# OPTIONS TO IMPROVE GAS PIPELINE REGULATION

## COAG Regulation Impact Statement

Prepared for

**COAG Energy Council**

Submitted by


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## COAG Regulation Impact Statement

## 1. EXECUTIVE SUMMARY

Energy Matrix is submitting this cover submission because we believe the Pipeline Regulation Consultation Regulation Impact Statement is too narrowly focused and is insufficient in its scope. The consultation only requests feedback on the a narrow range of regulatory reform options and we would like to take this opportunity to reflect on the historical context of third party access regulation and to call for a more efficient, easier to access, and more affordable regulation and arbitration regime to govern third party access to pipeline infrastructure.

This document argues that the base scheme set out in Section 44 of the Competition and Consumer Act was historically designed to be fit for purpose, but that its implementation has become unwieldy and tends to serve the interests of first and second parties to gas transport agreement and regulators. Promoting fair and easy access for third parties to arbitration is critical to improving the efficient operation of the gas market. We call for COAG to return to the underlying purposes of this regulatory regime instead of tweaking at the edges and expanding the burden of the existing regulatory framework.

## 2. BACKGROUND

Energy Matrix Group Pty Limited (ACN 050 889 604) (**Energy Matrix**) owns all of the shares in GasTrading Australia Pty Limited (**gasTrading**), Project Consultancy Services Pty Limited (**PCS**), Agora Gas Pty Limited (**Agora Gas**) and Agora Retail Pty Limited (**Agora Retail**). Together these companies:

- manage the supply of gas, for gas users and gas sellers, on the Dampier to Bunbury Natural Gas Pipeline (**DBNGP**), Pamelia Gas Pipeline, the Goldfields Gas Pipeline, the Mid West (WA) Gas Pipeline (**MWGP**), the Pilbara Energy Pipeline (**PEP**), the Telfer Gas Pipeline, the Amadeus Gas Pipeline and the Carpentaria Gas Pipeline;
- have developed and operate the gasTrading Spot Market™ in Western Australia;
- hold contracts for, and transport gas on the DBNGP the (MWGP) and, until recently, the PEP;
- buy to underwrite the liquidity of the gasTrading Spot Market™ and for on-sale in wholesale markets;

- are seeking to set up a gasTrading Spot Market™ out of the Northern Territory; and
- hold licences to retail gas in Western Australia and Victoria.

While the Energy Matrix group of companies are engaged with multiple Australian pipelines it is nevertheless the case that Energy Matrix has not sought to negotiate access to a non- scheme - Part 23 gas pipeline.

## 3. OF THE PROBLEM WITH THE DEFINITION OF "POTENTIAL PROBLEMS"

The summary of potential problems set out in part 6 of the COAG enquiry document focuses on problems with the current regulatory framework. This list does not address the fundamental issues of regulatory cost and effectiveness or regulatory fatigue or with how the regulatory model got to this point or where, as an industry or as a community, we want it to go.

This submission will, in so far as a market participant who has not sought access to a Part 23 pipeline can, respond formally to the question set issued with the COAG enquiry document. However, in the first instance, we will briefly outline the bigger issues noted above and express our concern about the direction the proposed regulatory changes are taking.

### 3.1 History of Third Party Access Regulation to Pipelines

It would surprise anyone looking at the cost and time spent on gas pipeline regulation in the last two decades to know that in the 1980s all gas pipelines in at least Western Australia, the Northern Territory and Federal Territorial waters (and perhaps in other jurisdictions) were subject to "**third party access**" regulation. The regulatory model was simple in that any party that had, bona fide, sought access to a licenced energy pipeline, and was not satisfied with the outcome of the negotiation, could ask the Minister administering the relevant legislation to review and set the terms of access. In the relevant jurisdictions all energy pipelines (other than what we now call "Type-B appliances") were licenced and subject to this third party access regime.

There may be arguments about whether this third party access regime sets out an appropriate role for a Minister of the Crown or whether there could have been more detail proscribing the intervention process but if there had been a significant demand for intervention pursuant to these provisions case law would, no doubt, have filled in the detail.

That said, what is bewildering beyond belief is that we had to consume so many resources and incur inordinate cost in the third party access policy debates of the late 1990s and 2000s to arrive, in 2017, at the rules that govern what are called on the COAG enquiry paper **Part 23 pipelines.** The Energy Matrix group urges policy makers to look back to where we began, and to define where we want to go. We desire a system that

allows efficient and timely resolution of access disputes for all shippers and potential shippers in the market. Expanding regulation as currently proposed is unlikely to achieve this end. Instead, we urge COAG to streamline and simplify the regulatory environment.

What is bewildering is that we started with a regime where access disputes could be settled by reference to the relevant Minister, moved to a model where access disputes could be settled by reference to a regulator, overrode that model by approving an industry third party access code which limited access dispute rights and, with Part 23 pipelines, returned to a model where access disputes could be settled by reference to a commercial arbitrator. What's worse is that we now have a medley of all of these options (except perhaps the Ministerial resolution option) with the commensurate layer on layer of cost and resource consumption.

## 3.2 Section 44 and the Challenges of Dispute Resolution

Section 44 of the Consumer and Competition Act governs the regulation of third party access to natural gas pipelines. We fear that the overarching structure of Section 44 has been lost to antiquity. Section 44 offers two pathways to follow when it comes to managing third party access to Essential Facilities and the services provided using these facilities. Namely, third party access:

- ❑ will be subject to a dispute and dispute resolution process managed by the ACCC; or
- ❑ will, if an industry has sought and received approval to operate an approved Access Regime, be managed pursuant to that regime.

That is, Part 23 dispute resolution processes and most of its information disclosure requirements applied to Essential Facility gas pipelines until that arrangement was overturned by the approval of the pipeline industry's alternative regime (Code).

Looking at the behaviour of the regulator in the last decade and a half one could reasonably conclude that the Gas Pipeline Third Party Access Code is the regulator's code. In fact, it was a code developed and put forward by industry and approved by the regulator.

### *3.2.1 Essential Facilities, Access Arrangements, and Regulatory Fatigue*

Declaring a particular pipeline a Covered or Scheme Pipeline, that is to say, an Essential Facility, presents one of the greatest problems, impediments, and costs associated with the current regulatory regime

This Coverage process was not necessary to warrant regulatory intervention in third party access disputes prior to Section 44 but it has proven to be the biggest obstacle to regulation since. The cost of seeking or even peripherally participating in the declaration and Access Arrangement review processes for a major pipeline has resulted in many pipeline shippers, and potential shippers, suffering what we call regulatory

fatigue. This is a condition where, just staying on track with, and engaging minimally in, the regulatory process is beyond the capacity and resources of a market participant.

The result of regulatory fatigue is that most potential participants in the regulatory process largely disengage from the process and the battle is fought between the regulator, the pipeline owner and, is some cases, the odd dominant and gas cost sensitive shipper. The industry that has prospered suppling advisory services to pipeline owners and to regulators is also engaged with the regulation process but its vested interest, like that of the regulator, is in continuing and enhancing regulation. This disengagement by most shippers with the regulatory process is often driven by a lack of in-house resources or the high cost of participating, especially when forced to use hired guns. Regulatory fatigue tends to only get worse over time.

Furthermore, we are concerned that this process of needing to declare a facility as an Essential Facility leaves some infrastructure, and more importantly (given the regulatory regime set out in the Code) many pipeline services, outside the purview of regulation and readily accessible arbitration. A simpler third party access arbitration scheme would allow users to dispute access to all pipelines and to pipeline-related infrastructure and services.

### *3.2.2 Third Party Access – where do we want to get to*

Our overview of Section 44 and the history of gas pipeline access regulation argues that the need to access regulation is fundamentally about regulating third party access to gas pipelines. That begs the question of what constitutes a "third party". We do not believe the COAG enquiry document adequately acknowledges the subtlety of this phrase or its relevance.

Third party access will only be achieved when all participants understand what we mean by "third party and the system is designed to deliver access to pipeline services to third parties, so defined.

In the gas transport context, the first gas transport agreement (**GTA**) on any pipeline is between the pipeline service provider and the foundation shipper. These are the "**first party**" and the "**second party**" respectively in the language of contract and regulation. There may, of course be more than one foundation shipper, and thus, more than one second party on any pipeline. Regulation is not considered necessary for regulating first and second party GTA negotiations as, given that the asset does not exist, these parties are deemed to have alternatives to contracting with each other and their competitive positions are judged to be reasonably balanced.

A third party is, therefore, a shipper or a potential shipper seeking access to gas pipeline services after the pipeline infrastructure and licences are in place. This third party will typically be seeking a shorter GTA term than foundation shippers, not necessarily offer the same credit status as foundation shippers, not be seeking to contract for quantities of gas comparable to foundation shippers and will not offer the same value to the first party

as the foundation shipper. That is because these parties will be excluded as foundation shippers (based on the fact that these shippers have insufficient credentials to underwrite bankable cash flows) even if they are/were seeking access contemporaneously with foundation shippers.

The current regulatory regime lost relevance when the terms contained in approved access arrangements were regulated to conform to the terms in a foundation shipper contract. That is to say, access arrangements became a price setting handbook for foundation shipper GTAs instead of reflecting the character and needs of third party shippers. Third parties could not deliver the basic "shipper profile" needed to qualify for those access arrangement terms, and pipeline service providers had no room to offer alternative terms since the regulated structures were set so tightly. This was always a scheme doomed to struggle as history has revealed.

## 4. AN ALTERNATIVE SUMMARY OF PROBLEMS (NOT POTENTIAL PROBLEMS)

This document has argued that there are underlying problems with the current regulatory framework and that the COAG enquiry document fails to consider or seek feedback on these broader issues. In our opinion, there are deeper problems that need COAG's attention than those set out in the enquiry document. In the form of an old Irish tale, if a quality third party access regime is our objective, we would not start from where we are now.

The problems with the current regulatory environment are that:

- ❑ the process of declaration consumes too many resources and is too costly;
- ❑ the Access Arrangement approval process consumes too many resources and is too costly;
- ❑ the cost of, and time taken to pursue, these processes frustrates any meaningful attempt by third parties to resort to third party access regulation as a tool in gas pipeline service negotiations;
- ❑ the restriction of regulation to Reference Services on Scheme Pipelines means that dispute resolution regarding other services on these pipelines is daunting; and
- ❑ the cost of continuing to refine a regime that fundamentally does not work is a waste.

## 5. MACRO RESOLUTION OPTION

Energy Matrix recommends in the strongest possible terms that COAG and the Energy Council take the time to define what it trying to achieve by regulating third party access to pipeline services.

If third party access regulation remains the objective, we strongly recommend a regime which:

- ❑ steps back from the current law and the pipeline industry's access code;
- ❑ abandons the coverage test for all pipelines;
- ❑ applies to all licenced pipelines;
- ❑ focuses on implementing Section 44 of the Consumer Law (that is to say, adopt a focus on resolving third party access disputes by arbitration as and when they arise);
- ❑ carries over a full suite of information disclosure provisions applicable to Scheme and Part 23 Pipelines (stratified by perhaps pipeline classification if appropriate);
- ❑ provides for the publication by the regulator of a set of what we mean by a "third party" and "third party access contract principles" (which might even include a risk weighted ROR or indicative price) so that everyone has a workable reference point for negotiations; and
- ❑ publishes the input to, and outcome of, third party access arbitrations, again to provide and enhance workable reference points for subsequent negotiations.

As part of this revision consideration should be given to the question of whether a regulator is equipped to be an unbiased arbitrator or whether this role should be assigned to a member(s) of a panel or approved arbitrator.

This reform would take all of the front end cost out of the regulatory process, allow shippers and pipeline service providers to get on and do what they are mandated to do and allow quick access to arbitration and equally quick resolution of access disputes. It would address many of the problems identified in recent reviews of the regulatory framework. This review might even consider innovative arbitration regime like Baseball Arbitration Model which might be a way to expedite the arbitration process and reduce cost. Baseball arbitration would also make the identity, biases/approach and qualification of the arbitrator less of an issue.

We will reflect this position in our response to the formal questions set out in the COAG enquiry document

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**Director**

ENERGY MATRIX GROUP

**January 2020**

# Pipeline Regulation Consultation Regulation Impact Statement – Stakeholder feedback template

## Submission from Energy Matrix Group Pty Limited

This template is to assist you to provide feedback on the COAG Consultation RIS titled *Options to improve gas pipeline regulation*. The template focuses on the questions asked through the RIS, which seek your views on issues which are central to the identified problems and proposed options. You may not wish to answer each question and there is no obligation to do so. If you wish to provide additional feedback outside the template, wherever possible please reference the relevant question to which your feedback relates. Thank you for your feedback.

## Chapter 5: Effectiveness of Part 23

| No. | Questions | Feedback |
|---|---|---|
| 1 | If you are a shipper that has negotiated with the operator of a non-scheme pipeline since August 2017, or a service provider of a non-scheme pipeline, how effective do you think Part 23 has been in terms of: | Not applicable |
| | (a) enabling shippers to make more informed decisions about whether to seek access and to assess the reasonableness of a service provider's offer? | NA |
| | (b) reducing the information asymmetries and imbalance in bargaining power that shippers can face in negotiations? | NA |
| | (c) facilitating timely and effective commercial negotiations between shippers and service providers? | NA |
| | (d) constraining the exercise of market power by service providers during negotiations by providing for a credible threat of intervention by an arbitrator? | NA |
| | (e) enabling disputes that cannot be resolved through negotiations to be resolved in a cost-effective and efficient manner? | NA |
| 2 | Do you agree with the observations and recommendations made by: | |
| | (a) respondents to the OGW shipper survey (see section 5.1)? If not, please explain why not. | These recommendations have little specificity and are difficult to either agree with or object to. |
| | (b) the Brattle Group in its review of the financial information (see section 5.2)? If not, please explain why not. | The recommendations of the Brattle Group are generally sound but the impact on the cost of compliance needs to be considered. |

| No. | Questions | Feedback |
|---|---|---|
| | (c) the ACCC in its review of the operation of Part 23 (see section 5.3)? If not, please explain why not. | The recommendations of the ACCC are generally supported, however they:<br>❑ may be better achieved if the concept of Scheme and Non-Scheme pipelines is done away with and all pipelines are subject to a regulatory regime focused on effective information disclosure and easy access to effective arbitration;<br>❑ need to ensure that any tariff's, RORs or pricing principles are relevant to "third parties access" and not foundation shipper price regulation; and<br>❑ need to recognise the difference between third party shippers and foundation shippers, and differences between third party shippers, and ensure that pricing principles recognise and acknowledge those differences. |
| 3 | Are there any changes that you think need to be made to Part 23 to make it more effective or efficient in terms of achieving its stated objective (i.e. to facilitate access at prices and on other terms and conditions that, so far as practical, reflect the outcomes of a workably competitive market)? | No Comment |

## Chapter 6: Potential problems and objectives of action

| No. | Questions | Feedback |
|---|---|---|
| 4 | Do you agree with the problems that have been identified and what effect do you think they could have on shippers, service providers, the relevant regulator, consumers and/or other gas market participants? | No. Please see cover submission |
| 5 | Are there any other problems that you think should be considered as part of the RIS (e.g. access to regional pipelines)? If so, please set out what they are, what effect you think they could have on shippers, service providers, the relevant regulator, consumers and/or other gas market participants, and how you think the problem should be addressed. | Please see cover submission |
| 6 | Are there any other objectives that you think the Energy Council should be pursuing? If so, please set out what they are. | Please see cover submission |

# Chapter 7: When a pipeline should be subject to regulation and how decisions should be made

| No. | Questions | Feedback |
|---|---|---|
| 7 | Do you think that the current threshold for regulation (i.e. all pipelines providing third party access are subject to regulation) is giving rise to over-regulation (see sections 7.2.1 and 7.3.1), or do you think the current threshold should be maintained? | Given the high cost and the time taken to implement the current regulatory arrangements they in themselves are an impediment to the efficient allocation of resources. We strongly support the proposition that the only licenced pipelines which should not be automatically subject to (a different form of) regulation are those pipelines that connect a single facility to a shipper location, are less than, say, [5] kilometres in length and are not subject to a request for third party access. There may be merit in subjecting the easements and "connection facilities" even of short, single user facility pipelines to regulation in all cases. |
| | (A) If you think it is giving rise to over-regulation: | Over regulation would suggest that the regulatory regime is working adequately. We consider the cost and structure of the existing regime is a hindrance to effective regulation. Most shippers cannot sustain the cost and resource commitment of engaging in the Coverage process, constant AA reviews and maintaining up to date records on disclosure.<br><br>The consequence will be regulatory fatigue and a reduction in the number of those engaged in the regulatory process to the service provider, the regulator and the occasional key shipper. Most shippers will assume the regulator is on their side and minimise engagement. This, in itself, is distortionary. |
| | (a) How significant do you think this issue is and what are the consequences likely to be? | |
| | (b) Do you think the risk of over-regulation should be addressed by:<br>(i) including an exemption mechanism in the regulatory framework to enable pipelines that do not have substantial market power to obtain an exemption from regulation?<br>(ii) limiting the application of regulation to those cases where it is established that the pipeline has substantial market power?<br>(iii) another means? | We feel the threat of over regulation should be addressed by a root and branch review of what the regulatory regime is intended to achieve. |
| | (B) If you think that (i) or (ii) should be implemented, do you think the test for establishing whether a pipeline has substantial market power should be based on the combined market power-NGO test proposed by the ACCC (see Box 7.6)? | This is just adding a new test for Coverage and new set of legal dissertations and arguments that will not advantage shippers. |
| | (a) If so, do you think the onus of demonstrating this test is met (or not met) should sit with the decision-maker or the service provider? | NA |

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| | (b) If not, please explain why and what test you think should be employed. | NA |
| 8 | Do you think the application of Part 23 to pipelines providing third party access that have obtained a greenfield exemption is distorting investment incentives for greenfield pipelines (see sections 7.2.2 and 7.3.2), or do you think the current approach should be maintained? | All regulation distorts investment, the question is:<br>❑ is it more distortionary than free market forces;<br>❑ is it the least distortionary regulatory option available; and<br>❑ more particularly, is it statically distortionary or does the extent of distortion change over time. |
| | If you think it is distorting investment incentives:<br>(a) How significant do you think this issue is and what are the consequences likely to be? | Modestly so, not more so that a monopoly market would produce but not necessarily the best available regulatory framework. |
| | (b) Do you think this issue should be addressed by:<br>(i) providing these pipelines with a full exemption from regulation?<br>(ii) providing these pipelines with an exemption from the Part 23 arbitration mechanism, but not from the disclosure and negotiation elements of Part 23?<br>(iii) another means? | We would apply regulation to all licenced pipelines<br><br>See covering submission, greenfield pipelines can be dealt with in an all-in regulatory regime provided the greenfield nature of the investment is taken into account in any arbitration. |
| 9 | Why do you think: | |
| | (a) the greenfield exemptions in the NGL have not been used by a greater number of service providers? | No Comment |
| | (b) the CTP provisions in the NGR have not been used by a greater number of shippers or governments? | No Comment |
| 10 | Do you think the greenfield exemptions and CTP provisions should be retained in the regulatory framework, or do you think: | Not if there is a review of the regulatory regime to focus on true “third party access”. If that is not done, then these arrangements are no more than a Band-Aid on a broken regulatory model. |
| | (a) changes to the greenfield exemptions and/or CTP provisions are required? | See above |
| | (b) the greenfield exemptions and/or CTP provisions should be replaced with another mechanism that would provide potential developers with greater certainty as to how new pipelines will be treated from a regulatory perspective, while also protecting potential users of these pipelines from exercises of market power? | See above |
| 11 | Do you think the current approach to seeking access to pipelines that are not providing third party access should be maintained (i.e. a decision must be made by the relevant Minister having regard to the NCC’s recommendations and the coverage test), or do you think it should be | No, all licenced pipelines should be subject to regulation. See cover submission<br><br>This approach would greatly reduce the cost of regulation and, if combined with an efficient arbitration framework, would remove one of the major (current) obstacles to |

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| | mandatory for all pipelines to offer third party access on a non-discriminatory basis, as it is in the US and Canada (see sections 7.2.3 and 7.3.3)?<br>Please explain your response to this question and set out what you think the costs, benefits and risks are likely to be of mandating third party access. | effective third party access regulation. The cost reduction for all concerned would be massive.<br><br>The concept of non discrimination is flawed. It assumes all shippers and GTA requirements are equal. When a pipeline operator plays the "non discrimination card" that means all negotiations are ended and you will take what is offered (without proof the it is truly non discriminatory). Better the regime defines what a third party and third party GTA looks like (a commercial definition) and sets a reference point for pricing that service.<br><br>Shippers and service providers can then negotiate around that third party reference point to reflect the actual shipper and GTA offering. This will be discriminatory, by definition, but that is what an efficient market would do. If everyone involved in a negotiation knows that an arbitrator will start deliberations at that third party reference point then the incentive for efficient outcomes is high. |
| 12 | If the current threshold for economic regulation is maintained and a test for regulation is only required for third party access and greenfield exemption decisions, which of the following tests do you think should be employed (see section 7.3.4) and why:<br>(a) the coverage test;<br>(b) an equivalent test to the recently amended Part IIIA test;<br>(c) an NGO-style test; or<br>(d) a combined market power-NGO test? | This is forcing a choice between wrong and even more wrong. We reject both the premise and the conclusion. |
| | Do you think the onus of demonstrating the test is met (or not met) should sit with the decision-maker or service provider? | We do not think there should be a test. It is not necessary if all licenced pipelines are regulated. |
| 13 | Do you think the governance arrangements associated with third party access and greenfield exemption decisions are giving rise to unnecessary costs and delays, or do you think the current arrangements should be maintained (see sections 7.2.4 and 7.3.5)? | Absolutely they are creating unnecessary costs and delays. |
| | If you think the current arrangements could give rise to unnecessary costs and delays:<br><br>(a) How significant do you think this issue is and what are the consequences likely to be? | See cover submission<br><br>The issue of cost and process and delay is an absolute failure in the current regulatory model. |
| | (b) Do you think this issue should be addressed by according a single organisation responsibility for making this decision? | No, it should be addressed by changing the regulatory model. |

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| | If not, please explain why not. | | |
| | If so: | (i) What expertise do you think this organisation should have? | That will depend on the regulatory model |
| | | (ii) Which of the following organisations do you think should be responsible for making this decision:<br>- the ACCC?<br>- the relevant regulator (i.e. the AER or the ERA in Western Australia)?the NCC?<br>- another organisation? | None, the question of coverage should be automatic and universal.<br><br>Questions of process related to regulation and information disclosure could satisfactorily be given to any of these bodies but none are particularly well suited (by reference to their DNA) to act as arbitrators.<br><br>All these bodies have demonstrated their incapacity to grasp the fundamental concept of "third party access" (as opposed to foundation or "second party access") and it remains to be seen as to whether they are capable of taking such a step. |
| 14 | If a change is made to the governance arrangements, do you think the same organisation should also be responsible for making form of regulation decisions (see Chapter 8)? | | "making form of regulation" ? We do not understand the question.<br><br>If it means "lighter handed form of regulation", then the comment above applies. |
| 15 | Are there any other problems with this aspect of the regulatory framework that have not been identified in this chapter? If so, please outline what they are and how you think they should be addressed. | | No Comment |

# Chapter 8: Forms of regulation

| No. | Questions | | Feedback |
|---|---|---|---|
| 16 | Do you think the use of the coverage test as a gateway between Part 23 and full regulation is resulting in under-regulation?<br>(A) If not, please explain why not. | | Not particularly, the entire regime is resulting in high cost for all, regulatory fatigue and a failure to engage those who need it to work. |
| | (B) If so: | (a) How significant do you think this issue is? | Very |
| | | (b) Do you think the coverage test should be removed and a single test used for moving between the alternative forms of regulation?<br>If so, do you think the single test should be based on:<br>(i) the form of regulation test in s. 122 of the NGL (see section 3.1.1)?<br>(ii) another test? | No, all pipelines should be covered. There could be some differentiation of the level of information disclosure but this differentiation should be minimised as far as possible.<br><br>The test should be whether a pipeline is licenced or not. Differentiation of information disclosure, access guidance etc might then be simply addressed by the significance of the asset by reference. But this would be much cheaper than the 5 yearly AA review process. |

| No. | Questions | | Feedback |
|---|---|---|---|
| | | (c) Do you think:<br>(i) the onus of demonstrating that a particular form of regulation should apply to a pipeline should sit with the applicant or decision making body; or<br>(ii) the onus should be on the service provider to demonstrate why a heavier handed form of regulation is not required? | These options are not exclusive. The decision making body should make the call but there is room for the service provider to demonstrate why a heavier handed form of regulation is not required |
| | | (d) Do you think the relevant regulator should play a greater role in monitoring the behaviour of service providers and be able to refer pipelines for a form of regulation assessment if it suspects market power is being exercised? | Yes, with audit powers and powers equivalent to the ACCC gas price enquiry information gathering powers. |
| 17 | Do you agree that the inconsistencies and overlap between the three forms of regulation that are currently available under the regulatory framework are increasing the complexity and administrative burden for regulators, shippers and service providers?<br>(A) If not, please explain why not. | | Yes, and this goes to the overlap between s 44 of the Competition and Consumer Act and virtual return to the default s 44 process.<br><br>NA |
| | (B) If so: | (a) How significant do you think this issue is? | Sufficiently to rethink and streamline the arrangements around a systematic set of principles. Not by an ad hoc process of patching over a system which is not working in the first place. |
| | | (b) If the number of forms of regulation was reduced to two, do you think: | We contend that there should be one! |
| | | (i) the heavier handed form of regulation should be based on:<br>- full regulation (i.e. negotiate-arbitrate with reference tariffs)?<br>- direct price (revenue) control?<br>- another form of regulation? | NA |
| | | (ii) the lighter handed form of regulation should be based on:<br>- the existing light regulation?<br>- Part 23?<br>- a strengthened Part 23 (i.e. the existing Part 23 plus the safeguards available under light regulation)?<br>- another form of regulation? | NA |

| No. | Questions | | Feedback |
|---|---|---|---|
| 18 | Do you think there is a case for adopting a different lighter handed form of regulation for distribution pipelines?<br>If so, do you think it should be based on:<br>(a) the Default Price Path (DPP) approach used in New Zealand?<br>(b) the negotiated settlements approach used in the US and Canada?<br>(c) another form of regulation?<br>Please explain your responses to these questions. | | No. All licenced pipelines should be subject to full regulation and arbitration but not to the Coverage or the AA approval process. Then the only differentiation may be on the default/base line level of disclosure and the need for more detailed levels of disclosure for some pipelines. |
| 19 | Do you think additional measures are required in the regulatory framework to deal with dynamic market power?<br>(A) If not, please explain why not. | | No, access and connection has never been a problem. It is the price of these services that have been a problem. An easily accessed and efficient arbitration process should address both the use of dynamic market power and the cost of related services. |
| | (B) If so: | (a) Do you think the NGR should be amended to include: | |
| | | (i) an explicit right to interconnection to regulated pipelines? | Yes, subject to safety constraints (which is virtually unconceivable) |
| | | (ii) pricing principles for interconnections to regulated pipelines? | Yes and design and connection facility delivery principles and authorities. |
| | | (b) Do you think the NGR should be amended to prohibit regulated pipelines from cross-subsidising new capacity by requiring incremental pricing to be used where the cost of an expansion or extension would otherwise result in the price of existing capacity increasing? | There are efficient models where this is valid (See NGP rolled in tariff model). How could we justify regulating to refuse an efficient system expansion just to increase competition at a higher cost. The key question is how the benefits of efficiency savings are shared in the event of expansion/extension. |
| 20 | Are there any other problems with this aspect of the regulatory framework that have not been identified in this chapter? If so, please outline what they are and how you think they should be addressed. | | |

# Chapter 9: Information disclosure requirements

| No. | Questions | | Feedback |
|---|---|---|---|
| 21 | Do you think the limited information available on full regulation pipelines is hindering the ability of shippers to negotiate access to non-reference services or having any other adverse effects (see section 9.2.1)?<br>(A) If not, please explain why not: | | If the principal mechanism of regulation is arbitration and all arbitration reasoning and outcomes is/are published then the role of information disclosure is to mitigate unwarranted arbitration. Then disclosure is in the interests of all participants. And the data disclosed is tested and cross checked at each arbitration.<br><br>Our experience is that, if one seeks access to a non reference service on a full regulation pipeline, the service provider can throw up any smoke screen to justify a tariff proposal. There is no disclosure obligation. The current arbitration process does not encourage taking a dispute on such matters to arbitration. This problem cannot be addressed by changing the disclosure requirements because the system is dynamic and the regulation will always be static and behind the game.<br><br>If an easily accessed and efficient arbitration process were available, these matters could be brought to arbitration as they arise. If the reasons/results are published everyone is informed. It will be in the service provider's interest to inform the market and avoid unnecessary arbitration. Especially if the costs of arbitration can be awarded to encourage good behaviour |
| | (B) If so: | (a) How significant do you think this issue is?<br>(b) Do you think this issue should be addressed by requiring full regulation pipelines to publish the following information:<br>(i) a description of all the reference and non-reference services offered by the pipeline (pipeline service information);<br>(ii) the standing terms for non-reference services (i.e. the standard terms and conditions, the standing prices and methods used to calculate standing prices);<br>(iii) information on the prices paid by shippers for each reference and non-reference service;<br>(iv) historic demand information for each service offered by the pipeline; and<br>(v) historic financial information for the pipeline on an annual basis in accordance with a financial reporting guideline published by the relevant regulator. | Information is not the key to a successful negotiation. Adjusting the balance of power (the authority to determine an outcome) is the solution. Ready access to a low cost and efficient arbitration in all situations will be more efficient than prescribing information disclosure from a backward looking pallet for a sub set of services. |

| No. | Questions | | Feedback |
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| 22 | Do you think the deficiencies that have been identified with the pricing methodologies and financial information published by service providers are limiting the reliance that shippers can place on this information and making them more susceptible to exercises of market power (see section 9.2.2)?<br>(A) If not, please explain why not: | | For full regulation pipelines we believe that the focus on fixing foundation shipper prices has meant that the current regulatory regime is more than impotent, it is counter productive. It has frustrated any attempt to negotiate GTA terms and forced service providers to adopt a one size (foundation shipper GTA) fits all.<br><br>We cannot comment on part 23 and light handed regulations pipelines.<br><br>A shift in focus to defining what we mean by "third party" and third party GTA would make these pricing principles more relevant and useful. Combined with a move to facilitate access to efficient arbitration in all instances much could be achieved. |
| | (B) If so: | (a) How significant do you think this issue is? | Very |
| | | (b) Do you think the deficiencies that have been identified with the pricing methodologies should be addressed by amending the NGR to require:<br>(i) service providers to publish the inputs used to calculate standing prices?<br>(iii) the relevant regulator to publish a guideline on what information should be contained in the pricing methodology? | They require a rethink of what we are trying to achieve with regard to third party access and a change of mind set by all participants.<br><br>These suggestions could be part of a solution |
| | | (c) Do you think the deficiencies that have been identified with the financial information should be addressed by requiring service providers to report on the extent to which future costs are likely to be in line with historic costs, and historic information on contracted capacity and volumes transported? | This suggestion could be part of a solution |
| 23 | Do you think the deficiencies that have been identified with the weighted average prices are limiting the reliance that shippers can place on this information and making them more susceptible to exercises of market power (see section 9.2.2)?<br>(A) If not, please explain why not. | | Generally weighted average prices are useless. They are backward looking and not necessarily relevant to a current situation. In contrast, reorienting the regulatory model to promote arbitration, even with less information disclosure prior to arbitration, will focus regulation on the particulars of a specific current situation and be forward looking. |
| | (B) If so: | (a) How significant do you think this issue is? | Little, given WAP adds little value and are of little relevance. |

| No. | Questions | | Feedback |
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| | | (b) Do you think the deficiencies should be addressed by requiring service providers to report:<br>(i) the individual prices (plus key terms and conditions) paid by each shipper rather than weighted average prices; or<br>(ii) the minimum and maximum prices paid for each service in addition to the weighted average prices? | This could be done on lines similar to the current ACCC gas price enquiry and published by the ACCC, not the service provider, using similar protocols. |
| | | If you are a shipper, please explain what, if any effect, the disclosure of individual prices may have on competition in the markets in which you compete. | Little. As noted above, knowing a service provider's previous price agreements does nothing to adjust the balance of power (the authority of the service provider to deal or not deal) between the parties. |
| | | If you are a service provider, please explain what effect the disclosure of individual prices or the price range may have on your incentive to offer prudent discounts to shippers. | NA |
| 24 | Do you think the quality and reliability issues identified by the ACCC are limiting the reliance shippers can place on the information reported by service providers and making them more susceptible to exercises of market power (see section 9.2.3)?<br>(A) If not, please explain why not. | | Yes |
| | (B) If so: | (c) How significant do you think this issue is? | Moderate |
| | | (d) Do you think this issue should be addressed by implementing one or more of the following measures:<br>(i) amending the NGR to provide for greater regulatory oversight of the information reported by service providers?<br>(ii) amending the access information standard in the NGR to require information to be updated as soon as practicable if the information is found to no longer be accurate?<br>(iii) increasing the penalties for breaches of the information disclosure obligations and the access information standard?<br>(iv) the changes to the Financial Reporting Guideline identified by the ACCC and the Brattle Group (see Appendix B) should be implemented? | Yes to all, provided they are part of an effective regime and targeted to mitigate abuse by facilitating arbitration. With less emphasis on the WAP. |

| No. | Questions | Feedback |
|---|---|---|
| 25 | Do you think the current approach to reporting information should be maintained, or do you think:<br>(a) the NGR should be amended to require the relevant regulator to prepare a guideline that sets out where and how the information is to be disclosed on a service provider's website and to inform the regulator whenever changes are made?<br>(b) links to all the information reported by service providers should be published in a single location (e.g. the regulator's website, the Bulletin Board or AEMC register)?<br>(c) all the information reported by service providers should be made available through a single repository?<br>Please explain your response to this question and set out how significant you think the accessibility issue is for shippers. | We think the reporting obligations should be reviewed only after the failure of the current regulatory regime has been resolved and in that light. |
| 26 | Do you think, the current approach to reporting information should be maintained, or do you think the usability should be improved by requiring:<br>(a) a summary tab to be included in the financial reporting template to provide a high level summary of the key financial and pricing information; and/or<br>(b) a template to be developed to enable shippers to use the information published by service providers to calculate one or more the pricing benchmarks identified by the Brattle Group?<br>Please explain your responses to these questions and set out how significant you think the usability issue is for shippers. | See above |
| 27 | Do you think the current exemptions from information disclosure under Part 23 should be retained, or do you think the scope should be amended to require exempt pipelines to publish a basic set of information? | See cover submission |
| | If you think a basic set of information should be reported by all pipelines, what do you think it should include (e.g. pipeline service information, standing terms, the prices paid by other shippers, service availability and pipeline information)? | This depends on the regulatory model adopted |
| 28 | Do you think the size threshold used for exemptions under Part 23 should be retained, or do you think it should be aligned with the 10 TJ/day nameplate rating used for the purposes of full and light regulation, the Bulletin Board and the capacity trading reforms? | No, 10 TJ per day capacity is an irrelevant concept because the capacity of a pipeline at a point in time is not a measure of demand for third party access for all time. The key considerations are more likely to be the length of the pipeline and access to the connection facilities and pipeline easements. |

| No. | Questions | Feedback |
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| 29 | Are there any other problems with the information disclosure requirements or exemptions that have not been identified in this chapter, or changes you think should be made to address the information deficiencies, accessibility, usability, reliability and quality issues outlined in section 9.2? If so, please explain what they are. | The fact that so much information is processed by so many participants, so often, on Scheme pipelines when no third party access request or dispute exists is a simple waste of resources and is guaranteed to frustrate the regulatory process. |

## Chapter 10: Negotiation frameworks and dispute resolution mechanisms

| No. | Questions | | Feedback |
|---|---|---|---|
| 30 | Do you think the differences in negotiation frameworks applying under Part 23 and full/light regulation is causing confusion, imposing unnecessary costs on negotiating parties or otherwise hindering the ability of shippers to negotiate access (see section 10.2.1)?<br>(A) If not, please explain why not. | | Yes, and the perceived difficulty of the process is frustrating its use.<br><br>Note our previous comments about second party/third party access terms and failure of the existing regime to address third party access. On the contrary, the current regime verges on foundation shipper price fixing. |
| | (B) If so: | (a) How significant do you think this issue is? | Fundamental |
| | | (b) Do you think this issue should be addressed by adopting a single negotiation framework that would apply under all negotiate-arbitrate models that is based on:<br>(i) the approach currently applied under full and light regulation (see Table 10.1)?<br>(ii) the approach currently applied under Part 23 (see Table 10.1)?<br>(iii) a hybrid of the two frameworks as described in section 10.3.1? | No, it should be addressed by defining a regulatory regime that allows for negotiation and, dare we say, discrimination on just commercial terms.<br><br>Negotiation does not need to be legislated for, all that is needed is an easily accessed and efficient arbitration process for all pre contract access disputes. |
| 31 | Do you agree with the ACCC that the preliminary enquiry process in Part 23 could delay a shipper's access to arbitration if negotiations fail and also allow service providers to avoid the rules relating to access requests (including response times)?<br>(A) If not, please explain why not. | | Yes, any regulatory framework can used to frustrate intended outcomes. That will not be resolved by more of the same regulation. It will be resolved by creating easily accessed and efficient "pressure release valves". |
| | (B) If so: | (e) How significant do you think this issue is? | Moderate |

| No. | Questions | | Feedback |
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| | | (f) Do you think the preliminary enquiry process should be removed from Part 23? | Yes, as part of a full regime review |
| 32 | Do you agree that the credibility of the threat of arbitration is weaker for smaller shippers (see section 10.2.2)?<br>(A) If not, please explain why not. | | Absolutely! |
| | (B) If so: | (a) How significant do you think this issue is? | It is fundamental that arbitration be made easy to access, efficient and instructive for future negotiations. |
| | | (b) Do you think the position of smaller shippers would be improved by:<br>(i) making it easier for pipelines to move from lighter to heavier handed forms of regulation as set out in Chapter 8?<br>(ii) requiring individual prices or maximum and minimum prices to be reported by service providers rather than weighted average prices (see Table 9.2)?<br>(iii) improving the usability and accessibility of information reported by service providers in the manner set out in Table 9.2? | No, the system needs root and branch review. "[s]mall shippers" is a poorly defined term. Does it mean insubstantial companies or does it mean modest GTA volumes? Irrespective, these dimensions of a shipper or a GTA often have parallel shipper characteristics that would, in an efficient market, result in differential pricing.<br><br>The only market where the relative size of a buyer has no bearing on price outcomes is a market where all buyers are homogeneous (whoops, there are no small buyers), there are no transaction costs and all market participants have perfect knowledge. |
| | | (g) Do you think any of the following should occur to further strengthen the position of smaller shippers:<br>(i) amend the cost provisions to prevent the dispute resolution body from awarding the service provider's costs against smaller shippers (relevant to full and light regulation only) and making smaller shippers pay more than half the dispute resolution body's costs?<br>(ii) allow user groups to intervene in arbitral proceedings involving smaller shippers?<br>(iii) give smaller shippers the option under Part 23 to have the dispute heard by the relevant regulatory dispute resolution body or a commercial arbitrator? | No, although being able to award costs against vexatious arbitration seekers (whether shippers or service providers) would be worthwhile. Given that all buyers are not homogeneous and that, in the real world, transaction costs are real and "lumpy", how does the subsidisation of small shippers (still do not know what that means but we are, by implication, taking a stab) increase efficiency and improve resource allocation? |

| No. | Questions | | Feedback |
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| | | (h) If any of the measures outlined in (c) are implemented, how should 'smaller shipper' be defined? If you think it should be based on a size threshold, what threshold do you think should be adopted? | This document has already used the term "small shipper" as self evident. Definition of "small shipper" is foundational to those previous questions and seeking respondent feedback at this point in the document (let alone the regulatory process) is problematic. |
| 33 | Do you think: | (a) there are any other groups of shippers for whom the threat of arbitration may not be considered credible by service providers? | This is an irrelevant concept if arbitration is easily accessible and efficient. The question will be "is the shipper (small by some measure or otherwise) considered credible by arbitrator"? Once the arbitrator sets the tone the service provider will fall in line. Publication of reasons/outcomes will assist in this context. |
| | | (b) there any other factors that may discourage shippers from threatening the use of arbitration? | The height of the bar that has to be jumped to initiate an arbitration and the cost of arbitration are the key. Innovative arbitration models, like Baseball Arbitration, could be extremely valuable in this regard. |
| 34 | Do you agree that the limited guidance provided in the NGL/NGR on the matters to be considered by the dispute resolution body under full and light regulation as set out in section 10.2.3 are adversely affecting the efficiency, effectiveness and credibility of the dispute resolution mechanism applying to full and light regulation pipelines?<br>(A) If not, please explain why not. | | The more likely reason arbitrations are discouraged is the complexity of triggering and running the arbitration and the associated cost of the process.<br><br>A commercial arbitration which clearly defines the test to be applied by the arbitrator should not discourage arbitration. A properly constructed regulatory arbitration may be a different thing, as the commercial and regulatory dimensions of the test that the arbitrator is required to apply may be in conflict. |
| | (B) If so: | (a) How significant do you think this issue is? | Moderate |

| No. | Questions | | Feedback |
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| | | (b) Do you think these deficiencies should be addressed by amending the NGL/NGR to:<br>(i) require the dispute resolution body to have regard to the NGO, the revenue and pricing principles, an applicable AA (where relevant), previous AAs or access determinations, pre-existing contractual rights and the price and revenue regulation provisions in Part 9 of the NGR?<br>(ii) require the existence of a dispute to be made public and to set out the process for joining parties?<br>(iii) introduce a 50-day fast-track option for certain disputes under full regulation?<br>(iv) specify the maximum period of time to be taken by the dispute resolution body to resolve a dispute (e.g. 8 months or 12 months)?<br>(v) only require the access determination to be binding on a shipper if the shipper decides to enter into a contract that reflects the access determination and to prevent a shipper that decides not to enter into such a contract from seeking arbitration for the same or a substantially similar service for 12 months?<br>(vi) require the dispute resolution body to publish the access determination, statement of reasons, relevant financial calculations and information provided in the course of the dispute (subject to the confidentiality provisions in the NGL)? | This is only a fragment of the list of strategies that might be introduced to improve dispute resolution. To comment on this truncated list is to lift them up in some sense above other options of comparable merit that have not been cited.<br><br>In general we favour that the arbitrator apply a test(s) that focus on sustainable and efficient commercial outcomes and that arbitration is easy to initiate, is expeditious, is low cost, discourages vexatious abuse, and public (both the content and result). Many of the proposed recommendations warrant serious consideration in this framework. |
| 35 | Do you have any concerns with the Part 23 pricing principles (see Box 10.1? | | No However, if the test to be applied by the arbitrator is to produce access terms that would be generated in a “workably competitive market”, then this objective should also frame the pricing principals. |
| | If so: | (a) Please explain what your concerns are, how significant you think they are and what, if anything, you think could be done to address these concerns. | NA |

| No. | Questions | | Feedback |
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| | | (b) Do you think these concerns will be addressed by making it easier for pipelines to move from lighter to heavier handed forms of regulation? | NA |
| | | (c) Do you think there would be value in providing greater clarity in Part 23 about:<br>(d) how prior regulatory decisions are to be accounted for by an arbitrator, in those cases where a pipeline has previously been subject to full regulation, particularly if it becomes easier to move between forms of regulation?<br>(ii) shared costs are to be allocated between other assets that are operated by the service provider and between the services offered by the pipeline? | NA |
| 36 | Are there any other problems with the negotiation frameworks and dispute resolution mechanisms that have not been identified in this chapter, or changes you think should be made to address the issues identified in section 10.2? If so, please explain what they are. | | No Comment |

## Chapter 11: Policy options

| No. | Questions | Feedback |
|---|---|---|
| 37 | Of the four policy options that have been identified in Chapter 11, which option do you think should be implemented (i.e. Option 1, Option 2, Option 3 or Option 4) and why? | A variation on Option 4. Apply regulation to all licenced pipelines but we do not think this needs to be qualified by a reference of non discrimination. See cover submission and above |
| 38 | If there are other policy options or refinements to these policy options that you think should be considered, please explain what they are, what they would involve and what the advantages, disadvantages, costs, benefits and risks are with these options. | See above |
| 39 | Do you agree with the advantages, disadvantages, costs, benefits and risks that have been identified for each option in sections 11.2-11.4?<br>If not, please set out what other advantages, disadvantages, costs, benefits and/or risks that you think are associated with each option? | No, because the cost review is straight jacketed by the assumption that the current regulation practices would be followed. The cost and benefits come down to the form of regulatory regime. A regime that does away with Coverage and Access Arrangement Approval processes and focuses more on ensuring easily accessed , low cost and efficient arbitration would have a very |

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| | | different cost structure to the cost structure presented in section 11.5 of the enquiry document.<br><br>It would also have a very different incidence of when and where the cost of regulation falls. A regulatory model based on dispute resolution would mean that a substantial cost of regulation would be borne by those fail to engage in bona fide negotiations. |
| 40 | If you think any of the policy options out in Chapter 11 could be implemented through alternative means (i.e. non-regulatory), please explain how you envisage this would work. | See above |
| 41 | If options 2, 3 or 4 were implemented and 'light regulation' removed, which of the following transitional arrangements do you think should be employed for the 5.5 pipelines that are currently subject to this form of regulation: | See above |
| | (a) grandfather the existing light regulation arrangements until an application is made for the form of regulation to change on the 5.5 pipelines? | No |
| | (b) deem all light regulation pipelines to be subject to full regulation? | Yes |
| | (b) deem all light regulation pipelines to be subject to the new lighter handed form of regulation (i.e. the strengthened Part 23)? | No – but they may be subject to a graduated information disclosure obligation |
| | (c) require the decision making body to carry out an assessment of whether the pipelines should be subject to the heavier handed or lighter handed form of regulation using the form of regulation test? | This could be consistent with graduated information disclosure obligation |
| 42 | Are there any other transitional arrangements that need to be considered? If so, please outline what they are. | See cover submission and above |

## Chapter 12: Regulatory impact assessment

| No. | Questions | Feedback |
|---|---|---|
| 43 | Do you agree with the risks that have been identified for:<br>(a) the status quo in Tables A.1 and A.2?<br>(b) identified for Options 2-4 in Tables A.3 and A.4?<br>If not, please explain why not.<br>If you think there are other risks and treatments that should be accounted for, please explain what they are. | Again, this risk analysis is straight jacketed by the underlying assumption that regulation means that the current regulatory processes must apply to regulated pipelines. |

| No. | Questions | | Feedback |
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| 44 | Do you: | (a) agree with the categories of costs and benefit categories set out in Table 12.1, or are there other categories that you think should be considered in the CBA? | Provided E is intended to capture the cost of all participants engaging with every development in the regulatory process and further cost is added – the cost of non-participation by market participants who suffer regulatory fatigue. This later cost is difficult to assess but it goes to the effectiveness of the entire regulatory regime. On the benefits side, efforts could be made to measure the benefit of the regulatory regime in settling access disputes at a low cost quickly and mitigating disputes.<br><br>We would note that there is no fundamental link between gas transport tariff reductions and gas prices. That connection assumes that gas producers, cannot or fail to capture any of the reduction in gas transport tariffs.<br><br>Widget makes really only want to make widgets. Widget makers do not want to become experts in pipeline costs structures and pipeline regulation and in reality they do not spend a lot of time examining or extolling the merits of competition policy reform. |
| | | (b) have any information on the costs and benefits outlined in Table 12.1? If so, please elaborate on the source and quantum of those costs and benefits. | Not really. We rely on successfully negotiating access rather than engaging in the regulatory process. |
| | | (c) agree with the proposed discount rate and appraisal periods to be used for the central case and sensitivity testing? If not, please explain why. | This could only be a big issue for a regulator and their advisors. |
| | | (d) think there are other input variables that should be subject to a sensitivity analysis? If so, please explain what those inputs are. | The range of gas producer behavioural responses. |
| 45 | Do you have any information on the compliance costs associated with the policy options set out in Chapter 11 that could be used for the CRBM? If so, please elaborate on the source and quantum of the costs. | | No |
| 46 | What, if any effect, do you think the policy options summarised in Chapter 11 will have on competition in the gas market and, in particular on: | | Little, if we fail to address the fundamental failings of the current regime. |
| | (a) the relative bargaining power of shippers and service providers? | | Little, we need to make access to arbitration easier, keep the cost down and ensure that the process, reasons and outcomes are public/published. |
| | (b) the search and transaction costs associated with contracting pipeline services? | | They remain unchanged or will increase if the regime structure is not reconsidered |

| No. | Questions | Feedback |
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| | (d) the potential for collusive behaviour in competitive segments of the market? | One consideration/recommendation is to encourage collusion by shippers, otherwise the changes should not affect the situation. |
| | (e) changes to any barriers to entry that could promote or deter market entry? | None with regime review |
| | (f) the long-term outlook for investment in the sector? | None. From where we are now. |