena response, p. 8.

219 Jemena submission to the consultation paper: Jemena response, p. 8.

220 NT Government submission to the consultation paper, p. 7.

221 For further discussion on this point, see AEMC, *Review into the scope of economic regulation applied to covered pipelines*, draft report, 27 February 2018, pp. 48–49.

through the greenfields 15-year no coverage determination process and the competitive tender process. Despite Jemena's claims, the current framework does not include a mechanism to provide relief from the Part 23 framework for non-scheme pipelines in a manner similar to the derogation. Instead, the provisions of Part 23 set out specific and narrow avenues under which service providers may apply for an exemption from some requirements. The consequential near universal application of Part 23 to non-scheme pipelines was a key aspect of its implementation by the COAG Energy Council.

In response to comments by some stakeholders implying that the Part 23 framework has a dampening effect on investment in pipelines which should be avoided, the Commission stated that it was not aware of evidence supporting this view. It noted that while significant pipeline investment tends to be lumpy, there have been some investment decisions made, suggesting that Part 23 had not had a dampening effect.<sup>222</sup>

Nevertheless, the Commission considered that there are particular circumstances about the NGP due to which the application of the Part 23 regime may not be appropriate. Specifically, the NGP is unusual as the tender process to build and operate the NGP was completed just before the Part 23 framework was conceived and developed. The legally binding NGP access principles were put in place to impose access and pricing obligations in relation to key services likely to be sought by prospective users on a pipeline that, at the time, may have otherwise been unregulated. As Part 23 of the NGR was developed, it was realised by policy-makers that its application to the NGP could lead to potential regulatory duplication. As a result, the derogation for the NGP was provided by the COAG Energy Council in the initial Part 23 rules. At this point, it was too late to use the NGR competitive tender provisions as the project development agreement had already been signed.

The Commission's draft rule determination concluded that the NGP derogation does not undermine the credibility and integrity of the overall gas regulatory framework because the NGP access principles and the derogation were not intended to serve as an alternative arrangement to the Part 23 framework or to circumvent the entire regulatory framework set out in the NGL and NGR. There are special circumstances impacting the NGP relating to the timing of its tender and development process due to which a derogation for the NGP is justifiable. The Commission noted that, in the future, it expects service providers and proponents of new pipelines in a similar situation as the NGP to make use of the competitive tender process under the NGR instead of a derogation.

## 5.4 Stakeholder views on the draft rule determination

Several stakeholders raised concerns regarding the application of the derogation to the NGP beyond its current capacity of 90 TJ/day and up to the capacity of 300 TJ a day.<sup>223</sup> Some stakeholders considered that the application of the derogation beyond the current capacity led to the provision of regulatory holidays for a pipeline not yet proposed and setting the precedent that application of Part 23 is discretionary.

<sup>222</sup> See section 4.3 of this final rule determination.

<sup>223</sup> Submissions to the draft determination: EJA, p. 2; Lock the Gate Alliance, p. 1; Submissions to hearing: IEEFA, p. 3; The Australia Institute, p. 2.

EJA claimed that “the Derogation applies to a *new pipeline* that will expand the NGP” as it was “not aware of any no [sic] evidence to suggest that the current NGP can handle volumes beyond 90 TJ/day.”<sup>224</sup> EJA stated that the draft rule determination “ignores shrewd negotiation by industry meant to lock in regulatory holidays for greenfield pipelines not yet officially proposed”.<sup>225</sup>

It was raised by The Australia Institute that the application of the derogation beyond the capacity of the NGP that has been built and to the potential future investment in gas pipeline infrastructure would set a broader precedent. According to The Australia Institute, “this sends a message to project proponents that Part 23 is merely discretionary”.<sup>226</sup>

EJA also claimed that the draft rule determination “supports industry evasion of regulation” because the “NT Government actively sought to have the NGP subject to the National Gas Rules and Jemena refused”.<sup>227</sup> Equity Generation Lawyers subsequently made similar comments, noting that “the Northern Territory is not a consumer of gas, it is a supplier. It bowed to Jemena’s pressure for the pipeline not to be a covered pipeline.”<sup>228</sup>

## 5.5 Final rule determination assessment

In relation to issues raised by EJA and The Australia Institute regarding expansions or extensions to the pipeline, the Commission notes that the definition of the NGP for the purposes of the derogation includes any extensions of the pipeline or expansions of the capacity of the pipeline that are subject to the access principles.

The access principles established by the Northern Territory Government apply to the NGP and any expansions or extensions to it that do not result in the capacity of the NGP exceeding 300 TJ/day or an extension beyond KP0 or KP622.

This arrangement establishes that in the future additional gas could be transported to Mt Isa from Tennant Creek through an expanded NGP. Expansion of the pipeline could be achieved by adding compressors to the pipeline or by looping.

Alternatively, Jemena (or another service provider) could construct a new pipeline in the Northern Territory to transport gas to the east coast gas market. Under the current arrangements, the access principles would not apply to such a pipeline. Instead, Part 23 of the NGR would apply.<sup>229</sup> As a result, no “regulatory holiday” is provided by the NGR as suggested by some stakeholders.

If the NGP’s capacity is expanded (by either compression or looping or both) up to 300 TJ/day, the access principles apply and provide a methodology to determine the tariffs and the sharing of reductions in cost achieved due to economies of scale for expansions between

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224 EJA submission to the draft determination, p. 5.

225 EJA submission to the draft determination, p. 5.

226 The Australia Institute submission to the hearing, p. 3.

227 EJA submission to the draft determination, p. 2.

228 Equity Generation Lawyers submission to the hearing, p. 3.

229 Part 23 of the NGR is the default regulatory regime. It will apply to any pipeline subject to a decision to make the pipeline a covered pipeline. Coverage is the only avenue to avoid regulation under Part 23.

90 TJ/day and 300 TJ/day. If the expanded NGP exceeds a capacity of 300 TJ/day, then Part 23 of the NGR will apply to that capacity resulting from a large expansion as defined in the NGP access principles.

The Commission notes that as the access principles contemplated and provided access arrangements for the NGP's expanded capacity of up to 300 TJ/day, the derogation aligns with the capacity of the NGP covered under the access principles.

Accordingly, the NGP derogation linked to the capacity contemplated in the NGP access principles does not undermine the credibility of the gas regulatory framework.

In response to claims that the derogation and draft rule determination "support industry evasion of regulation", the Commission notes that the NGP access principles were put in place to impose access and pricing obligations in relation to key services of a pipeline that, at the time, may have otherwise been unregulated. Chapter 3 describes why the Commission considers that those access principles constitute an effective access regime for the NGP.

In addition, in response to comments about the NGP not being a covered pipeline, nothing in the arrangements between Jemena and the Northern Territory Government or the derogation prevent the pipeline becoming a covered pipeline. Any party could apply for coverage of the NGP at any time. As such, the Commission does not consider that the access principles and the derogation facilitate evasion of regulation.

Accordingly, the Commission's conclusions on the special circumstances impacting on the NGP are the same as in the draft rule determination.

## 6 OTHER ISSUES

Two issues that have been raised by stakeholders during this rule change process related to concerns regarding climate change and an audit by the Australian Taxation Office (ATO) of Jemena.

The Commission sets out its considerations of these issues in this chapter.

### 6.1 Climate change related issues

#### 6.1.1 Proponents' views

The proponents' rule change request focussed on the financial viability of constructing the NGP and that the pipeline did not represent an efficient investment. The request stated:<sup>230</sup>

The NGP Derogation does not provide for efficient investment in gas services. In fact, it does the opposite, and it will only reward previous inefficient behaviour in a distorted marketplace.

The proponents also commented:<sup>231</sup>

Revocation [of the derogation to Part 23] will place the NGP on a more level playing field with other pipelines. It will remove perverse incentives to develop gas fields near Tennant Creek, many of which are opposed by local communities.

In response to the Commission's consultation paper, the proponents stated that the NGP would promote gas exploration and production in the Northern Territory and lead to "serious environmental and financial consequences". Noting the report from the Independent scientific inquiry into hydraulic fracturing in the Northern Territory, the proponents stated that the climate change risks for development of the gas industry in the Northern Territory were unacceptable.

The proponents also stated that the derogation from Part 23 of the NGR would facilitate an adverse impact on the safety, reliability and security of supply of natural gas. They noted:<sup>232</sup>

With respect to the safety, reliability and security of supply, SGSPAA [the owner of Jemena] itself recognises that climate change can damage its own gas infrastructure or third party gas supply.

#### 6.1.2 Stakeholder views on the request

In response to the consultation paper, a number of stakeholders commented on environmental and climate change related issues. In particular, that:

<sup>230</sup> Rule change request, p. 8.

<sup>231</sup> Rule change request, p. 9.

<sup>232</sup> EJA and IEEFA, submission to the consultation paper, p. 4. Similar comments were also made by GERALYN McCowan, submission to the consultation paper, p. 2.

- The NGP is likely to promote gas exploration and production using fracking in the Northern Territory. However, there are significant environmental and health costs for communities where fracking occurs.<sup>233</sup>
- There are climate change impacts that may damage the pipeline, putting people's safety and access to gas at risk.<sup>234</sup>
- There are significant costs to the broader community from the climate change impacts of fracking that the NGP promotes.<sup>235</sup>

### 6.1.3 Draft rule determination assessment

In response to stakeholder comments, the Commission stated in the draft rule determination:<sup>236</sup>

Decisions on the use of fracking and the production of gas, and the potential implications of these actions, are matters for the Northern Territory Government. These issues do not fall within the AEMC's statutory decision-making framework.

### 6.1.4 Stakeholder views on the draft rule determination

Submissions from EJA and several other stakeholders stressed that the Commission's draft rule determination did not give sufficient consideration to, and explain the Commission's assessment of, the risks posed by climate change.

EJA commented that the Commission's draft rule determination to not revoke the derogation facilitates "unacceptable climate impacts that extend to the security and supply of gas to consumers".<sup>237</sup>

It also stated that "The AEMC completely ignores the relationship between energy markets and climate change"<sup>238</sup> and "the Draft Determination dismisses climate change impacts in a manner that reflects gross oversight on behalf of AEMC".<sup>239</sup> According to EJA, the Commission's approach in the draft rule determination is inconsistent with other regulatory bodies such as the Australian Prudential Regulatory Authority that understand climate change risks fit into existing statutory decision-making frameworks and industry guidance.<sup>240</sup>

In EJA's view, the derogation from Part 23 facilitates the development of unconventional gas fields in the Northern Territory that it expects to lead to unacceptable risks associated with climate change.<sup>241</sup> EJA claimed that "The Derogation, and the NGP's Access Principles, are

233 Submissions to the consultation paper: Original Power, p. 2; Environment Centre NT, p. 1; Lock the Gate Alliance, p. 2.

234 Submissions to the consultation paper: Original Power, pp. 1-2; Environment Centre NT, pp. 1-2; Lock the Gate Alliance, pp. 1-2; Environment Council of Central Queensland, p. 1, Angela Comer (Environment Justice), p.1; Kate Muir, p. 1, Beyond Zero Emissions, p. 1.

235 Submissions to the consultation paper: Cate Cooper, p. 1; Environment Council of Central Queensland, p. 1

236 AEMC, *Northern Gas Pipeline — derogation from Part 23*, draft rule determination, 21 February 2019, p. 47.

237 EJA submission to the draft determination, p. 1.

238 EJA submission to the draft determination, p. 1.

239 EJA submission to the draft determination, p. 9.

240 EJA submission to the draft determination, p. 9.

241 EJA submission to the draft determination p. 5.

essential for further development of the unconventional gas fields that provide an unacceptable climate change risk.”<sup>242</sup>

Further, EJA commented that the NGP at its current capacity is an initial investment, and the “regulatory holiday” for the NGP for an increased capacity of up to 300 TJ/day provided by the derogation, “is precisely what will encourage the extraction of significant amounts of unconventional gas”.<sup>243</sup>

Similarly, IEEFA commented that the draft rule determination was not consistent with best practice in investment decision-making and did not assess a key risk to the price, safety, reliability and security of supply of natural gas as set out in the NGO.<sup>244</sup>

Lock the Gate Alliance opined that the derogation from Part 23 that applies to the NGP and an expansion of the pipeline could “lead to a major contribution to global climate change”.<sup>245</sup> It noted that climate change is a risk to infrastructure and people and for this reason, the impact of the NGP should be considered further. It noted:<sup>246</sup>

There are difficult decisions to be made about protecting existing infrastructure by taking appropriate action to limit future global warming and associated extreme weather events.

The Commission held a hearing in relation to this rule change process on 7 May 2019. Key points made in relation to climate change at the hearing were:

- that the Commission did not take into account climate change risk when making its draft rule determination<sup>247</sup>
- the Commission should consider climate change risk when agencies such as APRA have stated that climate change is a real risk for investments<sup>248</sup>
- that the derogation from Part 23 of the NGR for the NGP will facilitate and encourage climate change impacts.<sup>249</sup>

Equity Generation Lawyers’ submission made following the hearing commented:<sup>250</sup>

the AEMC should be aware of medium-term carbon pricing projections that we understand will cause demand destruction for gas use by consumers in Australia and render the NGP a stranded asset.

A number of submissions from private individuals made following the hearing suggested that further consideration of climate change associated risks by the Commission was required.<sup>251</sup>

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242 EJA submission to the draft determination, p. 4.

243 EJA submission to the draft determination, p. 5.

244 IEEFA submission to the draft determination, p. 2.

245 Lock the Gate Alliance submission to the draft determination, p. 1.

246 Lock the Gate Alliance submission to the draft determination, p. 2.

247 IEEFA statement to pre-final determination hearing, p. 3.

248 David Barnden statement to pre-final determination hearing, p. 7.

249 David Barnden, statement to pre-final determination hearing, p. 7.

250 Equity Generation Lawyers submission to the hearing, p. 2.

251 Submission to the hearing: Private individual 8, p. 1; Mike G, p. 1; Greg Wells, p. 1; Private individual 1, p. 1.

### 6.1.5 Final rule determination assessment

The Commission notes that climate change is a significant issue that has ramifications for policy decisions. The Australian Government, through the United Nations Framework Convention on Climate Change (UNFCCC) and Conference of the Parties (COP) process has agreed:

- warming should be limited to 2 degrees Celsius above pre-industrial levels with an aspiration to limit to 1.5 degrees
- the initial target for Australia is to reduce emissions by 26-28 per cent relative to 2005 levels by 2030.

From an economic perspective, it is important to note that it is the stock of emissions (the carbon budget) that is relevant, rather than the flow (the specific target in any particular year).

The Commission makes its decisions on rule change requests under the NGR with reference to the NGO. This objective does not expressly require the Commission to have regard to the long term interests of consumers with respect to climate change or the environment. Instead, the NGO directs the Commission to consider the promotion of efficient investment, operation and use of natural gas services for the long-term interests of gas consumers with respect to specified matters, being the price, quality, safety, reliability and security of supply of natural gas. The Commission may only make a rule if it is satisfied that the rule will or is likely to contribute to the achievement of the NGO.

However, in making its decisions under the NGR the Commission also has regard to relevant factors that can impact on the specific matters identified in the NGO. In relation to climate change this includes consideration of:

- how the physical world is changing or likely to change as a result of climate change (adaptation risk)
- how policy makers, consumers and investors are responding, or are likely to respond, to the risks presented by climate change (mitigation risk)

to the extent that these factors have an effect on the specific matters included in the NGO.

In this case of whether a derogation from Part 23 should continue to apply to the NGP, the Commission has considered both adaptation risk and mitigation risk.

First, in regard to adaptation risk, it is important to note that the derogation itself is unlikely to result in increased adaptation risk as the only impact of the derogation is on whether the current regulatory regime should continue or other similar requirements should also be applied. It should also be noted that the Commission considers that the existing access regime under the NGP access principles is effective in constraining any market power Jemena has in relation to the NGP. Accordingly, the Commission does not agree with claims in submissions that the choice of access regime for the NGP is likely to have a material impact on the safety, reliability and security of supply of natural gas services.

Furthermore, mitigation risk is borne by the service provider, and not consumers. For example, if utilisation of the pipeline decreases as a result of consumers responding to

climate change, the use of a maximum tariff capped at CPI in the NGP access principles means that the potential asset stranding risk will be borne by Jemena through lower future revenues and not by consumers through higher future prices.

## 6.2 ATO investigation

### 6.2.1 Proponents' views

In the rule change request from EJA and IEEFA, it was claimed that in 2015 Jemena "underwent a restructure and created \$800 million in convertible instruments, for the purpose of building the NGP" and "That transaction appears to be currently under investigation by the ATO for transfer pricing."<sup>252</sup>

### 6.2.2 Stakeholder views on the request

Some stakeholder submissions to the consultation paper including from IEEFA and EJA, and the Arid Land Environment Centre also noted that Jemena's transfer pricing activities were under investigation by the ATO.<sup>253</sup>

### 6.2.3 Draft rule determination assessment

The Commission stated the ATO's investigation of Jemena's transfer pricing activities was not relevant to the AEMC's considerations in making its draft rule determination.<sup>254</sup>

### 6.2.4 Stakeholder views on the draft rule determination

EJA, IEEFA and The Australia Institute disagreed with the Commission's statement on the relevance of the ATO's investigation of Jemena's transfer pricing activities. These stakeholders suggested that the Commission needed to carry out further assessment.<sup>255</sup> Some private individual stakeholders also expressed concerns regarding the ATO's investigation of Jemena's transfer pricing activities.<sup>256</sup>

EJA commented that Jemena was subject to a transfer pricing audit regarding \$800 million of convertible notes and claimed that there is "no reason to believe the convertible notes are not related to the NGP".<sup>257</sup> According to EJA "If potential illegal activity underpinned the competitive tender process then it is difficult to see how this is not a relevant consideration" and that a "legitimate competitive tender process cannot be underpinned by illegal behaviour".<sup>258</sup>

IEEFA highlighted governance risks at Jemena and noted that:<sup>259</sup>

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252 Rule change request, p. 4.

253 Submissions to the consultation paper: IEEFA and EJA, p. 4; Arid Land Environment Centre, p. 1

254 AEMC, *Northern Gas Pipeline — derogation from Part 23*, draft rule determination, 21 February 2019, p. 48.

255 Submissions to the draft determination: EJA, p. 1; EJA, p. 3; IEEFA, p. 2.

256 Submissions to the hearing: Private individual 8, p. 1; Donald Robertson, p. 1; Mike G, p. 1; Robert Anderson, p. 1; Private individual 6, p. 1; Heather Lawrence, p. 1; Private individual 3, p. 1; Private individual 9, p. 1; Yung En Chee, p. 1; Virginia Bowe, p. 1.

257 EJA submission to the draft determination, p. 3.

258 EJA submission to the draft determination, p. 3.

259 IEEFA submission to the draft determination, p. 2

If a company is hit with taxation fines and back taxes it may look to recover those costs from the consumer. In Jemena's case this could occur via the derogation to the National Gas Laws that is in the process of being granted to them by the AEMC as per the draft determination.

The Australia Institute noted that EEFA and EJA "question the efficacy of the tender process, in particular the effect of potential transfer pricing on the tender" and that the Commission's draft rule determination did not consider this issue in detail or consider it to be relevant.<sup>260</sup>

In response to these comments, Jemena stated that its parent company had acknowledged an ATO audit in its 2017 financial report. It also commented that:<sup>261</sup>

it is the role of the Australian Taxation Office, and not the AEMC, to administer tax law and in doing so determine if there are any tax issues

While Jemena noted the link made by the proponents between the ATO investigation and the release of convertible notes, it commented that "no evidence has been provided to draw such a conclusion". Jemena stated that the issuance of convertible notes was "unrelated to the cost of the NGP project".<sup>262</sup>

## 6.2.5

### Final rule determination assessment

The Commission notes that a transfer pricing audit is currently being conducted by the ATO in relation to Jemena's convertible instruments. However, there is no information available to the Commission regarding the nature or likely outcome of the audit or whether it is in any way related to the NGP.

The Commission considers that the existence of the audit is not relevant to the issues in this rule change process. The fact that an audit is being conducted does not imply that the tender process to build the NGP conducted by the NT Government failed to elicit competitive tension between the bidders. Nor does it suggest that the NT Government was unable to use the resulting competitive tension to negotiate competitive terms of access for all future prospective users of the NGP.

Potential breaches of laws by corporations are dealt with according to the applicable legislation by the relevant authority administering those laws. Potential breaches of transfer pricing regulations are a matter for the ATO. If the ATO finds Jemena in breach of transfer pricing rules, the matter will be dealt with accordingly by the ATO.

If Jemena is penalised or has to pay back taxes because of the audit, the NGP access principles will restrict Jemena's ability to pass on these costs to NGP users, as the NGP access principles set the maximum tariffs that can be charged for NGP's key services.

<sup>260</sup> The Australia Institute submission to the draft determination, p. 2; Equity Generation Lawyers submission to the hearing, p. 2.

<sup>261</sup> Jemena submission to the hearing, p. 8.

<sup>262</sup> Jemena submission to the hearing, p. 8.

## ABBREVIATIONS

AEMC	Australian Energy Market Commission
AEMO	Australian Energy Market Operator
AER	Australian Energy Regulator
APGA	Australian Pipelines and Gas Association
COAG	Council of Australian Governments
Commission	See AEMC
EJA	Environmental Justice Australia
EUAA	Energy Users Association of Australia
IEEFA	Institute for Energy Economics and Financial Analysis
NCC	National Competition Council
NEGI	North East Gas Interconnector
NGL	National Gas Law
NGO	National Gas Objective
NGP	Northern Gas Pipeline
NGR	National Gas Rules
NT	Northern Territory
PDA	project development agreement
TJ	Terajoules

## A SUMMARY OF OTHER ISSUES RAISED IN SUBMISSIONS

This appendix sets out the issues raised in the three rounds of consultation on this rule change request and the AEMC's response to each issue. If an issue raised in a submission has been discussed in the main body of this document, it has not been included or cross-referenced in this appendix.

In making its final rule determination, the Commission has had regard to all submissions made during this rule change process, including those summarised in this appendix.

### A.1 Summary of other issues raised in submissions to the consultation paper

**Table A.1: Summary of other issues raised in response to the consultation paper**

STAKEHOLDER(S)	ISSUE	AEMC RESPONSE
Rule change request, pp. 3-6; Submissions to the consultation paper: Arid Lands Environment Centre submission, p. 2; Kate Muir, p. 1; Beyond Zero Emissions, p. 1; Office of Senator Pauline Hanson, p. 1; Geralyn McCarron, p. 2.	The derogation applicable to the NGP removes oversight of the NGP by the AER. Under the derogation Jemena can set NGP's tariffs without AER oversight.	Under Part 23, the AER does not set tariffs, it's role is primarily administrative. See Appendix C for further information on the Part 23 regime.
Submissions to the consultation paper: Original Power, p. 1; Environment Centre NT, p. 2; Lock the Gate Alliance, p. 1.	The NGP is likely to promote gas exploration and gas production using hydraulic fracturing (fracking) in the NT.	Issues related to these are discussed in section 6.1.
Submissions to the consultation paper: Doctors of the Environment, p. 1; Environment Centre NT, p. 1; Original Power, p. 2.	There are serious impacts on health and the environment caused by the extraction and use of gas, including climate change.	
Submissions to the consultation paper: EJA and IEEFA p. 4; Kate Muir, p. 1.	The derogation applicable to the NGP will promote the production of shale gas in the NT. The production of shale gas would lead to increased risk of climate change. In addition, Jemena accepts that increased extreme weather	

STAKEHOLDER(S)	ISSUE	AEMC RESPONSE
	<p>events due to climate change can damage gas infrastructure and threaten gas supplies. The derogation is foreseen to adversely impact the safety, reliability and security of supply of natural gas.</p>	
<p>Cate Cooper submission to the consultation paper, p. 1.</p>	<p>"This is a very bad deal for consumers with regard to the pipeline, and any encouragement of fracking in the NT leaves the company concerned exposed to stale assets and the community as well as the world at large exposed to a huge negative impact of acceleration of climate change."</p>	
<p>Submissions to the consultation paper: Environment Centre NT, pp. 1-2; Environment Council of Central Queensland, p. 1; Original Power, p. 1; Lock the Gate Alliance, p. 1.</p>	<p>The moratorium on fracking in the Northern Territory was popular. Production of shale gas in Australia "carries dangers above US shale industry because our geology means a much greater number of wells are required to extract the same amount of gas". There are significant environmental and health costs for communities where fracking occurs.</p>	<p>Decisions on the use of fracking and the production of gas are matters for the Northern Territory Government. The AEMC may only make a rule if it is satisfied the proposed rule will, or is likely to, contribute to the achievement of the NGO. See Chapter 6.</p>
<p>Arid Land Environment Centre submission to the consultation paper, p. 1.</p>	<p>"Jemena lobbied the NT government for the exemption and is under investigation by the ATO for a \$500m tax evasion scheme. It is therefore reasonable to assume the derogation operates in the interests of Jemena rather than future gas shippers and customers, contrary to the National</p>	<p>This issue is discussed in detail in section 6.2.</p>

STAKEHOLDER(S)	ISSUE	AEMC RESPONSE
	Gas Objective."	
APPEA submission to the consultation paper, p. 1.	APPEA supports the principle of the 15-year exemption from full regulation for greenfield pipelines where there has been competition for the market, as is the case for the NGP.	An exemption from full regulation can be obtained via the 15-year no coverage determination process available to greenfields pipelines. Such an exemption can be sought by service providers from the NCC.
Beyond Zero Emissions submission the consultation paper, p. 1.	"Jemena is doing all it can to build an uneconomical pipeline."	It is for Jemena to decide upon its business activities. This is not part of the AEMC's statutory decision-making framework.
Office of Senator Pauline Hanson submission to the consultation paper, p. 1.	Special treatment for the NGP sets a dangerous precedent for other pipelines.	The Commission considers that the derogation applicable to the NGP is not likely to undermine the credibility and integrity of the gas regulatory framework in Australia. The circumstances giving rise to the derogation are unusual and unlikely to arise in the future. See Chapter 2.
EJA and IEEFA submission to the consultation paper, p. 1.	Jemena admits that the NGP is not subject to economic regulation and does not have to submit access arrangements to the regulator.	The NGP is not a covered pipeline and consequently is not required to submit an access arrangement to the AER. This would not change if the proposed rule was made to remove the derogation. However, any party can apply for the NGP to become a covered pipeline.

## A.2 Summary of other issues raised in submissions to the draft rule determination

**Table A.2: Summary of other issues raised in submissions to the draft rule determination**

STAKEHOLDER	ISSUE	AEMC RESPONSE
<p>EJA submission to the draft determination, p. 3.</p>	<p>"The AEMC has failed to investigate the circumstances around the proposal of the derogation by the NT Government."</p>	<p>The Commission notes and has taken into account the statement made by Northern Territory Department of Treasury and Finance at the pre-final determination hearing in relation to this issue is as follows: "The Northern Territory Government is responsible for the derogation being in place today. We were concerned that the application of the Part 23 framework to the NGO would unnecessarily duplicate the existing access principles, which were intended to address many of the same issues the Part 23 framework is intended to address. The Territory Government put its concerns to the Gas Market Reform Group, the body tasked with developing and implementing the Part 23 framework, and the Energy Council, whose membership comprises ministers of each Australian state and territory and the Energy Council agreed to implement a derogation in the initial rules exempting the NGP from Part 23 framework for the life of the access principles, which is 15 years from the commencement of the pipeline."</p>

## A.3 Summary of other issues raised at and after the hearing

**Table A.3: Summary of other issues raised at and after the hearing**

<b>STAKEHOLDER</b>	<b>ISSUE</b>	<b>AEMC RESPONSE</b>
Submissions to the hearing: IEEFA, p. 1; Private individual 4, p. 1; Anthony Barham, p. 1; Virginia Bowe, p. 1; Private individual 6, p. 1; Private individual 3, p. 1.	The derogation leads to the transfer of wealth from the people of Australia and the Australian gas consumers to foreign governments of Singapore and China.	Jemena's ability to exercise market power is likely to be effectively constrained under the current arrangements.
IEEFA submission to the hearing, p. 3.	The revocation of the derogation would ensure that the tariffs of the NGP and any future augmentation of the NGP will be overseen by the AER.	As noted in the draft determination, the AER does not set tariffs under Part 23, its role is primarily administrative. See Appendix C.
Submissions to the hearing: Private individual 8, p. 1; Paul Tyrrell, p. 1; Heather Lawrence, p. 1; Mike G, p. 1; Private individual 5, p. 1; Virginia Bowe, p. 1; Robert Anderson, p. 1; Private individual 6, p. 1.	Gas production through hydraulic fracturing (fracking) would cause severe environmental impacts including contamination of aquifers and climate change.	Decisions on the use of fracking and the production of gas are matters for the Northern Territory Government. The AEMC may only make a rule if it is satisfied the proposed rule will, or is likely to, contribute to the achievement of the NGO. Issues related to these are discussed in section 6.1.
Christine Bottrell submission to the hearing, p. 1.	Australians now pay more for gas than do consumers in Asia who buy our gas.	The Commission notes stakeholder concerns regarding high cost of gas. The Commission considers that both the NGP access principles and Part 23 of the NGR would constrain Jemena's ability to use its market power. Thus, selecting one over the other would not have a significant impact on the price of gas. See Chapter 3.

STAKEHOLDER	ISSUE	AEMC RESPONSE
Submissions to the hearing: Private individual 4, p. 1; Anthony Barham, p. 1.	The rule change decision should be put to a vote with the public instead of being decided by the Commission.	The NGL requires the AEMC to make decisions on requests to change the NGR.
Equity Generation Lawyers submission to the hearing, p. 4.	The reason for no submissions from users or potential users of the NGP raising concerns with the level of the published maximum tariff is that potential customers would not want to upset a monopoly service provider especially as "under the Access Principles, Jemena has the final say on access disputes and the regulator is frozen out from pricing oversight". Additionally, Incitec Pivot is the only major, long terms consumer of the NGP and "it is getting a cut price deal via a contract with the Northern Territory".	<p>Consistent with usual practice for rule change processes, stakeholders have had the opportunity to lodge submissions and provide feedback informally to assist the Commission in its decision-making.</p> <p>The access principles do not provide Jemena "a final say in access disputes"; an independent arbitrator will make a decision if a dispute is referred to arbitration.</p> <p>No evidence on Incitec Pivot's contract has been provided to support the claim made.</p>

## B LEGAL REQUIREMENTS UNDER THE NGL

This appendix sets out the relevant legal requirements under the NGL for the AEMC to make this final rule determination.

### B.1 Final rule determination

In accordance with s. 311 of the NGL the Commission has made this final rule determination in relation to the rule proposed by EJA and IEEFA.

The Commission's reasons for making this final rule determination are set out in section 2.4 and in Chapters 3, 4, 5 and 6.

### B.2 Power to make the rule

The Commission is satisfied that the final falls within the subject matter about which the Commission may make rules. The final rule falls within s. 74 of the NGL as it relates to the regulation of access to pipeline services. In particular, as it relates to following matters set out in Schedule 1 to the NGL:

- The procedure and time limits for the making of access determination under Chapter 6A.
- The kinds of access determinations that may be made under Chapter 6A.
- Dispute resolution, including:
  - the definition of the class of disputes subject to the dispute resolution provisions of the NGR
  - the appointment of persons to arbitrate, mediate or assist in some other way in the resolution of such disputes
  - the appointment of a person to manage and facilitate the dispute resolution process (without however, derogating from that person's power to act personally as an arbitrator or mediator in a particular dispute).

### B.3 Commission's considerations

In assessing the rule change request the Commission considered:

- its powers under the NGL to make the rule
- the rule change request
- submissions received during each round of consultation
- presentations and statements made at the hearing
- the Commission's analysis as to the ways in which the proposed rule will or is likely to, contribute to the NGL.

There is no relevant Ministerial Council on Energy (MCE) statement of policy principles for this rule change request.<sup>263</sup>

The Commission may only make a rule that has effect with respect to an adoptive jurisdiction if satisfied that the proposed rule is compatible with the proper performance of Australian Energy Market Operator (AEMO)'s declared system functions.<sup>264</sup> The final rule is compatible with AEMO's declared system functions because it is unrelated to AEMO's functions.

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<sup>263</sup> Under s. 73 of the NGL the AEMC must have regard to any relevant MCE statement of policy principles in making a rule. The MCE is referenced in the AEMC's governing legislation and is a legally enduring body comprising the Federal, State and Territory Ministers responsible for energy. On 1 July 2011, the MCE was amalgamated with the Ministerial Council on Mineral and Petroleum Resources. The amalgamated council is now called the COAG Energy Council.

<sup>264</sup> Section 295(4) of the NGL.

## C REGULATORY REGIME FOR GAS PIPELINES

This appendix provides additional information regarding the regulatory regimes for third party access to scheme and non-scheme pipelines contained in the NGL and NGR.<sup>265</sup>

### C.1 Access regime for scheme pipelines

Two forms of regulation can be applied to covered pipelines under Parts 8 to 12 of the NGR: light and full regulation.<sup>266</sup> A series of tests are used to determine which form of regulation should apply to a particular pipeline.

The regulation of covered pipelines is carried out within a negotiate-arbitrate framework for third party access to the services provided by a pipeline. Prospective pipeline users negotiate access, based on information required to be provided by the service provider, and in the case of full regulation pipelines, by reference to the regulator-approved access arrangement. The information published by light regulation pipeline service providers and that contained in an access arrangement includes tariff and non-tariff terms and conditions relating to the services provided by the pipeline. If the prospective user and service provider are not able to agree on a contract to access pipeline services, then parties can move to an arbitration.<sup>267</sup>

Any party can apply to the National Competition Council (NCC) seeking that a pipeline be classified as a covered pipeline.<sup>268</sup> As well as being able to change the coverage status of a pipeline at any time, the form of regulation of a covered pipeline (that is, either full or light regulation) can also change upon application to the NCC.

In addition, the regulatory status of a pipeline could be determined prior to the commissioning of a pipeline, utilising either:

- Competitive tender process. A project proponent can initiate a competitive tender process with the regulator. Subject to the process meeting the relevant requirements, this will result in the pipeline becoming a covered pipeline, with certain outcomes of the tender process being incorporated into the access arrangement without any assessment by the regulator. The access arrangement period for a competitive tender pipeline is 15 years, after which, the pipeline automatically becomes a non-scheme pipeline.<sup>269</sup>
- Greenfield 15-year no-coverage determination. The service provider of a greenfields pipeline can apply to the NCC for a 15-year no-coverage determination at any time prior to the commissioning of the pipeline.<sup>270</sup> If granted, no party can seek coverage of the

<sup>265</sup> A separate regime for certain service providers to provide information to the Bulletin Board is set out in Part 18 of the NGR and, for Western Australia, the Gas Services Information Rules.

<sup>266</sup> Covered pipelines are a subset of the classification scheme pipeline. The second category within the scheme pipeline classification is international pipelines with a price regulation exemption. There are no international pipelines.

<sup>267</sup> AEMC, *Review into the scope of economic regulation applied to covered pipelines*, final report, 3 July 2018, pp. 26-29.

<sup>268</sup> Service providers also have the ability to voluntarily submit a full access arrangement to the regulator. Once approved, the pipeline is classified as a full regulation pipeline for the duration of the access arrangement period.

<sup>269</sup> Rules 22(4)(f) and 24(c)(vi) of the NGR specify that the expiry date of a competitive tender process access arrangement must be no more than 15 years from the commissioning of the pipeline.

<sup>270</sup> Section 151 of the NGL and rule 122 of the NGR.

pipeline for a period of 15 years; thus the pipeline is a non-scheme pipeline for that period.<sup>271</sup>

## C.2 Access regime for non-scheme pipelines

In April 2016, the Australian Competition & Consumer Commission (ACCC) published its report for the Inquiry into the east coast gas market (inquiry) which found many gas pipeline service providers to be engaging in monopoly pricing, resulting in higher delivered gas prices and having an adverse effect on the economic efficiency of the east coast gas market.<sup>272</sup> In response to the ACCC's inquiry and the AEMC's Eastern Australian wholesale gas market and pipelines framework review, the COAG Energy Council published its gas market reform package in August 2016.<sup>273</sup> One of the reform measures in the package directed Dr Michael Vertigan AC to examine the regulatory test for the regulation of gas pipelines and make recommendations on any further actions.

Dr Vertigan undertook the Examination of the test for the regulation of gas pipelines (examination).<sup>274</sup> He found that the service providers of existing pipelines had market power and, in some instances the exercise of the market power was resulting in inefficient outcomes for the market. Further, Dr Vertigan considered that the test for regulation did not appear to be posing a credible threat to pipeline service providers. As a result, he recommended the introduction of an information disclosure and arbitration framework for non-scheme pipelines in order to reduce the information asymmetry and the imbalance in bargaining power of shippers when negotiating with pipeline service providers.<sup>275</sup>

On 14 December 2016, the COAG Energy Council agreed to the recommendations from the examination and the Gas Market Reform Group (GMRG) commenced the development of the framework.<sup>276</sup> The establishment of the framework involved legislative changes to add Chapter 6A and s. 83A to the NGL which passed the South Australian Parliament on 20 June 2017. The development of the framework's detailed design involved the publication of an implementation options papers and stakeholder consultation by the GMRG, and approval of the final design recommendations by the COAG Energy Council's Senior Committee of Officials (SCO). The GMRG proceeded to publish draft initial rules and sought stakeholder input in developing the final initial rules. On 1 August 2017, the National Gas Pipeline Access-arbitration Amendment Rule was made by the South Australian Minister for Mineral Resources and Energy which introduced a new Part 23 into the NGR and brought into effect a new regulatory framework for non-scheme pipelines.

The overarching objective of the Part 23 framework is to facilitate access to services provided by non-scheme pipelines on reasonable terms. This is taken to mean at prices and on terms

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271 Section 158 of the NGL sets out the effect of making a 15-year no-coverage determination.

272 ACCC, *Inquiry into the east coast gas market*, April 2016, p. 18.

273 COAG Energy Council, *Gas market reform package: Bulletin Two*, August 2018, p.1.

274 Dr Michael Vertigan AC, *Examination of the current test for the regulation of gas pipelines*, 14 December 2016.

275 GMRG, *Gas pipeline information disclosure and arbitration framework, initial National Gas Rules explanatory note*, August 2017, p. 1.

276 GMRG, *Gas pipeline information disclosure and arbitration framework, initial National Gas Rules explanatory note*, August 2017, p. 1.

and conditions that so far as practical reflect the outcomes that would occur in a workably competitive market. The framework:<sup>277</sup>

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

The Part 23 regime does not require the regulator to assess or approve of information published by a service provider.

Subject to the granting of an exemption under the NGR, the framework applies to all transmission and distribution pipelines that are not scheme pipelines.<sup>278</sup> The AER (or the ERA in Western Australia) serves the role of the scheme administrator for the framework. The exemption mechanism allows non-scheme pipeline service providers to apply to the regulator for exemption from the framework in its entirety, or from some or all of the information reporting requirements under certain circumstances.<sup>279</sup> The categories and criteria for exemptions are provided in the table below.

**Table C.1: Part 23 exemption category and criteria**

<b>EXEMPTION CATEGORY</b>	<b>EXEMPTION CRITERIA</b>
Category 1: exemption from the access and arbitration of disputes sections of the framework	The pipeline does not provide third party access.
Category 2: exemption from information disclosure	Either the pipeline does not provide third party access, or the pipeline is a single shipper pipeline.
Category 3: exemption from publishing service usage information, service availability information and financial information	At any time, the average daily injection of natural gas into the pipeline calculated over the immediately preceding 24 months is less than 10 TJ/day.

Source: AER website, viewed 2 November 2018, <https://www.aer.gov.au/networks-pipelines/non-scheme-pipelines/part-23-access-to-non-scheme-pipelines-exemptions>.

<sup>277</sup> GMRG, *Gas pipeline information disclosure and arbitration framework, initial National Gas Rules explanatory note*, August 2017, p. 7.

<sup>278</sup> Section 216C of the NGL.

<sup>279</sup> GMRG, *Gas pipeline information disclosure and arbitration framework, initial National Gas Rules explanatory note*, August 2017, p. 43.