

Submission in response to Draft National Gas (South Australia) (Pipelines Access-Arbitration) Amendment Bill 2017



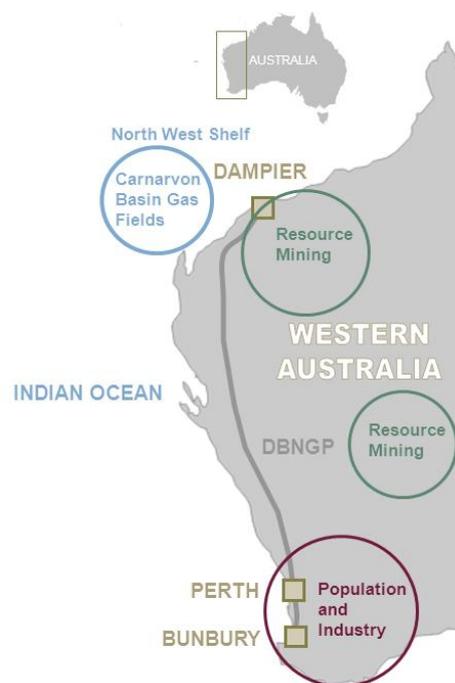
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***DBP Transmission (DBP)** is the trading name of the group of entities which own and operator the Dampier to Bunbury Natural Gas Pipeline (DBNGP), Western Australia's most important piece of energy infrastructure.*

The DBNGP is WA's key gas transmission pipeline stretching almost 1600 kilometres and linking the gas fields located in the Carnarvon Basin off the Pilbara coast with population centres and industry in the south-west of the State

***DBP Development Group (DDG)** was established in 2011 to build, own, operate and maintain gas transmission pipelines and associated infrastructure complementary to DBNGP.*

This submission is made by DBNGP (WA) Transmission Pty Ltd, the operator of the DBNGP, on behalf of both DBP Transmission and DDG.



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1. INTRODUCTION

- 1.1 DBP appreciates the opportunity to comment on the draft of the *National Gas (South Australia) (Pipelines Access-Arbitration) Amendment Bill 2017* (the **Draft Bill**).
- 1.2 DBP notes that the Draft Bill is intended to give effect to the 14 December 2016 decision of the COAG Energy Council (**Council**) which:
- (a) accepted the recommendations made by Dr Vertigan in his report *Examination of the Current Test for the Regulation of Gas Pipelines Report* (**Vertigan Report**); and
 - (b) required the commencement, by 1 May 2017, of the legislative regime to give effect to the recommendations of the Vertigan Report.
- 1.3 DBP notes that the Vertigan Report recommended the development of the following frameworks:
- (a) An information disclosure and transparency framework that contains the features outlined on page 90 of the Vertigan Report (**Information Framework**); and
 - (b) An arbitration framework that would apply to open access pipelines not covered under the NGL (**Arbitration Framework**).
- 1.4 Responding to the request to provide comment on the Draft Bill, DBP's submissions can be grouped into the following broad categories as follows:
- (a) Submissions on the timetable and process to give legislative effect to the recommendations of the Vertigan Report – see Section 2; and
 - (b) Submissions on the extent to which the Draft Bill gives effect to the recommendations of the Vertigan Report. In this regard, Sections 3 and 4 of this submission address the following:
 - (i) Fundamental issues as to whether the Draft Bill gives effect only to the Vertigan Report recommendations; and
 - (ii) Drafting issues with the Draft Bill that may not reflect the Vertigan Report recommendations.
 - (c) Section 5 contains DBP's response to questions contained in the COAG Energy Council Bulletin 3.
- 1.5 DBP notes that the Draft Bill is silent in respect of key aspects of the Information Framework and the Arbitration Framework, including the relevant pricing principles, and that these matters will be developed later. DBP understands that in respect of these matters an implementation options paper will be released by the Gas Market Reform Group (**GMRG**) led by Dr Vertigan in mid-March 2017 for public comment. The comments in this submission are necessarily limited by the inability to review the Draft Bill in conjunction with the proposed provisions for the Rules.

2. ISSUES CONCERNING THE TIMETABLE FOR IMPLEMENTING VERTIGAN REPORT RECOMMENDATIONS

2.1 While DBP accepts that, in the context of the timetable mandated by the Council, it makes sense to achieve this timetable by way of enacting amendments to the National Gas Law (**NGL**) so that key elements are enshrined in the NGL but with further detail to be developed by way of Rules to be included in the National Gas Rules (**NGR**). While DBP supports this approach, this support is subject to a number of qualifications discussed in this section.

2.2 Firstly, the approach of legislative change with rules to follow is a function of the specific circumstances surrounding this review. In the ordinary course, it would be desirable for the legislation and rules to be considered as a package particularly as, based on the current proposal:

- (a) the provisions of the NGL and those of the NGR are interdependent in many respects; and
- (b) it will not be possible for any arbitration to be triggered until the Rules are in place.

2.3 The following are just some of the interdependencies between the provisions of the NGL and those of the NGR. This list is not exhaustive because of the timeframe given for making submissions:

- (a) s216D of the Draft Bill deals with the application of the Chapter to disputes arising under Rules. This provision states that "*the provisions of this Chapter applicable to the determination of an access dispute apply, subject to such modifications as may be prescribed by the Rules, to the determination of any dispute arising under any provision of the Rules specified in the Rules for the purposes of this section*".

While the drafting is, on its face, ambiguous, we assume that the Rules are not able to modify the provisions of the Chapter itself, when enacted as part of the NGL. Rather, we assume that the Rules are able to 'modify' in the sense of 'add detail to' the relevant requirements, within the confines of the scope set out for the making of the Rules. If that is not correct s216D of the Draft Bill should be deleted. In any event, given that s216D sets out that the provisions of this Chapter are applicable to the determination of any dispute "*arising under any provision of the Rules specified in the Rules for the purposes of this section*", it seems clear that no arbitrations will be possible until the Rules are enacted.

- (b) The process to be followed for the conduct of an arbitration. For example, s216L states that "*a determination may deal with any matter relating to access by the prospective user or user to the pipeline services specified by the Rules for the purposes of this subsection (and the arbitrator must not make a determination that is inconsistent with the Rules or goes beyond the matters specified by the Rules)*".

Clearly, without the Rules being in place, this provision lacks meaning and it is difficult to provide constructive comment, other than the submissions made in Section 3 that this broad rule making power will allow for Rules to be developed which go well beyond what was intended in the Vertigan Report.

2.4 Secondly, there is a risk that by leaving the initial Rules to a separate consultation process, which it appears, will be run by the South Australian Minister for Mineral Resources and Energy instead of the GMRG, the commercial focus of the arbitration framework proposed by the Vertigan Report may be lost. The risk is that an approach that is more aligned to the regulatory framework that applies to covered pipelines under the NGL and NGR may be adopted. It is preferable for the consultation process to be led by the GMRG.

2.5 Thirdly, in DBP's view, given the significance of the reforms proposed by Dr Vertigan, it is important that they be carefully implemented, and that the established governance arrangements for the passage of legislation are followed. Accordingly, DBP supports the APGA's submission that the expedited timeframe should not preclude the need for a Regulation Impact Statement (**RIS**) and Explanatory Memorandum for the Draft Bill. It is not clear in the public documentation that has been

released to date by the COAG just what governance processes will be followed before the Draft Bill is sought to be voted on by the South Australian parliament. DBP considers that these governance processes are essential although it is noted that the Vertigan Report suggests that these governance processes will take approximately 12 months to be completed.

3. ENSURING THE DRAFT BILL IMPLEMENTS THE VERTIGAN REPORT RECOMMENDATIONS – FUNDAMENTAL ISSUES

- 3.1 This section of the submission outlines some fundamental points on the issue of whether the Draft Bill gives effect to the recommendations of the Vertigan Report. In this regard, DBP notes that the over-riding intentions of the Vertigan Report are for:
- (a) the Information Framework to be structured so as to encourage commercially negotiated outcomes between customers and pipeline operators/owners for pipeline services;
 - (b) the Arbitration Framework to operate as a safety net only in case commercially negotiated outcomes cannot be achieved; and
 - (c) the Arbitration Framework to be commercially-based (as distinct from judicial or regulator based).

Draft Bill doesn't only implement Vertigan Report recommendations

- 3.2 Given the clear statement of the Council's decision that the Draft Bill is to give legislative effect to the recommendations of the Vertigan Report, the amending legislation should only allow for the implementation of these recommendations. It would appear however that the Draft Bill:
- (a) does not implement some aspects of the Vertigan Report's recommendations; and
 - (b) in respect of some of the provisions relating to the Arbitration Framework, proposes something different to what was recommended in the Vertigan Report.

Aspects of Vertigan Report recommendations not implemented

- 3.3 DBP notes that the Draft Bill is silent in respect of the Information Framework (other than it outlines heads of power that provide for Rules to be drafted). The Information Framework is a key platform of the Vertigan Report reforms, given that Dr Vertigan considered that increasing transparency provides parties seeking pipeline services with an improved ability to undertake timely and effective negotiations. Vertigan flagged that information such as *'pricing principles, and/or information on the methodology used to determine prices, including costs incurred'* should be published.
- 3.4 The Information Framework is critically important, given the focus of the Vertigan Report on accentuating the negotiated or mediated commercial interaction phase. The Draft Bill should reflect the significance of the Information Framework, as it is intended to ensure that parties are not disadvantaged in negotiations that are designed to minimise the likelihood of having to go to arbitration (in other words, arbitration as a true "last resort" is designed to be part of the system). The Information Framework itself may not have much to do with the arbitration process, save to the extent that the nature of its operation may meaningfully illuminate how likely it is that arbitration mechanism will be required and what it is that an arbitrator will have to determine.
- 3.5 The Information Framework may also be an end in itself in terms of making the application of the pipeline capacity market more efficient and transparent.
- 3.6 DBP submits that the importance of the Information Framework in the context of the Vertigan reforms should be properly reflected in the Draft Bill.

Aspects of Vertigan Report recommendations that have been implemented differently

- 3.7 DBP submits that the Draft Bill implements certain aspects of the Vertigan Report differently from what was intended. In the time that has been allowed for public consultation, DBP has identified some examples. This list should not however, be considered to be an exhaustive list. Either further consultation should be allowed to do fully explore the extent to which the Draft Bill is consistent with

- the Vertigan Report or the timetable for the passing of the Draft Bill should align with the timing of the Rules, so as to allow time to ensure that the legislative package only implements the Vertigan Report recommendations.
- 3.8 The first example is the list of matters that the arbitrator can take into account in making an award. This is a very open-ended list. The comments made below are, in the absence of any Arbitration Framework or pricing principles, necessarily general in nature. DBP looks forward to making further submissions on receiving the GMRG implementation options paper in mid-March 2017.
- 3.9 Section 216M of the Draft Bill provides that the arbitrator must take into account the following list of matters:
- (a) *the National Gas Objective;*
 - (b) *pricing principles specified in the Rules; and*
 - (c) *any other principles specified in the Rules; and*
 - (d) *any other principles specified in the Rules and other matters the arbitrator considers appropriate.*
- 3.10 DBP notes that the intention of the Arbitration Framework in the Vertigan Report is to facilitate timely outcomes. In DBP's view, this is likely to be maximised by a targeted, commercial focus being given to the arbitrator and not making the arbitration a quasi-regulatory process.
- 3.11 While DBP acknowledges the NGO is the key objective of the NGL, it offers little guidance to an arbitrator in this instance and is likely to overly complicate what is intended to be a commercial process.
- 3.12 While the pricing principles and other principles that are to be 'specified in the Rules' will be crucially important, DBP is concerned that there is a danger that if the Draft Bill is adopted as currently drafted, there could be two potential consequences, either:
- (a) The Arbitration Framework will not establish a credible threat, as intended by the Vertigan Report, to effectively contain extremes in commercial behaviour (either perceived or real) because the costs associated with arbitration will be akin to those that could be incurred in a coverage application; or
 - (b) Arbitration will be a costly, resource intensive process of a similar nature to that experienced by covered pipelines, failing to meet the Vertigan Report objective of a quick and cost-effective resolution to disputes between two parties in a commercial setting.
- 3.13 It is DBP's view, it is the yet to be designed pricing principles envisaged by the Vertigan Report must be fit for purpose and appropriately focused on commercial principles (as opposed to regulatory, building block style principles).
- 3.14 The second example is s216L which allows for the Rules to give the arbitrator very broad powers as to what can be included in a determination. This broad rule making power potentially allows for Rules to be developed which go beyond the intentions expressed in the Vertigan Report. Yet, the Vertigan Report's intentions were clear – the arbitration framework should be commercially based. The rule making power in s216L should be constrained accordingly.
- 3.15 The third example is that the scope of the heads of power for the Rules allows for very prescriptive provisions for commercial negotiation processes. This is not consistent with the intentions outlined in paragraph 3.1 DBP submits that the heads of power should be much more narrowly constrained.
- 3.16 For example, s216F of the Draft Bill extends well beyond the recommendations of the Vertigan Report by prescribing the requirements for the initiation of a commercial negotiation for uncovered pipelines.

- 3.17 The purpose of introducing binding commercial arbitration is to provide a new mechanism to ensure appropriate behaviour from gas pipeline companies during commercial negotiations. It is the threat of arbitration that controls behaviour. Section 216F establishes powers in the NGR to dictate commercial process in uncovered pipeline businesses, which is unnecessary. DBP's negotiations with prospective shippers are fit for purpose, follow vastly different timeframes and responds to the needs of the customer. A high level of prescription on these processes will be detrimental and fails to recognise that there are a wide range of negotiations that can take place, the difference in complexity across this range, or the level of sophistication of an access seeker. As has been raised by the APGA in its submission, 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. They will be even more different if the access seeker is a new entrant gas user compared with it being an incumbent major shipper.
- 3.18 DBP notes that the Vertigan Report did not suggest any changes or prescription be introduced to the commercial processes of pipeline owners.
- 3.19 The strong focus should be on ensuring a satisfactory outcome from commercial negotiations, in this instance by providing adequate threat of binding arbitration, rather than making arbitration par for the course.

Key features of Vertigan Report recommendations should be enshrined in the NGL, not left to the NGR

- 3.20 To ensure that, over time, the fundamental aspects of the recommendations of the Vertigan Report are not removed or modified, the Draft Bill needs to have certain key features of both the Information Framework and the Arbitration Framework in the legislation itself, rather than leaving them to be reflected in the provisions of the NGR. This will also give industry greater certainty that the legislation will reflect the intentions outlined in the Vertigan Report.
- 3.21 DBP submits that the following key features should be elevated to the NGL.

Protection of pre-existing contractual rights

- 3.22 DBP is concerned that the Draft Bill does not acknowledge the importance of the pre-existing contractual rights of the pipeline owners. Sections 216G(2) and 216(N) of the Draft Bill make it clear that the existing contractual rights of third parties are to be protected, but does not extend the same protections to the pipeline owner. The wording used in the Draft Bill does not reflect the existing drafting in the NGL and Part IIIA and creates significant uncertainty for the industry.
- 3.23 Both s188 of the NGL and s44W of Part IIIA of the *Competition and Consumer Act 2010* (Cth), contain provisions restricting the ability to make access determinations that would encroach on pre-existing contractual rights. For consistency, DBP suggests that the Draft Bill mirror these provisions. For example:

Restrictions on access determinations

(1) The arbitrator must not make an access determination that would have any of the following effects:

- (a) preventing a user obtaining a sufficient amount of a pipeline service under a contract or previous access determination to be able to meet the user's reasonably anticipated requirements, measured at the time the access dispute was notified;*
- (b) preventing a prospective user or user from obtaining, by the exercise of a pre-notification right, a sufficient amount of a pipeline service to be able to meet the prospective user's or user's actual requirements;*
- (c) depriving a person of a relevant protected contractual right.*

- 3.24 If the Draft Bill included such a provision, definitions such as 'pre-notification right' and 'relevant protected contractual right' could mirror those definitions contained in s188(2) of the NGL.
- 3.25 Further, s216F(1)(b) should be removed. This provision currently states that the Rules may contain provisions for or with respect to "*seeking to vary an access contract in a significant way or to a significant extent*". DBP considers that the intended framework for reform, as described in the Vertigan Report, does not seek to vary existing access contracts. DBP submits that each existing access contract should operate on its terms, without regulatory encroachment. The contractual dispute resolution framework, as agreed between the parties and as set out in those contracts, should properly govern any disputes arising out of those contracts. The Vertigan reforms should only apply to circumstances where there is a new shipper seeking access to a pipeline, or where a contract with an existing shipper is up for renegotiation.

Open Access Pipelines

- 3.26 Consistent with the Vertigan Report's intention that the framework should not apply to all uncovered pipelines, in DBP's view there are at least three circumstances where pipelines should be exempted from the commercial arbitration process and this should be prescribed in the NGL. DBP submits that the NGL should prescribe the following pipelines as not subject to the Information Framework and the Arbitration Framework:
- (a) pipelines that have been given a 15-year greenfields no coverage determination;
 - (b) pipelines that have been built as a single user pipeline in circumstances where that user has contracted for all of the capacity on the pipeline and where there is no foreseeable third party demand requiring the expansion or extension of that pipeline; or
 - (c) pipelines where it can be demonstrated that genuine competition exists consistent with s187 of the NGL for disputes that arise on covered pipelines.
- 3.27 On the first point relating to greenfields pipelines, DBP notes that the new access disputes chapter in the Draft Bill applies to non-scheme pipelines (i.e. the arbitration provisions specifically exclude covered pipelines and international pipelines to which a price regulation exemption applies). However, an exemption for greenfields pipelines is not reflected in s216C of the Draft Bill. It is possible that the drafters intended for such pipelines to be excluded in the amendments to the NGL.
- 3.28 It is fundamentally important that the protection of the no coverage determination remain. It was introduced in order to provide the incentives for investment in new pipelines. It will undermine the incentive for such investment if there is scope for third parties to obtain arbitrated terms of access. It is not feasible for foundation contracts to be subject to an exclusion but for new shippers to have arbitrated terms of access. This would undermine the incentives to enter into foundation shipper contracts and create an incentive for most favoured nation clauses to be inserted into foundation shipper contracts. If such clauses were included and a new shipper obtained more favourable terms, then the commercial certainty that the foundation shipper contracts were designed to provide both to the pipeline owner and the financiers would be undermined.
- 3.29 On the second point relating to fully contracted, single user pipelines, it is self evident that there is no conceivable benefit in subjecting such pipelines to either the Information Framework or the Arbitration Framework. Furthermore, subjecting these pipelines to an Information Framework gives rise to issues concerning the confidentiality of information.
- 3.30 On the third point relating to pipelines where it can be demonstrated that genuine competition exists, DBP submits that:
- (a) pipelines meeting this criteria be excluded from the operation of the Chapter by the Rules in accordance with s216C; or
 - (b) an arbitrator should have the ability to refuse to make an access determination where he or she considers there is genuine competition, mirroring the existing provision in s187 of the NGL relating to access disputes for scheme pipelines. As an example, DBP submits that the new provision could state as follows:

Despite anything to the contrary in this Chapter, the arbitrator 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 arbitrator 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

- 3.31 If this suggested drafting is adopted, the NGL would need to separately provide that these pipelines are also exempt from the Information Framework.

Framework should encourage commercially negotiated outcomes

- 3.32 DBP is concerned that the current Draft Bill, despite containing a good faith obligation at s216G, allows almost immediate or routine access to arbitration. The Vertigan Report's stated intention was that the new disclosure and transparency of pipeline service pricing and contract terms and conditions, provide parties seeking pipeline services with an improved ability to undertake timely and effective negotiations. Vertigan states that where commercial processes are working effectively, arbitration should rarely be required. Arbitrations should therefore only be activated where parties to a negotiation are legitimately unable to reach a commercial resolution. DBP strongly agrees with the Vertigan Report's position and submits that the eventual Bill should not encourage proponents to seek arbitration, but rather facilitate agreement between parties in a commercial setting (with arbitration as the back-up mechanism to achieve a resolution in the absence of commercial agreement).

- 3.33 With that aim, the onus should be on the proponent to demonstrate a bona fide good faith negotiation has in fact taken place and there is legitimate dispute to be resolved.

- 3.34 Furthermore, DBP submits that, instead of appointing a scheme administrator to resolve such jurisdictional matters, the framework could be structured in such a way as to require the arbitrator to consider, as a preliminary matter, these jurisdictional matters. Not only are there many legislative precedents where this occurs (such as the state based Construction Contracts Acts), this will:

- (a) Reduce the overall costs of this framework to customers and service providers;
- (b) Ensure that stakeholders do not misuse the arbitration process, thereby creating an incentive on parties to negotiated commercial outcomes.

- 3.35 DBP considers that the arbitrator could have an investigatory role which considers a number of factors before an arbitration determination is made, which could include:

- (a) amount of time been allowed for parties to reach a decision;
- (b) evidence that parties have meaningfully engaged in negotiation;
- (c) evidence that a dispute has been escalated within organisations in an attempt to seek resolution;
- (d) evidence of clear understanding between parties which terms have been agreed and where a dispute needs resolution;

- 3.36 As an alternative, DBP suggests that there could be a legislative requirement that parties go through a certain period of contractual negotiations before a party is able to refer a dispute to arbitration (e.g. a period of 90 days). For example, s216J(2) - 'Power to refer dispute to arbitration' could be amended in the following way:

(2) The scheme regulator need not refer an access dispute to arbitration if the scheme regulator considers that -

...

(c) the party who notified the access dispute has not negotiated in good faith for a period of no less than 90 days.

- 3.37 Further, DBP submits that it is appropriate that a specified financial threshold is adopted to ensure that an arbitration is only able to be commenced, if the cost and resources associated with that arbitration process is commensurate with the value of contracts being considered. Such a financial threshold would reflect s249 of the NGL. Whilst s249 is clearly in a different context (i.e. the ability to seek merits review of a reviewable regulatory decision), the concept that a materiality threshold should be met before a process is commenced is clearly applicable to an arbitration.

Scheme administrator should not be the AER

- 3.38 The Draft Bill appoints the AER as the scheme administrator with very broad powers. For example, under the Draft Bill, the AER is:
- (a) notified in writing that an access dispute exists (s216H) - as part of this notification, the AER is given potentially sensitive information about the matters on which agreement has been reached, the matters in dispute, and any other matters specified in the Rules;
 - (b) given the power to join another person as a party if it is of the opinion that the resolution of the access dispute may involve requiring that person to do something (s216I);
 - (c) given the power to determine whether or not an access dispute is referred to arbitration in the first place (s216J). The AER has the power to determine if the notification of the access dispute is vexatious, is trivial, misconceived or lacking in substance, or that the notifying party has failed to negotiate in good faith etc. (arguably extremely broad powers); and
 - (d) given the power to select an arbitrator in the absence of agreement by the parties (s216K). DBP considers that this is a critically important function, and one that may determine if arbitrations are indeed commercially focused.
- 3.39 DBP submits that the scheme 'regulator' in the Draft Bill should not be the AER. DBP acknowledges that the Vertigan Report indicates that the AER may be an appropriate scheme administrator. However, DBP submits that appointing the AER to this role could potentially move the arbitration framework away from the intended commercially based framework (as distinct from regulator based). It is critically important that the arbitration framework achieve commercial outcomes, and not one that leads to outcomes that replicate those that are achieved for a covered pipeline under the NGL. In particular, it is important that:
- (a) the Draft Bill does not create a framework that imposes regulatory outcomes on pipelines that otherwise are not otherwise subject to regulatory intervention, and
 - (b) the Draft Bill reflects as much as possible the commercial arbitration framework that exist under some commercially negotiated contracts.
- 3.40 Further it is questionable an administrator of the framework is required particularly considering the AER already has an oversight role encompassing all parts of the regime set out in the NGL and NGR (s27 of the NGL). This is even more relevant if the role of determining jurisdictional issues or assessing whether pre-conditions to accessing the Arbitration Framework is vested with the arbitrator itself (as outlined above in paragraph 3.34).
- 3.41 Furthermore, it is not necessary to establish a scheme administrator for the purposes of appointing an arbitrator. Again, there are legislative precedents that create a framework to prescribe a variety of bodies who could be agencies to appoint an arbitrator – the Construction Contracts Act is again an example of this. DBP submits that having this as a feature of the Arbitration Framework is consistent with the intention of the Vertigan Report's recommendations in that:
- (a) It is more consistent with the commercial framework for the resolution of disputes;
 - (b) it creates maximum flexibility to ensure the most appropriate arbitrator is appointed given the variety of disputes that could be referred to arbitration;
 - (c) it reduces the costs of the Arbitration Framework; and
 - (d) it is a further means of removing the risk of regulatory-like outcomes.

- 3.42 DBP supports the APGA position in its submission, that the arbitration notification process can be largely self-executing and a commercial arbitration body or institute be selected to assess the arbitration referral before an arbitrator is appointed. Such frameworks are common in existing commercial contracts.
- 3.43 Further, DBP suggests that s216K(2) could be amended to have the Rules allow for prescribed appointing agencies (for example, one such agency could be the Institute of Arbitrators and Mediators) to be outlined and for any of these agencies be called on by the parties to appoint an arbitrator in the event that parties cannot reach agreement on an arbitrator.
- 3.44 The use of arbitration (at least as it is conventionally understood) falls into two distinct categories in a regulated context:
- (a) what might be described as “statutory arbitration” where statute-based arbitration rules are applied, usually with the regulator acting as arbitrator: the “statutory” arbitration mechanism tends to mimic administrative decision-making, even where it is described as “arbitration”, principally because it is the regulator that is charged with determining the result.
 - (b) “commercial arbitration”, where a more commercial-style arbitration is the add-on to the regulatory regime: use of a commercial arbitration model is designed to allow the parties to the dispute to “mimic” commercial dispute mechanisms subject to certain critical regulatory parameters that must be applied by the arbitrator (the commercial/regulatory interface, in effect). Thus, in that model the regulator sits outside the dispute and, subject to rule-oversight (in other words, the regulatory matters that an arbitrator is required to take into account), will not have any effect on the outcome. The matter is resolved commercially, whether by negotiation or by third-party (arbitrator) determination.
- 3.45 The Vertigan Report clearly envisages that the Arbitration Framework is designed to fall within the second category, however, given the specialised nature of access disputes it is not always clear what difference there is in the end between the statutory model and the commercial model. The NZ model is a good example.¹
- 3.46 DBP argues that for the Arbitration Framework system to function as a “commercial arbitration”, the AER should not be the scheme administrator.

¹ The Commerce Commission has published information disclosure requirements for suppliers of gas pipeline services under Part 4 of the *Commerce Act 1986* (Cth).

4. ENSURING THE DRAFT BILL IMPLEMENTS THE VERTIGAN REPORT RECOMMENDATIONS – DRAFTING ISSUES

- 4.1 The following contains a list of further drafting related issues that should be considered in the finalisation of the Draft Bill:
- (a) 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 used to reach a decision with reference to a different set of principles to that used by the AER during its determinations.
 - (b) As DBP has submitted above, s216F of the Draft Bill extends well beyond the recommendations of the Vertigan Report (e.g. by prescribing the requirements for the initiation of a commercial negotiation for uncovered pipelines). DBP considers that s216F should be substantially redrafted to limit the scope of what the Rules may contain, and to ensure that the Information Framework provisions more fully reflects the intentions of the Vertigan Report. However, if the existing s216F provision is retained, DBP submits that at a minimum, s216F(1)(b) should be deleted, given that the Vertigan Reforms do not contemplate shippers *"seeking to vary an access contract in a significant way or to a significant extent"*. The Rules should not contain any provisions dealing with seeking such variations. Any existing access contracts should be governed by their terms. The Rules may properly deal with negotiations on a renegotiation of the current terms of access once the contract comes to an end, but this is different to seeking to vary an access contract which is on foot through a regulatory process. A consequential amendment is then required to s216F(2)(a) - the words *"or a variation"* should be deleted.
 - (c) DBP submits that s216R requires a careful reconsideration. Under s216R(1), an access determination may be varied by agreement between all parties to the access determination - this seems uncontroversial. However, under s216R(2), the Rules may contain provisions with respect to seeking variations to an access determination. It is not clear whether these Rules will be provisions dealing with the procedures that apply when seeking a variation to an access determination by mutual agreement, or whether this provision contemplates that the Rules will be able to contain provisions where one party is able to unilaterally seek a variation to an access determination. This confusion is not clarified by s216R(3), which is also loosely drafted. Section 216R(3) states that *"the provisions of this Chapter about the arbitration of an access dispute apply with necessary modifications to a proposal under the Rules to vary an access determination or to a dispute arising out of such a proposal"*. What would constitute a *'necessary modification'* seems open to debate. Further, if a variation under s216R can only be made by mutual agreement, it is not clear how a dispute would arise. Alternatively, it is correct that the Rules can make provisions where a party is able to unilaterally seek variations to an access determination (under s216R(2)), and that a dispute arising out of such a proposal is then subject again to an arbitration process (under s216R(3)), this would seem to undermine the certainty of the access determination. Vertigan intended that the arbitration framework be designed for the expeditious resolution of the dispute with provisions to avoid delay and gaming. Vertigan also intended that the decision of the arbitrator would be binding on both parties. If one party can unilaterally seek to vary an access determination, and a dispute arising out of such a proposal would again be subject to the arbitration framework, this seems inconsistent with Vertigan's aims.

5. RESPONSE TO QUESTIONS IN COAG ENERGY COUNCIL BULLETIN 3

- 5.1 DBP notes that the COAG Energy Council Bulletin 3 contained a number of specific questions that largely relate to the overall design of the intended Information Framework and the Arbitration Framework to be adopted rather than issues contained in the Draft Bill.
- 5.2 As the Draft Bill is silent in respect of key issues of Information Framework and the Arbitration Framework, including the relevant pricing principles, and that these matters will be developed later in the 'design phase' led by Dr Vertigan, DBP's responses are brief.

Question 1 - Does the proposed framework provide sufficient threat of arbitration, whilst still ensuring that commercial negotiation is the preferred approach for access to open pipelines?

- 5.3 In the absence of any specific details of the Arbitration Framework, which has been left to the development of the Rules, DBP is unable to respond in a detailed way. As raised in Section 3 of this submission DBP is concerned that there is a risk that the current Draft Bill may allow immediate or routine access to arbitration rather than appropriately encourage commercial outcomes. This is inconsistent with attaching primacy to a commercial resolution arising from enhanced information disclosure.

Question 2 - Is there anything in the framework which may suggest that the expeditious resolution of the access dispute will occur?

- 5.4 While there is insufficient information in relation to the framework to answer this question, DBP has a concern that the current structure may lead to protracted arbitration disputes.

Question 3 - Are there other changes to the draft Bill that you consider are necessary to support a best practice arbitration and negotiation framework? Please provide an evidence base for your reasons.

- 5.5 Other than the matters referred to in the above submissions, there is insufficient information in relation to the framework to answer this question.

Question 4 - Do the proposed amendments provide a sound foundation for information transparency and disclosure particularly around service costs, pricing and contract terms and conditions?

- 5.6 The proposed amendments provide insufficient detail in relation to information transparency and disclosure to answer this question.

Question 5 - Are there other alternative options or models for a binding commercial arbitration framework that may better achieve the outcomes proposed by the Examination of the Current Test for the Regulation of Gas Pipelines report? Please provide details and reference existing models if relevant.

- 5.7 DBP notes that the Vertigan Report did not seek to adopt a predetermined model of arbitration and further work is required to evaluate potential options. DBP is currently undertaking a review of existing models but is unable to respond in the time provided. DBP aims to use this work to inform its response to the options paper to be released by the GMRG in mid-March.

Question 6 - What are your views on the interaction of these reforms with other COAG Energy Council gas market reform priorities, including standardisation of capacity contracts? Are there improvements which could be made?

- 5.8 In the time available and with very limited information available by what is intended under the standardisation of capacity contracts DBP is unable to respond to this question. DBP is seeking to participate in the technical working groups being established by the GMRG.

Question 7 - *What key parameters would you suggest be covered in the Rules to support these legislative reforms?*

- 5.9** In the absence of any specific details on the proposed Arbitration Framework and Information Provision Framework, which DBP understands will be the subject of a GMRG options paper in Mid-March, DBP is unable to respond to this question.