Jemena Limited

Submission on pipeline reform package exposure draft

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Overview

The stated objectives of the Energy Council, in its actions to improve gas pipeline regulation, are 'to implement a more efficient, effective and integrated regulatory framework that supports the efficient operation of the gas market and the long term interests of gas users and is fit for purpose, targeted and proportionate to the issues it is intended to address.'[1] We also note the policy intent, set out in the Decision Regulation Impact Statement (**Decision RIS**) of May 2021, to provide a greenfields incentive mechanism in recognition of the regulatory risks posed to new pipeline investment.

In contrast to these objectives, the reform package as proposed will not meet its objectives and in fact will deliver the perverse outcomes of reducing or halting investment, which will ultimately result in higher gas prices for domestic end users. Providing a regulatory environment which encourages, not dissuades, the development of new gas infrastructure and basins remains critical—particularly in the context of a decarbonising economy where, despite the need for gas to support energy system emissions reduction, financing and achieving public support for critical gas infrastructure is increasingly difficult in the face of competition from new energy sources.

Central to our concerns are:

- that the proposed greenfields incentive mechanism—even with a number of modifications as set out in this submission—will be unworkable in practice. While the greenfields incentive mechanism seeks to introduce flexibility with respect to the competitive process for pipeline development, it will continue to result in regulatory uncertainty that will have the effect of deterring pipeline investment, posing a significant barrier to the efficient development of new pipelines—particularly in Australia's northern strategic basins. The absence of a workable greenfields incentive pathway will result in less gas being evacuated from Australia's strategic basins, meaning either more expensive gas for domestic users, or new supply being developed only for export, or resources remaining undeveloped.
- the unintended consequences of the draft ringfencing provisions, namely the ringfencing of processing facilities attached to pipelines. These integrated facilities play a necessary but incidental role to the transportation of gas to market. There is no competition or practical benefit from ringfencing such activities, especially since doing so runs contrary to the technical and commercial understanding of the processing function, and will impose additional costs on all participants in the supply chain, ultimately including end users.
- in the context of the choices investors have when considering potential investments in Australia's gas transportation sector, the significant increase in the regulatory risk profile faced by owners of sunk investments—sending a negative signal to potential future investors about the risks associated with investments in the Australian energy market.
- the removal of any independence between decisions on whether economic regulation should be applied and the responsibility for then applying that regulation—diminishing regulatory accountability for quality decision making in the long-term interests of consumers and increasing the risk of over-regulation.
- the addition of further reporting and other compliance obligations, in addition to the wide range of new requirements introduced in previous reform packages—all of which result in additional costs which will ultimately be passed on to end users.

Alongside these broader concerns, we have also identified instances where we believe the reform package as proposed may result in other unintended consequences which may be detrimental to the long-term interests of consumers. The following sections of this submission identify and propose solutions to these matters.

About Jemena

Jemena owns and operates some of Australia's most important gas transmission pipelines. Our experience and expertise in building and operating major gas supply assets has earned us a reputation as a leader in gas

[1] COAG Energy Council, Options to improve pipeline regulation, COAG Regulation Impact Statement for consultation, October 2019, page 49

transmission, offering producers and customers safe, reliable and competitive transport via direct and dependable routes.

Jemena's gas transmission assets include the:

- Northern Gas Pipeline
- Queensland Gas Pipeline
- Darling Downs Pipelines
- Eastern Gas Pipeline
- VicHub
- Colongra Gas Transmission and Storage Pipeline
- Roma North Gas Processing Facility
- Atlas Gas Processing Facility.

Jemena has a strong record of significant investment in infrastructure which increases gas market competition and supply.

About this submission

This submission has been prepared in the context of Jemena's gas transmission assets. Jemena Gas Networks (NSW) Ltd (**JGN**) has provided a separate submission in response to the legislative package which focusses on the implications to Jemena's gas distribution networks.

Jemena has also contributed to, and broadly supports, the Australian Pipelines and Gas Association's submission on this matter.

This submission sets out our views on two key issues under the proposed framework—the greenfields incentive mechanism and ringfencing provisions—while also providing proposed drafting amendments relevant to the greenfields incentive mechanism, answers to the consultation paper questions and further detailed feedback on specific parts of the draft legal package.

1. A workable greenfields incentive is critical to fostering investment

1.1 Background

Consistent with the current focus of the Australian Government's National Gas Infrastructure and Strategic Basin Plans, northern Australia's significant undeveloped gas reserves have the potential to drive long-term economic prosperity and to alleviate supply pressures in the east coast gas market. As a past investor in infrastructure such as the Northern Gas Pipeline, Jemena is well placed to deliver pipelines which can unlock new supply in strategic basins such as the Beetaloo, Galilee and Bowen—however, such investment is contingent on the regulatory settings in place.

The premise of the Decision RIS is that the majority of new pipelines are fully underwritten by shippers and the driver for development is not speculative capacity. Although true in some circumstances,[2] this premise does not apply to the development of Australia's strategic gas basins which will be contingent upon the construction of pipelines which are not initially fully underwritten by customers—that is, they need to be designed and developed to be forward looking and sized to meet the needs of potential future users. The remoteness of new basins such as the Beetaloo, and the very large capital cost of constructing pipelines to connect these basins to demand markets, requires significant economies of scale in transportation to ensure that the delivered price of gas from these basins is economic for end users.

Although the size of the prospective resources in Australia's strategic basins makes it likely that sufficient volumes of gas required to realise these economies of scale in transmission pipelines may eventually be produced, the timing of the many discrete upstream developments in new basins will not be aligned. This means that in the absence of future-sized pipeline infrastructure, producers which are not able to commit to underwriting the pipeline at the time of construction will be left without the ability to transport their gas to market. While it is technically possible to build a pipeline and then later expand its capacity by adding compression or looping, doing so will result in a higher total cost of providing transportation services, and therefore a higher cost of delivered gas. To maximise the long-term economic benefits of these strategic resources for Australia and increase upstream supply and competition, these new pipelines must therefore be initially sized to meet future production requirements.

The greenfields incentive mechanism needs to support pipeline investment in relation to different development scenarios. In one scenario, where a pipeline is fully underwritten at the time of construction, an investor may bear a lower degree of risk around the future recovery of their investment (including an expected commercial rate of return commensurate with the risks faced by the investor) due to the minimal risk of price arbitration. In contrast, an investor in a pipeline which has a substantial amount of uncontracted capacity at the time of construction faces not only significant commercial or demand risk, but under the current framework also faces the significant regulatory risk that price arbitration may result in an under-recovery of their investment relative to their expected commercial rate of return.

1.2 Our concerns with the proposed greenfields incentive mechanism

The greenfields incentive must strike the right balance between fostering investment in essential pipeline infrastructure while ensuring such investment is underpinned by a workably competitive market. As currently proposed, the greenfields incentive mechanism seeks to introduce more flexibility than the current framework with respect to the competitive process for pipeline development, but in doing so continues to result in regulatory uncertainty that will have the effect of significantly deterring pipeline investment serving new basins.

The mechanism as proposed does not allow for an organic commercial process that ultimately should result in a workably competitive outcome and does not recognise the commercial practicalities of developing pipelines which serve a new gas basin, including:

[2] We note, for example, that all Jemena's gas transmission investments since the introduction of the 2017 gas market reforms have been underwritten by customers, and these recent projects have been significantly different to the types of multi-user pipelines required to open up new gas basins.

- most critically, the risks to investment decision timelines that would be posed by delays associated with undertaking the greenfields determination process itself, especially noting that a determination cannot be obtained until any foundation agreement with a prospective user has effectively been finalised—requiring both parties to agree a firm tariff, which for a new basin could involve years of work to develop and refine pipeline construction cost estimates
- the dynamic nature of commercial negotiation processes between prospective users and prospective pipeline developers—and in particular, the risk that these may not fall within the proposed definition of a 'competitive process'
- the existence of and lack of coordination between multiple prospective users with varied interests, which prevents the use of a single 'competitive process' and requires pipelines to be developed with spare capacity, thereby opening them to up the risk of price arbitration.

In addition, despite our understanding of the intention to reduce the uncertainty associated with an arbitration where a greenfields incentive determination specifies prices, we are also concerned that the proposed pricing principle under r 113Z of the NGR may provide the ability for a prospective shipper to bypass this arbitration requirement by seeking access to a service on slightly different non-price terms and conditions to those specified in a greenfields incentive determination under r 29(2). As such, we consider that r 113Z provides a relatively low degree of certainty to an investor about the potential outcome of an arbitration, further reducing the practical workability of the mechanism.

1.3 Although improvements are possible, we remain concerned about the practical workability of the framework

With the objective of taking the proposed reforms and improving their practical workability in the context of the commercial environment in which pipelines will be built—particularly in the context of new basin developments—we have proposed amendments. These amendments are explained in the section below and further detailed in section 3.

However, even if such amendments were to be adopted, we remain concerned that the greenfields incentive mechanism overall will not be sufficiently workable in practice to appropriately incentivise greenfields investments and mitigate the investment disincentives for pipelines serving new basins.

1.4 Proposed improvements

Our suggested improvements to the greenfields incentive mechanism drafting contained in the proposed legal package are focussed on two areas:

- **competitive process** – to provide clarity about the statutory requirements of a pipeline developed following a '*competitive process*' to reduce ambiguity and increase certainty in the greenfields process for pipeline providers
- **an alternative pathway focused on competitive outcome** – to introduce an alternative pathway for a greenfields incentive which would focus on whether the price and non-price terms and conditions for one or more users of the pipeline reflect a '*competitive outcome*', being those which reflect the outcomes of a workably competitive market.

1.4.1 The role of a competitive process

The proposed greenfields incentive determination regime includes an incentive for pipelines which have been developed following a "*competitive process*" to offer the prices and non-price terms and conditions agreed with foundation shippers to future users of the pipeline. As part of any greenfields incentive determination, the relevant regulator must specify a number of matters relating to the availability, duration and content of those terms and

conditions as part of its determination.[3] Those specified terms and conditions as to price must then be given effect to by an arbitrator in any dispute between the service provider and a user.[4]

This mechanism benefits both future users of the pipeline and the pipeline developer by providing them with certainty as to the price of pipeline services during the duration of the greenfields determination.

The phrase "competitive process" is not defined in the NGR or NGL but rule 26 of the NGR states:

> *"For the purposes of this Division, a pipeline will be taken to have been developed following a **competitive process** if the AER is reasonably satisfied from the information provided to it by the applicant that there was a **genuine competition** to develop the pipeline between 2 or more prospective service providers that are not related bodies corporate of each other, and that do not include a related body corporate of the applicant, for the greenfields incentive determination."*

The term "*genuine competition*" is not defined either and greater clarity is needed to ensure that the phrase is not interpreted in a way which has the unintended outcome of limiting the availability of the greenfields incentive to only those situations where a formal tender type process has been conducted—noting that it is rare for pipelines to be developed via a process that requires prospective developers to submit binding offers through a tender-style arrangement. Similarly, it is important that requirements to provide a description of the competitive process, the number of prospective service providers in the process and the criteria used to select the pipeline of the subject application[5] do not also lead to that de facto outcome.

In practice, the competition to develop a pipeline to service a production location or demand location often occurs in less structured ways but is no less competitive in the sense of two or more pipeline developers vying with each other to win the opportunity to develop the pipeline. The focus should rightly be on whether the process leading to the development of the pipeline is one in which there has been sufficient constraint on the market power of the prospective service provider given the countervailing bargaining power of prospective shippers to ensure that the terms and conditions of access do not reflect the exercise of market power by the service provider enabling it to impose monopoly prices on shippers.

The reference to a "competitive process" implies that at least part, if not all of that constraint, needs to come from other prospective service providers. We say part deliberately, because if the prospective shippers are of sufficient scale and sophistication they may well have a degree of countervailing bargaining power that already materially constrains the prospective service provider.

The reference to a "*competitive process*" in the NGR and NGL should be sufficiently flexible to account for such scenarios as well as those where the prospective service provider clearly has an imbalance of bargaining power compared to potential shippers.

1.4.2 Alternative pathway – the role of a competitive outcome

In addition to the "*competitive process*", Jemena proposes that an alternative pathway be available for pipelines seeking a greenfields incentive. This second pathway would focus on whether the price and non-price terms and conditions agreed with one or more pipeline users reflect a **competitive outcome,** which are those which reflect the outcomes of a workably competitive market.

The introduction of a second pathway would represent a degree of improvement in the ability of the greenfields test to accommodate a broader range of commercial processes which may arise for prospective pipelines, while still containing the protection for users that the service provider has been subject to a sufficient competitive constraint in its negotiations with users.

This alternative proposal directs the relevant regulator's assessment to the *outcome* rather than the *process* and provides pipeline providers with an opportunity to obtain a greenfields incentive determination where the process leading up to the development of the pipeline does not meet the indicia of the competitive process test.

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3 r 29(2) of the NGR

4 r 113Z(4)(c) of the NGR

5 r 27(2) of the NGR

Nonetheless, where there is a sufficient competitive constraint on the service provider such that the price and non-price terms and conditions for the pipeline service for one or more users reflect the outcomes of a workably competitive market, this is a competitive outcome which we consider accords with the intent of the greenfields incentive determination and therefore merits a greenfields incentive.

2. Ringfencing provisions need to be designed to avoid unintended consequences

The proposed reforms extend the structural and operational separation requirements (ringfencing) contained in Part 2 of the NGL to non-scheme pipelines. However in making this change, certain activities that would otherwise be treated as part of the pipeline business will be required to be ringfenced.

The ringfencing requirements will prohibit a non-scheme pipeline service provider from undertaking a related business that buys, sells or produces natural gas. In understanding how this ringfencing prohibition will impact our non-scheme pipelines, Jemena has identified an existing ambiguity in the definition of ‘related business’ in s. 137 of the NGL which will have unintended consequences for mid-stream processing facilities.

Processing facilities attached to pipelines play a necessary and incidental role in relation to the transportation of gas to market. By ‘processing’ the gas, these facilities refine the gas to ensure it is fit for purpose and suitable for transportation. Ownership of the gas does not transfer to the service provider as part of this process. It is essentially a function similar to compression or odourisation. However, unlike odourisation and compression which are legally recognised as incidental to pipeline services, the processing of gas could be characterised as a form of ‘production’ of gas. In turn, this would require those services to be ringfenced from the pipeline business. There is no competition or practical benefit from ringfencing such activities especially since it runs contrary to the technical and commercial understanding of the processing function. Instead, it will have the opposite effect, imposing additional costs on all participants in the supply chain and ultimately for end users.

We consider this outcome to be an unintended side effect of the evolution of natural gas markets since the inception of the ringfencing rules as part of the original NGL reforms. In section 5, we have suggested some minor drafting amendments to update the definition of 'related business’ to bring it into line with the technical reality of pipeline services. The proposed drafting changes will not change the substance of the ringfencing provisions or their ultimate objective with respect to natural gas markets.

3. Proposed drafting amendments to greenfields mechanism

Jemena proposes the following amendments to rules 26, 27, 29 and 113Z of the NGR and section 109 of the NGL.

Item	NGR/NGL	Proposed drafting	Jemena commentary
1	Rule 26	"For the purposes of this Division, a pipeline will be taken to have been developed following a competitive process if the AER is reasonably satisfied from the information provided to it by the applicant that: (a) there was ~~a genuine~~ competition between 2 or more prospective service providers which led to the development of the pipeline ~~between 2 or more prospective service providers~~ and those prospective service providers ~~that~~ are not related bodies corporate of each other, and ~~that~~ do not include a related body corporate of the applicant, for the greenfields incentive determination; and (b) that process had a material effect on the price and non-price terms and conditions to be offered to one or more users of the pipeline."	**"Competitive process"** The purpose of rule 26 is to set out the statutory criteria for determining whether a pipeline has been developed as a result of a "*competitive process*" in the context of an application for a greenfields incentive determination (**greenfields application**) under r 27(1)(m). As currently drafted, proposed rule 26 requires that the AER be reasonably satisfied that there was "*genuine competition*" between 2 or more service providers which led to the development of the pipeline. Jemena notes that the phrase "*genuine competition*" is undefined and understands that the phrase does not import any minimum threshold as to the quality of competition in rule 26. However, Jemena is concerned that the use of the same phrase "*genuine competition*" in section 49 of the NGL may import a higher threshold of effective competition in the greenfields context which would be an extremely high bar and contrary to the intended purpose of the greenfields exemption. **Jemena's proposed amendment to rule 26** Under Jemena's proposal, the AER would be satisfied a pipeline was developed following a competitive process if it is reasonably satisfied that: a) there was competition between 2 or more prospective service providers which led to the development of the pipeline; b) those service providers are not related bodies corporate; and c) that process had a **material** effect on the price and non-price terms and conditions to be offered to one or more users of the pipeline. Jemena considers that the materiality threshold is a longstanding legal test which is well understood by regulators and which provides a clear linkage between the pipeline development process and why such a process should be taken to have been a *'competitive'* process – that is, by reference to the price and non-price terms and conditions of access.

Item	NGR/NGL	Proposed drafting	Jemena commentary
2	Rule 26A	For the purposes of this division, the price and non-price terms and conditions agreed between the service provider and one or more users of the pipeline will be taken to have resulted in a competitive outcome if the AER is reasonably satisfied from the information provided to it by the applicant that those terms and conditions are consistent with the outcomes of a workably competitive market.	**An alternative greenfields pathway – "competitive outcome"** Jemena proposes that a second pathway be available for pipelines seeking a greenfields exemption (as an alternative to "*competitive process*"). This second pathway focuses on whether the price and non-price terms and conditions agreed with one or more pipeline users reflect a **competitive outcome**. The AER would be satisfied that the price and non-price terms and conditions for a proposed greenfields pipeline reflect a competitive outcome if they are consistent with the outcomes of a **workably competitive market**. Jemena considers that the use of the concept of workable competition is appropriate in the greenfields context, in circumstances where workable competition already underpins the existing Part 23 pricing principles and regulators have familiarity applying the concept in practice.
3	Rule 27(1)(m)	"information about whether the pipeline is being developed as a result of a competitive process ~~where 2 or more prospective service providers have competed to develop the pipeline~~;"	**Information about the competitive process (greenfields application)** Jemena has simplified the drafting and removed duplication in rule 27(1)(m), noting that the statutory requirements of "*competitive process*" are already set out in rule 26 (i.e. that there be competition between 2 or more prospective service providers to develop the pipeline).
4	Rule 27(1)(ma)	Information about whether there are price and non-price terms and conditions for one or more users of the pipeline which have a competitive outcome	**Greenfields application (information about competitive outcome)** As part of the alternative greenfields pathway proposed by Jemena, a new subrule 27(1)(m) would be introduced to require an greenfields application to provide information about whether price and non-price terms and conditions for one or more users of the pipeline have a **competitive outcome**.

Item	NGR/NGL	Proposed drafting	Jemena commentary
5	Rule 27(2)(a)	"a description of the competitive process which led to the development of the pipeline including: (i) the role of prospective service providers other than the service provider making the application; (ii) the way in which those other prospective service providers sought to develop a pipeline that would serve the same or similar markets and/or source to the pipeline the subject of the application; and (iii) the reasons why the pipeline the subject of the application proceeded to development in preference to the proposals of other prospective service providers;"	**Greenfields application (description of the competitive process)** Under the proposed reforms, a greenfields application is required to provide the information specified in rule 27(2) about the "competitive process". Jemena's view is that the rules must be more specific about exactly what types of information are required by the AER to assess whether a pipeline was developed following a "competitive process". This will provide pipeline providers with more certainty about the precise parameters by which the AER assesses what constitutes a "competitive process" in the context of a greenfields application. Jemena has proposed three additional pieces of information in rule 27(2)(a) which a pipeline provider would be required to provide, and the AER would be required to consider, in assessing whether a pipeline has been developed as a result of a "*competitive process*": a) the role the role of other prospective service providers; b) the way other prospective service providers sought to develop a pipeline that would serve the same or similar markets and/or source; c) the reasons why the pipeline in question proceeded to development in preference to the proposals of other prospective service providers.
6	Rule 27(2)(b)	~~"how many prospective service providers competed to develop the pipeline and what criteria were used to select the pipeline that is the subject of the application."~~	Jemena has proposed removing rule 27(2)(b) as it may have the unintended outcome of limiting the availability of the greenfields incentive to situations where a specific proponent has conducted a formal tender process (such as the NT Government with the NGP). The focus in rule 27(2)(b) on the (i) "*criteria used to select the pipeline*", and the (ii) "*number of prospective service providers in the process*" suggests a prescriptive tender process and Jemena is concerned this would inadvertently have the de facto outcome of barring prospective pipelines from the protection of a greenfields incentive.

Item	NGR/NGL	Proposed drafting	Jemena commentary
7	Rule 27(2A)	If the pipeline will offer price and non-price terms and conditions for one or more users which have a competitive outcome, the application must include a statement of the basis upon which the AER can be reasonably satisfied that the price and non-price terms and conditions agreed between the service provider and one or more users of the pipeline resulted in a competitive outcome including: (a) a description of the negotiation process that resulted in the agreed price and non-price terms and conditions; and (b) any relevant expert reports, consultant reports, data sets, models and other documents or materials.	**Greenfields application (information in support of a competitive outcome)** As part of the alternative greenfields pathway proposed by Jemena, a new subrule 27(2A) would be introduced requiring a greenfields application to include the following information in support of a competitive outcome: a) a statement of the basis upon which the AER can be reasonably satisfied the price and non-price terms and conditions for one or more users has resulted in a competitive outcome; b) a description of the negotiation process; c) any expert or consultant reports, and other relevant documents or materials which support why the price and non-price terms and conditions are consistent with those of a workably competitive market.

Item	NGR/NGL	Proposed drafting	Jemena commentary
8	Rule 29(2)	In addition, if the AER makes a greenfields incentive determination in relation to a pipeline: (a) that is being developed following a competitive process; or (b) for which the service provider and one or more users have agreed price and non-price terms and conditions which have a competitive outcome; and prices and non-price terms and conditions will be available to future users of the pipeline, the AER must specify as part of its determination (and provided to the AER as part of the application process): (i) the services to which those prices and terms and conditions will apply; and (ii) the prices and non-price terms and conditions applicable to the services specified under paragraph ~~(a)~~(i); and (iii) any price escalation mechanism that is to apply to prices over time; and (iv) how long the price and non-price terms and conditions will apply. […]	**Greenfields determination** As part of the alternative greenfields pathway proposed by Jemena, subrule 29(2)(b) would be introduced to clarify that the AER may make a greenfields incentive determination under either pathway – that is, on the basis that a pipeline: a) is being developed following a **competitive process**; or b) has price and non-price terms and conditions agreed with one or more users of the pipeline which have a **competitive outcome**.
9	Rule 113Z(4)(c)	The pricing principles are: […] (c) if a greenfields incentive determination applies to the pipeline and specifies pipeline services and prices under rule 29(2) – the price for access to that pipeline service and substantially similar pipeline services should reflect the price, and any related price escalation mechanism, specified in the greenfields incentive determination.	**Arbitration pricing principles for non-scheme pipeline (greenfields)** Jemena has proposed a minor amendment to the arbitration pricing principle applicable where a pipeline is subject to a greenfields incentive determination. Where a greenfields incentive determination specifies prices in relation to particular pipeline services, it is proposed that the greenfields incentive determination be extended to apply to "substantially similar pipeline services" to ensure that the greenfields pipeline provider is not exposed to the risk of a subsequent user challenging the prices specified in a greenfields incentive determination in arbitration where the pipeline services are substantially similar.

Item	NGR/NGL	Proposed drafting	Jemena commentary
10	Section 109(3) of the NGL	In doing so, the AER – (a) must have regard to the national gas objective; (b) must have regard to – (i) the form of regulation factors (ii) for a greenfields incentive determination… (ca) must have regard to the information provided in an application for a relevant determination; and (c) may have regard to any other matter it considers relevant, including for example, any information it obtains in the course of performing its functions.	**AER decision making (greenfields application)** Jemena has proposed a minor amendment to clarify that the AER, in assessing a greenfields application, must have regard to the information provided in a greenfields application.

4. Stakeholder feedback template

We have provided responses to selected consultation paper questions in the table below.

Number	Question	Response
1 Page 22	Do you agree with the proposal to allow Chapter 4 of the NGL, or particular provisions in this chapter, to be applied to a person other than a service provider if prescribed in Regulations? If not, please explain why not.	Based on the very brief explanatory material presented in the legal package consultation paper, we consider giving Ministers a regulation making power to unilaterally impose regulations on third parties that would not otherwise be captured by the national gas regime goes beyond what is contemplated by the Chapter 4 framework which is the regulation of service providers. This issue was not identified or consulted on during the RIS process. Furthermore, we are not aware of any concerns being publicly raised during the course of multiple recent reviews about service providers adopting an approach similar to the one described in the consultation paper in order to circumvent existing obligations under the current regulatory framework. Given the fact that the definition of 'service provider' is broad and there are robust provisions to capture the activities of 'associates' of the service provider, this proposal has no justifiable basis except to give Governments the ability to impose regulation on third parties without proper legislative processes. In the absence of a clearly defined and demonstrable 'problem' that cannot be solved within the existing framework which gives the AER broad market monitoring powers, Jemena queries whether this proposal is consistent with the objectives of the Energy National Cabined Reform Committee as outlined in the Decision RIS—particularly in relation to regulation that is fit for purpose, targeted and proportionate to the issues it is intended to address.[6] Should such a mechanism form part of the final reform package, a provision should be included to require that Ministers only take such action following a clear and proper assessment by the relevant regulator that it is necessary to prescribe such persons under this provision having regard to the form of regulation factors and other appropriate measures.
2 Page 22	Do you think it is necessary to prescribe any persons other than a service provider in the Regulations at the commencement of the legal package, or should it be assessed at a later stage? If you think the Regulations should prescribe any persons other than a service provider at the commencement of the legal package, please explain why.	Noting that the concerns referred to in the consultation paper have not been raised publicly and the basis these concerns is unclear, it would be premature to extend the application of Chapter 4 to a person other than a service provider at this stage.

[6] Energy Ministers, Options to improve gas pipeline regulation, Regulation Impact Statement for Decision, May 2021, p. viii

Number	Question	Response
4 Page 25	Do you agree with the proposal to allow the relevant regulator to determine that a pipeline should be subject to full regulation if the service provider has not provided any of the required information in a timely manner and to the reasonable satisfaction of the relevant regulator? If not, please explain why not.	Jemena considers this proposal is neither consistent with the Energy National Cabined Reform Committee's proportionality objective nor necessary to address an identified problem given the information gathering powers available to the relevant regulator. We have provided further feedback on rule 16(4) in section 5.
7 Page 30	Do you agree with the proposal to require expansions of non-scheme pipelines to be treated as part of the same pipeline for the purposes of the NGL and NGR? If not, please explain why not.	Jemena is concerned that too broad an application of this principle could actually lead to regulatory costs and complexities which would not otherwise arise. For example, where a dedicated lateral is commissioned by one customer (who agrees to bear the entire development cost) but is connected to an existing pipeline, it may not be appropriate to treat the new lateral as an extension to (and therefore part of) the pipeline it connects into. This would remove the ability to seek a single user exemption and, for example, require an auction to be run in respect of the lateral despite there only being one prospective user.

Number	Question	Response
8 Page 32	Do you agree with the proposed changes to the pipeline classification and reclassification mechanism? If not, please explain why not.	We broadly support the proposed changes to the pipeline classification and reclassification mechanism. However, the relevant pipeline licences do not classify the following Jemena pipelines as transmission or distribution pipelines: • Eastern Gas Pipeline[7] • Queensland Gas Pipeline[8] • Darling Downs Pipeline[9] • Northern Gas Pipeline[10] • VicHub pipeline[11] • Atlas pipeline[12] • Roma North pipeline[13] • Colongra pipeline.[14] Therefore, under the proposed reforms, these pipelines would need to be classified as transmission or distribution pipelines by the AER in accordance with the NGL and NGR. However, given the nature and use of these pipelines (in conveying gas to markets, rather than reticulating gas within markets), we consider that these pipelines are clearly transmission pipelines rather than distribution pipelines.[15] Given this, Jemena submits these pipelines should be deemed to be transmission pipelines under the transitional provisions of the NGL/NGR. Undergoing the classification process provided for in the proposed reforms would, in the circumstances, be an unnecessary exercise and result in an undue administrative burden on the AER.

7 PPL 232 (Vic) and PPL 26 (NSW)

8 PPL 30 (Qld)

9 PPL 90, PPL 133 and PPL 134 (Qld)

10 PPL 34 (NT) and PPL 2015 (Qld)

11 PPL 247 (Vic)

12 PPL 2040 (Qld)

13 PPL 2028 (Qld)

14 PPL 33 (NSW)

15 Further, the Petroleum and Gas (Production and Safety) Act 2004 (Qld) under which the Darling Downs Pipeline, Northern Gas Pipeline, Atlas and Roma North pipeline licences were granted also specifically provides that 'a pipeline licence under this Act cannot be granted for a distribution pipeline'.

Number	Question	Response
9 Page 34	Rule 109 currently prohibits a service provider from making it a condition of the provision of a particular pipeline service that the prospective user accept a non-gratuitous service unless the bundling of services is reasonably necessary. Do you: (a) Agree with the scope of this prohibition, which has been adopted in the draft legal package and only applies to the bundling of non-gratuitous services? (b) Think the prohibition should apply more broadly to any bundling of services (i.e. gratuitous and non-gratuitous services) unless it is reasonably necessary?	No information is presented in the consultation paper to suggest that expanding the scope of this prohibition to apply to non-gratuitous services would be necessary to achieve the policy intent of the reform package.
11 Page 35	If you think the obligation (refer to question 10) should be retained in the NGL, do you think: a. it should continue to just apply to producers, or do you think the obligation should extend to retailers? Please explain your response to this question. b. it should continue to just apply to scheme pipelines, or do you think the obligation should extend to non-scheme pipelines? Please explain your response to this question.	If extended to non-scheme pipelines, the section should be clarified to ensure that this obligation does not extend to a service provider (such as Jemena) of gas processing services to a third party, where the third party maintains ownership of the gas.
12 Page 38	Do you agree with the proposed interconnection requirements, or are there: • other requirements that you think should be specified in the NGR? • some requirements listed in section 4.2 that you think should not be specified in the NGR? If you think the proposed interconnection requirements need to be amended, please explain why you think this is required.	In Jemena's experience, interconnection involves obligations on the part of both connecting parties and a detailed connection agreement is required to be entered into by the parties to record their obligations and facilitate co-ordination. However, the requirement for such an agreement does not appear to us to be adequately addressed in the proposed instruments.

Number	Question	Response
13 Page 40	Do you agree with the proposal to limit the prohibition on cross-subsidising the development of new capacity to transmission pipelines operating under the contract carriage model? If not, please explain why not.	Jemena agrees that it would not be practical to apply this provision to pipelines (including distribution networks) operating under a market carriage model.
14 Page 40	Do you agree with the proposal to require the dispute resolution body in a scheme pipeline access dispute and the arbitrator in a non-scheme pipeline access dispute to (where relevant) give effect to the prohibition on cross-subsidising the development of new capacity in their access determinations?	In relation to the operation of the prohibition itself, we have provided specific feedback in section 5 regarding the need for greater clarity around the new terminology introduced by NGL s 136A.

Number	Question	Response
17 Page 47	Do you agree with the proposal to require service providers to publish the following non-price terms and conditions alongside the individual prices paid by shippers: i. the date the trade was entered into and the service term; ii. the type of service provided and the service priority (e.g. firm, as available or interruptible); iii. the receipt and delivery points at or between which the service is provided and in the case of a forward haul or backhaul service, the direction of the service; iv. the contracted quantities, expressed as a maximum daily quantity (in GJ/day) and maximum hourly quantity (in GJ/hour); v. the price escalation mechanism; vi. whether or not the transaction is on the same or substantially the same terms as the pipeline's standard terms for that service; and vii. the imbalance and overrun allowance associated with the service? If you do not agree with this proposal because you think there are: a) other non-price terms and conditions or information that should also be reported (e.g. other non- liability caps, gas specification, higher heating value requirements etc), please identify what those other non-price terms and conditions are and why you think they should be reported; and/or b) some non-price terms and conditions listed in (i)-(vii) that should not be reported, please identify what those non-price terms and conditions are and why you think they should not be reported.	Given the likely costs to pipeline service providers of publishing this information, and the potential usefulness of this information to market participants, Jemena considers the following refinements should be made to NGR rule 101E: • The scope of services subject to under rule 101E should be limited to firm haulage services only. These are the primary services provided by most pipelines, and are typically sought by customers for multi-year periods. As such, shippers are more likely to seek to negotiate with service providers over the prices for these services, and in the context of the intended purpose of publishing this actual price information, information about these services is more useful to the market than interruptible haulage, storage and other services. • Rule 101E(1)(b) should refer only to the date that the access contract was entered into (and should not refer to the date of any subsequent variations). As noted below, variations can occur relatively frequently over the life of a contract and the listing of the most recent variation date is likely to be less relevant in assisting a market participant understand the commercial context for a reported price than the date that the price was originally agreed between the two parties. • We do not believe the requirement to publish the price escalation mechanism under rule 101E(1)(n) is necessary or useful to market participants, as the proposed rules already require service providers to update published prices (and retain prior years' published prices) each time a price is changed due to the operation of any price escalation mechanism. • Provision should be made under rule 101E(1) to allow the service provider to specify whether a price relates to the underwriting of a capacity expansion, as this may be a matter which has a material effect on such prices. • Rule 101E(2) should be clarified so as to limit the requirement for service providers to update information published where a contract variation is minor and does not relate to a contract term that is likely to have a material effect on the price paid for the service—for example, a variation to accommodate a shipper's request to change delivery or receipt points. Such variations occur relatively frequently (in the case of the EGP, over 40 times this year to date), and therefore the requirement for continuous disclosure of contract variations which are not material to the price paid for a service may represent a larger administrative cost burden for service providers than any benefit to the market (likely to be zero) of obtaining such information.

Number	Question	Response
20 Page 56	Do you agree with the proposed definition of a small shipper? If not, please explain why you think this threshold is not appropriate and set out the alternative definition you think should be employed.	Jemena does not agree with the proposed definition of a small shipper. The proposed threshold takes no account of the size or sophistication of the prospective user—what is defined is not a 'small shipper' but a 'small access request'. This therefore does not appear to reflect the policy intent behind the introduction of the 'small shipper' measures. Applying a TJ/day threshold is an imprecise measurement of relative bargaining strength as different pipelines are of different capacity. For example, 5 TJ/day will represent a greater proportion of business to some pipelines than others. We also note the risk that a significant industry participant (which could have greater bargaining power than the pipeline operator) may seek to take advantage of 'small shipper' status simply by making a modest initial access request and avoiding liability for arbitration costs. Jemena requests that further consideration be given to alternative definitions or thresholds that might more closely reflect the bargaining power of a prospective shipper, such as those set out by the Australian Pipeline and Gas Association in its submission.
22 Page 58	Do you agree with the proposed approach to each of the transitional arrangements set out in Table 9.1? If not, please explain why not.	Jemena provides the following feedback in relation to the transitional arrangements set out in the consultation paper: • **Treatment of the existing Northern Gas Pipeline derogation** – we welcome the continuation of the NGP's existing derogation, and note that this is consistent with the intent of the derogation originally introduced under the current framework and the Australian Energy Market Commission's determination in 2019. We broadly agree with the proposed drafting of the NGL provision as contained in the draft package. One minor drafting amendment we request is that a clear link be provided in the NGR in relation to rules made for the purpose of NGL s 148C, so as to clarify that all of NGR Part 11 does not apply under the derogation. • **Obligation to publish the financial information, historical demand information and cost allocation methodology** – we have identified a transitional timing issue regarding the commencement of the new disclosure obligations under r 101D. This is explained further in section 5. • **Obligation to publish interconnection policy and user access guide** – we note that the consultation paper's proposed approach refers to a two month grace period for the commencement of these new obligations,[16] however the NGR markup in the consultation package reflects a one month grace period.[17] We consider that a two month period would be appropriate to align with the grace period for the publication of actual prices paid under the proposed transitional provisions.

[16] Energy Ministers, Improving gas pipeline regulation, Proposed legal package to give effect to the Decision Regulation Impact Statement, Consultation Paper, September 2021, page 65

[17] Proposed NGR Schedule 6 r 5 & 17

Number	Question	Response
23 Page 58	Are there any other transitional arrangements that you think need to be provided for in the NGL or NGR? If so, please explain what they are and why they are required.	Jemena considers that additional transitional arrangements should be included in the NGL and NGR in relation to the following: • **Ringfencing: gas processing facilities** – as set out in section 2 of this submission, the extension of the ringfencing requirements in Part 2 of the NGL to non-scheme pipelines risks the unintended consequence of requiring Jemena's processing facilities for its Atlas and Roma North Pipelines to be ringfenced from the respective pipeline businesses. If the definition of 'related business' is not clarified to address this issue, Jemena expects that transitional arrangements should be included in the package to provide for these facilities to be exempt from the ringfencing obligations in Part 2 of the NGL, reflecting that these commercial and contractual arrangements were made prior to the reforms being proposed. Furthermore, a standing exemption would be required for prospective processing facilities which would be unintendedly captured by the ringfencing rules. • **Ringfencing: associate contracts** – the transitional provisions should also provide protection for contracts entered into prior to the associate contract provisions coming into effect for non-scheme pipelines. For Jemena, any contracts between related Jemena entities with respect to non-scheme pipelines (excluding any contracts with Jemena Gas Networks) prior to the commencement date of the reforms which would be considered 'associate contracts' should be exempted on an ongoing basis within the transitional provisions. This would reflect that such contracts were entered into prior to the obligations coming into effect and no assessment against the associate contract obligations was made at that time. • **Pipeline classification and reclassification** – as set out in our response to question 8, we request that the transitional provisions provide for a number of Jemena pipelines to be deemed to be transmission pipelines to avoid an unnecessary administrative burden on the AER.

5. Feedback on proposed changes

Section	Agreed measure	Feedback on proposed changes to the NGL / NGR / Regulations
NGL, Chapter 2, Part 1, ss 63A-63B	Monitoring service providers	Noting the overlap between the requirements for the relevant regulator to undertake market monitoring under these NGL sections and the terms of reference for the ACCC's ongoing Gas Inquiry (including the requirement to report to Energy Ministers), we suggest that the Commonwealth Government reconsider the role of the Gas Inquiry as relevant to gas transportation in the context of the ongoing costs to market participants of responding to Inquiry notices.
NGL, Chapter 3, Part 1, s 92	AER may make scheme pipeline determination	The policy position set out in the Decision RIS referred to the relevant regulator being required to actively monitor the behaviour of service providers and to refer pipelines for a form of regulation assessment if it suspects market power is being exercised.[18] However, NGL s 92(1) as drafted appears to provide that the relevant regulator may initiate a form of regulation assessment for any reason—rather than in response to a specific concern identified through the course of its market monitoring function. Section 92 should therefore be amended to clarify that a specific concern needs to be identified in order for relevant regulator to self-initiate a scheme pipeline determination process. Additionally, the NGL should limit the number of times a relevant regulator may make a scheme pipeline determination for a pipeline to not more than once in any 12 month period. This limit should apply irrespective of whether the determination was initiated by the relevant regulator or following an application from a market participant. Such a limit will appropriately recognise the material administrative costs likely to be incurred by the regulator and the service provider through such determination processes. We note that similar provisions currently apply to other processes under the regulatory framework, including in relation to arbitrations under Part 23.
NGL, Chapter 3, Part 3, s 105	Lapse of greenfields incentive determination	A greenfields incentive determinations lapses if the pipeline to which it applies is not commissioned within three years after the determination takes effect. For some pipelines, such as those bringing gas from the a new gas basin to market, it is likely to take longer than three years between the making of a greenfields incentive determination and the commissioning of the pipeline. The NGL should allow some flexibility for the relevant regulator to extend the period beyond three years at the time it makes the greenfields incentive determination, as this would represent a more efficient means of providing time extensions without the need for the Regulations to be amended.

[18] Energy Ministers, Options to improve gas pipeline regulation, Regulation Impact Statement for Decision, May 2021, page 147

Section	Agreed measure	Feedback on proposed changes to the NGL / NGR / Regulations
NGL, Chapter 4, Part 1, s 136A	Prohibition on cross-subsidising developments	NGL s 136A adopts the new (undefined) terminology of 'existing user.' It is not clear whether a user (including a user who was an existing user at the time of a development) can be charged an additional charge for using the expansion or extension of the pipeline. In the example of an extension to a pipeline built at the request of one customer and an existing customer subsequently wanting to amend the terms of its existing service to include a new service point created by that extension, it is unclear whether the pipeline operator would be entitled to charge that new customer for the use of that extension or whether the entire cost of the extension would be borne by the commissioning customer. To provide greater clarity, Jemena suggests that the prohibition should apply only to services and users which do not make use of the augmentation or extension – whether they are existing users or new users.
NGL, Chapter 4, Part 2, s 137	Extension of structure and operational separation requirements (ring fencing) to non-scheme pipelines	As identified in section 2 of this submission, the 'related business' definition will result in in the processing of gas for the purpose of providing a pipeline service being treated as the 'production' of gas. The proposed definition of 'related business' under NGL s 137 should be clarified as follows: ***related business*** means the business of producing, purchasing or selling natural gas or processable gas, but does not include: (a) purchasing or selling of natural gas or processable gas to the extent necessary – (i) for the safe and reliable operation of a pipeline; or (ii) to enable a service provider to provide balancing services in connection with a pipeline; and (b) the processing of natural gas by gas processing facilities connected to the pipeline.
NGL Schedule 3, s 128	Provision for Northern Gas Pipeline	Jemena broadly supports the proposed drafting of the NGL provision as contained in the draft package, noting our request for minor clarifications around the interaction between NGL Chapter 4 and NGR Part 11, as set out in response to question 22 in section 4.

Section	Agreed measure	Feedback on proposed changes to the NGL / NGR / Regulations
NGR r 102	Exemptions from information disclosure requirements	The scope of Category 2 exemptions (for single user pipelines) should be broadened to also allow a service provider to be exempt from the obligations to publish service and access information (r 101B), standing terms (r 101C) and actual prices paid (r 101E), until such time that information under these rules is requested by a prospective user. In such cases, user access guides could make it clear to a prospective user that such information is available upon request. This would recognise the highly specific nature of some services provided by these single-user assets (e.g. Colongra, which was designed and built to meet a very specific haulage and storage requirement for its sole customer), given that such information will generally not allow for a prospective user to make meaningful pricing comparisons across assets/services, and the likelihood that such information may be misinterpreted by or misleading to the market. It would also reduce the administrative cost burden of these new obligations on single user pipelines, noting that these costs would otherwise be borne by that single customer.
NGR r 103A	Pricing template	The relevant regulator should be required to publicly consult on the initial development of, and any future amendments to, the pricing template under r 101A. This could be achieved by requiring the relevant regulator to apply the standard consultative procedure, and would be consistent with the requirement for the pipeline information disclosure guidelines under r 103.
NGR r 16(4)	Relevant regulator's power to draw an adverse inference	The new rule 16(4) empowers the relevant regulator to draw an adverse inference where a service provider has failed to provide the relevant regulator with information requested by the relevant regulator with respect to the scheme pipeline determination. This new, broad-ranging power which has no direct precedent either in the NGL or with respect to other AER powers in similar legislation enables the relevant regulator to draw multiple, unspecified adverse inferences regarding information that the relevant regulator has not received. Giving the relevant regulator such a power is not necessary or appropriate for the role that the relevant regulator is playing with respect to making a scheme pipeline determination. Ultimately if the relevant regulator is not satisfied by the information that is provided (or not provided), it can address the issue by: • issuing a compulsory information notice under s 42 of the NGL; and/or • proceeding to make the determination based on the information before it. Given the relevant regulator already has the requisite powers to address any information asymmetry, giving the relevant regulator the power to draw an adverse inference where it does not have the information to support such an inference goes beyond what would be expected of a regulator in similar circumstances.

Section	Agreed measure	Feedback on proposed changes to the NGL / NGR / Regulations
NGR r 46	Submission of access arrangement proposal	While we note that only minor drafting updates have been proposed to this rule as part of the package, we consider that the timeframe specified under r 46(1A) for the submission of an access arrangement proposal is insufficient for a service provider to prepare, and importantly, consult with customers on, an access arrangement proposal if it becomes a scheme pipeline. The specified timeframe—being a maximum of five months following publication of a reference service proposal decision—will not provide enough time for a service provider to meet customers' and regulators' expectations for customer engagement. For example, we note that gas and electricity networks which have been recognised as undertaking industry-leading engagement programs now commonly publish draft regulatory plans for customer consultation six months prior to the formal submission of a regulatory proposal. Given these significant changes in stakeholder expectations since this rule was originally introduced, we suggest that: • the period of time allowed for under r 46(1) be changed to two months • the period of time allowed for under r 46(1A) be changed to nine months • r 46(3) be amended to allow the relevant regulator to extend the time periods referred to under r 46(1) and r 46(1A) by up to two months each, providing for a total aggregate period of extensions under r 46(3) of four months.
NGR Schedule 6 r 9	Financial information, historical demand information and cost allocation methodology – transitional arrangements	The transitional arrangements for the requirement to publish information under r 101D, as proposed, will require publication of r 101D information in respect of the financial year during which the relevant regulator publishes its guideline under Part 10 (the **designated financial year**). The guideline will specify what information must be reported under r 101D, including the level of detail of this information, any accounting and auditing standards that apply to the information and what cost allocation principles service providers must apply in preparing this information. Where the guideline is published part way through a financial year, there is a risk that service providers may be unable to comply with r 101D in cases where the guideline requires the reporting of information in respect of that designated financial year that has not been collected by the service provider until the time the guideline is published. To ensure service providers have sufficient time to make the accounting system and other changes necessary to enable the capture of any new information required to be reported by the relevant regulator's guideline, the reporting requirements would need to be known by service providers prior to the commencement of a reporting period (i.e. a financial year). This will allow any necessary system changes for data capture to be in place for the entirety of the reporting period. This could be achieved by the transitional arrangements providing for the new r 101D information to first be reported four months after the end of the first full financial year following the designated financial year.