Submission to the Economic Regulation Authority

Re: Draft Decision on the Proposed Revisions to the Access Arrangement for AlintaGas Network's Mid-West and South-West Distribution Systems (AGNGDS)

AlintaGas Networks

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Glossary

AA	Current Access Arrangement
AAI	Submitted Access Arrangement Information
AGN	AlintaGas Networks Pty Ltd
CMS	CMS Gas Transmission of Australia
CPI	Consumer Price Index
DBNGP	Dampier to Bunbury Natural Gas Pipeline
ECA	*Energy Coordination Act (WA)1994*
ERA	Economic Regulation Authority
FCR	Firm Capacity Requirement
GDS	Mid-West and South-West Gas Distribution System
GRBMR	Gas Retail Business Market Rules
GPAA	*Gas Pipelines Access (Western Australia) Act 1998*
HHV	Higher Heating Value
IPART	Independent Pricing And Regulatory Tribunal (New South Wales)
OOE	Office Of Energy (Western Australia)
Part C Haulage Contract	The Reference Service Terms and Conditions set out in Part C of the PRAA
PRAA	Proposed Revised Access Arrangement
QCA	Queensland Competition Authority
REMCo	Retail Energy Market Company Ltd
RMR	Retail Market Rules
RMS	Retail Market Scheme
WA	Western Australia

1. Introduction

1. The Economic Regulation Authority (**"ERA"**) issued the Draft Decision on the revisions proposed by AlintaGas Networks Pty Ltd (**"AGN"**) to the Access Arrangement for its Mid-West and South-West gas distribution systems (**"GDS"**) on 28 February 2005.

2. AGN is pleased to make a submission on the Draft Decision in response to the invitation for submissions issued by the ERA on 28 February 2005.

3. AGN wishes to work cooperatively with the ERA to resolve the concerns that AGN has with the Draft Decision.

4. The provision of utility infrastructure is now high on the national agenda and many commentators have been concerned that low rates of return and arbitrary decisions by regulators are putting future Australian consumers at risk by failing to encourage the building of the necessary infrastructure for the future. AGN is concerned that the current Draft Decision fails to provide it with sufficient returns to confidently assure that its capital works program can be implemented.

5. AGN is also concerned that a number of aspects of the ERA's Draft Decision are not in compliance with the Code:

   (a) AGN does not accept the ERA's approach to the assessment of the weighted average cost of capital (WACC), on the basis that it is inconsistent with the Code.

   Recent legal decisions have determined that it is not the task of the Relevant Regulator under sections 8.30 and 8.31 of the Code to determine the rate of return of the utility. The task of the Regulator is to determine whether the rate of return is commensurate with prevailing conditions in the market for funds and the risk involved in delivering the Reference Services. AGN submits that the ERA has failed in this task and as a result has produced a rate of return too low for AGN to operate efficiently and effectively.

   AGN submits that this submission clearly establishes the WACC variables that fall within the range of rates commensurate with the prevailing market conditions and the relevant risk of delivering the Reference Services. AGN submits that the lower bound of returns are set by the ERA Draft Decision at 6.5% while the upper bound as estimated by this submission is set at 8.2%. At the 75^{th} percentile this would produce a rate of return of 7.75% as a rate clearly falling within a range of rates commensurate with the prevailing market conditions and allowing for the relevant risks of delivering the Reference Services.

   AGN submits that such a rate is consistent with the recommendations of the Productivity Commission, which recommended that regulators err of the side of the utilities to ensure long-term investment can be delivered.

   (b) AGN submits that there is no reasonable basis for the ERA's required amendment to provide for efficiency gains in network costs of one percent per annum (in real terms) for each of the final two years of the Access Arrangement Period. AGN considers that estimating gains that are yet to be achieved is highly speculative and fails to meet the Code requirement that the risks of delivering the Reference Services be adequately considered.

The only acceptable method of determining the efficiency performance of a utility going forward is to use an efficiency carryover to ensure that any actual efficiencies are shared with customers, so a speculative approach does not have to be followed.

It is instructive to consider the requirements for accuracy in regulatory decisions by reference to the Australian Competition Tribunal's decision on the Moomba to Adelaide Pipeline System (MAPS) where the Tribunal stated at para 65:

> *A representative figure was needed that was as accurate as could be hoped for, given the inability to specify the necessary parameters, the way in which the price data was collected, the relatively small number of prices that the Tribunal infers were obtained, and the lack of any statement of statistical reliability that could be attached to the findings presented by Microalloying.*

It is doubtful that another appeal body would consider a speculative guess on forward efficiencies to be a representative figure that was as "accurate as possible" when an alternative means of assessing such efficiencies is available which better takes into account the risks of delivering the Reference Services.

6. AGN looks forward to working closely with the ERA to clarify its position and reasoning as outlined in this submission.

Structure of this Submission

7. This submission addresses each Amendment required by the ERA in the Draft Decision in sequence as follows:

   (a) Services Policy – Part 2;

   (b) Reference Tariffs and Reference Tariff Policy – Part 3;

   (c) Terms and Conditions – Part 4;

   (d) Capacity Management Policy – Part 5; and

   (e) Review and Expiry of Access Arrangement – Part 6.

8. The Table of Amendments in Appendix A sets out whether AGN agrees or disagrees with each Amendment, however many of the Amendments raise complex issues and may not be easily answered simply by "Agree" or "Disagree". Accordingly, the Table is a guide only and to the extent of any inconsistency between the Table and the body of this Submission, the body of this Submission prevails.

9. This submission is accompanied by, and should be read with:

   (a) an amended Proposed Revised Access Arrangement; and

   (b) a Supplement to Amend the Access Arrangement Information.

2. Services Policy

2.1 Reference Services

Amendment 1

The Services Policy should be amended to include descriptions of the Services ancillary to the Reference Services which are likely to be sought by a significant part of the market.

10. AGN has amended the Services Policy in the PRAA to include descriptions of the following ancillary Services which AGN will make available to Users:

    (a) Apply Meter Lock Service – a Service by which AGN applies a meter lock to a meter at a delivery point at which a User is entitled to take delivery of gas under a B3 Service; and

    (b) Remove Meter Lock Service – a Service by which AGN removes a meter lock from a meter at a delivery point at which a User is entitled to take delivery of gas under a B3 Service.

11. The ancillary Services proposed in paragraph 10 accord with section 3.2(a) of the Code.

12. The ancillary Services proposed in paragraph 10 differ from the descriptions in the current Access Arrangement to reflect changes in the market including the introduction of the Retail Market Scheme (**"RMS"**).

13. For example, the ancillary Disconnection Service included in the current Access Arrangement was historically employed by Users to stop gas flow to end users for credit control purposes.

14. The Disconnection Service is now used only occasionally. This is because:

    (a) a User is able to arrange to simply have the valve on a meter closed and tagged to effect a "soft turn off", without needing to obtain a Disconnection Service from AGN; and

    (b) in any event, the Apply Meter Lock Service has largely supplanted the Disconnection Service because it is more effective and cheaper than removing the regulator or meter as required under Disconnection Service.

15. Users have responded positively to the new Apply Meter Lock Service, with the number of Disconnection Services provided by AGN per year having halved over the period of the current Access Arrangement.

16. Accordingly, the Reconnection Service too is now used less frequently, replaced by the Remove Meter Lock Service. It is also unnecessary where the User has effected a soft turn off as the valve can be opened by a "soft turn on".

17. An Additional Meter Testing Service is provided under the existing Access Arrangement however there have been very few of these tests requested.

18. An Additional Meter Reading Service is provided under the existing Access Arrangement in order for Users to obtain a special meter read, however Users can now liaise directly with a meter reading company to arrange the equivalent of a special meter read service.

Amendment 2

The proposed revised Access Arrangement should be amended to include Reference Tariffs and terms and conditions for Ancillary Services described in the Services Policy.

19. AGN does not agree that the ancillary Services proposed in paragraph 10 should be included as Reference Services for which Reference Tariffs and Terms and Conditions must be specified.

20. The proposed ancillary Services do not meet the test set out in section 3.3(b) of the Code as :

    (a) the proposed ancillary Services are not likely to be sought by a significant part of the market; and

    (b) further, the ERA in applying its discretion should not consider that a Reference Tariff should be included for the ancillary Services.

Not sought by a significant part of the market

21. AGN supplied approximately only 1900 Apply Meter Lock Services, 1500 Remove Meter Lock Services and 20 Meter Retake and Test Services last year. This does not constitute a significant part of the market.

22. As stated by OffGAR in the Draft Decision for AGN's current Access Arrangement:

> *the Access Arrangements submitted for distribution networks in other States indicate that ancillary services of the type referred to here by [AGN] are not normally treated as Reference Services.*[1]

23. This view is supported by the finding in the Queensland Competition Authority's (**"QCA"**) Final Decision on Gas Distribution Networks (Allgas Energy & Envestra Limited) Access Arrangement, where the QCA stated such services will:

> *only occur in a very limited number of circumstances…and this type of service is unlikely to be sought by a significant part of the market.*[2]

24. Clearly, the individual circumstances applying in each market must be taken into account in determining if any ancillary Services should be Reference Services.

25. In the Independent Pricing and Regulatory Tribunal (**"IPART"**) decision[3], the ancillary Services "effectively form part of the terms and conditions on which AGL Gas Networks will supply its Reference Services"[4] whereas in the case of the AGN GDS, the proposed ancillary Services do not form part of the terms and conditions of the Reference Services. In the case of the ESC decision,[5] the fact that the *Victorian Gas Industry Tariff Order 1998* was about to cease to have effect created a different regulatory environment. Both decisions are distinguishable from the present case.

ERA's discretion should be exercised to not include ancillary services as Reference Services

[1] OffGAR, *Draft Decision, MWSW Gas Distribution Systems*, 14 March 2000, page 33
[2] QCA, *Final Decision, Allgas Energy & Envestra Limited*, October 2001, page 1
[3] IPART, Draft Decision, Revised Access Arrangement for AGL Networks, December 2004
[4] ERA, *Draft Decision on the Proposed Revisions to the Access Arrangement for the South-West and Mid-West Gas Distribution Systems*, February 2005, para 56
[5] Essential Services Commission, *Final Decision, Review of Gas Access Arrangements*, October 2002, page 10

26. In applying section 3.3 of the Code, including in determining whether the ERA considers that a Reference Tariff should be included for the ancillary Services, the ERA must take into account the section 2.24 factors.

27. As the proposed ancillary Services are simple and discrete in nature and have historically, despite not being Reference Services, been provided without problems, there will be no benefit to Users and prospective Users in accordance with section 2.24(f) of the Code in including ancillary Services as Reference Services. [6]

28. In addition, the administrative burden of providing terms and conditions and Reference Tariffs for the ancillary Services would be very high. The costs involved in meeting the administrative burden would ultimately be borne by Users and would be completely disproportional to the revenue stream to AGN, and accordingly would not result in the economically efficient operation of the GDS in accordance with section 2.24(d) of the Code.

29. Finally, the ERA should note that, under section 6.17 of the Code, the arbitrator would be unlikely to make a decision that required AGN to provide any of the proposed ancillary Services to a prospective User because there is substantial competition in the market for the provision of each of those Services. Access regulation in other jurisdictions for forms of infrastructure other than gas pipelines, will often class such a service as an "Excluded Service" meaning that it cannot be a Reference Service.

2.2 Services other than Reference Services

Amendment 3

Clauses 24 & 25 of Part A of the proposed revised Access Arrangement should be deleted.

30. AGN has amended the PRAA to delete clause 24 of Part A.

31. Regarding clause 25 of Part A, see paragraphs 340 to 347.

2.3 Interconnection Service

Amendment 4

The term "User" should be defined as in the Code as "a person who has a current contract for a Service or an entitlement to a Service as a result of an arbitration."

32. AGN has amended the definition of "User" in the PRAA as suggested by the ERA.

33. However, AGN does not accept that it is necessary for the terminology used in the AA to be identical to the terminology used in the Code in order for the AA to be compliant with the Code.

Amendment 5

The proposed revised Access Arrangement should be amended to include provisions, in accordance with the Code, by which Reference Tariffs may recover from all Users of the GDS the costs of heating value management during the second Access Arrangement Period.

34. AGN agrees to include provisions in the PRAA by which Reference Tariffs may recover from all Users of the GDS the costs of heating value management during the second Access Arrangement Period.

[6] OffGAR, *Draft Decision, MWSW Gas Distribution Systems*, 14 March 2000, page 33

35. To implement amendments referred to in paragraph 34 AGN has adopted the first option suggested by the ERA in paragraph 119 of the Draft Decision, namely the inclusion of forecasts of the projected New Facilities Investment and Non Capital Costs for heating value management in the PRAA in accordance with section 8 of the Code.

36. AGN has adopted to include forecasts of the projected New Facilities Investment and Non Capital Costs because:

    (a) the second option, the Trigger Event Adjustment Approach, is undesirable due to the time and expenditure required to activate and complete the process;

    (b) the third option, seeking prior approval, would cause unnecessary delay, hindering AGN's ability to ensure that heating value management issues are resolved.

37. AGN has deleted clause 62 of Part A of the PRAA and has accounted for the costs of heating value management in its Reference Tariff Policy.

38. The forecasts of New Facilities Investment and Non Capital Costs projected to be incurred by AGN for heating value management are based on:

    (a) report by Gas Technology Limited Business International entitled "Study of the Variation in Higher Heating Value within the Perth Metropolitan Area" jointly commissioned by AGN and CMS Energy (now APTP); and

    (b) report by PCT Engineers entitled "Gas Network Heating Value Measurement – Feasibility Study and Market Survey Report" commissioned by AGN.

2.4 Conditions in relation to Non-Reference Services

Amendment 6

Clauses 16, 17 & 18 of Part B and clause 62 of Part A of the proposed revised Access Arrangement should be deleted.

39. AGN has amended the PRAA to delete clauses 16, 17 and 18 of Part B and clause 62 of Part A.

Amendment 7

Clause 31(c) of Part A of the proposed revised Access Arrangement should be amended to delete the references to clauses 16 to 18 of the proposed revised Access Arrangement.

40. AGN has amended clause 31(c) of Part A of the PRAA to delete references to clauses 16, 17 & 18 of Part B.

2.5 Elements of a Service

Amendment 8

Clause 26 of Part A of the proposed revised Access Arrangement should be amended to be consistent with sections 3.2(b) and (c) of the Code.

41. AGN does not agree that Amendment 8 is required.

42. AGN does not accept that it is necessary for the terminology used in the AA to be identical to the terminology used in the Code in order for the AA to be compliant with the Code.

43. AGN has made some amendments to clause 26 of Part A in order to make the terminology more similar to the terminology used in the Code. However in some cases, such amendments are inappropriate. For example, the ERA's conclusion in paragraph 135 of the Draft Decision that clause 26 of the PRAA excludes Users is incorrect. The definition of "Prospective User" in Schedule 2 to Part A of the PRAA expressly includes Users, and accordingly, this aspect of paragraph 26 is of identical effect to the provisions of the Code.

3. Reference Tariffs and Reference Tariff Policy

Amendment 9

Clause 22 of Part B of the Reference Tariff Policy in the proposed revised Access Arrangement should be amended to set out the principles used to determine the opening value of the Capital Base at the commencement of the second Access Arrangement Period.

44. AGN has amended clause 22 of Part B to read:

> *The Capital Base for AGN GDS as at 1 January 2005 is $658.4m (expressed in $m as at 31 December 2004). This value excludes the value of User Specific Delivery Facilities.*

Amendment 10

Clause 22 of Part B of the Reference Tariff Policy in the proposed revised Access Arrangement should be amended to clarify whether the value of User Specific Delivery Facilities has been included in actual and forecast New Facilities Investment.

45. Refer to paragraph 44.

Amendment 11

Table 4.1 of the Access Arrangement Information should be amended to show the values for the assets comprising the Initial Capital Base converted to dollars at 31 December 2004 using the appropriate index value to adjust for inflation.

46. AGN has amended Table 4.1 of the AAI to show values for the assets comprising the Initial Capital Base converted to dollars at 31 December 2004 using the appropriate index value to adjust for inflation in accordance with Amendment 11. AGN will lodge the amended AAI table with the ERA together with its amended PRAA.

Amendment 12

Table 4.4 of the Access Arrangement Information should be amended to set out the remaining lives of assets comprising the Initial Capital Base calculated as at 31 December 2004 as set out in Table 2 of this Draft Decision.

47. AGN has amended Table 4.4 of the AAI to set out the remaining lives of assets comprising the Initial Capital Base calculated as at 31 December 2004 in accordance with Amendment 12. AGN will lodge the amended AAI table with the ERA together with its amended PRAA.

Amendment 13

The Access Arrangement Information should be amended to include the values for Depreciation on the assets comprising the Initial Capital Base as set out in Table 3 of this Draft Decision.

48. AGN does not agree with Amendment 13. Section 8.32 of the Code leaves it up to the service provider to determine how best to structure its depreciation schedule, provided that the tests in section 8.33 are met. The ERA has not determined that the structure in Table 4.5 of the AAI fails to meet the requirements in section 8.33. AGN submits that Table 4.5 does comply with section 8.33.

49. Under s. 2.6 of the Code the AAI must contain:

> *such information as … would enable Users and Prospective Users to understand the derivation of the elements in the proposed Access Arrangement and to form an opinion as to the compliance of the Access Arrangement with the provisions of the Code.*

50. AGN submits that this standard can be met without providing the itemisation sought by Amendment 13.

Amendment 14

Table 4.2 of the Access Arrangement Information should be amended to reflect the values in Table 4 of this Draft Decision.

51. AGN has amended Table 4.2 of the AAI in accordance with Amendment 14. AGN will lodge the amended AAI table with the ERA together with its amended PRAA.

Amendment 15

The Access Arrangement Information should be amended to include the values for Depreciation for New Facilities Investment during the first Access Arrangement Period as set out in Table 5 of this Draft Decision.

52. AGN does not agree with Amendment 15 for the reasons set out in paragraphs 48 to 50.

Amendment 16

The Access Arrangement Information should be amended to include the values for total Depreciation for the first Access Arrangement Period as set out in Table 6 of this Draft Decision.

53. AGN has amended the AAI to include the values for total Depreciation for the first Access Arrangement Period in accordance with Amendment 16. AGN will lodge the relevant amendments with the ERA together with its amended PRAA.

Amendment 17

Clause 22 of Part B of the proposed revised Access Arrangement should be amended to provide an opening value of the Capital Base of $658.39 million (dollars at 31 December 2004).

54. Refer to paragraph 44.

3.1 Capital Base for each year of the second Access Arrangement Period

Amendment 18

Table 4.7 of the Access Arrangement Information should be amended to reflect the Authority's calculation of forecast User Initiated Capital as set out in Table 9 of this Draft Decision, and to adjust all other values to dollars at 31 December 2004.

55. AGN does not agree with the ERA's calculation of forecast User Initiated Capital and therefore proposes to amend table 4.7 of the AAI only to reflect the changes in values from June 2003 to December 2004. AGN believes that the forecasts it provided in the Access Arrangement Information submitted on 31 March 2004 are the most suitable. As expressed in paragraphs 143 to 150, AGN does not agree that the Code permits or requires forecast efficiencies not yet achieved to be used in determining future expenditure requirements.

Amendment 19

Table 4.6 of the Access Arrangement Information should be amended to reflect the Authority's calculation of forecast New Facilities Investment by asset class as set out in Table 1 of this Draft Decision.

56. Refer to paragraph 55.

Amendment 20

Table 4.5 of the Access Arrangement Information should be amended to reflect the Authority's calculation of total Depreciation for each year of the second Access Arrangement Period as set out in Table 13 of this Draft Decision.

57. Refer to paragraph 55.

Amendment 21

Table 4.3 of the Access Arrangement Information should be amended to reflect the Authority's calculation of the value of the Capital Base for each year of the second Access Arrangement Period grouped by asset class as set out in Table 15 of this Draft Decision.

58. Refer to paragraph 55.

3.2 Rate of Return

The Propose Respond Model in Gas

59. AGN submits that the ERA's approach to the assessment of the weighted average cost of capital (WACC) is inconsistent with sections 8.30 and 8.31 of the Code. Although the ERA quotes the Australian Competition Tribunal (**"Tribunal"**) findings in relation to GasNet[7] and Epic Energy[8], AGN submits that the ERA's analysis in not consistent with these decisions. The Tribunal stated:

> *Contrary to the submission of the ACCC,* ***it is not the task of the Relevant Regulator under s 8.30 and s 8.31 of the Code to determine a 'return which is commensurate with prevailing conditions in the market for funds and the risk involved in delivering the Reference Service****.' The task of the ACCC is to determine whether the proposed AA in its treatment of Rate of Return is consistent with the provisions of s 8.30 and s 8.31 and that the rate determined* ***falls within the range of rates*** *commensurate with the prevailing market conditions and the relevant risk.* [9] *(emphasis added)*

60. Although the Draft Decision cites this finding,[10] AGN submits that the ERA has not followed it.

61. The Tribunal went on in the next paragraph to say:

> *… s 8.30 involves issues of judgment and degree … as to whether the Rate of Return is commensurate with the prevailing conditions in the market for funds and the risk involved in delivering the Reference Service. Nevertheless, it involves making decisions as to the existence or otherwise of the underlying facts which are relevant to the statutory task and to the choice of a method of utilising those facts to produce a Rate of Return.*

62. AGN is concerned that the words "it involves making decisions as to the existence or otherwise of the underlying facts" might have led the ERA into error. While the making of decisions as to facts is clearly part of a Regulator's role, the Tribunal in the above passages makes it clear that the Regulator's task stops short of making a finding as to a particular rate of return.

63. In contrast to the Tribunal's ruling, the ERA in its Draft Decision clearly attempts to make its own determination of the return which is commensurate with prevailing conditions in the market for funds and the risk involved in delivering the Reference

[7] Application by GasNet Australia (Operations) Pty Ltd [2003] ACompT 6.

[8] Application by Epic Energy South Australia Pty Ltd [2003] ACompT 5

[9] [2003] A Comp T 6 at para 42.

[10] ERA, *Draft Decision on the Proposed Revisions to the Access Arrangement for the South-West and Mid-West Gas Distribution Systems*, February 2005, para 290

Service. Specifically, AGN submits that the ERA is not confining its analysis to the question as to "whether the proposed AA in its treatment of Rate of Return **is consistent with** the provisions of s 8.30 and s 8.31 and that the rate determined **falls within the range** of rates commensurate with the prevailing market conditions and the relevant risk." (emphasis added)[11] For instance, the ERA states in the Draft Decision:

> ***To determine a Rate of Return*** *which is "commensurate with prevailing conditions in the market for funds and the risk involved in delivering Reference Services", the Authority needs to examine the basis for each estimate by AGN of the value, or range of values, for the input parameters used to determine the pre-tax real Rate of Return of 8.5 percent per annum. (emphasis added)*[12]

64. The ERA's statement in paragraph 317 of the Draft Decision that "AGN's proposed value for the market risk premium of 7 percent is inconsistent with all past regulatory decisions under the Code" overlooks the 1997 IPART decision on AGL's gas distribution network, which provided a market risk premium of 7%.[13]

65. The more important issue, however, is that the ERA's task is to assess whether the rate of return proposed by AGN falls within the range of rates commensurate with the prevailing market conditions and the relevant risk. In relation to those CAPM parameters that are directly observable in the market place (eg the risk free rate), AGN accepts that the ERA should generally require AGN to update the AGN submission for the latest available information, provided that information is consistent with a reasonable estimate of the forward looking costs that the service provider will incur. However, in relation to those CAPM parameters which are not directly observable, the ERA's approach should be to test whether AGN's proposal falls within a reasonable range. In contrast, AGN submits that the ERA in the Draft Decision has in fact gone further than this and, contrary to the finding of the Tribunal referred to above, has tried to determine specific inputs and a specific rate of return.

Uncertainty and the Rate of Return

66. The ERA's approach appears to suggest that it can complete its task in isolation of regulatory developments. AGN does not believe that this is the case. As a result, AGN went to considerable lengths in its PRAA and AAI to outline recent regulatory developments, and their implications for the ERA's review of its proposed access arrangement in general and the cost of capital in particular. In contrast, the ERA's Draft Decision ignores these regulatory developments.

67. Meanwhile, there is growing concern about the impacts of regulators' decisions particularly in relation to the cost of capital. For example, the Australian Financial Review recently stated, in an editorial entitled 'Power policies need to change',[14] that:

> *The rate of return that electricity distributors can earn is regulated because they control monopoly assets. Since the shake-up of the electricity market in the late 1990s, the job of the regulators has been to ensure power companies do not walk away with monopoly profits.*
>
> *The problem is that regulators – who are not business people – are being asked to make risk assessments. The risk of error is high and a small misjudgement may result in years of bottlenecks and disruption. This is what the public is now experiencing with the blackouts. When applied to other industries, it feeds the bigger story of capacity constraints.*

[11] Application by GasNet Australia (Operations) Pty Ltd [2003] ACompT 6 at ¶ 42.
[12] para 300.
[13] Technically not a decision under the Code because it was made under the NSW precursor to the Code, but equally relevant.
[14] *Australian Financial Review*, 'Power policies need to change', 15 March 2005, page 62.

In the case of electricity there are other issues. Some states have refused to privatise their electricity assets – in defiance of competition policy – and stripped so much revenue out of them that investment in new capacity has been inadequate.

But the biggest impediment to infrastructure investment has been the rates of return dictated by regulators whose main job is to prevent price gouging. Consultant Henry Ergas recently said regulating rates of return has degenerated into a game of limbo, in which regulators compete to see how low they can go.

But raising rates of return won't come by haranguing the regulators. They're doing the job they've been asked to do. What's needed is a policy change by governments encouraging regulators to balance their emphasis on protecting consumers with recognition of the need to invest in new infrastructure.

Last Friday, Treasurer Peter Costello said he would implement the Productivity Commission's recommendation on the National Access Regime – the key one being to encourage investment in new infrastructure.

The Government has sat on this for too long. The inquiry reported in September 2001. But at least there is recognition that if business is to provide the infrastructure we want, it has to get a reasonable rate of return.

68. Similarly, The Australian newspaper recently voiced similar views in an editorial entitled "Stark choices in power game"[15] which is also relevant for the gas industry given the investment and pricing issues are identical. It stated that:

Yet another severe power outage in South Australia on Monday, plunging nearly half the state into chaos and severing a key supply link to Victoria, has highlighted growing problems in infrastructure investment and the national electricity grid. Along with a tightening labour market, capacity constraints emerging in key infrastructure areas – power, ports, rail and water – look like the main obstacle to keeping our economy growing at the clip we have been enjoying for nearly 14 years. And while Western Australia is not part of the national grid, last week's outages there will raise renewed questions about whether investment in generation and transmission has been sufficient to meet the increasing demand from business and domestic consumers.

Our power problems are not the result of the competition reforms of the 1990s but of the fact that these have not been properly completed…Despite the fact the Productivity Commission recommended a national price arbiter and a national regulator in 2002, the legislation to enable them has so far made it through only the South Australian parliament. The result is that each year the state regulators, with an eye to their political masters, have played a game of "chicken" to see who can keep retail prices the lowest. While certainly there must be price regulation in monopoly markets – and transmission and distribution are monopolies in all the states – all the game does is squeeze the network investment out of the skinny margins of the utilities.

69. By way of another practical example, one of the most topical issues in unregulated markets at the moment that relates to valuation and thus to the cost of capital has been the recent takeover activity surrounding Western Mining Corporation (**"WMC"**). WMC hired Grant Samuel to provide an independent valuation of its business to defend it against the first takeover offer.[16]

70. It is worth noting what Grant Samuel say and do in relation to estimating the cost of capital:

Selection of the appropriate discount rate to apply to the forecast cash flows of any business enterprise is fundamentally a matter of judgement. The valuation of an

[15] *The Australian*, 'Stark choices in power game', 16 March 2005, page 14.
[16] Grant Samuel, Xstrata Takeover Offer, 22 December 2004.

asset or business involves judgements about the discount rates that may be utilised by potential acquirers of that asset. There is a body of theory that can be used to support that judgement. However, a mechanistic application of formulae derived from that theory could obscure the reality that there is no "correct" discount rate. Despite the growing acceptance and application of various theoretical models it is Grant Samuel's experience that many companies rely on less sophisticated approaches. Many businesses use relatively arbitrary "hurdle rates" which do not vary significantly from investment to investment or change significantly over time despite interest rate movements. Valuation is an estimate of what real world buyers and sellers of assets would pay and must therefore reflect the criteria that will be applied in practice even if they are not theoretically correct."[17]

71. The approach used by Grant Samuel is refreshingly simple compared with the debate regulators create and is different in a number of ways for various reasons.[18] It concludes that certain numbers can be calculated for the various business units of WMC using the theoretically pure approach. Critically, however, it then states:

> *These theoretically calculated WACC's are considered to be lower than the discount rates that real world potential acquirers would use in assessing these assets. In addition, the betas of comparable companies set out above are relatively low compared with those historically observed. Accordingly, Grant Samuel has judgementally increased the estimated WACCs for the purpose of selecting discount rates…*[19]

72. This involved increasing its estimates by about 50 basis points in each case.[20]

73. This is precisely the type of perspective that the ERA should bring to assessing whether AGN's proposed cost of capital is consistent with the Code.

The Market Risk Premium

74. In relation to the market risk premium (**"MRP"**), the available historic data does not show that AGN's proposed MRP of 7% is outside the feasible range. In particular, the ERA itself examined historic MRPs in the following table and commented as follows:

> 3.11 The table below (Table 17) summarises the Australian historical data available to the Authority on the realised historical market risk premium.
>
> **Table 17: Historical Realised Market Risk Premium in Australia[45]**
>
Time Period of Estimation	Average Market Risk Premium	Standard Deviation	Standard Error of the Mean
1882-2001	7.19%	16.97%	1.55%
Differing End Point			
1882-1950	8.00%	11.11%	1.34%
1882-1970	8.16%	13.70%	1.45%
1882-1990	7.40%	17.33%	1.66%
Different			

[17] Ibid., Appendix 1 page 1

[18] For example, it suggests that WMC's assets are likely to be priced on the basis of costs of capital established in international capital markets. It therefore uses a US risk free rate for the US dollar denominated businesses of WMC but also uses its judgement to derive a value based on a mix of 10 and 30 year securities to address the problems associated with prevailing risk free rate for 10 year securities.

[19] Ibid., Appendix 1 page 9

[20] It should also be noted that Grant Samuel was hired by WMC to defend against a takeover action. Commentators have recently questioned the independence of these reports. (See the Sydney Morning Herald, 'The value of hired experts', 14 March 2005, page 35.) If anything therefore the valuation by Grant Samuel might be expected to be at the high end of a reasonable range, which can be achieved by adopting a cost of capital at the low end of a reasonable range.

Beginning Point			
1900-2001	7.14%	17.94%	1.78%
1950-2001	6.51%	22.60%	3.13%
1970-2001	3.37%	24.38%	4.31%

3.12 The ability to draw conclusions from this historical evidence is limited by large standard errors of the estimates. There is some suggestion from the historical data that more recent estimates of the realised market risk premium are lower than the measurements for earlier periods, suggesting a decline in values over the period since 1882.

75. The view expressed by the ERA that the MRP might have declined in more recent times is, on the basis of the historical evidence, highly dependent on the time period considered. As the table outlined above shows, the market risk premium from 1970-2001 was 3.37%. However, using the 30 year data set from the period 1972-2001 results in an MRP of 5.6%. AGN notes that the data set from the period 1975 to 2004 results in an MRP of 7.7% and that this highlights the danger of using shorter-term data to assess an inherently volatile parameter.

76. Using data for the period 1883 to 2004 provides an MRP of 7.16%.[21] It is therefore simply not possible to conclude on the basis of the available historical evidence that a MRP of 7% is outside a range of estimates commensurate with the prevailing market conditions and the relevant risk.[22]

77. In a submission to the Productivity Commission Inquiry into the National Gas Access Regime the Networks Economic Consulting Group (**"NECG"**) also analysed the Australian MRP.[23]:

> Claiming that the MRP is less than 6% is inconsistent with the views of the ACCC's own advisor, Associate Professor Martin Lally, who supports a value of 6% for the MRP. Lally notes:
>
> 'To summarise this review of evidence on the market risk premium in the Officer CAPM, the estimates are .07 from historical averaging of the Ibbotson type, .056 from historical averaging of the Siegel type, .07 from the Merton methodology, and .040-.057 from the forward-looking approach. If a point estimate for the last approach is .048, then the average across these four approaches is .061. In addition various other methodologies have been alluded to, for which Australian results are not available but which have generated low values in the markets to which they have been employed. All of this suggests that the ACCC's currently employed estimate of .06 is reasonable, and no change is recommended.[24]'
>
> The ACCC also ignores other evidence on the MRP. Historical data and the results of benchmarking the MRP in Australia in relation to other markets support a range of 6-8%. The historical estimates of Lally in the quote above are consistent with a value of 7% for the MRP. Although the ACCC has repeatedly stated an inclination to lowering the MRP from 6%, it has not presented a credible case for doing so. In our opinion, if the MRP is to be adjusted, the case is stronger for an increase to 7%.[25]

78. Professor Robert Bowman also argues that the MRP is much higher in Australia on the basis of inter-country comparisons. As quoted in the Stephen Gray paper Bowman argues that:

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[21] S Gray[2005], "Estimating MRP", unpublished.
[22] Ibid
[23] NECG response to ACCC supplementary submission No. 72 on International WACC decisions March 2004,
[24] M. Lally, *The Cost of Capital under Dividend Imputation: A report for the ACCC,* June 2002, p34.
[25] NECG response to ACCC supplementary submission No. 72 on International WACC decisions March 2004, p.28

> *Australia has only recently become an open economy and that for much of the last 100 years equity and debt markets were subject to controls and intervention. For this reason, he argues that much of the historical data on the market risk premium is of limited use. His preferred approach is to base an estimate of the market risk premium on data from the United States, which has been an open economy for most of the period for which data is available. He suggests that an appropriate range for the U.S. market risk premium is 6% to 9% (p.6). Moreover, he suggests that Australia has a higher level of country risk that should result in a premium of 0.25% to 0.75% over the U.S. market risk premium. This yields a range of 6.25% to 9.75% for the Australian market risk premium.*[26]

79. In summary, the evidence above shows that the data does not support the ERA's contention that an MRP of 7% is outside the range of rates commensurate with the prevailing market conditions and the relevant risk. On this point, the approach applied by the ERA in its Draft Decision is inconsistent with the Code (having regard to the guidance provided by the Tribunal's findings in relation to GasNet and Epic Energy[27]) and is therefore open to challenge.

80. AGN requests that the ERA use an MRP of 7% on the basis that it falls within the range of rates commensurate with the prevailing market conditions and the relevant risk involved in delivering the service.

The Risk Free Rate

81. While the approach outlined by the ERA to set the risk free rate is generally used within the Australian regulatory context and is consistent with the approach AGN originally proposed, it is worth noting that the merits of this approach are increasingly debatable in light of recent market developments.

82. Regulators in the United Kingdom often have not relied solely on existing market rates when setting the real risk free rate or the debt premium.[28] This is despite having the world's second largest index linked bond market in absolute terms and the largest in proportional terms, and a large and sophisticated corporate bond market.

83. For example, in 2002 the Competition Commission stated its preference for relying on market data:

> *Unlike other inputs to the CAPM, the current risk-free rate can be observed directly from trading in liquid markets. The UK Government has issued index-linked securities (index-linked gilts) which are generally considered to have negligible default risk and inflation risk (inflation measured by the RPI, though lagged eight months). The redemption yield on these gilts provides an estimate of the real risk-free rate for different maturities. The Bank of England makes regular estimates of such rates over the whole yield curve which are, in addition, adjusted to a zero coupon basis which helps to deal with tax and other complications.*[29]

84. The Competition Commission, however, goes on to note that:

> *There appears to be widespread recognition that gilt yields have been affected by special factors, including an increased demand from pension funds as a result of the introduction of the MFR [minimum funding requirement] requirements in 1997, just*

[26] Bowman, Robert, "Estimating the Market Risk Premium: The Difficulty with Historical Evidence and an Alternative Approach," Working Paper, Department of Accounting and Finance, University of Auckland, 1999.

[27] Application by GasNet Australia (Operations) Pty Ltd [2003] ACompT 6; and Application by Epic Energy South Australia Pty Ltd [2003] ACompT 5

[28] This also has implications for estimating the expected rate of inflation.

[29] Competition Commission, *BAA: A report on the economic regulation of the London airports companies*, 2002, p. 172. It also noted that in more recent times corporate bonds had declined.

before the decline in gilt yields started. The strong demand has placed upward pressure on prices of both conventional and index-linked government securities. Relatively low UK Government borrowing in recent years could be another factor contributing to the upward pressure on gilts prices (and hence lower yields)…[30]

85. As a result, the Competition Commission recommended a range of 2.5%-2.75% for the real risk free rate when 10 year gilt yields were around 2.3%.

86. More recently, Ofgem in its initial proposals for the Electricity Distribution Price Control Review stated as follows:

> *The issue for DPCR4 is the expected risk free rate going forward. It is therefore important to come to a view whether the current low market rates are likely to persist into the future or whether these are factors, which are not expected to persist, which depress rates at present.*
>
> *At present, the UK yield curve is still slightly downward sloping at longer maturities. This has been attributed to institutional factors such as the minimum funding requirement (MFR) for pension funds and the health of public finances (resulting in low supply of government bonds).*[31]

87. Ofgem concluded that:

> *The cost of capital is very sensitive to the risk free rate with the risk-free rate being an important input both in the cost of debt and the cost of equity. Given this sensitivity and given the considerable uncertainty surrounding the expected risk-free rate, it seems appropriate to adopt a cautious approach and hence a relatively wide range at this stage.*
>
> *Given the above, it seems appropriate to adopt a slightly wider range than the most recent Competition Commission range. Ofgem gas widened the Competition Commission range symmetrically by 0.25%, which gives a range for the risk free rate of 2.25% to 3.0%.*[32]

88. At the time, 10 year gilt yields were around 1.9%.

89. In relation to the debt premium, Ofgem stated:

> *At the last price control review, Ofgem adopted a debt premium in the range of 1.65% to 1.85%, which included an adjustment for embedded debt.*
>
> *The current debt premium especially for DNO's UK debt seems to be relatively low and it is possible that this is due to increased demand for corporate debt by pension funds.*
>
> *Given that there seems to be considerable uncertainty surrounding the expected cost of debt, Ofgem has adopted a relatively wide range for the debt premium of 1.0%-1.8% in its cost of capital calculations.*[33]

90. At the time the relevant market data was providing a debt premium of 0.93% for UK debt on two years of data and a "long term" average debt premium of 1.36%.[34]

91. In other words, UK regulators have not always relied solely on current market rates or observed debt margins to estimate the expected risk free rate or cost of debt.

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[30] Ibid., page 174.
[31] Ofgem, *Electricity Distribution Price Control Review: Background information of the cost of capital*, March 2004, page 12.
[32] Ibid., page 13.
[33] Ibid., page 22.
[34] Ofgem did not specify what it meant by long term

Instead, they have adjusted these rates or made adjustments for the embedded cost of debt, where the market rates are not expected to prevail.

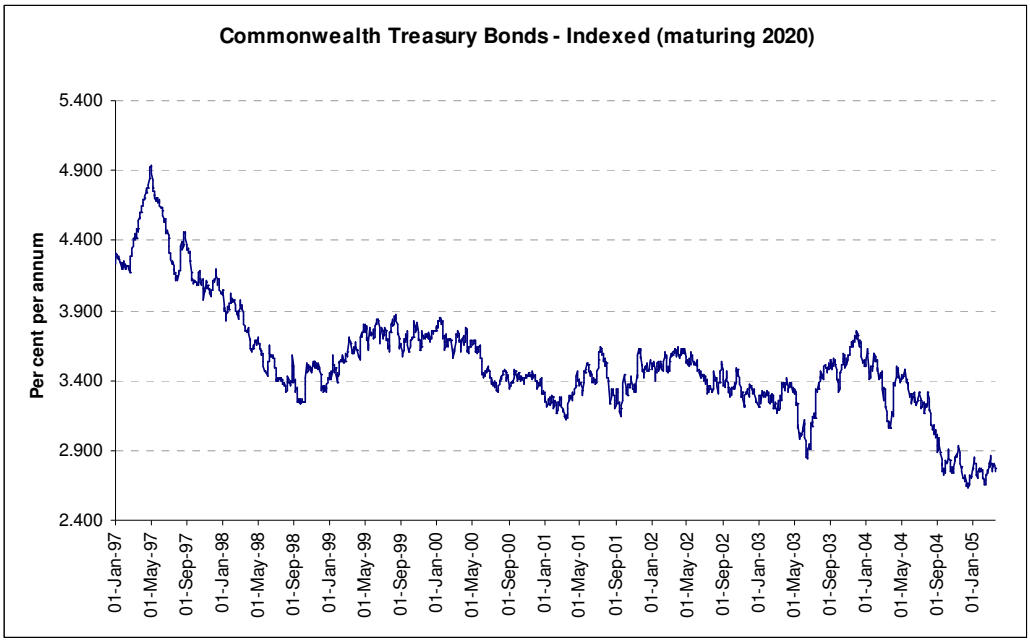
92. There is some evidence to suggest that similar issues might be arising in other bond markets as well. In particular, a number of commentators have noted the highly unusual circumstances that have recently arisen in the government and corporate bond markets.[35] A recent report by Morgan Stanley, an investment bank, highlights the degree to which the markets are in unchartered territory. The key conclusion of its analysis is that:

> *Long-term interest rates are effectively at their lowest level for 300 years, when William III was on the throne and the Bank of England was founded to finance wars against the French.*[36]

93. Morgan Stanley's Chief Economist suggests that more research is required to understand why (both real and nominal) rates are so low but he notes:

> *One thing which is clear is that interest rates tend to revert towards the mean over time. So I am afraid that means interest rates are likely to rise from here.*

94. These issues may be of some relevance to the situation in Australia, as is illustrated in the change in the yield on indexed bonds maturing 2020 from 1 January 1997 to 17 March 2005.



95. It is difficult to determine the extent to which these market developments are being driven by changes in market expectations or by exogenous factors (eg the decline in government borrowing). However, there is some evidence that exogenous factors could be having a significant influence on Australia's bond markets in the same way as the UK bond markets discussed above (eg Australia faces similar demographic issues and has also reduced its government debt levels significantly in recent times). There is also some evidence to suggest that, to the extent that this is the case, the effects are likely to be more pronounced in Australia than in the UK.

[35] *Economist*, 'Curious times in the bond market', September 18, 2004; AFR, 'Bond yields a big global worry', 30 September 2004, page 64.
[36] *The Age*, 'Rates last this low in good old William's time', 11 March 2005, page B4.

96. For example, the Commonwealth Government bond market is already comparatively small by virtue of the Government's fiscal position. Indeed, in 2002 this led to the Government holding an inquiry into whether it was necessary to maintain that market. The Government ultimately decided to retain the market, however, it decided that "the issuance of Treasury Indexed Bonds will be suspended."[37]

97. Since 1996, Commonwealth general government net debt has fallen from $100 billion to $30 billion. At the same time, funds under management in superannuation, a key investor in risk-free debt, have risen from about $300 billion to $600 billion. Indeed, some parties already argue that the market is already too small and less liquid than is desirable.[38] Moreover, the indexed link bond market in Australia is tiny by comparison to the UK (around $10 billion worth of bonds in total are on issue).

98. Legitimate questions can therefore be raised about the extent to which current market yields provide a reliable estimate of the expected risk free rate, which again highlights the uncertainties associated with estimating the cost of capital, even where forward looking market evidence is available. This is because it cannot always be assumed that they are likely to prevail.

99. AGN submits that taking a short term average of the risk free rate does not meet the requirements of the Code to provide a rate of return which is commensurate with prevailing conditions in the market for funds and the risk involved in delivering the Reference Service.

100. AGN therefore submits that a long-term average of the risk free rate would provide a more appropriate solution to the risks involved in delivering the service. In this regard AGN notes that ESCOSA used a five-year average of the risk free rate as part of its regulation of electricity distribution in South Australia. The five-year average of the 2015 indexed bond is 3.3% and the nominal figure is 5.7%.

The Debt Margin

101. AGN submits that the cost of debt recommended by the ERA is too low to comply with sections 8.30 and 8.31 of the Code.

102. Although AGN initially proposed the use of the CBA Spectrum econometric model to set the cost of debt it did so without recent evidence, which suggests that the model understates the actual cost of debt.

103. Section 8.30 of the Code establishes two separate requirements on Regulators considering the cost of debt and the rate of return more generally:

    (a) a return must be commensurate with the prevailing conditions in the market for funds; and

    (b) a return must be commensurate with the risk involved in delivering the reference service.

104. The market for funds to be considered is that for a utility with a credit rating of BBB+ and a level of debt of 60%. The question of what is a "market" for funds is also an issue given the lack of debt issues for companies with BBB and BBB+ credit ratings. To be consistent with the estimate of the risk free rate the term of the debt analysed should be 10 years.

[37] Treasury, Statement 7: Budget Funding, http:/www.budget.gov.au/2003-04/bp1/html/bst7.htm. None has been issued since February 2003.

[38] Skeffington, *Business Review Weekly*, 'Australia's illiquid bond market has its supporters, but others want it abolished, 18 July 2002, page 38.

105. As stated, the market for debt raising for companies with BBB or BBB+ credit risks is small. This means that regulators must look for estimates of the market for funds. Most have used the CBA Spectrum data. However, the ERA has recognised the limitations of this approach:

> *The Authority recognises, however, that this indicator of the debt margin should be treated with caution. Rates provided for the CBA Spectrum service are not actual market observations, but rather a prediction of yields based on an econometric model, and the market observations upon which the predictions are based are very thin.*[39]

106. AGN agrees. However, since an econometric model cannot be considered as part of the prevailing market for funds, this raises the question as to whether the CBA Spectrum model can properly be used as the basis of regulatory decisions on the cost of debt. A "market" usually involves buyers and sellers undertaking transactions. An econometric model is an estimate of a market, it is not an actual market.

107. The Trade Practices Tribunal in 1976 in *Re QCMA and Defiance Holdings* (1976) 25 FLR 169 stated:

> *We take the concept of a market to be basically a very simple idea. A market is the area of close competition between firms or, putting it a little differently, the field of rivalry between them. (If there is no close competition there is of course a monopolistic market.) Within the bounds of a market there is substitution – substitution between one product and another, and between one source of supply and another, in response to changing prices. So 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. Let us suppose that the price of one supplier goes up. Then on the demand side buyers may switch their patronage from this firm's product to another, or from one geographic source of supply to another. As well, on the supply side, sellers can adjust their production plans, substituting one product for another in their output mix, or substituting one geographic source of supply for another. Whether such substitution is feasible or likely depends ultimately on consumer attitudes, technology, distance, and cost and price incentives* [40]

108. AGN submits that there are strong arguments for applying the same analysis in relation to the Code, and no substantial counter-arguments. AGN can make further submissions on this point if necessary.

109. Thus, a market is an area of close competition between firms, not an econometric estimate of the market. As stated, this analysis raises doubts as to whether it is sufficient, when making decisions under the Code, to rely solely on the use of econometric evidence.

110. In addition, the CBA Spectrum model is likely to be volatile, as there are only 3 BBB+ bonds in CBA Spectrum's database.[41] This is demonstrated by large variations in the data from the CBA Spectrum model. In late 1998, the debt margin on BBB+ 10-year maturities as estimated by the CBA Spectrum model rose from around 100bp to around 280bp and fell back to around 140 bp in a matter of some months. Over the same period the estimated margin on BBB+ rated bonds in the actual market hardly changed.

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[39] ERA, *Draft Decision on the Proposed Revisions to the Access Arrangement for the South-West and Mid-West Gas Distribution Systems*, February 2005, page 72 para 328.

[40] (1976) 25 FLR 169 at 190.

[41] See NERA, ActewAGL Supplementary Submission, *Estimating the Debt Margin for ActewAGL, A Report for ActewAGL*, February 2004, page 1

111. There is currently some debate regarding the possibility that the data on yields supplied by CBA Spectrum may be understated relative to observed yields. This observation was made by the National Economic Research Associates (**"NERA"**) in a report prepared for ActewAGL as part of the ICRC's electricity distribution review.[42] NERA stated in its report that:

> *One source of market data that Australian regulators, such as the ACCC, IPART and ESCOSA, have recently relied on is CBA Spectrum data. On the 25th of February 2004, CBA Spectrum was reporting estimated debt margins of 101bp for 10 year maturity BBB+ bonds. However, CBA Spectrum's database only includes three BBB+ bonds. Moreover, two out of these three bonds have maturity dates of less than 3 years with only one having a maturity date of 9 years. The reported margins on these bonds as at 25 February 2004 and their year of maturity is summarised in the table below.*[43]

CBA Spectrum's database of BBB+ bonds

	Maturity	Spread relative to equivalent maturity government bond	"CBA Spectrum" estimate of the 'fair' debt margin for given maturity
BBB+ bonds			
BritAmerTob	2006	1.11%	0.82%
Qantas	2007	1.01%	0.87%
Snowy Hydro	2013	1.37%	1.00%
Source: ActewAGL Supplementary Submission, Estimating the debt margin for ActewAGL, A Report for ActewAGL prepared by Nera, February 2004.			

112. NERA went on to state that:

> *for BBB+ bonds, CBA Spectrum is on average 27 basis points below the actual observations of debt margins on BBB+ rated debt. For the only observation of long dated debt (Snowy Hydro), CBA Spectrum is 37 basis points below the equivalent actual observation.*[44]
>
> *….*
>
> *The explanation for this lies in the fact that CBA Spectrum simultaneously estimates the 'fair' relationship between debt margins and maturity for all 10 investment credit ratings from Government to BBB. In doing so, CBA Spectrum constrains these estimated curves to follow similar shapes to one another and never to cross (eg. 'fair' debt margin on a BBB+ bond must always be below that on a BBB bond). This effectively means that the estimates of 'fair' debt margins for BBB+ bonds, for which there are only three observations and for which there are even fewer long dated observations, are largely driven by observations for higher rated bonds…*[45]

113. This suggests that regulators are left with four broad choices for estimating the cost of debt. The choices are using:

(a) the unadjusted econometric evidence and perhaps failing to comply with the requirements of the Code or failing to propose the optimum benchmark to reflect commercial reality in the industry;

(b) the econometric evidence and adjusting it for its volatility and providing an optimum commercial benchmark but not complying with the Code;

[42] Ibid.
[43] Ibid, page 4.
[44] Ibid, page 4.
[45] Ibid, page 5.

(c) the evidence from the actual debt markets which are rather thin; or

(d) the adjusted econometric evidence and checking this with actual market data – which AGN submits will enable the Regulator to comply with the Code and also to produce the best commercial estimate.

114. The volatility of the econometric evidence suggests that the best practice approach should be to take a long term average of the CBA Spectrum data. The term chosen could be assumed to be consistent with the period which the current debt on AGN books has been established, because this best meets the commercial benchmark requirement.

115. To consider actual market rates to compare with the predictions from the CBA econometric model the ERA considered a range of actual debt raisings, however only one of these was relatively recent.

116. The example used by the ERA was the Snowy Hydro's (9 year) BBB+ rated bond raised in Australia which represented a margin of around 80 basis points calculated over the 20 business days to 29 April 2004. This sample however is not from March 2005 and hence can be discounted as a valid check on the CBA Spectrum predictions.

117. In terms of the Snowy Hydro bond issue the latest interest rate as at 15 March 2005 was 6.682%, giving a spread over the 10-year government bond rate of 119.7 bps. A 20-day average gives a yield of 6.659% and a spread of some 121.4 bps.

Problems with the Risks of Delivering the Service

118. AGN considers that the ERA's decision on the cost of debt only focuses on the first part of section 8.30, namely the prevailing conditions in the market, and does not consider the risks involved in delivering the service. The evidence for this position is the problems with the CBA Spectrum data discussed above and further issues as outlined below.

119. To establish a cost of debt, an appropriate credit spread is added to the risk-free rate to determine a benchmark cost of debt. This procedure implicitly assumes that an efficiently managed entity would obtain debt financing at the start of the regulatory access period. However, this may not be the case for the following reasons[46]:

- Knowing that a number of utilities will issue debt over a very short period, lenders are likely to act strategically in their pricing. That is, the actual cost of debt may exceed the risk-free rate plus a credit spread that is based on a sample of existing bonds.

- The regulatory process essentially determines the term of the debt (to match the regulatory cycle) or forces the entity to bear interest rate risk of some form. In practice, many regulated entities do borrow at the determination date for a term that matches the regulatory period. However, commercially efficient debt management may be to borrow at a term that differs from the regulatory period.

120. Moreover, the current regulatory practice also leaves the utility exposed to interest rate risk on new capital expenditure that is debt financed during the regulatory period.

121. These risks must be accounted for in establishing the cost of debt benchmark to ensure that the requirements of the Code have been adequately assessed.

[46] See *SFG Consulting, Issues in the Cost of Capital Estimation*, September 2003, Submission 69 (attachment 2) Productivity Commission Inquiry into the National Gas Access Arrangements.

Conclusion on the Cost of Debt

122. To ensure compliance with the Code and ensure the cost of debt is an accurate estimate of the current commercial benchmark, AGN considers that a long-term average of the CBA Spectrum data must be used and compared with the recent evidence from the actual debt market.

123. AGN recommends that the ERA assume a debt profile that more closely resembles a commercially efficient benchmark. This likely amounts to using a weighted average rate over a longer historical period – a period that covers the time during which AGN raised the debt that is currently on its books.

124. AGN suggests that a long-term average should be taken over some 3 years, which represents the debt raised on its current books. AGN therefore suggests that the level for BBB+ rated 10-year bonds from the CBA Spectrum model would be 125.6 bps.[47] In comparison the evidence from the actual debt market (the Snowy Hydro bond) would suggest that the level is 121.4bps which is quite close to the 3-year CBA Spectrum average data. An average of these two figures would suggest a current best commercial estimate of 123.5 bps.

125. With debt raising costs of 12.5 bps this would infer a cost of debt of 136 basis points over the risk free rate. AGN notes that this level would meet the test of a commercial benchmark.

The Value of Gamma

126. We note in respect of Gamma ("γ") that the ERA has paid particular regard to the evidence previously provided by Hathaway and Officer:[48]

> *In Australia, regulators under the Code have generally adopted a "γ" value of 0.5 based on the 1999 study by Hathaway and Officer, which estimates gamma at close to 0.5. The Authority takes the view that this assumption is appropriate for the GDS (Gas Distribution System).*[49]

127. The ERA should be aware that Hathaway and Officer recently updated their analysis in a paper entitled "The Valuation of Imputation Credits Update 2004". In other words, this revised version of their work contains updated data and more detailed and careful analysis, but the same approach.

128. They now conclude that:

> *the access factor is 71% and about 50% of distributed credits are being redeemed. Overall, about 35% of company tax is actually a pre-payment of personal tax.*

129. In other words, the update of their work reduces gamma from the 0.5 it has previously estimated to 0.35. A copy of Hathaway and Officer's analysis is available on request.

130. The value attributed to gamma consists of two elements – the rate at which franking credits are distributed by the firm (**"distribution rate"**) and the rate at which franking credits are utilised by shareholders (**"utilisation rate"**).

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[47] The Allen Consulting Group, December 2004, op cit, p. 24

[48] Hathaway, N and R R Officer, 1999, The Value of Imputation Tax Credits, Unpublished manuscript, Graduate School of Management, University of Melbourne.

[49] ERA, *Draft Decision on the Proposed Revisions to the Access Arrangement for the South-West and Mid-West Gas Distribution Systems*, February 2005, page 77.

131. Regulators have typically previously adopted a distribution rate assumption of 82%.[50] This assumption was based upon the study by Hathaway and Officer (1996), which found that the value of franking credits distributed in each year averaged 82% of the value of credits created.

132. The update of this study using more recent data and improved analysis estimates the appropriate value at 71%.

133. AGN has previously argued that this approach to estimating gamma has significant limitations (eg relevance to the marginal investor). However, if the ERA is going to rely solely on this approach, as its Draft Decision implies, then AGN submits that the ERA should have regard to Hathaway and Officer's updated conclusions, rather than to their previous but now outdated work.

134. AGN submits that Gamma should be between 0.3 and 0.35 as provided for in the latest study on the matter on the ground that this best meets the requirements of the Code.

The Overall Rate of Return

135. In light of this discussion AGN considers that a range of WACC variables can be constructed to show upper and lower ranges that are within the ranges commensurate with the prevailing conditions of the market and the risks of the service.

136. A lower range can be provided by the ERA Draft Decision. AGN considers that an upper range could be constructed by the variables outlined above including revised figures for the MRP, the Cost of Debt, the Risk Free Rate and the Gamma. This is show in the table below and represents a Real Pre Tax WACC of 8.17%.

137. AGN would suggest that an appropriate WACC would be the 75th percentile of the upper and lower bounds / a Real Pre Tax WACC of 7.75%:

Nominal Risk Free Rate	5.7%
Real Risk Free Rate	3.3%
Market Risk Premium	7.0%
Cost of Debt Margin	1.36%
Gamma	35%

138. The 75th percentile is chosen to be consistent with the Productivity Commission's concerns that regulatory pricing decisions should err on the side of the utility to encourage investment.

139. In a recent report the Commission stated:

> *the Commission considers it appropriate to give particular weight to ensuring that investment in essential facilities is not jeopardised. While it is unarguable that access can promote investment in markets using the services of essential facilities, such investment is contingent on preserving incentives to build or expand those facilities in the first place.*

[50] Essential Services Commission, *Final Decision, Review of Gas Access Arrangements*, October 2002, page 393.

Amendment 22

The pre-tax weighted average cost of capital referred to at page 49 of the submitted Access Arrangement Information should be amended from 8.5 percent to 6.50 percent.

140. AGN does not agree with Amendment 22. Refer to paragraphs 59 to 139 above.

Amendment 23

The submitted Access Arrangement Information should be amended to include the values as set out in Column 2 of Table 19 in this Draft Decision as the values for determining the Rate of Return for the revised Access Arrangement.

141. AGN does not agree with Amendment 23. Refer to comments made in paragraphs 59 to 139 above.

3.3 Return on Capital

Amendment 24

Table 4.8 of the Access Arrangement Information should be amended to reflect the Authority's calculation of the return on the Capital Base for each year of the second Access Arrangement Period as set out in Table 21 of this Draft Decision.

142. Whilst AGN does not agree that Amendment 24 is required, AGN has updated the values contained in Table 4.8 of the AAI to reflect a value that is consistent with more recent data.

3.4 Non Capital Costs

Amendment 25

Table 4.11 of the Access Arrangement Information should be amended to accord with the forecast Non Capital Costs shown in Table 23 of this Draft Decision.

143. AGN welcomes the ERA's conclusion (stated in paragraph 389 of the Draft Decision) that the company's forecasts of Non-Capital Costs for the first three years of the Access Arrangement Period comply with section 8.37 of the Code.

144. AGN does not agree, however, that the ERA's own estimates of prospective efficiency gains in the final two years of the Access Arrangement Period should be incorporated in order to derive a forecast of Non-Capital Costs for those years.

145. The forecast efficiency gains are yet to be achieved, and their expected timing and magnitude is speculative. AGN submits that forecasts of efficiency gains that are expected to be achieved in five or more years' time is highly uncertain. AGN submits that there is no reasonable basis for the ERA's required amendment to provide for efficiency gains in network costs of 1 percent pa (in real terms) for each of the final two years of the Access Arrangement Period, because there is no reasonable grounds for the ERA to be confident that this allowance would be consistent with the provisions of section 8.37 of the Code.

146. On the contrary, AGN submits that there are clear and valid grounds for the ERA to form the view that the forecasts of Non-Capital Costs submitted by AGN for all years of the Access Arrangement Period are consistent with the provisions of section 8.37 of the Code.

147. Until such time as AGN can confirm with the EPA that the land clearing permits will have no significant impact on costs, AGN confirms its current forecast. In addition

AGN has now included additional Non-Capital Costs to account for the expected costs of Heating Value Management.

148. AGN submits that section 8.37 is not the appropriate Code mechanism to regulate or incentivise efficiency gains. Over successive Access Arrangement Periods, it would be reasonable to expect a regulated company to achieve efficiency gains in response to the incentives provided by a price cap regime to do so. The conduct of a regulated company over successive Access Arrangement Periods, and the cost and other performance information disclosed by the company over that time will reflect the gains actually made. These gains, in turn, can be incorporated into future regulatory decisions in accordance with sections 8.44 to 8.46 of the Code. In this way, the gains *actually achieved* by a regulated company under an incentive-based regulatory regime can be passed on to consumers. This simple model of incentive-based regulation obviates the need for the regulator to make speculative estimates of the scope for *future* efficiency gains in price control decisions, which estimates can only ever be approximate at best. For these reasons, AGN submits that there is no need or basis for regulatory decisions under section 8.37 to pre-empt the efficiency gains that might be achieved .

149. A range of factors determine what efficiencies can actually be achieved, not all of them within AGN's control. The ERA's proposed approach would penalise AGN if it failed to achieve in the later years of the access arrangement period, a level of efficiencies established arbitrarily by the ERA well in advance of knowing the actual circumstances prevailing at the time. This negative, penalising approach is at odds with the positive, incentivising approach in section 8.44, supporting AGN's contention that section 8.37 is not intended to be used as a supplementary incentive mechanism.

150. Section 8.37 does not just impose a test of "acting efficiently". It also requires an assessment of prudence, good industry practice, and achieving the lowest sustainable cost of delivering services. It is impossible for AGN or the ERA to predict what developments may occur in the future which impact positively or negatively on non-capital costs. The only reasonable approach is to assume a relatively steady state of affairs on those matters which cannot be better forecast.

151. Finally it is noted that the ERA has stated it has no reason to believe that the forecasts presented for Corporate and IT Costs do not comply with the relevant provisions of the Code. Nonetheless, it has requested further substantiation of AGN's forecasts for these costs prior to making the Final Decision. AGN would welcome the opportunity to discuss this issue with the ERA. However, AGN submits that these forecasts comply with the relevant provisions of the Code.

3.5 Calculation of Total Revenue

Amendment 26

Table 4.11 of the Access Arrangement Information should be amended to accord with the Authority's determination of Total Revenue for each year of the second Access Arrangement Period, as set out in Table 24 of this Draft Decision.

152. For the reasons set out above in paragraphs 44 to 150, AGN does not agree with the ERA's calculation of forecast Total Revenue and therefore proposes to amend Table 4.14 of the AAI only to reflect the changes in values from June 2003 – December 2004. AGN believes that the forecasts it provided in the AAI are the most suitable. As expressed in relation to Amendment 25, AGN does not agree that the ERA can or should forecast efficiencies not yet achieved in determining future expenditure requirements.

3.6 Determination of Reference Tariffs

Amendment 27

The submitted Access Arrangement Information should be amended to include the information set out in Table 25 of this Draft Decision in relation to prudent discounts.

153. AGN has amended the AAI in accordance with Amendment 27. AGN will lodge the amended AAI table with the ERA together with its amended PRAA.

Amendment 28

The Reference Tariffs for Reference Services A1, A2, B1, B2 and B3 in Schedules 1, 2, 3, 4 and 5 of Part B of the proposed revised Access Arrangement respectively should be amended to accord with Table 26 of this Draft Decision for the Reference Tariffs to apply for the first year of the second Access Arrangement Period.

154. AGN does not agree with Amendment 28. The tariffs are quoted as 2005 tariffs whereas the remainder of the decision is quoted in 2004 values. This is an inconsistency and potentially confusing to the reader.

Amendment 29

The proposed 2005 Reference Tariffs set out in Tables 3.1 and 3.1A of the submitted Access Arrangement Information should be amended to accord with Table 26 of this Draft Decision.

155. AGN does not agree with Amendment 29. The tariffs are quoted as 2005 tariffs whereas the remainder of the decision is quoted in 2004 values. This is an inconsistency and potentially confusing to the reader

Amendment 30

The forecast number of B2 and B3 customers connected, as set out in Table 6.5 of the submitted Access Arrangement Information, should be amended to accord with Table 27 of this Draft Decision.

156. AGN agrees with Amendment 30 and will amend the Access Arrangement Information to incorporate latest available customers as at January 2005. The ERA has highlighted differences between customer information provided in Table 6.5 of the AAI and the number of connections to be made as part of AGN's capital program.

157. there will always be a greater number of customers who require connections in a year than the annual difference between opening and closing connection point numbers for the year. The difference relates to the number of abolishments made. AGN forecasts that the annual rate of abolishments is approximately 2,500 per year. Therefore assuming that the number of connections made in any one year is 17,500, the total customer connection point growth is 15,000, which represents the difference between connections and abolishments.

Amendment 31

The X factor referred to in clause 8(2) of Part B of the proposed revised Access Arrangement should be amended from –0.0218 to 0.0396.

158. AGN does not agree with Amendment 31 for the reasons outlined above. However, AGN has amended clause 8(2) of Part B to reflect that in the first year of the Access Arrangement Period (2005) X equals 0.0255. However based on AGN's revised modelling, X for the remaining four years will be amended to negative 0.026.

3.7 Adjustment of Reference Tariffs from price path

Amendment 32

Clause 8 of Part B of the proposed revised Access Arrangement should be amended to include a constraint which would limit the amount by which any particular Tariff Component may increase in any one year to 2 percent above the price path for any Tariff Component established by the Reference Tariff adjustment formula.

159. AGN does not agree with Amendment 32. Adopting Amendment 32 would severely limit the benefits of the tariff basket mechanism. AGN would welcome the opportunity to discuss this issue with the ERA and proposes to submit an alternative model.

Amendment 33

Clause 5(b) of Part B of the proposed revised Access Arrangement, providing AGN with a discretion to add or remove one or more Tariff Components, should be deleted.

160. AGN does not agree with Amendment 33. In paragraph 480 of the Draft Decision, the ERA states that it is satisfied that the adoption of the tariff basket form of price control as proposed by AGN is consistent with the efficiency objectives in section 8.1 of the Code. AGN welcomes this aspect of the Draft Decision.

161. However, an important element of any effective tariff basket price control is that it enables the regulated company to introduce new tariffs or tariff components, in response to changing customer needs and preferences, or other market developments. The intention of clause 5(b) of Part B of the PRAA is to provide a mechanism that will enable AGN to respond to these drivers.

162. Rebalancing with the constraint proposed by the ERA will not necessarily result in a rebalancing that reflects market conditions. For example, if the A1 or A2 tariffs need to be increased due to unforseen increases in telecommunications costs for telemetry on metering facilities, the 2% ceiling would result in a proportion of that cost being borne by the B1, B2 or B3 reference tariffs.

163. Accordingly, AGN cannot accept the amendment proposed by the ERA without the removal of proposed constraints on price control that will enable AGN to introduce new tariffs or tariff components in response to changing customer needs and preferences, or other market developments. AGN would welcome the opportunity to discuss this matter in further detail with the ERA, and may then make further submissions on the subject.

Amendment 34

Clause 11 of Part B of the proposed revised Access Arrangement should be amended to include a requirement that, at the time it submits the annual Variation Report, AGN also submits a forecast of Tariff Components of Reference Tariffs for 3 years or to the end of the second Access Arrangement Period whichever is the sooner.

164. AGN does not agree with Amendment 34. The PRAA is consistent with the current obligations and therefore consistent with the Code. AGN would welcome the opportunity to discuss this matter in further detail with the ERA, and may then make further submissions on the subject.

Amendment 35

The Reference Tariff adjustment formula, $CPI_t \times (1-X_t) \times (1+R_t)$, and the formula for determining the R factor in clause 8 of Part B of the proposed revised Access Arrangement, should be amended so that the formulae achieve their intended purposes.

165. AGN will amend the formula referred to in Amendment 35 to account for the revised flows of revenues based on details provided in this Submission. AGN will however

seek further clarification from the ERA as to what aspects of this formula that it believes do not achieve the intended purpose.

Amendment 36

Clause 66 of Part A, and clauses 12 to 14 of Part B of the proposed revised Access Arrangement should be amended to provide for a Reference Tariff Variation Method under section 8.3 of the Code, in relation to FRC Costs and FRC New Facilities Investment, that is consistent with sections 8.1 and 8.21 of the Code.

166. AGN does not agree with Amendment 36. AGN submits that clause 66 of Part A and clauses 12 to 14 of Part B (**"Trigger Event Provisions"**) are a Reference Tariff Variation Method consistent with the Code.

167. The ERA's concerns with the Trigger Event Provisions can be classified as follows:

(a) the Trigger Event Provisions do not apply to reduce tariffs if FRC expenditure is lower than forecast;[51]

(b) clause 14 of Part B bypasses the public consultation process in section 8.21 of the Code;[52] and

(c) the Trigger Event Provisions risk expensive regulatory costs and so should have a minimum threshold before they can be triggered.[53]

168. The ERA also notes that other tariff variation methods are available to AGN.[54]

169. AGN deals with each of these issues in turn below.

No symmetry

170. Sections 8.3A to 8.3H of the Code do not expressly require an Approved Reference Tariff Variation Method to be symmetrical. Therefore the question to be determined is whether an asymmetrical mechanism complies with sections 8.1 and 8.3 of the Code.

171. At the outset, AGN submits that although material cost underruns are theoretically possible, the practical reality of FRC implementation throughout Australia is that cost overruns are more likely to occur. Furthermore, as a matter of fact there is asymmetry between the potential reductions and the potential cost overruns. AGN's current FRC cost estimate is $1.3m pa, meaning that the maximum theoretically-possible (but very improbable) cost saving is $1.3m pa. There is no corresponding cap on any potential FRC cost overruns.

172. Any cost underruns would be able to be addressed at the next access arrangement revision, subject to the incentive mechanism.

173. The "harm" caused by cost overruns and underruns is also asymmetric. A cost underrun which was passed to the market immediately would have a minor distributed benefit for all Users, and the "harm" resulting from not adjusting for it until the next access arrangement revision is correspondingly modest. On the other hand the harm to AGN of incurring unrecovered costs falls solely upon AGN. Even on a dollar-for-dollar basis the two "harms" are not equal – deferred underrun recovery involves merely missing out on an unexpected and unbudgeted saving, whereas cost overruns involve actually having to incur additional unbudgeted expenditure.

[51] ERA, *Draft Decision on the Proposed Revisions to the Access Arrangement for the South-West and Mid-West Gas Distribution Systems*, February 2005, para 499, first bullet point
[52] Ibid, para 499, second bullet point
[53] Ibid, para 499, third bullet point
[54] Ibid, para 500

174. AGN submits that an asymmetrical Reference Tariff Variation Method:

(a) is consistent with the outcomes of a competitive market (section 8.1(b)) because:

(i) it is common in commercial contracting to have asymmetrical price-adjustment clauses to address the asymmetric risk to the vendor of a cost increase versus the less likely and less serious outcome of a cost decrease;

(ii) the parties in an arms-length negotiation may well determine that the time and expense involved in the application of the clause to a cost saving (which for the above reasons in practical terms is less likely to be substantial than a cost overrun) simply does not justify having a symmetrical clause; and

(iii) this access arrangement already includes mechanisms designed to share the benefits of any cost savings, so to include a symmetrical provision here which also deals with cost savings would be double regulation;

(b) is efficient (section 8.1(e)) for the reasons set out above; and

(c) will not distort investment decision in the network (section 8.1(d)) and provides an incentive to the service provider to reduce costs (section 8.1(f)).

Bypassing the public consultation process

175. The ERA is concerned that clause 14 of Part B constitutes a fetter on its obligation to undertake public consultation under section 8.21. AGN does not agree.

176. As a matter of statutory interpretation the general provisions of section 8.21 of the Code must be read as subject to the specific mechanisms set out in sections 8.3A to 8.3H.[55] These sections clearly contemplate an access arrangement containing a discrete Reference Tariff Variation Method which adjusts the reference tariff mid-period, and so anticipates the process that would otherwise occur at the next access arrangement revision and which is governed by numerous general provisions in section 8 including section 8.21.

177. The specific provisions in sections 8.3A to 8.3H:

(a) do not contain any statutory direction to the ERA to undertake public consultation; but

(b) do include provisions relating to transparency,[56] demonstrating that the legislature turned its mind to the matter in drafting these sections.

178. Thus, AGN submits that a Trigger Event Provision which has the effect of foreclosing the determination of a matter which otherwise would be open for determination at the next access arrangement revision, is not inconsistent with the general provision in section 8.21 provided that the specific provisions in section 8.3A to 8.3H are complied with.

[55] This the legal principle known as *generalia specialibus non derongant* (*Perpetual Executors and Trustees Association of Australia Ltd v FCT* (1948) 77 CLR 1 at 29). The Full Court of the Supreme Court of Western Australia applied this principle in *Re Dr Ken Michael AM: Ex parte EPIC Energy (WA) Nominees Pty Ltd & Anor* [2002] WA SCA 231 (23 August 2002) at paragraph 61 when interpreting the provisions of the Code.

[56] i.e. section 8.3C (final paragraph) and section 8.3F of the Code

179. Whether or not the ERA accepts the above submission, AGN submits that nothing in the Trigger Event Provisions (including clause 14 of Part B) prohibits the ERA from undertaking public consultation if it considers that it is required to do so under the Code, as part of its process under sections 12(1) or 12(2). AGN notes, however, that other stakeholders in the FRC process might not welcome the delay that public consultation will bring with its concomitant risk of delays in the implementation of market reforms, but AGN will leave this as a matter for submission to the ERA at a later time when it is deciding whether public consultation is needed in a given instance.

Setting a minimum threshold

180. AGN agrees to implement a threshold to grant comfort that the mechanism will not be triggered for immaterial cost overruns, but would like to discuss with the ERA how the threshold might be implemented and at what level, and may make further submissions on the matter after those discussions.

Alternative mechanisms

181. AGN notes the ERA's comments in paragraph 500 of the Draft Decision. AGN submits that the Trigger Event Provisions are consistent with the Code, but is interested in hearing the ERA's views on alternative mechanisms, and may make further submissions on the matter after those discussions.

3.8 Use of Incentive Mechanism

Amendment 37

Clauses 35 of Part B of the proposed revised Access Arrangement should be amended to provide for an Incentive Mechanism that provides for a rolling carry-over mechanism of no longer than five years.

182. AGN does not agree with Amendment 37 and seeks the ERA's working model for its proposed incentive mechanism to facilitate a better understanding.

183. AGN is disappointed that the Draft Decision has not accepted its proposal for a ten year rolling efficiency carry-over mechanism.

184. AGN notes that the ERA has not cited any grounds for a finding that 10 years is an inappropriate period or is not consistent with the Code.

185. As noted in the Draft Decision, the length of efficiency carry-over periods in some access arrangements approved so far by Australian regulators is five years. However, there are also a number of access arrangements (for instance, those relating to AGL's Central West System in New South Wales, the Amadeus Basin to Darwin System and Envestra's SA Distribution System) that permit retention of efficiency gains for periods of up to 10 years.

186. The draft decision also notes that section 8.46 of the Code provides that an Incentive Mechanism should be designed with a view to achieving objectives as follows:

    (a) providing the Service Provider with "an incentive" to engage in certain conduct consistent with the efficiency objectives of the Code (sections 8.46(a) to (d)); and

    (b) ensuring that Users and Prospective Users gain from increased efficiency (section 8.46(e)).

187. AGN notes that its proposed Incentive Mechanism clearly satisfies all of these Code requirements.

188. Finally, it is noted that the Draft Decision acknowledges that the Code provisions relating to Incentive Mechanisms are not prescriptive as to the share of efficiency improvements which may be regarded as sufficient to provide a Service Provider with the appropriate incentives, nor as to what sharing as between the Service Provider and Users may be regarded as optimal.

189. AGN submits that its proposed Incentive Mechanism would:

(a) mitigate adverse influences that otherwise may impact on the timing of initiatives to implement efficiency savings in expenditure;

(b) provide strong incentives for the company to achieve efficiencies by ensuring that it has a prospect of sharing in those efficiencies for a substantial period of time; and

(c) provide consumers with a reasonable share of the benefits of all efficiency gains over time.

190. In addition to the information contained in AGN's AAI, AGN has also responded in some detail to the initial consultation on the ERA's proposed Incentive Mechanism on 11 June 2004. AGN adopts that submission as part of this submission.

191. It is clearly open to the ERA to find that a ten year rolling efficiency carry-over mechanism satisfies all of the requirements of the Code, and AGN urges the ERA to reconsider its Draft Decision in relation to this matter.

Amendment 38

Clauses 33 to 36 of Part B of the proposed revised Access Arrangement should be amended to clarify how AGN proposes that net negative efficiency losses at the end of the second Access Arrangement Period are to be treated, including the exercise of any discretion by the Authority in this matter.

192. As noted by the ERA, the Essential Services Commission (**"ESC"**) considered the question of the treatment of negative efficiency carry-overs in detail in its final decision on the 2003 Victorian Gas Access Arrangements Review. Pages 165 and 166 of the ESC's final decision state:

> *The Commission notes TXU and Multinet's concerns that the carryover of a negative amount between the second access arrangement period and the third may be contrary to ensuring the financial viability of the distributors. As the Commission has previously noted in its Draft Decision, in deciding on the appropriate treatment of a negative carryover it would need to have regard to the principles set out in the Gas Code, including those in section 2.24 and in section 8.1. These principles include the need to take into account the service provider's legitimate business interests. The ability of the Commission to exercise discretion is therefore limited to an extent by the requirements of the Gas Code, and the Commission would take these requirements into account in making any future decision on the treatment of a negative carryover amount.*
>
> *In summary, the Commission remains of the view that it is appropriate for it to have discretion in determining the treatment of any accrued negative carryover amount at the end of future access arrangement periods. However, the Commission notes that such discretion will be exercised within the constraints of the objectives set out in the Gas Code.*
>
> *The Commission's Final Decision is that Multinet and TXU should amend their proposed Revisions to permit the Commission to exercise this discretion. The Commission requires Envestra to reinstate clauses 7.2(c)(3) and (4) in its proposed Revisions.*

193. AGN has reviewed the approved Victorian access arrangements, and these do not appear to incorporate the revisions sought by the ESC. From this, we infer that the Victorian regulator was satisfied that the access arrangements it ultimately approved did not constrain the exercise of regulatory discretion, even though the access arrangements themselves are silent on this matter.

194. Nothing in AGN's proposed revised Access Arrangement seeks to fetter the ERA's discretion regarding the treatment of negative carry-over amounts at subsequent access arrangement reviews. Given this consideration, and having regard to the similarity between the Incentive Mechanism provisions approved by the Victorian regulator and those proposed by AGN, it might reasonably be argued that there is no need to further clarify the Incentive Mechanism provisions along the lines required by Amendment 38.

195. AGN would like to discuss this matter in further detail with the ERA, rather than adopting the proposed amendment at this time, and may then make further submissions on this issue.

Amendment 39

Clauses 33 to 36 of Part B of the proposed revised Access Arrangement should be amended to confine the carry-over mechanism for New Facilities Investment to User Initiated Capital and amends the submitted Access Arrangement Information to include appropriate benchmark unit costs for this category.

196. The ERA argues that the efficiency carry-over mechanism should be confined to capital expenditure where benchmarks can be established to capture changes in the scope of works. AGN recognises the ERA's concern that "efficiency" should not be mistaken for "scope changes." However, AGN does not accept that scope of works cannot be established or measured for matters other than User Initiated capital expenditure. For example, scope of works and benchmark costs could possibly be established for renewal expenditure. AGN would like to explore this possibility with the ERA, rather than accepting the proposed amendment at this stage, and may then make further submissions on the subject.

Amendment 40

Clauses 33 to 36 of Part B of the proposed revised Access Arrangement should be amended to provide for an Incentive Mechanism that excludes from the carry-over mechanism those FRC and Regulatory Costs over which AGN has limited or no control.

197. Because the Draft Decision accepts AGN's proposed arrangements for the pass-through of Regulatory Costs (subject to the requirements of Amendment 35 being met) AGN has amended the PRAA in accordance with Amendment 40.

Amendment 41

Clauses 33 to 36 of Part B of the proposed revised Access Arrangement should be amended to provide for an Incentive Mechanism that provides an appropriate mechanism, which should expressly apply to both efficiency gains or losses, for determining the efficiency carry-over for the final year of the second Access Arrangement Period.

198. AGN believes that the Incentive Mechanism proposed in the PRAA does operate in the manner described by the ERA. In relation to non-capital expenditure, the effect of setting the next period's benchmark costs on the basis of the actual expenditure in year 4 is to provide a "bonus" or "penalty" in relation to any under- or over-spending in year 5.

199. AGN would like to discuss the proposed mechanism with the ERA prior to making any amendments, with a view to providing the clarification or illustration referred to in

the second bullet point of paragraph 532 of the Draft Decision, and may then make further submissions on the subject.

3.9 Other charges for Reference Services

Amendment 42

Clause (5) of Schedule 1 and clause (5) of Schedule 2 of Part B of the proposed revised Access Arrangement should be amended to specify the basis of the pro-rating under Reference Tariffs A2 and B1, and the basis of any necessary end-of-year reconciliation.

200. Whilst AGN agrees with the argument proposed by the ERA, AGN suggests the inclusion of the description within the AAI rather than in the AA. AGN has therefore not amended clause (5) of Schedule 2 and clause (5) of Schedule 3 to Part B of the PRAA,[57] but will provide to the ERA proposed new material for inclusion in the AAI to address the basis of the pro-rating under Reference Tariffs A2 and B1, and the basis of any necessary end-of-year reconciliation.

Amendment 43

The definition of the Overrun Charge applicable to clauses 7 to 9 of Schedule 1, and clauses 10 to 12 of Schedule 2, of Part C of the proposed revised Access Arrangement should be amended to clarify the gigajoules of gas to which the Overrun Service Rate of twice the Reference Tariff is to apply.

201. AGN has amended clauses 7 to 9 of Schedule 1, and clauses 10 to 12 of Schedule 2 to Part C of the PRAA to clarify the gigajoules of gas to which the Overrun Service Rate of twice the Reference Tariff is to apply, being those GJ in excess of the contracted peak rate taken on a day on which the contracted peak rate is exceeded.

Amendment 44

The Overrun Charge in relation to Reference Service A2, in clauses 10 to 12 of Schedule 2, of Part C of the proposed revised Access Arrangement, should be deleted.

202. AGN has amended clauses 10 to 12 of Schedule 2 to Part C of the PRAA to delete the Overrun Charge in relation to Reference Service A2 until such time as the A2 reference tariff has a demand component.

Amendment 45

The provisions regarding notification of overruns in clauses 7 to 9 of Schedule 1, and clauses 10 to 12 of Schedule 2, of Part C of the proposed revised Access Arrangement should be amended either to make notification mandatory in defined circumstances, or to confer a right upon a User who is incurring Overrun Charges to nominate an increased Contracted Peak Rate (subject to the Queuing Policy) or to have flow control installed.

203. AGN has amended clauses 7 to 9 of Schedule 1, and clauses 10 to 12 of Schedule 2 to Part C of the PRAA to confer a right upon a User who is incurring Overrun Charges to nominate an increased Contracted Peak Rate (subject to the Queuing Policy) or to have flow control installed.

Amendment 46

The provisions regarding notification of overruns in clauses 7 to 9 of Schedule 1, and clauses 10 to 12 of Schedule 2, of Part C of the proposed revised Access Arrangement should be amended to clarify the circumstances in which an excursion would count as being an “occasion”.

[57] Amendment 42 appears to contain a typographical error. The references should be to Schedules 2 and 3 to Part B of the PRAA, rather than Schedules 1 and 2.

204. AGN has amended clauses 7 to 9 of Schedule 1, and clauses 10 to 12 of Schedule 2 to Part C of the PRAA to clarify that an "occasion" is a day on which an excursion occurs.

Amendment 47

The proposed revised Access Arrangement should be amended to include a mechanism which complies with section 8.40 of the Code by which revenue from Overrun Charges exceeding the reasonable cost of providing the Overrun Service will be rebated across all Users of Reference Services.

205. AGN does not agree with Amendment 47.

206. The reasons AGN does not agree are:

(a) it may be difficult to identify the true costs of overrun because it depends if another User is prevented from taking its true entitlements because the offending User has exceeded its allocation; and

(b) it is questionable whether this amount should properly be rebatable: AGN is only proposing to charge overrun for the day on which the excursion occurs and hence part of the overrun charge will reflect what AGN should have received had the User actually booked the amount of capacity that it needed from the beginning of its contract term.

3.10 Fixed principles

Amendment 48

Clause 37(1)(b) of Part B of the proposed revised Access Arrangement should be amended to clarify the method of forecasting New Facilities Investment to which reference is being made.

207. AGN has deleted clause 37(1)(b) of Part B of the PRAA.

Amendment 49

Clause 37(1)(c) of Part B of the proposed revised Access Arrangement should be amended to specify the financing structure assumed for the purposes of determining the Rate of Return.

208. AGN does not agree with Amendment 49. AGN submits that nothing has changed since the ERA approved this provision in the current AA and the provision accords with the Code. The financing structure is set out on page 50 of the AAI.

Amendment 50

Clause 37(1)(d) of Part B of the proposed revised Access Arrangement should be amended to clarify the Fixed Principle that is intended in relation to depreciation.

209. AGN has amended clause 37(1)(d) of Part B of the PRAA to clarify that the Fixed Principle in relation to depreciation is the use of the straight line method.

Amendment 51

Clause 37(1)(e) of Part B of the proposed revised Access Arrangement should be amended to correct a typographical error by amending "Part B, clause 27(2)(a)" to read "Part B, clause 27(2), and to clarify the Fixed Principle that is intended in relation to FRC costs.

210. AGN has amended clause 37(1)(e) of Part B of the PRAA to correct a typographical error by amending "Part B, clause 27(2)(a)" to read "Part B, clause 27(2)" and to clarify the Fixed Principle that is intended in relation to FRC costs by making it clear that FRC Costs are to be a component of Non-Capital Costs for the duration of the Fixed Period.

Amendment 52

Clause 37(1)(g) of Part B of the proposed revised Access Arrangement relating to the tariff basket form of price control should be deleted.

211. AGN does not agree with Amendment 52. AGN would welcome the opportunity to discuss this issue with the ERA and may make further submissions after that.

4. Terms and Conditions

4.1 Requirement of the Code

212. Section 3.6 of the Code requires that "the terms and conditions […for each Reference Service in an Access Arrangement…] included must, in the Relevant Regulator's opinion, be reasonable." This section summarises the law regarding the interpretation of the word "reasonable" in this context.

213. In determining whether the terms and conditions proposed for a Reference Service are reasonable, the ERA must have regard to the factors set out in section 2.24 of the Code.

214. In the Office of the Regulator-General's (**"ORG"**) Final Decision in respect of the proposed Mildura Natural Gas Distribution System[58], the ORG identified three factors which should be taken into account when determining whether a term or condition is reasonable for the purposes of section 3.6. The factors are:

- ***level of detail*** *– the terms need to be sufficiently well defined so that it is credible to define a Reference Tariff for that service, and so that the likelihood of a dispute over the terms and conditions of access to the Reference Service is minimised;*

- ***benefits outweigh the costs*** *– to the extent that the terms and conditions impose costs on Users, the benefits obtained (for the market as a whole) must exceed the cost imposed on Users:*

  ⇒ *this implies that the terms and conditions must not impose excessive barriers to entry (which may dampen the level of competition in related markets); and*

  ⇒ *that where technical standards are imposed on the distribution system users, those standards pass a cost benefit test (from the perspective of the market as a whole)*

- ***reflect normal commercial arrangements*** *– the terms should generally reflect those that one would expect to see in normal commercial instruments… (emphasis added)*

215. AGN submits that this analysis is correct and helpful, and will use it in its discussion of specific issues below.

4.2 Retail Market Rules

Amendment 53

Clauses 16(1), 26, 27, 32(1), 36(3), 58 and 64 of Part C, of the proposed revisions should be amended to remove cross-referencing to the RMS or the RMR.

Requirement that references to RMS and RMR be deleted from clauses 16(1), 26, 27 and 32(1) of Part C of the PRAA

216. AGN has amended the PRAA to delete references to the RMS and RMR from clauses 16(1), 26, 27 and 32(1) and has made consequential amendments

[58] ORG, *Final Decision on the Access Arrangement for Envestra Limited*, 3 June 1999, page 20

necessary to address the matters previously dealt with by reference to the RMR and RMS.

Requirement that references to RMS and RMR be deleted from clauses 36(3) and 64 of Part C of the PRAA

Background – the RMS and RMR

217. Under section 11ZOB of the *Energy Coordination Act 1994* (**"ECA"**), the purpose of a retail market scheme for a gas distribution system is to ensure that the retail gas market that is supplied through the system is regulated and operates in a manner that is:

(a) open and competitive;

(b) efficient; and

(c) fair to gas market participants and their customers.

218. Under section 11ZOF of the ECA, a retail market scheme (in this case the REMCo retail market scheme (**"RMS"**)) for a gas distribution system must consist of:

(a) one or more agreements made between persons who are gas market participants in relation to the system (in this case the REMCo Constitution);

(b) a formal entity for the administration of the scheme (in this case REMCo); and

(c) a set of retail market rules (in this case the REMCo Retail Market Rules (**"RMR"**)).

219. "Gas market participants" are defined in the ECA to mean the network operator of the gas distribution system (ie AGN, the Service Provider) and retailers of gas transported through the system (ie Users).

220. Thus, as the ERA states in paragraph 582 of the Draft Decision, the RMR impact on the relations between Service Providers and Users.

221. The RMR were approved as complying with section 11ZOB of the ECA by the Minister for Energy on 31 May 2004 under section 44 of the *Energy Legislation Amendment Act 2003* (applying section 11ZOJ of the ECA).

Need for clause 36(3) (Information Exchange) and clause 64 (Notices)

222. It is unquestionably appropriate and reasonable for the exchange of operational data and contractual notices to be addressed in the service agreement negotiated and entered into between a network operator and a user.

223. The form and procedure for the exchange of operational data and notices in the RMR do not apply to any operational data provided or notices given under a service agreement, they only apply to that operational data and those notices given under the RMR.

224. For example, under the Reference Service Terms and Conditions set out in Part C of the PRAA (**"Part C Haulage Contract"**) notices may be given in the following circumstances, among others: clause 20 (emergencies), clause 22 (curtailment), clause 33 (under or over payment) and clause 34 (no equivalent reference service). These notices are particular to the Part C Haulage Contract and the parties are not obliged to give these notices under the RMR. Accordingly, if AGN made no provision

for these matters in the Part C Haulage Contract, then despite any provisions in the RMR, there would be no procedures for contractual notices between the parties. This incompleteness would lead to confusion and dispute between the parties and accordingly, failure to address such fundamental matters in the Part C Haulage Contract would be unreasonable and would result in the Part C Haulage Contract not complying with section 3.6 of the Code.

225. Accordingly, the ERA need not be concerned that matters already dealt with in the RMR and RMS are subject to "further regulation" in the PRAA, as it states in paragraphs 587 and 588 of the Draft Decision:

> *587. One consequence of the RMRs being cross-referenced in an Access Arrangement would be to provide remedies for breach of the Haulage Contract in addition to those remedies which the industry has determined under the RMRs as being appropriate for the enforcement of the RMRs.*
>
> *588. The Authority is concerned that it could be unreasonable for parties who have agreed to participate in and be bound by an industry process for determining a set of RMRs to find themselves subject to further regulation, through the Access Arrangement, of matters already dealt with reasonably under the RMRs.*

226. It is not correct that a consequence of the RMR being cross-referenced in the PRAA would be to provide remedies for breach of the Part C Haulage Contract in addition to those remedies which the industry has already determined under the RMR.

227. This is because, as demonstrated above, the Part C Haulage Contract does not deal with matters "already dealt with reasonably under the RMR". Instead, it deals with matters particular to the bilateral contractual relationship between AGN and a User which are not, and should not be, regulated by the RMR. Thus, the intention of clauses 36(3) and 64 is not to duplicate the matters dealt with by the RMR, but rather to adopt the **processes** developed by the parties at considerable expense for the purposes of the RMR, and apply those processes to different matters under the service agreement.

228. The Part C Haulage Contract and the RMR govern very different (although related) relationships between the parties. The RMR govern AGN and the User as market participants, along with other participants in the multilateral wholesale gas market administered by REMCo. The essence of the wholesale market is management of data flows and allocation of gas flows, not gas haulage. In contrast the Part C Haulage Contract governs the parties in a bilateral haulage relationship in which AGN provides a haulage service to the User. It is both appropriate and reasonable for all relevant matters to be regulated within that bilateral relationship.

Advantage of synchronising Part C Haulage Contract with RMR and RMS

229. Adoption in the Part C Haulage Contract of the procedural requirements and protocols for the giving of notices and exchange of operational data under the RMR and RMS is a prudent way to manage notices and operational data under the Part C Haulage Contract, and is in the interests of both Users and AGN.

230. It will enable AGN and Users to refer to established procedures accepted by industry and approved by the Minister for Energy under the ECA as being open and competitive, efficient, and fair to gas market participants. It will ensure that when those procedures and protocols are changed, consistency can be maintained between the two regimes. It will ensure that software, hardware and systems in which AGN and Users have invested are efficiently used and that AGN and Users are not required to inefficiently use their resources developing and acquiring duplicate software, hardware and systems.

231. Adopting the same procedures greatly simplifies the process for the parties concerned and will improve efficiency and reduce disputation by reducing the instances in which defective notices are given.

232. If the parties have to exchange suites of notices under the RMR in accordance with one notice regime, and suites of notices under the Part C Haulage Contract in a different way, this will not be a reasonable or efficient outcome.

Disadvantage of locking in RMR and RMS provisions at a point in time

233. AGN could, as suggested by the ERA, adopt the relevant provisions of the RMR regarding exchange of operational data and contractual notices into the Part C Haulage Contract as they currently stand. However, AGN is seeking to ensure synchronisation of the processes and protocols under the RMR and the Part C Haulage Contract.

234. In the coming years, a range of amendments will be made to the RMR as the market develops, in order to further improve and promote the efficiency of the market in accordance with the express statutory purpose of the RMS.

235. If AGN locks extracts from the RMS at a point in time into the Part C Haulage Contract without ensuring that there is a mechanism by which the processes and protocols will remain harmonised, AGN and the Users cannot avail themselves of the efficient improvements developed under the RMS.

236. AGN and Users who are party to a Part C Haulage Contract will be forced to maintain outdated communications systems when the whole market has developed and is using superior communications system, and the market will suffer as a consequence.

237. Alternatively, the RMR change process may be hamstrung by the existence of "legacy" Part C Haulage Contracts, because AGN and Users may have an incentive to resist RMS changes, in order to avoid the duplication in operations and systems, even if the RMS change might otherwise be to the benefit of the market participants. This is not reasonable and is not consistent with any of the section 2.24 factors set out in the Code.

Reasonableness of referencing an external standard

238. The ERA has stated further:

> *589. A further matter of concern for the Authority with respect to the reasonableness of proposed terms and conditions whereby RMRs would be cross-referenced in the revised Access Arrangement arises from the RMRs being subject to an amendment process during the life of an Access Arrangement.*
>
> *590. The Authority is not satisfied that changes to cross-referenced RMRs during the life of the revised Access Arrangement could, in accordance with the provisions of the Code, automatically flow on to the Access Arrangement as envisaged by AGN. This is because, under section 2.49 of the Code, the only way to vary terms and conditions of Reference Services contained in an approved Access Arrangement is through the review process provided under section 2 of the Code. The Authority has no power to vary such terms and conditions in any other way.*

239. AGN agrees with the ERA that, under section 2.49 of the Code, the only way to vary terms and conditions of Reference Services contained in an approved Access Arrangement is through the review process provided under section 2 of the Code. AGN is not requesting that the ERA approve a PRAA that seeks to vary the terms and conditions of the Part C Haulage Contract otherwise than in accordance with section 2 of the Code.

240. A distinction must be drawn between the substantive terms and conditions of a contract and a reference in the terms and conditions to an external standard that determines the standard of performance of the terms and conditions of the contract. The ERA's task under section 3.6 of the Code is to determine whether the term of the Part C Haulage Contract, which in effect contains a mechanism by which the standard of performance of the obligation in the term is nominated, is reasonable. The RMR is a reasonable mechanism for determining the precise standard of performance of an obligation in a term of the Part C Haulage Contract.

Existing references to external standards in the PRAA

241. In its existing approved Access Arrangement, and in its PRAA, AGN refers to established standards, procedures and protocols under relevant Acts, Regulations and other documents such as Australian Standards. Other Service Providers in every jurisdiction in Australia do the same. As would be expected, these standards, procedures and protocols are subject to amendment from time to time. Examples within the PRAA include:

(a) References to the Consumer Price Index (**"CPI"**) – the limit on Varied Tariff Components (which enables the setting of Tariff Components) is determined by reference to the CPI. The CPI is compiled for every quarter of every year by the Australian Bureau of Statistics (**"ABS"**). Every time a new CPI is compiled, the effect of the Part C Haulage Contract is changed. However this does not constitute a change to an effective Access Arrangement otherwise than in accordance with section 2 of the Code, because the terms and conditions of the Part C Haulage Contract do not change. The term of the Part C Haulage Contract which states that the limit on Varied Tariff Components is determined by reference to CPI, stays the same. This is a reasonable term for the purposes of section 3.6 of the Code because the concepts, sources and methods used by the ABS in compiling the CPI are published and are widely accepted as being reasonable and appropriate. Reference to CPI is a reasonable mechanism for determining a standard of performance under a term of the Part C Haulage Contract.

(b) References to the Prescribed Interest Rate, for example in clauses 30(2), 31(2) and 32(2) of Part C – the Prescribed Interest Rate is determined by reference to the bank bill rate displayed on the "BBSW" page of the Reuters Monitor System each day for bank bills having a tenor of one month. The bank rate may change every day. However, as with changes to CPI, this does not constitute a change to an effective Access Arrangement otherwise than in accordance with section 2 of the Code, because the terms and conditions of the Part C Haulage Contract do not change. The term of the Part C Haulage Contract which states that Prescribed Interest Rate is determined by reference to the bank bill rate, stays the same. This is a reasonable term for the purposes of section 3.6 of the Code because the concepts, sources and methods used by Reuters in determining the bank bill rate are widely accepted as being professionally determined and therefore reasonable and appropriate. Reference to the bank bill rate is a reasonable mechanism for determining a standard of obligation under a term of the Part C Haulage Contract.

(c) References to "Law" – for example:

(i) the definition of "Law" includes Codes of Practice and Australian Standards – as with the CPI, the precise standards established under an industry or professional Code of Practice or an Australian Standard is subject to change so upon amendment, the effect of the Part C Haulage Contract will change. This will not constitute an amendment

to a term of the Part C Haulage Contract because there will be no change to the provisions of the Part C Haulage Contract. Again, this is reasonable for the purposes of section 3.6 of the Code because the concepts, sources and methods used in maintaining a Code of Practice or an Australian Standard are published and are widely accepted as being reasonable and appropriate;

(ii) AGN is entitled to refuse to accept a quantity of gas in accordance with its rights under Law (clause 30(2) of Part A). These rights are subject to change as laws are amended (see clause 10 of Schedule 2 to Part A) and such a change will alter the effect of the clause for both AGN and Users; and

(iii) similarly:

A. AGN is entitled to curtail the quantity or pressure of gas deliveries in accordance with Law (clause 30(3) of Part A);

B. Gas Quality Specifications (as used, for example, in clause 30(2)(a) of Part A) is determined by reference to the Gas Standards Regulations, which include the *Gas Standards (Gas Supply and System Safety) Regulations 2000*; and

C. *Gas Standards (Gas Supply and System Safety) Regulations 2000* – the ERA has stated in the Draft Decision that it requires the inclusion of a reference to these regulations in clause 28 of Part C.

(d) References to "good industry practice" and "reasonable and prudent person" – as they should be, the precise standards of performance of the terms and conditions of a Reference Service will be dynamic as good industry practice, and the standard of performance of a reasonable and prudent person, develops and evolves.

(e) The Code – the ERA has specifically requested an amendment to the definition of 'Code' to pick up the words "as changed from time to time". This may effectively result in changes to the obligations of AGN and Users under the AA.

242. In referring to CPI, Australian Standards, Laws and good industry practice AGN is providing reasonable mechanisms for determining the precise standard of obligations under the Part C Haulage Contract which can evolve over time without changing the terms and conditions of the Part C Haulage Contract.

243. The adoption of references to the RMS and the RMR is no different in character from the references to CPI, Australian Standards, Laws and good industry practice in the PRAA and is entirely consistent with sections 3.6 and 2.49 of the Code.

244. Regulators around the country have approved Access Arrangements which employ such mechanisms for determining the standard of performance of terms and conditions. This does not involve authorising or enabling amendment of the Access Arrangement otherwise than in accordance with section 2.49 of the Code. AGN is happy to provide examples of such provisions in approved Access Arrangements upon request.

245. In the same way that the ERA is not required to exhaustively consider whether each change or update to Laws, CPI and good industry practice is reasonable, the ERA is

not required to review each change or update to information and data exchange processes and protocols, and notice provisions, under the RMS.

246. By analogy, in 1992, the Commonwealth Parliament passed legislation to amend the *Trade Practices Act 1974* (Cth) to include a provision which now reads as follows:

> *Section 51AA. Unconscionable conduct within the meaning of the unwritten law of the States and Territories*
>
> *(1) A corporation must not, in trade or commerce, engage in conduct that is unconscionable within the meaning of the unwritten law from time to time, of the States and Territories.*
>
> *(2) …*

247. The effect of section 51AA is expressly intended to be dynamic by its reference to a the law of the States and Territories *from time to time*. Thus, section 51AA contains a mechanism for determining the Commonwealth law at any time. The wording of the provision of the Commonwealth law does not change, but the effect of the law is subject to change when the unwritten law of the States or Territories changes.

248. In *ACCC v Berbatis Holdings Pty Ltd (No 2)* (2000) 96 FCR 491 (**"Berbatis"**), the High Court found that section 51AA is a valid exercise of Commonwealth Constitutional power. The fact that the effect of section 51AA is subject to change otherwise than in accordance with Commonwealth Parliament procedures did not invalidate the exercise of the power of the Commonwealth Parliament to enact section 51AA, which itself does not change.

249. The High Court, in *Berbatis,* described section 51AA as containing a "statutory formula".[59]

250. The position of the Regulator under the Code with respect to approving amendments to an access arrangement is analogous to the position of the Commonwealth Parliament with respect to passing laws. Both access arrangements and Commonwealth laws may, according to the law, only be amended in accordance with specific procedures, however provisions in access arrangements or laws which employ specified and reasonable mechanisms or formulae to determine the standard or performance required, are valid.

Reasonableness of mechanism using reference to RMS

251. The use of reference to the RMS as a mechanism for determining the precise standard of obligations under the Part C Haulage Contract without changing the terms and conditions of the Part C Haulage Contract is reasonable in accordance with section 3.6 of the Code.

252. This is because the information and data exchange and notices processes and protocols in the RMS are published and have been developed and settled upon by market participants (that is, network operators and Users alike) and the RMS contains well-defined processes for changes to these processes and protocols which involve wide consultation and require broad acceptance.

253. Changes to the RMS will require approval by the ERA[60]. The ERA stated in paragraph 593 that:

[59] para 12

[60] The role will be granted to the ERA under Part 3 Division 3 of the *Energy Coordination Act 1994* as amended by the *Energy Legislation Amendment Act 2003*. AGN understands that the grant will

the Authority does not consider that this addresses its concerns about the reasonableness of terms and conditions cross-referenced to the RMRs, because the Authority will be fulfilling a different statutory function in relation to the RMRs, guided by different statutory objectives.

254. This is certainly the case and it would constitute jurisdictional error for the ERA to apply the tests for approval of reference service terms and conditions under the Code in determining whether to approve RMS amendments. Tests for approving RMS amendments are set out in the ECA and it is these tests which must be applied.

255. However, in assessing the reasonableness of the use of reference to the RMS as a mechanism for determining the precise standard of obligations under the Part C Haulage Contract the provisions of section 11ZOL of the ECA are very important.

256. Under Section 11ZOL of the ECA, amendments to a RMS may only be approved if the Minister[61] is satisfied that, if the amendment is made, the provisions of the scheme will comply with the Act and will be suitable for the purposes of section 11ZOB, namely that the retail gas market that is supplied through the system is regulated and operates in a manner that is:

(a) open and competitive;

(b) efficient; and

(c) fair to gas market participants and their customers.

257. These statutory objectives complement very well the reasonableness test in section 3.6 of the Code and the section 2.24 factors, and as such, support the argument that the use of reference to the RMS as a mechanism for determining the precise standard of obligations under the Part C Haulage Contract is reasonable.

258. The ERA notes in paragraph 596 of the Draft Decision that

the difficulties with respect to the inter-relationship between the RMRs and terms and conditions in the Access Arrangement appear to have arisen because the Code was written well before the advent of FRC and RMRs regulating the conduct of market participants in a contestable retail market….Code amendments might be considered in order to better harmonise the RMS and the access regime.

259. While it is true that the Code was written before the advent of FRC, increased contestability was certainly contemplated at the time that the Code was written, as indicated by objective (c) of the Code:

The objective of this Code is to establish a framework for third party access to gas pipelines that:

…

(c) promotes a competitive market for natural gas in which customers may choose suppliers, including producers, retailers and traders….

become effective on 31 May 2005. However, it is irrelevant whether the decision-maker under section 11ZOL is, or is not, the same as the decision-maker in respect of the PRAA.

[61] The role will be granted to the ERA under Part 3 Division 3 of the *Energy Coordination Act 1994* as amended by the *Energy Legislation Amendment Act 2003*. AGN understands that the grant will become effective on 31 May 2005. However, it is irrelevant whether the decision-maker under section 11ZOL is, or is not, the same as the decision-maker in respect of the PRAA.

260. The Code does not expressly address how fully contestable retail markets and Access Arrangements are to be reconciled, but at the same time, it does not prohibit their reconciliation and harmonisation.

261. The approval of a term or condition in Reference Service Terms and Conditions which makes reference to a mechanism for determining the precise standard of obligations under the term or condition, the language of which will always remain constant, is entirely consistent with the Code and precedent may be found for it in every approved Access Arrangement.

Other jurisdictions

262. In further support of AGN's argument, there is in fact precedent in regulatory decisions on Access Arrangements for reference to documents containing market rules.

263. In the Essential Services Commission's (**"ESC"**) Final Decision on the Access Arrangement of MultiNet Gas (DB No.1) Pty Ltd and MultiNet Gas (DB No.2) Pty Ltd, the ESC approved an Access Arrangement containing the following clause:

> ***2.1 Regulatory Instruments to take precedence***
>
> *In the event of any inconsistency between:*
>
> *(a) a party's obligations or rights under a Regulatory Instrument; and*
>
> *(b) its obligations or rights under this Agreement,*
>
> *its obligations or rights under the Regulatory Instrument shall take precedence to the extent of the inconsistency.*

264. "Regulatory Instruments" is defined to mean:

> *the Access Act, Access Law, Access Code, GIA, Gas Safety Act 1997 (Victoria) and other legislation, any subordinate legislation, licence, code, rules, sub-code, guideline, safety case, order or regulation regulating the gas industry in Victoria, or elsewhere if applicable, whether made under the GIA or other applicable legislation having jurisdiction over the relevant party, including the MSO Rules and the Distribution System Code.*[62]

265. Thus, where a "Regulatory Instrument", such as the MSO Rules, changes, the effect of the service agreement will change, if there is any inconsistency between the service agreement and the MSO Rules. While, due to rule 403 in the RMR the reverse applies in Western Australia (ie an Access Arrangement will prevail over the RMR in the event of inconsistency), this regulatory decision remains a precedent for approval of reference service terms and conditions where the standard of performance may be influenced by external standards equivalent to the RMR during an access arrangement period.

266. Also, in the Draft Decision made by IPART in relation to the Revised Access Arrangement for AGL Gas Networks[63], IPART stated that it proposes to approve an arrangement which contains the following clause:

> *AGLGN may amend the terms and conditions set out in a Reference Service Agreement to reflect changes to:*
>
> *(a) the Gas Market Business Rules, to the extent the changes are consistent with this Access Arrangement; or*

[62] Page 8, 15 November 2002, Principal Arrangements.
[63] December 2004

(b) other applicable laws.

267. IPART was satisfied that the clause was reasonable,[64] stating that the clause was reasonable because it did not modify the access arrangement.[65]

268. It also stated that "a term in the access arrangement that is capable of existing alongside the GRMBR [Gas Retail Market Business Rules] (but is not directly inconsistent with them) should not fail a test of reasonableness for this reason alone."[66]

269. It is evident from the above decisions that regulators in other jurisdictions have been comfortable in approving Access Arrangements which refer to documents of a similar status to the RMR.

Summary

270. Clauses 36(3) and 64 of Part C of the PRAA are reasonable applying the analysis in the Mildura Final Decision[67] (see paragraphs 214 and 215) because on a cost-benefit analysis the clauses result in significant benefits, being increased efficiency and minimisation of compliance costs and disputes, and do not come at any cost. Further, they are reflective of normal commercial arrangements that would be made between the parties in the absence of third party access regulation.

271. Further, clauses 36(3) and 64 serve AGN's legitimate business interests and investment in the AGN GDS by enabling it to operate the GDS efficiently, minimising costs, in accordance with section 2.24(a) of the Code. The clauses achieve this as they enable AGN to utilise existing communications systems, prevent the unnecessary and wasteful expenditure necessary to maintain duplicate systems.

272. In the same way, the interests of Users and prospective Users are served by enabling them to use the communications systems that they are required to maintain under the RMS, in accordance with section 2.24(f) of the Code. If clauses 36(3) and 64 are not retained, the costs incurred by AGN described in paragraph 271 will be passed on to Users and prospective Users.

273. Efficiently minimising the costs associated with owning, operating and using the AGN GDS serves the public interest in accordance with section 2.24(e) of the Code because it promotes competition in markets between alternative energy sources and in downstream markets where gas is utilised as a feedstock or to provide energy.

274. Clauses 36(3) and 64 accord with section 2.24(d) because they promote the economically efficient operation of the AGN GDS by streamlining and conforming the processes for operational information exchange and contractual communications between the parties with those already utilised by the parties for the purposes of the RMS.

275. Finally, compliance by AGN and Users' with their existing contractual obligations in accordance with section 2.24(b) of the Code is supported by the inclusion of clauses 36(3) and 64.

Requirement that references to RMS and RMR be deleted from clause 58 of Part C of the PRAA

[64] IPART, *Draft Decision, Revised Access Arrangement for AGL Networks*, December 2004, page 173
[65] Ibid, page 173-174.
[66] Ibid, page 137.
[67] ORG Victoria, *Final Decision, Access Arrangement of Envestra Limited* in Respect of the Proposed Midura Natural Gas Distribution System, 3 June 1999.

276. The reference to the RMS in clause 58 of Part C of the PRAA appears to have been misconstrued by the ERA. This clause states that a dispute in good faith being dealt with under the Part C Haulage Contract, the Code or the RMS does not constitute an event of default for the purposes of the Part C Haulage Contract.

277. In the same way that the reference to the Code is acceptable, so is the reference to the RMS.

278. This clause does not import any uncertainty as a likely result of amendment to the RMS. It cannot be considered double regulation as it is in fact directed to exclude any overlap, thus reducing any prospect of double regulation.

279. AGN, as a reasonable and prudent network operator, is merely clarifying what the effect of such a dispute will be (or more accurately, will **not** be) on the contractual relationship governed by the AA. The ERA must simply consider whether this term is reasonable having regard to the factors set out in section 2.24.

280. AGN submits that it is clearly reasonable to provide in the Part C Haulage Contract that a dispute being dealt with under one of the relevant dispute resolution procedures, is not a default under the Part C Haulage Contract. In contrast, a provision of opposite effect (ie one which provided that despite the parties working through a dispute resolution process, there could be a default under the Part C Haulage Contract) would be manifestly unreasonable. Staying silent on the subject, creating uncertainty, seems both undesirable and unreasonable.

4.3 Services other than Reference Services

Amendment 54

Clause 34 of Part A – "Terms and conditions for Services other than Reference Services" – should be amended to remove provision for the inclusion of terms and conditions for Non-Reference Services in the revised Access Arrangement.

281. AGN has amended the PRAA to delete clause 34 of Part A.

Amendment 55

Clause 21(2) of Part A providing that the terms and conditions of the Interconnection Service are to be negotiated should be amended not to be subject to clause 22 of Part A.

282. AGN has amended the PRAA to delete the requirement that clause 21(2) of Part A be subject to clause 22 of Part A.

Amendment 56

Clause 21(4) of Part A setting out the list of matters with which it is expected that an Interconnection Contract will deal should be deleted.

283. AGN has amended the PRAA to delete clause 21(4) of Part A.

Amendment 57

Clause 22 of Part A requiring that there be a term of each Interconnection Contract in relation to compliance with the Gas Quality Specifications should be deleted.

284. AGN has deleted clause 22 of its PRAA.

285. However, as AGN has obligations under Law and under contracts with respect to the maintenance of certain gas quality specifications in relation to the GDS, AGN has inserted the following provision into the PRAA as a new clause 22 of Part A:

All Gas which enters the AGN GDS must comply with the Gas Quality Specifications.

286. Inclusion of a clause dealing with gas quality as set out in paragraph 285 (**"Gas Quality clause"**) is consistent with the Code. Gas quality is a relevant matter for inclusion in the Access Arrangement as revised for the purposes of section 2.29 of the Code. Under the Code, the section 2.24 factors must be taken into account in assessing a proposed Access Arrangement.

287. The Gas Quality clause will protect the interests of Users (s 2.24(f)) by ensuring that Users of the GDS receive gas which meets the Gas Quality Specifications in accordance with section 2.24(f). Users have rights to receive gas which meets the Gas Quality Specifications under firm and binding contracts, in accordance with section 2.24(b). In addition, AGN as a reasonable and prudent pipeline operator must insist on operational and technical standards that ensure the safe and reliable operation of the GDS, in accordance with s 2.24(c)).

288. As stated by OffGAR:

> *Should the Access Arrangement address matters in addition to the requirements of sections 3.1 to 3.20 of the Code, then the Regulator has a broad discretion to refuse to accept the Access Arrangement if the additional matters are considered not reasonable* [68]
>
> *…*
>
> *For terms or conditions that do not relate to explicit requirements of the Code, the Regulator assessed "reasonableness" on the basis of the intent of the Gas Access law and, his own knowledge of industry practice, and to particular circumstances of the … Pipeline.*[69]

Amendment 58

Clause 23 of Part A setting out the requirements for an application for an Interconnection Contract should be deleted.

289. AGN has deleted clause 23 of Part A and has inserted the following provision into the PRAA as a new clause 23 of Part A:

> *Unless otherwise agreed, all Gas which enters the AGN GDS must be subject to an agreement with a party acceptable to AGN as a reasonable and prudent pipeline operator, specifying a minimum receipt temperature between 0 and 10 for the receipt point.*

290. Under clause 23 AGN seeks to address essential gas quality issues directly with the pipeline operator of an interconnecting pipeline by way of the Interconnection Contract, rather than through Users in their Haulage Contracts.

291. This is the most efficient approach. To attempt to cover the same issues by contracting with users, AGN would need each Haulage Contract to contain provisions requiring Users to procure gas of the appropriate specification from the pipeline operator. The User would then have to procure such a provision in its gas supply contract with its shippers (because the User has no contractual relationship with the pipeline operator), and its shippers in turn would have to procure the relevant gas quality specification in their gas transportation agreements with the pipeline operator. This "daisy chain" of contracts seems an inefficient way to regulate what is in fact an operator-to-operator technical issue.

[68] OffGAR, *Final Decision, Access Arrangement Parmelia Pipeline*, 20 October 2000, page 15
[69] OffGAR, *Draft Decision, Access Arrangement Parmelia Pipeline*, 20 October 1999, page 30-31

292. Clause 23 has also been included in the PRAA in order to allow more flexibility in gas specification than has historically been the case. A more common requirement is the requirement for zero degrees centigrade as the maximum hydrocarbon dew point.[70] Clause 23 was included in the PRAA as an alternative to that specification aimed at providing greater flexibility to gas suppliers from pipelines other than the DBNGP. This more flexible approach enables one pipeline operator (DBNGP) to minimise its gas heating cost by using a zero degrees centigrade minimum delivery temperature whilst avoiding the need for another pipeline operator (APTP) to install gas processing facilities to reduce the hydrocarbon dewpoint of the supplied gas by using a 10 degree centigrade minimum delivery temperature. This greater flexibility is of benefit to the whole market.

293. Further, existing contracts on the GDS address this matter in the way proposed by AGN in the PRAA, and if AGN is required to accept Amendment 58, then it would face the difficult task of negotiating amendments to existing contracts with Users to address the issue.

294. The requirements set out in clause 23 are reasonable as they are consistent with firm and binding contractual obligations of AGN, users and pipeline operators already using the AGN GDS, in accordance with section 2.24(b) of the Code. In addition, in accordance with section 2.24(c) the requirement is necessary to ensure the safe and reliable operation of the AGN GDS, as the minimum receipt point temperature is required to give effect to gas quality. The requirement also protects the interests of Users in accordance with section 2.24(f) of Code as the minimum receipt point temperature will be covered in the Interconnection Contract and Users will not be required individually to seek agreement from shippers and the pipeline operator.

Amendment 59

Clauses 28(2) of Part A requiring that a Prospective User of an Interconnection Service who is a Pipeline Operator must enter into an Interconnection Contract with AGN should be deleted.

295. AGN has amended the PRAA to delete clause 28(2) of Part A.

Amendment 60

Clause 27 of Part A – Obtaining access to services – should be amended to confine its operation to Reference Services supplied under a Haulage Contract.

296. Clause 27 properly relates to AGN's proposed queuing policy and is not intended to, and does not, operate as a term and condition of a service agreement.

297. AGN proposes the relocate clause 27 to the Queuing Policy and amend clause 47 of Part A to incorporate clause 27:

> *Obtaining access to Services*
>
> *If a Prospective User wishes to obtain access to a Service, then the Prospective User must either:*
>
> *(1) make an application in accordance with this Access Arrangement; or*
>
> *(2) exercise an option to extend the duration of a Service Agreement which has been previously granted by AGN to the Prospective User in which case Part A, clause 45 does not apply.*

[70] For example, see Part 6 of the *DBNGP Access Manual*, *DBNGP Access Arrangement* approved 30 December 2003 (Annexure B, Schedule 2, Item 1) and *DBNGP Proposed Revised Access Arrangement* dated 21 January 2005 (Annexure A, Schedule 2, Item 1).

Amendment 61

Clause 28 of Part A – Parties required to enter into a Service Agreement – should be amended to confine its operation to Reference Services supplied under a Haulage Contract.

298. AGN has amended the PRAA to delete clause 28(3) of Part A.

Amendment 62

Clause 29 of Part A – Pre-conditions to the provision of Services – should be amended to confine its operation to Reference Services supplied under a Haulage Contract.

299. AGN does not accept that all of clause 29 of Part A should be amended to confine its operation to Reference Services under a Haulage Contract.

300. Parts of clause 29 of Part A are in effect elements of AGN's Queuing Policy. The Queuing Policy in an Access Arrangement applies to all Services provided on the covered pipeline (section 3.12 of the Code). AGN has amended its PRAA to move these parts into the Queuing Policy. These parts are discussed below.

301. Clauses 29(1)(a), 29(1)(b) and 29(2)(c) reflect restrictions under section 6.18 of the Code on arbitrated decisions:

- AGN will only enter into a Service Agreement (including a Haulage Contract) if:
  - doing so would not impede the existing right of a User to obtain a Service – section 6.18(b);
  - doing so would not deprive any person of a pre-existing contractual right other than an Exclusivity Right which arose on or after 30 March 1995 – section 6.18(c); and
  - doing so would be consistent with the Queuing Policy, if applicable – section 6.18(d).

302. If the arbitrator cannot make a decision which impedes a User's right to obtain a service, deprives a person of a pre-existing contractual right or is inconsistent with the Queuing Policy, then AGN should not enter into Service Agreements which contravene these requirements.

303. Clauses 29(1)(c) and 29(2)(b)(ii) reflect the factors that the arbitrator must take into account in arbitrating a dispute under section 6.15, and also reflect the section 2.24 factors:

- AGN will only enter into a Service Agreement (including a Haulage Contract) if:
  - it is possible to accommodate the prospective User's requirements under the Service consistently with the safe operation of the AGN GDS and prudent pipeline practices accepted in the industry – sections 2.24(c) and 6.15(f);
- AGN will only enter into a Service Agreement (including a Haulage Contract) if:
  - in relation to each requested delivery point, for the duration of the haulage contract, the delivery point will be of sufficient capability to accommodate the contracted peak rate requested at the delivery point and the receipt point and sub-network will be of sufficient capacility to accommodate the User's requirements under the Haulage Contract, having regard to the current contractual entitlements of all other Users of the sub-network – sections 2.24(b) and 6.15(e).

304. Accordingly it is appropriate to include such provisions in the Queuing Policy for the GDS.

305. Clause 29(2)(a) of Part A reflects section 6.22 of the Code and deals with the manner in which Users obtain access to Spare Capacity and Developable Capacity which are matters that section 3.12 of the Code states should be dealt with in the Queuing Policy. The policy behind section 6.22 of the Code can also be recognised in clause 29(2)(b)(ii) of Part A of the PRAA discussed at paragraph 303 above.

306. Finally, clauses 29(1)(d) and 29(2)(b)(i) of Part A do not reflect provisions of the Code but are entirely reasonable for inclusion in a Queuing Policy, dealing with the satisfaction of reasonable prudential requirements and requiring a User to identify the Receipt Points at which it wishes to supply gas into the GDS during the term of its contract.

307. With respect to clause 29(2)(b)(iii), see paragraphs 289 to 294.

308. With respect to clause 29(2)(b)(iv), see paragraphs 318 to 367.

Amendment 63

Clause 30 of Part A – Obligation to accept and deliver Gas – should be amended to confine its operation to Reference Services supplied under a Haulage Contract.

309. AGN has amended the PRAA to delete clause 30(1) of Part A and to insert a similar clause in Part C of the PRAA to apply only in respect of Reference Services.

310. AGN has also amended the PRAA to delete clauses 30(2) and 30(3) of Part A, inserting similar clauses in Part C of the PRAA to apply only in respect of Reference Services.

311. However AGN has drafted new clauses in the PRAA providing AGN with rights to refuse to accept gas or curtail delivery points in the event of the occurrence of the events set out in clauses:

(a) 30(2)(a) – Gas Quality Specifications;

(b) 30(2)(b) – heating value blending management issues;

(c) 30(2)(c) and 30(3)(a) – safety issues;

(d) 30(2)(d) and 30(3)(c) – breach of law;

(e) 30(2)(f) – exceeding the maximum allowable operating pressure for the GDS; and

(f) 30(3)(b) – compliance with laws dealing with gas.

312. These clauses are included in the Access Arrangement on the basis that they are relevant matters for inclusion in the Access Arrangement as revised for the purposes of section 2.29 of the Code. Under the Code, the section 2.24 factors must be taken into account in assessing a proposed Access Arrangement.

313. As stated by OffGAR:

> *Should the Access Arrangement address matters in addition to the requirements of sections 3.1 to 3.20 of the Code, then the Regulator has a broad discretion to refuse*

to accept the Access Arrangement if the additional matters are considered not reasonable [71]

…

For terms or conditions that do not relate to explicit requirements of the Code, the Regulator assessed "reasonableness" on the basis of the intent of the Gas Access law and, his own knowledge of industry practice, and to particular circumstances of the … Pipeline.[72]

314. These clauses are essential to protect the integrity of the GDS for the benefit of all Users in accordance with section 2.24(f) of the Gas Code. They are also essential to enable AGN to meet its commitments under its existing haulage contracts in accordance with section 2.24(b) of the Gas Code.

315. It is in AGN's legitimate business interests to ensure that it can perform its existing contracts, that it complies with applicable laws and that the integrity of the GDS is protected in accordance with section 2.24(a).

316. Including these clauses is the only way that the safe and reliable operation of the GDS can be assured, in accordance with s 2.24(c)).

Amendment 64

Clause 28 of Part C – Metering uncertainty – should be amended to confine its operation to Reference Services supplied under a Haulage Contract.

317. Clause 28 of Part C is intended to apply only to Reference Services. It has been amended to clarify this.

4.4 Entitlement to sufficient firm capacity on Interconnected Pipelines

Amendment 65

Part A, clause 29(2)(b)(iv) of the proposed revised Access Arrangement should be deleted.

Amendment 66

Part A, clause 60 of the proposed revised Access Arrangement should be deleted.

Amendment 67

Part A, clause 61 of the proposed revised Access Arrangement should be deleted.

Amendment 68

Part C, clause 22(1)(a)(vi) of the proposed revised Access Arrangement should be deleted.

Firm Capacity Requirement

318. The ERA in its Draft Decision states that it requires the deletion of clauses 29(2)(b)(iv), 60 and 61 of Part A and clause 22(1)(a)(vi) of Part C. These provisions require a User to have sufficient contractual entitlements to firm gas transportation capacity at the Receipt Point on a sub-network to meet the contracted peak rate requested by the User on the sub-network (**"Firm Capacity Requirement"**).

319. AGN does not agree with Amendments 65, 66, 67 and 68. For the reasons set out in this submission, it is both reasonable and necessary that the Firm Capacity

[71] OffGAR, *Final Decision, Access Arrangement Parmelia Pipeline*, 20 October 2000, page 15
[72] OffGAR, *Draft Decision, Access Arrangement Parmelia Pipeline*, 20 October 1999, page 30-31

Requirement is, or suitable alternative provisions are, included in the approved Access Arrangement.

ERA's misapprehension of purpose of including Firm Capacity Requirement in PRAA

320. In paragraph 623 of the Draft Decision, the ERA states:

> *The submitted Access Arrangement Information does not set out AGN's rationale for proposing the terms and conditions relating to the holding of sufficient firm capacity. The evident purpose of the proposed provisions is to protect AGN's legitimate business interests by providing a level of assurance to AGN that parties holding Haulage Contracts are bona fide and have access to gas sufficient to meet the requirements which their Haulage Contracts impose upon AGN to deliver gas at Delivery Points.*

321. This is not the case. AGN is not seeking to include the Firm Capacity Requirement in the PRAA order to protect its legitimate business interests by ensuring that parties holding Haulage Contracts have access to gas sufficient to meet the requirements which their Haulage Contracts impose upon AGN to deliver gas at Delivery Points, and thus maximise revenue.

322. Rather, AGN is concerned about maintaining system pressure in the GDS by ensuring that Users who take gas out of the GDS have the ability to put gas into the GDS.

Need to maintain system pressure in the GDS

323. System pressure within the AGN GDS must be maintained at all times. Because the GDS does not have any "linepack", it cannot accommodate a gas flow imbalance (ie an imbalance between the flows of gas into and out of the network) in way that a transmission pipeline can. On the contrary, the network operator must ensure that there is a continuous balance between total gas inflows and total gas outflows of the GDS. (In this respect it is more akin to an electricity network than a pipeline.)

324. If sufficient system pressure is not maintained, the GDS will become depressurised. This would be technically and commercially unacceptable. It would take weeks, not days, to restore pressure to the GDS, as it would be necessary to purge and recommission not only the entire system but also the consumer facilities connected at each delivery point on the GDS.

325. Put simply, AGN regards it as inconceivable that as a prudent network operator it would not take all reasonable steps to maintain system pressure in the GDS. The alternative would involve great cost and harm to AGN, Users and end users. The question is therefore what measures are available to protect system pressure and to respond to a gate station curtailment should one occur.

The Firm Capacity Requirement is intended to protect system pressure

326. AGN considers (for reasons which will be expanded upon below) that the best approach in this situation is to minimise the likelihood of gate station curtailment at Receipt Points on the GDS, by requiring the User to have access to firm capacity rather than interruptible capacity.

327. Where a User has adequate capacity to meet its contracted peak rate but that capacity is interruptible, a gate station curtailment of the User's interruptible capacity will result in a risk to system pressure. This is because gas will still be taken out of the GDS at the User's delivery points but gas will not be put into the GDS at the curtailed gate station (Receipt Point).

328. AGN did not establish the Firm Capacity Requirement in its existing Access Arrangement because at the time of approval of the existing Access Arrangement the Designated Supplier system existed, which established the "designated shipper link" (see clause 67 of the existing Access Arrangement and regulation 22 of the (now repealed) *Dampier to Bunbury Pipeline Regulations 1998.*[73]

329. The designated shipper link gave considerable security on the present subject, but was too inflexible for the FRC marketplace. During the development of the RMR, AGN agreed at the request of the marketplace to remove the designated shipper mechanism, but it was recognised at the time that another means would be needed in its AA and service agreements to address the risks being discussed here. AGN submits that the Firm Capacity Requirement is the most appropriate – it does not eliminate the risk of gate station curtailment but it does very substantially reduce it compared with a situation where interruptible capacity is being used to supply the GDS.

Responses to gate station curtailment

330. In the event of a gate station curtailment, system pressure can only be maintained in the following ways:

    (a) by load curtailment, that is, by curtailing supply to end users at delivery points; or

    (b) in a sub-network with more than one interconnected pipeline, the additional gas will flow from the other pipeline, which under the RMR will cause increased swing service and result in Users incurring additional swing service charges.

331. (**Load curtailment**) In the event of a gate station curtailment, if there is no other interconnected pipeline or the interconnected pipeline is unable to deliver sufficient additional gas, AGN would have to act to preserve the physical integrity of the AGN GDS in order to avoid depressurisation, by curtailing load to compensate for loss of supply at the gate station.

332. Under AGN's curtailment policy, load curtailment will typically be carried out in order of decreasing size of load with domestic and priority customers being the last to be curtailed. There are a range of sound policy reasons and practical reasons for this, including the need for AGN to be able to curtail sufficient load to have a meaningful effect in a short time and the huge expense which would be incurred if AGN attempted to curtail small use customers. For the same reasons, the curtailment of large end users first is uniform industry practice throughout Australia. To do otherwise would be a very expensive, highly labour-intensive exercise requiring a substantial army of staff to be on constant stand-by, ready to be mobilised at any time to the delivery points supplied by the User whose interruptible capacity has been curtailed.

333. Effectively, this means that regardless of the User with whom an end user contracts for its gas supply, the larger the end user's load, the greater the likelihood that its delivery point will curtailed in the event of a gate station curtailment.

334. Because in these circumstances there will be no necessary correlation between the end user who is curtailed and the User whose interruptible capacity brought about the need for curtailment, end users will be unable to manage their risk of curtailment

[73] Broadly, these provisions required each GDS Delivery Point to have a specific "designated shipper" on the interconnected pipeline, who was linked in a 1 to 1 relationship with a "designating user" and with the Delivery Point.

through their gas supply contracts. This is an uncommercial, risky and inefficient outcome for the gas supply market.

335. (**Swing service costs**) Under the RMR, for the sub-network with two interconnecting pipelines, gate station curtailment will cause an increase in the amount of swing service on the gas day across both gate stations and across all Users.[74] The increase in swing service will not adversely affect AGN, however it will have a significant financial impact on Users, who will be forced to acquire additional swing service off-market or through the bid stack, and may even be forced to acquire swing service from the swing service provider of last resort. The swing service causation compensation provisions under rule 300A of the RMR will not necessarily operate to alleviate the financial impact on Users in such a circumstance.

336. The RMR were not designed for the purpose of ensuring that Users with interruptible capacity will receive a back-up gas supply from swing service providers, subsidised by other Users.

337. Excessive, unnecessary swing charges are an inefficient result for the market and they will ultimately be borne by end users.

338. Currently only one sub-network in the GDS has two interconnecting pipelines.[75] Fifteen of the sub-networks in the GDS only have one interconnecting pipeline, therefore swing service is not available to alleviate the consequences of gate station curtailment to those sub-networks.

339. As a consequence, should a gate station curtailment occur, the only option universally available to AGN to protect system pressure is curtailment of Delivery Points.

Available alternatives

340. Apart from maintaining the Firm Capacity Requirement, AGN has identified 2 alternative ways of managing the risks associated with system depressurisation:

(a) (**Releases and indemnities**) AGN obtains in its haulage contracts with Users extensive:

(i) releases from Users against any loss they may suffer as a result of:

A. AGN having a limited ability to curtail end users; or

B. AGN's decision to curtail or to not to curtail end users,

in the event of a gate station curtailment; and

(ii) indemnities to AGN from a User whose failure to meet the Firm Capacity Requirement causes damage, in relation to any claims made against AGN by other Users and end users as a result of:

A. AGN having a limited ability to curtail end users; or

[74] Swing service for a gate point for a gas day is calculated under Part 5.10 of the RMR. In broad terms, it is based on the difference between the gate point meter reading for the day and the amount of gas that Users should have obtained through the gate point based on the information that they provided to REMCo and the total gas deliveries for the sub-network for the day. The swing service at the gate point is then allocated under Part 5.10 across all Users based on the User's pipeline nominations and deemed withdrawals (which is affected by total gas deliveries for the sub-network for the day).

[75] North Metro sub-network is interconnected with both the DBNGP and the Parmelia Pipeline.

B. AGN's decision to curtail or to not to curtail end users,

in the event of a gate station curtailment.

(b) (**Alternative arrangements**) AGN requires the User to have sufficient alternative arrangements to ensure that the issues arising from not meeting the Firm Capacity Requirement are adequately addressed, such as the installation of remotely operated flow controllers at delivery points supplied by Users who have interruptible gas transportation capacity. AGN is willing to provide such a service as a non-reference service.

341. Option (a) is necessary to protect AGN in the event that it is pursued in negligence by Users and end users if supply to their delivery points is curtailed on the ground that AGN did not take reasonable steps to ensure that system pressure was maintained and thereby avoid load curtailment. Of course, if the Firm Capacity Requirement is not maintained, AGN will not be permitted to take such reasonable steps.

342. It would be insufficient for AGN to obtain these releases and indemnities from only the User who did not satisfy the Firm Capacity Requirement. As described above it is likely to be other Users who suffer the cost and inconvenience of curtailment and who might seek to hold AGN accountable. Relying on an indemnity from the User in question would expose AGN to unacceptable commercial risk - particularly because one likely cause of gate station curtailment would be a payment dispute between the pipeline operator and an insolvent User. Thus, as soon as there was a single User who did not satisfy the Firm Capacity Requirement, all Users would have to give AGN the necessary releases. AGN acknowledges that although this is entirely commercially reasonable, it is a less-than-optimum approach, which is why AGN prefers the Firm Capacity Requirement solution.

343. Note that option (b) above may not be an entirely adequate solution if a User with interruptible capacity supplies an essential service such as a hospital unless that end user has agreed to being an interruptible load and has understood the implications. This is not simply a theoretical observation, as AGN has observed conditions which could have resulted in the above issues arising. The cost involved in applying option (b) is prohibitive for delivery points supplying smaller end users.

344. Establishing the Firm Capacity Requirement more efficiently addresses the underlying risks by minimising them at the outset, rather than reacting to them.

345. If AGN is unable to maintain the Firm Capacity Requirement, AGN will have to protect its interests with releases and indemnities, however, as demonstrated above and below, this will not protect the interests of Users and end users and will not bring about an efficient result for the market as a whole. For example, increased swing service costs will be payable by users and not by AGN.

346. However, AGN cannot ignore the possibility of negligence claims that may arise if AGN is required to curtail the loads of end users. Accordingly, whilst AGN could accept the ERA's recommendations in respect of removal of the Firm Capacity Requirement, it would need to secure extensive releases and indemnities from users in respect of potential negligence and other claims by end users.

347. Clearly, restructuring the Reference Tariffs to include a greater standing charge would not address the risks to system pressure arising from not maintaining the Firm Capacity Requirement.

348. Clauses 25 of Part A and clause 51 of Part C of the PRAA have been amended, and new clause 16 of Part C has been added, to provide the necessary supporting

mechanisms for a User seeking a Service Agreement to have alternative options for managing the risks of system depressurisation.

Firm Capacity Requirement is reasonable – section 3.6 of the Code

349. A term and condition in the Part C Haulage Contract establishing the Firm Capacity Requirement would be a reasonable term and condition in accordance with section 3.6 of the Code, having regard to the factors set out in section 2.24.

350. (**Cost benefit analysis – see paragraph 214 above**) Applying the cost benefit analysis:

(a) Costs: AGN acknowledges that the Firm Capacity Requirement may impose some cost on Users. For example, firm capacity may be more expensive than interruptible capacity, and Users may face difficulties or delays in obtaining firm capacity, or may be challenged by gas supply issues, on the pipelines interconnected with the AGN GDS. However a number of Users are likely to already have access to firm capacity and Users who are unable to obtain firm capacity on the DBNGP to meet the Firm Capacity Requirement are entitled to trigger an access dispute with the DBNGP operator under section 6 of the Code seeking firm capacity.

(b) Benefits: The potential costs are outweighed by the benefits of establishing the Firm Capacity Requirement including the benefits of ensuring system pressure is maintained and reducing costs and supply interruptions to Users and End Users. Further, the costs that market participants would be forced to bear if:

(i) AGN was forced to include extensive releases and indemnities in its haulage contracts; or

(ii) remotely operated flow control devices were installed in an attempt to manage the risk of loss of system pressure,

are much greater than the costs associated with the Firm Capacity Requirement.

351. Furthermore, under the PRAA, Users have flexibility in how they satisfy the Firm Capacity Requirement. For example, a User may choose to subcontract firm capacity from a shipper rather than contract directly with a pipeline operator.

352. Any risks that the Firm Capacity Requirement could either:

> *adversely affect the development of competition by creating a barrier to entry for Prospective Users…*[76]

or

> *effectively prevent … a User or Prospective User from seeking to make full use of upstream interruptible or spot transportation capacity [in meeting supply commitments to its customers]…*[77]

are far outweighed by the benefits (described above) to Users collectively of establishing the Firm Capacity Requirement.

[76] ERA, *Draft Decision on the Proposed Revisions to the Access Arrangement for the South-West and Mid-West Gas Distribution Systems*, February 2005, para 626
[77] Ibid, para 625

353. (**Legitimate business interests – section 2.24(a)**) Establishing the Firm Capacity Requirement enables AGN to manage its legitimate business interests in accordance with section 2.24(a) by appropriately allocating risk without giving inappropriate discretion to AGN.

354. The Firm Capacity Requirement enables AGN to proactively minimise the system pressure and safety risks and the financial risks to market participants in a reasonable way rather than simply waiting for the risks to materialise. As stated by the QCA in the Allgas Energy Final Decision, "efficiency will be enhanced if risk is allocated to the party that can best manage that risk."[78]

355. Natural gas in Western Australia as a distributed commodity has historically been a very reliable energy source with uninterrupted, continuous supply. A decrease in the reliability of natural gas supply due to load curtailment resulting from Users not meeting the Firm Capacity Requirement would be damaging to AGN's business reputation and therefore to AGN's legitimate business interests.

356. (**Safe and reliable operation of the AGN GDS – section 2.24(c)**) The Firm Capacity Requirement is necessary to ensure the safe and reliable operation of the AGN GDS in accordance with section 2.24(c) of the Code. The Firm Capacity Requirement reduces the risk of gate station curtailment and thus the risk of system depressurisation.

357. In *Allgas Energy Ltd and Envestra Ltd October 2001 (QLD)* the QCA stated that it had required:

> *the service providers to amend their terms and conditions to the effect that the service provider would not connect a new end user unless the system had sufficient capacity to sustain that end user.*[79]

358. The QCA required this action to be taken because it was concerned to ensure that service providers do not put the network at risk by overselling capacity beyond the physical or technical limitations of the network.

359. Clearly this amendment by the QCA could prevent a User from connecting an end user to the network, thus operating as a barrier to entry until such time as the network constraint was resolved. However, AGN submits that this barrier was outweighed by the need to protect the integrity and safety of the network.

360. The Firm Capacity Requirement is clearly analogous and should be maintained on the basis that it is an operational and technical requirement which is necessary for the safe and reliable operation of the GDS in accordance with section 2.24(c) of the Code.

361. (**Interests of users – section 2.24(f)**) As stated in paragraph 335, if the Firm Capacity Requirement is not retained, in the event of a gate station curtailment one or both of the following must occur:

(a) there will be curtailment of end users which will not only cause loss to the end users but also deprive Users of revenue and cause serious harm to the User's commercial reputations as gas suppliers; or

(b) excess swing gas will be caused generating additional, unnecessary expense for Users which will ultimately be passed on the end users.

[78] QCA, *Final Decision, Proposed Access Arrangements for Gas Distribution Networks: Allgas Energy Limited and Envestra Limited*, October 2001, page 76
[79] Page 62

This risk can be minimised by maintaining the Firm Capacity Requirement and accordingly the Firm Capacity Requirement is in the interests of Users and prospective Users.

362. Further, if supply to end users' is interrupted, many businesses will be interrupted causing profit loss and damaged reputations. There will no forewarning of the load curtailment and its consequences will be severely disabling and inconvenient for end-users.

363. (**Public interest – section 2.24(e)**) Interruption of gas supply due to load curtailment is counter to the public interest.

364. (**Firm and binding contractual obligations of AGN and Users – section 2.24(b)**) Users and AGN are bound by contract pursuant to the ECA to comply with the RMR. The Firm Capacity Requirement is consistent with, and complementary to, the Retail Market Rules. Under rule 178, a User is required to procure injections which match the likely User's estimated total withdrawals. In order to comply with the Rules, it is essentially required that a User will be utilising firm capacity and thus will be able to satisfy the Firm Capacity Requirement.

365. It must also be noted that AGN has limited rights of curtailment under its existing Haulage Contracts. Under these legacy contracts AGN will not be able to ensure that in the event of a gate station curtailment, it curtails only those end users who purchase their gas from the User whose interruptible capacity is responsible for the curtailment. AGN will be forced to act quickly and, in accordance with its curtailment policy, curtailing large loads may be the only way to ensure system safety (see paragraphs 331 to 334).

366. Arguably, under section 6.18(b) of the Code, the arbitrator would not be able to require AGN to enter into a Haulage Contract which did not contain the Firm Capacity Requirement as it would affect AGN's ability to perform its existing contracts, impeding the existing right of a User to obtain Services.

367. (**Economically efficient operation of the AGN GDS – section 2.24(d)**) Lowering the requirements for delivery of gas into the AGN GDS may send the wrong signals to the market. If a User is not able to obtain firm capacity because a pipeline or gate station is capacity constrained the appropriate signal to be sent to the market is that investment needs to take place to develop additional capacity. It is not economically efficient if, instead, other market participants are forced to accept more uncontrollable risk.

4.5 Receipt Point to be subject of Interconnection Contract

Amendment 69

Clause 21(3) of Part A of the proposed revised Access Arrangement should be deleted.

368. Clause 21(3) of Part A requires an Interconnection Contract to exist in respect of the Receipt Points at which a related shipper will deliver gas into a sub-network for transportation to a delivery point. It is reasonable for AGN to require the existence of an Interconnection Contract in order to receive gas at a Receipt Point.

369. Under clause 21(3) of Part A AGN seeks to address essential technical and operational interconnection issues directly with the pipeline operator of an interconnecting pipeline by way of an Interconnection Contract, rather than through Users in their Haulage Contracts.

370. This is the most efficient approach. To attempt to cover the same issues by contracting with users, AGN would need each Haulage Contract to contain provisions requiring Users to procure the pipeline operator to conform to with the appropriate technical and operational specifications. The User would then have to procure such a provision in its gas supply contract with its shippers (because the User has no contractual relationship with the pipeline operator), and its shippers in turn would have to procure such provisions in their gas transportation agreements with the pipeline operator. This "daisy chain" of contracts seems an inefficient way to regulate operator-to-operator technical and operational issues.

371. Clause 21(3) of Part A has also been included in the PRAA in order to allow flexibility in respect of changes to the technical and operational specifications applicable to the interconnection. Changes can be managed easily and efficiently operator-to-operator but cannot be managed easily if AGN is forced to face the difficult task of negotiating amendments to existing contracts with Users to address the issue, who would then need to procure amendments to their contracts with shippers, and then the shippers with the pipeline operators. The delay occasioned in these circumstances would cause great detriment to the whole market.

372. As a practical example of this potential inefficiency, a simple adjustment of 10 kPa to the delivery pressure at Russell Road Gate Station would require AGN to instruct all Users on the South Metro sub-network to procure this change from their shippers on the DBNGP who in turn would need to procure such a change from the DBNGP.

373. Technical issues such as gas quality managements plans, odorisation, metering and heating value management are most efficiently and effectively covered in an Interconnection Agreement.

374. Ensuring the existence of an interconnection agreement as set out in clause 21(3) is reasonable as it is consistent with firm and binding contractual obligations of AGN, users and pipeline operators already using the AGN GDS, in accordance with section 2.24(b) of the Code. In addition, in accordance with section 2.24(c), the existence of an interconnection agreement is necessary to ensure the safe and reliable operation of the AGN GDS by ensuring professional and timely management of technical issues and changes in technical standards. Section 21(3) also protects the interests of Users in accordance with section 2.24(f) of Code by ensuring that interconnection is managed properly and gas supply is secure and reliable, and by ensuring that Users will not be required individually to seek agreement from the shipper and the pipeline operator.

375. See also paragraphs 284 to 294 of this submission with respect to gas quality and temperature.

Amendment 70

Clause 8 of Part C of the proposed revised Access Arrangement, concerning Interconnection Contracts, should be deleted.

376. AGN has amended the PRAA to remove the requirement that no party to the applicable Interconnection Contract is in breach and to remove the requirement that the Interconnection Contract has not been suspended.

4.6 Changes to terms and conditions through Replacement Schedules

Amendment 71

Clause 33(1) of Part A should be amended to provide that the Authority's approval of Replacement Schedules referred to is approval of a revision to the Access Arrangement in accordance with the provisions of sections 2.28 to 2.48 of the Code.

377. AGN has amended the PRAA to delete clause 33 of Part A.

4.7 Definitions and Interpretation

Amendment 72

Clause 1 of Part C of the proposed revised Access Arrangement should be amended to ensure that any changes to the terms defined in the Access Arrangement and applicable in a Haulage Contract are subject to the procedure for amending an Access Arrangement in section 2 of the Code.

378. AGN has amended clause 1 of Part C of the PRAA as follows:

> ~~*Unless the contrary intention appears in the Haulage Contract, t*~~*The Glossary in Part A of the Access Arrangement applies to the interpretation of the Haulage Contract.*

Amendment 73

The definition of "**Code**" in the Glossary in Schedule 2 of Part A of the proposed revised Access Arrangement should be amended to correspond with the definition of that term in the Code, that is the definition should refer to the Code as amended from time to time, and not to the Code in force as at the Revisions Submission Date.

379. AGN has amended the definition of Code in Schedule 2 to Part A of the PRAA in accordance with Amendment 73.

Amendment 74

The definition of "**Confidential Information**" in the Glossary in Schedule 2 of Part A of the proposed revised Access Arrangement should be amended to correspond with the definition in section 10.8 of the Code.

380. AGN does not agree with Amendment 74.

381. The definition of Confidential Information in the PRAA is for use in a Haulage Contracts and applies as between both parties to the contract. The Code definition of Confidential Information is for use in different contexts: access applications, ringfencing and regulatory submissions to the Regulator, the Minister and the National Competition Council. The Code definition is not appropriate for use the context of the Haulage Contract.

382. As clause 65(4) of Part C expressly excludes the Code definition of Confidential Information, a contractual definition of Confidential Information is necessary.

Amendment 75

The definition of "**Cost of Service**" in the Glossary in Schedule 2 of Part A of the proposed revised Access Arrangement, which refers to a section of the Code which has been repealed, i.e. section 8.3(d), should be deleted, and replaced with an appropriate alternative definition.

383. AGN has amended the definition of Cost of Service in the PRAA in accordance with Amendment 75.

Amendment 76

The definition of "**Delivery Point**" in the Glossary in Schedule 2 of Part A of the proposed revised Access Arrangement should be amended to correspond with the definition in section 10.8 of the Code.

384. AGN does not agree with Amendment 76.

385. The definition of Delivery Point in the PRAA is a refinement of the Code definition. AGN considers that the differences between the Code definition and the AA definition are valuable refinements which assist in clarifying the relationships established under bilateral haulage contracts and should be retained.

Amendment 77

The definition of "**Developable Capacity**" in the Glossary in Schedule 2 of Part A of the proposed revised Access Arrangement should be amended to correspond with the definition in section 10.8 of the Code.

386. AGN does not agree with Amendment 77.

387. The definition of Developable Capacity in the PRAA encompasses Extensions to the AGN GDS and therefore includes an extension of the geographic range of the AGN GDS. This means that the PRAA definition applies more widely that it is required to under the Code. AGN should not be required to amend its definition.

Amendment 78

The definition of "**Gas**" in the Glossary in Schedule 2 of Part A of the proposed revised Access Arrangement should be amended to correspond with the definition in section 90(4) of the *GPAA*.

388. AGN does not agree with Amendment 78.

389. The effect of accepting Amendment 78 would be to extend 'Gas' to include LPG as well as natural gas. The GDS transports only natural gas, not LPG.

390. The definition of 'Gas' which includes only natural gas in the existing Access Arrangement was approved and the circumstances relevant to this approval have not changed.

391. Section 2.24(c) of the Code requires the ERA to take into account the operational and technical requirements necessary for the safe and reliable operation of the GDS. Confining the gas transported through the GDS to natural gas is such a requirement. For a number of technical reasons, the GDS cannot accept LPG.

392. The definition of "gas" in section 90(4) of the GPAA is used in a different context and relates to retail contestability in gas and is irrelevant to how the GDS, as a covered pipeline, should operate.

Amendment 79

The definition of "**New Facilities Investment**" in the Glossary in Schedule 2 of Part A of the proposed revised Access Arrangement should be amended to correspond with the definition in section 10.8 of the Code.

393. AGN has amended the definition of New Facilities Investment in Schedule 2 to Part A of the PRAA in accordance with Amendment 79.

Amendment 80

The definition of "**Prospective User**" in the Glossary in Schedule 2 of Part A of the proposed revised Access Arrangement should be amended to correspond with the definition in section 10.8 of the Code.

394. AGN does not agree that Amendment 80 is required.

395. The definition of "Prospective User" in the PRAA is intentionally different to the Code definition as AGN considers that the Code definition is fundamentally flawed. The existing Code definition of Prospective User includes a person who is reasonably likely to seek to enter into a contract for a Service. This would require the Service Provider to conduct an unproductive and exhaustive forensic enquiry to determine whether there are any Prospective Users who are reasonably likely to seek to enter into a contract for a Service.

396. AGN's definition requires a Prospective User to have communicated to AGN its intention to seek to enter into a contract for Service. AGN considers the communication requirement to be an improvement on the flawed Code definition, while still capturing the essential policy intent and purpose of the Code definition.

Amendment 81

The definition of "**Receipt Point**" in the Glossary in Schedule 2 of Part A of the proposed revised Access Arrangement should be amended to correspond with the definition in section 10.8 of the Code.

397. AGN does not agree with Amendment 81.

398. The definition is unchanged from the current Access Arrangement which was approved by the Regulator. The definition is an improvement from the Code's ambiguous definition and is tailored to AGN's requirements. The definition in the Code is used in a different context and is not appropriate to be adopted into the PRAA.

4.8 Identification of terms of Haulage Contract

Amendment 82

Clause 2 of Part C of the proposed revised Access Arrangement should be amended to provide that the terms and conditions of a Haulage Contract are the terms and conditions in the Access Arrangement, including those in Part A plus the general terms and conditions in Part C.

399. The Draft Decision is unclear on whether Amendment 82 requires the incorporation of all of the provisions in Part A of the PRAA into Part C (as suggested in Amendment 82 and paragraphs 661 and 662) or only certain provisions in Part A (as suggested in paragraphs 578 and 659).

400. AGN submits that it is inappropriate for all of the terms in Part A to be included in the Part C Haulage Contract. For example the Queuing Policy and the Capacity Management Policy should not be included in the Part C Haulage Contract.

401. AGN understands that the ERA has undertaken to provide clarification regarding which provisions in Part A it requires to be incorporated into the Part C Haulage Contract. AGN will provide a submission in response once the clarification is made available.

Amendment 83

Clause 2 of Part C should be amended to provide that the Authority's approval of amendments to the terms of Haulage Contracts is approval of a revision to the Access Arrangement in accordance with the provisions of sections 2.28 to 2.48 of the Code.

402. AGN has amended the PRAA to delete clause 2 of Part C.

4.9 Additional terms contained in Haulage Contract

Amendment 84

Clause 3 of Part C of the proposed revised Access Arrangement, providing for AGN to specify terms and conditions in a Haulage Contract in addition to those specified in an approved revised Access Arrangement, should be deleted.

403. AGN has amended the PRAA to delete clause 3 of Part C.

4.10 Security obligations and other relationship matters between AGN and User

Amendment 85

Clause 4(1)(a) of Part C of the proposed revised Access Arrangement should be amended to make the exercise of the discretion by AGN to require further security subject to an objective qualification (e.g. to provide for such further amount as is reasonable to protect AGN's legitimate business interests).

404. AGN has amended clause 4(1)(a) of Part C of the PRAA in accordance with Amendment 85.

4.11 Unaccounted for Gas

Amendment 86

Clause 17 of Part C of the proposed revised Access Arrangement should be amended to clarify AGN's obligation to replace lost gas.

405. AGN has amended clause 17 of Part C of the PRAA to insert the words "or possession" after "control" in accordance with amendment 86.

4.12 Metering uncertainty

Amendment 87

Clause 28 of Part C of the proposed revised Access Arrangement should be amended to note, for the avoidance of doubt, the existence of the minimum standards under the *Gas Standards (Gas Supply and System Safety) Regulations* 2000, which represent standards below which metering services supplied by AGN must not fall.

406. Clause 28 of Part C obliges AGN to comply with accepted good industry practice. In order to comply with good industry practice, AGN must comply with applicable laws.

407. AGN does not agree that Users are unlikely to be aware of AGN's obligation to comply with the metering standards in the *Gas Standards (Gas Supply and System Safety) Regulations 2000*. Users are well-informed and acquire gas transportation services at a commercial level. End users may not be aware of the obligations, but this is immaterial.

408. However, even if a User was not aware, it does not limit or lessen AGN's obligations under the regulations, because the monitoring mechanisms in place in the regulations are not dependent upon User notification.

409. AGN is obliged under statute to comply with many standards.

410. Because there are numerous laws that place obligations on AGN, AGN is concerned that highlighting particular obligations in the *Gas Standards (Gas Supply and System Safety) Regulations 2000* may imply that those are the only regulations which apply, or that those regulations are of greater importance than others.

411. If the ERA insists upon an inclusion of specific references to the metering obligations in the *Gas Standards (Gas Supply and System Safety) Regulations 2000*, AGN may be forced to conduct an expensive and exhaustive legal review of all those obligations that it is subject to with a view to including reference to those obligations in the PRAA. This is likely to result in unnecessary delay in the finalising of the Access Arrangement process.

4.13 Disputed invoices

Amendment 88

Clause 32(2) of Part C should be amended to reflect the wording of the equivalent clause in the current Access Arrangement, which provides an obligation applicable to both parties for the payment of interest upon amounts reimbursable following dispute resolution in relation to invoices.

412. AGN has amended clause 32(2) Part C of the PRAA in accordance with Amendment 88.

4.14 Correction of payment errors

Amendment 89

Clause 33(2) of Part C of the proposed revised Access Arrangement should be amended to reflect the wording of the equivalent clause in the current Access Arrangement, which provides an obligation applicable to both parties for the payment of interest upon subsequently detected over-payments.

413. AGN has amended clause 33(2) Part C of the PRAA in accordance with Amendment 89.

4.15 Guaranteed Service Level Payments

Amendment 90

Clause 35(2) of Part C of the proposed revised Access Arrangement should be amended to provide a reasonable period within which a User may pass on a GSL notice from a Small Use Customer without being required to reimburse any GSL payment by AGN.

414. AGN has amended the PRAA in accordance with Amendment 90.

415. AGN has further amended clause 35 of Part C to ensure that AGN is not required to make GSL payments when, due to the actions of a third party, the GSL is unable to be met. However, AGN has inserted a discretion enabling GSL payments to be made to Small Use Customers in such circumstances where it is the User's conduct that has led to the failure to meet the GSL.

4.16 Saving of AGN's other remedies

Amendment 91

The heading to clause 44 of Part C should be amended to refer to the parties' and not only AGN's remedies, consistent with the content of the clause.

416. AGN has amended clause 44 of Part C of the PRAA in accordance with Amendment 91.

4.17 Novation of contracts do not trigger default provisions

Amendment 92

Clause 46(1) of Part C of the proposed revised Access Arrangement should be amended to add a requirement that AGN's discretion to withhold consent shall only be exercised in circumstances where it is reasonable to do so.

417. AGN has amended clause 46(1) of Part C of the PRAA in accordance with Amendment 92.

5. Capacity Management Policy

Amendment 93

Clause 56(2) of Part A of the proposed revised Access Arrangement should be amended to remove the words "which consent binds the Regulator in respect of the Extension or Expansion specified in the request".

418. AGN has amended clause 56(2) of Part A of the PRAA in accordance with Amendment 93.

6. Review and Expiry of Access Arrangement

Amendment 94

Clause 58 of Part A of the proposed revised Access Arrangement should be amended to confine its operation to new connections for the provision of Reference Services under a Haulage Contract.

419. AGN has amended clause 58 of Part A of the PRAA in accordance with Amendment 94.

Amendment 95

Clause 63 of Part A of the proposed revised Access Arrangement should be amended to provide a Revisions submissions Date of not later than 31 March 2009.

420. AGN has amended clause 63 of Part A of the PRAA in accordance with Amendment 95.

Amendment 96

The values in Schedule 1, clause 2(1)(b) of Part B of the proposed revised Access Arrangement for the forecast total costs for providing Reference Services should be amended to accord with the amended values to be included in Table 4.14 of the submitted Access Arrangement Information as required by Amendment 26 in this Draft Decision.

421. AGN has amended clause 2(1)(b) of Schedule 1 to Part B of the PRAA in accordance with Amendment 96.

Appendix 1: Table of Amendments

Please see the note in paragraph 8 of this Submission.

Amendment No:	Amendment	AGN Response
Amendment 1	The Services Policy should be amended to include descriptions of the Services ancillary to the Reference Services which are likely to be sought by a significant part of the market.	Agree
Amendment 2	The proposed revised Access Arrangement should be amended to include Reference Tariffs and terms and conditions for Ancillary Services described in the Services Policy.	Disagree
Amendment 3	Clauses 24 & 25 of Part A of the proposed revised Access Arrangement should be deleted.	Agree (clause 24), disagree (clause 25)
Amendment 4	The term "User" should be defined as in the Code as "a person who has a current contract for a Service or an entitlement to a Service as a result of an arbitration."	Agree
Amendment 5	The proposed revised Access Arrangement should be amended to include provisions, in accordance with the Code, by which Reference Tariffs may recover from all Users of the GDS the costs of heating value management during the second Access Arrangement Period.	Agree
Amendment 6	Clauses 16, 17 & 18 of Part B and clause 62 of Part A of the proposed revised Access Arrangement should be deleted.	Agree
Amendment 7	Clause 31(c) of Part A of the proposed revised Access Arrangement should be amended to delete the references to clauses 16 to 18 of the proposed revised Access Arrangement.	Agree
Amendment 8	Clause 26 of Part A of the proposed revised Access Arrangement should be amended to be consistent with sections 3.2(b) and (c) of the Code.	Disagree
Amendment 9	Clause 22 of Part B of the Reference Tariff Policy in the proposed revised Access Arrangement should be amended to set out the principles used to determine the opening value of the Capital Base at the commencement of the second Access Arrangement Period.	Agree

Amendment 10	Clause 22 of Part B of the Reference Tariff Policy in the proposed revised Access Arrangement should be amended to clarify whether the value of User Specific Delivery Facilities has been included in actual and forecast New Facilities Investment.	Agree
Amendment 11	Table 4.1 of the Access Arrangement Information should be amended to show the values for the assets comprising the Initial Capital Base converted to dollars at 31 December 2004 using the appropriate index value to adjust for inflation.	Agree
Amendment 12	Table 4.4 of the Access Arrangement Information should be amended to set out the remaining lives of assets comprising the Initial Capital Base calculated as at 31 December 2004 as set out in Table 2 of this Draft Decision.	Agree
Amendment 13	The Access Arrangement Information should be amended to include the values for Depreciation on the assets comprising the Initial Capital Base as set out in Table 3 of this Draft Decision.	Disagree
Amendment 14	Table 4.2 of the Access Arrangement Information should be amended to reflect the values in Table 4 of this Draft Decision.	Agree
Amendment 15	The Access Arrangement Information should be amended to include the values for Depreciation for New Facilities Investment during the first Access Arrangement Period as set out in Table 5 of this Draft Decision.	Disagree
Amendment 16	The Access Arrangement Information should be amended to include the values for total Depreciation for the first Access Arrangement Period as set out in Table 6 of this Draft Decision.	Agree
Amendment 17	Clause 22 of Part B of the proposed revised Access Arrangement should be amended to provide an opening value of the Capital Base of $658.39 million (dollars at 31 December 2004).	Agree
Amendment 18	Table 4.7 of the Access Arrangement Information should be amended to reflect the Authority's calculation of forecast User Initiated Capital as set out in Table 9 of this Draft Decision, and to adjust all other values to dollars at 31 December 2004.	Disagree
Amendment 19	Table 4.6 of the Access Arrangement	Disagree

	Information should be amended to reflect the Authority's calculation of forecast New Facilities Investment by asset class as set out in Table 1 of this Draft Decision.	
Amendment 20	Table 4.5 of the Access Arrangement Information should be amended to reflect the Authority's calculation of total Depreciation for each year of the second Access Arrangement Period as set out in Table 13 of this Draft Decision.	Disagree
Amendment 21	Table 4.3 of the Access Arrangement Information should be amended to reflect the Authority's calculation of the value of the Capital Base for each year of the second Access Arrangement Period grouped by asset class as set out in Table 15 of this Draft Decision.	Disagree
Amendment 22	The pre-tax weighted average cost of capital referred to at page 49 of the submitted Access Arrangement Information should be amended from 8.5 percent to 6.50 percent.	Disagree
Amendment 23	The submitted Access Arrangement Information should be amended to include the values as set out in Column 2 of Table 19 in this Draft Decision as the values for determining the Rate of Return for the revised Access Arrangement.	Disagree
Amendment 24	Table 4.8 of the Access Arrangement Information should be amended to reflect the Authority's calculation of the return on the Capital Base for each year of the second Access Arrangement Period as set out in Table 21 of this Draft Decision.	Agree
Amendment 25	Table 4.11 of the Access Arrangement Information should be amended to accord with the forecast Non Capital Costs shown in Table 23 of this Draft Decision.	Disagree
Amendment 26	Table 4.11 of the Access Arrangement Information should be amended to accord with the Authority's determination of Total Revenue for each year of the second Access Arrangement Period, as set out in Table 24 of this Draft Decision.	Disagree
Amendment 27	The submitted Access Arrangement Information should be amended to include the information set out in Table 25 of this Draft Decision in relation to prudent discounts.	Agree

Amendment 28	The Reference Tariffs for Reference Services A1, A2, B1, B2 and B3 in Schedules 1, 2, 3, 4 and 5 of Part B of the proposed revised Access Arrangement respectively should be amended to accord with Table 26 of this Draft Decision for the Reference Tariffs to apply for the first year of the second Access Arrangement Period.	Disagree
Amendment 29	The proposed 2005 Reference Tariffs set out in Tables 3.1 and 3.1A of the submitted Access Arrangement Information should be amended to accord with Table 26 of this Draft Decision.	Disagree
Amendment 30	The forecast number of B2 and B3 customers connected, as set out in Table 6.5 of the submitted Access Arrangement Information, should be amended to accord with Table 27 of this Draft Decision.	Agree
Amendment 31	The X factor referred to in clause 8(2) of Part B of the proposed revised Access Arrangement should be amended from –0.0218 to 0.0396.	Disagree
Amendment 32	Clause 8 of Part B of the proposed revised Access Arrangement should be amended to include a constraint which would limit the amount by which any particular Tariff Component may increase in any one year to 2 percent above the price path for any Tariff Component established by the Reference Tariff adjustment formula.	Disagree
Amendment 33	Clause 5(b) of Part B of the proposed revised Access Arrangement, providing AGN with a discretion to add or remove one or more Tariff Components, should be deleted.	Disagree
Amendment 34	Clause 11 of Part B of the proposed revised Access Arrangement should be amended to include a requirement that, at the time it submits the annual Variation Report, AGN also submits a forecast of Tariff Components of Reference Tariffs for 3 years or to the end of the second Access Arrangement Period whichever is the sooner.	Disagree
Amendment 35	The Reference Tariff adjustment formula, CPI_t x $(1-X_t)$ x $(1+R_t)$, and the formula for determining the R factor in clause 8 of Part B of the proposed revised Access Arrangement, should be amended so that the formulae achieve their intended purposes.	Agree
Amendment 36	Clause 66 of Part A, and clauses 12 to 14 of	Disagree

	Part B of the proposed revised Access Arrangement should be amended to provide for a Reference Tariff Variation Method under section 8.3 of the Code, in relation to FRC Costs and FRC New Facilities Investment, that is consistent with sections 8.1 and 8.21 of the Code.	
Amendment 37	Clauses 35 of Part B of the proposed revised Access Arrangement should be amended to provide for an Incentive Mechanism that provides for a rolling carry-over mechanism of no longer than five years.	Disagree
Amendment 38	Clauses 33 to 36 of Part B of the proposed revised Access Arrangement should be amended to clarify how AGN proposes that net negative efficiency losses at the end of the second Access Arrangement Period are to be treated, including the exercise of any discretion by the Authority in this matter.	Disagree
Amendment 39	Clauses 33 to 36 of Part B of the proposed revised Access Arrangement should be amended to confine the carry-over mechanism for New Facilities Investment to User Initiated Capital and amends the submitted Access Arrangement Information to include appropriate benchmark unit costs for this category.	Disagree
Amendment 40	Clauses 33 to 36 of Part B of the proposed revised Access Arrangement should be amended to provide for an Incentive Mechanism that excludes from the carry-over mechanism those FRC and Regulatory Costs over which AGN has limited or no control.	Agree
Amendment 41	Clauses 33 to 36 of Part B of the proposed revised Access Arrangement should be amended to provide for an Incentive Mechanism that provides an appropriate mechanism, which should expressly apply to both efficiency gains or losses, for determining the efficiency carry-over for the final year of the second Access Arrangement Period.	Disagree
Amendment 42	Clause (5) of Schedule 1 and clause (5) of Schedule 2 of Part B of the proposed revised Access Arrangement should be amended to specify the basis of the pro-rating under Reference Tariffs A2 and B1, and the basis of any necessary end-of-year reconciliation.	Disagree
Amendment 43	The definition of the Overrun Charge applicable to clauses 7 to 9 of Schedule 1, and clauses 10 to 12 of Schedule 2, of Part C	Agree

	of the proposed revised Access Arrangement should be amended to clarify the gigajoules of gas to which the Overrun Service Rate of twice the Reference Tariff is to apply.	
Amendment 44	The Overrun Charge in relation to Reference Service A2, in clauses 10 to 12 of Schedule 2, of Part C of the proposed revised Access Arrangement, should be deleted.	Agree
Amendment 45	The provisions regarding notification of overruns in clauses 7 to 9 of Schedule 1, and clauses 10 to 12 of Schedule 2, of Part C of the proposed revised Access Arrangement should be amended either to make notification mandatory in defined circumstances, or to confer a right upon a User who is incurring Overrun Charges to nominate an increased Contracted Peak Rate (subject to the Queuing Policy) or to have flow control installed.	Agree
Amendment 46	The provisions regarding notification of overruns in clauses 7 to 9 of Schedule 1, and clauses 10 to 12 of Schedule 2, of Part C of the proposed revised Access Arrangement should be amended to clarify the circumstances in which an excursion would count as being an "occasion".	Agree
Amendment 47	The proposed revised Access Arrangement should be amended to include a mechanism which complies with section 8.40 of the Code by which revenue from Overrun Charges exceeding the reasonable cost of providing the Overrun Service will be rebated across all Users of Reference Services.	Disagree
Amendment 48	Clause 37(1)(b) of Part B of the proposed revised Access Arrangement should be amended to clarify the method of forecasting New Facilities Investment to which reference is being made.	Agree
Amendment 49	Clause 37(1)(c) of Part B of the proposed revised Access Arrangement should be amended to specify the financing structure assumed for the purposes of determining the Rate of Return.	Disagree
Amendment 50	Clause 37(1)(d) of Part B of the proposed revised Access Arrangement should be amended to clarify the Fixed Principle that is intended in relation to depreciation.	Agree
Amendment 51	Clause 37(1)(e) of Part B of the proposed revised Access Arrangement should be amended to correct a typographical error by amending "Part B, clause 27(2)(a)" to read	Agree

	"Part B, clause 27(2), and to clarify the Fixed Principle that is intended in relation to FRC costs.	
Amendment 52	Clause 37(1)(g) of Part B of the proposed revised Access Arrangement relating to the tariff basket form of price control should be deleted.	Disagree
Amendment 53	Clauses 16(1), 26, 27, 32(1), 36(3), 58 and 64 of Part C, of the proposed revisions should be amended to remove cross-referencing to the RMS or the RMR.	Disagree
Amendment 54	Clause 34 of Part A – "Terms and conditions for Services other than Reference Services" – should be amended to remove provision for the inclusion of terms and conditions for Non-Reference Services in the revised Access Arrangement.	Agree
Amendment 55	Clause 21(2) of Part A providing that the terms and conditions of the Interconnection Service are to be negotiated should be amended not to be subject to clause 22 of Part A.	Agree
Amendment 56	Clause 21(4) of Part A setting out the list of matters with which it is expected that an Interconnection Contract will deal should be deleted.	Agree
Amendment 57	Clause 22 of Part A requiring that there be a term of each Interconnection Contract in relation to compliance with the Gas Quality Specifications should be deleted.	N/A clause deleted
Amendment 58	Clause 23 of Part A setting out the requirements for an application for an Interconnection Contract should be deleted.	Disagree
Amendment 59	Clauses 28(2) of Part A requiring that a Prospective User of an Interconnection Service who is a Pipeline Operator must enter into an Interconnection Contract with AGN should be deleted.	Agree
Amendment 60	Clause 27 of Part A – Obtaining access to services – should be amended to confine its operation to Reference Services supplied under a Haulage Contract.	Disagree
Amendment 61	Clause 28 of Part A – Parties required to enter into a Service Agreement – should be amended to confine its operation to Reference Services supplied under a Haulage Contract.	Agree
Amendment 62	Clause 29 of Part A – Pre-conditions to the provision of Services – should be amended to	Disagree

	confine its operation to Reference Services supplied under a Haulage Contract.	
Amendment 63	Clause 30 of Part A – Obligation to accept and deliver Gas – should be amended to confine its operation to Reference Services supplied under a Haulage Contract.	Disagree
Amendment 64	Clause 28 of Part C – Metering uncertainty – should be amended to confine its operation to Reference Services supplied under a Haulage Contract.	Agree
Amendment 65	Part A, clause 29(2)(b)(iv) of the proposed revised Access Arrangement should be deleted.	Disagree
Amendment 66	Part A, clause 60 of the proposed revised Access Arrangement should be deleted.	Disagree
Amendment 67	Part A, clause 61 of the proposed revised Access Arrangement should be deleted.	Disagree
Amendment 68	Part C, clause 22(1)(a)(vi) of the proposed revised Access Arrangement should be deleted.	Disagree
Amendment 69	Clause 21(3) of Part A of the proposed revised Access Arrangement should be deleted.	Disagree
Amendment 70	Clause 8 of Part C of the proposed revised Access Arrangement, concerning Interconnection Contracts, should be deleted.	Disagree
Amendment 71	Clause 33(1) of Part A should be amended to provide that the Authority's approval of Replacement Schedules referred to is approval of a revision to the Access Arrangement in accordance with the provisions of sections 2.28 to 2.48 of the Code.	Agree
Amendment 72	Clause 1 of Part C of the proposed revised Access Arrangement should be amended to ensure that any changes to the terms defined in the Access Arrangement and applicable in a Haulage Contract are subject to the procedure for amending an Access Arrangement in section 2 of the Code.	Agree
Amendment 73	The definition of "**Code**" in the Glossary in Schedule 2 of Part A of the proposed revised Access Arrangement should be amended to correspond with the definition of that term in the Code, that is the definition should refer to the Code as amended from time to time, and not to the Code in force as at the Revisions Submission Date.	Agree

Amendment 74	The definition of "**Confidential Information**" in the Glossary in Schedule 2 of Part A of the proposed revised Access Arrangement should be amended to correspond with the definition in section 10.8 of the Code.	Disagree
Amendment 75	The definition of "**Cost of Service**" in the Glossary in Schedule 2 of Part A of the proposed revised Access Arrangement, which refers to a section of the Code which has been repealed, i.e. section 8.3(d), should be deleted, and replaced with an appropriate alternative definition.	Agree
Amendment 76	The definition of "**Delivery Point**" in the Glossary in Schedule 2 of Part A of the proposed revised Access Arrangement should be amended to correspond with the definition in section 10.8 of the Code.	Disagree
Amendment 77	The definition of "**Developable Capacity**" in the Glossary in Schedule 2 of Part A of the proposed revised Access Arrangement should be amended to correspond with the definition in section 10.8 of the Code.	Disagree
Amendment 78	The definition of "**Gas**" in the Glossary in Schedule 2 of Part A of the proposed revised Access Arrangement should be amended to correspond with the definition in section 90(4) of the *GPAA*.	Agree
Amendment 79	The definition of "**New Facilities Investment**" in the Glossary in Schedule 2 of Part A of the proposed revised Access Arrangement should be amended to correspond with the definition in section 10.8 of the Code.	Agree
Amendment 80	The definition of "**Prospective User**" in the Glossary in Schedule 2 of Part A of the proposed revised Access Arrangement should be amended to correspond with the definition in section 10.8 of the Code.	Disagree
Amendment 81	The definition of "**Receipt Point**" in the Glossary in Schedule 2 of Part A of the proposed revised Access Arrangement should be amended to correspond with the definition in section 10.8 of the Code.	Disagree
Amendment 82	Clause 2 of Part C of the proposed revised Access Arrangement should be amended to provide that the terms and conditions of a Haulage Contract are the terms and conditions in the Access Arrangement, including those in Part A plus the general terms and conditions in Part C.	Disagree

Amendment 83	Clause 2 of Part C should be amended to provide that the Authority's approval of amendments to the terms of Haulage Contracts is approval of a revision to the Access Arrangement in accordance with the provisions of sections 2.28 to 2.48 of the Code.	N/A clause deleted
Amendment 84	Clause 3 of Part C of the proposed revised Access Arrangement, providing for AGN to specify terms and conditions in a Haulage Contract in addition to those specified in an approved revised Access Arrangement, should be deleted.	Agree
Amendment 85	Clause 4(1)(a) of Part C of the proposed revised Access Arrangement should be amended to make the exercise of the discretion by AGN to require further security subject to an objective qualification (e.g. to provide for such further amount as is reasonable to protect AGN's legitimate business interests).	Agree
Amendment 86	Clause 17 of Part C of the proposed revised Access Arrangement should be amended to clarify AGN's obligation to replace lost gas.	Agree
Amendment 87	Clause 28 of Part C of the proposed revised Access Arrangement should be amended to note, for the avoidance of doubt, the existence of the minimum standards under the *Gas Standards (Gas Supply and System Safety) Regulations* 2000, which represent standards below which metering services supplied by AGN must not fall.	Disagree
Amendment 88	Clause 32(2) of Part C should be amended to reflect the wording of the equivalent clause in the current Access Arrangement, which provides an obligation applicable to both parties for the payment of interest upon amounts reimbursable following dispute resolution in relation to invoices.	Agree
Amendment 89	Clause 33(2) of Part C of the proposed revised Access Arrangement should be amended to reflect the wording of the equivalent clause in the current Access Arrangement, which provides an obligation applicable to both parties for the payment of interest upon subsequently detected over-payments.	Agree
Amendment 90	Clause 35(2) of Part C of the proposed revised Access Arrangement should be amended to provide a reasonable period	Agree

	within which a User may pass on a GSL notice from a Small Use Customer without being required to reimburse any GSL payment by AGN.	
Amendment 91	The heading to clause 44 of Part C should be amended to refer to the parties' and not only AGN's remedies, consistent with the content of the clause.	Agree
Amendment 92	Clause 46(1) of Part C of the proposed revised Access Arrangement should be amended to add a requirement that AGN's discretion to withhold consent shall only be exercised in circumstances where it is reasonable to do so.	Agree
Amendment 93	Clause 56(2) of Part A of the proposed revised Access Arrangement should be amended to remove the words "which consent binds the Regulator in respect of the Extension or Expansion specified in the request".	Agree
Amendment 94	Clause 58 of Part A of the proposed revised Access Arrangement should be amended to confine its operation to new connections for the provision of Reference Services under a Haulage Contract.	Agree
Amendment 95	Clause 63 of Part A of the proposed revised Access Arrangement should be amended to provide a Revisions submissions Date of not later than 31 March 2009.	Agree
Amendment 96	The values in Schedule 1, clause 2(1)(b) of Part B of the proposed revised Access Arrangement for the forecast total costs for providing Reference Services should be amended to accord with the amended values to be included in Table 4.14 of the submitted Access Arrangement Information as required by Amendment 26 in this Draft Decision.	Agree