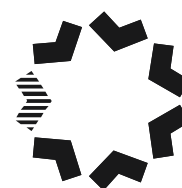


NATIONAL
COMPETITION
COUNCIL



Gas Guide

A guide to the functions and the
powers of the National Competition
Council under the National Gas Law



October 2013

Version 1.0

© Commonwealth of Australia 2013

ISBN 978-0-9577490-0-9

This work is copyright. Apart from any use as permitted under the *Copyright Act 1968*, the work may be reproduced in whole or in part for study or training purposes, subject to the inclusion of an acknowledgement of the source. Questions about this document and inquiries concerning reproduction should be addressed to the Executive Director, National Competition Council at the address below or by email to info@ncc.gov.au.

Executive Director
National Competition Council
GPO Box 250
MELBOURNE VIC 3001
Ph: (03) 9981 1600
Email: info@ncc.gov.au

An appropriate citation for this paper is:

National Competition Council 2013, *A guide to the functions and powers of the National Competition Council under the National Gas Law*, Melbourne.

The National Competition Council

The National Competition Council was established on 6 November 1995 by the *Competition Policy Reform Act 1995* (Cth) following agreement by the Australian Government and state and territory governments. It is a federal statutory authority which functions as an independent advisory body for all governments on third party access matters.

Information on the National Competition Council, its publications and its current work program can be found on the internet at www.ncc.gov.au or by contacting the Council on (03) 9981 1600 or via email to info@ncc.gov.au.

Table of Contents

Foreword	4
Glossary of terms and abbreviations	5
Version history	9
1 Background to the National Gas Law and overview of the Council's role.....	11
2 Classification and the decision maker	15
Classification	15
Classification decisions	15
Transmission or distribution	16
Cross-boundary pipelines	17
Reclassification	19
Other situations requiring classification	20
The decision maker – the relevant Minister	20
3 Pipeline coverage	23
Making coverage recommendations and determinations.....	26
Applying the pipeline coverage criteria	28
Criterion (a): Access (or increased access) to pipeline services provided by means of the pipeline would promote a material increase in competition in at least 1 market (whether or not in Australia), other than the market for the pipeline services provided by means of the pipeline.....	28
Criterion (b): It would be uneconomic for anyone to develop another pipeline to provide the pipeline services provided by means of the pipeline.....	39
Criterion (c): Access (or increased access) to the pipeline services provided by means of the pipeline can be provided without undue risk to human health or safety	45
Criterion (d): Access (or increased access) to the pipeline services provided by means of the pipeline would not be contrary to the public interest	46
Applications for coverage and revocation of coverage – procedural requirements.....	54
How the Council deals with applications.....	60
Regulating more or less of a pipeline	62
Deferring applications associated with tender approval pipelines	63
4 Form of regulation	65
Policy background.....	65
'Light ' regulation	66

Key features of light and full regulation	67
Light regulation determinations – overview.....	72
Light regulation determinations	73
Decisions on light regulation when pipeline is not a covered pipeline but an application for a coverage determination has been made	73
Decisions on light regulation when pipeline is already a covered pipeline.....	74
Section 122 – Principles governing light regulation determinations.....	76
Light regulation determinations – procedural requirements	93
Rules concerning the application for light regulation.....	94
Rules concerning the Council’s decision on an application for light regulation	99
Revocation of light regulation determinations.....	100
5 Greenfields Pipeline Incentives	105
15-year no-coverage determinations	106
Price regulation exemptions.....	108
Procedural requirements of applications for 15-year no-coverage and price regulation exemption recommendations	112
Process for applications for a no-coverage recommendation	124
Process for applications for a price regulation exemption	124
Modification and termination	126
6 Processes and other matters regarding applications made to the Council under the NGL	129
‘Pipelines’ for the purposes of the NGL.....	129
Procedures for the Council in considering applications under the NGL – the standard consultative procedure and the expedited consultative procedure	130
Providing information to the Council	134
Time limits, calculating time and extensions.....	134
Merits review.....	136
References	139
Appendix A Jurisdictional differences.....	141
Western Australia	141
Queensland.....	141
Appendix B Coverage and Revocation provisions.....	143
Appendix C Key features of regulatory arrangements for covered pipelines including the differences between full and light regulation	145
Covered pipeline – obligations of the service provider	145

Coverage following an extension or expansion of a pipeline	146
Appendix D Application fees under the NGL.....	149
What do the fees relate to?	149
Pipeline	149
Applications under the National Gas Law concerning more than one pipeline	149
Appendix E Use of extrinsic materials in this Guide	151
Use of extrinsic materials to assist interpretation	151
Interpretation best achieving NGL's purpose	151
Use of extrinsic material in interpretation.....	151

Foreword

The National Competition Council has prepared this Guide to its functions and powers under the National Gas Law (**NGL**).

The Guide deals with:

- coverage of pipelines (including revocation of coverage)
- pipeline classification
- the form of regulation of covered pipelines (full and light regulation); and
- greenfields pipeline incentives.

This Guide is intended to assist parties in preparing applications to the Council under the NGL. It will also assist other parties involved in the Council's consideration of such applications.

Glossary of terms and abbreviations

Abbreviation	Description
15-year no-coverage determination	A determination whereby a new pipeline cannot be covered for 15-years from its commissioning
ACCC	Australian Competition and Consumer Commission
Access arrangement	An arrangement setting out the terms and conditions of access to pipeline services provided by means of a pipeline
Australian Energy Market Commission or AEMC	The Australian Energy Market Commission established by s 5 of the <i>Australian Energy Market Commission Establishment Act 2004</i> (SA)
Australian Energy Market Operator or AEMO	A company limited by guarantee, established in 2009 by COAG and the MCE to manage the National Electricity Market (NEM) and the retail and wholesale gas markets of eastern and southern Australia and oversee system security of the NEM electricity grid and the Victorian gas transmission network. AEMO is also responsible for national transmission planning and the operation of the STTMs for gas.
Australian Energy Regulator or AER	The Australian Energy Regulator established by s 44AE of the <i>Competition and Consumer Act 2010</i> (Cth)
CCA	<i>Competition and Consumer Act 2010</i> (Cth)
COAG	The Council of Australian Governments
Council or NCC	National Competition Council established by s 29A of the <i>Competition and Consumer Act 2010</i> (Cth)
Coverage or covered	The status of a pipeline which is, or is deemed to be, the subject of a coverage determination and accordingly subject to economic regulation under the National Gas Law
Commonwealth Criminal Code	<i>Criminal Code Act 1995</i> (Cth)
Duke EGP decision	<i>Re Duke Eastern Gas Pipeline Pty Ltd</i> [2001] ACompT 2 (4 May 2001)
Economies of scale	Economies that occur where the average cost per unit of output decreases as output expands
Economies of scope	Economies that occur where the joint production of two or more products is less costly than producing the products individually
End user	A person who acquires natural gas or proposes to acquire natural gas for consumption purposes

Abbreviation	Description
ERA	Economic Regulation Authority of Western Australia
Expert Panel	The Expert Panel on Energy Access Pricing
Expert Panel Report	Expert Panel on Energy Access Pricing, <i>Report to the Ministerial Council on Energy</i> , April 2006
Form of regulation factors	The factors relating to market power set out in s 16 of the National Gas Law
Full regulation or access arrangement regulation	The form of regulation applicable to covered pipelines without a light regulation determination
Gas Code	The National Third party Access Code for Natural Gas Pipeline Systems set out in Schedule 2 to the <i>Gas Pipelines Access (South Australia) Act 1997</i>
Gas Pipelines Access Law	<i>Gas Pipelines Access (South Australia) Act 1997</i>
Hilmer Report	Report by the Independent Committee of Inquiry into National Competition Policy (Chair: Prof F G Hilmer) 1993
Jurisdictional determination criteria	The criteria to determine which jurisdiction a cross-boundary distribution pipeline is most closely connected with, contained in s 14 of the NGL
Light regulation	The form of regulation applicable to a covered pipeline when a light regulation determination of the Council is in force
Limited access arrangement	An access arrangement that is not required to make provision for price or revenue regulation but deals with the matters for which the National Gas Law and the National Gas Rules require provision to be made in an access arrangement
MCE	The Ministerial Council on Energy was established on 8 June 2001 as the Council of Ministers with primary carriage of energy matters at a national level comprising the Ministers representing the Commonwealth, the States, the Australian Capital Territory and the Northern Territory. In 2011 COAG agreed to merge the MCE with the Ministerial Council on Mineral and Petroleum Resources to form the Standing Council on Energy and Resources (SCER)
National Gas Law or NGL	The Schedule to the <i>National Gas (South Australia) Act 2008</i>
National Gas Objective	The objective set out in s 23 of the National Gas Law

Abbreviation	Description
National Gas Rules or Rules	The rules initially made by the South Australian Minister under s 294 of the National Gas Law and subsequent amendments to the Rules made by the AEMC under the National Gas Law
Part IIIA	Part IIIA of the CCA
<i>Pilbara HCA</i>	<i>The Pilbara Infrastructure Pty Limited v Australian Competition Tribunal</i> 246 CLR 379
Pipeline classification criterion	The criterion for determining whether the primary function of a pipeline makes it a distribution or transmission pipeline, in s 13 of the NGL
Pipeline coverage criteria	Criteria for the coverage or revocation of coverage of a pipeline in s 15 of the NGL
Price regulation exemption	A determination by the Commonwealth Minister that a new international pipeline is exempt from price or revenue regulation for 15 years from commissioning, but is subject to other non-price regulation under the NGL and Rules
Prospective user	A person who seeks or wishes to be provided with a pipeline service by means of a scheme pipeline
Queuing requirements	Terms and conditions providing for the priority that a prospective user has, as against any other prospective user, to obtain access to spare capacity and developable capacity
r or rr	Rule or rules
<i>Re QCMA</i>	<i>Re Queensland Cooperative Milling Association Ltd: Re Defiance Holdings</i> (1976) 25 FLR 169
Regulations	<i>National Gas (South Australia) Regulations</i> under Part 3 of the <i>National Gas (South Australia) Act 2008</i>
Regulator	AER, other than for Western Australian pipelines where it is the ERA
Rules	<i>National Gas Rules 2008</i>
s or ss	Section or sections
SCER	The Standing Council on Energy and Resources of COAG is responsible for pursuing priority issues of national significance in the energy and resources sectors and progressing the key reform elements of the former MCE and Ministerial Council on Mineral and Petroleum Resources. For more information see www.scer.gov.au .

Abbreviation	Description
Second Reading Speech	Speech by the Hon. Mr Conlon, MP on the second reading of the <i>National Gas (South Australia) Bill 2008</i> Parliamentary Debates, South Australia, Legislative Assembly, 9 April 2008, pp 2884-2916
Service provider	The owner, controller or operator of a pipeline
Sydney Airport Appeal decision	<i>Sydney Airport Corporation Ltd v Australian Competition Tribunal</i> (2006) 155 FCR 124
Sydney Airport decision	<i>Re Sydney International Airport</i> [2000] ACompT 1
Tribunal	Australian Competition Tribunal
User	<p>A person who—</p> <ul style="list-style-type: none"> a. Is a party to a contract with a service provider under which the service provider provides or intends to provide a pipeline service to that person by means of a scheme pipeline; or b. Has a right under an access determination to be provided with a pipeline service by means of a scheme pipeline

Version history

Version	Date	Modifications made
1	October 2013	Consolidation of the earlier four part guide and updating to reflect development in case law

This version of the Guide was prepared having regard to version 18 of the National Gas Rules published by the AEMC on 4 July 2013. Unless there are substantive changes to the provisions of the rules relevant to access, the Council does not intend to revise the guide with each revision of the Rules.

The Council originally published a Gas Guide in four parts. In 2013 the Council consolidated the Guide into one document that is available on the Council's website at www.ncc.gov.au. The Guide will continue to be updated periodically as required. Readers of the Guide are advised to ensure they have the latest version by checking on the website.

1 Background to the National Gas Law and overview of the Council's role

- 1.1 The National Gas Law (**NGL**), set out in the Schedule to the *National Gas (South Australia) Act 2008* (SA), commenced on 1 July 2008, replacing the former *Gas Pipelines Access Law*, more commonly known as the *Gas Code*.¹
- 1.2 Regulation of natural gas pipelines in Australia is the result of co-operative legislation establishing the NGL. The NGL is enacted as a law of South Australia. Each of the other jurisdictions in which the NGL applies has enacted legislation applying the NGL in its jurisdiction.² In some cases these laws modify the application of the NGL in a particular jurisdiction or contain derogations that limit the application of the law. Discussion of jurisdiction specific provisions is contained in Appendix A.
- 1.3 The NGL provides for the law to be supplemented by National Gas Rules (**Rules**). These Rules were first promulgated with the passing of the NGL. The Rules are subject to amendment through a rule change process administered by the Australian Energy Market Commission (**AEMC**). The Rules have been added to or amended over the intervening period and this is likely to be an ongoing process.
- 1.4 The NGL establishes two principal regulatory bodies for the gas (and electricity sectors), the Australian Energy Regulator (**AER**) and the AEMC. In Western Australia the Economic Regulation Authority (**ERA**) rather than the AER is the regulator of gas markets including pipeline access.
- 1.5 For additional information on the AER, AEMC and the ERA refer to the websites maintained by these bodies:
 - www.aer.gov.au
 - www.aemc.gov.au
 - www.erawa.com.au
- 1.6 The Council has certain functions under the NGL. It is responsible for **decisions** on the classification of natural gas pipelines and the form of regulation to be applied to a covered pipeline (whether full or light regulation).
- 1.7 The Council also considers applications for coverage (or revocation of coverage) of pipelines and for greenfields pipeline incentives (15-year no-coverage determinations and price regulation exemptions). It provides **recommendations** on such applications to Ministers who are responsible for making **determinations** in accordance with the NGL.

¹ The National Third Party Access Code for Natural Gas Pipeline Systems, set out in Schedule 2 to the *Gas Pipelines Access (South Australia) Act 1997*.

² See *National Gas (Queensland) Act 2008* ; *National Gas (New South Wales) Act 2008*; *National Gas (ACT) Act 2008*; *National Gas (Victoria) Act 2008*; *National Gas (Tasmania) Act 2008*; *National Gas (Northern Territory) Act 2008*; *Australian Energy Market Act 2004* (Cth); *National Gas Access (WA) Act 2009*.

1.8 The NGL and Rules sets out the basis for regulation of access to gas pipelines (the subject of this guide). The NGL and the Rules also deal with a range of other regulatory issues in relation to the gas sector, such as:

- the requirements and duties of the provider of a covered pipeline service, including ring fencing
- access arrangements, including price and revenue regulation and other requirements, including the regulator's process and the arbitration of access disputes by the regulator
- the natural gas services bulletin board and the short term trading market
- enforcement proceedings
- decision making under the NGL
- the scheme register, and
- confidentiality and disclosure obligations.

1.9 For information on these broader aspects of gas sector regulation see the AER website, www.aer.gov.au.

Access regulation under the NGL

1.10 The NGL only applies access regulation to pipelines with a coverage determination (ie 'covered' pipelines). Access to 'uncovered' pipelines is a matter for commercial negotiation and arrangements without recourse to a regulator.

1.11 Two forms of regulation are available for a covered pipeline – full regulation or light regulation. Full regulation requires the service provider to submit an access arrangement to the regulator and have it approved by the regulator. Light regulation provides a light handed approach, removing price regulation and the requirement for an ex ante access arrangement. It adopts instead a negotiate/arbitrate model for third party access, with arbitration by the regulator in the event of an access dispute. This reflects the negotiate/arbitrate model to access in Part IIIA of the *Competition and Consumer Act 2010* (Cth) (**CCA**).

1.12 Light regulation, in providing for a negotiate/arbitrate regime, offers a different avenue for access where particular risks are differently balanced. Light regulation may enable more timely and lower cost outcomes than full regulation. Where negotiations are successful light regulation is likely to result in reduced front end costs and less delay. However, if a negotiation is unsuccessful additional time will be required to resolve the access issue and accordingly the back end costs can be expected to increase. Unless a number of access disputes arise in the relevant period, light regulation can be expected to continue to result in lower overall cost outcomes than full regulation.

1.13 As well as being subject to full regulation or light regulation, covered pipelines are subject to other regulatory requirements under the NGL (for example in relation to

ring fencing of certain activities and provision of information). The key features of the regulatory arrangements for covered pipelines are discussed in Appendix C.

- 1.14 A coverage determination for a pipeline can be revoked on application. Such an application is made to the Council, which makes a recommendation to a decision making Minister. Exemption from regulation under the NGL is also available, on application, for greenfields pipeline projects (new pipeline projects which have not yet been commissioned) via specific provisions for greenfields pipelines.

The National Access Regime

- 1.15 In many respects the Council's roles under the NGL mirror those undertaken by the Council within the National Access Regime established in Part IIIA of the CCA. The criteria for coverage of a pipeline under the NGL are similar to those for the declaration of services provided by infrastructure facilities more generally under Part IIIA (see paragraph 3.3). The Council, the Australian Competition Tribunal (**Tribunal**) and the Courts regularly draw on coverage decisions under the NGL in considering similar issues under Part IIIA and vice versa.

This guide

- 1.16 There are a further five chapters in this guide and several appendices.
- 1.17 Chapter 2 is concerned with the classification of a pipeline and determining the decision maker for coverage and similar ministerial decisions. Pipeline classification decisions are made by the Council, usually as part of its recommendation on a coverage application, although applications for classification or reclassification of a pipeline can be made separately. A pipeline's classification and the jurisdiction within which it falls determine the relevant decision maker in relation to coverage and other decisions determined by Ministers.
- 1.18 Chapter 3 addresses the coverage of a pipeline, including applications for coverage and revocation of coverage, and examines the pipeline coverage criteria. In relation to coverage the Council is responsible for receiving such applications and for making a recommendation to the relevant Minister who is then responsible for making a coverage determination in accordance with the requirements of the NGL.
- 1.19 Chapter 4 deals with the form of regulation of a coverage pipeline. Under the NGL covered pipelines are by default subject to full regulation. However, light regulation may be applied to a pipeline in particular circumstances. The Council decides the form of regulation for a pipeline, either in conjunction with its recommendation on a coverage application or, in respect of a covered pipeline, following an application to it for a light regulation determination.
- 1.20 Chapter 5 considers the incentives available for greenfields pipelines under the NGL – 15-year no-coverage determinations and price regulation exemptions. The Council receives applications for these exemptions and makes a recommendation to the relevant Minister who is then responsible for making the no coverage determination

or price regulation exemption. As these measures apply to greenfields pipelines it may also be necessary to classify the pipeline.

1.21 Chapter 6 deals with the processes prescribed in the NGL for the various decisions and recommendations made by the Council. This chapter provides guidance in relation to issues of confidentiality. The nature and processes for merits review of Council and ministerial decisions are also addressed in this chapter.

1.22 The appendices in this Guide address:

- (a) differences in the application of the NGL in certain jurisdictions
- (b) the provisions for coverage and revocation
- (c) regulation under the NGL and the differences between full and light regulation
- (d) the fees for applications under the NGL, and
- (e) use of extrinsic materials in interpreting the NGL, as examined in this Guide.

2 Classification and the decision maker

Classification

- 2.1 In the NGL pipelines are classified as either:
- (a) transmission pipelines, or
 - (b) distribution pipelines.
- 2.2 The primary function of a transmission pipeline is to convey gas to a market. The primary function of a distribution pipeline is to reticulate gas within a market. The classification of a pipeline affects some of the obligations to which the pipeline service provider is subject and the relevant Minister who is to determine whether the pipeline should be regulated (ie covered).
- 2.3 The classification of a pipeline made under the Gas Code is preserved by clauses 6 and 7 of Schedule 3 to the NGL. The NGL also provides for classification to occur in association with an application for coverage and for a service provider to apply for reclassification of a pipeline.
- 2.4 Subrule 15(1)(c) requires that any application for coverage under s 92:
- give details of the pipeline's classification or, if there is no classification, the classification the applicant considers appropriate;
- 2.5 If the pipeline has already been classified this must be specified in the application. Otherwise, the applicant should express a view on the classification of the pipeline having regard to the Council's role in making an initial classification decision in s 98 of the NGL.

Classification decisions

- 2.6 Section 98 governs the making of classification decisions by the Council.

98—Initial classification decision to be made as part of recommendation

- (1) The NCC must, as part of a coverage recommendation, classify the pipeline the subject of an application under section 92 as a transmission pipeline or a distribution pipeline (an **initial classification decision**). In doing so, the NCC must apply the pipeline classification criterion.
- (2) The NCC must as part of an initial classification decision—
 - (a) if it classifies the pipeline the subject of the application as a transmission pipeline—determine whether the transmission pipeline is also a cross boundary transmission pipeline;
 - (b) if it classifies the pipeline the subject of the application as a distribution pipeline—determine whether the distribution pipeline is also a cross boundary distribution pipeline.
- (3) The NCC must also determine, as part of an initial classification decision, the participating jurisdiction with which the pipeline the subject of the

application under section 92 is most closely connected if the NCC determines the pipeline is also a cross boundary distribution pipeline. In doing so, the NCC must apply the jurisdictional determination criteria]

- 2.7 As the initial classification decision must be made at the same time as a coverage recommendation, the decision making process is the same as for making a coverage recommendation (see chapters 3 and 6).

Transmission or distribution

- 2.8 The pipeline classification criterion is set out in s 13 as follows:

13—Pipeline classification criterion

- (1) The pipeline classification criterion is whether the primary function of the pipeline is to—
 - (a) reticulate gas within a market (which is the primary function of a distribution pipeline); or
 - (b) convey gas to a market (which is the primary function of a transmission pipeline).
- (2) Without limiting subsection (1), in determining the primary function of the pipeline, regard must also be had to whether the characteristics of the pipeline are those of a transmission pipeline or distribution pipeline having regard to—
 - (a) the characteristics and classification of, as the case requires, an old scheme transmission pipeline or an old scheme distribution pipeline;
 - (b) the characteristics of, as the case requires, a transmission pipeline or a distribution pipeline classified under this Law;
 - (c) the characteristics and classification of pipelines specified in the Rules (if any);
 - (d) the diameter of the pipeline;
 - (e) the pressure at which the pipeline is or will be designed to operate;
 - (f) the number of points at which gas can or will be injected into the pipeline;
 - (g) the extent of the area served or to be served by the pipeline;
 - (h) the pipeline's linear or dendritic configuration.

- 2.9 The words 'without limiting subsection (1)' in s 13(2) make it clear that the primary function test is the main basis for classification. The factors in s 13(2) can be informative, but are not determinative. For instance, transmission pipelines will generally have a larger diameter, use higher pressure, have fewer injection points, serve a range of separate markets and operate in a linear manner. However,

transmission pipelines can also be small (eg Dawson Valley) and have a range of off-take points (eg Victorian Principal Transmission System). Accordingly the Council will balance the factors in s 13(2) when applying the primary test in s 13(1).

Cross-boundary pipelines

- 2.10 A cross-boundary pipeline is one which crosses a state or territory border. Usually this is purely a matter of fact. However, it should be noted that, for the purpose of the NGL, the Commonwealth offshore area (generally starting 3 nautical miles from the coast and extending to the limits of Australia's exclusive economic zone) is another jurisdiction and so a pipeline which starts in the offshore area will generally be a cross-boundary pipeline.

Western Australia

- 2.11 Western Australia is an exception to this. Subsection 3(1) of the *Australian Energy Market Act 2004* (Cth) defines an offshore Western Australian pipeline as follows:

"offshore Western Australian pipeline" means a pipeline (within the meaning of the National Gas (Commonwealth) Law) for transporting natural gas from one or more points of origination in the offshore area of Western Australia to one or more points of termination in:

- (a) Western Australia; or
- (b) the coastal waters of Western Australia;

but does not include a pipeline any part of which is situated in another State or in a Territory.

- 2.12 Section 11J of the *Australian Energy Market Act 2004* (Cth) then applies the National Gas Access (Western Australia) Law to offshore Western Australian pipelines as follows:

- (1) The National Gas Access (Western Australia) Law (within the meaning of the *National Gas Access (WA) Act 2009* of Western Australia) as in force from time to time:

- (a) applies as a law of the Commonwealth in relation to so much of an offshore Western Australian pipeline as is situated in the offshore area of Western Australia; and
- (b) so applying may be referred to as the *Offshore Western Australian Pipelines (Commonwealth) Law*.

2.13 Further to this provision, clause 9(2) of the *National Gas Access (WA) Act 2009* provides that:

A pipeline that is an offshore Western Australian pipeline as defined in section 3(1) of the *Australian Energy Market Act 2004* of the Commonwealth is to be regarded as being situated wholly within Western Australia for the purpose of determining who the relevant Minister is under the National Gas Access (Western Australia) Law.

2.14 Accordingly, a pipeline which begins in the offshore area of Western Australia and ends in Western Australia (or the coastal waters of Western Australia) will not be classified as a cross-boundary pipeline. As a result the Western Australian Minister will be the relevant Minister for determining the coverage of such a pipeline.

Most closely connected jurisdictions

2.15 For cross-boundary distribution pipelines the important determinant is the jurisdiction with which the pipeline is most closely connected, according to the criteria in s 14 of the NGL.³

14 Jurisdictional determination criteria—cross boundary distribution pipelines

The pipeline jurisdictional determination criteria are—

- (a) whether more gas is to be delivered by a cross boundary distribution pipeline in the jurisdictional area of 1 participating jurisdiction than in the jurisdictional area of any other participating jurisdiction;
- (b) whether more customers to be served by a cross boundary distribution pipeline are resident in the jurisdictional area of 1 participating jurisdiction than in the jurisdictional area of any other participating jurisdiction;
- (c) whether more of the network for a cross boundary distribution pipeline is in the jurisdictional area of 1 participating jurisdiction than in the jurisdictional area of any other participating jurisdiction;
- (d) whether 1 participating jurisdiction has greater prospects for growth in the gas market served or to be served by a cross boundary distribution pipeline than any other participating jurisdiction;
- (e) whether the regional economic benefits from competition are likely to be greater for 1 participating jurisdiction than for any other participating jurisdiction.

³ It is not necessary to determine a most closely connected jurisdiction for transmission pipelines as coverage and similar decisions in relation to all cross-boundary transmission pipelines are the responsibility of the Commonwealth Minister (see further paragraph 2.27).

Examples

Under the Gas Pipelines Access Law, the Tweed Heads distribution network was determined to be more closely connected with Queensland and the Albury network more closely connected with Victoria. These determinations were transitioned into the NGL by clause 53 of Schedule 3 of the NGL.

Reclassification

- 2.16 Part 5 of Chapter 3 of the NGL allows a service provider of a pipeline which has already been classified to have its pipeline reclassified. In accordance with r 131, a reclassification application must:
- (a) identify the pipeline to which the application relates, and
 - (b) specify the nature of the reclassification sought by the applicant, and
 - (c) demonstrate that the reclassification would be consistent with the pipeline classification criterion, and
 - (d) include, or be accompanied by, any further information or materials on which the applicant relies in support of the application.
- 2.17 Accordingly, an applicant should provide the current technical and market information for the pipeline to address the matters that need to be considered under the pipeline classification criterion (ie markets served, pipeline diameter, injection/off-take points, pressure, configuration).
- 2.18 The *National Gas (South Australia) Regulations 2008* (Regulations) prescribe that an applicant must pay a fee of \$2,000 at the time it lodges a reclassification application with the Council. Intending applicants should contact the Council in relation to methods for paying the application fee.
- 2.19 The Council must deal with applications for reclassification in accordance with the expedited consultative procedure (pursuant to r 132(1)) – see paragraph 6.10.
- 2.20 In reclassifying a pipeline the Council must consider the pipeline classification criterion in s 13 (see paragraph 2.8 above) and also have regard to the national gas objective. In taking the national gas objective into account the Council may consider whether the change in classification is likely to have any effects on the efficiency of pipeline access or the operation of gas markets through changing the obligations to which the pipeline's service provider is subject. Accordingly, where a change in pipeline classification diminishes the rights of third parties in a manner inconsistent with the national gas objective, the Council may refuse to reclassify the pipeline.
- 2.21 The Council's decision must be delivered to the service provider and other parties involved in the Council's consideration of the issue, published on the Council's website and made available for inspection during business hours at the Council's office (see r 9(4)).
- 2.22 The reclassification takes effect on the day that it is made (s 130 of the NGL).

Other situations requiring classification

Classification where tender approval becomes irrevocable

2.23 Pursuant to the Rules, a person may apply to the regulator for approval of a proposed tender to construct and operate a new pipeline to be a competitive tender process. Pipelines constructed and operated on this basis are covered and regulated on the basis of the approved tender conditions. After a tender approval process has been reviewed by the regulator and it becomes irrevocable, the regulator must refer the proposed pipeline to the Council for a classification decision in accordance with the pipeline classification criterion. The regulator must then assist the Council with information to allow the Council to classify the pipeline. The Council must notify the regulator and the AEMC of the decision it makes. The Council is not required to consult, but may choose to consider the views of interested stakeholders if the classification is not straightforward (see r 26).

Classification where submission of voluntary access arrangement

2.24 The NGL allows for the service provider for a light regulated pipeline to submit a voluntary access arrangement to the regulator. In such cases the regulator must refer the pipeline to the Council for classification and give the Council the relevant application (see r 47(3)(b)). The Council is not required to consult in making its decision. The decision must be given to the regulator and the AEMC. However, if the service provider withdraws its voluntary access arrangement before it is approved, the Council's classification decision lapses (see r 47(6)(b)).

The decision maker – the relevant Minister

2.25 The Council's role in matters under the NGL, other than those relating to pipeline classification and form of regulation, involves the Council making a recommendation to the relevant Minister.

2.26 One of the primary reasons to classify a pipeline is to determine who is the relevant Minister to determine a coverage / revocation application, or an application for a 15-year no-coverage determination.

2.27 The term relevant Minister is defined in s 2 of the NGL as follows:

relevant Minister means if, in a coverage recommendation, no-coverage recommendation, classification decision under the Rules or reclassification decision, the NCC determines the pipeline is—

- (a) a cross boundary transmission pipeline—the Commonwealth Minister;
- (b) a transmission pipeline situated wholly within a participating jurisdiction—the designated Minister;

Note—

The term designated Minister is defined in the Act of this jurisdiction

- that applies this Law as a law of this jurisdiction.
- (c) a distribution pipeline situated wholly within a participating jurisdiction—the Minister of the participating jurisdiction;
 - (d) a cross boundary distribution pipeline—the Minister of the participating jurisdiction determined by the NCC in the recommendation as being the participating jurisdiction with which the cross boundary distribution pipeline is most closely connected;

2.28 The term 'Commonwealth Minister' is defined in s 2 of the NGL as:

Commonwealth Minister means the Minister of the Commonwealth administering the *Australian Energy Market Act 2004* of the Commonwealth;

This is usually the Minister whose responsibilities encompass the energy and resources portfolio.

2.29 The term 'designated Minister' is defined in the New South Wales, Australian Capital Territory, Queensland, Victoria, Tasmania and Northern Territory application Acts as the Commonwealth Minister. In South Australia and Western Australia the local State Minister is the designated Minister. The resulting allocation of responsibilities is summarised in Table 1.

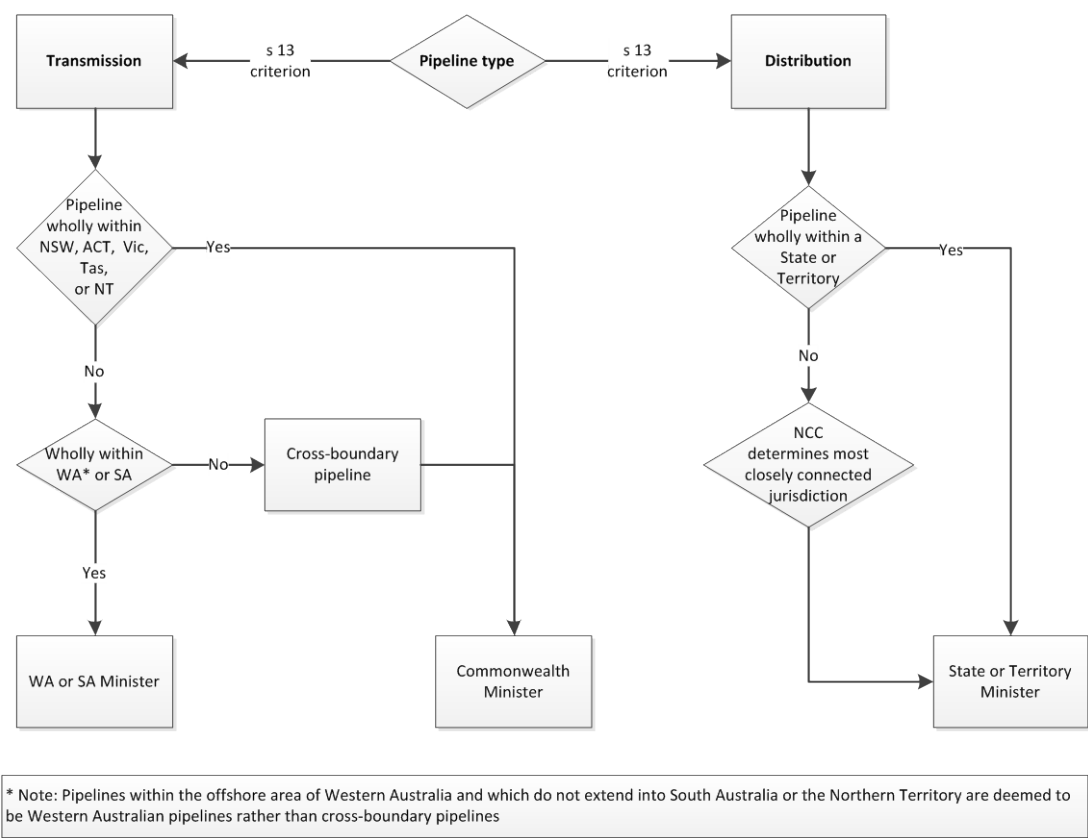
Table 1: 'designated Minister'

Commonwealth Minister	Transmission pipelines wholly within New South Wales, Australian Capital Territory, Queensland, Victoria, Tasmania and Northern Territory and cross-boundary transmission pipelines
South Australian and Western Australian Ministers	Transmission ⁴ and distribution pipelines wholly within their jurisdiction and cross-boundary distribution pipelines most closely connected with it
New South Wales, Australian Capital Territory, Queensland, Victoria, Tasmania and Northern Territory State/Territory Ministers	Distribution pipelines within their jurisdiction and cross-boundary distribution pipelines most closely connected with their jurisdiction

2.30 The flowchart in Figure 1 can be used to identify the decision maker for various scenarios.

⁴ Pipelines within the offshore area of Western Australia and which do not extend into South Australia or the Northern Territory are deemed to be Western Australian pipelines rather than cross-boundary pipelines.

Figure 1: Determining the relevant Minister



3 Pipeline coverage

3.1 Access regulation applies only to covered pipelines. Under the NGL a pipeline may be a covered pipeline in a number of ways:

- (a) Pipelines which were covered pipelines under the Gas Code are deemed by items 5, 6 and 7 of Schedule 3 of the NGL to be covered pipelines under the NGL (with some exceptions in Queensland)⁵
- (b) Any person may apply to the Council for coverage of a particular pipeline under s 92 of the NGL: the relevant Minister makes a decision on the application (to cover or not cover the pipeline) by applying the coverage criteria and having regard to a recommendation from the Council (ss 99 and 100)⁶
- (c) A pipeline will be covered where a service provider has been awarded a tender to construct and operate a pipeline as a result of a tender approval process approved under the Rules (s 126),⁷ or
- (d) A pipeline will be covered where a service provider voluntarily submits a full access arrangement to the regulator and the regulator makes or approves that voluntary access arrangement (s 127).

3.2 In order to become covered a pipeline must meet the coverage criteria set out in s 15 of the NGL:

15 Pipeline coverage criteria

The pipeline coverage criteria are –

- (a) that access (or increased access) to pipeline services provided by means of the pipeline would promote a material increase in competition in at least 1 market (whether or not in Australia), other than the market for the pipeline services provided by means of the pipeline;
- (b) that it would be uneconomic for anyone to develop another pipeline to provide the pipeline services provided by means of the pipeline;
- (c) that access (or increased access) to the pipeline services provided by means of the pipeline can be provided without undue risk to human health or safety;
- (d) that access (or increased access) to the pipeline services provided by means of the pipeline would not be contrary to the public interest.

⁵ Pipelines that are covered pipelines in light of their inclusion in Schedule A to the Gas Code have never had the coverage criteria independently applied to them. Applications for revocation of coverage of these pipelines may be made.

⁶ The exception is that pipelines that have been granted a greenfields pipeline incentive (ie a 15-year no-coverage determination or a price regulation exemption under Chapter 5 of the NGL) may not be covered until the end of their exemption period (see s 167(4)).

- 3.3 The coverage criteria largely mirror the declaration criteria under Part IIIA of the CCA.⁷ Table 2 compares the coverage criteria under the NGL with the parallel provisions for declaration in the CCA.

Table 2: Pipeline coverage criteria and the declaration criteria in Part IIIA of the CCA

Pipeline coverage criteria in s 15 of the NGL	Declaration criteria in ss 44G and 44H of the CCA
that access (or increased access) to pipeline services provided by means of the pipeline would promote a material increase in competition in at least 1 market (whether or not in Australia), other than the market for the pipeline services provided by means of the pipeline (criterion (a))	that access (or increased access) to the service would promote a material increase in competition in at least one market (whether or not in Australia), other than the market for the service (declaration criterion (a))
that it would be uneconomic for anyone to develop another pipeline to provide the pipeline services provided by means of the pipeline (criterion (b))	that it would be uneconomical for anyone to develop another facility to provide the service (declaration criterion (b))
that access or increased access to the pipeline services provided by means of the pipeline can be provided without undue risk to human health or safety (criterion (c))	[repealed]
	that the facility is of national significance, having regard to: (i) the size of the facility; or (ii) the importance of the facility to constitutional trade or commerce; or (iii) the importance of the facility to the national economy (declaration criterion (c))
	that access to the service: (i) is not already the subject of a regime in relation to which a decision under section 44N that the regime is an effective access regime is in force (including as a result of an extension under section 44NB); or (ii) is the subject of a regime in relation to which a decision under section 44N that the regime is an effective access regime is in force (including as a result of an extension under section 44NB), but the Council believes that, since the Commonwealth Minister's decision was published, there have been substantial modifications of the access regime or of the relevant principles set out in the Competition Principles Agreement (declaration criterion (e))

⁷ The equivalent health and safety criterion in Part IIIA to s 15(c) of the NGL was repealed in 2010.

Pipeline coverage criteria in s 15 of the NGL	Declaration criteria in ss 44G and 44H of the CCA
that access (or increased access) to the pipeline services provided by means of the pipeline would not be contrary to the public interest (criterion (d))	that access (or increased access) to the service would not be contrary to the public interest (declaration criterion (f))

- 3.4 Any party which considers that a pipeline meets the coverage criteria may apply to the Council for the pipeline to be covered (see s 92).
- 3.5 Coverage of a pipeline which no longer meets the coverage criteria may be revoked. Any person may apply to the Council to revoke the coverage of all or part of a pipeline at any time (s 102). Pipelines covered as part of a tender process or through voluntary submission of an access arrangement become uncovered on the expiry of their access arrangements (see ss 126(2) and 127(2)), but all other pipelines remain covered until the Minister makes a coverage revocation determination under s 106 of the NGL.
- 3.6 The legal requirements applying to coverage determinations and coverage revocation determinations largely mirror each other (noting some exceptions at paragraph 3.7). The process (being the standard consultative procedure) and considerations (being the pipeline coverage criteria and the national gas objective) are identical such that the hurdles involved in applying and removing coverage are generally the same.
- 3.7 The exceptions are that:
- (a) coverage may need to deal with the classification of a pipeline whereas revocation of coverage does not (because the pipeline is already classified)
 - (b) coverage involves a concurrent process of determining the form of regulation - light or full regulation (see s 110, and chapter 4 of this Guide)
 - (c) a coverage process may need to be suspended when the pipeline is going through a tender approval process which will result in the pipeline becoming covered (ss 94 and 96)
 - (d) for a covered pipeline subject to a voluntary access arrangement which will expire, coverage can only be sought from the end of that access arrangement (r 15(2))
 - (e) revocation of coverage processes require the applicant (who will generally be the service provider or an associated entity) to provide a greater amount of information (r 18), and
 - (f) the coverage revocation process may need to be combined with applications to revoke a light regulation determination (see s 119 and chapter 4 of this Guide).
- 3.8 Appendix B provides additional detail on how the provisions applying to coverage determinations and coverage revocation determinations relate to each other.

Making coverage recommendations and determinations

- 3.9 Where a person applies to the Council for a coverage determination (ie, for a pipeline to be covered), the Council is required to make a coverage recommendation to the relevant Minister in respect of that application. The Council's recommendation must be either that the pipeline:
- (a) be a covered pipeline, or
 - (b) not be a covered pipeline.
- 3.10 Similarly, where a person applies to the Council for a coverage revocation determination (ie for a pipeline to no longer be covered), the Council's recommendation must be either that the pipeline:
- (a) continue to be a covered pipeline, or
 - (b) not continue to be a covered pipeline.
- 3.11 The Council's recommendations must be given to the relevant Minister without delay (ss 95(4) and 104(4)).
- 3.12 On receiving the Council's recommendation, the relevant Minister must decide:
- (a) in the case of coverage, whether to make a coverage determination in respect of the pipeline to which the recommendation relates, or
 - (b) in the case of a coverage revocation, whether to make a coverage revocation determination.
- 3.13 The principles for the Council to make coverage recommendations (s 97) and coverage revocation recommendations (s 105) mirror each other. They require the Council and the relevant Minister to give effect to the pipeline coverage criteria (see paragraph 3.2 above). Section 97 provides as follows (as does the identical s 105):

97—Principles governing the making of a coverage recommendation

- (1) In making a coverage recommendation, the NCC—
 - (a) must give effect to the pipeline coverage criteria; and
 - (b) in deciding whether or not the pipeline coverage criteria are satisfied must have regard to the national gas objective.
- (2) The NCC gives effect to the pipeline coverage criteria as follows:
 - (a) if the NCC is satisfied that all the pipeline coverage criteria are satisfied in relation to the pipeline—the recommendation must be in favour of the pipeline being a covered pipeline;
 - (b) if the NCC is not satisfied that all the pipeline coverage criteria are satisfied in relation to the pipeline—the recommendation must be against the pipeline being a covered pipeline.

- 3.14 If the Council is satisfied that the four pipeline coverage criteria are met, the Council must recommend that the pipeline be (or remain) covered. If the Council is not

satisfied that one or more of the criteria are met, the Council must recommend that the pipeline not be covered or that coverage be revoked. These are the only ways in which the Council may give effect to the pipeline coverage criteria.

Having regard to the national gas objective

- 3.15 Subsection 97(1) makes clear that in deciding whether each criterion is satisfied, the Council must have regard to the national gas objective in s 23 of the NGL.

23 National gas objective

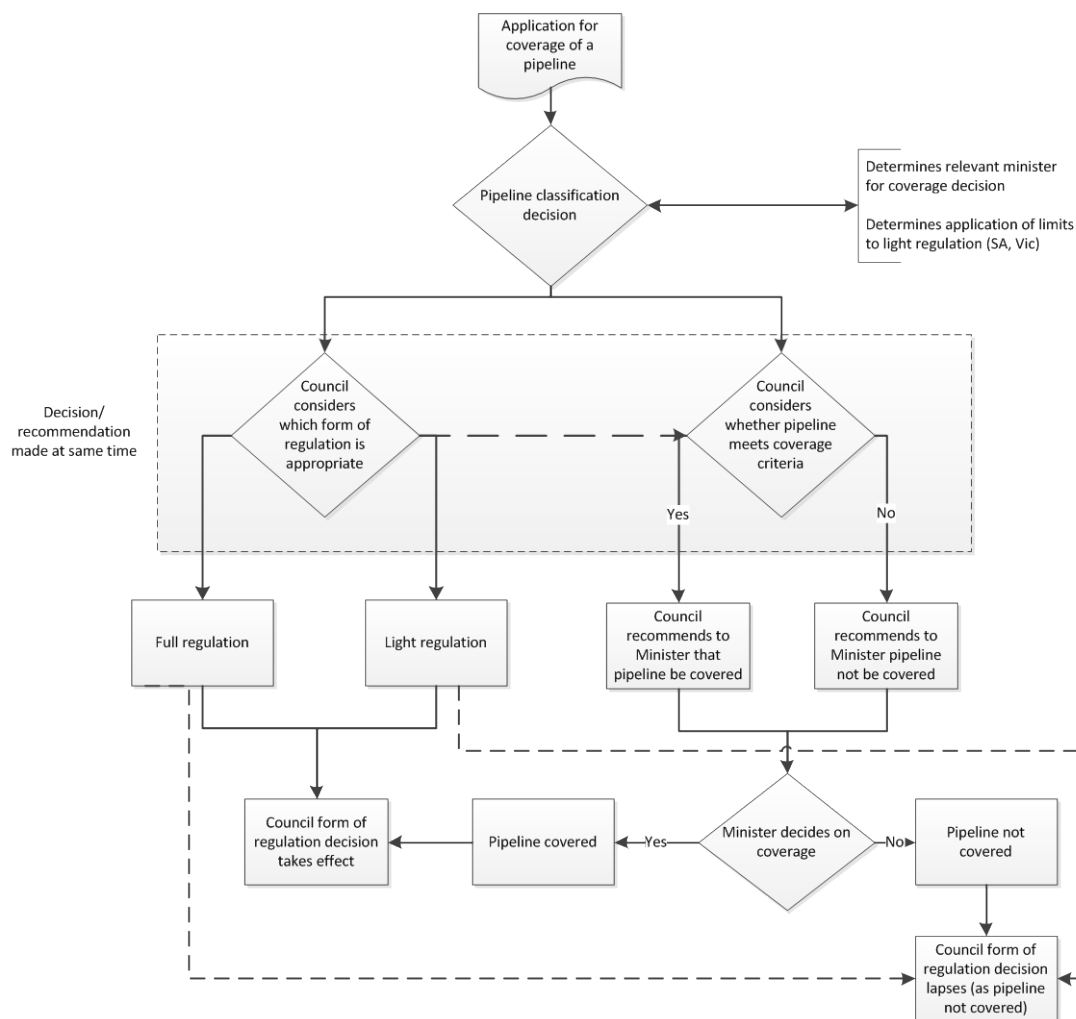
The objective of this Law is to promote efficient investment in, and efficient operation and use of, natural gas services for the long term interests of consumers of natural gas with respect to price, quality, safety, reliability and security of supply of natural gas.

- 3.16 The national gas objective requires the consideration and balancing of productive, allocative and dynamic efficiencies in the provision of network services as well as in upstream and downstream markets where competition is the key driver of welfare gains. The need for a 'long term' perspective is included as a caution against focusing on short term benefits to consumers which may undermine longer term investment and welfare gains.
- 3.17 The requirement that the Council have regard to the national gas objective in giving effect to each coverage criterion means that the Council must take into account the economic efficiency focus in determining whether the particular criterion is met. The national gas objective reinforces the importance of the focus on the market power of the service provider and on considering whether making or keeping the pipeline a covered pipeline is a means of mitigating that market power.
- 3.18 The national gas objective does not operate in its own right as a basis for covering or not covering a pipeline, nor can it operate to override the plain meaning of the coverage criteria and the need for each criterion to be satisfied in order for a pipeline to be covered.

Considering coverage and the form of regulation

- 3.19 When the Council considers an application for coverage of a pipeline it must, in conjunction with making a coverage recommendation to the Minister, determine the form of regulation that will apply to the pipeline in the event the Minister decides to cover it.
- 3.20 Figure 2 illustrates the processes for simultaneously considering coverage and the form of regulation of a pipeline. The form of regulation decision itself is discussed in chapter 4.

Figure 2: Simultaneous consideration of pipeline coverage, classification and form of regulation



Applying the pipeline coverage criteria

Criterion (a): Access (or increased access) to pipeline services provided by means of the pipeline would promote a material increase in competition in at least 1 market (whether or not in Australia), other than the market for the pipeline services provided by means of the pipeline

3.21 The Council cannot recommend that a pipeline be covered unless it is satisfied that access (or increased access) to the pipeline services provided by means of the pipeline would promote a material increase in competition in at least one market other than the market for the service. The markets in which competition might be promoted are commonly referred to as ‘dependent markets’.

3.22 The issue to be considered under criterion (a) is whether access would improve the opportunities and environment for competition in dependent markets such that it

promotes materially more competitive outcomes. The assessment is concerned with the process of competition, rather than the particular commercial interests or pursuits of individual competitors, including an applicant for coverage, given that any access that may result from coverage is not limited to the party that made the application.

- 3.23 The purpose of criterion (a) is to limit coverage to circumstances where it is likely to materially enhance the environment for competition in at least one dependent market. Whether competition will be materially enhanced depends critically on the extent to which the incumbent service provider can and is likely, in the absence of coverage, to use market power to adversely affect competition in a dependent market(s). If the service provider has market power, as well as the ability and incentive to use that power to adversely affect competition in a dependent market, coverage would be likely to improve the environment for competition, offering the prospect of tangible benefits to consumers (including reduced prices and better service provision).
- 3.24 In assessing whether criterion (a) is satisfied, the Council:
- (a) identifies the relevant dependent (upstream or downstream) markets
 - (b) considers whether the identified dependent market(s) is separate from the market for the pipeline service to which access is sought, and
 - (c) assesses whether access (or increased access) on reasonable terms and conditions would be likely to promote a materially more competitive environment in the dependent market(s).
- 3.25 The Council's approach to each of the above steps for assessing criterion (a) is considered in detail in the following sections.

Identifying dependent markets

3.26 In *Re Queensland Cooperative Milling Association Ltd: Re Defiance Holdings* (1976) 25 FLR 169 (*Re QCMA*) the Trade Practices Tribunal (the predecessor to the Tribunal) described a market as being ‘the area of close competition between firms’ or ‘the field of rivalry between them’ (at [190]). The Tribunal said that within a market there is substitution between products or sources of supply in response to price changes. It said that—

a market is the field of actual and potential transactions between buyers and sellers amongst whom there can be strong substitution, at least in the long run, if given a sufficient price incentive.⁸

3.27 As is generally the case in considering markets in competition law matters, the Council takes a purposive approach to market definition. The purpose in defining a market is to identify the scope for exercising market power.

3.28 Conventionally, markets are identified or defined in terms of:

- a product or service dimension
- the geographic area, and (if relevant)
- the functional level.⁹

3.29 The **product/service dimension** of a market delineates the products and/or services that are sufficiently substitutable to be considered to be traded within a single market.

3.30 The **geographic dimension** of a market identifies the area within which substitution in demand or supply is sufficient for the product(s)/service(s) traded at different locations to be considered to be in the same market.

3.31 Where products or services pass through a number of levels in a supply chain, it is also useful to describe the market in terms of the function being considered. The **functional dimension** identifies which of a set of vertically related markets is being considered. Defining the relevant functional market requires distinguishing between the different vertical stages of production and/or distribution and identifying those that comprise the field of competition in a particular case.

3.32 The Council seeks to identify one or more dependent markets where competition appears likely to be materially affected by the availability of access to the pipeline services provided by the pipeline the subject of the application. These markets will

⁸ The *Re QCMA* description of a market has been frequently approved in the Courts, including by the High Court in *Queensland Wire Industries Proprietary Limited v. The Broken Hill Proprietary Company Limited* (1989) 167 CLR 177, and adopted by the Tribunal, including in the *Sydney Airport decision* and the *Duke EGP decision*.

⁹ A temporal or time related element can also be relevant to market definition in some circumstances, although this is less likely in this context where markets usually involve long lived assets and shorter term market conditions are less likely to be relevant. However, see the discussion on the time horizon for assessment in relation to coverage criterion (b).

more often than not be vertically related to the market for the pipeline services. That is, they are upstream or downstream of the market for the pipeline services. It may be unnecessary to consider all possible dependent markets. Criterion (a) is satisfied if access will materially promote competition in one or more dependent markets. In practice, it is unlikely that the Council will examine more than the two most likely dependent markets in relation to an application for coverage or revocation of coverage.

Separate markets from the market for the pipeline services

- 3.33 For the purposes of criterion (a), the Council needs to be satisfied access (or increased access) would promote a material increase in competition in 'at least one market ... other than the market for the pipeline services provided by means of the pipeline'. This means that dependent markets must be functionally distinct markets from the market for the pipeline services.
- 3.34 In the context of the NGL, the focus upon pipeline services, which can only be provided by means of a natural gas pipeline, means that establishing this requirement is generally more straightforward than under Part IIIA of the CCA. Under the NGL, the focus is on the relevant upstream and downstream markets, principally gas production/processing, the sale or retailing of gas to end users and, increasingly, the use of gas to generate electricity.
- 3.35 Although it is possible that Part IIIA's criterion (a) for declaration of a service may be satisfied where a service provider is not vertically integrated into a dependent market(s), criterion (a) will, in the context of Part IIIA, most commonly be satisfied where a service provider is vertically integrated. The Federal Court stated in *BHP Billiton Iron Ore Pty Ltd v The National Competition Council* [2007] ATPR 42-141 that:
- ... it is the very prevention of a vertically integrated organisation using its control over access to an essential facility to limit effective competition in dependent markets that is a key activity that the access regime seeks to deal.
- ... In these circumstances it must be established that the provision of the service provided by the facility and the vertically related activity in the dependent market occur in distinct functional markets. Where there are such overwhelming efficiencies from vertical integration, and the provision of the service and the vertically related activity occur in the same functional market, there may not be a case for facilitating access to third parties. (at [45])
- 3.36 By contrast, vertical integration is likely to be less relevant in the context of gas pipelines and services given the structural and operational separation requirements of the NGL.
- 3.37 The NGL's structural and separation requirements mean that it is also more likely that up or downstream markets for production and supply of gas are separate from markets for pipeline services.

Access (or increased access) to pipeline services

3.38 The phrase ‘access (or increased access) to pipeline services’ refers to the right to access pipeline services consequent upon coverage under the NGL. That is, it refers to a regulated right to access pipeline services under the NGL rather than access that may be available under individual commercial arrangements.

3.39 The context in which the phrase appears in the NGL indicates that access must be provided on terms and conditions that give effect to the efficiency objective in the NGL and, accordingly, seek to replicate the outcome of a competitive market. The provision of services at a competitive market price, for example, will result in an optimal level of demand for access to the services. The reference to ‘access (or increased access)’ describes the conditions that would derive from access under the NGL as opposed to the conditions that would result in a less than effectively competitive dependent market for the services provided by means of the pipeline.

3.40 The words ‘increased access’ underscore the emphasis on removing structural impediments or barriers to competition in markets dependent on pipeline services.

3.41 The phrase ‘access (or increased access)’ was considered by the Full Court in the *Sydney Airport Appeal decision*. The Full Court held that criterion (a) requires:

... a comparison of the future state of competition in the dependent market with a right or ability to use [the] service and the future state of competition in the dependent market without any right or ability or with a restricted right or ability to use the service. (at [83])

3.42 As the Tribunal noted in the *Sydney Airport decision*:

The purpose of an access declaration is to unlock a bottleneck so that competition can be promoted in a market other than the market for the service. The emphasis is on ‘access’, which leads us to the view that s 44H(4)(a) is concerned with the fostering of competition, that is to say it is concerned with the removal of barriers to entry which inhibit the opportunity for competition in the relevant downstream market. (at [107])

3.43 Criterion (a) does not require that access to the service is unavailable at the time an application for a coverage recommendation is made. In the *Sydney Airport decision*, the Tribunal held that “existing access to a service is no bar to a consideration whether a declaration should be made in respect of that service” (at [229]). This principle is further illustrated by the Tribunal’s discussion in the *Duke EGP decision* re criterion (a) in the Gas Code. In that case, Duke contended that the question of whether access or increased access to the service would promote competition in other markets does not arise unless, as a matter of fact, access to the Eastern Gas Pipeline was either unavailable or restricted. In the *Duke EGP decision*, the Tribunal rejected this argument in the following terms:

The object of the Code, and its structure, make it clear that criterion (a) does not have as its focus a factual question as to whether access to the pipeline services is available or restricted. Put in that way, the question would not take sufficient account of the terms on which access is offered. Rather, the question

posed by criterion (a) is whether the creation of the right of access for which the Code provides would promote competition in another market. The enquiry is as to the future with coverage and without coverage. We agree with the approach adopted by the Tribunal in *Sydney International Airport* in this respect. The Tribunal must have regard to the position as it now stands, insofar as it provides a reliable guide to the future without coverage. Thus, (assuming the present is a reliable guide to the future without) account is to be taken of the EGP as an open access pipeline, and of any other pipelines supplying the upstream or downstream gas markets, in order to determine whether coverage of the EGP would promote competition in at least one of those markets. (at [73] and [74])

- 3.44 Further, the Full Court stated in *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2011) 193 FCR 57 that “access”:

is access on such reasonable terms and conditions as may be determined in the second stage of the Pt IIIA process (at [112])¹⁰

While this interpretation was made in relation to the public interest criterion in Pt IIIA of the CCA, on statutory interpretation principles it is also necessarily applicable to criterion (a) under the NGL.

Material promotion of competition

- 3.45 The notion of 'promoting ... competition' reflects the underlying competition policy underpinning both the CCA and NGL. Competition is valued for serving economic, social and political goals. It is a mechanism for discovering market information and enforcing business decisions in light of this information. The basic characteristic of effective competition is that no one seller or group of sellers has undue market power. Competition is a dynamic process, generated by market pressure from alternative sources of supply and the desire to keep ahead. In this sense, competition expresses itself as rivalrous market behaviour.

- 3.46 The promotion of a material increase in competition involves an improvement in the opportunities and environment for competition such that competitive outcomes are materially more likely to occur. As expressed in the *Sydney Airport decision*, it is the promotion of 'competition' rather than the promotion of 'competitors' (at [21]).

- 3.47 In the *Sydney Airport decision*, the Tribunal stated:

The Tribunal does not consider that the notion of 'promoting' competition in s 44H(4)(a) requires it to be satisfied that there would be an advance in competition in the sense that competition would be increased. Rather, the Tribunal considers that the notion of 'promoting' competition in s 44H(4)(a) involves the idea of creating the conditions or environment for improving competition from what it would be otherwise. That is to say, the opportunities

¹⁰ In the subsequent appeal, the High Court did not examine this issue or comment on the Full Court's finding.

and environment for competition given declaration, will be better than they would be without declaration. (at [106])

- 3.48 The Tribunal went on to say that the removal of barriers to entry in any dependent market(s) can be expected to promote competition:

We have reached this conclusion having had regard, in particular, to the two stage process of the Pt IIIA access regime. The purpose of an access declaration is to unlock a bottleneck so that competition can be promoted in a market other than the market for the service. The emphasis is on 'access', which leads us to the view that s 44H(4)(a) is concerned with the fostering of competition, that is to say it is concerned with the removal of barriers to entry which inhibit the opportunity for competition in the relevant downstream market. It is in this sense that the Tribunal considers that the promotion of competition involves a consideration that if the conditions or environment for improving competition are enhanced, then there is a likelihood of increased competition that is not trivial. (at [107])

- 3.49 The Tribunal also adopted this approach in the *Duke EGP decision*, stating at [83] that 'the question for the Tribunal is whether the opportunities and environment for competition in market(s) upstream or downstream of the EGP would be enhanced if the EGP were to be covered in terms of the Code than if it were not'. This question is assessed by a comparison of the future conditions and environment for competition with and without access (or increased access).

- 3.50 Similarly, even if access will not remove all barriers to entry and actual entry may still be difficult notwithstanding access, criterion (a) can still be satisfied if access would remove a significant barrier to entry and thereby promote competition. The Tribunal stated:

Before turning to the specific arguments raised in this matter, we must address the question of what is meant by the term "promote competition" in s 44H(4)(a) of the Act. The Tribunal has expressed a view in the past that the promotion of competition test does not require it to be satisfied that there would necessarily or immediately be a measurable increase in competition. Rather, consistent with the purpose of Pt IIIA being to unlock bottlenecks in the supply chain, declaration is concerned with improving the conditions for competition, by removing or reducing a significant barrier to entry. Other barriers to entry may remain and actual entry may still be difficult and take some time to occur, but as long as the Tribunal can be satisfied that declaration would remove a significant barrier to entry into at least one dependent market and that the probability of entry is thereby increased, competition will be promoted. (at [131])

- 3.51 The reference to 'competition' in criterion (a) is a reference to effective competition, rather than any theoretical concept of perfect competition. 'Effective competition' refers to the degree of competition required for prices to be driven towards economic costs and for resources to be allocated efficiently at least in the long term. It is unlikely that the reference to 'competition' in criterion (a) is intended to refer to the theoretical concept of perfect competition, not only given the Hilmer Report's stated

objective of access regulation to promote effective competition, but also because the subject matter of the criterion (a) assessment involves an assessment of the competitive conditions in a real-life industry.¹¹

- 3.52 Where a dependent market is effectively competitive, access is unlikely to promote a material increase in competition and an application for coverage that seeks to add to competition in such a dependent market is unlikely to satisfy criterion (a).
- 3.53 In the *Duke EGP decision*, the Tribunal concluded that whether access will promote competition critically depends on whether the access provider has market power that could be used to adversely affect competition in the dependent market(s). The Tribunal said:

Whether competition will be promoted by coverage is critically dependent on whether EGP has power in the market for gas transmission which could be used to adversely affect competition in the upstream or downstream markets. There is no simple formula or mechanism for determining whether a market participant will have sufficient power to hinder competition. What is required is consideration of industry and market structure followed by a judgment on their effects on the promotion of competition. (at [116])

- 3.54 If a service provider is unable to exercise market power in the dependent market, then a coverage determination so as to regulate the terms and conditions of access to the pipeline services would not promote competition or efficiency in that market.
- 3.55 Barriers to entry are a primary determinant of the existence of market power. Only in the presence of significant barriers to entry can a firm sustainably raise prices above economic costs without new entry taking away customers in due course.
- 3.56 It is important to note that the regulation of access under the NGL is not directed to eliminating monopoly rents by providing for control of pipeline tariffs. It is only where coverage (and consequent regulation of access terms and conditions) will be likely to materially promote competition in a dependent market, and the other requirements in the coverage criteria are met, that a pipeline may be covered. Disputes over gas tariffs of themselves are of little or no relevance to the question of coverage.

Focusing on a 'material increase' in competition

- 3.57 The words 'a material increase' were added to criterion (a) of the Gas Code when the criterion was replicated in s 15 of the NGL. This is consistent with an equivalent amendment to the declaration criteria in Part IIIA of the CCA.¹² The Second Reading Speech clarified this intent as follows:

¹¹ See, for example, the discussion of perfect competition, workable competition and the interpretation of competitive market in the introduction to, and s 8.1(b) of, the Gas Code in *Re Dr Ken Michael AM; Ex parte Epic Energy (WA) Nominees Pty Ltd & Anor* [2002] WASCA 231 at [124] and [125] in particular.

¹² See item 16 of Schedule 1 to the *Trade Practices Amendment (National Access Regime) Act 2006* (Cth).

This, consistent with similar amendments to Part IIIA of the Trade Practices Act, ensures that the increase in competition needs to be non trivial before regulation is imposed. (p 2889)

- 3.58 In the Council's view, this amendment reflects the general sentiment of previous decisions on coverage, and declaration under Part IIIA of the CCA, that a non trivial increase in competition is necessary before coverage would be recommended.
- 3.59 The ability and incentive for a service provider to exercise market power to adversely affect competition in a dependent market is a necessary (although not sufficient) condition for access to promote competition. Prima facie, regulation of the terms and conditions of the provision of the service by the service provider in these circumstances is likely to promote competition.
- 3.60 In addition, a finding that the service provider has the ability and incentive to exercise market power to adversely affect competition in a dependent market is likely to mean that the barriers to entry in that market result from the natural monopoly characteristics of the facility and its bottleneck position. In the usual case, this finding would mean that access would reduce barriers to entry and promote competition in that dependent market.
- 3.61 By contrast, the service provider may not have the ability or incentive to exercise market power to adversely affect competition in the dependent market(s) where:
- (a) the facility does not occupy a bottleneck position in the supply chain for the service
 - (b) the service provider is constrained from exercising market power in the dependent market(s), perhaps by competitive conditions in the dependent market(s) and/or the market power of other participants in the market(s), or
 - (c) the incentives faced by the service provider are such that its optimal strategy is to maximise competition in the dependent market(s). It may be profit maximising, for example, for a service provider to promote increased competition in the dependent market(s) and maximise demand for the services provided by its facility.
- 3.62 Access is unlikely to materially promote competition in the dependent market(s) if the service provider does not have the ability and incentive to exercise market power to adversely affect competition in the dependent market(s).
- 3.63 Finally, the Council observes that the Tribunal has made it clear that promotion of competition should not be gauged in terms of either:
- (a) the effect of access on particular competitors, such as a particular applicant seeking to have a pipeline covered, or
 - (b) the delivery of efficient outcomes.

- 3.64 The Council considers that the assessment of promotion of competition should focus on the impact of access on the competitive environment generally, rather than on particular competitors.

Ability and incentive to exercise market power

- 3.65 Whether competition will be materially enhanced as a result of access depends critically on the extent to which the incumbent service provider can and is likely, in the absence of coverage, to use market power to adversely affect competition in a dependent market. If a service provider has market power, and the ability and incentive to use that power to adversely affect competition in a dependent market, coverage would be likely to improve the environment for competition.

- 3.66 In the *Duke EGP decision* (at [116]), the Tribunal considered a range of factors in assessing whether Duke EGP could exercise market power to hinder competition in the relevant dependent markets, including:

- (a) the commercial imperatives on Duke to increase throughput, given the combination of high capital costs, low operating costs and spare capacity
- (b) the countervailing market power of other participants in the dependent markets
- (c) the existence of spare pipeline capacity, and
- (d) competition faced by Duke from alternatives to the use of the Eastern Gas Pipeline in the dependent markets.

- 3.67 Following its consideration of these factors, the Tribunal concluded that Duke did not have sufficient market power to hinder competition in the dependent markets.

- 3.68 In the *Duke EGP decision* the Tribunal did not indicate that it examined all the relevant factors for assessing competitive conditions in dependent markets in all instances. Rather, it focused on the pertinent aspects of industry and market structure of specific relevance to the Eastern Gas Pipeline. As the Tribunal stated:

There is no simple formula or mechanism for determining whether a market participant will have sufficient power to hinder competition. What is required is consideration of industry and market structure followed by a judgment on their effects on the promotion of competition. (at [116])

- 3.69 In essence, there are three mechanisms by which the use of market power in the provision of the service for which coverage is sought by a service provider may adversely affect competition in a dependent market:

- (a) a service provider with a vertically related affiliate may engage in behaviour designed to leverage its market power into a dependent market to advantage the competitive position of its affiliate
- (b) where a service provider charges monopoly prices for the provision of the service, those monopoly prices may restrict participation in the dependent market (thereby having an adverse effect on competition), and/or

- (c) explicit or implicit price collusion in a dependent market may be facilitated by the use of a service provider's market power. For example a service provider's actions may prevent new market entry that would lead to the breakdown of a collusive arrangement or understanding or a service provider's market power might be used to 'discipline' a market participant that sought to operate independently.
- 3.70 Where competition in a dependent market(s) is not effective, a service provider may still have little or no incentive to exercise market power to adversely affect competition in that market. In some situations, a service provider may have an incentive to engage in strategies designed to increase competition. If, for example, a service provider has no vertical interests in a dependent market(s), and its facility has excess capacity, then it may be profit maximising for the service provider to promote increased competition in the dependent market(s), reduce margins and prices in the dependent market(s), and increase incremental demand for the services provided by the facility. In these circumstances, the service provider would not have an incentive to engage in the conduct described in paragraph 3.69 and access is unlikely to promote competition in a dependent market.
- 3.71 Accordingly, in assessing whether a service provider has the ability and incentive to use its market power to adversely affect competition in a dependent market, the Council asks whether the service provider has the ability and incentive to engage in any of the types of conduct described in paragraph 3.69.

Time horizon for assessment

- 3.72 The Council recognises that factors such as changes in technology or market developments are relevant to judgments as to whether access would improve the environment for competition in a dependent market. Accordingly, in assessing whether access would promote competition, it is necessary to consider the time horizon over which the assessment should be made and as the nature of the markets in question will differ for each application the time horizon considered is likely to be distinct in relation to each application. Further, the focus in the national gas objective on the long term interests of consumers suggests that the assessment should not focus purely on the immediate future.
- 3.73 The Council also considers the impact of anticipated future changes to the market, such as planned interconnections, expansions or acquisitions and/or changes in the regulatory landscape which may affect the application of criterion (a) in determining an appropriate time horizon for assessment. This may involve the Council defining the dependent market(s) at different points in time, to account for such anticipated changes.
- 3.74 In *Re Alliance Petroleum Australia Pty Ltd & Ors* [1997] ACompT 2 concerning the AGL Cooper Basin Natural Gas Supply Arrangements, the Tribunal recognised that substitution possibilities and market boundaries were changing over time, given the dynamic quality of gas markets and the emerging competition between gas and

electricity due to technological change. The Tribunal defined the relevant market at three points in time for the purpose of assessing the competition effects of the long term supply contract between Australian Gas Light Company and a group of producers of natural gas in the South Australian sector of the Cooper Basin. The Tribunal stated:

We have concluded, as canvassed with counsel in the course of the hearing, that the appropriate approach in this matter is to think in terms of a market expanding over time — i.e. an expanding market definition. Such an approach is consistent with both commercial reality and the traditional methodology of market definition, and is apt to expose the issues in this matter.

In considering this expanding market, we specify three dated markets of interest: the market in 1986, the market today, and the market in 'the future' — perhaps ten or fifteen years hence. Quite obviously the geographic market is expanding over this time period, and the product market is also expanding, as we explain below. (pp 94-95)

- 3.75 Further, changes in market conditions while not affecting the definition of a dependent market, may nonetheless have implications for the competitive conditions in that market and thus have an impact on the criterion (a) assessment. Planned new entry or investment in expanded capacity, for example, may increase available alternatives to the use of the service and so change conditions for competition in the relevant dependent market. These changes may also have an impact on the ability of, and incentive for, the service provider to exercise market power to adversely affect competition in the market.
- 3.76 The Council is less likely to conclude that criterion (a) is satisfied where:
- (a) there are foreseeable changes in conditions such that criterion (a) would no longer be satisfied, and
 - (b) there is a high probability of these changes occurring in the not too distant future.
- 3.77 While there is a time horizon to the assessment of both criteria (a) and (b), the time horizon over which the Council accounts for relevant changes for the two assessments may not necessarily be the same.

Criterion (b): It would be uneconomic for anyone to develop another pipeline to provide the pipeline services provided by means of the pipeline

The High Court's interpretation of criterion (b) for declaration in the CCA

- 3.78 Criterion (b) of s 15 of the NGL mirrors ss 44G(2)(b) and 44H(4)(b) of the CCA which provide that 'it would be uneconomical for anyone to develop another facility to provide the service'. While Part IIIA uses the word 'uneconomical' and the NGL 'uneconomic', the Tribunal stated in the *Duke EGP decision* at [58] that 'nothing turns upon this difference in language'. Beyond the Tribunal, the courts have considered in

depth the similarity and differences in the language of the criteria for declaration in the CCA, the criteria for coverage (and revocation of coverage) in the NGL (and as it was expressed in the former Gas Code) and the terms of the Competition Principles Agreement. Accordingly, the case law concerning criterion (b) in Part IIIA of the CCA is relevant to the interpretation of coverage criterion (b).

- 3.79 Critical in this regard is the decision of the High Court in *Pilbara HCA*. Prior to *Pilbara HCA*, the Council (along with the decision making Ministers, the Tribunal and a number of judgments delivered by the courts) had interpreted criterion (b) in both the CCA and the NGL in a way that was concerned with the waste of Australian society's resources associated with the duplication of facilities/pipelines that exhibit natural monopoly characteristics. In the case of gas pipelines, this approach followed the reasoning of the Tribunal in the *Duke EGP decision*, and focused on whether a single pipeline could meet the likely demand at a lower cost than two or more pipelines. In the *Duke EGP decision*, the Tribunal stated the test for criterion (b) as follows:

[the] test is whether for a likely range of reasonably foreseeable demand for the services provided by means of the pipeline, it would be more efficient, in terms of costs and benefits to the community as a whole, for one pipeline to provide those services rather than more than one. (at [137])

- 3.80 However, in *Pilbara HCA*, the High Court determined this approach as inappropriate and the test for whether it is "uneconomical to develop another facility", is actually one concerned with private profitability. It said that criterion (b) in the CCA:

uses the word "uneconomic" to mean "unprofitable" [and] is to be read as requiring the decision maker to be satisfied that there is not anyone for whom it would be profitable to develop another facility. (at [77])

- 3.81 The High Court went on to state that:

the central assumption informing and underpinning this construction of criterion (b) is that no one will develop an alternative service unless there is sufficient prospect of a sufficient return on funds employed to warrant the investment. And criterion (b) is read as directing attention to whether there is "anyone" for whom it would be economical (in the sense of profitable, or economically feasible) to develop another facility to provide the service. (at [82])

- 3.82 In the Council's view, the High Court's findings apply equally to whether it is "uneconomic for anyone to develop another pipeline" in the context of the NGL. Therefore, in considering criterion (b) in the NGL it is necessary to consider whether there is anyone for whom it would be profitable to develop another pipeline to provide the pipeline services.

- 3.83 Further observations of the High Court about the nature of the criterion (b) inquiry in the CCA and the factors relevant for consideration are also relevant to criterion (b) in the NGL:

- The meaning previously given to the word “anyone” in criterion (b) excluding the incumbent owner or operator of the facility ‘proceeded from an incorrect construction of criterion (b)’. The High Court said that “anyone” in criterion (b) ‘includes existing and possible future market participants’ (at [105])
- Whether it would be profitable for someone to develop another facility to provide the service requires that ‘the person could reasonably expect to obtain a sufficient return on capital that would be employed in developing that facility’ (at [104]). If someone could profitably develop an alternative facility as part of a larger project, it would be necessary to consider the whole project in deciding whether the development of the alternative facility, as part of that larger project, would provide a sufficient rate of return.
- The High Court observed that a private profitability test may result in the duplication of a natural monopoly but said that

Duplication would occur only if it were profitable for another to develop an alternative facility to provide the service (despite the fact that total market output could be supplied at lower cost by one facility). It *would* be profitable for another to develop an alternative facility if the new facility is more efficient than the existing facility... . And if a new facility is *not* more efficient than the existing facility, it is to be doubted that development of the new facility in competition with a natural monopoly would be profitable. Especially would that be so where, as here, the capital costs of establishing the new facility would necessarily be very large. (at [102])

Applying the profitability test

- 3.84 The Council has considered three applications under the NGL since *Pilbara HCA* – one for revocation, one for coverage and one for a no-coverage determination pursuant to the greenfields pipeline incentives.
- 3.85 In the case of the application for coverage, it was not disputed that criterion (b) was satisfied as both the application and submissions considered that construction of a new pipeline was unlikely to be less than the cost of haulage on the existing pipeline and therefore not profitable. In making its findings, the Council also considered whether it would be profitable to develop another pipeline as part of a larger project. The Council concluded this was unlikely. In this case there were few participants in the dependent markets and little prospect of commercially viable local gas reserves being identified to suggest it could be profitable to develop another pipeline. Furthermore, the geography and proximity of other transmission pipelines suggest that even if a participant were to consider developing another pipeline it was likely that it would follow a different route and therefore provide different pipeline service(s) to that of the incumbent (NCC 2013a).

- 3.86 In the case of the application for a greenfields no-coverage determination, the Council found criterion (b) was not satisfied. Other participants are proposing to construct or are constructing pipelines to also transport gas in the region concerned. The development of multiple pipelines that essentially provide the same pipeline service (or are capable of providing the same pipeline service) illustrate that it is likely to be profitable for someone to develop an alternative pipeline to provide the pipeline service (NCC 2013b).
- 3.87 In the application for revocation of coverage, no party disputed that criterion (b) was satisfied. Given the significant excess capacity in the gas network and limited prospects for growth in demand for gas, the Council considered the existing network has sufficient capacity to meet expected demand for the foreseeable future. Accordingly, it would be unprofitable for anyone to duplicate the network (NCC 2013c).
- 3.88 More generally, following *Pilbara HCA* the Council considers the following matters as relevant to the criterion (b) enquiry.
- (a) An applicant for coverage needs to demonstrate the basis on which it is unprofitable for it or anyone else (including the pipeline owner) to develop another pipeline to provide the service.
 - (b) In assessing profitability, information should be provided about:
 - expected capital and operating costs of developing and operating a new pipeline
 - projected use of the pipeline and revenue(s)
 - the required rates of return on the debt and equity necessary to finance the development of the pipeline. Also the return on capital employed in developing the pipeline and the cost of that capital, and
 - the basis for such estimates and underlying assumptions.
 - (c) The consideration of profitability of a new pipeline may seek to address the profitability of such a project relative to other uses of finance and other resources.
 - (d) The consideration of profitability of a new pipeline involves, at least in part, an assessment of the ability of such a pipeline to successfully compete to supply the pipeline services and thus attract sufficient revenue to be profitable.
 - (e) The estimation of the profitability of anyone developing a new pipeline will involve assumptions regarding among other things, the capital and operating costs of such a pipeline, likely levels of use and revenues and risks associated with such assumptions.
 - (f) Where it appears that the only party likely to be in a position to develop a new pipeline is the existing pipeline owner/incumbent, the assessment of the profitability of the new pipeline should:
 - be based upon the development of a separate, new pipeline, and

- examine why the existing service provider would develop a new pipeline where the existing pipeline may be capable of servicing the requirements at lesser cost through augmentation, such as changes in compression and pumps used on the pipeline.
- (g) Where development of a new pipeline may involve duplication of a natural monopoly, it may be appropriate to consider whether the new pipeline is more efficient than the existing pipeline and why that is so, perhaps due to cost advantage or technological improvement.
- (h) Where a new pipeline is not profitable on a standalone basis, but only as an integrated part of a larger project, the assessment of profitability should consider the impact of the cost of developing the new pipeline on the overall profitability of the project and any cross-subsidisation.

3.89 The Council acknowledges that addressing some of the matters above may involve the disclosure of commercially sensitive information. The Council will maintain confidentiality in accordance with the requirements of the NGL. However, the Council relies on public consultation as part of its processes and accordingly is unlikely to rely on estimates that do not disclose, in a form that can be tested via the public consultation process, the underpinning assumptions and sensitivity of the estimates to variations in the underlying critical assumptions. Applicants are encouraged to discuss these issues with the Council's secretariat as there may be approaches that can be utilised, for example disclosing a range of figures in the public consultation.

'Another pipeline'

3.90 In contrast to Part IIIA, the use of the word 'pipeline' in criterion (b) in the NGL, as distinct to facility, prevents the Council from considering whether a facility other than a pipeline could provide the services provided by the pipeline that is the subject of the application for coverage. The Council cannot examine, for example, whether liquefying natural gas and then transporting it by ship may provide the service of gas transportation provided by the pipeline that is the subject of the application.¹³

'Pipeline services provided by means of the pipeline'

3.91 The test focuses attention on the pipeline services provided by means of the pipeline which is the subject of the coverage application. 'Pipeline services' is defined in s 2 of the NGL to be:

¹³ The Council can however consider competition from gas transported in this way in its assessment of criterion (a).

2 'Pipeline service'

- (a) a service provided by means of a pipeline, including—
 - (i) a haulage service (such as firm haulage, interruptible haulage, spot haulage and backhaul); and
 - (ii) a service providing for, or facilitating, the interconnection of pipelines; and
- (b) a service ancillary to the provision of a service referred to in paragraph (a),
 but does not include the production, sale or purchase of natural gas or processable gas.

3.92 It will be important to clearly specify the services which are currently provided by the pipeline. In the *Duke EGP decision*, the Tribunal considered that there were two ways of looking at the concept of pipeline services, by the markets they serve or point to point definitions. It preferred the latter as follows:

The question of what constitutes the services provided by the pipeline is fundamentally a mixed question of fact and the proper construction of criterion (b), rather than a matter of economic analysis. Every haulage service will of necessity be from one point to another. That is the commercial service actually provided by the pipeline operator to its customers. That service may be of different use to the producers in the origin market or to the customers in the destination market, but it is the same service. No market analysis is necessary or appropriate in the description of the services provided by the pipeline. However, questions of market definition and market power do arise in the context of criterion (a).

...

We should, however, add that the Code contemplates (for example in s 1.13) that coverage may occur in relation to part of a pipeline, which lends some slight support to the proposition that a haulage service is appropriately defined on a point to point basis, rather than by reference to the market/s which it serves. (at [69]-[70])

3.93 Accordingly, the relevant point to point service descriptions for the pipeline in question provide the basis for determining whether it would be economic to duplicate the pipeline in question. For distribution networks, the service definition will need to include the use of system services provided to retailers to serve customers in particular areas (rather than looking at each of those end users separately).

Time horizon for assessment

3.94 Consideration of whether it would be uneconomical for someone to develop another pipeline to provide the pipeline services has temporal elements. The Council recognises that a conclusion that it would be uneconomical for anyone to develop

another pipeline to provide the pipeline services may change over time as a result of changes in demand and changes in supply conditions, such as those due to technological change. As profitability is under examination, financial considerations and changes are also applicable.¹⁴

- 3.95 The Council may elect not to recommend coverage of a pipeline if, as a result of predicted and likely changes in market conditions and technology, criterion (b) would no longer be satisfied during the time horizon for the criterion (b) assessment. The time horizon over which criterion (b) must be satisfied will vary from case to case, and is determined with regard to the timing and probability of the foreseeable changes in demand and supply conditions. The Council notes that the focus of the national gas objective on the long term interests of consumers highlights that the assessment should not focus on the immediate future. Where, for example, the pipeline services are expected to become contestable in the future as a result of changes in demand and supply in the market, the Council may consider such matters as the investment timetable for competing investment in determining whether contestability will be introduced in the time horizon for the criterion (b) assessment. The Council may determine, therefore, that criterion (b) is not satisfied by reason of foreseeable changes, development and/or technological enhancements, where there is a significant probability of these changes occurring in the not too distant future.

Criterion (c): Access (or increased access) to the pipeline services provided by means of the pipeline can be provided without undue risk to human health or safety

- 3.96 Under criterion (c) in s 15 of the NGL the Council must be satisfied that access to the pipeline services can be provided without undue risk to health and safety. In considering this criterion, the Council considers the following matters:
- (a) whether there is a statutory health and safety scheme which will apply to the pipeline services in circumstances where access is granted to third parties, and
 - (b) whether the terms and condition of access can adequately deal with any safety issues.
- 3.97 The rationale for this criterion is that coverage should not occur where access (or increased access) to pipeline services may pose a legitimate risk to human health or safety.
- 3.98 Where pipelines require a degree of spare capacity to provide appropriate safety margins, then an appropriate level of spare capacity will need to be maintained and, if necessary, the pipeline's capacity expanded to allow for this. In addition, access to pipelines may need to be governed by conduct codes and operational guidelines. For

¹⁴ Similarly, the application of the other pipeline coverage criteria may change over time.

a pipeline to be covered, access must be possible without compromising system and operational integrity, and safe scheduling must be feasible.

- 3.99 If access is already being provided (and the application therefore relates to increased access), then the fact there is existing access is not necessarily definitive that access is being provided safely. The Council must still assess whether increased access can be provided without undue risk to human health or safety.¹⁵
- 3.100 The existence of relevant safety regulations may satisfy this criterion where the regulations deal appropriately with any safety issues arising from access to the pipeline service. The Council understands that all jurisdictions have legislation or licence conditions dealing with the safe operation of natural gas pipelines.
- 3.101 Additionally, the NGL itself has provisions relating to the safe operation of pipelines. In particular, an access arrangement can set out detailed safety conditions as part of the terms and conditions of access to the pipeline service. These terms and conditions must be applied by the arbitrator in an access dispute (s 189 of the NGL) and any expansion of capacity in an access dispute must be 'consistent with the safe and reliable operation of the pipeline' (r 118(2)(c)(ii)).
- 3.102 Rules 113–116 also provide a robust procedure to ensure that an access determination does not compromise the safety or integrity of the pipeline. Importantly, the rules provide that the dispute resolution body cannot override the independent expert's view regarding the safe operation of the pipeline.
- 3.103 Generally the Council would expect these regulatory arrangements to ensure effective mechanisms to preserve human health and safety in the event that coverage of a pipeline leads to access or increased access. For the Council to be satisfied that this criterion is not met in relation to a particular pipeline, a party will need to demonstrate how coverage under the NGL would result in an undue risk to human health or safety despite the provisions in the NGL and Rules, and specific state or territory legislation, aimed at protecting against adverse safety outcomes.

Criterion (d): Access (or increased access) to the pipeline services provided by means of the pipeline would not be contrary to the public interest

- 3.104 Under criterion (d) in s 15 of the NGL, access (or increased access) to the pipeline services must not be contrary to the public interest.
- 3.105 The term 'public interest' is not defined in the NGL (or the CCA) but the Council considers that under this criterion a broad range of issues may be considered, with a particular focus on public interest issues raised directly by the national gas objective. Recent High Court authority supports this. The *Pilbara HCA* decision (at [42]) found that the assessment of the public interest encompasses a very wide range of matters.

¹⁵ *Sydney Airport decision* at [210]–[211].

3.106 Coverage (and revocation of coverage) determinations are decisions by relevant Ministers that go to the scope of regulation. They hinge on an assessment of whether coverage is in the public interest and whether the benefits from regulated access outweigh the costs. They require the decision maker to balance the potentially conflicting goals of promoting competition in dependent markets and ensuring appropriate investment incentives, and to consider the likely effectiveness of regulation and its costs. The Hilmer Committee recognised that the power to make such a decision appropriately rests with a politically accountable Minister acting on (but not bound to follow) independent expert advice. It said that,

[a]s the decision to provide a right of access rests on an evaluation of important public interest considerations, the ultimate decision on this issue should be one for Government, rather than a court, tribunal or other unelected body. (Hilmer Report, p 250).

3.107 The High Court explored this further in *Pilbara HCA* where it stated:

... It is well established that, when used in a statute, the expression "public interest" imports a discretionary value judgment to be made by reference to undefined factual matters. As Dixon J pointed out in *Water Conservation and Irrigation Commission (NSW) v Browning*, when a discretionary power of this kind is given, the power is "neither arbitrary nor completely unlimited" but is "unconfined except in so far as the subject matter and the scope and purpose of the statutory enactments may enable the Court to pronounce given reasons to be definitely extraneous to any objects the legislature could have had in view". It follows that the range of matters to which the NCC and, more particularly, the Minister may have regard when considering whether to be satisfied that access (or increased access) would not be contrary to the public interest is very wide indeed. And conferring the power to decide on the Minister (as distinct from giving to the NCC a power to recommend) is consistent with legislative recognition of the great breadth of matters that can be encompassed by an inquiry into what is or is not in the public interest and with legislative recognition that the inquiries are best suited to resolution by the holder of a political office. [footnotes omitted] (at [42])

3.108 The High Court also noted that, like declaration criterion (c) in the CCA (which deals with the national significance of an infrastructure facility) consideration of declaration criterion (f) "may also direct attention to matters of broad judgment of a generally political kind" (*Pilbara HCA* at [43]). The High Court contrasted this sort of judgment with that involved in considering other criteria which it regarded as of "a more technical kind" (*Pilbara HCA* at [44]).

3.109 Consideration of this criterion does not revisit the issues considered under the other three coverage criteria. Rather it draws on the Council's conclusions in relation to those criteria. For example, where the Council has found that access will promote a material increase in competition in one or more dependent markets, there are consequent benefits that should be included in the assessment of criterion (d). However, since the findings in *Pilbara HCA*, the nature of this inquiry has changed. In particular, the High Court's interpretation of criterion (b) as a test of private

profitability means that the scope of potential benefits from access (or increased access) in situations where criterion (b) is satisfied is arguably narrower than previously. Prior to *Pilbara HCA*, for example, the avoidance of costs associated with the unnecessary duplication of facilities would likely be found to have resulted in a significant public benefit, whereas following *Pilbara HCA* the assessment under criterion (b) may not capture this benefit.

3.110 If the consideration of coverage criterion (d) focuses on a comparison of the costs of access with the benefits that follow from access, then it is likely to disregard benefits not relevant to the assessment of criteria (a) and (b). Alternatively, if criterion (d) is to involve a fully developed cost benefit analysis then it may require a fuller examination of the benefits of access.

3.111 The Council observes however that a detailed technical examination of the costs and benefits of access is inconsistent with the High Court's view of the judgment involved in considering declaration criterion (f), and by implication the equivalent public interest considerations in coverage criterion (d) of the NGL.

3.112 The Council considers that the preferable approach to coverage criterion (d) is to seek to identify any matter that could mean access (or increased access) might be contrary to the public interest and then assess whether the likelihood and consequences of that matter lead to a conclusion that access is contrary to the public interest.¹⁶ The Council considers that this approach is consistent with the *Pilbara HCA* decision in that it involves a judgment that the Council is well able to advise on, and a Minister is well placed to make, rather than a detailed technical examination of costs and benefits for which only partial information is likely to be available.

3.113 Given the findings in *Pilbara HCA* and the nature of applications, the Council considers that it is impracticable to list all matters that might potentially be relevant. Notwithstanding this, the assessment of the public interest has, to date, encompassed matters involving economic efficiency, regulatory cost, disruption effects and cost and investment effects. These areas are briefly examined below.

Economic efficiency

3.114 A key public interest consideration is the net impact of coverage on economic efficiency. This is consistent with the national gas objective. Economic efficiency must be assessed from the perspective of society as a whole and in respect of the long-term interests of the consumers of natural gas. The concept of economic efficiency involves using society's resources to maximise welfare. Economic efficiency encompasses:

- (a) producing at least cost — that is, technical/productive efficiency

¹⁶ Ultimately it will be for a Court to determine the proper interpretation of coverage criterion(d) (and declaration criterion (f)) and the approach to be taken in assessing whether the criterion is satisfied.

- (b) ensuring services are provided to those who value them most highly — that is, allocative efficiency, and
- (c) preserving incentives for innovation and investment — that is, dynamic efficiency.

3.115 In considering whether access (or increased access) would be economically efficient, it is necessary to consider the efficiency gains and costs of coverage. Coverage that yields short term static gains in technical and allocative efficiency but that constrains longer term dynamic efficiency gains may not be welfare maximising.

3.116 The promotion of effective competition is generally consistent with the encouragement of economic efficiency. Economists generally consider that effectively competitive markets lead to conditions that encourage economically efficient outcomes. Where access (or increased access) promotes competition, efficiency gains are likely to result, including for the following reasons:

- (a) in the short term, the entry, or threat of entry, of new firms in downstream markets may encourage lower production costs for services such as the supply of natural gas to households (the promotion of productive or technical efficiency)
- (b) in the longer term, competitive pressures may stimulate innovation designed to reduce costs and develop new products (the promotion of dynamic efficiency), and
- (c) if the terms and conditions of access are appropriate, then all customers who value the service more than its cost of supply will be supplied (the promotion of allocative efficiency).

3.117 In other words, a promotion of competition such as to satisfy criterion (a) is likely to be associated with efficiency gains in the dependent market(s) relevant to criterion (d).

3.118 Coverage may also impose efficiency costs in the provision of the pipeline services. Just as the promotion of competition by coverage is likely to result in efficiency gains, the regulatory burden associated with coverage is likely to result in efficiency losses. The regulatory burden imposed on businesses by coverage —or by regulatory failure associated with coverage— may result in inefficiencies.

3.119 Potential efficiency losses from coverage include:

- (a) in the short term, the distortion of price signals, which may result in the allocation of resources to the provision of services that are not of most value to society (a reduction in allocative efficiency)
- (b) in the longer term, the dampening of incentives for innovation (a reduction of dynamic efficiency), and
- (c) in the longer term, the deterrence of investment (a reduction of productive or technical efficiency).

3.120 Effects of access on service providers (including increases in a service provider's costs) are generally to be reflected in access costs payable by access seekers. Where efficiency losses incurred by a service provider are addressed in access charges or are otherwise prevented or reduced by the requirements governing determination of access disputes these will not generally be relevant to the consideration of criterion (d).

Regulatory costs

3.121 The Council accepts that coverage creates regulatory costs that must be considered under criterion (d). These are the costs that service providers may incur in complying with the various obligations under the NGL. They may also include the costs of the regulator and other public bodies in carrying out their functions in relation to a covered pipeline. The Council recognises these inherent regulatory burdens, costs and inefficiencies associated with coverage, and in applying the public interest test, considers whether the costs of coverage outweigh the benefits.

3.122 Where the application is for a coverage recommendation, the Council will also decide the form of regulation for the pipeline. Therefore, the Council needs to take into account the costs that are relevant to the preferred form of regulation. Where the application is to revoke coverage of a pipeline, the assessment will ordinarily focus on costs associated with the form of regulation currently applicable to the pipeline. However, if another form of regulation is available to the pipeline at lower cost, then the Council may also take the costs of that form of regulation into account.

3.123 In determining whether the benefits of coverage are likely to outweigh the costs, it will be useful to compare the direct costs of coverage with the potential price reductions for the provision of the service where there is evidence of monopoly pricing by the service provider. The Council looks for information to help it address this.

3.124 Indirect regulatory costs that may follow coverage include:

- (a) reduced incentives to invest in essential infrastructure
- (b) reduced incentives to innovate or provide flexible services
- (c) regulatory pricing rigidities and other rigidities in access contracts, which may adversely affect the ability of market participants to respond to changing market conditions and so could lead to inefficiencies.

3.125 The Council is of the view that the regulatory costs which are taken into account under criterion (d) should not include costs associated with the application for coverage as these are not costs that result from access (or increased access).

Disruption costs

3.126 The Council recognises that the provision of access to a pipeline may involve some disruption to the operations of the service provider. However, in general terms,

disruption costs can be adequately dealt with by the various provisions of the NGL and Rules which impose obligations on service providers.

- 3.127 In the absence of specific evidence as to why the safeguards in the NGL and Rules are generally ineffective or would be ineffective in respect of any particular application the Council must accept that the provisions will operate as intended. Any service provider opposing an application for a coverage recommendation should explain with supporting evidence why these protections do not adequately deal with disruption costs either generally or in the context of their pipeline.

Investment effects

- 3.128 It is important for Australia's economy that there is appropriate investment in natural gas pipelines. This is consistent with the national gas objective. The Council accepts that the NGL, and the possibility of coverage for pipelines, creates a risk that investors in pipelines may not receive the return from their investment that they might have received in the absence of coverage. This 'regulatory risk' arises in relation to each of Part IIIA of the CCA, the original Gas Pipelines Access Law and now the NGL. Some similar risk would likely have followed from any form of intervention aimed at addressing the policy issues underlying the decision to enact Part IIIA and the NGL. It is reasonable to assume that the then Ministerial Council on Energy (**MCE**)¹⁷ and Parliaments considered these costs to be outweighed by the benefits to Australia from effective regulation of access in the circumstances allowed for under the NGL where a pipeline satisfies the coverage criteria.

- 3.129 The NGL provides for service providers to receive a risk-adjusted commercial return on covered pipelines. Investors in a pipeline can therefore expect, if their pipeline is covered and a third party access seeker obtains mandated access through arbitration and/or an access arrangement is put in place, to receive an appropriate return on their investment. This fact will form the background to access negotiations, and encourage a negotiated access arrangement that provides an appropriate return on investment. Some of the protections in the NGL in this regard include the fact that the regulator and dispute resolution body in making or approving an access arrangement or in any access dispute must take into account the revenue and pricing principles set out in s 24 of the NGL:

24—Revenue and pricing principles

- (2) A service provider should be provided with a reasonable opportunity to recover at least the efficient costs the service provider incurs in—
 - (a) providing reference services; and
 - (b) complying with a regulatory obligation or requirement or making a regulatory payment.
- (3) A service provider should be provided with effective incentives in order

¹⁷

Now the Standing Council on Energy and Resources (**SCER**).

	to promote economic efficiency with respect to reference services the service provider provides. The economic efficiency that should be promoted includes—
	(a) efficient investment in, or in connection with, a pipeline with which the service provider provides reference services; and
	(b) the efficient provision of pipeline services; and
	(c) the efficient use of the pipeline.
(4)	Regard should be had to the capital base with respect to a pipeline adopted—
	(a) in any previous—
	(i) full access arrangement decision; or
	(ii) decision of a relevant Regulator under section 2 of the Gas Code;
	(b) in the Rules.
(5)	A reference tariff should allow for a return commensurate with the regulatory and commercial risks involved in providing the reference service to which that tariff relates.
(6)	Regard should be had to the economic costs and risks of the potential for under and over investment by a service provider in a pipeline with which the service provider provides pipeline services.
(7)	Regard should be had to the economic costs and risks of the potential for under and over utilisation of a pipeline with which a service provider provides pipeline services.

3.130 Additionally, in an access dispute the dispute resolution body:

- (a) cannot prevent 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 (s 188(1)(a))
- (b) cannot prevent 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 (s 188(1)(b))
- (c) cannot deprive a person of a relevant protected contractual right (s 188(1)(c))
- (d) may not require the service provider to extend the geographical range of the access dispute pipeline (r 118(1)(b))
- (e) cannot require a service provider to carry out an expansion of the capacity of a light regulation pipeline unless the prospective user funds the capacity expansion in its entirety (r 118(2)(a))
- (f) cannot require a service provider to fund, in whole or part, an expansion of the capacity of a full regulation pipeline unless the extension and expansion

requirements of the applicable access arrangement provide for the relevant funding (r 118(2)(b)), and

- (g) must ensure that an expansion of capacity required under an access determination is:
- technically and economically feasible, and
 - consistent with the safe and reliable operation of the pipeline (r 118(2)(c)).

3.131 There is one possible element of the return on a particular investment for which the NGL (and Part IIIA) does not seek to compensate a pipeline owner/provider that is required to provide access. This element is any monopoly profit arising from the owner/provider's power in a dependent market. As explained in the Hilmer Report such a 'return' to an owner/investor is not consistent with welfare maximisation:

If there are indeed profit implications associated with the application of an access regime, the revenues in question will have been obtained at the expense not only of consumers but of a more efficient economy generally. (at p 263)

3.132 Access under both Part IIIA of the CCA and the NGL is designed to eliminate monopoly profits. To the extent that the application of the NGL discourages investment that is predicated on such profits this is not a cost as it does not discourage efficient investment in infrastructure.

3.133 The Australian Competition and Consumer Commission (ACCC) and AER in decisions across a range of industries have accepted the importance of maintaining appropriate commercial returns for investment, lest investment be inefficiently deterred. In any event, the regulator is obliged to allow appropriate commercial returns and to consider investment effects in determining access prices and other terms in any arbitration of an access dispute.

3.134 In *Re: Application by ElectraNet Pty Limited (No 3)* [2008] ACompT 3 (30 September 2008) the Tribunal further emphasised that minimising regulatory risk to promote efficient investment is a central part of the regulatory framework:

Efficient investment in the long term interests of consumers will not be promoted if investors perceive a significant risk that the rules will change and they will not be able to recover the opportunity cost of capital reasonably invested. The minimisation of regulatory risk, consistent with the promotion of efficient investment, is one of the tenets that has driven the development of regulatory regimes in Australia. That tenet is reflected in the objective of the Law and in the revenue and pricing principles embodied in the Law. (at [201])

Applications for coverage and revocation of coverage – procedural requirements

Applications generally

3.135 Any person may apply to cover a pipeline (s 92) and any person may apply to revoke coverage of a pipeline (s 102). In both cases the applications must be:

- (a) made to the Council in accordance with the Rules
- (b) contain the information required by the Rules, and
- (c) must be accompanied by the fee prescribed in the Regulations.

3.136 The information and requirements for making applications for coverage and revocation of coverage are contained within rr 15 and 18.

3.137 The Regulations prescribe a fee of \$7,500 for each coverage application and revocation of coverage application. The fee must be paid at the time an application is lodged with the Council. Intending applicants should contact the Council in relation to methods for paying the application fee.

3.138 Applications can be made to the Council by mailing a hard copy of the application and payment of the application fee to:

National Competition Council
GPO Box 250
Melbourne VIC 3001

and emailing an electronic copy of the application to gas@ncc.gov.au.

Requirements for coverage applications (rule 15)

3.139 The requirements for making applications to cover a pipeline (coverage determination) in r 15 are as follows.

(a) state the applicant's name and contact details

3.140 The applicant should clearly identify the legal person who is seeking coverage (whether a natural person or a corporation), the name of the contact person in respect of the application and relevant contact details (including mailing address, phone numbers and email).

(b) identify the pipeline for which coverage is sought

3.141 A coverage determination needs to clearly identify the pipeline to which coverage applies and distinguish that pipeline from other connected pipelines which are not covered. Accordingly, applications should be clear about which parts of a pipeline are the subject of the application, and are to be assessed by the Council (noting that the Council and Minister retain discretion to cover more or less of an integrated pipeline system).

3.142 Useful information to identify a pipeline includes:

- (a) the name by which the pipeline is commonly known
- (b) the relevant pipeline licence number, and
- (c) a map of the pipeline marking the parts of the pipeline for which coverage is sought.

3.143 It is also helpful if the applicant sets out who it understands is the service provider in respect of the pipeline, and any possible relationship between that service provider and participants in upstream and downstream markets, or other pipelines in any of the markets served by the pipeline which is the subject of the application.

(c) give details of the pipeline's classification or, if there is no classification, the classification the applicant considers appropriate

3.144 An uncovered pipeline may already have been classified under the Gas Pipelines Access Law or by an earlier coverage process under the NGL. The applicant should give details of any such classification.

3.145 Where there is no classification, the applicant should set out its view on whether:

- (a) the pipeline should be classified as a transmission or distribution pipeline in accordance with the pipeline classification criteria, and
- (b) if the pipeline is a cross-boundary distribution pipeline, the jurisdiction with which the pipeline is most closely connected.

3.146 See chapter 2 of this Guide for further information.

(d) state the applicant's reasons for seeking coverage of the pipeline (including a demonstration of how coverage of the pipeline would give effect to the pipeline coverage criteria)

3.147 The applicant should set out the reasons why it seeks to have the pipeline covered (to ensure that the application is not frivolous or vexatious) and the general reasons why it believes each of the coverage criteria are satisfied in relation to the pipeline. Each of the criteria should be addressed separately. Reasoning should address the applicant's own circumstances, and also the broader consequences of coverage for the pipeline concerned.

(e) include any information or documents on which the applicant relies in support of the application

3.148 The applicant should submit to the Council the key factual and evidential materials which are necessary to support the arguments presented in relation to each of the coverage criteria, and rebut potential arguments that certain criteria may not be met. This may include confidential information which the Council will deal with in accordance with ss 90 and 331 of the NGL.

3.149 Where the applicant provides comprehensive and relevant information about the pipeline and markets in the application, the Council is able to consider the application more quickly and efficiently. The Council does not have information gathering powers so relies on affected persons to present the necessary evidence to establish their position. As the Council and relevant Minister need to be positively satisfied of all the coverage criteria to apply coverage to a pipeline, a lack of essential information may mean that the Council and relevant Minister are unable to be satisfied. Additionally, the NGL's restrictions on presenting new information in the merits review process means that new information which may have been able to satisfy the Council or relevant Minister of the coverage criteria cannot be used to make out a ground of review.¹⁸

3.150 For a coverage revocation application, the applicant should present as much information as it is able to in relation to the relevant matters (see r 18(2)). These matters are explored further in the following sections.

18 Application for coverage revocation determination

(1) [Not extracted here - see the Rules]

(2) The application must also include the following information

- (a) the capacity of the pipeline and the extent to which that capacity is currently utilised; and
- (b) for a transmission pipeline, a description of:
 - (i) all locations served by the pipeline (i.e. all locations at which receipt or delivery points for natural gas carried by the pipeline exist); and
 - (ii) all pipelines that currently serve the same locations; and
 - (iii) all pipelines that currently pass within 100 km of any location served by the pipeline; and
- (c) for a distribution pipeline, a description of:
 - (i) the geographical area served by the pipeline; and
 - (ii) the points at which natural gas is, or is to be, injected into the pipeline; and
- (d) a description of the pipeline services provided, or to be provided, by the pipeline; and
- (e) an indication of any other sources of energy available to consumers of gas from the pipeline; and
- (f) the identity of the parties with an interest in the pipeline and the nature and extent of each interest; and

¹⁸ See paragraphs 6.26-6.34 for more information on reviews.

- (g) a description of the following relationships:
 - (i) any relationship between the owner, operator and controller of the pipeline (or any 2 of them);
 - (ii) any relationship between the owner, operator or controller of the pipeline and a user of pipeline services or a supplier or consumer of gas in a location or geographical area served by the pipeline;
 - (iii) any relationship between the owner, operator or controller of the pipeline and the owner, operator or controller of any other pipeline serving any one or more of the same locations or the same geographical area; and
- (h) an estimate of the annual cost to the service provider of regulation; and
- (i) any other information the applicant considers relevant to the application of the National Gas Objective or the pipeline coverage criteria in the circumstances of the present case.

Requirements for a revocation of coverage application (rule 18)

3.151 The requirements for making an application to revoke coverage of a pipeline (coverage revocation determination) in r 18 are as follows.

(1)(a) state the applicant's name and contact details

3.152 See paragraph 3.140 above.

(1)(b) state whether the application is for revocation of coverage for the whole, or part only, of the covered pipeline

3.153 See paragraphs 3.141-3.143 above.

(1)(c) state the applicant's reasons for the application (including a demonstration of how the coverage revocation determination would give effect to the pipeline coverage criteria)

3.154 The applicant should set out the reasons why it seeks to have the coverage determination revoked (to ensure that the application is not frivolous or vexatious) and the general reasons why it believes one or more of the coverage criteria are not satisfied in relation to the pipeline. The applicant should address the criteria separately. The reasoning should focus on both the applicant's own circumstances and the general consequences of revocation for the pipeline concerned (including its users and end users).

3.155 Where the applicant does not want to dispute that one or more of the coverage criteria are met, the applicant should state this in the application and the reasons why the applicant considers that criterion is satisfied.

(1)(d) include information, and be accompanied by the documents, on which the applicant relies in support of the application.

3.156 See paragraphs 3.148-3.149 above.

(2)(a) the capacity of the pipeline and the extent to which that capacity is currently utilised

3.157 This requirement primarily relates to the maximum capacity of pipeline throughput on the central parts of the pipeline (rather than every receipt point) and how that capacity is used. Where usage is relatively stable and any variations are seasonal, it may be sufficient to provide data on average use in summer and winter. Where pipeline usage is more variable and shows peaks, it may be necessary for the applicant to discuss use at peak times and factors driving usage (such as high electricity prices).

3.158 The information should be focused upon the capacity to which prospective users are likely to seek access. Applicants should provide information about the extent to which the capacity of the pipeline could be extended or expanded to accommodate prospective users and the potential costs of such extensions and expansions.

(2)(b) for a transmission pipeline, a description of:

- (i) all locations served by the pipeline (i.e. all locations at which receipt or delivery points for natural gas carried by the pipeline exist); and*
- (ii) all pipelines that currently serve the same locations; and*
- (iii) all pipelines that currently pass within 100 km of any location served by the pipeline;*

3.159 In respect of transmission pipelines, the applicant should describe the location of all of the receipt and delivery points for the pipeline and any other obvious points on the pipeline that might readily provide a new receipt or delivery point (eg a coal seam gas field near the pipeline or a potential load such as a mine). The applicant should then set out what other pipelines currently provide natural gas to those locations and any other pipeline which is within 100 km of any one of those locations.

(2)(c) for a distribution pipeline, a description of:

- (i) the geographical area served by the pipeline; and*
- (ii) the points at which natural gas is, or is to be, injected into the pipeline;*

3.160 In respect of distribution pipelines, the applicant should clearly set out either by a map and/or postcode areas the area served by the pipeline network and the points at which gas currently is, or is able to be, injected into the pipeline. This includes receipt points from transmission pipelines, gas production facilities and gas storage facilities.

(2)(d) a description of the pipeline services provided, or to be provided, by the pipeline

3.161 This requirement involves setting out the basic parameters of each pipeline service provided, or to be provided, by means of the pipeline, including any services which differ depending on the location of the user's receipt or delivery points, and other specialised services for particular users which are being or are to be provided. An understanding of each of the services provided or to be provided is essential to weighing up the market power associated with the basket of services being provided. The applicant should describe each service in sufficient detail for the Council to analyse the consequences of continuing to apply the access regime to these services. The description of services might usefully be taken from the service provider's access arrangement, or information published for a pipeline which has been granted a light regulation determination under r 36.

(2)(e) an indication of any other sources of energy available to consumers of gas from the pipeline

3.162 This should set out the substitution possibilities for the consumers of gas served by the pipeline. Some idea of whether particular large users have dual fuel capabilities will be important, as will other potential bypass opportunities. The nature of consumers' use, such as the reliance of end users on gas for heating or the use of natural gas as a feedstock, may be relevant to fully understand the extent to which other sources of energy are a realistic option for those consumers.

(2)(f) the identity of the parties with an interest in the pipeline and the nature and extent of each interest

3.163 This requirement relates to the structure of each pipeline service provider for the pipeline and other persons with an interest in the pipeline, such as ownership interests in a service provider. As a matter of practicality, where a pipeline service provider's shares are held by a large number of individuals an appropriate threshold will need to be found for those with 'an interest' relevant to the analysis. At the very least, parties with a direct or indirect shareholding of five per cent or more of a service provider should be identified. The need to explain the interests involved may differ depending upon the ability for the entity to exercise control over the operation of the pipeline or profit from any exercise of market power in either the provision of pipeline services or associated upstream or downstream markets.

(2)(g) a description of the following relationships:

- (i) any relationship between the owner, operator and controller of the pipeline (or any 2 of them);*
- (ii) any relationship between the owner, operator or controller of the pipeline and a user of pipeline services or a supplier or consumer of gas in a location or geographical area served by the pipeline;*

(iii) any relationship between the owner, operator or controller of the pipeline and the owner, operator or controller of any other pipeline serving any one or more of the same locations or the same geographical area

3.164 This requirement focuses on the relationship between various service providers of a pipeline, users in upstream and downstream markets and other pipelines which may potentially compete with the pipeline. At issue is whether any of these relationships could produce anti-competitive effects or an abuse of market power. Where such a prospect exists, an applicant should set out what mechanisms have been put in place to mitigate the likelihood of that occurring.

(2)(h) an estimate of the annual cost to the service provider of regulation

3.165 This requirement is designed to allow the Council to understand the costs involved in regulation under the NGL. To make the cost estimate meaningful, a breakdown on how it was arrived at (including relevant assumptions, such as the level of access disputes or cost of access arrangement approvals) and what constitutes the annual cost is essential. The analysis and substantiation of the various transaction costs involved in each regulatory approach is important.

3.166 The applicant should focus on costs associated with the form of regulation currently applicable to the pipeline. However if another form of regulation is available and would be less costly, the Council may factor the costs of that form of regulation in its consideration.

(2)(i) any other information the applicant considers relevant to the application of the National Gas Objective or the pipeline coverage criteria in the circumstances of the present case

3.167 This allows the applicant to bring forward other relevant material to assist the application of the coverage criteria. The applicant should ensure that the application as a whole contains all relevant information to the application of the statutory test and has also disclosed any information which it considers material but unhelpful to its application. This may include information about significant developments which the applicant knows are likely to occur, such as a change in ownership of the pipeline.

How the Council deals with applications

3.168 The Council is required to deal with applications in accordance with the Rules (ss 93 and 103), which as prescribed in rr 16 and 19 requires the Council to use the standard consultative procedure in dealing with the application (see paragraphs 6.7-6.9).

3.169 Section 95 governs the coverage recommendation itself:

95—NCC coverage recommendation

- (1) Subject to sections 94 and 96, the NCC must recommend to the relevant Minister that the pipeline the subject of the application—
- (a) be a covered pipeline; or
 - (b) not be a covered pipeline.

Note—

See also Chapter 3 Part 2 Division 1 Subdivision 1.

- (2) A recommendation under this section must—
- (a) be made in accordance with this Law and the Rules; and
 - (b) be made within the time specified by the Rules; and
 - (c) contain the information required by the Rules; and
 - (d) be given to the persons specified by the Rules; and
 - (e) be made publicly available in accordance with the Rules.

- (3) A recommendation under this section may recommend an outcome different from the outcome sought in the application under section 92.

Example—

An applicant may apply for a determination that the whole of a pipeline be a covered pipeline. The NCC may recommend that only a part of the pipeline the subject of the application be covered or may recommend that the pipeline not be covered.

- (4) A recommendation under this section must be delivered to the relevant Minister without delay.

3.170 For coverage revocation recommendations, s 104 of the NGL is in equivalent terms to s 95. It provides as follows:

104—NCC coverage revocation recommendation

- (1) The NCC must make a recommendation to the relevant Minister as to whether the covered pipeline the subject of the application should continue to be a covered pipeline.

Note—

See also section 119.

- (2) A recommendation under this section must—
- (a) be made in accordance with this Law and the Rules; and
 - (b) be made within the time specified by the Rules; and
 - (c) contain the information required by the Rules; and

- (d) be given to the persons specified by the Rules; and
 - (e) be made publicly available in accordance with the Rules.
- (3) A recommendation under this section may recommend an outcome different from the outcome sought in the application under section 102.
- Example—**
- An applicant may apply for a determination that revokes the coverage of a covered pipeline by means of which the provider provides pipeline services. The NCC may recommend that the coverage of the covered pipeline be only partly revoked or not be revoked.
- (4) A recommendation under this section must be delivered to the relevant Minister without delay.

Time limits for the recommendation

3.171 Subrules 16(2) and 19(2) provide that coverage recommendations and coverage revocation recommendations are to be made within 4 months of receiving the application (see paragraphs 6.20-6.25).

Regulating more or less of a pipeline

3.172 The definition of 'pipeline' in s 2 of the NGL includes 'parts of pipes' (paragraph (c)). Accordingly, coverage need not apply to all of a pipeline system owned, controlled or operated by a particular service provider or group of service providers. While an applicant might seek coverage or revocation of coverage for only a part of a pipeline the Council's recommendation and the Minister's decision may determine that coverage be applied, or coverage be revoked from, a greater or smaller part of the system than requested. This is achieved through the equivalent provisions in ss 95(3), 99(7), 104(3) and 106(7) of the NGL. For example, s 95(3) provides that:

- (3) A recommendation under this section may recommend an outcome different from the outcome sought in the application under section 92.

Example

An applicant may apply for a determination that the whole of a pipeline be a covered pipeline. The NCC may recommend that only a part of the pipeline the subject of the application be covered or may recommend that the pipeline not be covered.

3.173 In making a decision to recommend that more or less of a pipeline should be covered, the Council considers whether:

- (a) covering more or less of the pipeline is likely to promote the national gas objective having regard to the services prospective users are likely to seek from the pipeline, and

- (b) the impact that covering more or less of the pipeline has on the application of the coverage criteria (such that the focus on a particular grouping of pipes is not used to avoid coverage).

Deferring applications associated with tender approval pipelines

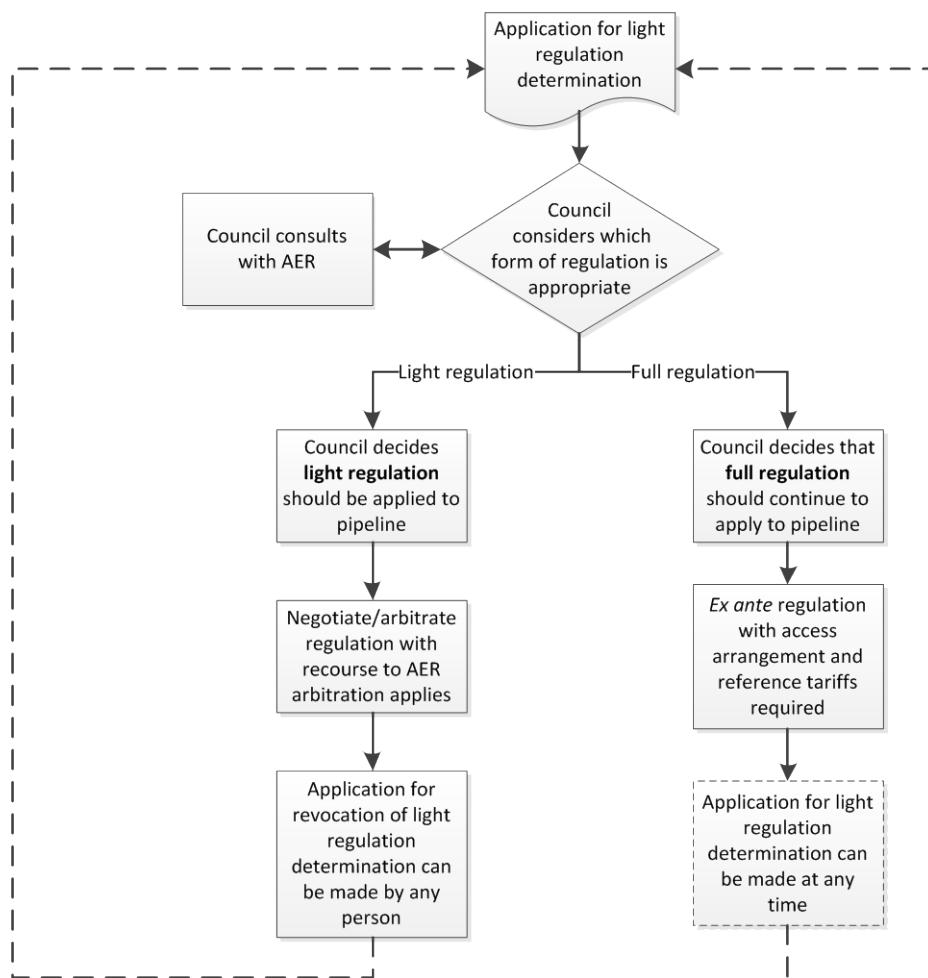
3.174 Sections 94 and 96 of the NGL are designed to ensure the integrity of processes to bring a pipeline into the regime by a competitive tendering process. It is possible that a person may seek to undermine the intent of the tendering arrangements by trying to cover a proposed pipeline and have an access arrangement apply which is not consistent with the tendering arrangements. Sections 94 and 96 provide mechanisms to prevent this.

4 Form of regulation

- 4.1 This chapter outlines the Council's role in determining the form of regulation for covered pipelines, in particular making light regulation determinations and revoking a light regulation determination.

Policy background

- 4.2 Like the Gas Code before it, the NGL applies economic regulation only to covered pipelines. These are pipelines which meet the coverage criteria. Accordingly, covered pipelines can be taken to have a degree of market power which warrants some regulatory intervention to promote overall efficiency. The question surrounding the form of regulation of a pipeline is the appropriate degree of regulatory intervention.
- 4.3 The NGL provides for two forms of regulation of covered pipelines—*full regulation* and *light regulation*.
- 4.4 *Full Regulation* centres on ex ante approval by the relevant regulator of an access arrangement put forward by a pipeline operator setting out the terms and conditions for access to a pipeline.
- 4.5 *Light Regulation* is intended to be a less expansive and less costly form of regulation which may involve the voluntary submission of a limited access regime (largely dealing with non-price terms of access) and if necessary *ex post* determination of access prices through a negotiate/arbitrate process similar to that for services declared under Part IIIA of the CCA.
- 4.6 Covered pipelines are subject to full regulation unless a light regulation determination is made in relation to that pipeline. Such a determination may be made in conjunction with a coverage application or through a separate application for a light regulation determination. Light regulation determinations are made by the Council.
- 4.7 The framework for light regulation determinations is illustrated in Figure 3.

Figure 3: Framework for light regulation determinations for covered pipelines

'Light ' regulation

- 4.8 The light regulation regime is intended to operate so that not all covered pipelines will necessarily be subject to 'full' regulation under the access arrangement process. Rather, eligible pipeline service providers, operating covered pipelines, are able to apply for a 'light regulation determination' to avoid the upfront setting of reference tariffs (price regulation) under the access arrangement process and potentially the need for an access arrangement altogether.
- 4.9 The principal concern under the NGL is to ensure that the form of regulation that is appropriate for a particular pipeline service is proportionate to the degree of market power that is involved. More costly forms of regulation should be adopted only where there is the potential for significant inefficiencies to arise from the exploitation of market power (Expert Panel Report 2006, p 44).
- 4.10 Full regulation involves direct control being imposed on the prices and related terms and conditions of service supply, via the service provider submitting an access arrangement for approval by the AER. This form of regulation often leads to significant administrative costs for the service provider and the regulator. Full

regulation is however likely to be appropriate where the pipeline service provider possesses significant market power (Expert Panel Report 2006, pp 44-45).

- 4.11 Providing for light regulation under the NGL involves regulatory methods that emphasise commercial negotiation and information transparency, with regulatory intervention through the right to have disputes arbitrated by the regulator, being retained as a default. Such ex post regulation may be appropriate where the market power exercised by the provider is less substantial and there is the potential for contestability for the services to emerge. It may also be appropriate where the number of access seekers is relatively small and these parties can themselves exercise some countervailing market power in the course of commercial negotiations. Further, light regulation may be an appropriate option for regulation where particular assets are in transition towards effective competition (Expert Panel Report 2006, pp 44-45).
- 4.12 Light regulation, in providing for a negotiate/arbitrate regime, offers participants in the gas sector a different avenue for access where particular risks are balanced differently. Light regulation may provide more timely and lower cost outcomes than full regulation. Where negotiations are successful, light regulation is likely to result in reduced front end costs and less delay. However, if a negotiation is unsuccessful additional time will be required in order to resolve an access issue/dispute and back end costs are likely to be higher. Part of the Council's determination on the form of regulation will involve balancing the risks involved in moving to light regulation.

Key features of light and full regulation

- 4.13 As a level of market power is present for a pipeline to be a covered pipeline, both forms of regulation have mechanisms to protect third party users. Deciding the form of regulation involves considering which option is more appropriate for a particular covered pipeline.
- 4.14 Many obligations of the regime are common for light regulation and full regulation pipelines with the requirement to submit a full access arrangement being the key difference. The main differences between full and light regulation are set out Table 3. The two forms of regulation are examined in more detail in Appendix C.

Table 3: Key features of full and light regulation

Full (access arrangement) regulation	Light regulation (additions or differences from full regulation)
<p>Service provider subject to general duties:</p> <ul style="list-style-type: none"> • Must be a specified legal entity (principally a corporation - s 131). • Must not engage in conduct to prevent or hinder access (s 133). • Obligated to disclose gas supply information in certain circumstances (r 138). 	<p>No difference.</p>
<p>Subject to 'ring-fencing' requirements</p> <ul style="list-style-type: none"> • Must not carry on a related business (s 139). • Must keep marketing staff separate from associate's related businesses (s 140). • Must keep consolidated and separate accounts (s 141). • Must comply with any AER regulatory information instrument about information reporting (s 48). • Must keep sensitive information confidential (r 137). • Any additional ring-fencing requirements imposed by the AER under s 143. 	<p>No difference.</p>
<p>Contracts with associates must not be entered into, varied or given effect to if they substantially lessen competition in a market for natural gas services or breach competitive parity rule unless approved by the AER under the rules (ss 147 and 148 and r 32). Entering into or varying an associate contract must be notified to the AER (r 33).</p>	<p>No difference.</p>
<p>Subject to rules relating to facilitating requests for access and information disclosure:</p> <ul style="list-style-type: none"> • Requirements to publish information and access arrangement (r 107). • Must provide certain information about tariffs (r 108). • Must not bundle services (r 109). • Must respond to request for access in structured manner (r 112). 	<p>Subject to same rules as for full regulation pipelines and additionally:</p> <ul style="list-style-type: none"> • Must report annually to the AER on access negotiations (r 37). • Must publish terms and conditions of access, including prices on offer, on website (r 36).

Full (access arrangement) regulation	Light regulation (additions or differences from full regulation)
<p>Requirement to submit and have in force a full access arrangement which sets out terms and conditions of access and reference tariffs for services likely to be sought by a significant part of the market (s 132). Importantly:</p> <ul style="list-style-type: none"> • Non-price conditions subject to AER approval, including capacity trading requirements, changes of receipt and delivery points, extension and expansion requirements and queuing requirements (rr 103 - 106). • Total revenue to be set by the AER taking into account the revenue and pricing principles (s 24 and 28) and using the building blocks approach to economic regulation (r 76) which is highly dependent upon: <ul style="list-style-type: none"> • rules relating to the establishment and roll forward of a regulatory capital base • determination of a rate of return on capital • assessment of regulatory depreciation allowances and schedules • estimates of corporate income tax (where post-tax model adopted) • maintenance and reporting of incentive arrangements • determining allowances for operating expenditure • creating a reference tariff variation mechanism based upon total revenue and appropriate cost allocation, and • complex arrangements relating to surcharges, capital contributions, speculative investment and capital redundancy (see generally Part 9 of the Rules). 	<p>No requirement to submit or have in force a full access arrangement. A limited access arrangement (governing only non-price terms and conditions) may be submitted for approval by the service provider if it chooses to do so (s 116).</p> <p>Only conforming capital expenditure is included in a capital base while a pipeline is under full regulation, however if a light regulation pipeline returns to full regulation actual capital expenditure in the intervening period is rolled into the capital base (r 77(3)).</p>
<p>Requirement to submit detailed access arrangement information with an access arrangement and keep this information available (rr 42 - 43). This extends to detailed financial and operational information (r 72). The AER may also impose additional information requirements to allow them to assess an access arrangement as a regulatory information instrument (s 48).</p>	<p>No general requirement to submit or have approved access arrangement information. Minimal access arrangement information on capacity required if service provider chooses to submit a limited access arrangement (r 45(2)).</p>

Full (access arrangement) regulation	Light regulation (additions or differences from full regulation)
Requirements relating to compliance (usually annually) with the reference tariff variation mechanism to increase reference tariffs by the control mechanism (including any pass through arrangements) (r 97).	No such requirements imposed.
<p>A user or prospective user is able to notify to the dispute resolution body (the AER everywhere but Western Australia where the dispute resolution body is the Energy Disputes Arbitrator) an access dispute about any aspect of access to pipelines services provided by means of a covered pipeline (s 181) and the access determination may deal with any matter relating to the provision of a pipeline service to a user or prospective user (s 193). The dispute resolution body must take into account the national gas objective and revenue and pricing principles in resolving a dispute (s 28). Existing user rights and usage are protected (s 188) and the applicable access arrangement must be applied (s 189). Geographical extensions of a pipeline cannot be ordered (r 118(1)(b)).</p> <p>Note that pipeline services which are not likely to be sought by a significant part of the market (ie non-reference services) may still be the subject of an access dispute even though no price is provided by the access arrangement (s 181).</p>	<p>Access dispute provisions apply, any approved limited access arrangement must be applied, but otherwise price and non-price terms and conditions set by the dispute resolution body.</p> <p>In relation to capacity expansions, for a light regulation pipeline the access seeker needs to fund the expansion entirely (r 118(2)(a)), an extension or expansion requirement in an access arrangement governs the ability for a service provider to be required to fund the expansion of a full regulation pipeline (r 118(2)(b)).</p>
Price discrimination between users recognised in both prudent discount provisions (r 96) and pricing principles for distribution services (r 94). While service providers can offer other discounts, these would not be reflected in reference tariffs (r 96).	Prohibition on engaging in price discrimination unless that discrimination is conducive to efficient service provision (s 136).
Must comply with queuing requirements in an approved access arrangement (s 135).	Where a limited access arrangement is in force, the queuing policy must be complied with under s 135. Where no limited access arrangements are in place, issues about the priority of access could be resolved as part of an access dispute.
Other than for the queuing requirements, service providers and users are free to agree on alternative terms and conditions of access than set out in the access arrangement (s 322).	No difference.

Full (access arrangement) regulation	Light regulation (additions or differences from full regulation)
Pre-existing contractual rights protected (ss 188 and 321)	No difference.
The extent to which an extension or expansion of a pipeline is taken to be part of the covered pipeline, and regulated by the regime, is governed by the extensions and expansion requirements in the access arrangement (s 18).	As for full regulation where a limited access arrangement applies, but otherwise all extensions and expansions are taken to be part of the covered pipeline (s 19).
May apply to be uncovered if the pipeline no longer satisfies the coverage test (s 102).	No difference. Any person can at any time apply to revoke the light regulation determination (s 118).
<p>Must, for interconnected transmission pipelines, disclose information to the Bulletin Board:</p> <ul style="list-style-type: none"> • Nameplate rating (r 170). • 3-day capacity outlook (r 171). • Linepack/capacity adequacy indicators (r 172). • Nominated and forecast delivery nominations (r 173). • Actual delivery information (r 174). 	No difference.
Must, unless an exempt distribution network, maintain a register of spare capacity on its website (r 111).	No difference.

- 4.15 Apart from the enforcement of access arrangements in access disputes (s 189), a number of the obligations are also enforceable by the AER as civil penalties and by other parties as conduct provisions.¹⁹
- 4.16 Pipelines may also become subject to full access arrangement regulation through a competitive tendering process via s 126 of the NGL and Part 5 of the Rules. These pipelines are regulated like other pipelines with an access arrangement, but the content of their access arrangements and variation process does not need to comply with the rules prescribed in Parts 8, 9 and 10 of the Rules (see r 29).

Light regulation determinations – overview

- 4.17 Part 2 of Chapter 3 of the NGL provides for the light regulation of covered pipeline services. Table 4 provides an overview of the key legislative provisions relevant to the Council making light regulation determinations. These provisions are discussed in more detail below.

Table 4: Key provisions for making light regulation determinations

Subdiv 1 of Div 1 of Pt 2 (especially s 110)	the Council can make a light regulation determination in respect of a pipeline which is not a covered pipeline - where an application for a coverage determination in respect of that pipeline has been made
Subdiv 2 of Div 1 of Pt 2 (especially s 114)	the Council can make a light regulation determination in respect of a covered pipeline when an access arrangement is in force
Section 114	sets out the requirements for the Council's decision on light regulation of pipeline services, including a requirement in s 114(2)(a) that a light regulation determination must be made in accordance with the NGL and the Rules
Section 122	requires the Council to consider the principles governing the making of light regulation determinations set out in s 122(1). In doing so, the Council must have regard to: <ul style="list-style-type: none"> • s 23 the national gas objective, and • s 16 the form of regulation factors, and • any other matters it considers relevant (s 122(2)(c))

¹⁹ A number of sections and rules are prescribed under the NGL and the Regulations as civil penalties and conduct provisions.

Light regulation determinations

4.18 The Council is required to decide whether to make a light regulation determination under the NGL in the following two circumstances:

- (a) where an application has been made under s 92 for a coverage determination in respect of a pipeline that is not covered (See Subdiv 1 of Div 1 of Pt 2 of the NGL) and
- (b) where an application for a light regulation determination is made by a service provider that provides pipeline services by means of a covered pipeline to which an applicable access arrangement approved or made under a full access arrangement decision applies (See Subdiv 2 of Div 1 of Pt 2).

4.19 A light regulation determination cannot be made in respect of pipeline services provided by means of a designated pipeline (see ss 109 and 111).²⁰ The covered South Australian and Western Australian distribution pipelines, the Dampier to Bunbury Natural Gas Pipeline and Goldfields Pipeline are the designated pipelines at the date of this guide.²¹ The Regulations may, on the unanimous recommendation of the Standing Council on Energy and Resources (SCER), be amended to remove one or more of these pipelines from being so designated.²² The SCER or a service provider can seek AER advice on whether a pipeline should no longer be designated under s 125 of the NGL.

Decisions on light regulation when pipeline is not a covered pipeline but an application for a coverage determination has been made

4.20 The Council must decide whether to make a light regulation determination where an application has been made under s 92 for a coverage determination and the pipeline the subject of that application is not a designated pipeline.

Coverage recommendations

4.21 Where a person applies to the Council for a coverage determination (ie that a pipeline be a covered pipeline), the Council is required to make a coverage recommendation to the relevant Minister in respect of that application. The Council's recommendation must be either that the pipeline:

- (a) be a covered pipeline, or
- (b) not be a covered pipeline.

²⁰ A designated pipeline means a pipeline prescribed by the Regulations to be a designated pipeline (see s 2).

²¹ See Schedule 1 of the Regulations and Schedule 1 of the *National Gas Access (WA) (Part 3) Regulations 2009*.

²² See s 11(4) of the *National Gas (South Australia) Act 2008* which limits the ability of Regulations to add other pipelines as designated pipelines.

- 4.22 On receiving the Council's recommendation, the relevant Minister must decide whether to make a coverage determination in respect of the pipeline to which the recommendation relates (see ss 92-99).

Light regulation determination

- 4.23 At the same time as making the recommendation to the relevant Minister in relation to coverage, the Council must decide whether to make a light regulation determination in respect of the pipeline the subject of the application for the coverage determination. This decision must be made by the Council at the same time as it makes the coverage recommendation to the relevant Minister; and within the time it must make the coverage recommendation (see s 110).
- 4.24 The process for considering a light regulation determination in conjunction with a coverage application is illustrated in Figure 2 on p 28.

Requirements

- 4.25 The light regulation determination (or a decision not to make a light regulation determination) that is made by the Council at the time it makes a coverage recommendation must:
- (a) be made in accordance with the NGL and the Rules, and
 - (b) be attached to the coverage recommendation, and
 - (c) contain the information required by the Rules (see s 110(3)).

Decisions on light regulation when pipeline is already a covered pipeline

Application for light regulation

- 4.26 Section 112(1) of the NGL provides that a pipeline service provider may apply to the Council for a determination that the pipeline services, provided by means of a covered pipeline, be light regulation services. Under s 112(2) the application must:
- (a) be in accordance with the Rules, and
 - (b) contain the information required by the Rules (see paragraph 4.110 below).
- 4.27 An application may only be made in respect of all of the pipeline services provided by means of the covered pipeline (s 112(3)).
- 4.28 The Council must deal with an application under s 112 in accordance with the Rules (s 113).

The Council's decision on light regulation of pipeline services

- 4.29 Section 114 of the NGL sets out the requirements that the Council must comply with when making a decision on the light regulation of pipeline services.

114—NCC's decision on light regulation of pipeline services

- (1) The NCC must decide whether to make a light regulation determination within—
- (a) 4 months after receiving an application under section 112; or
 - (b) if the Rules specify a later period, that period.
- (2) A light regulation determination or a decision not to make a light regulation determination must—
- (a) be made in accordance with this Law and the Rules; and
- Note—
For example, see section 122.
- (b) contain the information required by the Rules; and
 - (c) be given to the persons specified by the Rules; and
 - (d) be made publicly available in accordance with the Rules.
- Note—
If the NCC makes a light regulation determination, the service provider may submit a limited access arrangement in respect of the light regulation services to the AER for approval: see section 116.

Subsection 114(1) – timing

- 4.30 The Council must decide whether to make a light regulation determination within 4 months after receiving an application under s 112, or such later period as is specified in the Rules.
- 4.31 The Council will use its best endeavours to meet the time frame of 4 months unless there are exceptional circumstances.

Subsection 114(2) – requirements for light regulation determination

- 4.32 The Council must comply with all of the four requirements set out in s 114(2) when making a light regulation determination, or a decision not to make a light regulation determination. Each requirement is discussed separately below.

(a) *made in accordance with this Law and the Rules*

- 4.33 In summary, when making a light regulation determination, the Council is required under the NGL to consider the principles governing light regulation determinations which are set out in s 122 – broadly, the Council has regard to the likely effectiveness of the forms of regulation having regard to the national gas objective, a set of “form of regulation factors” (see paragraph 4.39), and any other factors it considers relevant.

(b) contain the information required by the Rules

4.34 Rule 35(2) specifies the information to be included in a light regulation determination or a decision not to make a light regulation determination. More specifically, r 35(2) provides that a light regulation determination, or a decision not to make a light regulation determination, must:

- (a) identify the pipeline, and the pipeline services, to which the determination or decision relates, and
- (b) include a reference to a website at which a description of the pipeline, and the pipeline services, can be inspected, and
- (c) state the terms of the determination or decision and the reasons for it.

(c) be given to the persons specified by the Rules

4.35 In accordance with the standard consultative procedure the Council must give copies of the decision to 'the parties to the administrative process in which the decision is made' (see r 8(4)(b)). In this case, this will be the service provider that made the application for light regulation and any other party which has been actively involved in the decision making process.

(d) be made publicly available in accordance with the Rules

4.36 The Council must publish the final decision on its website (see r 8(4)(c)) and make it available for inspection during business hours at its office (see r 8(4)(d)). The AEMC is also required to keep an online register of light regulation determinations (r 133).

Section 122 – Principles governing light regulation determinations

122—Principles governing the making or revoking of light regulation determinations

- (1) In deciding whether to make a light regulation determination under Division 1 or to revoke a light regulation determination under Division 2, the NCC must consider—
 - (a) the likely effectiveness of the forms of regulation provided for under this Law and the Rules to regulate the provision of the pipeline services (the subject of the application) to promote access to pipeline services; and
 - (b) the effect of the forms of regulation provided for under this Law and the Rules on—
 - (i) the likely costs that may be incurred by an efficient service provider; and
 - (ii) the likely costs that may be incurred by efficient users and efficient prospective users; and
 - (iii) the likely costs of end users.

Note—

The forms of regulation provided for under this Law and the Rules to regulate the provision of the pipeline services by means of a covered pipeline are—

- (a) making a light regulation determination so that those services become light regulation services;
 - (b) not making a light regulation determination so that those services are regulated under a full access arrangement decision that approves or makes the applicable access arrangement that applies to those services.
- (2) In doing so, the NCC—
- (a) must have regard to the national gas objective; and
 - (b) must have regard to the form of regulation factors; and
 - (c) may have regard to any other matters it considers relevant.

4.37 In the Council's view, it is clear from the words 'in doing so' in s 122(2), that the factors in that subsection require consideration in the course of the Council's contemplation of the matters in subsection (1). This approach is supported by the discussion in the Second Reading Speech for the NGL of the manner in which light regulation determinations are to be made:

Determining how covered pipeline services are to be regulated requires an assessment of the potential for market power to be exploited by a service provider. The National Gas Law requires the National Competition Council to consider the likely effectiveness of light regulation as opposed to access arrangement regulation in promoting access to pipeline services in light of the costs of each form of regulation. Accordingly, where light regulation can reduce the costs of regulation while still providing an effective check on a pipeline's market power, the light regulation option should be available. Light regulation may be particularly relevant for point to point transmission pipelines with a small number of users who have countervailing market power.

The National Gas Objective and 'form of regulation factors' guide this assessment of the form of regulation to apply to covered pipeline services.
(p 2889)

Factors the Council 'must have regard to' under s 122(2)

(a) The national gas objective – s 23 of the NGL

4.38 See paragraphs 3.15-3.18.

(b) The form of regulation factors

4.39 Section 122(2)(b) requires the Council to have regard to the form of regulation factors set out in s 16 of the NGL which provide:

16—Form of regulation factors

The form of regulation factors are—

- (a) the presence and extent of any barriers to entry in a market for pipeline services;
- (b) the presence and extent of any network externalities (that is, interdependencies) between a natural gas service provided by a service provider and any other natural gas service provided by the service provider;
- (c) the presence and extent of any network externalities (that is, interdependencies) between a natural gas service provided by a service provider and any other service provided by the service provider in any other market;
- (d) the extent to which any market power possessed by a service provider is, or is likely to be, mitigated by any countervailing market power possessed by a user or prospective user;
- (e) the presence and extent of any substitute, and the elasticity of demand, in a market for a pipeline service in which a service provider provides that service;
- (f) the presence and extent of any substitute for, and the elasticity of demand in a market for, electricity or gas (as the case may be);
- (g) the extent to which there is information available to a prospective user or user, and whether that information is adequate, to enable the prospective user or user to negotiate on an informed basis with a service provider for the provision of a pipeline service to them by the service provider.

4.40 See further paragraphs 4.58-4.107.

(c) Any other matters it considers relevant

4.41 This section gives the Council the ability to consider other relevant issues. Given the economic focus of the NGL and the large number of factors already being considered, the Council does not regard this provision as a mechanism for a large number of arguments and perspectives to be put outside of those already under consideration. To do so would be to take the reference out of context.

4.42 What may be relevant will differ for each pipeline and market circumstance, but will usually have some relationship to the national gas objective or one of the form of regulation factors.

Factors the Council must consider under s 122(1)

4.43 As discussed above, the Council must have regard to the factors in s 122(2)(a)-(c) in the course of considering the matters set out in s 122(1) of the NGL.

4.44 Section 122(1) itself has two elements, as follows:

122—Principles governing the making or revoking of light regulation determinations

- (1) In deciding whether to make a light regulation determination under Division 1 or to revoke a light regulation determination under Division 2, the NCC must consider—
- (a) the likely effectiveness of the forms of regulation provided for under this Law and the Rules to regulate the provision of the pipeline services (the subject of the application) to promote access to pipeline services; and
 - (b) the effect of the forms of regulation provided for under this Law and the Rules on—
 - (i) the likely costs that may be incurred by an efficient service provider; and
 - (ii) the likely costs that may be incurred by efficient users and efficient prospective users; and
 - (iii) the likely costs of end users.

4.45 The purpose of s 122(1) is to require the Council, when making a light regulation determination, to consider the likely effectiveness of light regulation (compared to full regulation via an access arrangement) in promoting access to pipeline services and the likely costs of each form of regulation. The test is intended to be a 'future with and without' analysis looking at what would be the likely result of the pipeline being subject to the full regulation regime compared to the light regulation regime.

4.46 The Council also considers that the questions of judgment involved in assessing the likely future scenarios and the explicit role given to the national gas objective and form of regulation factors indicates the focus will be on qualitative rather than a quantitative economic analysis which would be highly dependent upon the assumptions included in the model. Nonetheless, in some circumstances quantitative data and other modelling may be useful in informing the Council's application of the principles under s 122. The Council will consider data provided on a case by case basis.

The operation of s 122(1)(a)

4.47 The question in s 122(1)(a) of whether light regulation or full access arrangement regulation will be more effective in a particular case, must be informed through consideration of the national gas objective and form of regulation factors.

4.48 The consideration of the effectiveness of each form of regulation in promoting access to the particular pipeline services in the market in question is a central part of the 'with or without' analysis to be conducted. The effectiveness analysis of light regulation compared to the full regulation scenarios is guided by the economic efficiency focus of the national gas objective and degree of market power

considerations inherent in the form of regulation factors (Expert Panel Report 2006, p 53).

4.49 Effectiveness needs to be examined by looking at how the key regulatory differences between light and full regulation impact upon the access rights of third parties in the relevant upstream and downstream markets, including potential new entrants and the likely outcomes which will be generated by the regulatory framework (Second Reading Speech 2008, p 2889). Issues which may be raised in this analysis of effectiveness include:

- (a) How the nature of the pipeline network (eg point-to-point, meshed, long/short) and the particular users and likely prospective users of the pipeline might interact with each regulatory framework to obtain effective access rights and promote their long term interests.
- (b) The efficiency benefits and regulatory certainty likely to be delivered by having an approved access arrangement in force.
- (c) The effectiveness of additional obligations on light regulation pipelines, including prohibition against price discrimination, reporting and disclosure of offers for pipelines services, in addressing likely access issues for users and prospective users.
- (d) How effective an access dispute process is likely to be in resolving likely access disputes in respect of the particular pipeline services, which may have regard to:
 - (i) the nature of capacity rights already in existence and the actual capacity and developable capacity of the pipeline
 - (ii) the ability to use previous regulation, and in particular previously approved capital bases and reference tariffs, to assist in resolving a dispute, and
 - (iii) any potential barriers users may face in resolving their disputes by means of an access dispute.
- (e) The risk of regulatory error in setting access prices either too high or too low under the full access arrangement framework, taking into account the revenue and pricing principles and relevant rules for AER decision making.
- (f) The incentives on the particular service provider to misuse its market power, including its relationship with participants in upstream and downstream markets and potential sources of competition, including other pipelines and storage facilities.
- (g) The application of particular form of regulation factors to the pipeline in question and their likely impact upon the exercise of market power possessed by the pipeline.

4.50 The analysis of these issues should focus on the particular pipeline, market circumstances, particular users and prospective users rather than being based on abstract theory or generalised assumptions.

The operation of s 122(1)(b)

4.51 In making a decision as to which form of regulation is appropriate in a particular situation, the Council is required under s 122(1)(b) to consider the effect that each form of regulation may have on a number of different entities, in terms of the likely costs that may be incurred by those entities. Consistent with the national gas objective, a primary issue in determining the form of regulation is to minimise the overall costs of regulation across all parties.

(i) the likely costs that may be incurred by an efficient service provider

4.52 This assessment looks at the likely costs of each form of regulation to the service provider, if that service provider is acting in an efficient manner. While the service provider needs to estimate the costs (r 34(2)(h)) the Council will need to come to an independent view of the level of likely costs. The focus on 'likely' costs is also structured to exclude consideration of costs which are unlikely to be, or improbable of being, incurred.

4.53 An efficient service provider should minimise its own transaction costs in dealing with both the regulator and users wherever feasible. As such, a service provider which engages in regulatory processes in a manner which incurs unnecessary costs should not be able to use those costs to seek a more advantageous form of regulation. As there are some costs which are incurred under both light and full regulation (eg ring-fencing and regulation of associate contracts) the Council focuses on the costs which are likely to differ under the two forms of regulation. It must be recognised that costs imposed by regulation on service providers are passed on to users and end users through the regulatory regime.²³ The Council considers that the compliance/transaction/administrative costs involved in each form of regulation are the primary issue to be considered under s 121(1)(b).

4.54 The likely costs that may be examined include:

Where light regulation applies	Where full regulation applies
The likely costs of potential access disputes given the nature of existing users and prospective users.	The costs involved in fully participating in the access arrangement approval process and associated information requirements.
Any costs of complying with additional provisions only applicable to light regulation pipelines (eg reporting on access negotiations, r 37).	The costs of complying with a reference tariff variation mechanism and associated reporting concerning compliance with the access arrangement.

²³ Note that the revenue and pricing principles in s 24(2)(b) explicitly refer to the recovery of costs involved in complying with regulatory obligations which include the NGL and Rules.

(ii) the likely costs that may be incurred by efficient users and efficient prospective users

- 4.55 This assessment looks at the likely costs of each form of regulation on users who have access to pipeline services and prospective users who may seek access to spare or developable capacity. This clause also assumes that these users will be acting in an efficient manner, minimising their own transaction costs. The key issue for consideration is the transaction costs involved for users in negotiating new or altering existing access arrangements. In undertaking this assessment the actual costs of users and prospective users in negotiating access under the existing regulatory arrangements may be taken into account to determine what costs are likely to be incurred in the future.
- 4.56 Under the NGL, when an access arrangement is in place, this arrangement, including the regulated prices, will be applied in an access dispute (see s 189 of the NGL). The certainty of this structure significantly reduces transaction costs for users. By comparison, while light regulation pipelines are required to publish prices and terms and conditions under r 36, these are not binding in an access dispute which is guided by the revenue and pricing principles and national gas objective (see s 28 of the NGL). However, where the number of users is small, existing capacity is fully contracted and long term contracts are in place, there may be little cost for users in moving to light regulation and no material lessening of the effectiveness of the regulation in addressing the exercise of market power.

(iii) the likely costs of end users

- 4.57 This assessment looks at the comparative costs which might flow through to end use consumers of natural gas through the different forms of regulation. It includes the pass through of costs imposed upon service providers and users from the two forms of regulation and any additional burden which may be felt by end users from the arrangements.

Form of regulation factors – relevant considerations

- 4.58 When considering an application for light regulation of an existing covered pipeline, the Council must have regard to the form of regulation factors, set out in s 16 of the NGL (see s 122(2)(b)). More specifically, regard must be had to these factors when considering the matters referred to in s 122(1) in the course of making a light regulation determination.

Relevance of the pipeline coverage criteria

- 4.59 The form of regulation factors raise some similar issues to those considered under the pipeline coverage criteria in s 15 of the NGL. Coverage criteria (a) and (b) for example conceivably require similar considerations to at least some of the form of regulation factors. Both the coverage criteria and form of regulation factors are premised around the concept of market power which is both:
- (a) a threshold trigger for regulation to be applied at all (coverage), and

- (b) a key consideration in the choice of the form of regulation, whereby the degree of market power is relevant rather than a threshold presence.

4.60 This raises the question of the extent to which the Council should separately evaluate, for the purposes of assessing the most appropriate form of regulation, issues that may have already been considered in the process of determining coverage.

4.61 Where an application for light regulation is made for an existing covered pipeline, the Council considers there are three main reasons why it is inappropriate for it to rely on assessments made at the coverage stage (which may have been some time ago) in relation to issues that may arise for consideration under the form of regulation factors:

- (a) there are differences between the coverage criteria and the form of regulation factors
- (b) the coverage criteria and form of regulation factors address different purposes, and
- (c) practical constraints may arise, for example, from changes or developments occurring since coverage.

The Council can determine the weight to be given to each factor

4.62 The Council considers that the requirement that it 'must have regard to' the form of regulation factors does not mean that each factor is to be given the same weight in determining the form of regulation.

4.63 The significance of each factor may vary depending upon the circumstances of each application, and so may vary across applications. For example, it is possible that different factors may be more or less significant depending upon whether the application is for a transmission or distribution pipeline.

4.64 The Council acknowledges that the differing nature of gas markets throughout Australia means that care needs to be taken in appropriately weighing up each factor relative to the particular market circumstances in question.

Considering each of the form of regulation factors

(a) The presence and extent of any barriers to entry in a market for pipeline services

4.65 The requirement to consider the presence and extent of any barriers to entry in a market for pipeline services necessarily requires consideration of the applicant's market power and the market power that the existing service provider(s) in that market may have. This is because barriers to entry are a primary determinant of the existence of market power.

4.66 *Eastern Express* (1992) 35 FCR 43 establishes that the question of whether barriers to entry exist requires consideration of the question 'to what extent is it rational or

possible for new entrants to enter the market?’ (at [66]). As the High Court noted in *Queensland Wire Industries*:

...the ease with which competitors would be able to enter the market must ... be considered. It is only when for some reason it is not rational or possible for new entrants to participate in the market that a firm can have market power. (at [189])

- 4.67 Only in the presence of significant barriers to entry is a market insulated from competition, so that a company operating in that market can sustainably raise prices above economic costs, or otherwise behave independently of competition, without losing customers over time to new entrants into the market.

Examples of barriers to entry

- 4.68 Barriers to entry that may be relevant to a market for gas pipeline services, may arise as a result of:
- (a) the incumbent pipeline having natural monopoly characteristics
 - (b) the realisation of economies of scale and scope, and
 - (c) other factors, such as administrative or operational arrangements.

The height of barriers to entry

- 4.69 The size or height of the barriers to entry to a particular market will directly affect the access of a service provider to that market and the degree of market power that a provider can exercise. With high barriers to entry there are likely to be fewer opportunities for competitive pressure because it would be uneconomic for other players to enter and compete for market share. The more substantial these barriers are, the greater are the potential costs from the exercise of the resulting market power (Expert Panel Report 2006, p 48).

Comparison to issues considered at the coverage stage

- 4.70 As discussed above, although it might be said that for a pipeline to be a covered pipeline there must be existing barriers to entry to a particular market, the Council is nevertheless required to consider the presence and extent of those barriers under form of regulation factor (a). This is because the relevant barriers to entry may have changed during the period since coverage was determined and the focus is on the degree of those barriers to entry rather than the fact that they are present.

(b) The presence and extent of any network externalities (that is, interdependencies) between a natural gas service provided by a service provider and any other natural gas service provided by the service provider

- 4.71 This factor requires the Council to identify the presence and extent of any network interdependencies (externalities), between a natural gas service provided by a service provider and any other natural gas service provided by the same provider. This is for the purpose of identifying those interdependencies as potential sources of market

power. That is, the interdependent nature of network services often predisposes pipelines towards natural monopoly. This means that it is usually more efficient to have one service provider provide a pipeline service to a given geographical area. Additionally it may be more efficient to have the same company provide other pipeline services to the same geographical area (Second Reading Speech 2008, p 2889).

- 4.72 Whether the particular natural gas service in question is a transmission service or a distribution service may be relevant to whether network externalities or interdependencies exist.

Transmission services

- 4.73 Network externalities or interdependencies are less pronounced for gas transmission pipelines which typically provide end-to-end services that can be operated independently without loss of efficiency. This point was made in the Expert Panel Report as follows:

...individual gas transmission pipelines typically can be operated independently with little loss of overall efficiency, and it is also typically feasible to assign capacity rights associated with the asset's existing and new capacity. Thus, users can be provided with a choice about which pipeline to use where there are multiple, independent pipelines, and users can also be provided with a choice about whether they wish to use (and contribute to) any augmentation. Thus, ongoing competition between pipelines (i.e. where multiple pipelines serve the same markets) is feasible, and 'market forces' can be left to play a greater role in deciding when new investment should occur (that is, users can be left to contract for their needs, and pipelines get built when sufficient capacity in a pipeline will be contracted). (p 13) (Footnotes omitted)

- 4.74 Therefore, direct competition between individual gas transmission pipelines and tradeable rights to pipeline capacity are two means of establishing contestability in a particular market for gas transmission services, lowering market power (Expert Panel Report 2006, p 49). This may be less so for meshed transmission networks, particularly those which are less able to use linepack as a balancing mechanism than longer pipeline systems.
- 4.75 End-to-end networks with fewer network interdependencies and greater potential for contestability are likely to be more amenable to less direct forms of regulation. This is particularly the case where there are alternative supply options and users have considerable countervailing market power.

Examples

The Expert Panel identified two examples of transmission services with relatively low levels of interdependence with other natural gas services, resulting in relatively low levels of market power. First, certain transmission pipelines in the South East Australian market have been found to be sufficiently competitive with each other to justify the removal, or non-application, of regulation. Secondly, where a new, independently-owned pipeline is to join a new source of gas supply to an existing demand centre, it would be difficult to conclude that the owner of the new facility would be in a position to exercise substantial market power (Expert Panel Report 2006, p 14).

- 4.76 Service providers operating in similar circumstances to these in terms of network externalities or interdependencies and market power may be more appropriately regulated by light regulation.

Distribution services

- 4.77 By contrast, network externalities or interdependence may be more apparent for gas distribution pipelines. Where strong network externalities or interdependencies and any-to-any supply characteristics operate to strengthen the market power of service providers, a more restrictive form of regulation is likely to be warranted.
- 4.78 However, there may be some exceptions. Market power may not exist in areas where the supply of natural gas has recently been introduced. Further, even in large gas markets, where rates of connection and/or average usage is low, the unit cost for the provision of natural gas may be sufficiently high that competition from alternative energy sources provides an effective constraint on market power. In either situation, as the market power would be low, the network externalities or interdependence are also likely to be low.

(c) The presence and extent of any network externalities (that is, interdependencies) between a natural gas service provided by a service provider and any other service provided by the service provider in any other market

- 4.79 As for form of regulation factor (b), discussed above, the Second Reading Speech identified these externalities or interdependencies as potential sources of market power (p 2889). Externalities or interdependencies may still be relevant to related businesses in upstream and downstream markets (such as gas retailing), although ring-fencing and associate contract provisions apply to both forms of regulation to mitigate and control the risks of anti-competitive outcomes. Some distribution networks may also have externalities with business units providing other utility services, such as electricity, water and telecommunications. The trial of metering systems which read and allow joint billing of gas, electricity and water usage is one example of this.

(d) The extent to which any market power possessed by a service provider is, or is likely to be, mitigated by any countervailing market power possessed by a user or prospective user

4.80 This requires consideration of the extent to which market power possessed by the owner, operator or controller of a pipeline is likely to be mitigated by countervailing market power possessed by the users of those services. As the Second Reading Speech notes, this factor allows the Council to consider whether a major user(s) has this type of countervailing market power when deciding whether to apply light regulation (p 2889).

Countervailing market power

4.81 Countervailing market power can occur where users (ie customers) are of sufficient size and have negotiating power in a market for network services to mitigate a service provider's market power in the negotiation of the terms and conditions of access. Some of the factors relevant to the existence of countervailing market power, which were identified in the Expert Panel Report, include circumstances where:

- (a) users are large or concentrated and can present a credible threat of bypass or securing an alternative source of supply, or
- (b) where the cost and demand circumstances of the infrastructure provider is such that it would be adversely affected by the failure of users, or a group of users, to take supply (eg, resulting in the full or partial stranding of certain assets) (Expert Panel Report 2006, p 49).

4.82 Where these circumstances are present, users are in a stronger position to protect themselves from the potential for service providers to exercise market power. Users are also more likely to be able to negotiate appropriate prices and conditions of access. The countervailing power of users may be stronger when they are relatively few in number and are well resourced.

4.83 Where there is significant countervailing market power, a less intrusive form of regulation, such as light regulation, may be more appropriate.

4.84 By contrast, as noted above, where a service provider operates a meshed monopoly network with strong externalities and significant information asymmetry, users may be less able to exercise countervailing market power. In these circumstances, stronger regulation through an access arrangement, rather than light regulation, may be more appropriate.

4.85 The analysis of countervailing market power needs to be assessed in relation to the pipeline and markets in question. It will draw on evidence from those markets to determine the extent to which any countervailing market power of users may be an effective constraint upon the market power of the relevant service provider.

4.86 For example, in considering the application for light regulation of the Central West Pipeline, the Council concluded that although there were several large users and spare capacity on the pipeline, this was unlikely to be sufficient to counterbalance the

provider's market power, particularly because there was no alternative pipeline providing substitute services to users (NCC 2010, p 16).

(e) The presence and extent of any substitute, and the elasticity of demand, in a market for a pipeline service in which a service provider provides that service

4.87 This form of regulation factor allows the Council to consider the presence and extent of substitutes for users of the particular pipeline service.

Substitution and the elasticity of demand

4.88 The price responsiveness of users to the cost of energy can impose some constraints on the exercise of market power in certain situations. For example, if the price of gas rises (including as a result of a rise in the costs of network services) such that users no longer find value in purchasing an additional unit of gas, the most likely responses are either a reduction in the level of consumption by the user (demand side management), or a shift towards an alternative means of supply (Expert Panel Report 2006, p 50). This shift may be either to an alternative means of gas supply, or to an alternative source of energy. This latter situation is discussed below in relation to form of regulation factor (f).

4.89 Users are better able to exercise a choice on the source of their gas supply where there are competing sources of supply to a common area. These competing sources may be in the form of an alternative pipeline from the same gas source, or a pipeline from an alternative gas basin. The availability of gas storage facilities and use of linepack capacity may also mitigate the need to rely on a particular pipeline when there is a constraint upon contracted supply sources.

4.90 This means that where a pipeline service provider with market power seeks to limit supply and raise prices, there is some potential for users to exercise their choice to use alternative gas pipeline services or substitute energy sources.

The nature of the pipeline

4.91 The nature of the pipeline, that is whether it is for transmission or distribution, or point to point or meshed, may be relevant to the presence and extent of any substitute for a particular service.

4.92 In relation to transmission pipelines, there has been an emergence of competing pipelines for the supply of gas to large demand centres from competing gas basins. This inter-basin and pipeline-to-pipeline competition has increased the competitiveness of the market and in a number of cases is expected to moderate the market power of particular pipeline owners (Expert Panel Report 2006, pp 13-14).

4.93 Users of distribution pipeline services are generally less able to substitute supply, although market circumstances differ depending upon consumer reliance on gas for heating and hot water in different parts of Australia.

Comparison to issues considered at the coverage stage

- 4.94 This form of regulation factor is one where there is possibly some overlap with the matters to be considered under the coverage criteria in s 15 of the NGL (see especially, criterion (a) which requires consideration of competition issues).
- 4.95 However, as explained above, while criterion (a) requires consideration of competition issues for the purposes of determining whether a pipeline should be regulated, form of regulation factor (e) requires the consideration of competition issues for a different purpose – the purpose of determining the extent of regulation that should be applied to a particular pipeline service.
- 4.96 In a practical sense, this means that the greater the elasticity of demand for a particular gas pipeline service (ie where substitutes for that service exist), the less likely the service provider is to exercise significant market power. In these circumstances, it may be more likely that light regulation should be applied to the pipeline service provider.

(f) The presence and extent of any substitute for, and the elasticity of demand in a market for, electricity or gas (as the case may be)

- 4.97 The degree to which other products may be substituted for gas is another factor affecting the choice of the form of regulation and is related to factor (e). Form of regulation factor (f) allows the Council to consider the presence and extent of substitutes, and the elasticity of demand, for the gas product itself. For example, electricity may also compete with natural gas for some or all of a customer's needs or a gas fired generator may be able to switch fuel sources between diesel, coal or LPG depending upon their availability and relative prices. However, other users may not have realistic substitutes for natural gas, such as those users who use natural gas as a feedstock in a production process or where there is no cost effective method of modifying their plant to use another fuel source.
- 4.98 The Expert Panel noted that, generally speaking, the demand for energy services, and in particular electricity services, is considered to be relatively inelastic (Expert Panel Report 2006, p 49). In relation to electricity, this reflects the essential nature of electricity to commercial and industrial activity and to modern domestic life. By contrast some consider gas to be a 'fuel of choice', meaning that it is subject to more competition from substitutes. Accordingly, in general, electricity is a better substitute for gas, than gas is for electricity. As a result, the demand for gas is more elastic than the demand for electricity.
- 4.99 In relation to gas, this means that where a pipeline service provider seeks to limit supply and raise prices there may be some potential for users to shift consumption away from gas towards alternatives, such as electricity. Where this is the case, it may be more likely that light regulation should be applied. However, elasticity of demand is not static and must be considered in relation to each market on a case by case basis.

(g) The extent to which there is information available to a prospective user or user, and whether that information is adequate, to enable the prospective user or user to negotiate on an informed basis with a service provider for the provision of a pipeline service to them by the service provider

4.100 Users can usefully negotiate with service providers only when they have adequate information to determine whether or not payments required of them accurately reflect the efficient cost of providing the service. In a competitive market the efficient cost is revealed as competing providers seek to outbid each other down to the point where they are covering their costs plus a normal profit. Where a business is a natural monopoly this does not occur and it can be difficult for consumers and regulators to access information from natural monopoly service providers. The final form of regulation factor allows the Council to consider the extent to which there is adequate information available to users, to enable them to negotiate with the service provider on an informed basis.

4.101 Generally speaking, where there is a lack of competitive pressure to drive down prices, the true costs of a service provider are unlikely to be revealed in market prices. As a result, where a service provider exercises a degree of market power, there is likely to also be a disparity of information (information asymmetry) between a service provider and users of that service.

4.102 As a result, service providers are likely to have a significant position of advantage over network users, in seeking to negotiate commercial terms and conditions of access, particularly in the absence of some form of regulation to redress information imbalances (Expert Panel Report 2006, p 50).

Provision of information requirements under the National Gas Law

4.103 The NGL and Rules contain extensive mechanisms that are intended to facilitate the provision of information in various circumstances. These may operate to assist in addressing any information asymmetry between service providers and users. These mechanisms include:

- (a) disclosure of prices and terms and conditions on offer for pipeline services (r 36)
- (b) the Natural Gas Services Bulletin Board and Short Term Trading Markets
- (c) rules relating to facilitating requests for access including:
 - (i) providing general information to users (s 107)
 - (ii) providing tariff information on request (r 108)
 - (iii) not bundling services (r 109), and
 - (iv) handling access requests (r 112)
- (d) registers of spare capacity (r 111)
- (e) any information requirements imposed by the AER in relation to ring-fencing obligations in the NGL (such as s 141)

- (f) information contained in any AER performance reports under s 64 of the NGL
- (g) information reported to and disclosed by the AER about the success of access negotiations (r 37), and
- (h) the information disclosed from periods of regulation (see below).

Disclosure of historic information from access arrangement approvals

- 4.104 The NGL places certain requirements on covered pipelines to make some information publicly available about the access arrangements applying to the pipeline (see rr 43 and 44) and additional information may be released by the AER in assessing an access arrangement under Part 2 of Chapter 10. Given the high initial capital costs of pipeline infrastructure, the establishment or proxy for an assessed capital base (such as through a competitive tendering process) will give users greater bargaining power over prices and greater certainty over the outcomes of any potential access disputes.
- 4.105 It is also possible that service providers may disclose information to users in other ways not required by the NGL and Rules and these disclosures may be relevant to the analysis. Nonetheless, where a covered pipeline competes with other pipelines for a particular market, a service provider may be less willing to publicly disclose information which may undermine its competitive position in that market.
- 4.106 The information disclosed under these mechanisms may go some way in addressing any information asymmetry between service providers and users and assist in providing a more even platform for negotiations. The adequacy of the information available is a key component of this along with the ability for users and prospective users to be able to obtain up to date information.
- 4.107 Where the disclosure of information in accordance with the NGL and Rules provides adequate information to users and prospective users to enable them to engage in effective negotiations with service providers, light regulation may be the more appropriate form of regulation. Where it is considered that the disclosure requirements under light regulation, along with the disclosure of information to the Natural Gas Services Bulletin Board, will effectively operate to ensure that the service provider discloses adequate information in the future to ensure the degree of information asymmetry is as small as possible, then light regulation is likely to be the more appropriate form of regulation.

Summary Table

- 4.108 Table 5 is a summary of considerations which may make light regulation more or less likely is below.

Table 5: Summary of considerations for light regulation

Form of regulation factor (s16)	Circumstances conducive to light regulation	Circumstances where light regulation less likely
(a) the presence and extent of any barriers to entry in a market for pipeline services	Barriers to entry present but are relatively low	Barriers to entry relatively high.
(b) presence and extent of any network externalities (that is, interdependencies) between a natural gas service provided by a service provider and any other natural gas service provided by the service provider	Stand-alone pipeline activity, where a service provider has no other pipeline operations Rights to pipeline capacity readily tradeable Transmission services and other end to end services generally involve less interdependence with other pipelines	Greater interdependence, where a service provider has other pipeline interests in the same regions as a pipeline for which light regulation is sought Rights to pipeline capacity not readily traded Distribution services (especially established ones) are likely to be more interdependent with other pipeline services
(c) presence and extent of any network externalities (that is, interdependencies) between a natural gas service provided by a service provider and any other service provided by the service provider in any other market	Service provider has no involvement in upstream or downstream markets (at least in areas served by a pipeline for which light regulation is sought) Ring fencing and other regulatory requirements effectively prevent a service provider from taking advantage of market power in upstream or downstream markets	Service provider has upstream or downstream involvements in gas or other energy businesses Upstream or downstream involvements are in related but not ring fenced activities, or ring fencing of pipeline operations is ineffective
(d) the extent to which any market power possessed by a service provider is, or is likely to be, mitigated by any countervailing market power possessed by a user or prospective user (countervailing market power)	Large or concentrated users Users with by-pass opportunities High interdependence between users and service provider Users involved in pipeline services elsewhere (such users may face lesser information asymmetry given their direct knowledge and experience of pipeline operations)	Many small users Users have limited resources Diverse user interests (for example where users span different industries or economic sectors) Significant users have the capacity to pass through higher pipeline service costs (these users may have less incentives to expend resources to resist increases in pipeline costs) Poorly represented users

Form of regulation factor (s16)	Circumstances conducive to light regulation	Circumstances where light regulation less likely
(e) the presence and extent of any substitute, and the elasticity of demand, in a market for a pipeline service in which a service provider provides that service	<p>Greater substitution possibilities exist</p> <p>Relatively high elasticity of demand suggesting bypass or other substitution opportunities exist</p> <p>Transmission pipelines (demand is generally more elastic than for distribution services)</p> <p>Availability of large (independent) storage capacity</p> <p>Ability to defer gas production/expansion for significant periods</p>	<p>Reduced substitution options</p> <p>Low elasticity</p> <p>Distribution pipelines (especially established distribution pipelines with a high market penetration)</p>
(f) the presence and extent of any substitute for, and the elasticity of demand in a market for, electricity or gas (as the case may be)	<p>Fuel choice available to significant proportion of users</p> <p>Narrower relative prices per unit energy produced from different fuel sources</p> <p>Use of multi fuel plant</p>	<p>Wider relative prices between fuel types</p> <p>Gas dependent users</p> <p>Other energy sources have efficiency disadvantage</p> <p>Dedicated gas plant</p>
(g) the extent to which there is information available to a prospective user or user, and whether that information is adequate, to enable the prospective user or user to negotiate on an informed basis with a service provider for the provision of a pipeline service to them by the service provider	<p>Previous regulated pipelines (a significant base of publicly available and regulator tested information will be available for use in negotiations)</p> <p>Historic pipeline costs available and previously exposed to public/industry scrutiny</p> <p>NGL information disclosure requirements operative</p>	<p>Previously unregulated pipelines</p> <p>NGL information requirements impeded (for example through use of related party contracting which prevents effective scrutiny of underlying costs)</p>

Light regulation determinations – procedural requirements

4.109 The procedural requirements for making a light regulation determination are set out in Part 7 of the Rules and address:

- (a) the application process (that is, the requirements with which an application for light regulation must comply)
- (b) the Council's decision-making process, and

- (c) the compliance requirements for light regulation once a light regulation determination has been made.²⁴

Rules concerning the application for light regulation

4.110 An application for light regulation where the pipeline is a covered pipeline must be in accordance with the Rules and contain the information required by the Rules. Also, an application may only be made in respect of all the pipeline services provided by means of the covered pipeline (see paragraphs 4.26-4.27 above).

4.111 The specific requirements for an application for light regulation (in particular, the information that should be included in an application), is set out in r 34 of the Rules. The following paragraphs outline the requirements.

(a) the application must be in writing²⁵

4.112 This requirement can be satisfied by emailing an application which covers the requirements of the NGL and Rules to gas@ncc.gov.au and also delivering a hard copy of the application to:

National Competition Council
GPO Box 250
Melbourne VIC 3001

(b) the application must identify the pipeline that provides, or is to provide, the services for which the determination is sought and include a reference to a website at which a description of the pipeline can be inspected

4.113 This requirement can be satisfied by setting out the name by which the pipeline is commonly known, stating the relevant pipeline licence number, providing a link to a website where interested parties can see the locations served by the pipeline and including a map depicting the pipeline's route and proximity, connections or relationship to other pipelines (if any).

(c) the application must include a description of all pipeline services provided or to be provided by means of the pipeline

4.114 This requirement can be satisfied by setting out the basic parameters of each pipeline service provided or to be provided by means of the pipeline, including any services which differ depending on the location of the user's receipt or delivery points and other specialised services for particular users which are being or are to be provided. The understanding of each of the services provided is essential to weighing up the market power associated with the basket of services being provided.

²⁴ Pipeline service providers operating a pipeline that provides light regulation services will need to seek their own advice on the operation of rules that apply specifically to them

²⁵ Note 'writing' is defined broadly in clause 10 of Schedule 2 to the NGL as including 'any mode of representing words in a visible form'.

(d) the application must include the applicant's reasons for asserting that the pipeline services should be light regulation services

4.115 The applicant must address the reasons for why the services should be subject to light regulation as relevant to the Council's application of the test in s 122. The Council would expect the reasons to cover all of the s 122 principles and why a decision should be made for light regulation.

(e) the application must include other information and materials on which the applicant relies in support of the application

4.116 The applicant should submit to the Council the key factual and evidentiary materials which are necessary to back up the arguments presented in favour of light regulation and rebut potential arguments against making a light regulation determination. This may include information about actual pipeline usage and possibly confidential information which the Council may deal with in accordance with ss 90 and 331 of the NGL.

(f) the application must include certain specific information

4.117 Subrule 34(2) sets out certain specific information that must also be included in an application for light regulation, as follows:

Information required by r 34(2)	Explanation
(a) the capacity of the pipeline and the extent to which that capacity is currently utilised	This requirement primarily relates to the maximum capacity of pipeline throughput on the central parts of the pipeline (rather than every receipt point) and the manner in which that capacity is being used. Where pipeline usage is relatively stable with seasonal variation, average usage in summer and winter may be sufficient. Where pipeline usage is more variable and demonstrates peaks, some discussion of the usage in peak periods may be necessary.
(b) for a transmission pipeline	<p>A description of:</p> <ul style="list-style-type: none"> a. all locations served by the pipeline (ie all locations at which receipt or delivery points for natural gas carried by the pipeline exist), and b. all pipelines that currently serve the same locations, and c. all pipelines that currently pass within 100 km of any location served by the pipeline. <p>This requires a description of where gas comes in and out of the pipeline (such as the various production facilities or electricity generators) and other pipelines which either serve the same location or could potentially be extended to serve the same location (ie are within 100 km of a location being served).</p>
(c) for a distribution pipeline	<p>The application must include a description of:</p> <ul style="list-style-type: none"> a. the geographical area served by the pipeline, and b. the points at which natural gas is, or is to be, injected into the pipeline. <p>This requires a map and/or post code zones where end users are supplied gas by the pipeline and the points where gas comes into the distribution system (either production facilities, storage facilities or other pipelines).</p>
(d) a description of the pipeline services provided, or to be provided, by the pipeline	This requires no further information than already required under r 34(1)(c) discussed above (see paragraph 4.114), but more detailed service descriptions may be provided where they are useful in understanding the nature of the network and the markets it supplies.

Information required by r 34(2)	Explanation
(e) an indication of any other sources of energy available to consumers of gas from the pipeline	This should set out the substitution possibilities for the consumers of gas served by the pipeline. Some idea of whether particular large users have dual fuel capabilities will be important as will other potential bypass opportunities. The nature of consumers' usages, such as the reliance of end users on gas for heating, may be relevant to fully understand the extent to which the other sources of energy are a realistic option for those consumers.
(f) the identity of the parties with an interest in the pipeline and the nature and extent of each interest	This requirement relates to the structure of each pipeline service provider and other persons with an interest in the pipeline, such as ownership interests in a service provider. As a matter of practicality, where a pipeline service provider's shares are held by a large number of individuals an appropriate threshold will need to be found for those with 'an interest' relevant to the analysis and those which are irrelevant for the analysis. At the very least, parties with a (direct or indirect) shareholding of five per cent or more of a service provider should be identified. The need to explain the interests involved may differ depending upon the ability for the person/entity to exercise control over the operation of the pipeline or profit from any exercise of market power in either the provision of pipeline services or associated upstream or downstream markets.
(g) a description of certain relationships	<p>An application must include a description of the following relationships:</p> <ul style="list-style-type: none"> a. any relationship between the owner, operator and controller of the pipeline (or any 2 of them) b. any relationship between the owner, operator or controller of the pipeline and a user of pipeline services or a supplier or consumer of gas in a location or geographical area served by the pipeline, and c. any relationship between the owner, operator or controller of the pipeline and the owner, operator or controller of any other pipeline serving any one or more of the same locations or the same geographical area. <p>This requirement focuses on the relationship between various service providers of a pipeline, users in upstream and downstream markets and other pipelines which may potentially compete with the pipeline. To establish that any of these relationships are unlikely to produce anti-competitive effects or an abuse of market power, an applicant should set out what has been put in place to mitigate the likelihood of that occurring.</p>

Information required by r 34(2)	Explanation
(h) an estimate of the annual cost to the service provider of regulation on the basis of light regulation and on the basis of full regulation	This requirement is designed to allow the Council to understand the costs involved in both forms of regulation for the purposes of applying s 122(1)(b). To make the cost estimate meaningful, a breakdown on how it was arrived at (including relevant assumptions, such as the level of access disputes) and what constitutes the annual cost is essential. The analysis and substantiation of the various transaction costs involved in each regulatory approach are important.
(i) any other information the applicant considers relevant to the application of the National Gas Objective or the form of regulation factors in the circumstances of the present case	This allows the applicant to bring forward other relevant material to assist the application of the test in s 122(2). The applicant should ensure that the application as a whole contains all relevant information for the application of the statutory test including information which it considers material but unhelpful to its application. This may include information about significant developments which the applicant knows are likely to occur, such as a change in ownership of the pipeline in question.

Rules concerning the Council's decision on an application for light regulation

4.118 In making a decision on an application for light regulation the Council is required to comply with the standard consultative procedure (see paragraphs 6.7-6.8), and consult with the AER (rule 35 and ss 113 and 114 of the NGL).

Rule 35 NCC's decision on the application (Sections 113 and 114 of the NGL)

- (1) In deciding an application for a light regulation determination, the NCC must:
 - (a) proceed in accordance with the standard consultative procedure; and
 - (b) consult with the AER.
- (2) A light regulation determination or a decision not to make a light regulation determination must:
 - (a) identify the pipeline, and the pipeline services, to which the determination or decision relates; and
 - (b) include a reference to a website at which a description of the pipeline, and the pipeline services, can be inspected; and
 - (c) state the terms of the determination or decision and the reasons for it.

Consult with the AER – r 35(1)(b)

4.119 As noted above, r 35(1)(b) requires the Council to consult with the AER in deciding an application for a light regulation determination. The Council will seek the AER's view when it first receives an application, upon release of its draft determination and at other points where relevant. It will take the AER's views into account as is relevant in applying the statutory test.

4.120 It may be necessary for confidential information to be shared between the AER and the Council to ensure that a proper consideration of all the issues will be undertaken. This is possible under ss 30 and 90 of the NGL and s 44AAF of the CCA.²⁶

Requirements for a light regulation determination – r 35(2)

4.121 The final decision must be:

- (a) in writing with full reasons (r 8(3))
- (b) given to the applicant and any other party which has been actively involved in the decision making process (r 8(4)(b))

²⁶ See in particular regulation 7, item 1.1 of the *Competition and Consumer Regulations* which prescribes the Council for the purpose of s 44AAF(3)(e) of the CCA.

- (c) be published on the Council's website (r 8(4)(c)), and
- (d) available for inspection at the Council's office (r 8(4)(d)).

4.122 The Council's decision will identify the pipeline, and the pipeline services, to which the determination relates consistent with that in the application and include a reference to the website at which the description of the pipeline and service provider can be inspected as provided by the applicant.²⁷ In compliance with r 35(2)(c), the decision will state whether the Council has decided to make a light regulation determination in relation to the application or decided not to make such a determination and give the reasons for that decision.

When the determination takes effect

Making a light regulation determination with a coverage recommendation

4.123 Where a light regulation determination is made with a coverage recommendation, s 115(1)(a) of the NGL provides that it comes into effect on the day the relevant coverage determination takes effect.²⁸

Making a light regulation determination for a covered pipeline

4.124 Where a light regulation determination is made on the application of a service provider under s 112, s 115(1)(b) of the NGL provides that it comes into effect 60 business days after the light regulation determination is made.

Merits review

4.125 See chapter 6 for information on how the merits review framework applies.

Revocation of light regulation determinations

Advice by service provider that light regulation services should cease to be light regulation services (s 117 of the NGL)

4.126 A service provider who provides light regulation services may advise the Council in writing that it wishes that the subject pipeline services cease to be light regulation services (ss 117(1) and (2) of the NGL). For example, a service provider may wish to be subject to a full access arrangement again in circumstances where light regulation becomes comparatively more costly for the service provider.

4.127 On receiving advice of this kind, the Council must, without delay, publish notice of that advice on its website and in a newspaper circulating generally throughout Australia (s 117(3) of the NGL). The Council is not required to conduct any other process.

²⁷ To comply with rr 35(2)(a) and (b).

²⁸ Subject to merits review which would ordinarily stay the decision in accordance with s 252(b), this is the date specified by the Minister in accordance with s 99(6) of the NGL.

4.128 On publication of a notice under s 117(3), the service provider must submit (in accordance with s 132) to the AER, for approval under the Rules, a full access arrangement in respect of the pipeline services that it provides. The light regulation determination applying to the pipeline services will, by force of s 117(5) of the NGL, be revoked on the same day that an access arrangement that applies to the pipeline services provided by that service provider is, as the case requires, approved or made under a full access arrangement decision. On the revocation of the light regulation determination the pipeline services to which the light regulation determination applied cease to be light regulation services (s 117(6)).

Application (other than by service provider) for the revocation of a light regulation determination (s 118 of the NGL)

4.129 A person other than the service provider who provides light regulation services may apply to the Council under s 118(1) of the NGL for the revocation of a light regulation determination relating to those services. An application of this kind must:

- (a) be in accordance with the Rules, and
- (b) contain the information required by the Rules (see s 118(2)).

4.130 The requirements for an application under s 118 for the revocation of a light regulation determination are set out in r 38 of the Rules. Table 6 provides an explanation of each of the requirements of Rule 38.

Table 6: Explanation of the rule 38 requirements

Requirements of rule 38	Explanation
(a) state the applicant's name and contact details	All relevant contact details should be provided (such as contact person, postal address, email address, phone number and fax number).
(b) identify the light regulation determination to which the application relates	Identify the determination which granted light regulation to the pipeline. The name and date of the original decision granting light regulation to the pipeline is sufficient.
(c) identify the service provider	Identify which service provider(s) currently owns, controls and operates the pipeline in question.
(d) identify the covered pipeline	Identify which covered pipeline the application relates to, noting that some service providers own, control or operate more than one covered pipeline.
(e) state the applicant's reasons for asserting that the light regulation determination should be revoked	Explain why the services should no longer be lightly regulated as relevant to the Council's application of the principles in s 122 of the NGL. The Council would expect the reasoning to address all principles and make a case as to why the overall decision should not be in favour of light regulation. This would normally include some analysis of how the pipeline operator has behaved while the light regulation determination has been in force.

Requirements of rule 38	Explanation
(f) include any information and materials on which the applicant relies	Provide supporting materials or evidence to support the reasoning why the services should cease to be light regulation services and a full access arrangement apply. The Council that users will not have all of the relevant pipeline information or information about other users' usage to establish a complete picture of the pipeline in question, but what can be gathered and presented will be an important input into the Council's deliberations.

The Council's decision on an application for the revocation of a light regulation determination

4.131 Sections 119 and 120 of the NGL govern the Council's decisions on an application for revocation of light regulation under s 118 depending upon whether an application for revocation of coverage also needs to be considered.

4.132 Under s 119, if there is an undetermined application for revocation of coverage or one is made subsequent to the application for revocation of the light determination under s 118, both applications must be dealt with together and delivered at the same time (s 119(4)). Under s 119(5) the decision must:

- (a) be made in accordance with the Law and the Rules, and
- (b) be attached to the coverage revocation recommendation, and
- (c) contain the information required by the Rules.

4.133 Where there is no application to revoke coverage, s 120(3) provides that the Council's decision on the application must be made within 4 months (subject to the procedures in rr 11 and 12 for extending this period). Subsection 120(4) requires such a decision to:

- (a) be made in accordance with this Law and the Rules, and
- (b) contain the information required by the Rules, and
- (c) be given to the persons specified by the Rules, and
- (d) be made publicly available in accordance with the Rules.

4.134 For the purposes of both ss 119(5) and 120(4), r 39 sets out the procedural requirements for making a decision on an application for the revocation of a light regulation determination, requiring the Council to proceed in accordance with the standard consultative procedure and consult with the AER.

39 NCC's decision on application (Sections 119 and 120 of the NGL)

- (1) In deciding an application for revocation of a light regulation determination, the NCC must:
 - (a) proceed in accordance with the standard consultative procedure; and
 - (b) consult with the AER.
- (2) A decision on an application for revocation of a light regulation determination must:
 - (a) be in writing; and
 - (b) identify the light regulation determination; and
 - (c) identify the service provider and the covered pipeline; and
 - (d) describe the pipeline services affected by the decision; and
 - (e) state the terms of the decision and the reasons for it.

4.135 The Council's decision will identify the previous determination, the pipeline, the pipeline services to which the determination relates and the relevant service provider in accordance with r 39(2)(a) to (d). In compliance with r 39(2)(e), the decision will state whether the Council has decided to revoke the light regulation determination the subject of the application or decided not to revoke the determination and give the reasons for that decision.

When the revocation takes effect

4.136 In accordance with r 8(5), and subject to the NGL, a decision to revoke a light regulation determination made in accordance with r 8 takes effect on the date provided for its commencement under the terms of the decision or, if no date is provided, 10 business days after the date of the decision.

5 Greenfields Pipeline Incentives

5.1 Chapter 5 of the NGL provides for two different types of decisions which are designed to facilitate investment in new ('greenfields') pipeline projects:

- (a) 15-year no-coverage determinations, and
- (b) price regulation exemptions.

The first incentive is potentially available to all new pipeline projects whereas the latter is only available for new international pipelines which bring gas to Australia.

5.2 If a 15-year no-coverage determination is made, a pipeline cannot be covered or regulated until 15 years after commissioning of the pipeline. A price regulation exemption exempts an international pipeline from being price or revenue regulated for 15 years after commissioning, but other non-price regulatory requirements will apply.²⁹

Greenfields pipeline projects

5.3 A central concept for the availability of these exemptions is that of a 'greenfields pipeline project', which is defined (in s 149) as:

greenfields pipeline project means a project for the construction of—

- (a) a pipeline that is to be structurally separate from any existing pipeline (whether or not it is to traverse a route different from the route of an existing pipeline); or
- (b) a major extension to an existing pipeline that is not a covered pipeline; or
- (c) a major extension to a covered pipeline by means of which light regulation services are provided if that extension is exempted by the AER under section 19.

5.4 The concept captures a broad range of new pipeline investment but does not capture 'brownfields' expansions. In particular, it does not cover pipelines which are part of a covered pipeline because of the operation of the extension and expansion requirements in an access arrangement (paragraph (b)) or because of the operation of s 19 (paragraph (c)).

5.5 Extensions to covered pipelines need to be 'major' to qualify as a greenfields pipeline project.

5.6 Applicants for either form of greenfields incentive must establish that the relevant pipeline is a greenfields pipeline project.

²⁹ A person may still apply for coverage of a pipeline while it is subject to a 15-year no-coverage determination or price regulation exemption, however, such an application can be made only if the coverage sought in the application is to commence from, or after, the end of the [15 year] no-coverage or price regulation exemption period (ss 158(2) and 167(4)).

15-year no-coverage determinations

- 5.7 Applications for 15-year no-coverage determinations may be made in relation to all greenfields pipeline projects. Applications are made to the Council which then makes a recommendation to the relevant Minister.³⁰ The Council's recommendation must be either that the pipeline:
- (a) be exempt from being a covered pipeline for a period of 15 years, or
 - (b) not be exempt from being a covered pipeline for a period of 15 years (s 153(1)).
- 5.8 The Council's recommendation may recommend that only part of the pipeline be exempt from coverage (s 153(3)).
- 5.9 On receiving the Council's recommendation, the relevant Minister must decide whether or not to make a 15-year no-coverage determination (s 156(1)). The Minister may grant a 15-year no-coverage determination if satisfied that one or more of the coverage criteria will not be met for the 15 year period for which the no-coverage determination would apply.³¹

Key decision making criteria

- 5.10 Section 154 provides as follows:

154—Principles governing the making of a no-coverage recommendation

- (1) In making a no-coverage recommendation, the NCC—
 - (a) must give effect to the pipeline coverage criteria; and
 - (b) in deciding whether or not the pipeline coverage criteria are satisfied must have regard to the national gas objective.
- (2) The NCC gives effect to the pipeline coverage criteria as follows:
 - (a) if the NCC is satisfied that all the pipeline coverage criteria are satisfied in relation to the pipeline—the recommendation must be against making a 15-year no-coverage determination;
 - (b) if the NCC is not satisfied that all the pipeline coverage criteria are satisfied in relation to the pipeline—the recommendation must be in favour of making a 15-year no-coverage determination.

³⁰ The relevant Minister is the Commonwealth Minister for both cross-boundary transmission pipelines and transmission pipelines in New South Wales, Queensland, Victoria, Tasmania, Australian Capital Territory and Northern Territory and the local State Minister in all other circumstances. See also paragraphs 2.25-2.29.

³¹ See paragraphs 5.13-5.15 for further discussion of the time horizon for assessing the coverage criteria.

Giving effect to the pipeline coverage criteria

- 5.11 The test centres around whether or not the Council is satisfied that the pipeline coverage criteria in s 15 of the NGL are met. Where the Council is satisfied that one or more of the coverage criteria is not met, it must recommend that a 15-year no-coverage determination be made. It is only where the Council is satisfied that all the coverage criteria are met that it can recommend against the Minister making a 15-year no-coverage determination.
- 5.12 The application of the coverage criteria in relation to a 15-year no-coverage recommendation is the same as for coverage recommendations (s 97) and coverage revocation recommendations (s 105). Accordingly, the discussion in chapter 3 of this Guide applies to no-coverage determinations.

Time horizon for assessment

- 5.13 The effect of a no-coverage determination is that a pipeline is exempt from coverage for a period of 15 years from its commissioning (s 158(1)). It follows that in considering a no-coverage recommendation the Council will do so applying a 15 year time horizon.
- 5.14 Where the Council is satisfied that all four coverage criteria will be met for the 15 year period, the result is straightforward—the Council must recommend against a no-coverage determination. Similarly, where the Council is satisfied that at least one of the criteria will not be met for the 15 year period it must recommend in favour of the determination.
- 5.15 In some cases it is possible to envisage a range of circumstances occurring or changing during the 15 year period. Reaching a conclusion in these cases may be less straightforward. The Council will examine the impact various scenarios are likely to have on the relevant pipeline coverage criteria and look at the likelihood of various circumstances eventuating. The Council's recommendation will be made on the basis of the available information, having regard to the pipeline coverage criteria and the national gas objective.

Having regard to the national gas objective

- 5.16 Subsection 154(1)(b) provides that in deciding whether each criterion is satisfied, the Council must have regard to the national gas objective.³² The Council notes however that the coverage criteria are generally self-contained and explicit as to the relevant matters to be considered. This limits the need, or ability, for regard to the national gas objective to be determinative of whether a particular criterion is satisfied.
- 5.17 As noted by the Expert Panel, the national gas objective points to the need, when considering the coverage criteria, to examine and balance productive, allocative and dynamic efficiencies in the provision of pipeline services as well as in upstream and downstream markets—where competition is the key driver of welfare gains (Expert

³² See paragraphs 3.15-3.18.

Panel Report 2006, pp 31-58). The national gas objective reinforces the importance of the focus on the market power of the service provider in applying the coverage criteria and considering whether the ability for the pipeline to become a covered pipeline during its first 15 years is a means of mitigating that market power. The need for a 'long term' perspective is also a caution against focusing on short term benefits to consumers which undermine longer term investment and welfare gains.

- 5.18 The national gas objective does not operate in its own right as a basis for covering or not covering a pipeline, nor can it operate to override the plain meaning of the coverage criteria and the need for each criterion to be satisfied in order for a pipeline to be covered.

Price regulation exemptions

- 5.19 Price regulation exemptions are only available to international pipeline projects that will bring foreign gas to Australia.
- 5.20 The Council makes recommendations on an application for exemption and the decision is taken by the Commonwealth Minister based upon weighing the benefits to the public of granting the exemption against the detriments to the public of granting the exemption. This assessment is guided by the national gas objective.
- 5.21 A price regulation exemption means the pipeline will not be subjected to price or revenue regulation under the NGL for a period of 15 years from commissioning. Such pipelines are however subject to various other regulatory requirements (see Table 7).
- 5.22 The test for granting a price regulation exemption is broader than that for a 15-year no-coverage determination. As such, if an international pipeline project could qualify for a 15-year no-coverage determination it is also highly likely to be granted a price regulation exemption.³³
- 5.23 A 15-year no-coverage determination means that the service provider of the pipeline would be free of all regulatory oversight whereas, as noted above, a price regulation exemption still involves significant non-price regulatory oversight by the AER (see Table 7).

Table 7: Regulatory requirements for pipelines subject to price regulation exemptions

<p>Service providers of pipelines to which a price regulation exemption applies are subject to a number of obligations under the NGL and Rules. These include:</p> <ul style="list-style-type: none"> • they must publish on their website prices for the provision of pipeline services (s 166(a)) • they must have a limited access arrangement which provides for non-price aspects of access approved by the AER and publish it on the their website (ss 166(b) and 168)
--

³³ Of course an international pipeline project may qualify for a price regulation exemption without meeting the requirements for a no-coverage determination.

- they must publish a register of spare capacity on their website (s 166(b))
- they must provide information and reports on access negotiations (s 166(c))
- they must comply with the general obligations in Part 1 of Chapter 4 (except ss 132 and 136) (s 169(1)(a))
- they must comply with the ring-fencing obligations in Part 2 of Chapter 4 (s 169(1)(b))
- they must comply with the Rules relating to requests for access (s 169(2) and Part 11 of the Rules)
- they must not engage in price discrimination unless that discrimination is conducive to efficient service provision (s 170), and
- they are subject to the access dispute provisions on non-price matters (s 180).

- 5.24 Generally where an international pipeline is likely to qualify for a 15-year no-coverage determination and a price regulation exemption, a prospective applicant may elect to proceed by way of an application for a 15-year no-coverage determination.³⁴
- 5.25 In some circumstances a service provider who could qualify for a 15-year no-coverage determination may wish to first apply for a price regulation exemption because it could be determined in a shorter time period (see paragraph 5.59 below). The service provider would then have the option of applying for a 15-year no-coverage determination which would supersede the price regulation exemption (s 167(3)).³⁵
- 5.26 A price regulation exemption is ineffective unless an approved limited access arrangement is in force (s 167(2)).
- 5.27 The Commonwealth Minister, on application by the AER, may revoke a price regulation exemption if any of the conditions of the exemption is breached (see s 176 and Table 7).

Principles applying to granting a price regulation exemption

- 5.28 Where a person applies to the Council for a price regulation exemption, the Council must make a recommendation on whether or not a price regulation exemption

³⁴ Where a 15-year no-coverage application is unsuccessful in relation to an international pipeline, the applicant may request that the Minister treat the application as if it were an application for a price regulation exemption and where appropriate (with or without seeking a further recommendation from the Council) the Minister may grant such an exemption without further application (see paragraphs 5.65-5.66).

³⁵ Where a price regulation exemption is granted, an application for a 15-year no-coverage determination can be made at any point prior to the end of the exemption period. In such situations, the no-coverage period is limited to the remainder of the price regulation exemption period (see paragraph 5.67).

should be granted. The general principles applying to this recommendation are set out in s 163 as follows:

163—General principle governing NCC's recommendation

- (1) In making its recommendation on an application for a price regulation exemption, the NCC must weigh the benefits to the public of granting the exemption against the detriments to the public.
- (2) In doing so, the NCC—
 - (a) must have regard to the national gas objective with particular reference to—
 - (i) the implications of the exemption for relevant markets (including the effect on market power); and
 - (ii) other possible effects on the public interest; and
 - (b) may have regard to any other relevant matter.

5.29 In making its recommendation, the Council will focus on the effect of granting the price regulation exemption to the particular greenfields pipeline project, including the impact on public benefits and detriments compared to the effect of not granting the price regulation exemption.

5.30 Long term security of supply considerations are also a relevant consideration in the public benefits that may flow from an international pipeline project. This is also consistent with the national gas objective.

(a) National gas objective

5.31 The national gas objective emphasises that an economic efficiency focus needs to be a central part of the benefits and detriments being examined. Accordingly, productive, allocative and dynamic elements of efficiency are relevant to the granting of the exemption (see the discussion at paragraphs 5.16 to 5.18) .

(a)(i) Implications for the exemption on relevant markets

5.32 This requirement emphasises that the relevant markets to be served by the pipeline need to be examined and the potential for the abuse of market power in those markets explored. The national gas objective focuses the assessment of the market power of the service provider on efficiency considerations and the long term interests of consumers. The same considerations in defining relevant markets and assessing market power that are considered in applying the coverage criteria would apply to this factor. These are explored in chapter 3 of this Guide.

(a)(ii) Public interest

5.33 As with coverage, and matters under Part IIIA of the CCA, the Council considers the matters that may arise in respect of the public interest to be broad. Potential areas for consideration may include:

- (a) ecologically sustainable development
- (b) social welfare and equity considerations, including community service obligations
- (c) government legislation and policies relating to matters such as occupational health and safety, industrial relations, access and equity
- (d) economic and regional development, including employment and investment growth
- (e) the interests of consumers generally or of a class of consumers
- (f) the competitiveness of Australian businesses, and
- (g) the efficient allocation of resources.

5.34 By way of example, the following types of public interest benefits may relate to granting an exemption to a particular project and increase the likelihood that it will proceed:

- (a) it may bring natural gas to areas not previously served by natural gas
- (b) it may increase security of supply for existing markets by adding a new source of gas
- (c) it may increase competition in the downstream markets for the supply of natural gas
- (d) it may promote regional development
- (e) it may facilitate the expansion of industries and electricity generation facilities which rely on natural gas in the areas served by the pipeline
- (f) it may facilitate the investment in facilities which liquefy natural gas for export, and
- (g) the regulatory burden of price regulation would be avoided by the service provider and may be passed onto users of the pipeline.

5.35 Possible public interest detriments could include:

- (a) the risk that the pipeline may have market power in supplying particular markets and the service provider may have an incentive to take advantage of that market power
- (b) the risk that other sources of natural gas will decline in the 15 years of the exemption leaving the international pipeline with growing and substantial market power, and
- (c) the existing market power of a pipeline service provider may be increased where it will also be the service provider of the pipeline with the price regulation exemption.

5.36 In considering the extent of possible detriments the extent to which the obligations placed on a service provider with a price regulation exemption may mitigate the likelihood of the detriments eventuating or having a severe impact on the public interest need to be considered.

Procedural requirements of applications for 15-year no-coverage and price regulation exemption recommendations

Applications

5.37 The service provider of a greenfields pipeline project may apply to the Council for a 15-year no-coverage determination before a pipeline has been commissioned (s 151). If the greenfields pipeline project is for the construction of an international pipeline, a service provider may apply for a price regulation exemption (s 160). Additionally, a service provider with a price regulation exemption may also apply for a 15-year no-coverage determination during the period of their price regulation exemption for the duration of the period for which that exemption applies (s 151(2)(b)). In all cases the applications:

- (a) must be made to the Council
- (b) must include a description of the pipeline which meets the requirements specified in the Rules
- (c) must contain the information required by the Rules
- (d) need not describe excluded infrastructure,³⁶ and
- (e) must be accompanied by the fee prescribed in the Regulations.

5.38 The information and requirements for making applications for a no-coverage determination and a price regulation exemption are contained within rr 122 and 125.

5.39 The Regulations currently prescribe a fee of \$7,500 for an application for a 15-year no-coverage determination and also for a price regulation exemption application. The fee must be paid to the Council at the time an application is lodged with the Council. Intending applicants should contact the Council in relation to methods for paying the application fee.

5.40 Applications can be made to the Council by mailing a hard copy of the application and payment of the application fee to:

National Competition Council
GPO Box 250
Melbourne VIC 3001

and emailing an electronic copy of the application to:

gas@ncc.gov.au

Application requirements

5.41 The requirements for making applications for 15-year no-coverage determinations and price regulation exemptions are largely the same. This section will discuss the requirements together, noting the minor differences where they exist.

³⁶ Defined by r 120 as 'all tanks, reservoirs, machinery and equipment that form part of a pipeline'.

Pipeline description

5.42 This is provided for in ss 151(3) and 160(2) of the NGL. As discussed in the following section, should the pipeline as constructed differ materially from that described in the pipeline description, the greenfields pipeline incentive will not apply to the pipeline. While there is a limited opportunity to amend a pipeline description before the pipeline is commissioned, it is important that the pipeline description be as accurate as possible in the initial application. This will enable the market power issues with the pipeline project to be properly analysed.

5.43 The concept of a pipeline description is defined by r 121 as follows:

- (1) A pipeline description for a proposed transmission pipeline (including an international pipeline) for which a greenfields pipeline incentive is sought must contain the following information:
 - (a) the route of the pipeline; and
 - (b) the end points of the trunk of the pipeline (i.e. the points defining the extremities, where the trunk begins and ends); and
 - (c) if a lateral forms part of the pipeline – the point where the lateral interconnects with the trunk and the end point of the lateral; and
 - (d) the range of diameters for the principal pipes (including laterals).
- (2) A pipeline description for a proposed distribution pipeline for which a greenfields pipeline incentive is sought must contain the following information:
 - (a) the geographical area to be served by the pipeline; and
 - (b) the points at which natural gas is to be injected into the pipeline.

5.44 As should be noted from the above requirements, the 'pipeline description' is intended to be in general terms, such that a minor deviation in the route would not be seen as a variation of the pipeline description. Subsections 151(3)(d) and 160(2)(d) of the NGL also establish that it need not include details of excluded infrastructure (ie all tanks, reservoirs, machinery and equipment that form part of a pipeline).

5.45 For a transmission pipeline, the range of pipeline diameters should be disclosed. While precise diameters depend upon final demand, the range of potential diameters that are possible should be disclosed. For instance, it could be stated that the pipeline will have a diameter between 90-110 cm. Accordingly, if the pipeline as constructed had a diameter between 90 and 110 cm (say 98 cm) it would comply with its pipeline description and maintain its 15-year no-coverage determination or price regulation exemption. However, if it was built with a diameter outside of this range the incentive would lapse unless the pipeline description had been amended before the pipeline was commissioned in accordance with s 172 of the NGL. Applicants should resist including excessively broad ranges in applications as this may unnecessarily complicate the assessment.

Requirements of rules 122 and 125

5.46 An explanation of the requirements of rules 122 and 125 is set out in Table 8.

Table 8: Requirements of rules 122 and 125

Rule 122 requirements for an application for a 15-year no-coverage determination	Rule 125 requirements for an application for a price regulation exemption	Explanation
(a) name and contact details of the applicant	(a) name and contact details of the applicant	Identify the legal person who is seeking the greenfields pipeline incentive, the name of the contact person in respect of the application and relevant contact details (including mailing address, phone numbers and email).
(b) a short description sufficient to identify the pipeline and its route together with a website address at which a map of the route, and a description, of the pipeline can be inspected	(b) a short description sufficient to identify the international pipeline and its route together with a website address at which a map of the route, and a description, of the pipeline can be inspected	Describe where the pipeline will be constructed. There also needs to be a link to a website where a map of the pipeline route and its description can be inspected. This should be drafted to allow parties to clearly understand competition issues with the pipeline. Detailed network diagrams and street by street analysis of a distribution network are not required.
(c) a statement of the basis on which the project for the construction of the pipeline is to be regarded as a greenfields pipeline project	(c) a statement of the basis on which the project for the construction of the pipeline is to be regarded as a greenfields pipeline project	The application should set out how the project is a greenfields pipeline project. The applicant should also ensure that the pipeline will be a 'pipeline' within the meaning of s 2 of the NGL.

Rule 122 requirements for an application for a 15-year no-coverage determination	Rule 125 requirements for an application for a price regulation exemption	Explanation
(d) a statement of expenditure already made on the construction of the pipeline and an estimate of the expenditure yet to be made together with a statement of the basis on which the estimate has been made	(d) a statement of the amount already expended on the construction of the pipeline and an estimate of the expenditure yet to be made together with a statement of the basis of the estimate	<p>The application should state the overall costs of the pipeline project. If regulated under the NGL, these costs would be the key inputs to the calculation of the pipeline's capital base which is a central determinant of reference tariffs. Costs are also relevant to the ability for others to duplicate the project and the efficiency of such duplication.</p> <p>Applicants may note that the wording of r 125(1)(d) differs slightly from r 122(1)(d) but the intended effect is the same.</p>
(e) an estimate of the pipeline's capacity and an estimate of the extent to which the pipeline's capacity is likely to be utilised by the applicant or associates of the applicant	(e) an estimate of the pipeline's capacity and an estimate of the extent to which the pipeline's capacity is likely to be utilised by the applicant or associates of the applicant	<p>This requirement primarily relates to the maximum capacity of pipeline throughput on the central parts of the pipeline (rather than every receipt point) and the manner in which that capacity is likely to be used. There is also a particular focus upon the applicant's own use of the pipeline and its associate's use of the pipeline.</p> <p>Where pipeline usage is likely to be relatively stable and just varies with the seasons, average projected usage in summer and winter may be sufficient. Where pipeline usage is more variable and demonstrates peaks, some discussion of the usage in those peak periods may be necessary. The information should be focused upon capacity which prospective users are likely to seek access to. Applicants are also advised to provide information about the extent to which the capacity of the pipeline could be extended or expanded to accommodate prospective users and the potential costs of such extensions and expansions.</p>

Rule 122 requirements for an application for a 15-year no-coverage determination	Rule 125 requirements for an application for a price regulation exemption	Explanation
(f) a statement of the services to be provided by means of the proposed pipeline	(f) a statement of the services to be provided by means of the proposed pipeline	This requirement can be satisfied by setting out the basic parameters of each pipeline service to be provided by means of the pipeline, including any services which differ depending on the location of the user's receipt or delivery points and other specialised services for particular users which are being or are to be provided. The understanding of each of the services provided is essential to weighing up the market power associated with the basket of services being provided. The applicant should describe each service in sufficient detail for the Council to analyse the consequences of applying the access regime to these services.
(g) a statement of the locations to be served by the proposed pipeline and, in relation to each downstream location, a statement of other sources of natural gas available at the relevant location	(g) a statement of the locations to be served by the proposed pipeline and, in relation to each downstream location, a statement of other sources of natural gas available at the relevant location	<p>The application should set out clearly the locations where natural gas is being delivered (either to users or other pipelines). The application needs to outline the other sources of natural gas that are available at those locations. This may be delivered through other pipelines or generally available at those locations (such as gas storage facilities or gas production facilities directly linked to the location). The applicant should set out which of those sources are currently delivering gas to the locations and which would be able to deliver gas to the location in the future.</p> <p>An applicant may also wish to outline substitution possibilities for the consumers of gas served by the pipeline. Some idea of whether particular large users have dual fuel capabilities will be important as will other potential bypass opportunities. The nature of consumers' usages, such as the reliance of end users on gas for heating, may be relevant to fully understanding the extent to which the other sources of energy are a realistic option for those consumers.</p>

Rule 122 requirements for an application for a 15-year no-coverage determination	Rule 125 requirements for an application for a price regulation exemption	Explanation
(h) a statement of any existing pipelines, and any proposed pipelines of which the applicant is aware, that serve (or will serve) any of the same locations or that pass (or will pass) within 100 km of any of the same locations	(h) a statement of any existing pipelines, and any proposed pipelines of which the applicant is aware, that serve (or will serve) any of the same locations or that pass (or will pass) within 100 km of any of the same locations	The purpose of this is to examine potential competition from those pipelines and the effect such competition may have on the market power of the pipeline project.
(i) an estimate of the reserves of natural gas available at any upstream location to be served by the pipeline and an estimate of the rate of production from that location	(i) an estimate of the reserves of natural gas available at any upstream location to be served by the pipeline and an estimate of the rate of production from that location	This would best be presented with respect to the point at which gas is intended to be, or could be, injected into the pipeline. Accordingly, if several fields are served by a single production facility which will inject gas into the pipeline, the aggregate reserves of those fields and the daily production capacity of the production facility would be sufficient.

Rule 122 requirements for an application for a 15-year no-coverage determination	Rule 125 requirements for an application for a price regulation exemption	Explanation
(j) an estimate of expected demand at each downstream location to be served by the pipeline including for each location a description of the expected customer base and an indication of the revenue expected from each location	(j) an estimate of expected demand at each downstream location to be served by the pipeline including for each location a description of the expected customer base and an indication of the revenue expected from each location	The application should set out the demand at each downstream location for the pipeline and what customers are likely to make up this demand. This will be used to assess market power associated with the pipeline, including the potential countervailing power of the users of the pipeline. A general indication of potential revenue from each location is required. Where a location consists of only one user the Council understands that the revenue figures would be likely to include confidential information pertaining to that user. Where this is the case, the information should be clearly labelled as confidential so that the Council can protect that information in accordance with ss 90(1) and 331 of the NGL.
(k) the identity of all parties with an interest in the proposed pipeline and the nature and extent of each interest	(k) the identity of all parties with an interest in the proposed pipeline and the nature and extent of each interest	This requirement relates to the structure of each pipeline service provider for the pipeline project and other persons with an interest in the pipeline project, such as ownership interests in a service provider. As a matter of practicality, where the shares of a pipeline service provider are held by a large number of individuals an appropriate threshold will need to be found for those with 'an interest' relevant to the analysis and those which are irrelevant for the analysis. At the very least, parties with a (direct or indirect) shareholding of five per cent or more of a service provider should be identified. The need to explain the interests involved may differ depending upon the ability of the person to exercise control over the operation of the pipeline or profit from any exercise of market power in either the provision of pipeline services or associated upstream or downstream markets.

Rule 122 requirements for an application for a 15-year no-coverage determination	Rule 125 requirements for an application for a price regulation exemption	Explanation
<p>(I) a description of the following relationships:</p> <p>(i) any relationship between the owner, operator and controller of the pipeline (or any 2 of them)</p> <p>(ii) any relationship between the owner, operator or controller of the pipeline and a user of pipeline services or a supplier or consumer of gas in any of the locations served by the pipeline</p> <p>(iii) any relationship between the owner, operator or controller³⁷ of the pipeline and the owner, operator or controller of any other pipeline serving any one or more of the same locations</p>	<p>(I) a description of the following relationships:</p> <p>(i) the relationship between the owner or operator (or proposed operator) of the pipeline</p> <p>(ii) any relationship between the owner or operator (or proposed operator) of the pipeline and a user of pipeline services or a supplier or consumer of gas in any of the locations served by the pipeline</p> <p>(iii) any relationship between the owner or operator (or proposed operator) of the pipeline and the owner, operator of any other pipeline serving any one or more of the same locations</p>	<p>This requirement focuses on the relationship between various service providers of a pipeline, users in upstream and downstream markets and other pipelines which may potentially compete with the pipeline. To establish that any of these relationships are unlikely to produce anti-competitive effects or an abuse of market power, an applicant should set out what measures have been put in place to mitigate the likelihood of that occurring.</p>

³⁷

The provisions in r 125(1)(I) for applications for price regulation exemptions differ from these in that 'controllers' are not referred to. This appears to be the result

Rule 122 requirements for an application for a 15-year no-coverage determination	Rule 125 requirements for an application for a price regulation exemption	Explanation
(m) a statement of whether it would be feasible to expand the capacity of the pipeline and, if so, an explanation of how the capacity might be expanded and an estimate of the cost	[no equivalent provision]	<p>The context here concerns providing access to prospective users of the pipeline. The ability to utilise cheaper capacity expansions (such as compression as opposed to more expensive looping) is relevant to a pipeline's market power and likelihood of access being granted in the future.</p> <p>It is noted that this requirement does not appear in r 125(1) in respect of applications for a price regulation exemption but the Council considers this information is likely to be relevant to the granting of an exemption. Accordingly, applicants are encouraged to include this in their applications, rather than waiting for a subsequent request from the Council.</p>
(n) an estimate of the annual cost to the service provider of regulation	(m) an estimate of the annual cost to the service provider of regulation (assuming regulation on the basis of a full access arrangement)	<p>This requirement is designed to allow the Council to clearly understand the differential costs involved in regulation under the NGL to assist in applying the public interest criterion of the coverage criteria and price regulation exemption criteria. To make the cost estimate meaningful, a breakdown on how it was arrived at (including relevant assumptions, such as the level of access disputes or cost of access arrangement approvals) and what constitutes the annual cost will be essential. The analysis and substantiation of the various transaction costs involved in each regulatory approach will be an important factor for the decision making process.³⁸</p>

of earlier drafts of the NGL where controllers were not listed as service providers. In terms of the competition issues involved, the Council would be interested in any relationships involving controllers of a pipeline who are not operators or owners in respect of price regulation exemptions and applicants would be advised to include this information in their applications even though not specifically required by r 125(1)(l).

³⁸ Applicants for a price regulation exemption should base these estimates on the costs of full access arrangement regulation (noting that there are some similarities in the costs of regulation for light regulation and in the costs associated with the requirements for pipelines with a price regulation exemption).

Rule 122 requirements for an application for a 15-year no-coverage determination	Rule 125 requirements for an application for a price regulation exemption	Explanation
(o) any other information the applicant considers relevant, in the circumstances of the present case, to the application of the National Gas Objective or the pipeline coverage criteria	(n) any other information the applicant considers relevant, in the circumstances of the present case, to the application of the National Gas Objective or the criteria governing the making of a price regulation exemption	This allows the applicant to bring forward other relevant material to assist the consideration of the criteria in light of the national gas objective. The applicant should ensure that the application as a whole contains all relevant information to the application of the statutory test and has not failed to disclose information which it considers material but unhelpful to its application. This may include information about significant developments which the applicant knows are likely to occur, such as a change in ownership of the pipeline project in question or other pipelines in the area.
(p) any other information or materials on which the applicant relies in support of its application	(o) any other information or materials on which the applicant relies in support of its application	<p>The applicant should submit to the Council the key factual and evidential materials which are necessary to support the claims presented in relation to the criteria and rebut potential arguments against its application. This may include confidential information. Applicants are reminded that all confidential information must be clearly identified.</p> <p>The more relevant the information about the pipeline project and markets in question that can be presented with the application, the quicker and more efficiently the Council can deal with the application. The Council does not have information gathering powers to compel information and so relies on affected persons to present the necessary evidence to establish their position. As the Council and relevant Minister need to be satisfied that one or more of the coverage criteria are not met to recommend and grant a 15-year no-coverage determination, a lack of essential information may mean that the Council and relevant Minister are unable to be satisfied on the information provided. Similarly, a number of matters need to be adequately considered in granting a price regulation exemption and weighing up the public benefits and detriments of such an exemption. Additionally, the restrictions on new information in merits review (s 261 of the NGL) mean that information which may have been able to satisfy the Council or relevant Minister cannot subsequently be used to make out a ground of review.</p>

Estimates and supporting facts and assumptions

5.47 Rules 122(2) and 125(2) require that '[i]nformation in the nature of an estimate must be supplemented by a statement of the facts and assumptions on which the estimate is based.' Accordingly, applicants need to disclose appropriate facts and assumptions where an application relies on an estimate. This will allow the Council to test the relevant facts and assumptions and determine the likelihood that the estimate will reflect what has or will take place.

Pipeline classification

5.48 As a greenfields pipeline project will not have been formally classified, the Council must classify the pipeline when making a no-coverage recommendation (see s 155 of the NGL). Accordingly applicants should set out their reasoning as to how a pipeline should be classified and, if the pipeline is a cross-boundary distribution pipeline, identify which jurisdiction the pipeline is most closely connected with in accordance with the jurisdictional determination criteria (s 14 of the NGL). These requirements are discussed in chapter 2 of this Guide.

The Council's process

5.49 The Council is required to deal with applications in accordance with the Rules (ss 152 and 161). The requirements in relation to dealing with 15-year no-coverage and price regulation exemption applications can be found in rr 123 and 126 respectively.

15-year no-coverage recommendations

5.50 Section 153 governs the no-coverage recommendations as follows:³⁹

153—No-coverage recommendation

- (1) The NCC must recommend to the relevant Minister that the pipeline the subject of the application—
 - (a) be exempted from being a covered pipeline for a period of 15 years; or
 - (b) not be exempted from being a covered pipeline for a period of 15 years.
- (2) A recommendation under this section must—
 - (a) be made in accordance with this Law and the Rules; and
 - (b) be made within the time specified by the Rules; and
 - (c) contain the information required by the Rules; and
 - (d) be given to the persons specified by the Rules; and
 - (e) be made publicly available in accordance with the Rules.

³⁹ This is equivalent to coverage recommendations in s 95 of the NGL.

- (3) A recommendation under this section may recommend an outcome different from the outcome sought in the application under section 151.

Example—

An applicant may apply for a 15-year no-coverage determination in relation to the whole pipeline. The NCC may recommend that only a part of the pipeline the subject of the application be subject to a 15-year no-coverage determination.

- (4) A recommendation under this section must be delivered to the relevant Minister without delay.

Price regulation exemptions

5.51 Section 162 sets out equivalent provisions for recommendations about price regulation exemptions as follows:

162—NCC's recommendation

- (1) The NCC must make a recommendation to the Commonwealth Minister as to whether the Minister should grant a price regulation exemption for the pipeline the subject of the application.
- (2) A recommendation under this section must—
- (a) be made in accordance with this Law and the Rules; and
 - (b) be made within the time specified by the Rules; and
 - (c) contain the information required by the Rules; and
 - (d) be given to the persons specified by the Rules; and
 - (e) be made publicly available in accordance with the Rules.
- (3) A recommendation under this section must be delivered to the Commonwealth Minister without delay.

More or less of the pipeline

5.52 The NGL provides that the Council may make a 15-year no-coverage recommendation (and the relevant Minister a 15-year no-coverage determination) that differs from the outcome sought in an application. In particular, it may be recommended (or decided) that only part of a pipeline receive a 15-year no-coverage determination leaving the rest of the pipeline subject to potential coverage applications. This principle is discussed earlier in this Guide in relation to coverage. However, for price regulation exemptions the decision must relate only to the pipeline project as described in an application and there is no power to apply the exemption to only part of the pipeline.

Process for applications for a no-coverage recommendation

- 5.53 Rule 123(1) provides that an application for a no-coverage recommendation must be dealt with in accordance with the standard consultative procedure (see paragraph 6.7).
- 5.54 Subrule 123(2) provides that a no-coverage recommendation is to be made within four months of receiving the application. However, this period needs to be understood in the context of determining time under the NGL (see paragraphs 6.19-6.25).
- 5.55 The Council's recommendation must be given to the relevant Minister without delay (s 153(4)). The relevant Minister is then required to use his or her best endeavours to make a final decision within 30 business days (see s 156(2)).

Process for applications for a price regulation exemption

- 5.56 The process for dealing with applications for a price regulation exemption is intended to be quicker than that involved in making a no-coverage recommendation. It is governed by rr 126 and 127 which are discussed below.
- 5.57 Subrule 126(1) requires that the Council on receiving an application for a price regulation exemption must:
- (a) notify the Commonwealth Minister of the application, and
 - (b) publish notice of the application on its website and in a newspaper circulating generally throughout Australia.
- 5.58 In accordance with r 126(2) this notice must:
- (a) state the nature of the application, and
 - (b) identify the international pipeline to which the application relates, and
 - (c) include a reference to a website at which a description of the pipeline can be inspected, and
 - (d) invite submissions and comments within a specified period from the date of the notice.
- 5.59 The Council is required to make its recommendation to the Commonwealth Minister within 30 business days after receiving an application (r 127(1)). This time limit cannot be extended (r 127(2)). Accordingly, the Council's process will not include the release of a draft recommendation. All stakeholders will, therefore, need to submit their responses to the Council's invitation for submissions in the period following the Council publication of receipt of the application.
- 5.60 The Council envisages allowing around 15 business days for submissions on an application. In accordance with r 11(1)(c), the Council may treat this period of time as a 'stop the clock' period which is not counted in the 30 day time limit. If the Council does so, it will notify the applicant and publish this fact on its website in accordance with r 11(2).

- 5.61 Applicants should also be aware that the powers relating to rejecting non-compliant or frivolous proposals in r 10 (see paragraphs 6.11-6.13) apply to applications for price regulation exemptions.
- 5.62 A recommendation relating to a price regulation exemption must:
- (a) be in writing, and
 - (b) identify the pipeline to which the recommendation relates, and
 - (c) include a reference to a website at which a description of the pipeline can be inspected, and
 - (d) state the terms of the recommendation and the reasons for it (r 127(3)).
- 5.63 As soon as practicable after delivering the recommendation to the Commonwealth Minister, the Council must:
- (a) give copies of the recommendation to the:
 - (i) applicant
 - (ii) AEMC
 - (iii) AER, and
 - (b) publish the recommendation on the Council's website, and
 - (c) make copies of the recommendation available for inspection at the office of the Council during business hours (r 127(4)).
- 5.64 The general provisions regarding late decisions also operate (see paragraphs 6.24-6.25).

Where a 15-year no-coverage determination is not granted for an international pipeline

- 5.65 There is a special provision for the situation where a service provider for a proposed international pipeline has applied for and been rejected for a 15-year no-coverage determination. In this circumstance s 159 provides as follows:

159—Consequences of Minister deciding against making 15-year no coverage determination for international pipeline

- (1) If—
 - (a) the Commonwealth Minister decides against making a 15-year no coverage determination for an international pipeline; and
 - (b) the applicant asks the Commonwealth Minister to treat the application as an application for a price regulation exemption,
 the Commonwealth Minister may treat the application as an application for a price regulation exemption under Chapter 5 Part 3.
- (2) If the Commonwealth Minister decides to treat an application for a 15-year no-coverage determination as an application for a price regulation exemption, the Commonwealth Minister may—

- | |
|--|
| <ul style="list-style-type: none">(a) refer the application to the NCC for a recommendation under Chapter 5 Part 3; or(b) proceed to determine the application without a recommendation under Chapter 5 Part 3. |
|--|

5.66 Accordingly, where requested by the service provider, the Commonwealth Minister has the discretion to decide whether to make a price regulation exemption without advice from the Council or refer the matter back to the Council for advice as a price regulation exemption application. Where the matter is referred back to the Council for advice the Council will apply the rules for making a recommendation on whether or not to grant a price regulation exemption.

Applications for a 15-year no-coverage determination by a service provider with a price regulation exemption

5.67 Subsection 151(2) of the NGL allows a service provider who has been granted a price regulation exemption to apply for a 15-year no-coverage determination up to the point at which the price regulation exemption is due to end. Such applications need to meet the ordinary form and process requirements specified above. If granted, in this situation, a 15-year no-coverage determination will only apply for the balance of the period for which the price regulation exemption would otherwise have been in force (s 167(3)).

Modification and termination

Conformity of the pipeline description and pipeline as constructed

5.68 Part 4 of Chapter 5, and s 171 in particular, outlines the central requirement for conformity between the pipeline description provided as part of the application and the pipeline which is actually constructed. A pipeline description is further defined by r 121. Should the pipeline as constructed differ materially from that described in the pipeline description, the greenfields pipeline incentive will not apply to the pipeline.

5.69 In determining conformity with the pipeline description, excluded infrastructure is not to be taken into account. Rule 120 defines excluded infrastructure to be 'all tanks, reservoirs, machinery and equipment that form part of a pipeline'.

Amending a pipeline description

5.70 To reflect the realities that pipeline projects may be modified while they are being built, s 172 of the NGL allows a pipeline description to be amended before the pipeline is commissioned. Commissioning is defined by s 12 of the NGL as the point at which the pipeline is 'first used for the haulage of natural gas, on a commercial basis'.

5.71 Applications can be made by a service provider to the relevant Minister to amend the pipeline description prior to the commissioning of the pipeline. These applications can be referred to the Council for advice in all cases and must be referred in cases where there is a substantial change to the pipeline description (subsection 172(3)).

The Council's advice must have regard to the relevant criteria for granting the 15-year no-coverage determination or price regulation exemption (subsection 172(4)). The relevant Minister must also have regard to those criteria and the Council's advice in making a decision on whether to allow the pipeline description amendment sought (subsection 172(5)).

Early termination of greenfields pipeline incentives

- 5.72 Generally a service provider has three years to commission the pipeline after the greenfields pipeline incentive was granted. By regulation this date can be extended in a particular case. The regulations required to do so need the unanimous agreement of the SCER (see s 173 of the NGL).

Revocation

- 5.73 Under s 174, a service provider can ask the relevant Minister to revoke a greenfields pipeline incentive.
- 5.74 Section 175 provides that the AER may apply to the relevant Minister to revoke the greenfields pipeline incentive on the ground that:
- (a) the applicant misrepresented a material fact on the basis of which the application was granted, or
 - (b) the applicant failed to disclose material information that the applicant was required to disclose under Chapter 5 of the NGL.
- 5.75 Section 176 allows the Commonwealth Minister to terminate a price regulation exemption on the application of the AER where a condition on which the exemption has been granted has been breached. These conditions are outlined in s 166 to include the publication of prices for pipeline services, the publication on its website of the service provider's limited access arrangement and register of spare capacity and the provision of information to the AER and the Commonwealth Minister on access negotiations.
- 5.76 Section 177 provides that the list of termination circumstances in Part 5 of Chapter 5 of the NGL is intended to be exhaustive.

6 Processes and other matters regarding applications made to the Council under the NGL

‘Pipelines’ for the purposes of the NGL

- 6.1 The NGL applies to pipelines for the haulage of natural gas which is of consumption quality. This is because pipeline is defined in s 2 of the NGL as follows:

pipeline means—

- (a) a pipe or system of pipes for the haulage of natural gas, and any tanks, reservoirs, machinery or equipment directly attached to that pipe or system of pipes; or
- (b) a proposed pipe or system of pipes for the haulage of natural gas, and any proposed tanks, reservoirs, machinery or equipment proposed to be directly attached to the proposed pipe or system of pipes; or
- (c) a part of a pipe or system of pipes or proposed pipe or system of pipes referred to in paragraph (a) or (b),

but does not include—

- (d) unless paragraph (e) applies, anything upstream of a prescribed exit flange on a pipeline conveying natural gas from a prescribed gas processing plant; or
- (e) if a connection point upstream of an exit flange on such a pipeline is prescribed, anything upstream of that point; or
- (f) a gathering system operated as part of an upstream producing operation; or
- (g) any tanks, reservoirs, machinery or equipment used to remove or add components to or change natural gas (other than odourisation facilities) such as a gas processing plant; or
- (h) anything downstream of a point on a pipeline from which a person takes natural gas for consumption purposes;

- 6.2 Natural gas is defined in s 2 as:

natural gas means a substance that—

- (a) is in a gaseous state at standard temperature and pressure; and
- (b) consists of naturally occurring hydrocarbons, or a naturally occurring mixture of hydrocarbons and non-hydrocarbons, the principal constituent of which is methane; and
- (c) is suitable for consumption;

- 6.3 From these definitions it is clear that 'wet'/unprocessed gas pipelines, processing facilities, upstream gathering lines and pipes downstream of an end user's connection point are not included in the definition of a 'pipeline' and accordingly cannot be 'covered' by the NGL. However, the definition of 'consumption' quality gas would

include gas that is fit to be consumed by industrial facilities but does not meet specifications for residential use.⁴⁰

- 6.4 'Proposed' pipelines are covered by paragraph (b) and the wording in paragraph (c). This means that applications for coverage can be made in respect of pipeline projects which are proposed and not yet in existence.
- 6.5 Additionally, s 6A of the *National Gas Access (WA) Act 2009* allows the Western Australian law to extend to LPG distribution systems as well as natural gas.

Procedures for the Council in considering applications under the NGL – the standard consultative procedure and the expedited consultative procedure

- 6.6 The Council must deal with matters before it according to the standard consultative procedure or the expedited consultative procedure, as prescribed in the NGL and the Rules.

Standard consultative procedure

- 6.7 Rule 8 prescribes the standard consultative procedure as follows:

- (2) The decision maker must proceed as follows:
- (a) the decision maker must publish a notice on its website and in a newspaper circulating generally throughout Australia:
 - (i) describing the proposal and giving the address of a website at which the proposal can be inspected; and
 - (ii) inviting written submissions on the proposal within 15 business days of the date of the notice; and
 - (b) the decision maker must, after considering relevant submissions made within the time allowed in the notice and other matters the decision maker considers relevant, make a draft decision; and
 - (c) if the draft decision identifies changes to the proposal that should, in the decision maker's opinion, be made, the decision maker must:
 - (i) ...
 - (ii) if someone else is the proponent – notify the proponent of the decision and the reasons for it and give the proponent a reasonable opportunity to modify its proposal in the light of the decision;
 - (d) the decision maker must then publish, on its website and in any other way the decision maker considers appropriate:

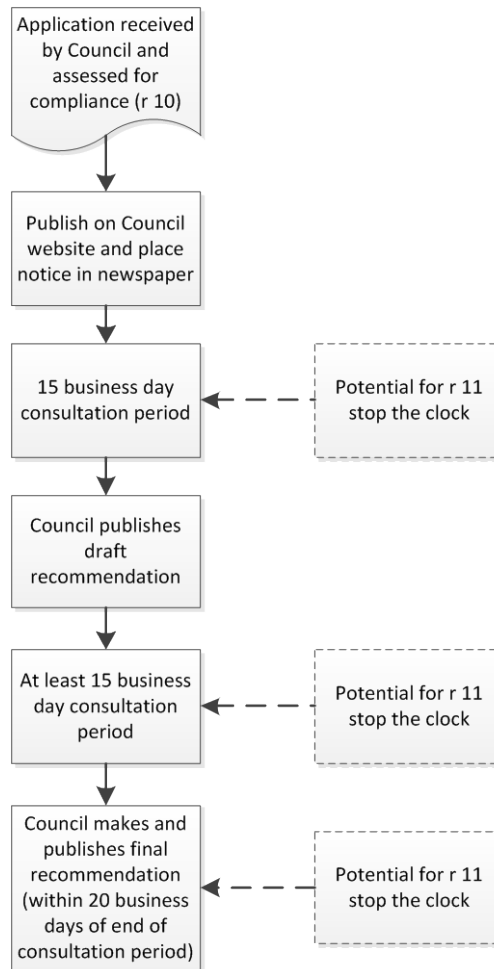
⁴⁰ Reading the word 'consumption' down to only include residential quality gas would narrow the application of the legislation in a manner inconsistent with its objective.

- (i) the draft decision; and
 - (ii) any modification of the proposal made in the light of the draft decision; and
 - (iii) a notice inviting written submissions and comments on the draft decision, and (if applicable) the modified proposal, within a period (at least 15 business days) stated in the notice;
 - (e) the decision maker must, within 20 business days after the end of the period allowed for making submissions and comments on the draft decision, consider all submissions and comments made within the time allowed and make its final decision.
- (3) A draft or final decision must:
- (a) be in writing; and
 - (b) state the terms of the decision and the reasons for it.
- (4) After making a final decision, the decision maker must, without delay:
- (a) if the decision is in the nature of a recommendation – deliver the final decision to the authority or person to whom the recommendation is addressed; and
 - (b) give copies of the final decision to the parties to the administrative process in which the decision is made; and
 - (c) publish the final decision on the decision maker's website; and
 - (d) make the final decision available for inspection during business hours at the decision maker's public offices.

6.8 The standard consultative procedure under rule 8 is illustrated in Figure 4.

6.9 In respect of public consultation on the Council's draft recommendation (or draft decision, as the case may be), once that draft has been published on the Council's website, the Council must specify a public consultation period in a notice on its website. That period must be at least 15 business days (r 8(2)(d)(iii)). The Council considers that 15 business days would ordinarily be long enough. In circumstances where the decision raises particularly difficult or complex issues additional time may be allowed.

Figure 4: Standard consultative procedure



Expedited consultative procedure

6.10 The expedited consultative procedure is in r 9 and provides –

- (2)(a) the [Council] must, after such consultation (if any) as the decision maker considers appropriate (and any revision of the proposal that results from that consultation), make a draft decision, and
- (b) the [Council] must give copies of the draft decision to the parties to the administrative process in which the decision is to be made, and
- (c) the [Council] must publish, on its website and in any other way the decision maker considers appropriate, the draft decision together with a notice:
 - (i) stating why the decision is required, and
 - (ii) giving reasonable details of the context in which the draft decision has been made, the issues involved and the possible effects of the decision, and
 - (iii) inviting written submissions and comments on the draft decision within 15 business days from the date of the notice;

- (d) the [Council] must, within 20 business days after the end of the period allowed for making submissions and comments on the draft decision, consider all submissions and comments made within the time allowed and make its final decision.

Applications that do not comply with the Rules or the Law

6.11 The Council is not obliged to consider an application that has not been made in accordance with the Rules and has the power to reject non-compliant or frivolous proposals under r 10. That rule provides that the Council may, despite any other provision of the Rules, reject a ‘proposal’⁴¹ on the ground that:

- (a) it has not been made in accordance with the Law, or
- (b) relevant information or materials have not been provided as required by the Law, or
- (c) the proposal is frivolous or vexatious.

6.12 An application received by the Council that does not comply with the specific requirements outlined below, will mean that that particular application has not been made 'be in accordance with the Rules':

- (a) for coverage and revocation of coverage – an application that does not contain the information set out in rr 15 or 18 will not comply with the requirements in ss 92(2) and 102(2) of the NGL
- (b) for a light regulation determination – an application that does not contain the information set out in r 34 will not comply with the requirements of s 112(2) of the NGL
- (c) for revocation of a light regulation determination - an application that does not contain the information set out in r 38 will not comply with the requirements in s 118(2) of the NGL
- (d) for a no-coverage determination or price regulation exemption – an application that does not contain the information set out in rr 122 or 125 will not comply with the requirements in ss 153(2) and 162(2) of the NGL, and therefore in each case will not ‘be in accordance with the Rules’.

6.13 A decision to reject a proposal under r 10 must be made within 10 business days after receipt of the proposal by the decision maker, and the decision must also:

- (a) be made in writing, and
 - (b) set out the reasons for the decision, and
 - (c) be given to the proponent without delay
- (see rr 10(2) and (3)).

⁴¹ A ‘proposal’ for the purposes of r 10 means: (a) an application; or (b) an access arrangement proposal; or (c) a proposal that a decision maker itself initiates for making a decision of a particular kind under the NGL (see r 7).

Providing information to the Council

Confidential information

- 6.14 In making applications and submissions to the Council, it may occasionally be necessary to provide confidential information. It would be unlikely for a situation to arise where a party could claim confidentiality over an application or submission in its entirety, but some specific commercially valuable information may need to be withheld. Applicants and submitting parties must clearly identify the confidential information at the time it is provided to the Council and outline why it considers the material is confidential. Assuming the Council decides the material is confidential, the Council is obliged to keep such information confidential in accordance with ss 90 and 331 of the NGL.
- 6.15 Applications or submissions containing confidential information must have the confidential sections clearly identified and marked 'confidential'. A second copy of the application or submission with all the confidential material removed and identifying or marking where this information has been redacted should also be provided to the Council. The Council will publish this 'non-confidential' or public version on its website.
- 6.16 The Council's processes are open and transparent and as such the Council expects confidentiality claims to be kept to a minimum. The Council may give less weight to information that it is unable to test through a public process. Where issues of confidentiality do arise, the Council anticipates that the material should still be capable of examination via the Council's public consultation processes by disclosing, for example a range of figures rather than the actual numbers themselves.
- 6.17 In undertaking its consideration of an application, it may be necessary for confidential information to be shared between the AER, ERA and Council to ensure that a proper consideration of all the issues is undertaken. This is possible under ss 30 and 90 of the NGL and s 44AAF of the CCA.

False or misleading information

- 6.18 Persons submitting information to the Council should note that the giving of false or misleading information is a serious offence. In particular, s 137.1 of the Commonwealth Criminal Code makes it a criminal offence for a person to supply information to a Commonwealth entity knowing that the information is false or misleading in a material particular or omitting any matter or thing without which the information is misleading in a material particular.

Time limits, calculating time and extensions

- 6.19 Recommendations and determinations by the Council under the NGL are subject to time limits. While time limits are prescribed, time needs to be understood in the context of the following.

Calculating time

6.20 Rule 11 allows a decision maker, when calculating elapsed time (such as the four months provided for in rr 16(2), 19(2), 123(2) and s 114 of the NGL), to disregard any of the following periods:

- (a) any period allowed the proponent for correction or revision of the proposal
- (b) any period taken by the proponent or any other person to provide information, relevant to the decision maker's decision on the proposal, in response to a notice or requirement issued or made by the decision maker under the NGL
- (c) any period allowed for public submissions on the proposal or on a draft decision on the proposal
- (d) any period allowed for submissions on a proposal by the AER to disclose confidential information, any period then taken by the AER to consider the submissions and decide whether to disclose the information, and any period occupied by a review of the decision, and
- (e) the period between commencement and conclusion of court proceedings to determine questions arising from the proposal or the decision maker's handling of the proposal.

6.21 Where the Council makes a decision under r 11 to disregard a particular period, the Council must give notice of that decision to the proponent and must also publish notice of the decision on its website (see r 11(2)).

Extending time limits

6.22 Under r 12(1) the Council has the power to extend time limits, such as the four months in which it is generally required to make a recommendation. However, under r 12(2) the power to extend the four month time limit can only be exercised if:

- (a) the proposal involves questions of unusual complexity or difficulty, or
- (b) the extension of time has become necessary because of circumstances beyond the Council's control.

6.23 If the Council decides to extend this four month time limit, it must give notice of the extension to the proponent giving reasons for the extension. Additionally, it must publish notice of the extension (and reasons) on its website and in a newspaper circulating generally throughout Australia (see rr 12(3) and (4)). Limits exist. For example, in relation to no-coverage recommendations, the four month time limit cannot be extended by more than 2 months (r 123(3)).

Decisions made out of time

6.24 Rule 14 operates so that where the Council fails to make a decision within 'an overall time limit', it must report on its failure to the MCE. An 'overall time limit' is defined in r 7 to mean 'the time within which a decision maker is required by the Law to make a final decision on a proposal'. This would include, therefore, any decision by the

Council to 'stop the clock' pursuant to r 11 or any extensions made to a time limit under r 12.

- 6.25 Non-compliance with a time limit does not, however, invalidate a decision made by the Council (see s 332).

Merits review

- 6.26 Merits review is available under Part 5 of Chapter 8 of the NGL for reviewable regulatory decisions, including:

- (a) a coverage determination, or a decision not to make a coverage determination
- (b) a coverage revocation determination or a decision not to make a coverage revocation determination
- (c) a light regulation determination, or a decision of the Council under Part 2 of Chapter 3 not to make a light regulation determination
- (d) a decision of the Council under Part 2 of Chapter 3 to revoke or not revoke a light regulation determination
- (e) a 15-year no-coverage determination, or a decision not to make a 15-year no-coverage determination, and
- (f) a price regulation exemption or a decision not to grant a price regulation exemption.⁴²

- 6.27 Having regard to the above, the decision of the relevant Minister on a recommendation from the Council is merits reviewable, but the recommendation itself is not subject to merits review. The Council's classification decisions are not subject to merits review.

- 6.28 Judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) is available for decisions of the AER, the Council and Commonwealth Minister under the NGL (see Schedule 3). In respect of the Council, this includes classification decisions and coverage recommendations. However whether any particular decision is reviewable will depend on the individual circumstances.

Application for merits review

- 6.29 An application for merits review of one of the above reviewable regulatory decisions, may be made to the Tribunal, with the leave of the Tribunal (s 245(1) of the NGL). The application may be made on one or more of the following grounds:

- (a) the original decision maker made an error of fact in the decision maker's findings of facts, and that error of fact was material to the making of the decision

⁴² See also s 244 (definition of 'reviewable regulatory decision'), s 2 (definition of 'Ministerial coverage decision') and s 245 of the NGL. Note also the additional procedural provisions in s 44ZZR of the CCA and Regulation 7B of the Competition and Consumer Regulations.

- (b) the original decision maker made more than 1 error of fact in the decision maker's findings of facts, and those errors of fact, in combination, were material to the making of the decision
- (c) the exercise of the original decision maker's discretion was incorrect, having regard to all the circumstances, or
- (d) the original decision maker's decision was unreasonable, having regard to all the circumstances (see s 246(1) of the NGL).

Time limitations and leave

- 6.30 Other than in respect of a coverage related light regulation decision, the application for review must be made no later than 15 business days after the reviewable regulatory decision is published in accordance with the NGL or the Rules (s 247(1)).
- 6.31 Where an application for review concerns a coverage related light regulation decision, which is defined for the purposes of Part 5 to mean a decision of the Council under either s 110(1) or s 119(3) of the NGL (see s 244), it must be made:
- (a) in the case of a decision of the Council under s 110(1) of the NGL, no later than 15 business days after the making of the coverage determination relating to the coverage recommendation to which the decision under s 110(1) is attached (s 247(2)(a) of the NGL)
 - (b) in the case of a decision of the Council under s 119(3) of the NGL, no later than 15 business days after the making of the coverage revocation determination relating to the coverage revocation recommendation to which the decision under s 119(3) is attached (s 247(2)(b) of the NGL).
- 6.32 There are also a number of situations where the Tribunal may refuse to hear an application for merits review which are set out in ss 248—251 of the NGL.⁴³ In particular, s 250 of the NGL requires that the Tribunal refuse leave to persons who have not made submissions in relation to the making of the decision (which would include submissions to the Council in relation to applications made to it). Additionally, leave may be refused where a service provider has:
- (a) without reasonable excuse, failed to comply with a request for information from the Council (s 251(2)(a)(i)) or conducted itself in a manner that resulted in the delay of the decision (s 251(2)(a)(ii)), or
 - (b) misled or attempted to mislead the Council in making its recommendation (s 251(2)(b)(ii)).

New information and matters that can be raised

- 6.33 In making out a ground or grounds of review, parties are unable to introduce new information to the Tribunal not submitted as part of the original decision making

⁴³ Some of these are discussed in *Re: Application by ElectraNet Pty Ltd* [2008] ACompT 1 (23 June 2008) at [39]-[42] and [58]-[63].

process (see s 261). The effect of subsections 261(7)(d) and (g) is that submissions to the Council are 'review related matter' and can therefore be material before and considered by the Tribunal. Subsection 261(2) specifically provides that the Tribunal must have regard to any document prepared and used by the Council and that the Council has made publicly available.

- 6.34 Subsection 258(2) limits parties from raising issues not raised in submissions in relation to the making of the decision. Subsection 261(2) is also designed to ensure that the Tribunal has regard to public policy statements, such as this Guide, in conducting its review of the decision.

References

Expert Panel Report (Expert Panel on Energy Access Pricing) 2006, *Report to the Ministerial Council on Energy*, April.

Hilmer Committee (Independent Committee of Inquiry into National Competition Policy) 1993, *National Competition Policy*, Australian Government Publishing Service, Canberra.⁴⁴

NCC (National Competition Council) 2010, *Light regulation of the Central West Pipeline*, Final Determination and Statement of Reasons, January.

— 2013a, *Application under the National Gas Law for a coverage determination for the South Eastern Pipeline System*, Final Recommendation, April.

— 2013b, *GLNG Pipeline-application for a 15 year no-coverage determination*: Final Recommendation, May.

— 2013c, *Application under the National Gas Law for a revocation of coverage determination for the Wagga Wagga Gas Distribution Network*, Final Recommendation, August.

Second Reading Speech (South Australia, Parliamentary Debates, House of Assembly) 2008, 9 April, pp 2884-2916.

Cases Cited

Australian Competition Tribunal decisions

Re Alliance Petroleum Australia Pty Ltd & Ors [1997] ACompT 2

Re Application by ElectraNet Pty Limited (No 3) [2008] ACompT 1

Re Application by ElectraNet Pty Limited (No 3) [2008] ACompT 3

Re Duke Eastern Gas Pipeline Pty Ltd (2001) 162 FLR 1; [2001] ACompT 2

Re Queensland Co-operative Milling Association Ltd; Re Defiance Holdings Ltd (1976) 25 FLR 169

Re Sydney Airports Corporation Ltd (2000) 156 FLR 10; [2000] ACompT 1

Court decisions

BHP Billiton Iron Ore Pty Ltd v The National Competition Council [2007] ATPR 42-141; [2006] FCA 1764

Eastern Express (1992) 35 FCR 43

Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal (2011) 193 FCR 57

Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal 246 CLR 37; [2012] HCA 36

⁴⁴ Available at <http://www.ncc.gov.au/index.php/publications/C42>

Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd (1989) 167 CLR 177; [1989] HCA 6

Sydney Airport Corporation Limited v Australian Competition Tribunal (2006) 155 FCR 124; [2006] FCAFC 146

Appendix A Jurisdictional differences

A.1 There are some jurisdictional differences in the application of the NGL and regulatory bodies.

Western Australia

A.2 For Western Australian pipelines the ERA is the regulator rather than the AER, unless the pipeline is an international pipeline or crosses into South Australia or the Northern Territory (which are within AER jurisdiction).

A.3 Where an application is made to the Council concerning a Western Australian pipeline, the Council needs to consult with the ERA rather than the AER, unless the pipeline is an international pipeline or crosses into South Australia or the Northern Territory.

A.4 The dispute resolution body in Western Australia remains the arbitrator originally established under the *Gas Pipelines Access (Western Australia) Act 1998*. This is the Western Australian Energy Disputes Arbitrator.

A.5 Section 6A of the *National Gas Access (WA) Act 2009* allows the Western Australian law to extend to LPG distribution systems as well as natural gas.

A.6 In Western Australia, under s 20 of the *National Gas Access (WA) Act 2009* the Kalgoorlie to Kambalda pipeline had six months from the commencement of that Act to apply for light regulation under s 112, despite the fact that it did not have an applicable access arrangement in place (as required by s 112). Southern Cross Pipelines Australia Pty Ltd (a wholly owned subsidiary within the APA Group) applied to the Council for a light regulation determination for the services provided by the Kalgoorlie to Kambalda pipeline on 22 April 2010. The Council issued its light regulation determination for the Kalgoorlie to Kambalda pipeline on 29 June 2010, with that determination coming into effect 60 business days after that date. Accordingly, the Kalgoorlie to Kambalda pipeline is currently subject to light regulation.

Queensland

A.7 Section 15A of the *National Gas (Queensland) Act 2008* states that the Carpentaria Gas Pipeline is a covered transmission pipeline⁴⁵ and subject to a light regulation determination. Further, it provides that the pipeline cannot be made the subject of a full access arrangement until 1 May 2023.

⁴⁵ This pipeline was not included in Schedule A of the Gas Code and so needed to be specifically covered and classified in light of the repeal of the previous Queensland application Act.

Appendix B Coverage and Revocation provisions

Coverage	Revocation	Difference
Section 92 application.	Section 102 application.	None
Regulation 14 and Schedule 5 - \$7500 fee.	Regulation 14 and Schedule 5 - \$7500 fee.	None
Rule 15 application requirements.	Rule 18 application requirements.	Applications for revocation need to contain a greater amount of information as the service provider should have this readily available.
Subrule 15(2)(c) Limit of applications to cover pipelines subject of voluntary access arrangements.	N/A	Deals with specific situation of covering an already covered pipeline which is soon to be uncovered on the expiry of its voluntary access arrangement.
Section 93 application dealt with according to rules.	Section 103 application dealt with according to rules.	None
Rule 16 applications dealt with in accordance with standard consultative procedure and 4 month time limit.	Rule 19 applications dealt with in accordance with standard consultative procedure and 4 month time limit.	None
Sections 94 and 96 deferral of consideration where ongoing tendering process.	N/A	Only relevant where a new pipeline is to be constructed and covered for the first time.
Section 95 requirements for Council coverage recommendations.	Section 104 requirements for Council coverage revocation recommendations.	None
Section 97 principles for recommendations.	Section 105 principles for recommendations.	None
Section 98 classification.	N/A	Covered pipelines are already classified.
Section 99 requirements for Minister's decision.	Section 106 requirements for Minister's decision.	None
Rule 17 detailed requirements relating to Minister's decision.	Rule 20 detailed requirements relating to Minister's decision.	None
Section 100 principles for Minister's decision.	Section 107 principles for Minister's decision.	None
Section 101 operation and effect of decisions.	Section 108 operation and effect of decisions.	Clarifies whether or not a pipeline is covered after the decision.

Appendix C Key features of regulatory arrangements for covered pipelines including the differences between full and light regulation

C.1 It is important to understand the regulatory framework that applies to a pipeline if a coverage determination is made compared to that which applies to pipelines which are not covered. Many obligations are common for light regulation and full regulation pipelines, with the requirement to submit a full access arrangement being the key difference. Obligations fall primarily on the 'service provider' who is any person who owns, controls or operates the pipeline (s 8 of the NGL).

Covered pipeline – obligations of the service provider

C.2 The primary requirements for a service provider of a covered pipeline are as follows:

- (a) subject to general duties (ie must be a specified legal entity (s 131), must not engage in conduct to prevent or hinder access (s 133) and obliged to disclose gas supply information in certain circumstances (r 138))
- (b) subject to 'ring-fencing' requirements including:
 - (i) not carrying on a related business (s 139)
 - (ii) keeping marketing staff separate from associate's related businesses (s 140)
 - (iii) keeping consolidated and separate accounts (s 141)
 - (iv) keeping sensitive information confidential (r 137)
- (c) controls over contracts with associates which are likely to substantially lessen competition in a market for natural gas services or breach the competitive parity rule (ss 147 and 148)
- (d) subject to particular rules relating to facilitating requests for access and information disclosure (e.g. rr 107 - 112)
- (e) subject to the access dispute process in Chapter 6 of the NGL whereby the dispute resolution body (usually the AER)⁴⁶ may make a determination regarding any aspect of access to pipeline services provided by means of the covered pipeline
- (f) must comply with queuing requirements in an approved access arrangement (s 135)⁴⁷
- (g) subject to any regulatory information instrument about information reporting (s 48), and

⁴⁶ In Western Australia the Energy Disputes Arbitrator performs this function.

⁴⁷ A light regulation pipeline may not have an access arrangement and so this provision would not apply in that situation.

- (h) must, unless an exempt distribution network, maintain a register of spare capacity on its website (r 111).

Specific requirements for a full regulation pipeline

C.3 A service provider of a full regulation (covered) pipeline must also:

- (a) submit and have in force a full access arrangement which sets out the terms and conditions of access and reference tariffs for services likely to be sought by a significant part of the market (s 132). Importantly:
 - (i) non-price conditions are subject to approval by the regulator, including capacity trading requirements, changes of receipt and delivery points, extension and expansion requirements and queuing requirements (rr 103 - 106)
 - (ii) total revenue is to be set by the regulator taking into account the revenue and pricing principles (ss 24 and 28) and using the building blocks approach to economic regulation (r 76)
 - (iii) an access arrangement is likely to include an annual approval/compliance process (r 97), and
 - (iv) access arrangements need to be accompanied by access arrangement information (rr 42 - 43 and 72).

Specific requirements for a light regulation pipeline

C.4 Service providers of light regulation pipelines do not need to submit an access arrangement but:

- (a) may submit a limited access arrangement dealing with non-price matters (s 116)
- (b) are prohibited from engaging in price discrimination unless that discrimination is conducive to efficient service provision (s 136)
- (c) must report annually to the regulator on access negotiations (r 37), and
- (d) must publish terms and conditions of access, including prices on offer, on its website (r 36).

Coverage following an extension or expansion of a pipeline

C.5 The NGL provides a mechanism for extensions or expansions of a pipeline to become part of the covered pipeline, such that new applications for coverage are not required. This is set out in ss 18 and 19 of the NGL as follows:

18—Certain extensions to, or expansion of the capacity of, pipelines to be taken to be part of a covered pipeline

For the purposes of this Law—

- (a) an extension to, or expansion of the capacity of, a covered pipeline must be taken to be part of the covered pipeline; and
- (b) the pipeline as extended or expanded must be taken to be a covered pipeline,

if, by operation of the extension and expansion requirements under an applicable access arrangement, the applicable access arrangement will apply to pipeline services provided by means of the covered pipeline as extended or expanded.

19—Expansions of and extensions to covered pipeline by which light regulation services are provided

For the purposes of this Law, an extension to, or expansion of the capacity of, a covered pipeline by means of which light regulation services (and in respect of which there is no limited access arrangement) are provided, must be taken to be part of the covered pipeline unless the AER determines otherwise in writing.

C.6 Accordingly, the access arrangement itself (whether limited or full) for an existing covered pipeline determines that a new piece of the pipeline (such as a compressor, lateral or pipe system in a new suburb) is part of the covered pipeline. Where there is no access arrangement (ie for light regulation pipelines without a limited access arrangement), all extensions or expansions are still covered.

Appendix D Application fees under the NGL

D.1 Schedule 5 of the *National Gas (South Australia) Regulations 2008* prescribe fees for certain applications made to the Council under the NGL.

Application	Fee (\$)
For a coverage determination under s 92 of the NGL	7,500
For a coverage revocation determination under s 102 of the NGL	7,500
For a reclassification under s 128 of the NGL	2,000
For a 15 year no coverage determination under s 151 of the NGL	7,500
For a price regulation exemption under s 160 of the NGL	7,500

What do the fees relate to?

D.2 An application under the NGL may relate to a single pipeline and therefore a single fee is payable. However some applications may relate to more than one pipeline. Under the NGL fees attach to an application, rather than to the pipeline or pipelines that are subject of the application. In some situations a single application may relate to more than one pipeline—with one fee being payable.

Pipeline

D.3 All relevant applications under the NGL concern a “pipeline”. However s 2 of the NGL defines a “pipeline” as:

(a) a pipe or system of pipes for the haulage of natural gas and any tanks, reservoirs, machinery or equipment directly attached to that pipeline or system of pipes; or ... (emphasis added)

D.4 The term “system” is not defined in the NGL, but the Concise Oxford Dictionary defines “system” as:

a complex whole, or set of connected things or parts; ...

D.5 Thus a “pipeline” as defined may comprise a single pipeline in some cases and more than one pipeline in other cases.

Applications under the National Gas Law concerning more than one pipeline

D.6 In some cases a party may be considering making an application under the NGL that may concern more than one pipeline which operate as a system. For example, the proposed application may concern pipelines identified by different licence numbers or which are described as unique pipelines in the Scheme Register⁴⁸ but which are generally considered as one system.

⁴⁸ Maintained by the AEMC and available at www.aemc.gov.au.

D.7 In the Council's view, if the pipelines concerned are:

- owned, controlled or operated by the same entity (or related parties within a corporate group)
- have the same classification
- are interlinked, and
- exist and operate together in a network or system,

then where an application is made in respect of such pipelines it is appropriate for a single application to be made.

D.8 In this situation the Council believes that the pipelines are appropriately characterised as a "system of pipes" and it will generally be appropriate for only one application to be made to the Council under the relevant section of the NGL. The Council will consider and assess that application as it relates to the pipeline system. In these circumstances the Council will look to issue a single decision covering the full scope of the application. In most circumstances this will see a single result for the application.

Appendix E Use of extrinsic materials in this Guide

Use of extrinsic materials to assist interpretation

E.1 This Guide refers to a range of relevant extrinsic materials that assist in interpreting the NGL. A key consideration, therefore, is the legitimacy of referring to extrinsic material for this purpose, and its relevance to the interpretation of the NGL and Rules.

E.2 Section 9(2) of the *National Gas (South Australia) Act 2008* (SA) provides that the *Acts Interpretation Act 1915* (SA) does not apply to the *National Gas (South Australia) Act 2008* (SA), which contains the NGL, or the *National Gas (South Australia) Regulations* (the Regulations).⁴⁹ Rather, the NGL contains its own interpretation provisions which are set out in Schedule 2.

E.3 The interpretation provisions in Schedule 2 apply to the NGL, the Regulations and the Rules and any other statutory instrument made under the NGL (see s 20 of the NGL; see also subclause 51 of Schedule 2).

Interpretation best achieving NGL's purpose

E.4 Subclause 7(1) of Schedule 2 provides that in the interpretation of a provision of the NGL, the interpretation that will best achieve the purpose or object of the NGL is to be preferred to any other interpretation. Subclause 7(1) applies whether or not the purpose is expressly stated in the NGL.

Use of extrinsic material in interpretation

E.5 Subclause 8(2) of Schedule 2 provides that in the interpretation of a provision of the NGL, consideration may be given to 'Law extrinsic material' capable of assisting in the interpretation—

- (a) if the provision is ambiguous or obscure, to provide an interpretation of it, or
- (b) if the ordinary meaning of the provision leads to a result that is manifestly absurd or is unreasonable, to provide an interpretation that avoids such a result, or
- (c) in any other case, to confirm the interpretation conveyed by the ordinary meaning of the provision.

E.6 'Law extrinsic material' is defined in subclause 8(1) as 'relevant material not forming part of this Law'. That provision then goes on to list a number of examples of relevant Law extrinsic material, including an explanatory note or memorandum and the Second Reading Speech relating to the Bill that contained the provision.

E.7 Subclause 8(3) is in similar terms to subclause 8(2) but relates to the interpretation of the Rules. It provides that in the interpretation of a provision of the Rules, consideration

⁴⁹ A similar provision exists in the Application Acts for the other State and Territory jurisdictions.

may be given to Law extrinsic material or 'Rule extrinsic material' capable of assisting in the interpretation of a provision where its meaning is unclear. 'Rule extrinsic material' is defined in subclause 8(1) to mean:

- (a) a draft Rule determination; or
- (b) a final Rule determination; or
- (c) any document (however described)—
 - (i) relied on by the AEMC in making a draft Rule determination or final Rule determination; or
 - (ii) adopted by the AEMC in making a draft Rule determination or final Rule determination.

E.8 In determining whether consideration should be given to Law extrinsic material or Rule extrinsic material, and in determining the weight to be given to that material, subclause 8(4) requires that regard is to be had to the desirability of a provision being interpreted as having its ordinary meaning; and the undesirability of prolonging proceedings without compensating advantage, as well as any other relevant matters.

E.9 Accordingly, it may be possible in particular cases regarding pipeline services for courts to have regard to the Second Reading Speech for the NGL, and the other documents referred to therein, to help establish the object of a particular provision and to point to why the provision should be interpreted in a particular way. For this reason, where appropriate this Guide refers to extrinsic materials.

E.10 Importantly, however, extrinsic material cannot be used to alter the clear meaning of a provision. This point was noted, for example, in the case of *Re Bolton: Ex parte Beane* (1987) 162 CLR 514, when the High Court stated that 'the words of a Minister must not be substituted for the text of the law' (at [518] per Mason CJ, Wilson and Dawson JJ). Accordingly, while the extrinsic materials may be relevant to the interpretation process, those materials cannot be used to alter or detract from what is a clear and unambiguous meaning on the face of a provision.

E.11 Additionally, it must be recognised that the policy surrounding the development of the NGL and specific regimes within—such as that for light regulation and greenfields pipeline incentives—while consistent at a high level, did develop significantly from a variety of sources such that some care needs to be taken in relying too heavily on any one particular statement.