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8 February 2017

Energy Council Secretariat
Via email: energycouncil@industry.gov.au

National Gas (South Australia) (Pipelines Access-Arbitration) Amendment Bill 2017

Thank you for the opportunity to comment of the draft National Gas (South Australia) (Pipelines Access-Arbitration) Amendment Bill 2017.

The Australian Pipelines and Gas Association (APGA) supports implementation of the recommendations by Dr Michael Vertigan regarding binding commercial arbitrationas agreed by the COAG Energy Council on 14 December 2016.

APGA is concerned, however, that the draft legislation does not reflect Dr Vertigan's recommendations. It instead seeks to implement a model more in common with heavy-handed regulatory arbitration, rather than commercial arbitration, on non-scheme pipelines.

APGA is also concerned with the release of the draft Bill without any notice; the short timeframe for consultation; the lack of a Regulation Impact Statement; the lack of an Explanatory Memorandum; and the lack of transparency around the forward process. The process and material presented to date fail to meet the guidelines set by the Office of Best Practice Regulation for regulatory change.

It is imperative that appropriate consideration of submissions and meaningful consultation is undertaken during the remaining development of this important legislation. The haste to date is unnecessary - the legislation will not have an effect until the details of the reform are enabled through the National Gas Rules – and has the potential for poor outcomes.

In the attached submission, APGA focusses on developing the legislative framework required to implement a binding commercial arbitration framework that meets the characteristics set out by Dr Vertigan in the Final Report of the Examination of the Coverage Test for Gas Transmission Pipelines.

APGA welcomes the opportunity to discuss this matter further. Please contact me on sdavies@apga.org.au or (02) 6273 0577.

Yours sincerely

STEVE DAVIES
National Policy Manager

Submission

National Gas (South Australia) (Pipelines Access-Arbitration) Amendment Bill 2017

8 February 2017

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Introduction

APGA supports implementation of the recommendations by Dr Michael Vertigan as agreed by the COAG Energy Council on 14 December 2016. APGA is concerned, however, that the draft legislation released by the COAG Energy Council does not reflect the COAG Energy Council agreement, and instead seeks to implement a model closer to heavy-handed regulatory arbitration model on non-scheme pipelines.

The very compressed timeline imposed by the CoAG Energy Council means that stakeholders have been given limited opportunity to consider this legislation. This is disappointing given the scope of this legislation and the potential, if it is not crafted carefully, to significantly undermine incentives for investment and innovation for pipelines that are not suitable for full regulation. This would be contrary to the intent Dr Vertigan's proposed scheme, and undermine the broader policy aim of supporting the future development of the gas sector.

APGA considers that, notwithstanding the compressed timetable imposed by the COAG Energy Council, it is critical that officials complete a regulation impact statement (RIS). It is a clear requirement of the Office of Best Practice Regulation that all regulatory changes be accompanied by such an analysis.

The rapid timeline also seems to have limited the ability of SCO to provide an Explanatory Memorandum for the draft Bill. The development of an Explanatory Memorandum imposes a discipline on drafters to consider and articulate the specific purpose of each clause, providing an opportunity to improve a draft Bill. The absence of an Explanatory Memorandum means readers of the draft Bill have to make assumptions regarding the intent and purpose of each section.

APGA anticipates an equally tight timeframe following submissions to the draft Bill and it is incumbent on the Energy Council Secretariat to provide greater transparency around the forward process.

APGA would also like to highlight to the COAG that there are fundamental interdependencies between the NGL and the Rules. These interdependencies are relevant in two respects:

- Firstly, the information framework to be outlined in the NGR will be critical to determining the arbitration framework that is to apply.
- Secondly, the arbitration framework will have no practical effect until the details of that framework are outlined in the Rules.

It would therefore be appropriate for more time to be taken to get the amending legislation right and pass it at the same time as the Rules are created.

The purpose of introducing binding commercial arbitration for gas pipeline access disputes to the National Gas Law is to provide a new mechanism that acts as a credible threat to encourage appropriate behaviour from contracting parties during negotiations. It is clear from the Vertigan Review that the intent is that it is the threat of commercial arbitration that will control behaviour.

The focus should therefore be on ensuring a satisfactory outcome from bona fide negotiations, which in this instance should be achieved by providing adequate threat of timely decision making through binding commercial arbitration, rather than imposing a single and prescriptive path on all negotiations for gas pipeline access.

It is APGA's view that some aspects of the Draft Bill establish powers in the NGR which indicate that a very prescriptive approach to controlling the behaviour during negotiations will be adopted. This is not only unnecessary but fails to recognise the intention of the Vertigan Review to encourage effective commercial negotiations in a manner that avoids the time delays and high costs usually associated with formal regulatory processes. In this regard, there are many paths to satisfactory outcomes in commercial negotiation. Every negotiation is different. Some are more complex than others. There are also many different mechanisms to resolve disputes which arise in negotiations.

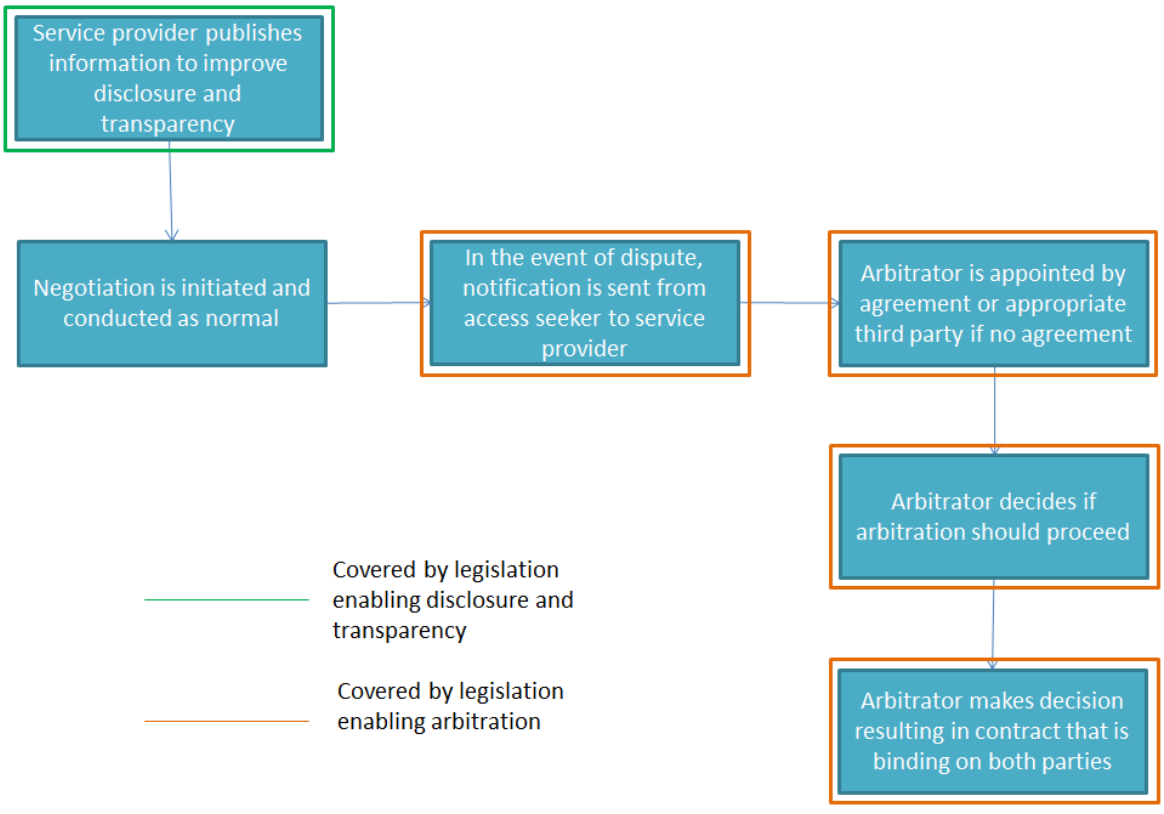
APGA has focussed on identifying the most expedient path to achieving the threat of arbitration without developing overly prescriptive and cumbersome negotiation and arbitration processes.

In this submission, APGA will provide an overview of key issues and specific comments on sections of the Draft Bill.

Summary

APGA considers that the implementation of a binding commercial arbitration framework should be implemented in the NGL so that there is minimal impact on existing commercial processes. This is consistent with the indicative framework set out in the Vertigan Review.

Such a process is set out in the below diagram.



APGA has made 22 recommendations on changes to the draft Bill that will:

- Implement an arbitration process more closely aligned with the recommendation of the Vertigan Review.

- Limit the number of new powers to those absolutely necessary to implement the two separate transparency and arbitration frameworks.
- Decrease complexity and improve timeliness of the dispute resolution process.
- Achieve appropriate behaviour change through threat of arbitration.

Each recommendation is set out in the following submission with supporting arguments and discussion.

Arbitration Framework envisaged by the Vertigan Review

In considering the draft Bill, APGA has been mindful of the indicative characteristics set out on pages 91 and 92 of the Final Report of the Vertigan Review

On an indicative basis, the arbitration framework would encompass the following characteristics:

1) Commercial negotiation between parties would occur whenever any party sought pipeline services on an open access pipeline.

2) The existing provision for a fifteen year 'no-coverage period' would be retained and during that period any negotiations on services which are contained in the foundation contracts would be governed by the provisions of those contracts. However, negotiations involving parties to those foundation contracts relating to services not covered in those contracts, or involving a new party, would be subject to the arbitration framework.

3) After negotiations had commenced either party could signal a breakdown which would trigger the arbitral process.

4) The arbitration would be commercially-based (as distinct from judicial or regulator based), with the arbitrator appointed by mutual agreement of the parties, but with provision for imposition of an arbitrator where there is no agreement. The framework would be designed for expeditious resolution of the dispute with provisions to avoid delay and gaming. Structures such as 'final offer arbitration' would be considered for inclusion.

5) The decision of the arbitrator would be binding on both parties.

6) Oversight and maintenance of the framework will be required, including in relation to procedural rules, pricing principles and the power to appoint an arbitrator to a dispute in the absence of agreement between the parties. The AER is the logical institution to undertake this role.

APGA considers that the Vertigan Review intended that the arbitration framework to be implemented matches standard commercial arrangements as closely as possible. The intent of the legislation is to create the right for the parties to access commercial arbitration in relation to non-scheme pipelines, where currently access to commercial arbitration is by the agreement of the parties. It is not clear that the legislation needs to go much further in relation to setting out the conduct of commercial arbitration.

New Powers in the draft Bill

APGA's review of the draft Bill has identified that extensive new powers are to be given to make Rules and to exercise certain functions under the arbitration framework. They are summarised in the

table below. APGA believes that some of these new powers will allow the development of a framework that goes well beyond the COAG Energy Council agreed framework set out in the Final Report of the Vertigan Review.

As outlined above, APGA is concerned to ensure that the powers to be granted in the draft Bill are limited to those necessary to give effect to the recommendations in the Final Report. Bestowing broad powers on the scheme regulator and the arbitrator, as the draft Bill does, will create the investment and innovation chilling environment that Dr Vertigan was seeking to avoid in crafting his recommendations. This is particularly important as,over time, changes can be made to that part of the framework to be established in the NGR with relative ease.

Clause	**Power**	**Wielder**
216C(2)	Making of exclusions for application of Chapter 6A	Rule maker (SA or AEMC)
216D	Making of applications of Chapter 6A to disputes	Rule maker (SA or AEMC)
216F	**Making of provisions for access proposals**	Rule maker (SA or AEMC)
216H(2)	**Making of requirements for a notification of access dispute**	Rule maker (SA or AEMC)
216I(b)	Determination for a third party to be included in an access dispute	**Scheme Regulator**
216J(1)	**Refer dispute to arbitration**	**Scheme Regulator**
216J(3)	Making of specified dispute termination circumstances	Rule maker (SA or AEMC)
216K (1)	Making of process for appointment of arbitrator	Rule maker (SA or AEMC)
216K(2)	Appoint arbitrator if parties fail to agree	**Scheme Regulator**
216L(1)	Determination of access dispute	Arbitrator
216L(4)	**Making of specifics of a determination**	Rule maker (SA or AEMC)
216M(b+c)	Making of pricing and other principles to guide behaviour	Rule maker (SA or AEMC)
216M(d)	**Ability to take any matters into account**	**Arbitrator**
216O(1)	Ability to terminate arbitration	Arbitrator
216P(1)	Ability to terminate arbitration	Access seeker
216Q	Ability to vary compliance with access determination	Rule maker (SA or AEMC)
216R(1)	Ability to vary an access determination	All parties
216R(2)	Making of provisions to vary an access determination	Rule maker (SA or AEMC)
216S(b)	Making of exclusions to application of Chapter 6 Part 6	Regulations
216T	Making of provisions for correction of access determination	Rule maker (SA or AEMC)
216V(2)	Making of rules for cost allocation	Rule maker (SA or AEMC)

New legislation should seek to introduce as few powers as necessary to achieve the outcome sought. Additional powers create an environment for regulatory creep, introduce additional steps that add time to decisions and create new decision points that can be subject to judicial review.

While many of the powers proposed in the draft Bill are appropriate and necessary to implement a binding commercial arbitration mechanism for uncovered pipelines in the NGL, there are several powers that are unnecessary in order to implement an arbitration framework with the characteristics set out by the Vertigan Review. In some cases, there are powers that have been drafted in such a way that will implement a slower arbitration process than that recommended by the Vertigan Review. APGA has bolded these in the above table.

Requirements for the draft Bill

Following the characteristics set out by the Vertigan Review, APGA has identified issues with powers and provisions set out in the draft Bill.

Characteristic 1

Commercial negotiation between parties would occur whenever any party sought pipeline services to an open access pipeline.

Gas market participants who contract for services on transmission pipelines are well versed in commercial negotiation. These negotiations can be initiated in many ways and take many forms. The legislative framework should therefore not mandate a single process for conducting commercial negotiations. Nor should it outline a prescriptive framework for commercial negotiations.

Clause 216F sets out a new power mandating specific requirements regarding commencement of negotiations and behaviour during negotiations.

216F – Access Proposals

Clause 216F(1) sets out that the Rules may contain provisions for users or prospective to users to seek access to pipeline services or vary existing contracts. The details in 216F(2) indicate that a highly prescriptive approach is envisaged, to the point where the actions of service providers and access seekers during negotiations could easily become dictated by the NGR.

Clause 216F of the draft legislation sets out heads of powers for the Rules to do two things:

- Set out how the parties should initiate and conduct negotiations; and
- Prescribe the disclosure and sharing of information prior to and during negotiation.

Both of these powers are inappropriate.

Initiation and conduct of negotiations

As noted above, there is no need to dictate the conduct of a commercial negotiation.

An effort to prescribe behaviour at the commencement and during negotiation does not recognise and cannot account for the wide range of negotiations that can take place, the difference in complexity across this range, or the level of sophistication of an access seeker. Commercial negotiations can take many forms. For example, an enquiry (and subsequent negotiation) for a standard firm forward haul service on a single pipeline has very little in common with an enquiry for transportation and storage services across multiple pipelines. Negotiations after either enquiry will be very different if the access seeker is a new entrant gas user or an incumbent major retailer.

Attempting to prescribe these matters moves the proposed framework away from a commercial negotiation and arbitration framework towards a regulatory one (and indeed, appears based on rules

for negotiation in access regimes). This is not consistent with the COAG Energy Council agreed framework set out by Dr Vertigan.

APGA accepts a primary driver for this reform is concerns around the behaviour and level of power of pipeline service providers during negotiation. The threat of binding commercial arbitration is being introduced to address this. The intent is that this threat, of itself, is sufficient to drive changes in behaviour. It is not appropriate or effective to attempt to prescribe how behaviour during negotiations should change. There are too many variables across the range of negotiations that occur for pipeline services for this to be practical.

The Vertigan Review did not recommend that prescriptions on behaviour during negotiation be introduced. It is sufficient that an access seeker describe the behaviour of both parties in its information presented to inform the decision on whether a notice should proceed to arbitration.

Information publication

The Vertigan Review recommended:

Recommendation 1

That the disclosure and transparency of pipeline service pricing and contract terms and conditions be enhanced, including requiring the provision of information on the full range of pipeline services which are available or sought (not solely focused on forward haul services).

And that

Recommendation 3

That the GMRG be tasked with developing a detailed design of the disclosure and transparency requirements and of the arbitration framework, after consultation with industry, other stakeholders, the ACCC, the AER and the AEMC, with recommendations to be considered by the COAG Energy Council in mid-2017.

The Vertigan Review's discussion of recommendation 1 makes clear that the envisaged information is to be published and publically available. This means it will be visible to all stakeholders, regardless of whether they are currently seeking access to a pipeline or not.

APGA supports the purpose of recommendation 1.

216F(b) goes beyond this in envisaging that the information provided by a service provider to an access seeker during negotiation may be subject to mandate through the NGR. This is inappropriate. As set out above, the range of negotiations possible also makes this impractical.

The threat of binding arbitration is sufficient to ensure a service provider provides appropriate information during negotiation. If a service provider does not provide appropriate information, it will be self-evident to an arbitrator.

APGA has not conducted an exhaustive review of the existing powers related to information publication in the NGL. It may be necessary that a new power be created to implement recommendation 1 and mandate the additional publication of information to better inform stakeholders and support commercial negotiation.

Recommendation 3 of the Vertigan Review makes clear that the information and disclosure requirements and the arbitration framework are two separate matters.

The draft Bill introduces a new chapter to the NGL titled 'Chapter 6A –Access Disputes –Non-scheme pipelines'. The provisions of this chapter should deal only with the arbitration framework.

If a new power is necessary, a more appropriate location should be found (or created) that clearly applies to all non-scheme pipelines regardless of whether an access dispute is present.

Recommendation 1: ***Clause 216F should be removed from Chapter 6A of the draft Bill. If a new power to describe information that must be published by service providers to better inform stakeholders is required, a specific provision should be drafted and included in the NGL in a more appropriate place.***

Characteristic 2

The existing provision for a fifteen year 'no-coverage period' would be retained and during that period any negotiations on services which are contained in the foundation contracts would be governed by the provisions of those contracts. However, negotiations involving parties to those foundation contracts relating to services not covered in those contracts, or involving a new party, would be subject to the arbitration framework.

There do not appear to be any provisions to implement this recommendation. Pipelines that have been granted a fifteen year 'no coverage period' are by definition non-scheme pipelines. As currently drafted, Clause 216F would allow for variations to foundation contracts to be subject to binding commercial arbitration. This is not appropriate, and is discussed later in this submission.

Recommendation 2: ***That Clause 216C – Application of Chapter be amended to reflect the recommendation of the Vertigan Review that contracts subject to the fifteen year 'no coverage period' be excluded from the provisions of Chapter 6.***

Characteristic 3

After negotiations had commenced either party could signal a breakdown which would trigger the arbitral process.

Under the framework set out in the draft Bill, the scheme regulator is a gate keeper to arbitration. The scheme regulator must be notified of dispute through a mandatory process (to be defined in the NGR) and must make a decision whether to refer the matter to arbitration.

Consistent with the intention of the Vertigan Review that the framework reflect commercial arrangements as much as possible and lead to the efficient resolution of negotiations, APGA submits that these are unnecessary steps as they:

- Add complexity;
- Delay the process; and

- Duplicate deliberations that the arbitrator will make in the normal course of considering the facts of the issue.

Trigger for arbitration

The addition of a third-party who is not the arbitrator in order to decide whether to refer something to arbitration introduces an additional step to the arbitration process that adds additional time, delays and cost.

Mandating the requirements of a notification process increases complexity of the notification process. If the mandatory requirements are not met, progressing of the process will be delayed.

APGA notes that there are many legislative precedents whereby a dispute resolution framework is established so that the decision maker (be it an arbitrator or adjudicator) not only decides what award to make but also decides whether it has jurisdiction to hear the arbitration. Examples are the Construction Contracts Acts of each State and Territory. The dispute resolution framework in this regime was established to allow for a speedy and cost effective means of resolving certain disputes under construction contracts.

APGA suggests that the arbitration framework of the NGL could be guided by relevant parts of the Construction Contracts Act by:

- Allowing for bona fide or prescribed disputes to be resolved by an arbitrator or adjudicator who can be appointed by a "prescribed appointer". This allows for a variety of entities who could be chosen from to appoint an arbitrator. Given the nature of issues that could be relevant in a negotiation about pipeline access, it is important not to limit the appointing agency to one particular entity and to give the parties to a negotiation the flexibility to choose an appointing agency who they believe has the requisite skill set to choose an arbitrator best suited for matters that are in dispute. There are a variety of appointing agencies who could be called on by negotiating parties – such as the Institute of Mediators and Arbitrators Australia, the Institute of Chartered Accountants, the Chartered Institute of Arbitrators Australia, the Australian Arbitration Association, the Centre for Energy and Resources Arbitration;
- Providing for the arbitrator to be appointed by one of these appointing agencies in the absence of agreement between parties; and
- Providing for the arbitrator to also decide whether he or she has jurisdiction to hear the dispute. This will create the appropriate tension to ensure that frivolous and vexatious disputes are not referred to arbitration.

Recommendation 3: ***APGA recommends that Clause 216H – Notification of Access Dispute be amended to require that a prospective user or user must notify in writing a service provider, rather than the scheme regulator, of an access dispute.***

This is then a trigger for an arbitrator to be appointed. The process by which the arbitrator should be appointed is discussed below in APGA's consideration of the fourth characteristic in the Vertigan Review's framework.

Notification requirements

Section 216H(2) sets out that:

> *(2) A notification must include, in accordance with the Rules, information about—*
> *(a) the matters (if any) on which agreement has been reached; and*
> *(b) the matters that are in dispute; and*
> *(c) any other matter specified by the Rules.*

These obligations are unnecessary. A commercial arbitration framework should be essentially self-executing. The party seeking to refer a dispute to arbitration can notify the counterparty and the arbitrator of the dispute. It is up to the notifying party to provide the arbitrator with necessary information to support the arbitration, and it is in the interests of both parties to provide information to the arbitrator in respect of a dispute – there is no need to mandate this process.

Recommendation 4: ***The need for the detail of a notification of access dispute to be specified in the rules be removed. Access seekers are capable of appropriately crafting a notification dispute.***

Parties to an access dispute

The requirement in Clause 216I(2) for the scheme regulator to identify third parties to an access dispute is unnecessary and duplicative.

The arbitrator is well placed to identify any third parties and may need to do so regardless of the scheme regulator's assessment.

The draft Bill adds an additional step, and time, to the arbitration process.

Recommendation 5: ***Only the arbitrator should have the power to identify related parties to an access dispute.***

Referring a dispute to arbitration

Clause 216J sets out the power of the scheme regulator to refer a matter to arbitration. In commercial arbitration, it is the arbitrator who decides whether a matter should proceed further. The arbitrator is the appropriate decision maker here too.

The matters set out in Clause 216J(2) that the decision maker must consider in deciding whether to refer a dispute to arbitration are issues that will be covered in information considered by an arbitrator in the normal course of making an access determination. Requiring the scheme regulator to assess these matters and make a decision:

- Duplicates considerations that will naturally occur during the arbitration process.
- Introduces an additional party to a decision that could be subject to judicial review, with the potential for substantially delaying any outcome.

APGA also notes that the scope of matters that can be referred to arbitration has not been determined yet.

Recommedation 6: ***The power to decided whether arbitration should proceed should lie with the arbitrator.***

The immediate referral of a dispute to arbitrator has further benefit as it will introduce the costs of arbitration earlier in the process. This will assist in deterring vexatious notices from access seekers and further incentivise service providers to achieve negotiated outcomes. As currently drafted, service providers face no costs until an arbitrator is appointed.

Characteristic 4

The arbitration would be commercially-based (as distinct from judicial or regulator based), with the arbitrator appointed by mutual agreement of the parties, but with provision for imposition of an arbitrator where there is no agreement. The framework would be designed for expeditious resolution of the dispute with provisions to avoid delay and gaming. Structures such as 'final offer arbitration' would be considered for inclusion.

Selection of the arbitrator

The draft Bill sets out that parties to an access dispute may agree to appoint an arbitrator. The detail of this process will be set out in the NGR. This is appropriate and options will be investigated further by APGA. This process should only be triggered where prospective user or user and a service provider cannot agree on an arbitrator.

It is also appropriate that a third-party be identified in legislation to appoint an arbitrator in the event of a failure to reach agreement.

APGA does not agree with the Vertigan Review that the AER is the appropriate institution to perform this role. The AER does not make this decision in the course of commercial arbitration. Commercial arbitration differs significantly from regulatory arbitration in its scope and conduct, and this decision does not appear to be similar to any other made by the AER.

It is not apparent that the AER has any particular expertise to offer in the selection of a commercial arbitrator.

APGA refers to the earlier comments about not limiting the "appointing agency" to one particular entity. There is ample legislative precedent to refer to.

Recommendation 7: ***Clause 216K(2) be amended to have the Regulations allow for prescribed appointing agencies to be outlined and for any of these agencies to be called on by a party to appoint an arbitrator if parties cannot reach agreement on an arbitrator.***

Framework for decision making

Clause 216M sets out the principles to be taken into account by the arbitrator.

Use of the National Gas Objective

The NGO is the objects clause of the NGL and is to guide all decisions required by the NGL and NGR. This does not include the commercial arbitration decision and it is not appropriate for a decision of the commercial arbitrator to be guided by the NGO. The NGO is relevant to this scheme

only to the extent that the existence of the scheme is considered to be consistent with the NGO, and that the NGO guides the development of the legislation, rules and regulations that enact the commercial arbitration scheme.

The commercial arbitrator needs to consider the matters relevant to the dispute before it, not the broader economic efficiency considerations that can involve the balancing of competing policy objectives that is involved in the NGO. This is a key area where commercial and regulatory arbitration differs, and this difference needs to be reflected in the commercial arbitration scheme.

Further, a specific requirement to consider the NGO places significant complexity on the decision making of the arbitrator and appears to add little, if any value. It is not conducive to the quick resolution of disputes.

Recommendation 8: ***The requirement for the arbitrator to consider the NGO be removed. The broad questions of economic efficiency across the Australian economy are not an appropriate consideration during commercial arbitration. It also adds complexity and dely.***

Other matters

The inclusion of an 'other matters' provision broadens the scope of the arbitrator's decision and decreases the likelihood of an expeditious resolution. It also increase the potential for gaming, allowing for the consideration of interesting but ultimately irrelevant information. The uncertainty that this provision introduces to the commercial arbitration process is likely to undermine incentives for investment and innovation by the pipeliner.

Recommendation 9: ***A consideration of 'other matters' should be removed from the arbitrator's decision making requirements.***

The decision to be made

To ensure an expeditious resolution, the arbitrator should be limited to deciding whether or not the offering made by the service provider meets the pricing and other principles. The requirements of pipeliner pricing principles will be determined during rule development.

Recommendation 10: ***The principles to be taken into account during an arbitrator's decision be constrained to the pricing (and other) principles.***

Specifics of a determination

Clause 216L(4) sets out the Rules may specify requirements of a determination. Decisions are made in commercial arbitration regularly and such determinations do not require specifications on form. Professional arbitrators have a clear understanding of the information that needs to be conveyed in their decision.

A requirement to meet mandatory requirement increases complexity and can delay decision making timelines.

Recommendation 11: ***The arbitrator be provided discretion on the form and specifics of a determination.***

Characteristic 5

The decision of the arbitrator would be binding on both parties.

This is accounted for in clause 216Q.

Given that a decision is binding on both parties, APGA assumes that a binding contract must result from the arbitration process. This may open the possibility that the arbitrator will make decisions on aspects of the contract not in dispute. There should be a limitation on the arbitrators decision making to those only matters that are within scope and subject of the dispute before the arbitrator.

The draft legislation also includes provision for the access determination from a commercial arbitration to be enforceable under section 271. This creates a potential double jeopardy situation and is not appropriate in this scheme. The outcomes of commercial arbitration should be enforceable between the parties under contract as per proposed section 216Q.

Recommendation 12: ***The arbitrator's decision should be limited to matters in dispute before the arbitrator.***

Characteristic 6

Oversight and maintenance of the framework will be required, including in relation to procedural rules, pricing principles and the power to appoint an arbitrator to a dispute in the absence of agreement between the parties. The AER is the logical institution to undertake this role.

The primary role of the AER is to monitor and enforce compliance with the NGL and NGR. This is the appropriate oversight role for the AER with the implementation of this new mechanism.

APGA does not believe it is appropriate that the AER has responsibility for the pricing principles to be followed in commercial processes. The AER is well versed in regulatory pricing principles which have little in common with commercial pricing principles or how they are applied in a commercial negotiation. These are roles for the arbitrator.

The proposed commercial arbitration scheme is to be set out in the NGR, the normal rule change processes should apply to the scheme.

Recommendation 13: ***The role of the AER be consistent with its role as compliance monitor and enforcer.***

Other Issues

Role of the scheme regulator

The process described above has a very limited role for a scheme regulator, with the only decision requiring a party other that the service provider, prospective user/user or arbitrator being the appointment of an arbitrator if the parties cannot reach agreement.

Recommendation 14: ***The role of scheme regulator be removed entirely.***

The party to appoint an arbitrator if the parties cannot reach agreement can be explicitly referenced.

The removal of the scheme regulator and associated processes will speed up the arbitration process by reducing the number of steps to be followed and removing the potential for duplication of consideration of some matters.

Decision to proceed with arbitration

In addition to the recommendation above that the arbitrator be the party to make this decision, APGA considers there are other improvements that can be made.

Consideration to include period of time between submission of notification of access dispute and referral to arbitration

The first is to consider equiring a period of time to pass between a notification of access dispute and the referral of a dispute to arbitration. As currently drafted, the notice of access dispute leads immediately to arbitration. This does not provide an access seeker the ability to formally escalate an access dispute yet avoid arbitration.

Superior negotiated outcomes may be achieved if a notice of access dispute signals a formal escalation of an issue without immediate recourse to arbitration. A prescribed period of a number of days between submission of a notification of access dispute and the referral of the dispute to an arbitrator would allow for further negotiation to occur. This negotiation, with the imminent referral to arbitration, provides an excellent opportunity to reach satisfactory outcomes.

The value of a prescribed period between notification of access dispute and referral to arbitration needs to be balanced against the need for a timely decision to resolve the access dispute.

Recommendation 15: ***Consideration be given to a prescribed period of time between notification of access dispute and referral to arbitration.***

Requirement for scheme regulator to not refer certain notifications

Clause 216J(2) sets out provisions that mean the scheme regulator ‘need not’ refer an access dispute to arbitration. ‘Need not’ should be replaced with ‘must not’. If the decision maker deems an access dispute to be vexatious, it must not be allowed to refer it to arbitration.

Recommendation 16: ***Notifications that are deemed inappropriate ‘must’ not be referrable to arbitration, as opposed to ‘need not’.***

No access determination if the arbitrator considers there is genuine competition
It is not appropriate for the binding commercial arbitration mechanism to be used in instances where there is genuine competition for a service. . It is also not appropriate for a notification of access dispute to be lodged if an access seeker is involved in negotiation with two or more service providers (or a provider of an alternative but substitutable service) for an equivalent service. This includes potentially contestable works such as pipeline extensions and laterals completed by third parties.

Clause 187 in the current NGL requires that of the decision maker for access disputes on covered pipelines and it is appropriate that this provision be mirrored for uncovered pipelines.

187—No access determination if dispute resolution body considers there is genuine competition
Despite anything to the contrary in this Chapter, the dispute resolution body may refuse to make an access determination that requires the service provider to provide a particular pipeline service to a prospective user or user if the dispute resolution body considers that the pipeline service the subject of the access dispute could be provided on a genuinely competitive basis by a person other than the service provider or an associate of the service provider

The decision maker must not be able to continue arbitration if it considers that genuine competition is present.

Recommendation 17: ***Arbitration should not be available in circumstances where there is genuine competition.***

Protection of existing contractual rights

Clause 216G(2) and 216N make clear that the existing contractual rights of 'genuine' third parties are to be protected during negotiation and arbitration.

It is appropriate that the existing contractual rights of all parties be protected during arbitration. APGA cannot envisage a circumstance where it is appropriate that an arbitrator deliver a determination that removes existing contractual rights of a service provider or an access seeker. Further, APGA is unsure as to what a 'genuine' third party is. This term is not used elsewhere in the legislation and APGA considers that a reference to third parties is sufficient.

The current drafting of Clause 216F(1)(b) would appear to allow a user to seek arbitration in relation to a variation to an existing contract. Extension of arbitration powers to contract variations could allow a user to effectively reopen a contract and its terms to arbitration after agreement. Often, existing contracts also have agreed arbitration or dispute resolution mechanisms that should not be able to be replaced by this scheme. To do so would fundamentally undermine investment incentives and certainty for pipeline investment.

Arbitration needs to be explicitly limited to agreements in relation to new services. To the extent it covers variations, these variations should be limited to circumstances where the access seeker is seeking additional services in an existing contract, and the contract does not already provide a process for this.

Recommendation 18: ***All contractual rights should be protected during arbitration, not just those of third parties.***

Definition of access determination

The term 'access determination' is already used in the NGL to apply to a decision made by the AER in the case of an access dispute for a pipeline subject to light regulation. It is not appropriate to use the same term for a decision arising from binding commercial arbitration. A different process is proposed to be used to reach a decision with reference to a different set of principles to that used by the AER during its determinations.

Recommendation 19: ***The term 'access determination' should not be used for both a regulatory arbitration decision and a commercial arbitration decision.***

Definition of gas distribution pipeline and gas transmission pipeline

The definitions in the Draft Bill are the same as provided in Chapter 1 of the NGL. There is no need for their repetition in the proposed Chapter 6A. Indeed, their repetition here leads a reader to the expectation that they are different to the Chapter 1 definitions, which is not the case.

Recommendation 20: ***The terms 'transmission pipeline' and 'distribution pipeline' not be repeated in the definitions of Chapter 6A.***

216 C – Application of this chapter

Clause 216C(1) states:

> *(1) Subject to subsection (2), this Chapter applies to and in relation to—*
> *(a) a transmission pipeline that is not a scheme pipeline; and*
> *(b) a distribution pipeline that is not a scheme pipeline.*

As far as APGA is aware, a pipeline is only classified as a transmission or distribution pipeline :

1. during a coverage determination process; and
2. during a 15 year no coverage determination process.

As such, uncovered pipelines that have not been subject to one of these processes are not classified under the NGL as either transmission pipelines or distribution pipelines.

The provisions of the NGR allow for a pipeline to be deemed a BB transmission pipeline, but this is not equivalent to a transmission pipeline under the NGL.

Clause 216C(1) should be drafted to have Chapter 6A apply to non-scheme pipelines. It is likely this is the appropriate section to include an exemption for the foundation contacts of pipelines subject to a 15 year no-coverage determination.

Recommendation 21: ***The application of Chapter 6A be to non-scheme pipelines.***

216J(4) –Notification to parties

Clause 216J(4) requires that the scheme regulator give notice of a referral or decision not refer to the parties to the negotiations and any other relevant parties.

Clause 216I defines parties of an access dispute as ‘the parties to negotiation and any other parties deemed relevant by the scheme regulator.

Clause 216J(4) should simply require that all parties to an access dispute be notified, rather than essentially repeat the definition embodied in Clause 216I.

As APGA has noted above, this role of scheme regulator should be removed. This limits the duplication of decision on relevant parties to just one decision maker as opposed to two as in the current draft Bill.

Recommendation 22: ***The power to identify parties to any aspect of an access dispute should be defined once.***