The Allen Consulting Group

# Revisions to AGLGN's Access Arrangement

## Assessment of Terms and Conditions

**28 October 2004**

Final Report to Independent Pricing and Regulatory Tribunal

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# Preface

This report provides an evaluation of the "terms and conditions" for reference services set out in AGL Gas Networks Limited's proposed revisions to its access arrangement for the NSW Gas Distribution System.

The process of undertaking the evaluation of the terms and conditions has been as follows:

- an initial assessment of the terms and conditions and provision of a draft report to IPART;
- provision by IPART of a copy of the draft report to AGLGN and acceptance by IPART from AGLGN of a submission (dated 10 September 2004) on the draft report and the conclusions therein;
- provision to IPART of a revised report that included and responded to the public submission made by AGLGN;
- public release by IPART of the revised report and holding of a public forum on 15 September 2004;
- acceptance by of IPART of submissions, including an additional submission from AGLGN; and
- further revision of the report to address all submissions received.

# Contents

*Chapter 1*

# Introduction and summary

On 23 December 2003, AGL Gas Networks Limited ("AGLGN") submitted proposed revisions to its Access Arrangement ("proposed access arrangement") to the Independent Pricing and Regulatory Tribunal ("IPART"). The Allen Consulting Group was commissioned by IPART to undertake an assessment of the terms and conditions set out in the proposed access arrangement for reference services. The assessment was directed at addressing two broad questions.

- Are there aspects of the terms and conditions of reference services under the proposed AGLGN Access Arrangement that would have a broad impact on users/customers that would be inconsistent with any of the broad objectives of the gas Code and, if so, how could the Access Arrangement be revised to better reflect the Code objectives?
- Do any of the proposed terms and conditions in AGLGN's proposed access arrangement appear to be inconsistent with the reasonableness criterion of section 3.6 of the Code and, if so, how could the proposed terms and conditions be revised to better reflect the requirements of the Code?

As indicated in the second of these questions, the terms and conditions for reference services must comply with the requirements of section 3.6 of the Code:

> An Access Arrangement must include the terms and conditions on which the Service Provider will supply each Reference Service. The terms and conditions included must, in the Relevant Regulator's opinion, be reasonable.

This report is organised into sections as follows.

- In section 2, descriptions are provided of the reference services proposed by AGLGN, reproduced from the proposed access arrangement. The nature of proposed terms and conditions applying to the reference services are also indicated.
- In section 3, a number of general issues in relation to the terms and conditions are addressed including the form of the access arrangement in respect of the specification of terms and conditions; the incomplete specification of terms and conditions in the access arrangement; the ability of IPART to examine and require amendments to the terms and conditions for non-reference services; and the relationship between the terms and conditions for reference services and the Gas Retail Market Business Rules.
- Section 4 documents the assessment of general terms and conditions that apply across reference services.
- Section 5 documents the assessment of terms and conditions specific to each reference service.

In undertaking the assessment of the terms and conditions, attention has been given to submissions made on the proposed access arrangement from the following parties:

- Alinta / Duke Energy International, 27 April 2004
- Alinta EA Pty Ltd, 21 June 2004
- Energy Markets Reform Forum, May 2004
- Energy Advice Pty Ltd, May 2004
- EnergyAustralia, 20 April 2004
- Gas Market Company, 25 May 2004
- Harrison Manufacturing 13 April 2004
- Hunter Gas Users Group, 4 May 2004 (no non-tariff matters addressed)
- Lovells Springs Pty Ltd, undated (no non-tariff matters addressed)
- Orica Australia Pty Ltd, 3 May 2004 (no non-tariff matters addressed)
- Origin Energy, 19 April 2004
- TXU, 16 April 2004

Attention has also been given to the following submissions made subsequent to The Allen Consulting Group's provision of an initial report to IPART:

- AGL Gas Networks, 10 September 2004
- AGL Gas Networks, 6 October 2004
- Alinta Ltd and Energy Australia (Joint Submission), undated (no non-tariff matters addressed)
- Country Energy, 5 October 2004
- Energy Advice, 6 October 2004
- Energy Australia, 6 October 2004
- Energy Markets Reform Forum, 5 October 2004 (no non-tariff matters addressed)
- Macquarie Generation, 6 October 2004
- Metal Manufactures Limited, undated (no non-tariff matters addressed)
- Orica Australia, 6 October 2004
- Origin Energy, 6 October 2004
- TXU, 6 October 2004

In addition to written submissions, attention has been given to verbal submissions made by parties at the stakeholder forum held by IPART on 15 September 2004 and views of AGLGN expressed in discussions on issues relating to this assessment.

In using the advice provided by The Allen Consulting Group, IPART should recognise that this assessment of the terms and conditions was undertaken without detailed consideration of other components of the proposed access arrangement. IPART's assessment and determinations on other components of the proposed access arrangement may have interactions with the terms and conditions, and requirements for amendment of the other components may necessitate consequential amendments to the terms and conditions. Moreover, this assessment was undertaken without legal advice. It is recommended that IPART have both the terms and conditions of the proposed access arrangement and this report reviewed by its legal advisors before coming to firm conclusions for the purpose of its draft decision. It is considered particularly recommended that provisions of the terms and conditions relating to liability be subject to a review by legal advisors.

As a general comment on the terms and conditions under the proposed access arrangement, the Allen Consulting group does not consider there to be any particular elements or provisions of the terms and conditions that in themselves could be regarded as materially contrary to effective third party access to the AGLGN network. There are, however, a number of deficiencies in the terms and conditions that cause particular elements of the terms and conditions to be considered unreasonable. Considered together, these deficiencies may have the effect of increasing costs and time requirements for prospective users to gain access to the gas network.

The deficiencies detected in the terms and conditions arise in respect of:

- omission from the terms and conditions of provisions dealing with matters considered a necessary part of a terms and conditions of a service agreement;
- for a limited number of provisions, overlap and interaction between the terms and conditions for distribution services and the Gas Retail Market Business Rules;
- inconsistencies and ambiguities in the terms and conditions; and
- terms and conditions on certain specific matters failing to reflect common commercial practice, particularly in provision of gas transmission and distribution services, and being unreasonably contrary to the interests of users.

It is considered that in their current form, the terms and conditions for reference services are inadequate for AGLGN and a user to enter into a service agreement for one of the reference services on the basis of the terms and conditions as set out in the access arrangement.

For these reasons, The Allen Consulting Group is of the view that it is open for IPART to find that the terms and conditions set out the proposed access arrangement are not reasonable. Table 1.1 indicates recommended amendments to the terms and conditions that are considered necessary for the terms and conditions to be found to be reasonable. Table 1.1 also indicates the response from AGLGN in relation to each of the recommended amendments.

Table 1.1

**RECOMMENDATIONS FOR REQUIREMENTS TO AMEND THE TERMS AND CONDITIONS**

| Recommended Amendment | Report Reference | AGLGN Position |
|---|---|---|
| **Incomplete specification of terms and conditions** | | |
| The proposed access arrangement should be amended such that terms and conditions for reference services are specified in full, sufficient for AGLGN and a User to enter into a service agreement for each reference service under those terms and conditions. | Section 3.3 | Opposes. |
| **Reference service agreement** | | |
| Clause 7 of schedule 2A of the proposed access arrangement should be deleted and a new provision introduced to indicate that to the extent of any inconsistency between the terms and conditions under a service agreement for a reference service and the Gas Retail Market Business Rules, the Gas Retail Market Business Rules will prevail. | Section 4.2 | Opposes. |
| **Security for payment** | | |
| Schedule 2A of the proposed Access Arrangement should be amended to include provisions that IPART considers reasonable for the resolution of disputes under a service agreement. | Section 4.5 | Opposes. |
| **Responsibility for gas and unaccounted for gas** | | |
| Clause 12 of schedule 2A of the proposed access arrangement should be amended such that provisions for management of unaccounted for gas cease to have effect in the event of a change in the treatment of unaccounted for gas as a result of new GRMBRs during the access arrangement period. | Section 4.7 | Agrees. |
| **Overruns** | | |
| Provisions of schedule 2A of the proposed access arrangement relating to overruns should be amended to indicate that where a delivery point is served under two or more service agreements then an overrun is only deemed to occur where withdrawals at that delivery point exceed the total for all service agreements of MDQ in any day or MHQ in any hour. | Section 4.8 | Reflects intent of AGLGN as indicated in submissions but requirement for amendment has not been canvassed with AGLGN. |
| **New receipt points and receipt stations** | | |
| Clause 32 of schedule 2A should be amended to limit the ability of AGLGN to recover costs incurred by AGLGN in undertaking works required to enable a new receipt point to be established and integrated into the AGLGN network to those costs *reasonably* incurred. | Section 4.11 | Agrees. |
| **Alteration of receipt points and receipt stations** | | |
| Clauses 33 and 34 of Schedule 2A should be amended to:<br>• indicate that AGLGN may require users to make alterations to receipt stations for the purpose of upgrading measurement performance or accommodating changes to gas demand characteristics only to the extent that the alterations are in accordance with good industry practice and/or appropriate Australian and internationally recognised standards and codes; and<br>• indicate that AGLGN's rights to recover costs are limited to recovery of costs *reasonably* incurred. | Section 4.12 | Agrees. |

| Recommended Amendment | Report Reference | AGLGN Position |
|---|---|---|
| **Accounts and payments** | | |
| Clauses 38 and 39 of schedule 2A should be amended so as to include detailed provisions relating to invoicing and payment, including requirements for the provision of information with invoices, obligations of parties in the event of disputes over invoices, procedures for dealing with instances of under and over charging and under and over payment, methods of payment, and calculation of interest on under and over payments. | Section 4.14 | Opposes. |
| **Suspension of supply** | | |
| Clause 48 of schedule 2A should be amended such that the provision for AGLGN to suspend supply to a delivery point at the request of the manager of an approved scheme is conditional upon the scheme providing the manager of the scheme with the authority to make such a request. | Section 4.16 | Reflects intent of AGLGN as indicated in submissions but requirement for amendment has not been canvassed with AGLGN. |
| Clause 49 of Schedule 2A should be amended to limit the value of charges imposed on a User in connection with the cessation or suspension of supply to costs reasonably incurred by AGLGN in complying with the request of the user to stop or suspend delivery of gas. | Section 4.16 | Agrees. |
| **Liability** | | |
| Clause 57 of schedule 2A, that requires that a user include in supply arrangements with a customer a provision limiting or excluding liability to the customer to the extent reasonable practicable and in particular in relation to the transportation of gas, should be deleted. | Section 4.18 | Opposes |
| Section 2.7 of the proposed access arrangement should be amended such that the statement of a users liability in relation to a gas swap reads “the user will be liable for and indemnify AGLGN against any costs, penalties, expenses or any other loss or damage suffered or incurred by AGLGN arising from inaccurate or misleading information supplied by the user to AGLGN in connection to a Gas Swap, or the users participating in the Gas Swap failing to time and coordinate Gas Swap notifications and gas balancing nominations (made in accordance with Schedule 3) to ensure that their daily withdrawal requirements and completed Gas Swaps reflect their arrangements for delivery of gas to receipt points for each day”. | Section 4.18 | Agrees. |
| **Schedule 2B: additional terms and conditions applicable to reference services except tariff services** | | |
| Clause 4 of schedule 2B should be amended to indicate that an application of a user for a service in the circumstances contemplated by clause 4 is not subject to the queuing policy of the access arrangement. | Section 4.24 | Reflects intent of AGLGN as indicated in submissions but requirement for amendment has not been canvassed with AGLGN. |
| Clause 3 of schedule 2B should be amended to indicate the period over which a service may be continued. | Section 4.24 | Reflects intent of AGLGN as indicated in submissions but requirement for amendment has not been canvassed with AGLGN. |
| Sections 2.6 and 2.7 of the access arrangement should be amended to remove reference to schedule 2B as part of the terms and conditions for the Meter Data Service and Gas Swap Service. | Section 4.24 | Agrees. |

| Recommended Amendment | Report Reference | AGLGN Position |
|---|---|---|
| **Schedule 4: operational principles** | | |
| Clauses 46 to 52 of schedule 2A and/or schedule 4 of the access arrangement should be amended to make explicit provision for AGLGN to interrupt gas deliveries (shed load) for reason of a shortfall of gas in the distribution system and to state the circumstances in which such interruption may occur. | Section 4.26 | Requirement for amendment has not been canvassed with AGLGN. |
| Schedule 4 of the access arrangement should be amended such that the liability of AGLGN for "any losses, liabilities or expenses incurred by the User and/or the Users' Customers arising from load shedding" is limited only in circumstances where the AGLGN acts in good faith and in accordance with the principles of the Access Arrangement. | Section 4.26 | Agrees. |
| **Service-specific terms and conditions: delivery point / receipt point** | | |
| The terms and conditions for the Local Network Multiple Delivery Point Service and Trunk Multiple Delivery Point Service should be amended to make provision for deletion of delivery points from service agreements during the term of the agreements. | Section 5.3 | Agrees. |
| The terms and conditions for the Local Network Multiple Delivery Point Service and Trunk Multiple Delivery Point Service should be amended to remove limits on the time period within which additional delivery points may be added to a service agreement for the Local Network Multiple Delivery Point Service and Trunk Multiple Delivery Point Service. | Section 5.3 | Opposes. |
| The terms and conditions for the Trunk Capacity Reservation Services, Trunk Managed Capacity Services and Trunk Throughput Services should be amended to make it clear that a service agreement for these services may provide for gas to be delivered to only a single delivery point. | Section 5.3 | Agrees. |
| **Service-specific terms and conditions: MDQ and MHQ** | | |
| Sections 2.1, 2.2, 2.3 and 2.5 of the access arrangement should be amended to clearly state that AGLGN's obligation to deliver gas extends to MDQ and MHQ and includes any authorised overrun that is expressed as an increase in MDQ and/or MHQ. | Section 5.4 | Agrees. |
| Section 2.1 of the proposed access arrangement should be amended so as to explicitly indicate that the MDQ under a service agreement for Capacity Reservation Services includes capacity obtained as summer, short term or additional capacity. | Section 5.4 | Agrees. |
| **Service-specific terms and conditions: summer, short-term and additional capacity** | | |
| Section 2.1 of the proposed access arrangement should be amended so as to explicitly indicate that additional capacity for Capacity Reservation Services is obtained under an existing service agreement. | Section 5.8 | Agrees. |
| Section 2.1.1 under the heading of *Short Term Capacity for Users Supplying Customers above 30TJ per annum at a Delivery Point* such that the second bullet point reads "A User may increase the MDQ to cover the Customer's additional operational requirements, where such activity occurs less frequently than once every year". | Section 5.8 | Requirement for amendment has not been canvassed with AGLGN. |

In addition to the above recommendations for amendments to the proposed terms and conditions for reference services, a number of other matters were identified during the course of this study which IPART may wish to consider in relation to other elements of the access arrangement:

- whether provision should be made in the access arrangement for pass through to users of costs associated with unaccounted for gas by a change to the relevant reference tariff (section 4.7); and
- whether trunk and local network services should be made available as individual reference services (section 5.2).

*Chapter 2*

# Reference services and terms and conditions

The services policy of section 2 of the proposed access arrangement describes seven reference services, five of which are gas transportation services that each have a component service for the local network and the trunk system (giving, in effect, 12 reference services). The reference services and the sections of the access arrangement that set out the terms and conditions pertaining to each service are indicated in Table 2.1.

Table 2.1

**REFERENCE SERVICES AND ASSOCIATED TERMS AND CONDITIONS**

| Reference Service | Description | Terms and Conditions |
|---|---|---|
| **Capacity Reservation Services** | | |
| Local Network Capacity Reservation Service | A transport service from the Local Network Receipt Point to a single Non-Tariff delivery point, including options for Summer Tranche capacity and Short Term capacity, with charges determined on the basis of capacity reservation ($ per GJ of MDQ) and charges payable for Overruns. | • General terms and conditions in Schedule 2A and Schedule 2B<br>• Gas balancing arrangements in Schedule 3<br>• Operational principles in Schedule 4<br>• Service-specific terms and conditions in section 2.1.1 |
| Trunk Capacity Reservation Service | A service for the transportation of gas by AGLGN through the Trunk from the Trunk Receipt Point to the Trunk Exit Zone for the nominated delivery point. | • General terms and conditions in Schedule 2A and Schedule 2B<br>• Gas balancing arrangements in Schedule 3<br>• Operational principles in Schedule 4<br>• Service-specific terms and conditions in section 2.1.2 |
| **Managed Capacity Services** | | |
| Local Network Managed Capacity Service | A service for the transportation of gas by AGLGN from a Local Network Receipt Point through the Local Network to a single Non-Tariff delivery point with charges determined on the basis of capacity reservation ($ per GJ per MDQ) and no charges payable for Overruns. The MDQ must usually be equal to or greater than the maximum quantity of gas withdrawn at the delivery point on any Day in the previous 12 months. | • General terms and conditions in Schedule 2A and Schedule 2B<br>• Gas balancing arrangements in Schedule 3<br>• Operational principles in Schedule 4<br>• Service-specific terms and conditions in section 2.2.1 |
| Trunk Managed Capacity Service | A service for the transportation of gas by AGLGN through the Trunk from a Trunk Receipt Point to a Trunk Exit Zone for the nominated delivery point. | • General terms and conditions in Schedule 2A and Schedule 2B<br>• Gas balancing arrangements in Schedule 3<br>• Operational principles in Schedule 4<br>• Service-specific terms and conditions in section 2.2.2 |

| Reference Service | Description | Terms and Conditions |
|---|---|---|
| **Throughput Services** | | |
| Local Network Throughput Service | A service for the transportation of gas by AGLGN from the Local Network Receipt Point through the Local Network to a single Non-Tariff delivery point with Charges determined on the basis of throughput ($ per GJ of throughput), no charges payable for Overruns and a minimum annual bill based on 10TJ per annum. | • General terms and conditions in Schedule 2A and Schedule 2B<br>• Gas balancing arrangements in Schedule 3<br>• Operational principles in Schedule 4<br>• Service-specific terms and conditions in section 2.3.1 |
| Trunk Throughput Service | A service for the transportation of gas by AGLGN from the Trunk Receipt Point through the Trunk to the Trunk Exit Zone. | • General terms and conditions in Schedule 2A and Schedule 2B<br>• Gas balancing arrangements in Schedule 3<br>• Operational principles in Schedule 4<br>• Service-specific terms and conditions in section 2.3.2 |
| **Multiple Delivery Point Services** | | |
| Local Network Multiple Delivery Point Service | A service for the transportation of gas by AGLGN from one or more Local Network Receipt Points through the Local Network to a number of Non-Tariff delivery points for a single User. The User must nominate each delivery point as subject to the conditions applying to a Capacity Reservation Service, a Managed Capacity Service or a Throughput Service. | • General terms and conditions in Schedule 2A and Schedule 2B<br>• Gas balancing arrangements in Schedule 3<br>• Operational principles in Schedule 4<br>• Service-specific terms and conditions in section 2.4.1 |
| Trunk Multiple Delivery Point Service | A service for the transportation of gas by AGLGN from Trunk Receipt Points through the Trunk to Trunk Exit Zones for multiple Corresponding Local Network Services. | • General terms and conditions in Schedule 2A and Schedule 2B<br>• Gas balancing arrangements in Schedule 3<br>• Operational principles in Schedule 4<br>• Service-specific terms and conditions in section 2.4.2 |
| **Tariff Service** | | |
| Local Network Tariff Service | A service for the transportation of gas by AGLGN from a Local Network Receipt Point through the Local Network to a Tariff delivery point. | • General terms and conditions in Schedule 2A<br>• Gas balancing arrangements in Schedule 3<br>• Operational principles in Schedule 4<br>• Service-specific terms and conditions in section 2.5.1 |
| Trunk Tariff Service | A service for the transportation of gas by AGLGN from one or more Trunk Receipt Points through the Trunk to one or more Trunk Exit Zones for a Corresponding Local Network Service. | • General terms and conditions in Schedule 2A<br>• Gas balancing arrangements in Schedule 3<br>• Operational principles in Schedule 4<br>• Service-specific terms and conditions in section 2.5.2 |

| Reference Service | Description | Terms and Conditions |
|---|---|---|
| **Meter Data Service** | A service for the provision of meter reading and on-site data and communication equipment to a delivery point under a Reference Service Agreement. | • General terms and conditions in Schedule 2A and Schedule 2B<br>• Gas balancing arrangements in Schedule 3<br>• Operational principles in Schedule 4<br>• Service-specific terms and conditions in section 2.6 |
| **Gas Swap Services** | a service provided by AGLGN which entitles Users of Trunk non-tariff Reference Services to have gas delivered at an Alternate Receipt Point on a Day, or transfer gas from one User (the "Transferor of the Gas") to another User (the "Recipient of the Gas") on a Day, after that gas has been delivered to the Network. A Gas Swap does not vary a User's Capacity entitlement under any Service. | • General terms and conditions in Schedule 2A and Schedule 2B; and<br>• Gas Balancing arrangements in Schedule 3<br>• Operational principles in Schedule 4<br>• Service-specific terms and conditions in section 2.7 |

The matters addressed in each of the sections of the proposed access arrangement that set out terms and conditions for reference services are as follows.

- Schedule 2A: terms and conditions applicable to all reference services
  - Reference Services Agreement
  - Right to Access
  - Obligation to Transport
  - Security for Payment
  - Gas Pressure
  - Responsibility for Gas and Unaccounted for Gas
  - Overruns
  - Metering
  - Allocation between Users Sharing a Delivery Point
  - New Receipt Points and Receipt Stations
  - Alteration of Receipt Points and Receipt Stations
  - Delivery Points and Delivery Stations
  - Accounts and Payments
  - Force Majeure
  - Suspension of Supply
  - Interruptions of Supply
  - Liabilities and Indemnities

  - Emergency Contact Information
  - Title to Gas
  - Gas Quality
  - Breach of Agreement
  - Commencement and Termination of Agreement
- Schedule 2B: additional terms and conditions applicable to reference services except tariff reference services
  - MDQ and MHQ
  - Extension of Term
- Schedule 3: gas balancing
  - Section A: gas balancing with operational balancing agreement
  - Section B: gas balancing with no operational balancing agreement
- Schedule 4: operational principles
  - Load Shedding
  - Establishment of Receipt Points
- Service-specific terms and conditions
  - Availability
  - Specification of Receipt Points and Delivery Points
  - Specification of MDQ and MHQ
  - Overruns
  - Metering
  - Term of the service agreement
  - Summer tranche capacity, short term capacity and additional capacity (for the Capacity Reservation Service)

*Chapter 3*

# General matters relating to the terms and conditions

## 3.1 Introduction

Before giving consideration to elements of the terms and conditions as set out in the proposed access arrangement, this chapter addresses a number of general matters relating to the terms and conditions, both as raised in submissions and otherwise considered important in a consideration of the proposed terms and conditions against the criterion of reasonableness. The matters thus addressed are:

- the form of the proposed access arrangement, and in particular the manner in which terms and conditions are presented and set out in the access arrangement;
- the failure of terms and conditions to address matters that must necessarily be addressed to adequately describe the rights and obligations of AGLGN and a user under a service agreement for a reference service;
- terms and conditions for non-reference services; and
- the relationship and interaction of the terms and conditions with the Gas Retail Market Business Rules.

## 3.2 Form of the proposed access arrangement

### *Outline of issues and initial submissions*

The submission made by EnergyAustralia highlights a potential deficiency of the proposed access arrangement, in that the proposed access arrangement is drafted in a manner that is disjointed and repetitive. EnergyAustralia submits that the manner of drafting causes the Access Arrangement to be "unnecessarily clumsy, complicated and difficult to comprehend" and "confusing and repetitive". In particular relation to the terms and conditions, EnergyAustralia submits the following.

- **EnergyAustralia**

  4. Form and substance of Access Arrangement is unclear

  …

  4.2 Form

  The terms and conditions relating to a service are littered throughout the document. Repetition of a number of concepts makes the document more confusing than it otherwise should be. For example, for each of the reference services the general terms and conditions in schedule 2A, 2B, schedule 3 and schedule 4 apply. This could be stated once only, with each of the individual sections covering the distinctive terms and conditions for each reference service.

Some concepts are covered various times throughout the document – an example is overruns.

…

5.1 Duplication of terms and conditions particular to each service

It would seem that the intention of the Access Arrangement is for the service to be described and the terms and conditions applying to that service explained. The terms and conditions specific to each service are contained below the definition. In many respects these terms and conditions are not actually different for each of the Non-Tariff Reference Services. If they apply to each of the services then they could be included in Schedules 2A or 2B (where they do not also apply to Tariff Services). Examples are:

- That the reference service is available to any single delivery point where a customer is reasonably expected to withdraw a quantity of gas exceeding 10TJ per contract year.
- A local network service can only be taken in conjunction with a corresponding trunk service except where users in the Wilton-Wollongong network section are served by the Local Network Receipt Point at Port Kembla with the Eastern Gas Pipeline.
- the local network service is only available where all services to the delivery point are local network services. In addition to the fact that this is a common requirement for each Non- Tariff Reference Services, what is intended by this statement? What does it actually mean? For example, not all services to the delivery point will be the same – for example the meter data service.
- the local network receipt point for each delivery point will be determined in accordance with the table in section 3.3 and/or Schedule 7. Also, what does this mean? How is it determined by using the table? By reference to the postcode for the delivery point? This is not clear.
- AGLGN's obligation to deliver gas to the delivery point is limited to the MHQ in any hour and the MDQ on any day.
- An overrun will have occurred if withdrawals at the delivery point exceed the MHQ in any hour or the MDQ on any day. Overruns may be authorised or unauthorised. These points are also covered in Schedule 2A.
- Basic metering equipment will be provided in accordance with the conditions in Schedule 2A (this is provided for above anyway). Where AGLGN offers a Meter Data Service as a Reference Service, the local network service must be taken in conjunction with the Meter Data Service.
- Terms and conditions for each of the trunk services regarding availability, the nominated delivery point and term are the same

EnergyAustralia also describes perceived deficiencies in drafting of the proposed access arrangement in relation to the services policy and the descriptions of reference services.

### *Preliminary analysis*

In its preliminary analysis of the issues raised by EnergyAustralia in relation to the form of the terms and conditions set out in the proposed access arrangement, The Allen Consulting Group indicated concurrence with the view that the terms and conditions are poorly drafted, but also indicated the view that IPART has a limited ability to not approve the access arrangement for the sole reason of perceived deficiencies in drafting, or to require amendments to remedy the perceived deficiencies. In respect of the terms and conditions, the Code requires only that, in the regulator's opinion, the terms and conditions are reasonable. Perceived deficiencies in drafting may therefore only constitute cause for not approving the proposed access arrangement, and requiring amendments to the proposed access arrangement, if the deficiencies cause IPART to consider the relevant terms and conditions to be unreasonable. This conclusion may be drawn where, for example, provisions fail to adequately describe the rights and obligations of AGLGN and users as a result of being ambiguous, or as a result of there being inconsistencies between provisions that are duplicated in different parts of the proposed access arrangement.

### *Further submissions*

- **AGLGN (6 October 2004)**

  AGLGN has agreed to alter many sections of the proposed Access Arrangement to address twelve of the nineteen recommendations made by AGC concerning perceived inconsistencies and ambiguities.

- **Energy Australia**

  One major issue concerning the review of the AA is the requirements of section 3.6 of the National Third Party Access Code. EnergyAustralia has obtained legal advice on this issue because it seemed that ACG's approach to the review of the terms and conditions was unduly narrow and restrictive. Also, ACG considered provisions individually, but not as a whole.

  The advice concluded that in deciding whether to approve AGLGN's proposed revisions to its AA, the Independent Pricing and Regulatory Tribunal must satisfy itself that the terms and conditions of the proposed AA are objectively reasonable in all of the circumstances, including the costs to users of ambiguous, repetitive and confusing provisions (including provisions dealing with important issues such as liability and indemnity). The test requires IPART to consider each of the terms and conditions of the Access Arrangement individually as well as the combined effect of the terms and conditions. (A summary of the advice is contained in Attachment 2).

  [Attachment 1 of EnergyAustralia's submission]

  EnergyAustralia acknowledges that the terms and conditions must be reasonable and that IPART's abilities in this regard may be considered to be limited. Having said that the reasonable terms and conditions need to be readily ascertainable and understood. The Access Arrangement was originally drafted in 1996 (as an access undertaking). Since then the regime for access has developed and the document has been amended considerably and in a piecemeal fashion. It is appropriate to begin afresh with a new, clearer set of terms and conditions.

  [Attachment 2 of EnergyAustralia's submission]

In deciding whether to approve AGLGN's proposed revisions to its AA, IPART must satisfy itself that the terms and conditions of the proposed Access Arrangement are reasonable.

The test of reasonableness in section 3.6 of the Code is an objective test, and not the test of unreasonableness in the Wednesbury decision.

The Wednesbury test requires examination of whether the decision is so unreasonable that no reasonable decision maker could ever have come to it. For example, in Application by Epic Energy South Australia Pty Ltd (2003) ATPR fi 41-932 at 46,925, the Australian Competition Tribunal held that section 39(2) of the Gas Pipelines Access Law (which concerns the unreasonable exercise of discretion by a decision maker) required the Tribunal to be concerned with:

(a) the correction of the exercise of a discretion that was so unreasonable on the basis of the matters before the decision maker that no reasonable decision maker could have ever come to it (citing Associated Provincial Picture House Ltd v Wednesbury Corporation [l9481 1 KB 223 at 223 - 234); and

(b) the situation where the decision is so far outside the range of decisions open to a reasonable decision maker that it bespeaks of error even though the particular error cannot be identified (citing House v The King (1 936) 55 CLR 499 at 505).

In contrast to the Wednesbury test of manifest unreasonableness, section 3.6 of the Code requires IPART to satisfy itself that the terms and conditions of the AA are objectively reasonable in all the circumstances. The question is not, therefore, whether the terms and conditions in AGLGN's proposed AA are so unreasonable that no reasonable decision maker would approve them, but whether they are objectively reasonable having regard to all the circumstances, including the costs to Users of ambiguous, repetitive and confusing liability and indemnity provisions.

The High Court of Australia enunciated the requirements of what is objectively reasonable in all the circumstances in Waters V Public Transport Corporation (1991) 103 ALR 513 (per Dawson and Toohey JJ (endorsed by Brennan, Deane and McHugh JJ)), when the Court cited with approval the findings of Bowen CJ and Gummow J in DFAT v Styles (1989) 88 ALR 621 that:

> The test of reasonableness is less demanding than one of necessity, but more demanding than a test of convenience. The criterion is an objective one, which requires the court to weigh the nature and extent of the discriminatory effect on the one hand, against the reasons advanced in favour of the requirement or condition on the other. All the circumstances must be taken into account.

The objective test requires IPART to consider each of the terms and conditions of the Access Arrangement in their own right (as ACG recognises), as well as (importantly) the combined effect of the terms and conditions.

- **Origin Energy**

Origin is … concerned that the terms and conditions are unnecessarily complex and repetitive, thereby reducing the efficiency of the agreement and increasing the contract management overheads for both AGLGN and retailers. Origin recommends aggregation and simplification of the various sets of terms and conditions related to access to the AGLGN network.

Origin is of the firm view that rationalisation of the terms and conditions fits with the stated aim of the Code:

> "to provide sufficient prescription so as to reduce substantially the number of likely arbitrations, while at the same time incorporating enough flexibility for the parties to negotiate contracts within an appropriate framework."
>
> (Page 1, National Third Party Access Code for Natural Gas Pipeline Systems)

#### *Final analysis and recommendations*

AGLGN has defended its access arrangement in its current form, contending that the repetition and duplication of provisions that are in the nature of terms and conditions is necessary for both the description of services in the services policy and the provision in the access arrangement of a "reasonably complete" set of terms and conditions for each reference service.

Despite AGLGN's submission, The Allen Consulting Group still concurs with the view expressed by EnergyAustralia, and Origin Energy in the further submissions, that the specification of terms and conditions in the access arrangement is unnecessarily duplicative. As indicated above, however, IPART may be limited in its ability to address this potential deficiency of the access arrangement other than through seeking amendment to particular provisions where duplication causes the particular provisions to be considered by IPART to be unreasonable.

There are some instances where provisions of the terms and conditions may be considered unreasonable on these grounds. These are identified in Chapter 4 and Chapter 5 of this report and recommendations are made in these chapters as to requirements for AGLGN to amend the terms and conditions.

IPART may wish to seek legal advice to confirm this view.

### 3.3 Incomplete specification of terms and conditions

#### *Outline of issues and initial submissions*

During the term of the current access arrangement, AGLGN has provided the references services described in the access arrangement under service agreements that include more detailed and more rigorously drafted terms and conditions than are set out in the proposed access arrangement. AGLGN has published on its website the following documents that specify general terms and conditions for some of the reference services:

- Multiple Delivery Point Services Agreement;
- Tariff Service Agreement;
- General Terms and Conditions for Tariff Reference Services (version 3); and
- General Terms and Conditions for Non-Tariff Reference Services (version 3).

In its submission on the proposed revisions to the proposed access arrangement, Origin Energy draws attention to the difference in the terms and conditions that are stated in the proposed access arrangement and those that AGLGN seeks to include in services agreements.

- **Origin Energy**

  Section 3.6 of the National Third Party Access Code for Natural Gas Pipeline Systems obliges the Service Provider to provide terms which are in the Regulator's opinion, reasonable.

  While AGLGN has provided broad terms and conditions in this submission, Origin is aware of AGLGN's more detailed "General Terms and Conditions" used in conjunction with the current Access Arrangement. A copy of the detailed "General Terms and Conditions" was not been presented by AGLGN for this review of the 2005 Access Arrangement.

EnergyAustralia also draws attention to the difference between the terms and conditions for reference services that AGLGN specifies in the proposed access arrangement and the terms and conditions that AGLGN seeks to establish in service agreements for the reference services. EnergyAustralia further submits that AGLGN seeks advantage through only a general indication of terms and conditions in the access arrangement while establishing a broader and more detailed specification in service agreements.

- **EnergyAustralia**

  5.2 Reference services - Terms and conditions contained in Schedule 2A

  (a) Access Arrangement Principles

  Under section 3.6 of the Access Code, the 2003 Access Arrangement must include the terms and conditions on which AGLGN will supply each reference service. IPART must be satisfied that the terms and conditions are reasonable.

  As noted by other regulators such as the Queensland Competition Authority and the ICRC:

  "The terms and conditions of a contract form the basis of the relationship between the service provider and user. A monopoly service provider has the ability to adopt a "take it or leave it" approach to the terms and conditions on which it operates, with the effect of shifting risk from the service provider to the buyer."

  The terms and conditions proposed by AGLGN in the 2003 Access Arrangement are not sufficient to enable IPART to form an opinion on their reasonableness and is out of step with the approach taken in other jurisdictions.

  For IPART to form a view on the reasonableness or otherwise of the terms and conditions, they must be adequately defined and considered as a whole package rather than in isolation.

  The 2003 Access Arrangement (particularly Schedule 2A) does not adequately define the terms and conditions. Some examples are covered below.

  [EnergyAustralia provides examples of terms and conditions in relation to "security", "accounts and payments" and "rebate provisions". These examples are addressed separately in Chapter 4 of this report in relation to the particular elements of the terms and conditions.]

  …

  (c) Other jurisdictions

With the exception of ActewAGL in the ACT, distributors in all other jurisdictions have included the benchmark contract in the proposed Access Arrangement submitted for approval. AGLGN is the only distributor which has taken the approach of including only very high level terms and conditions in its Access Arrangements. These high level terms and conditions will then be translated into a detailed contract but presumably not until after the Access Arrangement has been approved. However, the "devil is in the detail". This approach effectively allows AGLGN to set the detailed terms and conditions outside the Access Arrangement process.

In EnergyAustralia's experience, AGLGN has been reluctant to negotiate terms and conditions which differ from AGLGN's interpretation of the Access Arrangement principles. In its view EnergyAustralia considers that AGLGN's approach to risk allocation has been less than fair and reasonable. See comments on liability and indemnity below.

(d) Suggested approach

EnergyAustralia considers that AGLGN should be required to lodge the Reference Service Transportation Agreements with the Access Arrangement. It is clear that the proposed Access Arrangement will require changes to the current contracts.

Users should be given the opportunity to consider the actual terms and conditions on which access will be provided and make submissions to IPART on areas of particular concern.

This does not mean that IPART needs to conduct a line by line review of these agreements. However, IPART will be in a position to consider those submissions in the context of the contracts. The issue is critical given that AGLGN is inflexible in its negotiation of these contracts and they reflect not so much the starting point for negotiations but the end point.

Alternatively, if this approach is not adopted, then self-evidently Schedule 2A requires much greater detail to enable IPART to be confident of the reasonableness of the terms and conditions.

In Attachment A, we include a redraft of sections of Schedule 2A relating to provision of security and accounts and billing.

Origin's comments are based on the broad terms and conditions provided with AGLGN's current submission.

### *Preliminary analysis*

In its preliminary analysis of the terms and conditions, The Allen Consulting Group addressed the question of whether a service provider may attach terms and conditions to a service agreement for a reference service that are in addition to those specified in an access arrangement as an issue of construction of the Code. It was consequently recommended that IPART seek legal advice before making a determination in this respect, however The Allen Consulting Group set out the following views.

Section 3.6, which requires that an access arrangement *include the terms and conditions on which the Service Provider will supply each Reference Service*, may be interpreted as requiring that any terms and conditions for provision of a reference service will be stated in the access arrangement as terms and conditions for that reference service and not be a matter for determination before the service provider and a prospective user enter into a service agreement. This would not prevent a service provider specifying outside of the access arrangement certain obligations of a user that give effect to terms and conditions for a reference service (for example the determination of a level of security under AGLGN's proposed clause 10 of Schedule 2A), but would prevent the service provider imposing any new requirements on a user that are not explicitly contemplated by the terms and conditions specified in the access arrangement. For this reason, AGLGN's specification outside of the access arrangement of terms and conditions may not be sustainable if challenged by a prospective user in an access dispute bought before the arbitrator under section 6 of the Code.

That said, it is probably not possible under the Code for IPART to require that AGLGN submit the standard service agreements as part of the proposed revisions to the access arrangement and assess the terms and conditions contained in these service agreements against the requirements of the Code. Rather, IPART may be limited in its role to assessment of the terms and conditions set out in the proposed access arrangement against the criterion of reasonableness established in section 3.6 of the Code. This may, however, take into account whether the terms and conditions address all matters necessary and are sufficiently detailed to adequately describe the rights and obligations of AGLGN and a user under a service agreement if a service agreement was entered into under the terms and conditions as set out in the proposed access arrangement.

It is notable that the terms and conditions set out in the proposed access arrangement fail to address several matters than are commonly included in service agreements for gas distribution services. It is also notable that these matters are addressed by AGLGN in its standard service agreements, suggesting that AGLGN itself considers that "reasonable" terms and conditions would address these matters, or at least that AGLGN considers that it is necessary for these matters to be addressed in terms and conditions under a service agreement to adequately specify AGLGN's own rights and obligations. The matters that are conspicuous in their omission from the terms and conditions set out in the proposed access arrangement are:

- provision for deletion of delivery points from a service agreement, particularly in respect of the Multiple Delivery Point Reference Services and the Tariff Reference Services;
- changes in receipt points and delivery points;
- assignment of rights under a service agreement, particularly in the context of giving effect to the trading policy of the proposed access arrangement;
- disclosure and confidentiality of information; and
- dispute resolution.

In addition, the terms and conditions set out in the proposed access arrangement do not address several matters that are commonly addressed in commercial contracts in the nature of service agreements for gas distribution services, and which are addressed in the general terms and conditions for reference services that AGLGN has established outside of the current access arrangement. Matters that are not addressed in the terms and conditions set out in the proposed access arrangement include:

- indication that the service agreement comprises the entire agreement between AGLGN and the user;
- severability;
- waiver;
- relationship between the parties;
- enforceability;
- further assurances;
- inurement;
- governing law and jurisdiction; and
- survival.

Of these matters omitted from the terms and conditions set out in the proposed access arrangement, the submission from Energy Advice Pty Ltd has explicitly requested that provisions for dispute resolution be included in the terms and conditions.

In its preliminary analysis, The Allen Consulting Group took the view that it would be open to IPART to find the terms and conditions to be unreasonable on the basis that they fail to address the above matters and thereby fail to specify the rights and obligations of AGLGN and a user sufficiently to enable AGLGN and the user to enter into a service agreement on the basis of those terms and conditions. It was recommended that IPART make such a finding and seek amendment of the proposed access arrangement to include reasonable terms and conditions in respect of these matters.

### *Further submissions*

- **AGLGN (10 September 2004)**

  The terms and conditions in AGLGN's AA are designed to meet section 3.6 of the Gas Code. These terms and conditions are supported by standard Transportation Agreements that are available on AGL's website, but which may vary periodically as circumstances change.

  It was not the intention of the Gas Code that detailed terms and conditions be included in, or be attached to an AA. In addition, the inclusion of such detail in an AA would generate practical problems due to the resulting inflexibility of the resulting terms and conditions throughout regulatory periods. Once incorporated in an AA, the terms and conditions for a reference service can only be varied through a very formal and time consuming review process.

The Gas Code was developed on the principles established in the Inter-governmental Competition Principles Agreement. Section 6 of the Inter-governmental Competition Principles Agreement provides that wherever possible third party access to a service provided by means of a facility should be on the basis of terms and conditions agreed between the owner of the facility and the person seeking access. This substantiates AGLGN's view that it is not the intention of the Gas Code to remove all aspects of negotiation between users and service providers in respect of access to reference services.

Section 6 of the Gas Code itself provides further evidence of this principle. Clause 6.13 clearly contemplates that there can be a dispute about a reference service and clause 6.27 clearly provides that an arbitrator can determine the contractual terms even when the dispute relates to a reference service. This is inconsistent with the concept that clause 3.6 mandates a standard binding services agreement for reference services. (i.e. if clause 3.6 required a standard agreement, there would have been no reason for 6.27 to give the arbitrator power to make a decision on the terms of a contract for a reference service.)

Evidence that this interpretation of the Code is shared by the ACCC is that the ACCC does not require detailed terms and conditions from service providers for gas transmission assets and yet is clearly satisfied that the AA's comply with the Code. The ACCC drafted its own AA for the Moomba Sydney Pipeline and did not include detailed terms and conditions.

The ACCC in Carpentaria Gas Pipeline Final Decision supported this position with the resulting terms and conditions similar in nature to that now proposed by AGLGN. During the review of that AA Submission the CGPJV's stated that if the alternative approach of having fully detailed terms and conditions in the AA were adopted :

> "any variation to the standard Access Agreement with an individual user would constitute a 'negotiated service', rather than a reference service, even though fundamentally it would be the same as the reference service. CGPJV considers that this would be a 'perverse outcome."

Requiring a Service Provider to include detailed terms and conditions in an AA, which a Regulator would then approve, is tantamount to the Regulator assuming the necessary legal, technical, operational, financial and business acumen to make detailed decisions concerning operation and management of the network. The removal from the Service Provider of the responsibility for the management of the operational and legal issues associated with these conditions should not be done without also removing the operational and legal risks that result from the consequences of these decisions.

- **AGLGN (6 October 2004)**

  AGLGN believes that it clearly established in its earlier submission that the notion that an Access Arrangement should include a complete specification of terms and conditions dealing with matters typically included in a service (or transportation) agreement:

  - Is inconsistent with the intent of the National Gas Code (the Code)
  - Is contrary to the position taken by key Australian regulators including the ACCC and IPART.
  - Would severely limit the ability for Users and Service Providers to negotiate mutually agreeable terms and conditions, a key aim of the Code.

- Would result in detailed terms and conditions being "locked-in" for the period of the Access Arrangement, despite developing market and commercial conditions.
- Would result in the Regulator removing from the Service Provider, the Service Provider's responsibility and ability for the management of key aspects of commercial risk management. This should not be removed without the Regulator also removing the commercial consequences of those actions.

Having considered AGLGN's submission, ACG has changed its original recommendation that AGLGN's approach was inconsistent with the Code to a position that "it may be open for IPART to take either position" over consistency with the Code. This position is apparently taken on the basis that various Access Arrangements around the country have terms and conditions of varying levels of detail and therefore regulators had taken different positions on the interpretation of the Code.

Having had discussions with a variety of Service Providers AGLGN believes that the varying level of detail that exist in Access Arrangements is a natural consequence of the propose/response model of the Code. Various Service Providers have chosen to present Access Arrangements in varying levels of detail, this has not been imposed on Service Providers due to varying interpretations of the Code by Regulators. A perfect example of this is the ACCC that has approved a variety Access Arrangements types, but did not include detailed terms and conditions when it drafted it own Access Arrangement for the Moomba Sydney Pipeline.

- **TXU**

  TXU believes that these arrangements should contain all terms and conditions so that there is no need for a separate contract between AGLGN and the supplier as under the current arrangements suppliers are typically in a weaker contract bargaining position than AGLGN.

- **Origin Energy**

  The terms and conditions presented by AGL Gas Networks for the Tribunal's determination of reasonableness under the code are not the only terms and conditions by which AGL Gas Networks allows access to its network. AGL Gas Networks directs prospective users to the following agreements which also apply to its Access Arrangement;

  - "General Terms and Conditions for Tariff Reference Services"
  - "Tariff Service Agreement"
  - "General Terms and Conditions for Non-Tariff Reference Services"
  - "Multiple Delivery Point Services Agreement"

  The Tribunal has not been consulted on reasonableness of these additional terms and conditions.

- **EnergyAustralia**

  [Attachment 1]

  <u>Provision of the full terms and conditions</u>

AGLGN argues in its response that it is not required to include the detailed terms and conditions in the AA. It points to the ACCC's approach in certain decisions on transmission pipelines which is to allow the "Principles for Terms and Conditions". While this may be the ACCC's approach, it is not the approach of other Australian regulators of gas distribution pipelines and it is not based upon the correct construction of the Code.

Section 3.6 of the Code is clear in its requirement that an AA must include the terms and conditions on which the Service Provider will supply each Reference Service. Section 3.6 does not refer to "principles". The wording is specific in contrast, for example, to references to queuing and trading policies. If the terms and conditions are not complete or if the Service Provider has reserved some terms and conditions in separate documentation - then the requirement in section 3.6 is not fulfilled. (As an aside, EnergyAustralia queries how IPART determine the reasonable terms and conditions without seeing them as a whole. A limited set of high level principles may appear to be reasonable on their own but once they are detailed in an agreement and read alongside a host of other provisions that are not included in the original list of principles, the outcome may be different.)

In support of its argument, AGLGN also refers to section 6.27 of the Code, which allows the arbitrator to make decisions on the terms and conditions of a draft contract reflecting the arbitrator's determination. However, clause 6.27 also covers disputes regarding access to non-Reference Services, in which case such a power would be necessary.

Any contract involves a trade-off between price and risk. A Reference Tariff for a Reference Service becomes meaningless in the absence of the terms and conditions on which it will be provided. The "principles" for the terms and conditions on which the services will be provided, in EnergyAustralia's view, is not sufficient.

Omission of relevant terms and conditions

At the very least, ACG is clearly correct in stating that:

- IPART's consideration of reasonableness may include consideration of whether the terms and conditions set out in the AA address all matters necessary to specify the rights and obligations under a service agreement;
- the terms and conditions in the AA fail to address several matters commonly addressed in service agreements for gas distribution services; and
- it is open for IPART to find the terms and conditions to be unreasonable by virtue of these omissions.

IPART should require AGLGN to address these areas in its AA.

Inadequate specification of existing terms and conditions

Even if it is accepted that IPART cannot require the complete terms and conditions to be included in the AA, there must be a sufficient level of detail included in the terms and conditions submitted to IPART to enable IPART to approve the AA.

As set out in EnergyAustralia's original submission, AGLGN's proposed AA does not provide a sufficient level of detail (particularly when compared to the underlying transportation agreements). ACG supports this view in a number of cases (eg provision of security and accounts and payment).

AGLGN has already prepared the detailed contracts and should be required to include more detail in the AA in relation to its proposed terms and conditions sufficient to enable a User or Prospective User to properly understand all of their rights and obligations under the Access Contract. Given that the contracts are already prepared, AGLGN gives no reason why it is unable to provide more detail on these areas, even if this falls short of including the entire terms and conditions relating to the matter from the transportation agreements.

(Having regard to the test of reasonableness set out in Waters v Public Transport Corporation as described in EnergyAustralia's covering letter, the effect on Users far outweighs the minor inconvenience to AGLGN of including more detail in the AA.)

### *Final analysis and recommendations*

As indicated above under The Allen Consulting Group's preliminary analysis, there is ambiguity in construction of the Code in respect of whether the Code requires that the terms and conditions for reference services be specified "in full" (i.e., sufficiently for a service provider and user to enter into a service agreement on the basis of the terms and conditions as set out in the access arrangement) or whether the only requirement is for the access arrangement to contain only the principle terms and conditions, or the principles of the terms and conditions.

AGLGN has taken a view on construction of the Code that section 3.6 of the Code requires only terms and conditions for reference services to be specified in a general sense in the access arrangement, and that it is permissible under the Code, and indeed consistent with the intent of the Code, for the detailed terms and conditions for a service agreement to be determined outside of the access arrangement.

The Allen Consulting Group acknowledges the examples cited by AGLGN of regulators having approved access arrangements where the specification of terms and conditions is "incomplete". It is also noted, however, that practice amongst regulators has not been consistent, particularly with the Western Australian regulator having taken a stance that the terms and conditions may only be specified in the access arrangement and may not be altered other than through the process of changing an access arrangement as set out in section 2 of the Code.

A number of other reasons cited by AGLGN in support of a construction of the Code that requires only of general specification of terms and conditions are not valid.

- AGLGN contends that a detailed specification of terms and conditions is inconsistent with the intent of the Code. Related to this contention, AGLGN also suggest that a requirement for detailed terms and conditions in the access arrangement is inconsistent with powers under section 6.27 of the Code for an arbitrator to an access dispute to specify terms and conditions for a reference service (which would be unnecessary if the detailed terms and conditions were required to be set out in the access arrangement).

Contrary to the contentions by AGLGN, section 6 of the Code does not empower an arbitrator under section 6 to make a determination in respect of the terms and conditions on which a reference service is provided. Section 6.27 of the Code relates to a decision by the arbitrator in relation to services generally and not reference services. Section 6.13 of the code constrains the arbitrator in a decision in respect of a reference service and limits the arbitrator to a decision that requires a reference service to be provided "at the Reference Tariff and on the terms and conditions specified under section 3.6 [of the Code]".

- AGLGN contends that specification in the access arrangement of detailed terms and conditions for reference services "would severely limit the ability for Users and Service Providers to negotiate mutually agreeable terms and conditions, a key aim of the Code". AGLGN also contends that specification in the access arrangement of detailed terms and conditions for reference services "would result in detailed terms and conditions being 'locked-in' for the period of the Access Arrangement, despite developing market and commercial conditions".

  There is no basis for these contentions. The Code is explicit in allowing for a user and a service provider to negotiate terms and conditions and tariffs that differ from those set out for reference services in an access arrangement. Moreover, if "market and commercial conditions" were to change sufficiently for the existing terms and conditions of reference services to no longer be suitable for the provision of these services then it would be possible, and indeed desirable, for AGLGN to revise the access arrangement under the processes of section 2 of the Code, which it may do at any time.

- AGLGN contends that specification in the access arrangement of detailed terms and conditions for reference services "would result in the Regulator removing from the Service Provider, the Service Provider's responsibility and ability for the management of key aspects of commercial risk management. This should not be removed without the Regulator also removing the commercial consequences of those actions."

  There is no evident basis for this contention. The process by which the IPART assesses and approves the access arrangement, including the terms and conditions for reference services, is one by which the terms and conditions are proposed by the service provider and assessed by IPART taking into consideration submissions from both the service provider and other interested parties. If there are relevant matters of "commercial risk management" in consideration of terms and conditions, then the service provider has ample opportunity to bring these to the attention of IPART.

The Allen Consulting Group maintains a view that the intent of the Code in having reference services specified for the purposes of providing a "benchmark" service would be best achieved if the terms and conditions for reference services were specified in sufficient detail in the access arrangement for a user to enter into a service agreement for a reference service under the terms and conditions and for the reference tariff as set out in the access arrangement, without having to enter into negotiations with the service provider.

In the absence of any clear ruling on the appropriate construction of the Code by a Court, it may be open for IPART to take either the position that the terms and conditions should be sufficiently complete for a user to enter into a service agreement for a reference service under terms and conditions as set out in the access arrangement for that service, or (as submitted by AGLGN) that the terms and conditions in the access arrangement need only provide a guide as to the principal terms and conditions for the relevant reference service.

In the absence of guidance by a court as to the proper construction of the Code, the Allen Consulting Group recommends that IPART require amendment of the proposed access arrangement such that terms and conditions for reference services are specified sufficiently for AGLGN and a User to enter into a service agreement on the basis of those terms and conditions.

The sufficiency of the terms and conditions set out in the proposed access arrangement are examined in relation to the matters already addressed by those terms and conditions in Chapter 4 and Chapter 5 of this report.

## 3.4 Terms and conditions for non-reference services

### *Outline of issues and initial submissions*

Submissions from EnergyAustralia and Energy Advice Pty Ltd both address the determination of terms and conditions for non-reference services. EnergyAustralia refers generally to the absence of an obligation on AGLGN to negotiate terms and conditions in good faith.

- **EnergyAustralia**

  (g) Negotiated services

  • (Page 34) - This section provides that the user may seek to negotiate different terms and conditions as a negotiated service. There is no obligation on AGLGN to negotiate or accommodate a user's needs in good faith. This is not consistent with the Code. It would be reasonable to impose an obligation on AGLGN to do its best to accommodate the specific needs of a user. Also, in EnergyAustralia's experience, AGLGN is unwilling to negotiate the terms and conditions in relation to a particular negotiated service – for example AGLGN will not negotiate on liability and indemnity even though the provisions may very well be inappropriate in some circumstances.

Energy Advice Pty Ltd addresses the terms and conditions set out in the proposed access arrangement in relation to a non-reference service – the Interconnection of Embedded Network Service – and raises a number of concerns with these terms and conditions. This submission is not reproduced here.

#### *Preliminary analysis*

The requirements of the Code in respect of terms and conditions extend only to a requirement that an access arrangement include the terms and conditions on which each reference service will be provided. As such, the terms and conditions for non-reference services lie outside of the requirements for an access arrangement under sections 3.1 to 3.20 of the Code, and a regulator would not be able to determine to not approve an access arrangement on the basis that the access arrangement fails to include terms and conditions for a non-reference service. An extension of this is that a regulator is effectively unable to require amendments to an access arrangement in respect of the terms and conditions for non-reference services. In the event that a regulator did so and the service provider opposed making the amendments, it would be open to the service provider to remove the terms and conditions for the non-reference service from the access arrangement, in which case it would not be open to the regulator to refuse to approve the access arrangement solely on that basis.

Despite the inability of IPART to require amendment to the terms and conditions for non-reference services if it considers these to be unreasonable, IPART is able to give consideration to whether the relevant non-reference service should be a reference service, in which case the terms and conditions would be subject to assessment against the criterion of section 3.6 of the Code. This is matter for consideration in respect of the services policy of an access arrangement and is not further addressed in this report.

#### *Further submissions*

No further submissions were made in respect of terms and conditions for non-reference services.

#### *Final analysis and recommendations*

The Allen Consulting Group maintains the conclusion as set out under its preliminary analysis that the Code does not empower IPART to require that an access arrangement include terms and conditions for non-reference services.

### 3.5 Relationship with the Gas Retail Market Business Rules

#### *Outline of issues and initial submissions*

In NSW there are regulatory requirements for AGLGN and its users to participate in an "approved scheme" of rules and arrangements that support the use of the network by multiple users whose identities, loads and delivery points change over time. There is currently one approved scheme that is relevant to AGLGN's network and it is perhaps a matter of practicability that only one scheme could operate at one time with regard to that network. This is the scheme operated by the Gas Market Company under the Gas Retail Market Business Rules (GRMBRs).

The Gas Market Company is a company limited by guarantee and that is owned, governed and funded by a cross section of businesses within the gas industry. The company has an ongoing role in administration and enforcement of the GRMBRs that have been developed by the NSW Government with the strong participation of participants in the gas industry and other stakeholders. The GRMBRs were designed to be comprehensive, pro-competition and non-discriminatory. The Gas Market Company changes the GRMBRs about every two to three months after extensive consultation with its members, including AGLGN.

It is a condition of authorisation (licensing) of gas retailers (including the retailing subsidiary of AGL) that they participate in the authorised scheme, requiring at this time that they comply with the GRMBRs. IPART monitors and enforces compliance with authorisation conditions, and, where necessary, may initiate sanctions for non-compliance. An independent compliance panel of the Gas Market Company considers potential breaches of the GRMBRs by AGLGN or users and, where necessary, may initiate sanctions for breach.

The GRMBRs deal with a range of matters as follows.

- Delivery point registration:
  - administration of the delivery point registry;
  - creation and deactivation of delivery points;
  - transferring of responsibility for a delivery point from one user to another; and
  - transferring of responsibility for a delivery point from one user to the "retailer of last resort".
- Metering:
  - the network operator's responsibilities;
  - appointment of meter-data agents;
  - on-site data and communications equipment;
  - basic metering equipment;
  - reading of meters and estimated meter readings; and
  - provision of metering data to network operators and the data estimation entity for the reconciliation of load profiles.
- Nomination, balancing, estimation and reconciliation:
  - load forecasting;
  - nomination processes and timetable for circumstances with and without an operational balancing agreement (OBA) in place;
  - treatment of user imbalances without an OBA;
  - estimation (load profiling)and reconciliation.
- Accreditation and audit:

  - accreditation of meter data agents; and
  - audit of Gas Market Company.
- Reporting and review:
  - development, reporting and review of the forecasting, nomination, and estimation and reconciliation processes; and
  - Gas Market Company Board reviews.
- Administration and compliance:
  - business rules amendment process;
  - power of the Gas Market Company Board to rectify an undesirable situation;
  - establishment, role and powers of an Independent compliance panel;
  - notification of breaches;
  - the process for making determinations on alleged rule breaches;
  - the process for making determination on interpretation of the rules; and
  - registration of stakeholders.

The GRMBRs address a number of matters that are also addressed in the proposed access arrangement, including in the terms and conditions for reference services. The terms and conditions for reference services duplicate to a large extent (with substantially different wording and meaning, and with additional provisions) many of the provisions of the GRMBRs, for example provisions in relation to metering and estimated meter readings (clauses 21 to 26 of Schedule 2A), and gas balancing (Schedule 3).

The GRMBRs may interact with the terms and conditions for services provided by the AGLGN network. AGLGN recognises this within the proposed access arrangement by including provision in the terms and conditions for reference services (clause 7 of Schedule 2A) for AGLGN to amend the terms and conditions of a service agreement to reflect changes to the GRMBRs to the extent that (AGLGN believes) the changes are consistent with the access arrangement. However, notwithstanding AGLGN's recognition of the interaction between the terms and conditions of services and the GRMBRs, the provisions of the terms and conditions that duplicate, paraphrase or add to the GRMBRs have the potential to cause conflict between the GRMBRs and the terms and conditions.

#### *Preliminary analysis*

In the preliminary analysis of the proposed access arrangement, The Allen Consulting Group considered the potential interaction between the GRMBRs and the terms and conditions of service contracts (as set out in the access arrangement for reference services). For efficient operation of the provision of distribution services and functioning of the retail gas market, conflict between the GRMBRs and the terms and conditions of distribution services should be avoided. This could be achieved by the application of the following principles in the terms and conditions.

- The terms and conditions should not seek to replicate provisions of the GRMBRs.

  This is unnecessary. All users and AGLGN itself are compelled to comply with the GRMBRs through their authorisation conditions. Replication also limits the extent to which the GRMBRs can change without AGLGN's cooperation in changing the terms and conditions and hence, in effect, AGLGN's explicit approval of the change in the GRMBRs. It is not the intent of the NSW gas market regulatory regime that AGLGN should have this power.

  Moreover, paraphrasing the GRMBRs within the terms and conditions can change the meaning and effect of the rules. At the very least, to the extent that there is any potential for conflict between the GRMBRs and the terms and conditions, the replication and/or paraphrasing of provisions may cause an unreasonable and unnecessary degree of uncertainty as to the rights and obligations of users and AGLGN.

- The terms and conditions should not seek to supplement the GRMBRs in a manner that is unreasonable.

  Provisions of the terms and conditions that supplement the GRMBRs could have the effect of creating unreasonable circumstances that would not be accepted had the provisions been considered through the Gas Market Company's rule-change process. The appropriate manner to deal with any shortcomings of the GRMBRs is to seek a change in rules.

While AGLGN includes provision in the terms and conditions for reference services (clause 7 of Schedule 2A) for AGLGN to amend the terms and conditions of a service agreement for a reference service to reflect changes to the GRMBRs, this is not considered to be an appropriate means of addressing the problem of interaction between the terms and conditions and the GRMBRs. There are two main reasons for this.

Firstly, and as already indicated above (section 3.3), AGLGN may not have explicit power to attach terms and conditions to a service for a reference service where those terms and conditions are in addition to terms and conditions stated in the access arrangement.

Secondly, it is not possible (or should not be possible) for AGLGN to change the terms and conditions for reference services as specified in the access arrangement other than through revisions to the access arrangement under the process set out in section 2 of the Code. Section 2.49 of the Code provides that an access arrangement that has become effective may be changed only pursuant to section 2 of the Code or pursuant to the implementation of an Approved Reference Tariff Variation Method as provided for under sections 8.3B to 8.3H of the Code. Section 2 of the Code does not provide for changes to an access arrangement by unilateral decision of the service provider. Provision under clause 7 of the proposed access arrangement for AGLGN to vary certain terms and conditions other than through the process for revision of an access arrangement is therefore considered as not complying with the requirements of the Code. This stance was taken by the Independent Gas Pipelines Regulator in Western Australia in respect of the proposed Access Arrangement for the Dampier to Bunbury Natural Gas Pipeline.[1]

It was concluded in the preliminary analysis that IPART seek amendment of the terms and conditions for the provision of reference services as set out in the proposed access arrangement such that:

- the terms and conditions do not deal with any matter that is already the subject of the GRMBRs, except where a provision of the terms and conditions constitutes a "reserve" provision that takes effect in the event that the GRMBRs are changed so as to no longer address the matter, or an alternative authorised scheme is introduced that fails to deal with matter;
- a term should be added to the terms and conditions that states clearly that the GRMBRs will prevail where there is any inconsistency between the terms and conditions and the GRMBRs;
- the terms and conditions should only include provisions that supplement the GRMBRs to the extent that such provisions are beyond the jurisdiction of the Gas Market Company and would be unable to be introduced into the GRMBRs; and
- where it is necessary for the terms and conditions to address a matter that is considered likely to be addressed in future by the GRMBRs, the relevant provisions of the terms and conditions should fall away at the time the GRMBRs address the matter.

### *Further submissions*

- **AGLGN (10 September 2004)**

  The Gas Market Company's (GMC's) role is to regulate arrangements between retail market participants and it has been constituted with the objective " to develop and operate cost effective and efficient retail market arrangements, which are fair and equitable, to facilitate competition in the gas retail market."

[1] Independent Gas Pipelines Access Regulator, 23 May 2003, Final Decision on the Proposed Access Arrangement for the Dampier to Bunbury Natural Gas Pipeline paragraphs 525 – 527.

Retail market arrangements in NSW and the ACT are built on top of the open access environment delivered in the AAs of Country Energy, ActewAGL, and AGLGN. Under this model the AAs specify the arrangements between regulated networks and Users, while the GRMBR primarily regulate arrangements between retailers. In this context the AA and the GRMBR necessarily deal with similar subject matter but from different and complementary perspectives.

Network Operators as members of the GMC have obligations under the GRMBR, however these obligations are structured to facilitate GMC's regulation of arrangements between Retail members rather than to regulate the terms of access to regulated infrastructure between Network and Retail members.

The GRMBR themselves recognize the underpinning role of network access arrangements. Specifically clause 3.3 of the GRMBR states that the rules only apply to the extent that they are consistent with relevant access arrangements.

ACG's view that the AGLGN's Terms and Conditions are in conflict with or unnecessarily duplicate the GRMBR is misinformed. It is worth noting that this view has not been put forward by any User or by the GMC itself.

The GMC provides a vehicle for retailers and network operators to satisfy their license obligations to be members of an approved retail market scheme, however it has no jurisdiction or constitutional mandate in relation to regulating the terms and conditions of access to networks regulated under the Gas Code. AGLGN is of the view that its AA must deal with all key terms and conditions relevant to access to its network, and that it would be inappropriate to rely the GRMBR.

A letter from the GMC confirming the nature of these governance arrangements is attached.

[The letter from the Gas Market Company referred to by AGLGN is reproduced as follows.]

While Gas Market Company supports Allen's conclusion that "conflict between the GRMBRs and the terms and conditions of distribution services should be avoided", we believe the GRMBRs already deal with this issue by effectively requiring the GRMBRs to be consistent with the Access Arrangement (rule 3.3 of the GRMBRs). The retail market participants agreed in establishing the GRMBRs that, should conflict exist between the GRMBRs and the Access Arrangement, the terms of the Access Arrangement would apply to the extent of any inconsistency. This provision recognized the fact that the terms of access to the distribution networks are governed under the National Third Party Access Code for Natural Gas Pipelines, and are approved by an independent regulator after extensive consultation. The GRMBRs are determined by the retailers (with some specific rights accorded to network operators in relation to safety and security of the network and cost recovery), and it would be inappropriate for retailers to be able to impose conditions on the network operator relating to transportation of gas which were inconsistent with those approved by the regulator. Accordingly, any rule governing the interaction between retailers and network operators in the competitive retail market should be framed in a consistent manner with those approved terms.

We believe that the GRMBRs were originally drafted in a consistent and complementary manner to the Access Arrangements existing at the time, and that all changes have remained consistent. Further, the GRMBRs do not deal in the main with Business to Business matters, the market participants preferring to deal with such matters contractually through the transportation agreements.

In looking at the specific areas in which Allens raised concerns, we note that Gas Market Company does not at this time govern meter data agents, and that this remains a covered service under the Access Arrangements, so that the terms and conditions of this service need to be set out in that Access Arrangement. We also note that the Gas Balancing Committee which is presently considering the gas balancing arrangements in NSW and the ACT are pursuing options other than an OBA, and therefore we would seek the flexibility in the Access Arrangement which is contemplated in the AGLGN terms to introduce a different balancing scheme. However, unless change is introduced, the current arrangements under the Access Arrangement need to be maintained.

Allens have recommended that IPART seek amendment of clause 48 of Schedule 2A to remove provision for AGLGN to suspend the delivery of gas to a delivery point if AGLGN is requested by the manager of an approved scheme to suspend the delivery of gas to the delivery point. Market participants through the Business Rules Industry Committee are presently finalizing rule changes to address the issue of settlement of imbalances on a user's exit from the market. Those rules will, if accepted, introduce a provision to allow the market administrator to request network operators to suspend delivery of gas in certain circumstances. The circumstances in which such a request would be made will be limited and set out in detail in the new rule, if adopted. Therefore, we would request that the provision for AGLGN to suspend delivery to gas if requested by the manager of an approved scheme to suspend the delivery of gas to the delivery point be retained.

- **AGLGN (6 October 2004)**

  AGLGN agree to the inclusion of a provision for a change in the treatment of unaccounted for gas as a result of new GRMBRs during the access arrangement period. This is in response to a submission by the Gas Market Company that was lodged subsequent to the submission of the Revisions to AGLGN's Access Arrangement.

  Apart from the above issue, AGLGN maintain the position set out in submissions by both AGLGN and the Gas Market Company that the GRMBRs were originally and still are consistent with and complimentary to the Access Arrangement.

  AGLGN note that no market participant has raised any issue of inconsistency between the Access Arrangement and the GRMBRs and those specific concerns identified by ACG have been addressed.

- **Energy Australia**

  EnergyAustralia notes and supports ACG's comments on the relationship between the AA and the Gas Retail Market Business Rules. The potential for duplication of the Business Rules should be avoided and, accordingly, the AA should not replicate the provisions of the Business Rules. Also, the Access Arrangement should not seek to supplement the Business Rules in a manner that is unreasonable.

- **Orica**

  On the specific recommendation,

  > "Failure of the terms and conditions to deal adequately with interaction between the terms and conditions for distribution services and the Gas Retail Market Business Rules"

  Orica support the views detailed in Patricia McKenzie letter dated 30 August 2004 to AGL Energy Networks (attached to AGLGN Submission on the Draft Allen Consulting Group Report on Assessment Terms and Conditions).

  > "The retail market participants agreed in the establishing the GRMBRs that, should conflict exist between the GRMBRs and the Access Arrangement, the terms of the Access Arrangement would apply to the extent of any inconsistency. This provision recognised the fact that the terms of access to final analysis and recommendations the distribution networks are governed under the National Third Party Access Code for Natural Gas pipelines, and are approved by an independent regulator after extensive consultation."

### *Final analysis and recommendations*

AGLGN has objected strongly to The Allen Consulting Group's recommendations in respect of the interaction between the GRMBRs and the access arrangement, in particular that the GRMBRs should take precedence over terms and conditions set out in the access arrangement for reference services.

AGLGN is correct in noting that the GRMBRs specifically provide for the access arrangement (and not the GRMBRs) to prevail where there is any conflict between the two. Clause 3.3 of the GRMBRs provides that:

> 3.3 Inconsistency with other laws
>
> (1) These Rules apply to the extent that they are consistent with laws and relevant Access Arrangements.
>
> (2) To the extent that these Rules are inconsistent with any law and/or relevant Access Arrangement, the law and/or Access Arrangement will apply to the extent of the inconsistency.

The provisions of clause 3.3 of the GRMBRs run counter to the recommendation of The Allen Consulting Group that IPART should seek amendment of access arrangement to ensure that the GRMBRs will prevail where there is any inconsistency between the terms and conditions for reference services and the GRMBRs. The Allen Consulting Group accepts that it erred in this recommendation having failed to recognise clause 3.3.

Notwithstanding this, recognition of the provisions of clause 3.3 highlights a potential difficulty in the operation of the access arrangement and the GRMBRs. That is, an inconsistency between the terms and conditions for a reference service and the GRMBRs would imply that AGLGN seeks to override terms of the GRMBRs that have been put in place through mutual agreement of the members of the GMC that includes both AGLGN and Users. This would appear inappropriate for reason that it would be absurd for a regulator to approve a provision that runs contrary to a position reached through mutual agreement by a service provider and users in circumstances where there is a reasonable balance in bargaining power. For this reason (and given the provisions of clause 3.3 of the GRMBRs), The Allen Consulting Group maintains its view that IPART should seek amendment of the terms and conditions as set out in the access arrangement, where necessary, to ensure that:

- the terms and conditions do not deal with any matter that is already the subject of the GRMBRs, except where a provision of the terms and conditions constitutes a "reserve" provision that takes effect in the event that the GRMBRs are changed so as to no longer address the matter, or an alternative authorised scheme is introduced that fails to deal with matter;
- the terms and conditions should only include provisions that supplement the GRMBRs to the extent that such provisions are beyond the jurisdiction of the Gas Market Company and would be unable to be introduced into the GRMBRs; and
- where it is necessary for the terms and conditions to address a matter that is considered likely to be addressed in future by the GRMBRs, the relevant provisions of the terms and conditions should fall away at the time the GRMBRs address the matter.

Specific provisions of the terms and conditions where issues of interaction with the GRMBRs arise are identified in Chapter 4 and Chapter 5 of this report in relation to:

- management of unaccounted for gas (section 4.7);
- metering (sections 4.9 and 5.6);
- suspension of supply (section 4.16); and
- gas balancing (section 4.25).

*Chapter 4*

# General terms and conditions

## 4.1 Introduction

Schedules 2A, 3 and 4 of the proposed access arrangement specify terms and conditions that apply to all proposed reference services. In addition, Schedule 2B specifies terms and conditions that apply to all reference services with the exception of the Local Network Tariff Service and the Trunk Tariff Service.

The terms and conditions in each of these schedules are addressed in this chapter under the same sub headings and in the same order as set out in the proposed access arrangement. For each matter addressed by the terms and conditions, the proposed terms and conditions are described, submissions in relation to the matter are presented and matters for consideration by IPART are discussed, including recommendations for IPART to seek amendments to the terms and conditions in instances where the terms and conditions as proposed are not considered reasonable.

## 4.2 Reference service agreement

### *Proposed terms and conditions*

Clauses 5 to 7 of Schedule 2A relate to a reference service agreement between AGLGN and a user and provide that:

- access by a user to a reference service requires the user to enter into a "reference services agreement" with AGLGN (clause 5);
- obligations of AGLGN and the user under a reference services agreement are to be performed in a commercially reasonable manner and in accordance with reasonable operating and management practices (clause 6); and
- AGLGN may amend the terms and conditions set out in a reference service agreement to reflect changes to the Gas Retail Market Business Rules and other applicable laws (clause 7).

### *Initial submissions*

No submissions on the proposed access arrangement address the clauses of Schedule 2A relating to the reference services agreement.

### *Preliminary analysis*

It its preliminary analysis of the proposed terms and conditions, The Allen Consulting Group addressed clauses 5, 6 and 7 of Schedule 2A as follows.

Clauses 5 and 6 of Schedule 2A relate to the provision of reference services under a reference services agreement, which is in effect a contract between AGLGN and the User. The provision of services under a contract of this nature is considered to be consistent with normal and reasonable commercial practice. Also, there is nothing in clauses 5 and 6 of Schedule 2A or the definition of reference services agreement to suggest that the reference services agreement comprises more than the terms and conditions as set out in the proposed access arrangement.

Clause 7 provides for AGLGN to amend terms and conditions applying to reference services under a service agreement to reflect changes in the Gas Retail Market Business Rules. Reflecting conclusions drawn in section 3.5 in respect of interaction between the GRMBRs and the access arrangement, it was recommended that IPART seek amendment of the terms and conditions to remove clause 7 of Schedule 2A.

### *Further submissions*

- **AGLGN (10 September 2004)**

  ACG's comments on this issue appear to be based on a misunderstanding of the GRMBR in New South Wales and does not accept that clause 7 of schedule 2A is inconsistent with the Code.

### *Final analysis and recommendations*

The matter of the ability of AGLGN to alter the terms and conditions on which reference services are provided to reflect changes in the GRMBRs is related to the issue of AGLGN having the ability to attach terms and conditions to a service agreement for a reference service that are in addition to terms and conditions set out in (or at least explicitly contemplated by) the access arrangement, and/or the ability to amend terms and conditions for the provision of reference services outside of a revision of the access arrangement.

If IPART were to take the view that the terms and conditions for reference services are to be fully set out in the access arrangement and are not able to be changed other than through revision of the access arrangement, then it would be necessary to find a means of accommodating changes to the GRMBRs within the terms and conditions. It is noted that AGLGN contemplates the terms and conditions for reference services changing to reflect any changes in the GRMBR's and in view of this The Allen Consulting Group recommends that IPART require amendment of the access arrangement to remove clause 7 of schedule 2A and to include provision in the terms and conditions to indicate that to the extent of any inconsistency between the terms and conditions under a service agreement for a reference service and the GRMBRs, the GRMBRs prevail.

If IPART takes the view that a service agreement for a reference service may include terms and conditions that are beyond the terms and conditions set out in the access arrangement for that reference service, then The Allen Consulting Group accepts that clause 7 of schedule 2A may appropriately remain in the access arrangement.

## 4.3 Right to access

### *Proposed terms and conditions*

Clause 8 of Schedule 2A specifies a number of principles for non-discriminatory treatment of prospective users in the provision of services.

### *Initial submissions*

No submissions on the proposed access arrangement address the clauses of Schedule 2A relating to the right to access.

### *Preliminary analysis*

The principles for non-discriminatory access are more in the nature of access principles than terms and conditions for provision of a service. There is not considered to be anything unreasonable in these principles either in the context of general principles of access or in the context of terms and conditions.

### *Further submissions*

No further submissions on the terms and conditions of the proposed access arrangement addressed clause 8 of schedule 2A.

### *Final analysis and recommendations*

The Allen Consulting Group maintains the view set out in the preliminary analysis.

## 4.4 Obligation to transport

### *Proposed terms and conditions*

Clause 9 of Schedule 2A specifies an obligation of AGLGN to accept gas at a receipt point and deliver gas at a delivery point subject to the user's delivery point maximum hourly quantity (MHQ) and the user maintaining a gas balance, both as specified and required under other provisions of the terms and conditions.

### *Initial submissions*

No submissions on the proposed access arrangement address the clauses of Schedule 2A relating to the obligation to transport gas.

### *Preliminary analysis*

The obligation of AGLGN to accept and deliver gas subject to compliance of the user with terms and conditions of a reference service agreement is considered reasonable.

It is notable that an express obligation of the service provider to accept and deliver gas was required by the Independent Gas Pipelines Access Regulator to be included in the access arrangement for the Dampier to Bunbury Pipeline, implying that the absence of such provision was regarded by the Regulator to not be reasonable.[2]

#### *Further submissions*

No further submissions on the terms and conditions of the proposed access arrangement addressed clause 9 of schedule 2A.

#### *Final analysis and recommendations*

The Allen Consulting Group maintains the view set out in the preliminary analysis.

### 4.5 Security for payment

#### *Proposed terms and conditions*

Clause 10 of Schedule 2A provides for AGLGN to require that a user:

- provide security for the performance of the user's obligations under a service agreement, where the security is of such type and such extent as AGLGN reasonably determines;
- pay all amounts owing under a service agreement as a precondition to continuing receiving the service; and
- demonstrate its ability to meet all financial obligations under a service agreement.

#### *Initial submissions*

Submissions from Energy Australia, Origin Energy and TXU addressed the provision under the terms and conditions for AGLGN to determine amounts and a form of security to be provided by a user. The relevant parts of these submissions are reproduced as follows.

- **EnergyAustralia**

  Under clause 10(a) of Schedule 2A, a user must, on request by AGLGN "provide security for the performance of its obligations under a Service Agreement. Such security may be of such type and such extent as AGLGN reasonably determines."

  Unless a user is successful in negotiating other terms, the actual detailed provisions in the Reference Service Agreements could be the same as this. They provide that AGLGN can request security at any time for an amount which it reasonably determines to be approximately equivalent to the total charges payable by the user for two typical billing periods. There are no stated exceptions (eg where a user has credit ratings above certain thresholds). It can then be retained for the life of the contract even if the user has a perfect payment history.

[2] Independent Gas Pipelines Access Regulator, 23 May 2003, Final Decision on the Proposed Access Arrangement for the Dampier to Bunbury Natural Gas Pipeline paragraphs 528, 728.

This approach is not consistent with other jurisdictions. For example, the Victorian Access Arrangements (clause 7.8) contain detailed provisions which define when a distributor can request credit support and when it must be returned. The Essential Services Commission of Victoria required these changes because it considered the distributor's original proposal would have imposed significantly greater costs on retailers than alternative arrangements with no material change to the level of risk borne by distributors.

On the issue of distributor discretion, the QCA took the view that where distributor discretion was unavoidable, there should be a process in place and the ability for parties to access dispute resolution procedures.

[EnergyAustralia suggests the following alternative provisions in Attachment A of its submission.]

AMENDMENTS TO SCHEDULE 2A

Security for payment

(This is based on the Victorian provisions.)

1 AGLGN may request the User to procure a Security to secure its payment obligations under a Service Agreement only if, at the time of the request:

(a) the User cannot demonstrate that it has an unqualified credit rating from Standard & Poor's of at least BBB-, from Moody's of at least Baa3, or from Fitch of at least BBB- (an "Acceptable Credit Rating");

or

(b) within the previous 12 months the User has failed to pay in full:

(i) 5 invoices within the required time limit for payment; or

(ii) 3 consecutive invoices within the required time limit for payment; or

(iii) 1 invoice within 25 days of the due date; or

(c) [insert any others].

2 If AGLGN requests a Security from the User in accordance with clause 1, the User must provide a Security to AGLGN within 7 days of receipt of notice from AGLGN as to the amount of the Security required.

3 The amount of the Security will be determined by AGLGN after having regard to the User's average monthly Charges and payment history, provided that the Security shall not exceed AGLGN's reasonable estimate of two months average charges ("Required Security Amount") payable by the User under a Service Agreement.

4 AGLGN may require the User to increase the amount of the Bank Guarantee where AGLGN's reasonable estimate of two months average Charges, calculated by reference to the immediately preceding twelve month period, is greater than the amount of the Security. The User must, within 10 Business Days of receipt of a request from AGLGN, increase the amount of the Bank Guarantee to the amount calculated under clause 3.

5 The User may request that the amount of the Security be decreased where the User's reasonable estimate of two months average Charges, calculated by reference to the immediately preceding twelve month period, is less than the amount of the Security. Where AGLGN agrees that the amount of the Security should be reduced in accordance with this clause, AGLGN must in conjunction with the User, do all things reasonably necessary to reduce the amount of the Security held by AGLGN to the amount agreed by AGLGN under this clause.

6 AGLGN may draw or claim on the Security for payment, in whole or in part, to secure payment of the outstanding amounts under a Service Agreement where the User fails to pay the charges invoiced by AGLGN provided that the User has not paid the outstanding Charges within 7 days of the receipt by the User of a notice of default issued by AGLGN under clause [ ] (Termination for default or insolvency).

7 The User must within 7 days of AGLGN informing the User in writing that the Security has been claimed or drawn on for payment, deliver to AGLGN a further Security for the Required Bank Guarantee Amount in substitution for the Security which has been claimed or drawn on by AGLGN to the bank for payment in whole or in part.

8 Payment under the Security does not limit AGLGN's rights under this Access Arrangement or operate as a waiver by AGLGN of the User's breach of this Access Arrangement.

9 On termination or expiry of a Service Agreement, if the Security has not been presented, AGLGN must return the Security to the User if there are no further Charges payable and, in any event, return the Security or any part of it remaining once all Charges have been paid.

10 At the end of 6 months after the date on which the Security was originally requested, and at the end of any 6 month period thereafter (or as otherwise agreed by the parties), the User may request the release of the Security, and AGLGN must release the Security, if the User shows that, at that date, none of the criteria identified in clause 1 apply.

11 Any interest on the Security may be retained by AGLGN and form part of the Security. AGLGN is under no obligation to maximise or ensure any return on any Security.

Security means at the User's option, one or a combination of the following:

(a) a refundable deposit or bank guarantee;

(b) a parent company guarantee provided that it has an unqualified credit rating from Standard & Poor's of at least BBB-, from Moody's of at least Baa3, or from Fitch of at least BBB, in a form satisfactory to AGLGN (acting reasonably).

- **Origin Energy**

While Origin believes that there is a requirement to protect AGLGN's ability to collect its tariffs from Retailers, Origin is concerned that AGLGN's requirements for security for payment are too subjective and open to contention.

Origin therefore recommends replacement clauses similar to those proposed by Country Energy, which in turn are similar to the prudential requirements outlined in Victorian gas Access Arrangements, Victorian electricity Use of System Agreements and the South Australian Coordination Agreement, and which set out objective measures that;

- Describe objective requirements to invoke a bond or credit support, such as a minimum objective credit rating,
- Allow for a payment guarantee by an entity with sufficient Credit Rating,
- Describe the amount of the bond and/or credit support invoked, and
- Specify a finite duration for a bond or credit support after invocation, instead of an indefinite duration.

Origin believes that such an initiative will increase commonality between systems and processes and help reduce the potential for preferential treatment of industry participants.

- **TXU**

AGLGN can request any security it considers necessary. This broad power needs to be limited whereby additional security is only to be provided if certain trigger events occur (eg for downgrading of credit rating).

### *Preliminary analysis*

In its preliminary analysis of terms and conditions of the proposed access arrangement, The Allen Consulting Group addressed provisions relating to security as follows.

The submissions received in respect of provisions for AGLGN to require security from users contest AGLGN's proposal to be able to determine levels and types of security required, although none of the submissions contest the reasonableness of AGLGN being able to require that users provide security in circumstances where there is a potential risk of a user defaulting on payments due under a service agreement.

AGLGN has proposed that it be able to determine the form and level of security, subject to this determination being reasonable. The three submissions made on this provision contend, in effect, that the "reasonableness" constraint on AGLGN's determination of the form and level of security does not provide adequate protection to users against AGLGN requiring a form and level of security that is more than is reasonably required or justified for AGLGN to protect itself against the risk of default on payments by users.

There is no clear regulatory precedent on reasonable constraints on a service provider in requiring security from Users. As indicated in the submissions of EnergyAustralia and Origin Energy, the access arrangements for the Victorian distribution systems contain detailed specification of the circumstances in which security may be sought, the level of security able to be sought, the duration for which the security requirement may be maintained, and the circumstances in which the level of security may be increased or decreased.

For access arrangements approved in Western Australia, the Independent Gas Pipelines Access Regulator has accepted provisions that allow the service provider discretion to establish a level of security subject to this level being reasonable[3] or subject to the level being the minimum amount necessary to protect the legitimate interests of the service provider.[4]

In consideration of the reasonableness of the provisions relating to the form and level of security, there are a number of matters that IPART may consider.

While parties have submitted that the provision for AGLGN to require security offers inadequate protection to Users, there has been no contention that AGLGN has previously imposed unreasonable requirements for security on Users despite the same provisions existing under the current Access Arrangement. However, despite this, should AGLGN in the future seek to impose unreasonable requirements for security, there are no provisions in the terms and conditions establishing a mechanism for resolution of a dispute over the reasonableness of a requirement for security. Greater detail in specification of circumstances under which security can be required may be warranted in the absence of a clear mechanism for resolution of disputes.[5]

### *Further submissions*

- **AGLGN (10 September 2004)**

  While the AA does not contain limits on the level and type of security, it does require AGLGN to act reasonably and is subject to the dispute resolution procedures contained in the Code.

  AGLGN believe that the proposed terms in relation to security:

  - protect both the service providers and users reasonable business interests;
  - are a continuation of the current arrangements that have not proven an obstacle for users in the past;
  - avoid the problems associated with prescriptive security provisions adopted in some other jurisdictions which do not allow the service provider to assess all available information;
  - lessen the likelihood of significant revenue losses that are not allowed for in any aspect of the allowed cost of service equation.

- **AGLGN (6 October 2004)**

  ACG are concerned that on a range of matters, including security payments, the requirement for AGLGN to behave reasonably should be accompanied by a dispute resolution mechanism incorporated in the terms and conditions. AGLGN highlighted in its earlier submission that clear dispute resolution mechanisms are incorporated in both the Code and the Transportation Agreements. AGLGN maintain that these provisions make the need for any further dispute resolution mechanism redundant.

[3] Independent Gas Pipelines Access Regulator, 23 May 2003, Final Decision on the Proposed Access Arrangement for the Dampier to Bunbury Natural Gas Pipeline paragraphs 646, 647.
[4] Independent Gas Pipelines Access Regulator, 30 June 2000, Final Decision Proposed Access Arrangement Mid West and South West Gas Distribution Systems, Part B page 40.
[5] The absence of provisions in the terms and conditions for resolution of disputes is addressed in section 3.3 of this report.

- **TXU**

  AGLGN can request any financial security it considers necessary. This broad power needs to be limited whereby additional security is only to be provided if certain trigger events occur (eg for downgrading of credit rating).

- **EnergyAustralia**

  [Attachment 1]

  EA accepts the inclusion of security provisions in third party access agreements. The issue for EA is the type and content of security provisions included in access agreements with AGLGN. They are draconian and uncommercial.

  Also, AGLGN is resistant to amending its security provisions in the agreements themselves. Detailed provisions should be included in the AA itself if the agreements are not to be attached. In its first submission EnergyAustralia referred the Tribunal to the provisions contained in the equivalent agreements in Victoria.

- **Orica**

  On the specific recommendation,

  "Absence of explicit qualitative or quantitative limits on the level and type of security that AGLGN may seek from user"

  Orica strongly supports the Allen Consulting Group's recommendations. Orica is very reluctant to rely on the requirements for AGLGN to act reasonably. Additionally the dispute resolution procedures contained in the code are very difficult to implement to protect the customer.

- **Origin Energy**

  AGLGN has not set out specific objective requirements for Security Payments.

### *Final analysis and recommendations*

In its preliminary analysis of the provisions relating to requirements for security to be offered by users to AGLGN, The Allen Consulting Group took the view that the qualitative constraint of "reasonableness" on AGLGN in establishing requirements for security is consistent with some regulatory precedent for covered pipelines elsewhere in Australia, and would be likely to provide sufficient protection to users if the terms and conditions also contained reasonable provisions for the settlement of disputes. It is only in the absence of such a mechanism for dispute resolution, that it was recommended that the terms and conditions be amended to set out the circumstances in which security may be required and the manner in which the type and amount of security would be determined.

The Allen Consulting Group maintains its conclusions in this respect, with a recommendation that IPART require amendment of the proposed access arrangement so that the terms and conditions for reference services include reasonable provisions for the settlement of disputes arising under service agreements. In addition to the matter of determining the level of security that may be required under provisions of clause 10 of schedule 2A, there are a range of additional powers of AGLGN under the terms and conditions that are constrained only by a requirement for AGLGN to behave reasonably, which further justify a requirement for the terms and conditions to include a mechanism of dispute resolution.

AGLGN contends that the inclusion in the terms and conditions as set out in the access arrangement of provisions for resolution of disputes is not necessary given provisions for resolution of disputes by arbitration under section 6 of the code and inclusion of provisions for resolution of disputes in terms and conditions of service agreements specified outside of the access arrangement. These contentions of AGLGN are not considered to be valid. The mechanisms for dispute resolution by arbitration under section 6 of the Code have affect only in an access dispute, i.e. prior to parties entering into a service agreement. To the extent that requirements for security are determined or subject to change after entering into a service agreement, the provisions of section 6 are not relevant to resolution of disputes. Mechanisms for dispute resolution specified outside of the access arrangement are not a matter which IPART has power to establish the reasonableness thereof, and therefore not a matter that IPART can take into account in considering whether a "reasonableness" constraint on powers of AGLGN provide adequate protection to users.

The Allen Consulting Group did not (as implied by AGLGN) recommend the inclusion of additional terms and conditions that would limit AGLGN's ability to assess and manage the risk of non-payment and user insolvency.

AGLGN also contends that "the recommendation not to approve the proposed clause (which is the same as the clause approved by IPART in 2000) would require IPART to come to a view that AGLGN is reasonably expected to act unreasonably during the coming access arrangement period". While this is a legal question, it is the view of The Allen Consulting Group that that it would not be necessary for IPART to explicitly make such a finding. It is a presumption in imposing access regulation that the service provider would (in the absence of regulation) seek to exploit market power to the disadvantage of users.

## 4.6 Gas pressure

### *Proposed terms and conditions*

Clause 11 of Schedule 2A requires that a user of a reference service deliver gas to the receipt point for the service at a pressure within the range specified by AGLGN in Schedule 8 of the proposed access arrangement.

### *Initial Submissions*

No submissions on the proposed access arrangement address the clauses of Schedule 2A relating to gas pressure.

### *Preliminary Analysis*

The reasonable range of gas pressure within which a user may deliver gas to the AGLGN gas network is a technical question and IPART may wish to seek technical advice on this issue.

It is notable that, with the exception of two receipt-point locations (Horsley Park CTS and Port Kembla CTS), minimum and maximum receipt-point pressures are the same under the proposed access arrangement as in the current access arrangement, and that there have been no submissions on the issue of receipt-point pressures. This would suggest that the pressure ranges have not been found to be unreasonable during the current access arrangement period. It is noted that gas pressures at receipt points are not directly controllable by users, who must rely upon operators of the relevant gas transmission pipeline to manage pressures at receipt points within the range required by AGLGN. As such, a user may be unlikely to be directly concerned with gas pressures.

### *Further submissions*

No further submissions on the terms and conditions of the proposed access arrangement addressed clause 11 of schedule 2A.

### *Final analysis and recommendations*

The Allen Consulting Group maintains the view set out in the preliminary analysis.

## 4.7 Responsibility for gas and unaccounted for gas

### *Proposed terms and conditions*

Clause 12 of Schedule 2A provides for AGLGN to assume responsibility for gas while the gas is in its control and for AGLGN to replace gas lost from the AGLGN gas network through the purchase of gas by competitive tender. Clause 3.11(b) of the proposed access arrangement provides for AGLGN to adjust reference tariffs if the cost or quantity of unaccounted for gas differs from the forecast quantity and cost used in the derivation of the reference tariffs.

### *Initial submissions*

The submission from the Gas Market Company addressed the provision under the terms and conditions for AGLGN to purchase gas for replacement of unaccounted for gas and pass through the cost of purchase to users. The Gas Market Company submits that an alternative mechanism for management of unaccounted for gas may be implemented through the Gas Market Business Rules, and that the prospect for alternative management of unaccounted for gas should be accommodated in the terms and conditions for reference services. The relevant extract from this submission is reproduced as follows.

- **Gas Market Company**

  Allowance for a Future Alternate Treatment of UAG in the Upcoming AGLGN AA

  Under the present AGLGN AA, there is a requirement for AGLGN to provide UAG to the market, and pricing and incentive provisions apply to that provision of UAG. This requirement would prevent the market moving to a reconciliation methodology convergent with that adopted in SA/WA.

> In order to provide sufficient flexibility for the Market to consider all options for a reconciliation methodology, GMC suggests that the new AGLGN AA include a provision that all obligations on AGLGN to provide and manage UAG be completely removed in the event that GMC's Business Rules provide for an alternative mechanism for provision of UAG associated with a gas reconciliation process. Such removal of UAG related obligations would need to be reflected in the price and incentive mechanism provisions of the AA. AGLGN has indicated to GMC that it would not object to a provision which allowed for an alternative provided that this can be done so that all current UAG related obligations cease to apply. GMC agrees that this would be appropriate.
>
> GMC is aware that the release of a draft decision on revised AGLGN AA is imminent. We request that IPART consider adopting this suggestion in its draft decision in order to provide the NSW and ACT Gas Retail Market with flexibility to consider a better reconciliation methodology and to facilitate greater convergence of gas market operations.

The current and potential future arrangements for managing unaccounted for gas are described in the Gas Market Company submission, but not reproduced here.

### *Preliminary analysis*

In its preliminary analysis of terms and conditions under the proposed access arrangement, The Allen Consulting Group addressed provisions relating to unaccounted for gas as follows.

The provision under clause 12 of Schedule 2A for AGLGN to take responsibility for unaccounted for gas and to pass through the costs of replacing unaccounted for gas to Users are the same as the relevant provision under the current access arrangement.

The Gas Retail Market Business Rules do not currently provide for the manner in which AGLGN determines the daily unaccounted for gas for reconciliation purposes. The Gas Market Company is developing a new approach for AGLGN to estimate daily unaccounted for gas and has submitted that the access arrangement should provide for AGLGN's proposed unaccounted for gas provisions to fall away at such time as the GRMBRs address the issue.

The relationship between the GRMBRs and the terms and conditions has been addressed in section 3.5 of this report. Consistent with conclusions drawn in this section, it was recommended that IPART seek amendment of the proposed access arrangement to provide for AGLGN's proposed unaccounted for gas provisions to fall away at such time as the GRMBRs address the issue, consistent with the submission from the Gas Market Company.

The mechanism under section 3.11(b) of the proposed access arrangement for the pass through of costs is a matter requiring consideration under the reference tariff and reference tariff policy. The Code may not permit the pass through of costs through an adjustment of reference tariffs as contemplated by clause 3.11(b) of the proposed access arrangement (as it is not expressed as a mechanism for variation of reference tariffs in accordance with sections 8.3A to 8.3H of the Code).

### *Further submissions*

- **AGLGN (6 October 2004)**

  AGLGN agree to the inclusion of a provision for a change in the treatment of unaccounted for gas as a result of new GRMBRs during the access arrangement period. This is in response to a submission by the Gas Market Company that was lodged subsequent to the submission of the Revisions to AGLGN's Access Arrangement.

- **Energy Australia**

  EnergyAustralia supports the Gas Market Company's submission on the alternative mechanism for management of accounted for gas and accommodating that in the AA. This would give the Gas Market Company and its members additional flexibility to address some difficult issues associated with balancing and reconciling the market (as well as promoting convergence with other jurisdictions).

### *Final analysis and recommendations*

AGLGN has indicated agreement to the provisions of clause 12 of schedule 2A ceasing to have effect in the event that the GRMBRs are amended to manage unaccounted for gas. It is thus recommended that IPART seek amendment of Clause 12 of Schedule 2A of the proposed access arrangement such that provisions for management of unaccounted for gas cease to have effect in the event of a change in the treatment of unaccounted for gas as a result of new GRMBRs during the access arrangement period.

## 4.8 Overruns

### *Proposed terms and conditions*

Clauses 13 to 20 of Schedule 2A relate to overruns and provide for:

- a conceptual definition of an overrun (clause 13);
- provision for users to obtain an authorised overrun (clauses 14 to 16);
- a conceptual definition of an unauthorised overrun (clause 17);
- provision for users of certain services (Throughput Service, Managed Capacity Service and Tariff Service) to not be liable for any charges in respect of overruns (clause 18);
- provision for users to be liable for, and indemnify AGLGN against, any loss, liability or expense suffered or incurred by AGLGN as a result of any unauthorised overrun (clause 19); and
- provision for AGLGN to apportion an overrun quantity between service agreements where an overrun occurs at a delivery point served under two or more service agreements (clause 20).

Provisions relating to overruns are also contained in terms and conditions specific to each reference service as set out in clauses 2.1 to 2.7 of the proposed access arrangement. These provisions define when an overrun is deemed to occur under each service and indicate the circumstances in which overrun charges are payable, and indicate that overrun charges are payable only in respect of overruns on MDQ for the Local Network Capacity Reservation Service and Trunk Capacity Reservation Service.

Charges for overrun are described in clause 3.13 of the proposed access arrangement. For an authorised overrun, a user of the Local Network Capacity Reservation Service or Trunk Capacity Reservation Service must pay an overrun charge equal to the daily equivalent to the "annual unit charge for capacity". For an unauthorised overrun, a user must pay an overrun charge equal to 1.5 times the daily equivalent to the annual unit charge for capacity. In addition to these charges, a user must pay (for either an authorised or unauthorised overrun) an additional charge (the annual overrun charge) if the number of overruns is in excess of a threshold determined on the basis of the term of the service agreement, and the value of the annual overrun charge escalates as the number of overruns in excess of the threshold increases.

### *Initial submissions*

Submissions from EnergyAustralia and Harrison Manufacturing addressed the provisions of the terms and conditions relating to overruns. Extracts of the relevant sections of these submissions are reproduced below.

EnergyAustralia submits that the definitions of overrun are not clear and that the terms and conditions relating to overruns should be consolidated in a single section of the access arrangement.

Harrison Manufacturing submits that the overrun charges are unreasonably punitive and suggests that a tolerance limit be established within which overruns may occur before penalty charges are applicable.

- **EnergyAustralia**

  8. Overruns

  The definition of overruns needs to be improved. It is not clear. Also, there are references to overruns throughout the document. These various provisions should be located in one place and applied consistently. EnergyAustralia provides some drafting amendments in this regard in Attachment D.

  …

  [Attachment D]

  CONSOLIDATED OVERRUN PROVISIONS

  1 Definitions

  Authorised Overrun means an Overrun approved before the Overrun occurs. (p.72) An Authorised Overrun at the Delivery Point or Nominated Delivery Point (as appropriate) will be deemed to be an Authorised Overrun for the purposes of a Trunk Service.

  Charge Number means:

(i) nine Days plus,

(ii) for each Month or part Month in excess of 12 Months but less than a whole Contract Year in the Period, an additional ¾ of a day, rounded up to the nearest whole number.

Overrun means the withdrawal of a quantity of gas at a Delivery Point in excess of the MHQ in any Hour or in excess of the MDQ on any Day. (p.77) Overruns may be authorised or unauthorised.

In relation to Trunk Services, an Overrrun will be deemed to have occurred if withdrawals at the Delivery Point or Nominated Delivery Point (as appropriate) exceed the MHQ in any Hour or the MDQ for that Delivery Point or Nominated Delivery Point (as appropriate) on any Day.

Overrun Charges means the charges as described in clause 4. (p.77)

Period means a Contract Year plus the number of Months or part Months in the Term in excess of 12 Months but less than a whole Contract Year.

Unauthorised Overrun means an Overrun which is not approved by AGLGN before it occurs. (p.81)

2 Authorised Overruns

(a) A User may request an Authorised Overrun on giving one Business Day's notice to AGLGN.

(b) The User and AGLGN must agree the overrun quantity for MDQ and MHQ (such agreed Quantity is the "Authorised Overrun Quantity" in respect of each) and the Day or Days and/or Hour or Hours, on which the Authorised Overrun Quantity will be transported and/or delivered.

(c) To avoid doubt, if the withdrawals at a Delivery Point (and Nominated Delivery Point):

(i) on a Day exceed the sum of the MDQ for the Delivery Point or Local Network Receipt Point and any authorised Overrun Quantity for MDQ for the Day; or

(ii) in any Hour exceed the MHQ and any Authorised Overrun Quantity for MHQ for the Hour,

then an Unauthorised Overrun will have occurred and the excess will be an Unauthorised Overrun Quantity.

(d) Where a Delivery Point is served under two or more Service Agreements, and an Overrun occurs:

(i) an Overrun will have occurred under each Service Agreement;

and

(ii) the Overrun quantity will be apportioned between the Service Agreements proportionately according to MDQ. (p.86)

(e) In relation to all Reference Services (except Tariff Reference Services), AGLGN will not be obliged to deliver at any of the User's Delivery Points or Local Network Receipt Points a quantity of gas greater than the MDQ for that Delivery Point, or MHQ in any Hour except to the extent it has agreed to an Authorised Overrun under this clause. (p.94)

3 When Overrun Charges apply

(a) A User is not required to pay charges for Overruns in relation to the following services:

(i) Local Network and Trunk Managed Capacity Services;

(ii) Local Network and Trunk Throughput Services; and

(iii) Local Network Tariff Services.

(b) A User is liable for Overrun Charges in respect of Overruns under Local Network Capacity Reservation Service Agreements and Trunk Capacity Reservation Service Agreements.

(c) Where a Request for Additional Capacity in relation to a Local Network Capacity Reservation Service is accepted after the Additional Capacity or part of it has been used by the User, a charge will be payable by the User in respect of an Overrun incurred as a result of the User exceeding:

(iii) the MDQ (excluding the Additional Capacity requested) prior to the Retrospective Date; and

(iv) the MDQ (including the Additional Capacity requested) on or after the Retrospective Date. (p.7)

Except as provided above, a charge will be payable by the User in respect an Overrun on the quantity of Gas in excess of the MDQ (excluding the Additional Capacity Requested), up until the later of the date AGLGN agrees to the Request and the date of commencement of the Additional Capacity. (p.7)

(d) To avoid doubt, in respect of a Customer above 30TJ, where a Request for Short Term Capacity in relation to a Local Network Capacity Reservation Service is accepted after the capacity or any part of it has been used by the User, a charge will be payable by the User in respect of an Overrun on the quantity of gas in excess of the MDQ and Short Term Capacity used at the Delivery Point. (p.6)

(e) Overrun charges under paragraphs (b) to (e) will be calculated in accordance with clause 4.

4 Overrun Charges

(a) A User is only liable for Overrun Charges in respect of overruns relating to MDQ in any Day and are not payable in respect of Overruns relating to MHQ.

(b) For each Day on which an Overrun occurs, the User must pay an Overrun Charge calculated by multiplying the Overrun quantity by 1/365 if authorised, and 1.5/365 if unauthorised, of the Annual Unit Charge for Capacity.

(c) In addition to the Daily Overrun Charge the User will also be liable to pay an annual Overrun Charge as follows:

(i) for Overruns up to the Charge Number in the Period, the annual Overrun Charge will be nil.

(ii) If the number of Overruns in the Period is greater than the Charge Number, the annual Overrun Charge will be the timeweighted average Annual Unit Charge for Capacity during the Period multiplied by the Relevant Quantity.

(iii) The Relevant Quantity will be determined as follows:

(A) if the number of overrun Days during the Period is equal to the Charge Number plus one, the Relevant Quantity will be the daily overrun quantity which is third in the order of all daily overrun quantities for the Period when ranked from largest to smallest;

(B) if the number of overrun days is equal to the Charge Number plus two, then the Relevant Quantity will be the second in that ranking;

(C) if the number of overrun days is equal to the Charge Number plus three, four or five, then the Relevant Quantity will be the largest daily overrun quantity; and

(D) if the number of overrun days is equal to or greater than the Charge Number plus six, the Relevant Quantity will be 1.2 times the largest daily overrun quantity. (p.57)

(d) Any charge payable by a User in respect of an Overrun is payable in addition to, and not in substitution for, any other charge under the Service Agreement.

(e) Payment of Overrun Charges does not alter MDQ specified in the Service Agreement. (p.58)

5 Liability for Overruns

(a) Users will be liable for and indemnify AGLGN against any loss, liability or expense suffered or incurred by AGLGN as a result of any Unauthorised Overrun.

(b) To avoid doubt, notwithstanding that a Request for Short Term Capacity or Additional Capacity in relation to a Local Network Capacity Reservation Service is accepted, the User will be liable for and indemnify AGLGN against all losses, liabilities and expenses incurred as a result of the User exceeding the MDQ applicable at the time it utilised the capacity unless the capacity was taken at that time as an Authorised Overrun. (p.6 and 8)

- **Harrison Manufacturing**

  2. Charges for Consumption above the MDQ

  We understand that the proposed arrangement applies to Users and not necessarily to Customers and acknowledge that we may be somewhat confused as to its impact on us as (we presume) a Customer. However, we submit that, for small to medium customers, the size and rate of escalation of the charges for consumption above the contracted MDQ are disproportionate to the magnitude of any problem that such consumption would cause AGLGN. We believe that they are set at a punitive level to force such customers to contract for quantities considerably in excess of their probable needs to ensure a safety margin.

We acknowledge that some notice was taken of our submission on this matter in 1998 and that the additional summer tranche provision was introduced. Further, we have taken advantage of this provision on one occasion. However, this provision is only of use in circumstances when a customer knows at least one month in advance that their offtake will increase temporarily. More often than not this is not the case. Opportunities for extra work can arise at short notice, and the period of extra use may be less than one month, or may not fall nicely within the boundaries of a calendar month. (In this regard we also acknowledge that we are not sure whether the Short Term Capacity provisions - which appear to be more flexible - will be able to be accessed by Customers).

We submit that the total network could readily absorb short-term random consumption by small to medium customers at levels 20% above their MDQ. The network's storage capacity was well-demonstrated during the recent Moomba supply problem. Given this, we propose that daily consumption rates of up to 110% of MDQ be allowed for such customers for up to three days per month without incurring a penalty. The provision for purchasing temporarily-increased offtakes should also be retained.

In making this proposal we recognise fully the need for AGLGN to be protected against deliberate understating by customers of their potential consumption. However, we believe that the current charge system errs far too greatly in the other direction. To check the actual situation, we would like to request, through the Tribunal, that AGL/AGLGN publish - summed over the small to medium class of customers in total - the Annual Contract Quantity and the Annual Actual Quantity consumed in the last 12 month period.

### *Preliminary analysis*

In its preliminary analysis of the terms and conditions, The Allen Consulting Group addressed three aspects of provisions relation to overruns: the clarity of provisions; the provisions for and legality of overrun charges; and the attribution of overruns in the case of shared delivery points.

#### *Clarity of provisions relating to overruns*

EnergyAustralia submits that the definitions of overrun are not clear and that the currently fragmented terms and conditions relating to overruns should be consolidated within a single section of the access arrangement.

In its preliminary assessment of the terms and conditions, The Allen Consulting Group did not find the definitions of overrun to be unclear and did not consider the terms and conditions relating to overruns to be unreasonable for reason of ambiguity.

It is evident, as EnergyAustralia addresses, that the terms and conditions relating to overruns are fragmented within the Access Arrangement document. However, as discussed in section 3.2 of this report, it was considered that IPART is only able to require amendments to the access arrangement in this respect if the fragmentation causes the terms and conditions to be unreasonable, such as for reason of consequent ambiguity. The Allen Consulting Group did not consider this to be the case in respect of the provisions relating to overruns.

### *Overrun charges*

In regard to whether there should be additional charges for overruns, Harrison Energy appears to submit that if there is a capacity of the AGLGN network to accommodate overruns without a compromise in the integrity of the network, then a tolerance for overruns should be established within which penalty charges are not payable.

It would not be possible to establish whether the AGLGN network could accommodate overruns without technical advice on the system and as such it is not possible to definitively comment on Harrison Manufacturing's suggestion of the network being capable of accommodating an overrun threshold. It is notable, however, that the access arrangements for the Victorian and Western Australian gas distribution systems do not explicitly contemplate either the concept of an overrun or of overrun charges.[6]

The Allen Consulting Group gave consideration to the legality of charges for overruns that may be in the nature of penalties.

Section 3.13 of the proposed access arrangement provides for charges that are in the nature of penalty charges to apply to unauthorised overruns (a charge of 1.5 times the unit charge for capacity under the relevant reference tariff) and for a number of either authorised or unauthorised overruns in excess of a threshold number each year.

The provisions for overrun charges are the same as apply under the current access arrangement. There have been no submissions from users of the AGLGN network that these charges are unreasonable (Harrison Manufacturing is not a user of the network, but rather an end-use customer of gas).

In Western Australia, the Independent Gas Pipelines Access Regulator has investigated whether a service provider may legally impose charges that are in the nature of a penalty: that is, charges that do not reflect damages incurred by the service provider as a result of the related actions of users. The Western Australian regulator determined that provisions for imposition of penalty charges are reasonable only to the extent that they are imposed only to penalise specific conduct engaged in by users which causes actual pecuniary loss or damage or which exposes a pipeline to a significant risk that threatens the integrity of the pipeline.[7]

In view of the precedent with the Victorian and Western Australian distribution systems for the absence of penalties in respect of overrun and the potential illegality of penalty charges applied indiscriminately, it was concluded that IPART may wish to consider seeking amendment of the proposed terms and conditions to limit the circumstances in which overrun charges may be applied. It was suggested that IPART obtain legal advice on this issue.

[6] The Victorian gas distribution systems are operated as market carriage pipelines and therefore have no contracted MDQ/MHQ that can be overrun.

[7] Independent Gas Pipelines Access Regulator, 18 November 2003, Supplementary Reasons and Amendment – Final Decision on the Proposed Access Arrangement for the DBNGP.

#### *Overruns at shared delivery points*

While not raised in submissions, there is a further issue in respect of overruns, being the provision under clause 20 of Schedule 2A that relates to the allocation of overruns between service agreements where a delivery point is served under two or more service agreements.

Under clause 20, where an overrun occurs at a delivery point served under two or more service agreements, an overrun at the delivery point is deemed to have occurred as an overrun under each of the service agreements with the extent of overrun under each of the agreements determined in proportion to the MDQ of each agreement. This provision fails to recognise that under clause 27 of Schedule 2A, where gas is delivered to a delivery point for more than one user or under more than one service, the user or users must establish allocation methodologies for the purposes of allocating gas deliveries to users and services. The Allen Consulting Group took the view that it may be unreasonable that where such allocation methodologies have been established that AGLGN would not apportion overrun quantities in accordance with the allocation methodologies. It was therefore recommended that IPART seek amendment of clause 20 of the proposed access arrangement to provide for apportionment of overrun quantities in accordance with allocation methodologies established under clause 27, and if no allocation methodology has been established then for apportionment to occur under provisions of clause 20 as proposed.

### *Further Submissions*

#### *Clarity of provisions relating to overruns*

- **Energy Australia**

  [Attachment 1]

  EnergyAustralia is of the view that provisions are unreasonable if they cannot be readily ascertained. The reasonableness test must be made having regard to all the circumstances, included the costs to users of ambiguous, repetitive and confusing provisions.

#### *Overrun charges*

- **AGLGN (10 September 2004)**

  The pricing structure in the AA is designed so that the revenue derived from the various services will cover the efficient costs of providing those services. If revenue derived from services related to non-tariff delivery points is to cover the costs of those services, then it is essential that Users contract for the appropriate level of usage of those services.

  If there were no mechanism to ensure that Users pay for an appropriate amount of capacity, then the pricing structure would not meet the requirements of section 8.1(a) of the Gas Code as it would not provide AGLGN with "the opportunity to earn a stream of revenue that recovers the efficient cost of delivering the Reference Service"

  Overrun charges are not a penalty imposed on Users but the essential mechanism used to encourage Users of Services related to Non-Tariff Delivery Points to contract for the appropriate level of services. Overrun charges also correct a shortfall where a User has failed to contract for an appropriate level of service under a capacity reservation service.

If AGLGN's ability to impose overrun charges was taken away this would require a complete redesign of AGLGN's services and pricing structure. It is highly likely that any replacement pricing structure would be less rational, equitable and predictable than that proposed in AGLGN's proposed AA.

- **AGLGN (6 October 2004)**

  ACG initially raised the question of whether the overrun charges proposed by AGLGN are by nature a penalty, and if is so whether it is permissible under the code for charges that are in nature a penalty to be charged. AGLGN maintains its position that the proposed overrun charges are not a penalty but an essential mechanism for ensuring that users pay for an appropriate portion of the total cost of providing the service. It is AGLGN's understanding that having considered the submissions by AGLGN, the only aspect of the proposed overrun charges that ACG still consider may be a penalty is the loading that is added to an unauthorised daily overrun.

#### *Overruns at shared delivery points*

- **AGLGN (10 September 2004)**

  AGLGN does not agree with this recommendation which appears to be based on a misunderstanding of clauses 20 and 27 of the AA.

### *Final analysis and recommendations*

#### *Clarity of provisions relating to overruns*

In its preliminary assessment, The Allen Consulting Group determined that while terms and conditions relating to overruns are fragmented throughout the Access Arrangement document this fragmentation is not sufficient to create ambiguity in the provisions and hence not reason for requiring amendment of the terms and conditions.

In its further submission, EnergyAustralia reiterated its view that the fragmentation of provisions relating to overruns results in unreasonable ambiguity in provisions.

The fragmentation referred to by EnergyAustralia arises in respect of the general provisions relating to overruns in clauses 13 to 20 of schedule 2A, and specific provisions for individual reference services in sections 2.1, 2.2, 2.3 and 2.5 of the proposed access arrangement. In light of the further submission from EnergyAustralia, these provisions have been re-examined. The provisions of clauses 13 to 20 of schedule 2A are in the nature of terms and conditions setting out when an overrun is deemed to occur, making provision for authorised overrun, indicating those services for which overrun charges are payable, indicating liability of users for damages resulting from unauthorised overruns, and indicating the manner in which overruns are apportioned in the case of shared delivery points. The provisions relating to overruns in sections 2.1, 2.2, 2.3 and 2.5 of the proposed access arrangement indicate, for individual reference services, when an overrun is deemed to occur and whether overrun charges are payable. The provisions in these sections duplicate, but do not contradict, provisions of clauses 13 to 20 of schedule 2A. The Allen Consulting Group therefore maintains the view that, while there is duplication in the statement of terms and conditions relating to overruns, this duplication does not result in inconsistency or ambiguity and therefore cannot be held to be unreasonable.

### *Overrun charges*

In its preliminary assessment of the terms and conditions, The Allen Consulting Group raised the issue of the potential illegality of a penalty component of overrun charges, although stressing that this is an unresolved issue and not recommending that IPART seek amendment of the Access Arrangement on this matter.

AGLGN has made further submissions that the proposed overrun charges are not in the nature of a penalty, but in the nature of a charge which reflects a reasonable cost of service. AGLGN also contends, however, that overrun charges are an essential mechanism used to encourage Users of Services related to Non-Tariff Delivery Points to contract for the appropriate level of services. It is this latter consideration that would explain the overrun changes being established as a multiple of the distribution tariff that would have been payable if the overrun quantity had comprised delivery of gas within the contracted capacity of the user. This situation arises in respect of the charge for unauthorised daily overrun.

It may reasonably be considered that the amount of the overrun charge that is in excess of the reference tariff that would normally be payable for the gas delivery is in the nature of a charge that is levied on the user for the purpose of motivating the user to contract for an appropriate level of capacity, rather than deliberately contract for less capacity and transfer the risk of demand being less than forecast from the user to AGLGN. It is this component of the overrun charge that may be considered to be in the nature of a penalty if fails to be reflective of costs incurred by AGLGN as a result of a user taking an overrun quantity.

As indicated above under the preliminary analysis, a penalty charge may be held to be unreasonable as a result of it not reflecting the value of actual damages or losses. However, whether this is the case is uncertain. In its preliminary assessment, The Allen Consulting Group reflected a position taken by the Western Australian regulator that penalty charges that do not reflect a cost actually incurred by a service provider may not be legally permitted. Whether this is the case has not, however, been conclusively determined and the determination of the Western Australian regulator in this respect is currently the subject of an appeal. The Allen Consulting Group recommended that IPART seek legal advice on taking a position on this issue, but refrained from recommending that IPART seek amendment of the access arrangement. It may be open for IPART to accept the provisions for overrun charges as proposed on the basis that such charges appear to be accepted (or at least not opposed) by users, or to seek to limit the circumstances in which the "penalty component" of overrun charges may be imposed.

At this point in time and reflecting common practice in the pipeline industry of having penalty charges for the purpose of motivating users to use gas transportation services in accordance with contractual entitlements, it is not recommended that IPART seek amendment of the proposed access arrangement.

### *Allocation of overrun charges across users*

In its preliminary assessment of the terms and conditions, The Allen Consulting Group took the view that for shared delivery points where the respective users have established allocation methodologies for the purposes of allocating gas deliveries to users and services, AGLGN should apportion overrun quantities in accordance with the established allocation methodologies rather than automatically in proportion to the MDQ of each user.

AGLGN submits that in relation to a delivery point that is served under two or more Service Agreements that it is only an overrun defined as delivery of gas in excess of the total MDQ for the delivery point that is of concern and which would attracted overrun charges, rather than overrun in respect of individual users that take delivery of gas at the shared delivery point. This is not evident from the relevant provisions of schedule 2A. If its is indeed the intent of AGLGN that this should be the case, then amendment of clause 20 of schedule 2A may be warranted to indicate that "where a delivery point is served under two or more service agreements then an overrun is only deemed to occur where withdrawals at that delivery point exceed the total for all service agreements of MDQ in any day or MHQ in any hour". It is recommended that IPART require the terms and conditions to be amended to this effect.

This point aside, AGLGN contends that there are advantages in allocating the amount of overrun between service agreements in proportion to MDQ under each service agreement rather than in accordance with an allocation methodology notified to AGLGN under clause 27 of schedule 2A. The Allen Consulting Group accepts the advantages cited by AGLGN. In effect, however, the allocation of overrun in the manner proposed by AGLGN would place an onus on the users sharing the delivery point to determine who should bear liability for the overrun charges. This implies a requirement for the users sharing the delivery point to enter into some manner of arrangement to allocate overrun charges. This is not necessarily unreasonable, as similar arrangements between the users are already contemplated under clause 27 of schedule 2A for the purposes of allocating deliveries. The Allen Consulting Group therefore withdraws from its recommendation that IPART seek amendment of clause 20 of the proposed access arrangement to provide for apportionment of overrun quantities in accordance with allocation methodologies established under clause 27, and if no allocation methodology has been established then for apportionment to occur under provisions of clause 20 as proposed.

## 4.9 Metering

### *Proposed terms and conditions*

Clauses 21 to 26 of Schedule 2A relate to metering of gas deliveries at delivery points and provide for:

- metering to occur by metering equipment provided by AGLGN (clause 21);
- access for AGLGN to delivery points and metering equipment, and provision for AGLGN to estimate gas deliveries where access is not provided (clauses 22 and 23);
- determination of gas deliveries in the event that metering equipment fails to operate (clause 24);
- determination of the quantity of gas delivered as a product of volumes and average heating values (clause 25);
- a user to provide details of meters and meter readings to AGLGN in the event that the Gas Market Business Rules are changed to metering and meter reading to be undertaken by a person other than AGLGN (clause 26).

#### *Initial submissions*

No submissions on the proposed access arrangement address the clauses of Schedule 2A relating to metering.

#### *Preliminary analysis*

In its preliminary analysis of terms and conditions it was determined that provisions of the terms and conditions relating to metering appear reasonable and in accordance with similar provisions under the access arrangement for the Western Australian distribution systems and under the Victorian Gas Distribution System Code.

It was also noted that AGLGN has explicitly provided for a change in metering arrangements that may arise as a result of changes in the Gas Retail Market Business Rules. Metering is a matter already addressed by the GRMBRs and it was indicated that one element that IPART should consider amendment of the terms and conditions relating to metering to ensure that there are no provisions that deal with a matter that is already the subject of the GRMBRs, as discussed in section 3.5.

#### *Further submissions*

No further submissions were made on this issue, although AGLGN has indicated separately from submissions that it maintains that the current provisions are reasonable requirements of a service provider.

#### *Final analysis and recommendations*

In light of the submission from AGLGN, The Allen Consulting Group has further examined clauses 21 to 26 of Schedule 2A relating to metering of gas deliveries at delivery points. It is noted that the provisions relating to metering are an example of a matter on which the GRMBRs and access arrangement interact. The manner in which AGLGN has addressed this interaction – for clause 26 to apply only as a contingent provision allowing for a change in the GRMBRs – is considered appropriate and no change to the terms and conditions is considered necessary to accommodate the interaction between the terms and conditions and the GRMBRs.

### 4.10 Allocation of gas at a shared delivery point

#### *Proposed terms and conditions*

Clause 27 of Schedule 2A relates to circumstances in which gas is delivered to a delivery point for more than one user or more than one service. Clause 27 requires that in such circumstances the user or users establish allocation methodologies and notification processes reasonably acceptable to AGLGN, and provides for AGLGN to adopt some other reasonable methodology for allocation of gas where no such methodology or notification processes are established.

#### *Initial submissions*

No submissions on the proposed access arrangement address the clauses of Schedule 2A relating to allocation of gas at a shared delivery point.

#### *Preliminary analysis*

Provisions of the terms and conditions relating to allocation of gas at a shared delivery point appear reasonable. Provision for users to determine a gas allocation method at delivery points, and for a service provider to determine a reasonable allocation in the event that users fail to provide notification of an allocation methodology has been found reasonable in respect of other Access Arrangements.[8]

#### *Further submissions*

No further submissions on the terms and conditions of the proposed access arrangement addressed clause 27 of schedule 2A.

#### *Final analysis and recommendations*

The Allen Consulting Group maintains the view set out in the preliminary analysis.

### 4.11 New receipt points and receipt stations

#### *Proposed terms and conditions*

Clauses 28 to 32 of Schedule 2A relate to the establishment by a User or another party of new receipt points and receipt stations for delivery of gas into the AGLGN network. The clauses provide for:

- a requirement that there be a receipt station established upstream of any receipt point established after 1 January 2005, and that the receipt station comply with technical requirements established by AGLGN (clauses 28 to 30);
- Provision for AGLGN to unilaterally determine to operate the pressure and flow control facilities at any receipt station that is not owned by AGLGN (clause 31); and
- provision for AGLGN to require that users of a new receipt point pay costs incurred by AGLGN in undertaking works required to enable a new receipt point to be established and integrated into the AGLGN network (clause 32).

#### *Initial submissions*

The submission of TXU addresses the provisions relating to new receipt points and receipt stations, as follows.

- **TXU**

  Where a user is required to establish a receipt station, AGLGN may request certain alterations or additions to be made to that receipt station at the user's cost. There is currently no limit on AGLGN's power to request these, and no cap on the amount that a user would pay.

#### *Preliminary analysis*

TXU submits that there is no limit on the amount that a user may be required to pay to meet technical requirements established by AGLGN for receipt stations.

[8] Independent Gas Pipelines Access Regulator, 23 May 2003, Final Decision on the Proposed Access Arrangement for the Dampier to Bunbury Natural Gas Pipeline, para 559, 729.

TXU's submission is not correct. Clause 29 of Schedule 2A provides that requirements that may be imposed by AGLGN must be in accordance with good industry practice for the type of facility and conform to appropriate Australian and internationally recognised standards and codes. Under this provision, a user could contest requirements imposed by AGLGN if it is considered that requirements being imposed by AGLGN are in excess of good industry practice or compliance with relevant standards and codes.

Notwithstanding these limits on AGLGN's ability to impose requirements on users, there may be a difficulty in a User contesting requirements imposed by AGLGN as there are no dispute resolution mechanisms established by the terms and conditions.

While TXU's submission that there is inadequate protection offered to users in respect of technical requirements for receipt stations may not be justified, a similar contention could be justified in respect of the provision of clause 32 for AGLGN to pass on to users the costs incurred in undertaking works required to enable a new receipt point to be established and integrated into the AGLGN network. There is no qualitative or quantitative protection offered to users is respect of this requirement and the requirement could therefore be considered unreasonable.

### *Further submissions*

- **AGLGN (10 September 2004)**

  AGLGN agree to include a reasonableness test on costs to be recovered from users that would work in conjunction with existing appeal provisions.

- **AGLGN (6 October 2004)**

  ACG are concerned that on a range of matters, including security payments, the requirement for AGLGN to behave reasonably should be accompanied by a dispute resolution mechanism incorporated in the terms and conditions. AGLGN highlighted in its earlier submission that clear dispute resolution mechanisms are incorporated in both the Code and the Transportation Agreements. AGLGN maintain that these provisions make the need for any further dispute resolution mechanism redundant.

- **TXU**

  [In its submission of 6 October, TXU repeats its original submission in relation to costs of establishing a receipt station.]

- **Macquarie Generation**

  Macquarie Generation has undertaken negotiations with AGLGN in relation to a connection agreement for design and construction of works associated with connection of the proposed pipeline from Hexham to Tomago into the AGLGN trunk network at Hexham.

  AGLGN has provided Macquarie Generation with its quotation of costs associated with such interconnection – and Macquarie Generation is concerned that the proposed cost for the connection is very high.

  Macquarie Generation is seeking greater transparency in relation to the proposed connection works, and given that Macquarie Generation is the only user in relation to those works, submits that such works should be contestable.

#### *Final analysis and recommendations*

The Allen Consulting Group maintains the recommendation, which AGLGN has indicated agreement to implement, that IPART seek amendment of clause 32 of schedule 2A to limit the ability of AGLGN to recover costs to a limit of costs *reasonably* incurred.

The Allen Consulting Group also maintains the general recommendation that, given the range of powers of AGLGN under the terms and conditions that are constrained only by a requirement for AGLGN to behave reasonably, a requirement for AGLGN to include a mechanism of dispute resolution in the terms and conditions for reference services is considered to have ample justification.[9] The submission from Macquarie Generation on potential disagreements over cost gives weight to this recommendation.

### 4.12 Alteration of receipt points and receipt stations

#### *Proposed terms and conditions*

Clauses 33 and 34 of Schedule 2A relate to alterations to receipt points and receipt stations. The clauses provide for:

- AGLGN to require that users make alterations to receipt stations for the purpose of upgrading measurement performance or accommodating changes to gas demand characteristics; and
- AGLGN to recover from users costs incurred in undertaking works in modifying the network for the purposes of measuring or improving the measuring of gas quality at a receipt point.

#### *Initial submissions*

No submissions on the proposed access arrangement address the clauses of Schedule 2A relating to alterations to receipt points and receipt stations.

#### *Preliminary analysis*

While no submissions made on the proposed access arrangement addressed the provisions relating to alterations of receipt points and receipt stations, the submission by TXU in respect of establishing new receipt points and receipt stations has some relevance. That is, no qualitative or quantitative limits are established in respect of AGLGN's ability to require Users to undertake works and to pass on to Users costs incurred by AGLGN. The absence of such limits is considered to be unreasonable.

#### *Further submissions*

- **AGLGN (10 September 2004)**

  AGLGN agree to include a reasonableness test on costs to be recovered from users that would work in conjunction with existing appeals provisions.

[9] The absence of provisions in the terms and conditions for resolution of disputes is addressed in section 3.3 of this report.

- **AGLGN (6 October 2004)**

  ACG are concerned that on a range of matters, including security payments, the requirement for AGLGN to behave reasonably should be accompanied by a dispute resolution mechanism incorporated in the terms and conditions. AGLGN highlighted in its earlier submission that clear dispute resolution mechanisms are incorporated in both the Code and the Transportation Agreements. AGLGN maintain that these provisions make the need for any further dispute resolution mechanism redundant.

#### *Final analysis and recommendations*

The Allen Consulting Group recommends that amendments be sought to clauses 33 and 34 of Schedule 2A to:

- indicate that AGLGN may require users to make alterations to receipt stations for the purpose of upgrading measurement performance or accommodating changes to gas demand characteristics only to the extent that the alterations are in accordance with good industry practice and/or appropriate Australian and internationally recognised standards and codes; and
- indicate that AGLGN's rights to recover costs are limited to recovery of costs *reasonably* incurred.

The Allen Consulting Group maintains the recommendation that, given the range of powers of AGLGN under the terms and conditions that are constrained only by a requirement for AGLGN to behave reasonably, a requirement for AGLGN to include an acceptable mechanism of dispute resolution in the terms and conditions for reference services is considered to have ample justification.[10]

### 4.13 Delivery points and delivery stations

#### *Proposed terms and conditions*

Clauses 35 to 37 of Schedule 2A relate to delivery points and delivery stations. The clauses provide for:

- AGLGN to agree, at its discretion, to a request from a user for an additional delivery station at a single delivery point, while the intention is for each delivery point to contain only one delivery station (clause 35);
- delivery stations to generally be owned by AGLGN except for some facilities which are not integral to the transportation of gas (clause 36); and
- a delivery point to consist of one or all delivery stations where a customer's site was connected to the network as at the date of the 1997 Access Undertaking and was at that time being served by multiple delivery stations (clause 37).

#### *Initial submissions*

No submissions on the proposed access arrangement address the clauses of Schedule 2A relating to alterations to delivery points and delivery stations.

[10] The absence of provisions in the terms and conditions for resolution of disputes is addressed in section 3.3 of this report.

#### *Preliminary analysis*

Clauses 35 to 37 set out non-binding principles for the management of delivery points and discretions for AGLGN to manage delivery points in a manner different to these principles.

Taking into account the absence of submissions on these provisions, the provisions are considered to be reasonable.

#### *Further submissions*

No further submissions on the terms and conditions of the proposed access arrangement addressed clauses 35 to 37 of schedule 2A.

#### *Final analysis and recommendations*

The Allen Consulting Group maintains the view set out in the preliminary analysis.

### 4.14 Accounts and payments

#### *Proposed terms and conditions*

Clauses 38 and 39 of Schedule 2A relate to accounts and payments and provide for AGLGN to render invoices at regular intervals not less frequently than monthly, and for AGLGN to charge interest on amounts not paid within 14 days of the date of an account.

#### *Initial submissions*

Provisions of Schedule 2A relating to accounts and payments were addressed in submissions made by EnergyAustralia and Origin Energy. Both EnergyAustralia and Origin Energy submit that the provisions of Schedule 2A relating to accounts and payments are too brief and general to adequately address issues relating to accounts and payments. EnergyAustralia indicates that AGLGN incorporates additional terms and conditions relating to accounts and payments into service agreements for reference services, despite these terms and conditions not being specified in the proposed access arrangement.

Energy Australia submits that more detailed terms and conditions should be specified in the access arrangement, and provides an example of such terms and conditions.

- **EnergyAustralia**

  Schedule 2A contains two lines on accounts and payments. The general terms and conditions (forming part of the current transportation agreements) contain two and a half pages of detailed drafting. Some of it is out of step with standard commercial practice and the terms and conditions on which access to distribution networks is available in other jurisdictions. For example, in the General Terms and Conditions for Tariff Reference Services:

  - if a user disputes an invoice, it is still required to pay the full amount of the invoice rather than those amounts not in dispute;
  - where payment falls on a non-business day, payment is due on the first preceding business day;

- invoices will be provided "as soon as possible" after the Billing Period, rather than an obligation (even if it is only reasonable endeavours) to issue them by a set date.

[EnergyAustralia suggests the following different provisions in Attachment A of its submission]

(The following is a mark up of clause 17 from General Terms and Conditions for TariffReference Services)

17. INVOICING AND PAYMENTS

17.1 Service Provider to issue invoice

(a) As soon as possible after each Billing Period, the Service Provider must provide the User with an invoice specifying the amounts due for all Services supplied to the User in the preceding Billing Period. The Service Provider will use its best endeavors to render invoices to the User on the same Business Days of each month or such other invoicing period as agreed between the Service Provider and the User.

(b) Any adjustments or outstanding amounts in respect of any previous Billing Period (including, but not limited to, the amount referred to in clause 9(a)) must be included in the invoice.

(c) Invoices issued under this clause shall be in a format determined by AGLGN and must contain sufficient information as is reasonable to allow the User:

(i) to assess the accuracy of the Charges specified in each invoice; and

(ii) to comply with its obligations under any relevant regulation, rule, code, law or instrument in relation to the provision to the Customer of information concerning such Charges.

(d) If AGLGN renders an invoice for services that were provided more than 11 months prior to the date of the invoice, the User will not be obliged to pay that invoice to the extent that the User is precluded from recovering those costs from the relevant Customers.

17.2 Invoicing of Gas Balancing Charges

Any of the following amounts set out in the table may be included in any invoice under this condition 17, or separately invoiced in accordance with Annexure 2. In either event, the provisions of this condition 17 apply, except that payment of the amount is due within the time period specified in the table.

| Amount included in invoice | Time period within which payment is due |
|---|---|
| (a) the User's portion of the Operational Balancing Cost as specified in the notice given by the Service Provider under condition B17 of Annexure 2; | As specified in the notice |
| (b) the amount required to settle the User's Prior Imbalance Account as specified in the notice given by the Service Provider under condition A17 of Annexure 2; and | Within 7 days after date of notice |

| | |
|---|---|
| (c) the Notional Debt as specified in the notice Within 5 Business Days after date given by the Service Provider under condition A20.9(a)(ii) of Annexure 2 | Within 5 Business Days after date of notice |

17.3 Due Date for payment

(a) Except as otherwise stated in condition 17.2, the User must pay the aggregate amount stated in each invoice within 14 days of the date of the invoice ('Due Date'). Where payment falls due on a day which is not a Business Day, the Due Date will be the next Business Day after the date which is 14 Days after the date of the invoice.

(b) The User must nominate in writing the recipient of invoices if different to the party specified in Schedule 1.

17.4 Method of Payment

(a) Unless otherwise agreed by the Service Provider, payment of invoices must be made by unendorsed bank cheque, telegraphic transfer or electronic funds transfer to an account nominated by the Service Provider.

(b) If payment is made by telegraphic transfer or electronic funds transfer, the funds must be immediately available and payment will be deemed to be made only when the funds are credited to the Service Provider's account.

17.5 Interest on overdue payments

(a) If the User fails to pay an invoice by the Due Date, the User must, if required by the Service Provider, pay the Service Provider interest on any amount outstanding.

(b) Interest will be calculated from the Due Date to the date of payment (both inclusive) at an annual percentage rate equal to:

(i) the corporate overdraft reference rate (monthly charging cycle) applied by the Commonwealth Bank of Australia ('Bank') as at the Due Date (or if the Bank ceases to quote such a rate, then the rate which in the opinion of the Bank is equivalent to such rate in respect of similar overdraft accommodation) expressed as a percentage; plus

(ii) 2 per cent per annum.

17.6 Disputed payments

If the User disputes part or all of an invoice given by the Service Provider to the User under condition 17.1:

(a) the User must, within 10 days after receipt of the invoice, notify the Service Provider in writing specifying the amount in dispute and the reasons for the dispute;

(b) the Parties must comply with the dispute resolution process set out in condition 28; and

(c) the User must pay the those amounts of the invoice which are not bona fide in dispute in accordance with condition 17.3 and if the User fails to do so, the Service Provider may require the User to pay interest on the amount outstanding in accordance with condition 17.5.

17.7 Payment on resolution of dispute

If as a result of resolution of a dispute referred to in condition 17.6 the User is obliged to pay an amount to the Service Provider, then the User must pay the amount payable within 3 Business Days of the resolution of the dispute. If the Service Provider so requires, the User must pay interest to the Service Provider on the amount payable from the Due Date of the invoice in dispute to the date of payment by the User (both inclusive), calculated in accordance with condition 17.5.

17.8 Overcharging and undercharging

(a) If the User has been overcharged or undercharged under the Agreement and the User has paid an invoice containing the overcharge or the undercharge, then the Parties must agree on the correct amount payable and either:

(i) the Service Provider will credit or debit that difference to the User in the next invoice as appropriate; or

(ii) within 5 Business Days of the Parties agreeing on the correct amount payable, the Service Provider will refund the User or the User must pay the difference as appropriate.

(b) If the Party to whom the amount is owed so requires, the amount will include interest in accordance with condition 17.5 from the date of payment by the User or the date of invoice by the Service Provider (whichever is applicable), to the date of payment or refund under this condition 17.8 (whichever is applicable) (both inclusive).

(c) A Party may not claim from the other Party any amount overcharged or undercharged if more than 2 Calendar Years have elapsed since the date of the relevant invoice.

17.9 User to provide information

If information necessary for billing purposes is in the control of the User, the User must on request from the Service Provider furnish that information to the Service Provider within 3 Business Days after the end of the relevant Billing Period. If the User fails to furnish the information the Service Provider is entitled to render an invoice based on the Service Provider's estimate.

17.10 Justification of calculations

Each Party is entitled to require the other Party to provide sufficient evidence to establish the accuracy of any statement, charge or computation made by the other Party under the Agreement.

17.11 Set-off

Either Party is entitled, without prejudice to any other rights or remedies it may have, to withhold and set-off payment of any moneys not under dispute that are due or owing under this Agreement to the other Party (excluding any amount described in condition 17.2) against any amounts not under dispute that are due or owing under this Agreement by the other Party (excluding any amount described in condition 17.2).

17.12 Payment free of deduction or withholding

The User must pay amounts payable under this Agreement free and clear of any deductions or withholding except if required by law to deduct or withhold.

- **Origin Energy**

  AGLGN Access Arrangement for NSW Gas Networks Schedule 2A; Paragraphs 38 & 39 – Accounts and payments

  Origin is concerned that AGLGN's proposed clauses relating to Accounts and Payments are too subjective, open to contention and do not allow for common business practices such as:

  - Short payment of invoices by the amount in dispute in the case of disputes notified to the payee before the due date.
  - How retrospective disputes are to be handled
  - How to handle amounts in dispute but later found to be correct.
  - The rate of interest to be applied to unpaid amounts.

  To avoid the potential for preferential treatment of retailers, Origin therefore recommends the implementation of amended specific clauses that provide detail on how these common issues are to be handled.

### *Preliminary analysis*

Submissions made on the proposed access arrangement suggest that the provisions of schedule 2A relating to accounts and payments are too brief and general to adequately address issues relating to accounts and payments.

Clauses 38 and 39 of Schedule 2A do not address matters in relation to accounts and payment that are commonly addressed by other service providers in terms and conditions for reference services, and which are addressed by AGLGN in terms and conditions that are presented in standard service agreements for reference services, in addition to those terms and conditions specified in the Access Arrangement. These matters include requirements for the provision of information with invoices, obligations of parties in the event of disputes over invoices, procedures for dealing with instances of under and over charging and under and over payment, methods of payment, and calculation of interest on under and over payments. That these matters are addressed in the additional terms and conditions relating to accounts and payments that AGLGN has included in service agreements suggests that AGLGN itself considers the specification of such matters to be necessary in the specification of the rights and obligations of both AGLGN and a user under a service agreement. It is therefore considered that the provisions of the terms and conditions relating to accounts and payments are unreasonable by virtue of failing to address these matters. It is recommended that IPART seek amendments to the terms and conditions to include detailed provisions relating to invoicing and payment.

### *Further submissions*

- **AGLGN (10 September 2004)**

  AGLGN maintain that existing provisions are clear and address all material principles. Additional details are rightly addressed in transportation agreements.

- **EnergyAustralia**

  EnergyAustralia endorses [the view of The Allen Consulting Group] and refers IPART to the suggested provisions prepared by EnergyAustralia.

#### *Final analysis and recommendations*

The preliminary recommendation of The Allen Consulting Group (that IPART seek amendments to the terms and conditions to include detailed provisions relating to invoicing and payment) reflects a view that the terms and conditions for reference services should be specified in the access arrangement in sufficient detail that a user could enter into a service agreement for a reference service without further negotiation. As indicated in section 3.3, it is a matter for determination by IPART as to whether terms and conditions for reference services should be specified to this level of detail in the access arrangement.

AGLGN opposes amendment of the terms and conditions to include detailed provisions relating to invoicing and payment, contending that the general provisions set out in the proposed access arrangement are sufficient to be regarded as reasonable. Submissions from users present a contrary view.

In its submissions, AGLGN does not contend or provide any information to suggest reasons for establishing detailed provisions for invoicing and payment outside of the access contract. Indeed, the detailed provisions in standard service agreements produced by AGLGN suggest that AGLGN does not envisage the detailed provisions varying between users even if established outside of the access arrangement.

Given this, and in accordance with the view that the terms and conditions should be set out in sufficient detail for AGLGN and a user to enter into a service agreement under those terms and conditions, The Allen Consulting Group recommends that IPART require amendment of clauses 38 and 39 to include detailed provisions relating to invoicing and payment, including requirements for the provision of information with invoices, obligations of parties in the event of disputes over invoices, procedures for dealing with instances of under and over charging and under and over payment, methods of payment, and calculation of interest on under and over payments.

### 4.15 Force majeure

#### *Proposed terms and conditions*

Clauses 40 to 45 of Schedule 2A relate to obligations of parties where an event of force majeure occurs and provide for:

- non-performance under a service agreement to not be a breach of the service agreement where it results from an event of force majeure, subject to the party affected by the force majeure using reasonable endeavours to put itself in a position to perform its obligations (clauses 40 and 41) and providing notice to the other party (clause 42);
- an obligation for the parties to consult in good faith for resolution of a force majeure event if the event of force majeure prevents a party from meeting obligations for a period in excess of one year (clause 43);
- an option for either party to terminate the service agreement if an event of force majeure prevents a party from meeting obligations for a period in excess of one year, and the event of force majeure is not resolved by consultation in good faith (clause 43);

- waiving of charges based on MDQ in the event that AGLGN is unable to perform its obligations due to an event of force majeure occurring within the network (clause 44); and
- exclusion from provisions for force majeure of events of a party failing to pay money and a user failing to ensure that gas delivered to a receipt point meets the required specifications (clause 45).

### *Initial submissions*

Provisions of schedule 2A relating to force majeure were addressed in the submission from TXU, as follows.

- **TXU**

  Although the parties are relieved from any liability arising out an event of force majeure, such relief is not available where a party could have used "reasonable endeavours" to overcome the force majeure event after a reasonable period of time has passed. TXU believes it appropriate to remove the "reasonable endeavours" requirement from the Access Arrangements.

### *Preliminary analysis*

Limitation of liability for non-performance of contractual obligations as a result of an event of force majeure is a civil law concept that is a common contractual provision. Such provisions seek to limit the liability of parties to the contract for losses that occur as a result of events that:

- cannot reasonably be foreseen by the parties; and
- are beyond the parties' control.

A force majeure clause in a contract typically comprises a definition of the events that constitute events of force majeure, and statements of the rights and obligations of the parties where an event of force majeure occurs.

AGLGN has defined events of force majeure in Schedule 1 of the proposed Access Arrangement in a general manner as "any event or circumstance not within the control of a party to a Service Agreement and which by the exercise of due diligence, that party is not reasonably able to prevent or overcome. Definition of force majeure in this manner is common contractual practice, although practices in respect of gas access arrangements are variable and have comprised definition in a general sense similar to the proposal by AGLGN,[11] listing of events,[12] and definition by exception.[13] AGLGN's definition of the events that constitute force majeure is considered to be reasonable by consistency with common, although not universal, commercial practice.

AGLGN's statements of the rights and obligations of parties where an event of force majeure occurs have three principle elements:

[11] For example, the Access Arrangements for the Victorian Gas Distribution Systems (2003) that adopt the definition of force majeure from the Victorian gas Distribution System Code.
[12] For example, AlintaGas's Access Arrangement for the Mid West and South West Gas Distribution Systems (July 2000).
[13] For example, Epic Energy's Access Arrangement for the Dampier to Bunbury Natural gas Pipeline System (January 2004).

- a right of parties to not fulfil obligations where prevented from doing so by an event of force majeure;
- an obligation of a party that is prevented from fulfilling obligations by an event of force majeure to use reasonable endeavours to put itself in a position to perform its obligations; and
- an obligation of AGLGN to waive charges based on MDQ to the extent that an event of force majeure in the network prevents AGLGN from fulfilling its obligation to deliver gas.

TXU has objected to the second of these elements. This objection would not, however, appear to be justified. A continuation of a waiving of obligations for a party that could have returned itself to a position to fulfil its obligations would appear to be contrary to the principle of force majeure provisions that relate generally to circumstances where a party is unable to fulfil its obligations for reasons beyond the reasonable control of the party.

The obligation of AGLGN to waive charges where event of force majeure in the network prevents AGLGN from fulfilling its obligation to deliver gas places a financial risk on AGLGN in circumstances where AGLGN claims the benefit of force majeure. This is not a universal provision under Access Arrangements,[14] although the Independent Gas Pipelines Access Regulator in Western Australia has required that access arrangements in that state make provision for the refund of capacity charges of reference tariffs where a service provider claims the benefit of force majeure in respect of an interruption to gas deliveries.

Noting that AGLGN's provisions in relation to force majeure are consistent with common industry practice and with the general concept of force majeure, the provisions are considered to be reasonable.

#### *Further submissions*

- **TXU**

  [In its submission of 6 October, TXU repeats its original submission in relation to force majeure.]

#### *Final analysis and recommendations*

The further submission from TXU repeated its initial submission. In the absence of any further reasoning provided by TXU, The Allen Consulting Group maintains the view set out in the preliminary analysis.

### 4.16 Suspension of supply

#### *Proposed terms and conditions*

Clauses 46 to 50 of Schedule 2A relate to suspension of supply and provide for:

- a user to request AGLGN to stop or suspend delivery of gas to a delivery point, and an obligation on AGLGN to meet the request (clause 46);

[14] For example, there is no such explicit provision under the Access Arrangements for the Victorian distribution systems.

- AGLGN to require that a representative of the user is present at the time when AGLGN stops or suspends gas deliveries of gas to a delivery point (clause 47);
- AGLGN to unilaterally determine to stop or suspend the delivery of gas to a delivery point in certain specified circumstances (clause 48);
- AGLGN to charge the user for stopping or suspending the delivery of gas at the user's request (clause 49); and
- AGLGN to have no liability for losses, liabilities or expenses occurring as a result of the stopping or suspension of the delivery of gas in accordance with the terms and conditions, and for the user to indemnify AGLGN against any claims made in respect of the stopping or suspension of the delivery of gas (clause 50).

### *Initial submissions*

Provisions of schedule 2A relating to suspension of supply were addressed in the submission from TXU, as follows.

- **TXU**

  The provisions relating to suspension of supply are overly onerous (eg if a party requests suspension it must still pay a charge and may also need to still pay for the service; and if AGLGN suspends deliveries, the party must indemnify AGLGN against claims made by the party's customers arising out of the suspension). This latter clause is of particular concern and should be removed from the Access Arrangements. Alternatively this clause could be amended to limit indemnity to those occasions where the party requests suspension.

### *Preliminary analysis*

The provisions of Schedule 2A provide for AGLGN to stop or suspend delivery of gas to a delivery point in three types of circumstance:

- at the request of the user;
- where the user is in breach of the service agreement by being unable to maintain a balance of gas deliveries with gas receipt or by not ceasing to take gas at a delivery point after being notified by AGLGN to do so; and
- where the user is not a member of the scheme for operation of the natural gas retail market, or where the operator of the scheme for the operation of the retail market requests the suspension of gas deliveries.

It is considered reasonable that AGLGN should be able to suspend a user if the user is not a member of an approved scheme. As a member of an approved scheme, a user has a number of important obligations upon which AGLGN must rely, such as for example, providing access to metering.

Notwithstanding this, AGLGN has no implied authority to suspend any user if AGLGN is requested by the manager of an approved scheme to suspend the delivery of Gas to the Delivery Point. Further the Gas Market Company (as the "manager" of its approved scheme) has no power under the Gas Retail Market Business Rules to make such a request. The GRMBRs contain enforcement provisions that provide for a range of sanctions for non-compliance none of which include requesting AGLGN to suspend a user. Therefore, the inclusion in the terms and conditions of a right for AGLGN to suspend a user if requested by the manager of an approved scheme may be without authority and on that basis may be considered to be unreasonable.

TXU submits that provisions for costs to be incurred by a user in the event of deliveries of gas being stopped or suspended are unreasonable. These costs may include:

- charges payable by the user in respect of the relevant service;
- charges levied on the user by AGLGN for stopping or suspending the delivery of gas at the user's request; and
- costs incurred by the user as a result of AGLGN stopping or suspending delivery of gas for reasons other than at the user's request.

With regard to the first of these classes of costs, the effect of the relevant provision is to place the financial risk of a suspension of supply with the user, where the user has contracted for the supply of gas for a period but requests the stopping or suspension of supply before the end of that period. This does not appear unreasonable.

With regard to the second of these classes of costs, it would not be unreasonable for AGLGN to levy charges on a user sufficient to recover costs incurred as a result of complying with a request by a user to stop or suspend gas deliveries. However, there is no limitation on AGLGN to limit the charges to costs reasonably incurred. For this reason, this provision of Schedule 2A is considered unreasonable.

With regard to the third of the classes of costs, it is noted that the circumstances in which AGLGN may unilaterally determine to stop or suspend supply are limited to where the user is not meeting obligations under a service agreement (in respect of gas balancing, or by failing to comply with a notice from AGLGN to cease taking gas at a delivery point) or where the user fails to meet requirements under other regulation to be member of the scheme for operation of the gas market (noting the above recommendation to remove provision for AGLGN to suspend the delivery of gas to a delivery point if AGLGN is requested by the manager of an approved scheme). It is not unreasonable under these circumstances for the user to bear the costs of the stopping or cessation of supply, and to indemnify AGLGN against other costs.

### *Further submissions*

- **AGLGN (10 September 2004)**

  AGLGN accept the ACG recommendation to limit clause 49 to reasonable costs.

The Gas Market Company addresses the issue of suspension of supply in the letter attached to AGLGN's submission of 10 September 2004.

The relevant extract from the letter from the Gas Market Company is as follows.

> Allens have recommended that IPART seek amendment of clause 48 of Schedule 2A to remove provision for AGLGN to suspend the delivery of gas to a delivery point if AGLGN is requested by the manager of an approved scheme to suspend the delivery of gas to the delivery point. Market participants through the Business Rules Industry Committee are presently finalizing rule changes to address the issue of settlement of imbalances on a user's exit from the market. Those rules will, if accepted, introduce a provision to allow the market administrator to request network operators to suspend delivery of gas in certain circumstances. The circumstances in which such a request would be made will be limited and set out in detail in the new rule, if adopted. Therefore, we would request that the provision for AGLGN to suspend delivery to gas if requested by the manager of an approved scheme to suspend the delivery of gas to the delivery point be retained.

- **TXU**

  [In its submission of 6 October, TXU repeats its original submission in relation to suspension of supply.]

AGLGN has indicated separately from submissions that it maintains that the provision to suspend supply at the request of the manager of an approved scheme is reasonable.

#### *Final analysis and recommendations*

AGLGN submits that it is reasonable for the terms and conditions to include provision for AGLGN to suspend supply where instructed by the manager of an approved scheme (i.e.: the Gas Market Company), despite the current market rules (the GRMBRs) not providing authority for the manager of the approved scheme to do so. AGLGN's reason for this stance is that the GRMBRs may, at some time in the future, be changed to include such authority. The Allen Consulting Group accepts that if the GRMBRs authorised the GMC to request AGLGN to suspend gas supply for a user or customer, then AGLGN's proposed power to put this into effect would be reasonable. The Allen Consulting Group also accepts that the proposed power may be without effect until the GRMBRs are so changed. Given this, The Allen Consulting Group is of the view that it is unreasonable that the conditional power of AGLGN is not clearly expressed. It is recommended that clause 48 of schedule 2A be amended such that the provision for AGLGN to suspend supply to a delivery point at the request of the manager of an approved scheme is conditional upon the scheme providing the manager of the scheme with the authority to make such a request.

AGLGN has indicated in its submissions that it agrees to amendment of clause 49 of Schedule 2A to limit the value of charges imposed on a User in connection with the cessation or suspension of supply to costs reasonably incurred by AGLGN in complying with the request of the user to stop or suspend delivery of gas. The Allen Consulting Group therefore maintains the recommendation for this amendment.

### 4.17 Interruptions of supply

#### *Proposed terms and conditions*

Clauses 51 and 52 of Schedule 2A relate to interruptions of supply and provide for:

- AGLGN to interrupt or reduce the delivery of gas to a delivery point for purposes of repairs, tests, upgrades or maintenance, subject to the user being provided with reasonable notification; and
- full discretion for AGLGN to interrupt or reduce deliveries of gas in cases of emergency or risk of injury to persons or damage to property.

### *Initial submissions*

No submissions on the proposed access arrangement address the clauses of Schedule 2A relating to interruptions of supply.

### *Preliminary analysis*

Similar provisions to those proposed by AGLGN for interruption of supply are common in access arrangements for gas pipelines. For example, service providers for Victorian distribution systems are able to curtail or interrupt deliveries of gas for reasons of unplanned repairs, planned maintenance or other works, force majeure events, force majeure events, emergencies, and risks to health and safety.[15] Given this, the general provisions for interruption are considered reasonable.

Different access arrangements do, however, have differing requirements for the service provider to give advance notice to users of interruptions occurring due to planned maintenance or works. Under the access arrangements for the Victorian distribution systems, the service providers are required to provide notice of 10 days. Under the access arrangement for the Western Australian distribution systems, AlintaGas Networks is required to use practical endeavours to provide users with reasonable advance warnings of interruptions, and more particularly to provide 90 days notice of interruptions for reasons of planned maintenance or augmentations. For the Dampier to Bunbury Natural Gas Pipeline, the Independent Gas Pipelines Access Regulator required that the Access Arrangement provide for 30 days notice to be given to Users where interruptions to deliveries may occur due to planned maintenance.

Common practice for gas pipelines and access arrangements therefore appears to be for specification of a minimum period of notification of users where interruptions may occur due to planned maintenance or other works, although no regulator has presented a case to suggest that a requirement only for "reasonable notice" does not provide sufficient protection of the interests of users, and no parties have made submissions on the absence of a minimum notification period. On this basis, a determination by IPART that provision only for "reasonable notice" is not reasonable may be difficult to sustain.

### *Further submissions*

No further submissions were received on this issue. AGLGN has questioned in discussions whether or not the provision of "reasonable notice" to users prior to interruption of supply by AGLGN for planned maintenance is reasonable. AGLGN has also indicated that a minimum period of notice is required of AGLGN under the Network Code. Inclusion in the access arrangement would be duplicating provisions already established by other relevant authorities and would not provide any net benefit to users or AGLGN.

[15] Victorian Gas Distribution System Code, section 9, included by cross reference in the Access Arrangements for the Victorian distribution systems.

#### *Final analysis and recommendations*

AGLGN submits that a requirement for a minimum period of notice to users of interruption of supply for reasons of planned maintenance is unnecessary as such a requirement is already imposed by AGLGN by the "Network Code". AGLGN appears to refer to section 13 of the *Gas Network Code for Full Retail Competition*[16] which at clause 13.1 requires that:

> Except as provided by Law, a Network Operator must use its best endeavours to give a Retailer and affected Customers at least 5 Business Days notice prior to carrying out any planned maintenance, inspections, repairs or testing which will interrupt or substantially affect supply to a Customer's Delivery Point.

As noted by AGLGN, a specific requirement in the access arrangement for a notice period may be unnecessary given this provision of the Network Code.

As indicated in the preliminary analysis, The Allen Consulting Group did not recommend that IPART seek amendment of the access arrangement to include a minimum period of notice, indicating that such a requirement may be difficult to sustain. The Allen Consulting Group maintains this view.

### 4.18 Liability

#### *Proposed terms and conditions*

Clauses 53 to 60 of Schedule 2A relate to liabilities and indemnities and provide for:

- limitation of AGLGN's liability arising from breach of any condition or warranty implied into the Access Arrangement by the Trade Practices Act or equivalent State or Territory legislation to the re-supply of the relevant service or the payment of having the relevant service re-supplied (clause 54);
- neither party to the service agreement to have any liability to the other party in respect of consequential losses (clause 55);
- limitation of liability of both parties to each other in respect of
  - personal injury,
  - damage to property, or
  - breach of the access arrangement

  to loss or damage suffered by the second party (clause 56);
- a requirement that a user include in its supply arrangements with gas customers a provision that limits the user's liability to those customers, especially in relation to transportation of gas (clause 57);
- indemnification by each party to the service agreement of the other for any third-party claim arising in respect of loss or damage caused by one party to the other (clause 58);

[16] Ministry of Energy and Utilities, New South Wales, 20 December 2001, *Gas Network Code for Full Retail Competition: Guidelines Approved by Director General*.

- exceptions to the limitations on claims, damages and liabilities for losses occurring as a result of a number of actions of the users or of other users (clause 59); and
- liability of one party to the other to be reduced to the extent that the party affected by loss or damage had itself caused or contributed to the loss or damage (clause 60).

### *Initial submissions*

Provisions of Schedule 2A relating to liability were addressed in submissions from EnergyAustralia and TXU.

EnergyAustralia submits that the liability provisions of Schedule 2A are unreasonable and expands on the elements of the provisions that are considered unreasonable and the reasons therefore. Energy Australia also submits that provisions relating to liability are set out not only in the terms and conditions for the reference services but also elsewhere throughout the access arrangement, and that all relevant provisions should be consolidated into a single set of terms and conditions. EnergyAustralia provides in its submission a suggested set of re-drafted provisions relating to liability.

TXU submits that the liability of users should be limited to a monetary cap and should exclude liability for consequential losses.

Extracts of relevant parts of these submissions are reproduced below.

- **EnergyAustralia**

  9. Liability

  One issue contained in Schedule 2A and elsewhere in the Access Arrangement is that of liability. EnergyAustralia has reviewed the liability provisions in the light of the reasonableness criteria set out in clause 3.6 of the Access Code, the non-excludable warranties in the Trade Practices Act 1974 (Cth) and the Contracts Review Act 1980 (NSW). They have also been considered alongside the unfair terms in consumer contracts provisions in the Victorian Fair Trading Act 1999 as the Victorian model is being considered for implementation in NSW.

  Users would be squeezed between the unreasonable liability provisions in the Access Arrangement and the rights conferred on consumers by various statutory provisions. To enable a user to formulate agreements with customers, the liability regime between AGLGN and the user must be clear and fair. The liability provisions must be consolidated and should not place an unreasonable burden on users when interpreted in the context of the statutory rights of consumers with respect to users.

  EnergyAustralia is of the view that all of the liability and indemnity provisions throughout the Access Arrangement (other than those contained in clauses 54-60 of Schedule 2A) be deleted.

  Clauses 54-60 should be revised as set out in Attachment E. Attachment E also includes a more detailed discussion on the liability and indemnity provisions contained in the Access Arrangement.

  …

[Attachment E]

COMMENTS ON THE LIABILITY PROVISIONS IN AGLGN'S ACCESS ARRANGEMENT

1 Overview of Liability Provisions in 2003 Access Arrangements

1.1 Schedule 2A contains general terms and conditions that apply to all Reference Services.

Clause 53 of Schedule 2A of the 2003 Access Arrangement states that unless otherwise provided in the 2003 Access Arrangement, clauses 54 to 60 shall regulate all liability of AGLGN and the User arising in relation to any act, omission or event arising out of the 2003 Access Arrangement.

1.2 Despite clause 53, there are a number of provisions in the other parts of the 2003 Access Arrangement that also refer to liability. The first part of this review concerns the provisions contained in the other parts of the 2003 Access Arrangement. The second part of this review concerns the provisions in clauses 54 to 60.

1.3 The review is based on the reasonableness criteria set out in clause 3.6 of the gas pipelines access Code. In this regard, it is noted that Users will be on-supplying the gas to corporate and consumer customers. Due to the size of the customer base and the nature of the product, the only practicable and cost effective way for Users to supply gas to consumers is through standard form contracts. There are a number of pieces of legislation that impose obligations upon suppliers (in particular suppliers to consumers who use standard form contracts), for example:

(a) non-excludable warranties in the Trade Practices Act 1974, such as an implied warranty as to title, quiet possession and that the goods will be free from incumbrance and a condition that the goods supplied will be of merchantable quality and fit for their purpose;

(b) provisions relating to unconscionable conduct in the Trade Practices Act 1974, in particular, a court may have regard to the relative strengths of the bargaining positions of the corporation and consumer and whether as a result of conduct engaged in by the corporation, the consumer was required to comply with conditions that were not reasonably necessary to comply with the legitimate interests of the corporation;

(c) the Contracts Review Act 1980 that provides for various forms of relief in relation to a contract or provision of a contract that is found to be unjust in the circumstances relating to the contract at the time it was made. In making such a determination, the Court is to have regard to the public interest and, amongst others, whether or not prior to or at the time the contract was made its provisions were the subject of negotiation, whether or not it was reasonably practicable for the party seeking relief under the Act to negotiate for the alteration of or to reject any of the provisions of the contract and whether or not any provisions of the contract impose conditions which are unreasonably difficult to comply with or not reasonably necessary for the protection of the legitimate interests of any party to the contract; and

(d) the unfair terms in consumer contracts provisions in the Victorian Fair Trading Act 1999, which provides that unfair terms in consumer contracts are void. A term in a consumer contract is to be regarded as unfair if, contrary to the requirements of good faith and in all the circumstances, it causes a significant imbalance in the parties' rights and obligations arising under the contract to the detriment of the consumer. A court may take into account whether the term was individually negotiated and, amongst others, whether the term has the object or effect of permitting the supplier but not the consumer to avoid or limit performance of the contract.

The unfair terms in consumer contracts provisions in the Victorian Fair Trading Act are predominantly aimed at standard form contracts. Any terms that are prescribed by the regulations to be unfair will affect all existing standard form contracts, even those entered into before the legislation. In respect of terms that are not prescribed specifically in the legislation, the regulator in Victoria, Consumer Affairs Victoria, has indicated that it will be particularly pursuing lockin terms, punitive dispute resolution terms, terms restricting the liability of suppliers and penalty clauses which allow a supplier to retain prepayments (other than deposits) when consumer cancels the contract or impose unfair charges on the consumer. The legislation is not simply concerned with how the contract came to be signed, but on the substantive nature of the terms. The Act provides a list of non-exhaustive factors which indicate unfairness in a contract. These factors include circumstances such as permitting the supplier but not the consumer to vary or terminate the contract and limiting the supplier's vicarious liability for negligence of its agents.

1.5 The unfair terms in consumer contract provisions in the Victorian Fair Trading Act are a relevant consideration as a proposal to introduce Australia-wide unfair contract laws was released by the Standing Committee of Officials for Consumer Affairs working party on 4 February 2004. The working party comprises State and Territory consumer affairs agencies, the Commonwealth Treasury, the Australian Competition and Consumer Commission and the Australian Securities and Investment Commission. The activities of the working party, is evidence of the increasing degree of scrutiny of standard form contracts by consumer affairs regulators.

1.6 Therefore, what is reasonable must be considered in the light of how Users are required to contract with their customers, and the liability they are required to assume in relation to those customers due to consumer protection legislation. Without taking these legislative constraints into account in determining what is reasonable as required by the Access Code, Users will be unable to pass liability to AGLGN whilst being unable to limit their liability in respect of their customers.

1.7 Effectively, Users would be squeezed between AGLGN's unreasonable requirements and the statutory rights conferred on consumers by consumer protection legislation. This situation would mean that Users would be unfairly disadvantaged in their position as an intermediary in the supply chain between a wholesaler and the retail customer. Any "reasonable" arrangement would not penalise Users in this way where fault for the liability is with AGLGN.

1.8 To enable a User to formulate agreements with retail customers, the liability regime between AGLGN and the User must be clear and fair. Therefore, the liability provisions in AGLGN's 2003 Access Arrangement must be consolidated and should not place an unreasonable burden on Users when interpreted in the context of the statutory rights of consumers with respect to Users.

2 Liability provisions outside of clauses 54 to 60

Liability clauses relating to additional capacity 2.1 Part 2 of the Access Arrangement describes the Reference Services. Part 2.1.1 describes the Local Network Capacity Reservation Service. That service includes:

(a) Short Term Capacity for Users Supplying Customers below 30TJ per annum at a Delivery Point;

(b) Short Term Capacity for Users Supplying Customers above 30TJ pr annum at a Delivery Point; and

(c) Additional Capacity.

2.2 The following clause applies to each of the Services:

Notwithstanding that a Request for [Short Term Capacity/Additional Capacity] is accepted, the User will be liable to indemnify AGLGN against all losses, liabilities and expenses incurred as a result of the User exceeding the MDQ applicable at the time it utilised [the capacity] unless [the capacity] was taken at that time as an Authorised Overrun.

2.3 An Authorised Overrun is defined as an Overrun approved before the Overrun occurs.

Overrun means the withdrawal of a quantity of gas in excess of the MHQ in any Hour or in excess of the MDQ on any Day. MDQ is the Maximum Daily Quantity which is defined as the maximum quantity of gas (in GJ's) which AGLGN is obliged to transport and deliver to a particular Delivery Point on behalf of the User on any Day (excluding Overruns).

2.4 The agreement provides for a Short Term Capacity Charge (in the case of service (a) above) and a charge in respect of an Overrun (in the case of service (b) above). The definition for "Overrun Charges" means the charges as described in Part 3.1.3. Part 3.1.3 sets out the Short Term Capacity Charge. That is a percentage premium applied to the Charge for MDQ for the additional MDQ reserved as Short Term Capacity.

2.5 However, in respect of service (c) above, after the Additional Capacity is approved, a charge payable for an Overrun is only incurred for exceeding the MDQ which includes the requested Additional Capacity. (The clauses which relate to the Additional Capacity are generally unclear and we make comment on them elsewhere.)

Interpretation of liability clauses relating to additional capacity

2.6 The liability clause set out above is not clear. The services to which the clause relates are specifically designed to provide the User with capacity over and above the User's MDQ. Therefore, once the Request for the additional capacity is approved, then either:

(a) the MDQ can be said to be increased by the amount of additional capacity such there would be no overrun; or

(b) the additional capacity is deemed to be an Authorised Overrun and the Overrun Charge payable.

2.7 It may be that the clause in intended to operate in respect of capacity that the User utilized prior to the request for additional capacity being accepted, or for capacity used which is over and above sum of the original MDQ and the approved additional capacity.

If that is the case, the drafting of the liability clause needs to be made clearer or, for the reasons set out below, the clause should be deleted.

Conclusions on liability clauses relating to additional capacity

2.8 Clause 59(d) of Schedule 2A effectively provides for unlimited liability of the User in respect of loss resulting from, or associated with, withdrawal at a Delivery Point, or a Local Network Receipt Point, of a quantity greater than MHQ or a quantity greater than MDQ on any Day except as an Authorised Overrun.

2.9 Clause 59(d) is similar to the liability clause in Part 2.1.1 of the Access Arrangement, as set out in 2.1 above. Having more than one clause providing for similar things in the Access Arrangement is confusing and creates unnecessary uncertainty .

EnergyAustralia suggests, therefore, that the liability clauses in Part 2.1.1 of the Access Arrangement be deleted.

Liability clause relating to the Gas Swap Services

2.10 Part 2.7 of the 2003 Access Arrangement describes the Gas Swap Service which enables Users to swap gas between them. That Part contains the following clause:

"Users are responsible for the timing and coordination of Gas Swap notifications and gas balancing nominations (made in accordance with Schedule 3) to ensure that their daily withdrawal requirements and completed Gas Swaps reflect their arrangements for delivery of gas to Receipt Points for each Day. The User will be liable for and indemnifies AGLGN against any costs, penalties, expenses or any other loss or damage suffered or incurred by AGLGN arising from a Gas Swap, whether the Gas Swap is accepted or not accepted by AGLGN for a particular Day."

2.11 The liability and indemnity in the above clause is very broad. It relates to anything arising from a Gas Swap. It would, therefore, apply to AGLGN's failure to comply with the 2003 Access Arrangement to the extent that there was any connection with a Gas Swap.

It may be that a reasonable outcome would be for AGLGN to be indemnified in relation to agreements between Users for Gas Swaps or in respect of the information supplied by Users to AGLGN in relation to Gas Swaps.

2.12 In any event, EnergyAustralia recommends that AGLGN should be required to narrow the scope of the clause so that it is more closely aligned to AGLGN's actual risks in respect of Gas Swaps and incorporate the clause into clauses 54 through 60 of Schedule 2A of the Access Arrangement.

Liability clause relating to Overruns

2.13 Clause 19 of Schedule 2A provides that Users will be liable for and indemnify AGLGN against any loss, liability or expense suffered or incurred by AGLGN as a result of any Unauthorised Overruns.

2.14 The clause is similar to clause 59(d) of Schedule 2A which effectively provides for unlimited liability for Users in respect of loss resulting from, or associated with withdrawal at a Delivery Point, or a Local Network Receipt Point, of a quantity greater than MHQ or a quantity greater than MDQ on any Day except as an Authorised Overrun.

For the reasons set out above, EnegyAustralia recommends that clause 19 be deleted and the entire liability regime be set out in clauses 54 through 60.

Liability clause relating to suspension

2.15 Clause 50 of Schedule 2A provides:

If AGLGN, suspends the Services in accordance with this Access Agreement, AGLGN will not [be] liable to the User or to the User's Customer's for any losses, liabilities and expenses incurred by the User arising out of or in connection to that suspension. The User will be liable for and indemnify AGLGN against any claims made by any third party (including against the User) arising out of AGLGN's actions to suspend supply of gas.

2.16 EnergyAustralia recommends that clause 50 be deleted and that the entire liability regime be set out in clauses 54 through 60.

Liability clause relating to Load Shedding

2.17 Schedule 4 contains the following clause:

AGLGN will not be liable for any losses, liabilities or expenses incurred by the User and/or the User's Customers arising from load shedding. The User will be liable for and indemnify AGLGN against any claims made by the User's customers (including against the User) arising out of AGLGN's implementation of load shedding procedures.

2.18 Again, EnergyAustralia recommends that the entire liability regime be set out in clauses 54 through 60 and that the above be deleted.

3 Liability provisions of clauses 54 to 60

Clause 54

3.1 Clause 54 excludes, to the maximum extent permitted by law, any express or implied warranties not contained in the 2003 Access Arrangement and limits AGLGN's liability to the User for breach of a condition or warranty that is implied by the Trade Practices Act 1974 or other equivalent State or Territory legislation that cannot be excluded, to resupply of the services or payment of having the relevant service re-supplied.

Clause 55

3.2 Clause 55 excludes from each party's liability to the other any consequential losses arising out of the 2003 Access Arrangement, including claims made by third parties.

3.3 Clause 55 is inconsistent with clause 58 which explicitly indemnifies a party for certain third party claims.

3.4 Clause 55(e) should be deleted.

Clause 56

3.5 Clause 56 limits one party's loss to the other party's loss or damage arising from:

(a) personal injury to employees, agents or contractors arising from acts or omissions under the Access Arrangement;

(b) damage to the other party's property arising from acts or omissions under the Access Arrangement; or

(c) any breach of the Access Arrangement by the party which causes loss or damage.

3.6 These heads of liability may be too narrow. Liability in relation to personal injury should not be confined to employees, agents or contractors, but should also be expanded to include other third parties who may suffer personal injury.

3.7 Further, the exclusion of third party claims under clause 55(e) should not apply.

3.8 Likewise, the limitation of liability in relation to property damage should not be confined to the other party's property. It should be expanded to include damage to property of any third party.

3.9 Another point to note is that the losses that a party accepts they are liable for in clause 56 may not extend to any loss arising from the negligence of a party. Liability arises from acts or omissions under the 2003 Access Arrangement or a breach of the 2003 Access Arrangement, however, it is not clear whether this extends to a non-contractual cause of action in negligence or other statutory and tortious claims. Sub-clauses (a) and (b) should be redrafted as follows:

(a) personal injury or death including where arising from the First Party's negligence or acts or omissions under this Access Arrangement; or

(b) damage to real or tangible property including where arising from the First Party's negligence or acts or omissions under this Access Arrangement.

Clause 57

3.10 Clause 57 requires Users to include in their supply arrangements with persons who are provided with gas arising out of the 2003 Access Arrangement, a provision that limits or excludes the User's liability to those persons, to the extent reasonably practicable, and in particular in relation to transportation of gas.

3.11 A User's ability to limit its liability is constrained by legislation. Where a User cannot lawfully limit its liability, or chooses not to limit its liability, and AGLGN's acts or omissions causes a customer to suffer loss or damage AGLGN should indemnify the User in respect of any claims made the customer against AGLGN.

3.12 Therefore, EnergyAustralia recommends that the following clauses replace the current version of clause 57:

The User may include in all its supply arrangements with persons who are provided with gas arising out of this Access Arrangement, a provision that limits or excludes the User's liability to those persons, to the extent reasonably practicable and only to the extent permitted by law, and in particular in relation to transportation of gas.

AGLGN indemnifies the User and its officers, employees, agents and contractors against all loss, damage, injury, claim, demand, costs or expense (including legal fees and expense) that any or all of them suffer or incur as a result of a breach by AGLGN of any term of this Access Arrangement or any act or omission of AGLGN which causes the User to breach any warranty to a customer of the User for the supply of gas related to this Access Arrangement which is implied by the legislation.

Clause 58

3.13 Clause 58 provides that a party will indemnify the other party against any loses which that other party suffers as a result of, or in connection with, any claim arising out of, or in connection with, the events described in clause 56.

3.14 As noted above, clause 55(e) is inconsistent with clause 58 and should be deleted.

3.15 EnergyAustralia's comments on the drafting of clause 56 are also applicable to clause 58.

Clause 59

3.16 This clause states that the limitations set out in clauses 55 and 56 do not apply in respect of loss associated with:

(a) delivery of non-Specification gas into the Network by or on behalf of a User;

(b) delivery of non-Specification gas to a Delivery Point by AGLGN (unless caused by the User or their agent);

(c) failure by the User to cease delivery or taking of gas as required under the Service Agreement;

(d) withdrawal at a Delivery Point or a Local Network Receipt Point of a quantity greater than MHQ in any Hour or a quantity greater than MDQ on any Day except as an Authorised Overrun; or

(e) any action or omission of a User or their agent regarding the installation, operation, maintenance or removal of Measuring Equipment.

3.17 As clauses 55 and 56 are the clauses which limit liability under the Access Arrangement, by taking the items at sub-clauses (a) to (e) outside of the limitations in clauses 55 and 56, a User's liability for these items is unlimited and would include any consequential loss arising from them.

3.18 EnergyAustralia notes that in clause 45(b), the Force Majeure clauses do not apply where a User fails to ensure that gas delivered to a Receipt Point meets the Specifications.

3.19 The scope of sub-clause (c) is not clear. For example, does it include Overruns? Should it include a cross-reference from this clause to those parts of the Service Agreement that require the User to cease delivery of taking of gas?

Clause 60

3.20 Clause 60 provides that one party's liability to the other is reduced to the extent to which the liability was caused or contributed to by the other party.

3.21 Clause 60 is consistent with the objectives of the Code.

SCHEDULE TO ATTACHMENT E

RECOMMENDED AMENDMENTS TO CLAUSES 53 TO 60

53 The following clauses 54 to 60 shall regulate all liability of AGLGN and the User arising in relation to any act, omission or event arising out of this Access Arrangement.

54 All express or implied warranties, representations or covenants which are not contained in this Access Arrangement are excluded to the maximum extent permitted by law. If a condition or warranty is implied into this Access Arrangement under the Trade Practices Act 1974 (Commonwealth) or any equivalent State or Territory legislation that cannot be excluded, then AGLGN's liability to the User for breach of the condition or warranty is limited to (at AGLGN's option):

(a) the re-supply of the relevant service under this Access Arrangement; or

(b) the payment of having the relevant service re-supplied.

55 A party (the "First Party") shall not be liable to the other party ("the Second Party") whether in contract, tort, statue or otherwise for or in respect of any consequential loss arising out of this Access Arrangement, including:

(a) loss of revenue;

(b) economic loss;

(c) loss of profits;

(d) loss of business opportunity or business interruption;

(e) loss of reputation;

(f) punitive or exemplary damages; or

(g) costs or expenses associated with or incidental to any of the above.

56 The liability of the First Party to the Second Party is limited to loss or damage suffered by the Second Party arising from:

(a) personal injury or death including where arising from the First Party's negligence or acts or omissions under this Access Arrangement;

(b) damage to real or tangible property arising from the First Party's negligence or acts or omissions under this Access Arrangement; or

(c) any breach of the Access Arrangement by the First Party which causes that loss or damage.

56 The User may include in all its supply arrangements with persons who are provided with gas arising out of this Access Arrangement, a provision that limits or excludes the User's liability to those persons, to the extent reasonably practicable and only to the extent permitted by law, and in particular in relation to transportation of gas.

57 AGLGN indemnifies the User and its officers, employees, agents and contractors against all loss, damage, injury, claim, demand, costs or expense (including legal fees and expense) that any or all of them suffer or incur as a result of a breach by AGLGN of any term of this Access Arrangement or any act or omission of AGLGN which causes the User to breach any warranty to a customer of the User for the supply of gas related to this Access Arrangement which is implied by the Trade Practices Act 1974 to the extent that the User is prevented by law from excluding or limiting liability for that loss in its agreement with that customer.

58 The First Party will indemnify and keep indemnified the Second Party, its employees and agents against all loss which the Second Party suffers or incurs as a result of or in connection with any claim by a third party arising out of or in connection with:

(a) personal injury or death including where arising from the First Party's negligence or acts or omissions under this Access Arrangement;

(b) damage to real or tangible property include where arising from the First Party's negligence or acts or omissions under the Access Arrangement; or

(c) any breach of the Access Arrangement by the First Party which causes that loss or damage.

59 The limitations on claims, damages and liability referred to in clauses 55 and 56, do not apply in respect of loss resulting from or associated with:

(a) delivery of non-Specification gas into the Network by or on behalf of a User;

(b) delivery of non-Specification gas to a Delivery Point by AGLGN, unless the delivery of non-Specification gas to a Delivery Point is due to a User or their agent delivering non-Specification gas into the Network;

(c) failure by the User to cease delivery or taking of gas as required under clauses [insert clause numbers] of the Service Agreement;

(d) withdrawal at a Delivery Point or a Local Network Receipt Point of a quantity greater than MHQ in any Hour or a quantity greater than MDQ on any Day except as an Authorised Overrun; or

(e) any action or omission of a User or their agent regarding the installation, operation, maintenance or removal of Measuring Equipment.

60 The liability of AGLGN and the User to one another under clauses 53 to 59 inclusive is reduced to the extent to which the liability is caused or contributed to by either AGLGN or the User.

- **TXU**

  TXU believes that its liability should be limited to a monetary cap with consequential losses excluded.

### *Preliminary analysis*

Liability of one party to another under a service agreement may arise, in a general sense, where loss or damage is incurred by one of the parties as a result of:

- breach by the other party of express terms and conditions of the service agreement;
- breach by the other party of terms implied into the service agreement by other legislation or by common law;
- a negligent act by the other party.

In relation to an event relating to any of the above, liability would be determined on a case by case basis. In particular cases there may be statutory or common law exposures and/or limitations to liability.

The provisions of clauses 53 to 60 of Schedule 2A seek to define and limit liabilities in the specific context of a service agreement.

The Allen Consulting Group considered the provisions relating to liability from a perspective of an economic analysis. Attention has been given to the provisions on liability from a perspective of whether an explicit provision for, or limitation to, liability has the likely result of more efficient outcomes in the provision of gas distribution services. Attention has not been given to whether and to what extent provisions relating to liability depart from the liabilities and limitations on liability that may arise under other statutes and under common law. It is recommended that IPART seek legal advice on the liability provisions, and their reasonableness in these respects.

By clause 54 of Schedule 2A, AGLGN appears to seek to limit its liability in respect of breach by AGLGN of any condition or warranty implied into the Access Arrangement by the Trade Practices Act or equivalent State or Territory legislation. This clause would have the effect of limiting AGLGN's liabilities that may otherwise arise under these statutes, although the practical effect of this is not known without a legal opinion on the impact and import of the provisions. Taking into account that these statutes are generally directed at increasing the efficiency of commercial outcomes, there is no obvious reason why limitation of liability in relation to these statutes should lead to more efficient outcomes in the provision of gas distribution services. However, EnergyAustralia, which appears to have undertaken an extensive review of the terms and conditions relating to liability, has not opposed this provision. Taking this into account, it is not considered that this provision is unreasonable.

AGLGN seeks to limit the liability of itself and the user under a service agreement in respect of consequential losses (clause 55); losses by one of the parties from personal injury, damage to property or breach of the access arrangement (clause 56); and third party claims (clause 58). These limitations on liability are symmetrical between AGLGN and the user, except to the extent that clause 59 excludes from these limitations:

- liabilities of the user to AGLGN in respect of a number of possible actions by the user including
  - delivery of non-specification gas into the network,
  - failure to cease delivery or taking of gas if required to do so under the service agreement,
  - withdrawal of gas at a delivery point in excess of MHQ in any hour or MDQ in any day except as an authorised overrun, and

  - action or omissions in regard to the installation, operation, maintenance or removal of measuring equipment; and

- liabilities of AGLGN to the user in respect of delivery of non-specification gas to a delivery point, unless the delivery of non-specification gas to a delivery point is due to a user or the agent of a user delivering non-specification gas into the network.

The limitations on liability under clauses 55, 56 and 58 appear to reduce risks of both AGLGN and the user in respect of claims in respect of consequential losses, claims beyond actual loss or damage, and claims by third parties. Taking into account the exceptions under clause 59, there is no reason obvious to The Allen Consulting Group to consider that these limitations change the relative distribution of risk between AGLGN and the user. As such the provisions may reduce commercial risk without distorting commercial transactions and on this basis the provisions are considered reasonable.

The exceptions under clause 59 to limitations of liability in respect of a number of events appear to preserve liability where actions of one of the parties may impose a substantial risk of loss or damage to the other party. As such, these exceptions are considered to be reasonable.

Clause 60 of Schedule 2A provides for the liability of one party to the other to be reduced to the extent that the party affected by loss or damage had itself caused or contributed to the loss or damage. This clause has the effect of allocating risk of liability to the party responsible for an action causing loss or damage, and as such is consistent with efficient outcomes. This clause is thus considered reasonable.

Clause 57 is not an express limitation of liability in any particular circumstance but rather is an attempt by AGLGN to influence a contract between the user and a customer of the user in respect of the provision of gas). Clause 57 requires that a user include in supply arrangements with a customer a provision limiting or excluding liability to the customer to the extent reasonable practicable and in particular in relation to the transportation of gas.

As a general principle, The Allen Consulting Group questions whether it is reasonable for AGLGN to impose restrictions upon the terms and conditions under which users may enter into contracts or arrangements in which AGLGN is not a party. AGLGN could take other measures to limit or prevent any liability to gas customers in relation to, for example, misrepresentation by the user of the reliability of distribution services, by ensuring that the user acknowledges under the terms and conditions for reference services that AGLGN is entitled to interrupt deliveries in accordance with the terms and conditions of the relevant Reference Services and as such, a user is not entitled to a guaranteed continuous delivery of gas. Further, AGLGN could require that a user advise customers of the terms upon which AGLGN delivers gas. For these reasons, it is concluded that clause 57 is not reasonable.

EnergyAustralia submits that other liability provisions stated under the proposed access arrangement but outside of clauses 53 to 60 of Schedule 2A are in some cases unreasonable and should be consolidated into a single set of terms and conditions relating to liability. Energy Australia in particular cites the following.

- The last bullet point of section 2.1.1 (page 8) of the proposed access arrangement, indicating liabilities of users in respect of a user taking gas in excess of an authorised overrun. EnergyAustralia submits that this clause is ambiguous, and in any case is similar to clause 59(d) of Schedule 2A and therefore potentially redundant.
- The penultimate bullet point of section 2.7 of the proposed access arrangement (page 30 under the heading "Gas Balancing") which provides for a user to be liable for, and indemnify AGLGN against, any costs, penalties, expenses or any other loss or damage suffered or incurred by AGLGN arising from a gas swap. EnergyAustralia submits that this provision is excessively broad and could, for example, apply to a loss or damage that arises from an action of AGLGN.
- Clause 19 of Schedule 2A that provides that users to be liable for and indemnify AGLGN against any loss, liability or expense suffered or incurred by AGLGN as a result of any unauthorised overruns. Energy Australia submits that this clause is similar to clause 59(d) of Schedule 2A and therefore potentially redundant.
- Clause 50 of Schedule 2A that excludes AGLGN from any liability in association with AGLGN suspending the service of a user. EnergyAustralia submits that this clause should be included in the section of Schedule 2A relating to liability.
- The last paragraph of page 108 of the Access Arrangement (under Schedule 4) that exempts AGLGN from liabilities in respect of load shedding. EnergyAustralia submits that this clause should be included in the section of Schedule 2A relating to liability.

The Allen Consulting Group has reviewed the clauses referred to by EnergyAustralia.

In regard to the submission of ambiguity in last bullet point of section 2.1.1 (page 8) of the proposed access arrangement (indicating liabilities of users in respect of a User taking gas in excess of an Authorised overrun), The Allen Consulting Group does not consider this provision to be ambiguous in referring to a liability arising where a user withdraws gas from the network in excess of an authorised overrun. As such, the clause is not considered to be unreasonable for reason of ambiguity.

In regard to the penultimate bullet point of section 2.7 of the proposed Access Arrangement (page 30 under the heading "Gas Balancing") (providing for a User to be liable for, and indemnify AGLGN against, any costs, penalties, expenses or any other loss or damage suffered or incurred by AGLGN arising from a gas swap) the Allen Consulting Group concurs with EnergyAustralia that the provision for liability of the user may be excessively broad and thereby unreasonable. It is recommended that IPART seek amendment of the provision so that the second sentence of this paragraph reads "The user will be liable for and indemnify AGLGN against any costs, penalties, expenses or any other loss or damage suffered or incurred by AGLGN arising from inaccurate or misleading information supplied by the user to AGLGN in connection to a Gas Swap, or the users participating in the Gas Swap failing to time and coordinate Gas Swap notifications and gas balancing nominations (made in accordance with Schedule 3) to ensure that their daily withdrawal requirements and completed Gas Swaps reflect their arrangements for delivery of gas to receipt points for each day."

EnergyAustralia cites a potential inconsistency between clause 55(e) of schedule 2A, which excludes from each party's liability to the other any claims made by third parties (as a form of consequential loss) and clause 58 that explicitly indemnifies a either party to a service agreement for certain third party claims. The Allen Consulting Group considers that both these clauses similarly limit liability in respect of third party claims and, while perhaps duplicative, are not inconsistent.

EnergyAustralia submits that clause 56, which limits liability of both parties to direct damages, may too narrow and should extend to liability of losses or damages to third parties. The Allen Consulting Group is aware that limitation of liabilities to direct damages is common in access arrangements, and has thus been considered to be reasonable by other regulators. Other than this, The Allen Consulting Group is not able to comment on whether this limitation of liability necessarily reduces the rights of third parties to be compensated for losses or damages or is otherwise unreasonable. IPART may wish to take legal advice on this issue.

EnergyAustralia submits that clause 59(c), which excludes from limitations on liability any liabilities of a user resulting from the user failing to cease delivery or taking of gas as required under the service agreement, is ambiguous in that it is not clear whether it applies to overruns. The Allen Consulting Group is of the view that this clause unambiguously relates to other clauses of Schedule 2A in respect of suspension of supply and interruptions of supply (clauses 46 to 52).

TXU has submitted that liability of users should be limited to a monetary cap and exclude consequential losses. The Allen Consulting Group does not consider there to be any obvious reason why liabilities of users should be capped at a certain monetary amount. Also, The Allen Consulting Group notes that clause 55 limits liability of users for consequential losses with the exception of certain liabilities as set out in clause 59. For these reasons already expressed above, these provisions for limitation of liability to consequential losses are considered reasonable.

### *Further submissions*

#### *Ambiguity in provisions relating to liability*

- **EnergyAustralia**

  [O]ne aspect of the combined effect of the terms and conditions, which IPART ought to consider is whether the layout of the liability and indemnity provisions (spread across AGLGN's AA) is efficient for Users. The layout of the liability and indemnity provisions is such that Users are required to deploy significant resources to come to grips with their overall potential exposure under the liability and indemnity provisions, and then translate that position into their contracts with their customers. The deployment of those significant resources increases the costs of Users and is not consistent with the objectives of the Code, including the public interest in having competition in markets and the interests of Users.

  In sum, the layout of the liability and an indemnity provisions in AGLGN's AA is not reasonable, and they should not be approved by IPART. In addition, the ambiguity of several of the liability and indemnity clauses is likely to lead to future disputes about the interpretation of the clauses, further increasing the costs of Users.

  …

  Section 2.1.1: ACG does not accept EnergyAustralia's arguments on the lack of clarity of section 2.1.1 (which indemnifies AGLGN for MDQ being exceeded). However, the AA should be modified to put beyond doubt that a user is not be required to indemnify AGLGN for against losses etc arising from the User taking a volume of gas which is within its MDQ plus the Additional Capacity once that Additional Capacity has been approved by AGLGN.

  …

  Section 59 (c) ACG state that clause 59(c) unambiguously relates to clauses 46 to 52 of the AA which, in turn, relate to suspensions and interruptions. AGLGN should confirm that ACG's interpretation of the clause is the same as AGLGN's interpretation of the clause. If that is so, the clause references should be inserted into clause 59(c).

#### *Limitation of liability*

- **TXU**

  [In its submission of 6 October, TXU repeats its original submission in relation to a statement that liability should be limited by a monetary cap with consequential losses.]

- **Energy Australia**

  Clauses 54 and 60: ACG concluded that these clauses are reasonable. EnergyAustralia did not raise any objections to them in its previous submission to IPART.

  Clause 55 (e) and clause 58: ACG has characterised as duplicative the exclusion from consequential loss in respect of claims of third parties in clause 55(e) and clause 58 by which one party indemnifies another in respect of third party claims. Clause 55 (e) characterises claims of third parties as consequential loss and absolves each party of liability in respect of such loss. However, under clause 58 the parties indemnify each other in respect of certain third party losses. They are inconsistent in that they would require a party to indemnify the other in respect of a loss for which the indemnifying party is not liable.

In EnergyAustralia's view, ACG has not properly understood the two clauses which are not duplicative, and perform entirely different functions.

Clause 56: ACG has advised IPART to seek legal advice in respect of EnergyAustralia's concerns with the scope of the limitations in this clause.

### *Constraints on contracts between users and third parties*

- **AGLGN (10 September 2004)**

  AGLGN does not share the view of ACG that this arrangement is unreasonable. Users have a direct contractual relationship with third parties that is not available to AGLGN and this provision is required to protect AGLGN's legitimate and reasonable business interests.

- **Energy Australia**

  Clause 57 ACG recommends that clause 57, by which AGLGN requires Users to include certain limitation in the Users' contracts with gas customers, be removed on the basis that AGLGN could take other measures to limit liability to gas customers. EnergyAustralia agrees with ACG's recommendation.

  Clause 57 is an unnecessary fetter on a user's freedom to contract with its customers. EnergyAustralia previously recommended that the clause be replaced with a clause that:

  - acknowledges that a user may, if it so chooses and where it is legally permissible to do so, limit its liability to its customers; and
  - which requires AGLGN to indemnify the User for all loss suffered as a result of AGLGN breaching the terms and conditions of the AA (see para 3.12 at Attachment 3 to our advice of 25 March 2004). EnergyAustralia is of the view that the clause be included in the AA in place of AGLGN's proposed clause 57.

### *Liabilities in respect of the Gas Swap Service*

- **AGLGN (10 September 2004)**

  AGLGN accepts the ACG recommendation to amend this provision.

- **Energy Australia**

  Section 2.7 ACG accepted EnergyAustralia's submission that the indemnity in relation to gas swaps was too broad and is, therefore, unreasonable. ACG recommended that an alternative clause and AGLGN, in its response of 10 September 2004, agreed to the clause.

  The alternative clause requires an indemnity in favour of AGLGN for loss suffered as a result of a User:

  - providing inaccurate or misleading information to AGLGN; or
  - failure to ensure users' daily requirements and gas swaps reflect arrangements for delivery to receipt points.

  The alternative clause appears reasonable. However, for the reasons set out in section 1 above, it should be moved to the liability regime in clauses 53 to 60 to ensure that its relationship to clauses 55, which excludes consequential loss, and 60, which excludes liability for AGLGN's acts which contribute to the loss, is clear.

### *Final analysis and recommendations*

#### *Ambiguity in provisions relating to liability*

In the preliminary analysis of the terms and conditions, The Allen Consulting Group addressed a number of matters relating to submissions by EnergyAustralia that the provisions of the terms and conditions relating to liability are made difficult to understand as a result of being stated in different parts of the access arrangement document and ambiguities in the manner the provisions are expressed.

The Allen Consulting Group took the view in the preliminary analysis that the statement of provisions relating to liability in different parts of the access arrangement did not reduce the clarity of expression of these provisions sufficiently to cause the terms and conditions relating to liability to be regarded as unreasonable. EnergyAustralia reiterates its contrary view in its further submission. In light of the submission from EnergyAustralia, The Allen Consulting Group has revisited the relevant provisions but maintains the view expressed in the preliminary analysis.

Also in response to the submission form EnergyAustralia, The Allen Consulting Group addressed in its preliminary analysis whether the last bullet point of section 2.1.1 (page 8) of the proposed access arrangement (indicating liabilities of users in respect of a User taking gas in excess of an Authorised overrun) is ambiguous in indicating a users liabilities in respect of use of additional capacity obtained under a service agreement for the Capacity Reservation Service.

The Allen Consulting Group does not consider this provision to be ambiguous in referring to a liability arising where a user withdraws gas from the network in excess of an authorised overrun. In its further submission, Energy Australia reiterated its claim of ambiguity. The Allen Consulting Group has revisited the relevant provision and notes that as long as a user's MDQ automatically includes additional capacity at the time at which the additional capacity is obtained, then liability only arises in respect of an overrun that is in excess of the contracted MDQ plus the addition to MDQ resulting from the additional capacity. That this is the case is a matter subject to another recommended amendment to the terms and conditions, to which AGLGN has indicated agreement (section 5.8). As such, The Allen Consulting Group maintains the view expressed in the preliminary analysis.

Finally, and again in relation to a submission from EnergyAustralia, The Allen Consulting Group addressed a claim of ambiguity in relation to clause 59(c) of schedule 2A, under which liability of a user is not limited if the user fails to cease delivery or taking of gas as required under a service agreement. In the preliminary analysis The Allen Consulting Group noted that this provision would relate to provisions for AGLGN to suspend or interrupt gas supply under clauses 46 to 52 of schedule 2A. EnergyAustralia has further submitted that this is not clear from the wording of clause 59(c) and that if this is the intent, the clauses 46 to 52 should be explicitly cross referenced.

In considering EnergyAustralia's further submission, The Allen Consulting Group notes that regardless of whether clause 59(c) relates just to suspension or interruption of gas deliveries under provisions of clauses 46 to 52 of schedule 2A, it may be reasonable for a user to not be relieved of liability in the event of ignoring a requirement to cease delivery or taking of gas, subject to the provisions providing for such a requirement are themselves reasonable. The latter question should be addressed in relation to the specific clauses and, as such, The Allen Consulting Group maintains the view that clause 59(c) is not unreasonable.

### *Limitation of liability*

In its preliminary analysis, The Allen Consulting Group addressed the submission from EnergyAustralia that clause 56 of schedule 2A, which limits liability of both parties to direct damages, may be too narrow and should extend to liability of losses or damages to third parties. The Allen Consulting Group noted that limitation of liabilities to direct damages is common in access arrangements, and has thus been considered to be reasonable by other regulators, but suggested that IPART may wish to take legal advice as to whether clause 56 has the effect of limiting any third party's rights to seek compensation against either the service provider or the user, under common law or statute, if it has suffered injury or damage arising from the acts or omissions of the service provider or user.

### *Constraints on contracts between users and third parties*

In its preliminary analysis, The Allen Consulting Group recommended that IPART require amendment of the proposed access arrangement to remove clause 57 of schedule 2A, requiring that a user include in supply arrangements with a customer a provision limiting or excluding liability to the customer to the extent reasonably practicable and in particular in relation to the transportation of gas.

AGLGN has opposed this amendment, while the amendment is supported by EnergyAustralia.

In making this recommendation, The Allen Consulting Group was reflecting a position taken by the Western Australian regulator in respect of a similar provision in the proposed Access Arrangement for the Goldfields Gas Pipeline,[17] repeated as follows:

> 557. The Authority accepts that GGT is entitled, as much as possible, to reduce any risk to it associated with a User making unwarranted representations to third parties which may result in liability being attributed back to GGT. The Authority also accepts, however, that it would generally be unreasonable for GGT to impose restrictions upon the ability of Users to enter into contracts or arrangements in which GGT is not a party.

[17] Economic Regulation Authority, 29 July 2004, *Amended Draft Decision on the Proposed Access Arrangement for the Goldfields Gas Pipeline*, paragraphs 557 to 559.

558. Moreover, the Authority is of the view that clause 12.1(m) may provide for more than is required to protect GGT's interests, particularly in light of clause 12.2 which provides that the warranty is also taken to be given in respect of each day gas is delivered to the User by GGT or any amount is outstanding under the Service Agreement. Clauses 12.1(m) and 12.2 effectively require a User to provide a blanket warranty that a User has not, before entering into the Service Agreement and during the Service Agreement, guaranteed the supply of gas to any of its customers. Such a warranty is likely to impose a practical restriction on a User's ability to guarantee supply of gas in any contracts it enters into with third parties, irrespective of where a User intends to source the gas. It is the view of the Authority that this is unreasonable.

559. In the Authority's view, a reasonable approach would be for GGT to limit its liability without effectively imposing requirements on any arrangements that a User may make with its customers. GGT could take steps to prevent any liability to third parties in relation to, for example, misrepresentation by ensuring that Users acknowledge in the Service Agreement that GGT is entitled to interrupt supply of gas from the GGP in accordance with the terms of the Service Agreement and as such, a User is not entitled to a guaranteed continuous supply of gas from the GGP. Further, GGT could require that a User advise third parties of the terms upon which GGT supplies gas to the User.

Consistent with the view taken by the Western Australian regulator, The Allen Consulting Group accepts that it is reasonable for AGLGN to seek to limit its liability in respect of a user guaranteeing delivery of gas to a customer, but considers that limiting the ability of a user to contract with the customer may be unreasonable where there are other mechanisms to limit liability in the manner desired., The recommendation that IPART require amendment of Schedule 2A to remove clause 57 is therefore maintained.

#### *Liabilities in respect of the Gas Swap Service*

In the preliminary analysis, The Allen Consulting Group determined that provisions for liability for users under the Gas Swap Service are unreasonably broad. It was recommended that IPART seek amendment of the section 2.7 of the proposed access arrangement so that the liability provision reads "The user will be liable for and indemnify AGLGN against any costs, penalties, expenses or any other loss or damage suffered or incurred by AGLGN arising from inaccurate or misleading information supplied by the user to AGLGN in connection to a Gas Swap, or the users participating in the Gas Swap failing to time and coordinate Gas Swap notifications and gas balancing nominations (made in accordance with Schedule 3) to ensure that their daily withdrawal requirements and completed Gas Swaps reflect their arrangements for delivery of gas to receipt points for each day."

AGLGN has agreed to this amendment.

### 4.19 Emergency contact information

#### *Proposed terms and conditions*

Clause 61 of Schedule 2A requires that a user ensure that at all times AGLGN has accurate emergency contact information for the user and for the customer at each delivery point.

#### *Initial submissions*

No submissions on the proposed access arrangement address the clause of Schedule 2A relating to emergency contact information.

#### *Preliminary Analysis*

The requirements for provision of emergency information are considered reasonable.

#### *Further submissions*

No further submissions on the terms and conditions of the proposed access arrangement addressed clause 61 of schedule 2A.

#### *Final analysis and recommendations*

The Allen Consulting Group maintains the view set out in the preliminary analysis.

### 4.20 Title to gas

#### *Proposed terms and conditions*

Clauses 62 and 63 of Schedule 2A relate to title to gas delivered to the network and provide for:

- AGLGN to require that the user warrants that it has title to gas delivered to the network, and to require that the user provide evidence of this; and
- AGLGN to commingle gas in the network.

#### *Initial submissions*

The provisions relating to title to gas were addressed in the submission from Origin Energy. Origin Energy submitted that the change in title to gas may have unintended implications in determination of liabilities for goods and services tax.

- **Origin Energy**

  AGL Gas Networks AGLGN Access Arrangement Information for NSW Network Networks Schedule 2A; Paragraphs 62 & 63 – Title to Gas

  Origin is concerned that there may be unintended GST implications under the current wording of these paragraphs.

  When a User injects gas into the pipe for transportation, does the User retain title to the gas while the gas is in the network or does it pass to AGLGN until it reaches the destination point, where the User receives title again?

  The transfer of title to the gas could give rise to a taxable supply for GST, provided there is any consideration for the transfer. No industry participant currently accounts for GST on these transactions and to do so would be administratively difficult.

  This is an industry issue and the various industry bodies are attempting to agree an accepted GST treatment with the ATO - however until a solution has been determined there is a risk that AGLGN and the User will have to account for GST on these transactions.

Origin therefore recommends clarification of this clause to align with GST legislation.

#### *Preliminary Analysis*

The transfer of title to gas from a user to the service provider is common practice in the operation of gas pipelines. On this basis, the transfer of title may be considered reasonable.

The commingling of gas in a gas distribution system serving multiple users is unavoidable and as such could not be found to be unreasonable.

Any potential implications of transfer of title of gas for liabilities for goods and services tax would be a matter for determination with the Australian Taxation Office. The Allen Consulting Group does not consider that this is a matter that should be investigated or resolved as part of assessment of the proposed access arrangement.

#### *Further submissions*

No further submissions were received in relation to title to gas. AGLGN has indicated separately from submissions that there is no stated or implied transfer in title to gas when gas is delivered to the network.

#### *Final analysis and recommendations*

The Allen Consulting Group accepts AGLGN's submission that the proposed access arrangement does not contain any stated or implied transfer in title to gas from the user to AGLGN while that gas is contained in the AGLGN distribution system, indicating that Origin Energy appears to have incorrectly interpreted the provisions of clauses 62 and 63 of schedule 2A as implying that there is a transfer of title to gas from users to AGLGN. There is nothing in the terms and conditions that implies such a transfer in title.

The correction of this error in The Allen Consulting Group's preliminary analysis does not affect any conclusion on the reasonableness or otherwise of the terms and conditions nor recommendations for IPART to seek amendment of the proposed access arrangement. The Allen Consulting Group maintains the conclusions that:

- the commingling of gas in a gas distribution system serving multiple users is unavoidable and as such could not be found to be unreasonable; and
- any potential implications of transfer of title of gas (either explicit or implied) for liabilities for goods and services tax would be a matter for determination with the Australian Taxation Office.

### 4.21 Gas quality

#### *Proposed terms and conditions*

Clauses 64 to 68 relate to gas quality and provide for:

- a requirement that the user deliver gas to the network that meets the gas quality specification set out in Schedule 5 (clause 64);
- AGLGN to direct a user to cease delivery of out of specification gas or refuse to accept the gas (clause 65);

- AGLGN to require that the user demonstrate that the user has contractual arrangements in place to prevent the supply of out of specification gas, and to require that the user provide facilities for AGLGN to monitor the quality of gas at the point where the gas is introduced into the system of pipes through which it is introduced to the network (clause 66);
- where gas quality is measured upstream of the network, requirements for the user to undertake testing of gas quality is accordance with applicable laws, or where laws are not in place, in accordance with provisions as determined by AGLGN (clause 67); and
- a requirement that the user acknowledge that the failure to deliver to the network gas that meets the gas quality specification may result in damage being suffered by persons receiving gas from the network (clause 68).

Schedule 5 indicates that gas delivered by a user to the receipt point must comply with specifications prescribed by relevant NSW law, and in the absence of such law or for gas quality parameters for which the law does not prescribe a specification, that the gas quality must comply with a specification set out in Schedule 5 or as otherwise notified by AGLGN.

### *Initial submissions*

No submissions on the proposed access arrangement address the clause of Schedule 2A relating to gas quality.

### *Preliminary analysis*

The provisions of Schedule 2A and Schedule 5 relating to gas quality differ to those of the current access arrangement.

AGLGN has added clauses 67 and 68 to the proposed access arrangement, relating to gas testing procedures where gas quality is measured upstream of the network, and the user's acknowledgement that delivery of out of specification gas to the network may cause damage to other persons receiving gas from the network.

AGLGN has also changed that default gas quality specification (that applies when gas quality is not specified under NSW law).

The core provisions relating to gas quality (that the user has an obligation to deliver gas within the gas quality specification specified under NSW law) has not been altered from the current access arrangement. As there have been no submissions from users in respect of these provisions, there is no reason to consider them to be unreasonable.

The new provisions introduced under the proposed access arrangement have also not been addressed in submissions from users. Nor do these provisions necessarily appear unreasonable, providing only for AGLGN to have gas quality measured in accordance with other law, and to have users acknowledge a matter of fact (that delivery of out of specification gas may cause damage to gas users taking gas from the network). As such, these provisions are not considered to be unreasonable.

The change in the default gas specification has involved a widening of the specification for Wobbe index, oxygen, total sulphur; a narrowing of the specification for the hydrocarbon dewpoint; removal of specifications for heating value, carbon dioxide and mercaptan sulphur; and introduction of a specification for total water content. On balance, the changes in this specification do not appear unreasonable although a definitive conclusion on this matter would require consideration of reasons of AGLGN for changing the specification, which have not been given.

#### *Further submissions*

No further submissions were received in relation to gas quality. AGLGN has separately indicated that the proposed access arrangement reflects the specification under the Gas Supply Act the specification contained in the Australian Standard AS4564 – 2003 Specification for General Purpose Natural Gas.

#### *Final analysis and recommendations*

AGLGN has provided the reason for the change in gas specification, being that the proposed specification reflects the specification contained in the Australian Standard AS4564 – 2003 Specification for General Purpose Natural Gas. AGLGN indicates that the proposed access arrangement reflects the specification contained in the current regulation and the specification contained in the Australian Standard AS4564 – 2003 Specification for General Purpose Natural Gas. It is also noted that the gas quality specification is that same as the specification set out in schedule 2 of the Gas Supply (Network Safety Management) Regulation 2002. Given this, the changes in the specification set out in the proposed access arrangement are considered reasonable.

### 4.22 Breach of agreement

#### *Proposed terms and conditions*

Clause 69 of Schedule 2A relates to deemed breaches of agreement and provides that a breach of a Local Network Reference Service Agreement or Trunk Reference Service Agreement will be deemed to be a breach of the corresponding Trunk Reference Service Agreement or Local Network Reference Service Agreement, as the case may be.

#### *Initial submissions*

No submissions on the proposed access arrangement address the clause of Schedule 2A relating to deemed breaches of agreement.

#### *Preliminary analysis*

Clause 69 of Schedule 2A has relation to the services policy, under which a user of a Local Network Reference Service must also be a user of the corresponding Trunk Reference Service, and vice versa.

Some parties making submissions have raised concern over this aspect of the services policy. This aspect of the Services Policy has not, however, been examined as part of this study. If amendment of the services policy is required (as some parties have submitted to IPART) then as a consequence clause 69 would become unreasonable.

#### *Further submissions*

No further submissions on the terms and conditions of the proposed access arrangement addressed clause 69 of schedule 2A.

#### *Final analysis and recommendations*

The Allen Consulting Group maintains the view set out in the preliminary analysis.

### 4.23 Commencement and termination of agreement

#### *Proposed terms and conditions*

Clauses 70 and 71 of Schedule 2A relate to commencement and termination of a services agreement and provide that:

- where a Local Network Reference Service Agreement or Trunk Reference Service Agreement is terminated, the corresponding Trunk Reference Service Agreement or Local Network Reference Service Agreement is also terminated, as the case may be; and
- the commencement date of the Trunk Reference Services Agreement will be the commencement date of the corresponding Local Network Services Agreement.

#### *Initial submissions*

No submissions on the proposed access arrangement address the clause of Schedule 2A relating to commencement and termination of service agreements.

#### *Preliminary analysis*

As with clause 69 of Schedule 2A, clauses 70 and 71 have relation to the services policy, under which a user of a Local Network Reference Service must also be a user of the corresponding Trunk Reference Service, and vice versa.

Some parties making submissions have raised concern over this aspect of the services policy. This aspect of the Services Policy has not, however, been examined as part of this study. If amendment of the services policy is required (as some parties have submitted to IPART), then as a consequence clauses 70 and 71 would become unreasonable.

#### *Further submissions*

No further submissions on the terms and conditions of the proposed access arrangement addressed clauses 70 and 71 of schedule 2A.

#### *Final analysis and recommendations*

The Allen Consulting Group maintains the view set out in the preliminary analysis.

## 4.24 Schedule 2B: additional terms and conditions applicable to reference services except tariff services

### *Proposed terms and conditions*

Schedule 2B sets out terms and conditions for reference services other than Tariff Services. The reference services to which Schedule 2B relates comprise those services for which the user contracts with AGLGN for gas transportation up to a maximum quantity in any day, specified as maximum daily quantity (MDQ), and a maximum hourly rate, specified as maximum hourly quantity (MHQ). The terms and conditions of Schedule 2B relate to specification of MDQ and MHQ, and to extensions in the term of service agreements, as follows.

MDQ and MHQ

- At the commencement of a service agreement, the user is required to specify an MDQ for each delivery point that is to apply for the whole of the term of the service agreement (clause 1), and AGLGN is not obliged to deliver gas in excess of the MDQ or MHQ in any hour, except as an authorized overrun (clause 2).

Extension of term

- The entitlement of a user to continue to receive the service after the expiry of the term of the service agreement depends upon when the service agreement expires relative to the revisions commencement date (i.e. the date of commencement of the next access arrangement period).
  - If the term expires on or before the revisions commencement date, the user is entitled to continue to receive the services under the services agreement after the expiry of the term of the service agreement, subject to the user giving AGLGN four weeks notice prior to the expiry requesting an extension of the term (clause 3). The user is entitled to a contracted capacity not exceeding the MDQ and MHQ applying at the expiry of the term, at the relevant reference tariff under the access arrangement in force from time to time (clause 5).
  - If the term of the service agreement expires after the revisions commencement date, the user may only continue to receive the services by entering into a new services agreement effective from the date of expiry (clause 4).
- The extension of the term of a service agreement is also contingent on other conditions:
  - In respect of a Managed Capacity Service, if the maximum quantity metered at the delivery point in the 12 months ending 2 months prior to the expiry of the term is greater than the MDQ, then the user shall be entitled to receive a Capacity Reservation Service, but may request a Managed Capacity Service in accordance with a request for service under Schedule 6 (clause 5).

  - Where the MHQ at a delivery point is more than one tenth of the booked MDQ, the ability of the user to continue to receive the service is dependent upon whether or not a queue exists, or is likely to exist, for capacity in the network: AGLGN gives the user at least 12 weeks notice prior to expiry of the term that a queue has been formed, or is likely to be formed during the following term, the user is not entitled to continue to receive the services to the delivery point. AGLGN may agree to continue to provide the services after the expiry of the term, to the delivery point on reasonable commercial and/or technical grounds, including, the installation of demand management devices by the user which are acceptable to AGLGN (clause 6).

- There is provision for AGLGN to determine that a service agreement is automatically extended from the expiry date in circumstances where the user fails to give four weeks notice to AGLGN to cease delivering gas from the expiry of the term, and fails to give four weeks notice to AGLGN of an application to continue to receive the service under clause 3 (clause 7).

### *Initial submissions*

No submissions on the proposed access arrangement address terms and conditions of Schedule 2B.

### *Preliminary analysis*

The provisions of Schedule 2B relating to MDQ and MHQ are the same terms and conditions as exist under the current access arrangement. As these terms merely require the specification of MDQ, and give meaning to the specification of MDQ and MHQ by limiting AGLGN's obligation to deliver gas to within the limits, these provisions are considered reasonable.

No submissions on the proposed access arrangement took issue with the provisions of Schedule 2B for extension of terms of service agreements, and the provisions do not appear unreasonable at face value.

However, the provisions appear to provide an incomplete specification of the rights of a user in several respects. In particular, the following ambiguities exist.

- In respect of the right of a user under clause 3 to have a service continue after the expiry of the service agreement, it is not obvious why AGLGN has differentiated between services expiring before and after the revisions commencement date. It is not clear whether a user that has a service agreement that expires after the revisions submission date (and which does not thus have a right to continue to receive the service after the expiry under clause 3) has a right to renew the services agreement under clause 4 or whether a new service agreement is contingent upon making an application for a service.

- In respect of the right of a user under clause 3 to have a service continue after the expiry of the service agreement, it is not clear whether a service thus continued will continue indefinitely or whether the continuation is for a particular term.
- It is not clear under clause 5, in the event that under a Managed Capacity Service the maximum quantity metered at the delivery point in the 12 months ending 2 months prior to the expiry of the term is greater than the MDQ, whether the user has a right to continue to receive the Managed Capacity Service in accordance with clause 3, or whether the user must either elect to receive a Capacity Reservation Service or request a Managed Capacity Service in accordance with a request for service under Schedule 6.
- Clause 7 does not appear to contemplate the circumstance where the expiry date of a service agreement occurs after the revisions commencement date.

For reason of these ambiguities, the provisions of Schedule 2B relating to extensions of term are considered unreasonable.

As an additional matter in relation to Schedule 2B, it is not clear how the terms and conditions contained in Schedule 2B bear relation to the Meter Data Service and the Gas Swap Service despite the services policy indicating that the terms and conditions of Schedule 2B apply to these services. The attachment of terms and conditions to a service where those terms and conditions bear no relation to that service may be considered unreasonable for reason of creating difficulty in the interpretation and application of the terms and conditions. It is recommended that IPART seek amendment of the proposed access arrangement to remove from the descriptions of the Meter Data Service and the Gas Swap Service the indication that the terms and conditions of Schedule 2B apply to these services.

### *Further submissions*

- **AGLGN (10 September 2004)**

  AGLGN maintain that clause 5 of Schedule 2B is not ambiguous.

  AGLGN agrees that [the specific reference in the descriptions of the meter data service and gas swap service to the terms and conditions set out in Schedule 2B] is not necessary.

- **AGLGN (6 October 2004)**

  ACG consider that it is unclear why any provision for extension of the term of a service agreement should bear any relativity to the Revisions Commencement Date. Clause 4 of Schedule 2B provides that if the term of a service expires after the Revisions Commencement Date, a User is not entitled to continue to receive services after the expiry of the term, unless the User enters into a Service Agreement with AGLGN effective from the date the term of the service expires under the preceding agreement.

The purpose of this provision is to ensure that where changes are made to the Access Arrangement, the parties have the benefit of those changes. Changes to the terms and conditions during an Access Arrangement review may be to the benefit or disadvantage of Users depending on the substance and effect of those changes. Without conditions as set out in clause 4 of Schedule 2B, a User would be entitled to seek Services under a Service Agreement beyond the Revisions Commencement Date, indefinitely, on terms and conditions which existed at the time the Service Agreement was entered into, notwithstanding that a Revised Access Arrangement has since been determined.

ACG have suggested that as an alternative to clause 4 of schedule 2B, Service Agreements could have an indefinite term but the terms and conditions of those agreements could be generally subject to terms and conditions of the Access Arrangement in force from time to time. Past advice given to AGLGN is that:

- a Service Agreement is a contract between the User and AGLGN that stands on its own terms. Except to the extent expressly stated in the Service Agreement, its terms and conditions are not subject to the terms and conditions of an Access Arrangement.
- the Access Arrangement is not a legally binding agreement between the User and AGLGN. As such, a future Access Arrangement cannot unilaterally import terms on AGLGN or the User, nor can it unilaterally vary the terms of the Service Agreement.
- variations made through a provision in a contract (service agreement) which attempts to incorporate the capacity for unspecified and unlimited unilateral variations at some future time (ie: without requiring the further express agreement of the parties at that time) could be readily challenged at law. In contrast, the provisions of clause 4 of Schedule 2B proposed by AGLGN foreshadow AGLGN and the User effecting a new, or explicitly varied, service agreement to clearly document the new terms and conditions at the time of the change.

- **EnergyAustralia**

  EnergyAustralia supports ACG's comments on the ambiguities in schedule 2B and supports the request that the terms and conditions contained in the schedule be clarified.

### *Final analysis and recommendations*

In its preliminary analysis of schedule 2B of the access arrangement, The Allen Consulting Group identified a number of ambiguities in provisions. AGLGN has responded to this preliminary analysis and in light of this submission, the matters of concern are further addressed below.

#### *Right to continue a service and the revisions commencement date*

In its preliminary analysis, The Allen Consulting Group noted that in respect of the right of a user under clause 3 to have a service continue after the expiry of the service agreement, AGLGN has differentiated between services expiring before and after the revisions commencement date. It was further noted that it is not clear whether a user that has a service agreement that expires after the revisions submission date (and which does not thus have a right to continue to receive the service after the expiry under clause 3) has a right to renew the services agreement under clause 4 or whether a new service agreement is contingent upon making an application for a service.

In its submissions, AGLGN indicates that the purpose of clauses 3 and 4 is to ensure that when the access arrangement is revised, users seeking continuation of a service beyond the term of an existing service agreement, a new service agreement is entered into that reflects the provisions of the revised access arrangement. The Allen Consulting Group accepts that this requirement is reasonable. However, clause 4 of schedule 2B remains ambiguous as to the process by which a user must enter into a new service agreement, and this ambiguity is considered unreasonable. The Allen Consulting Group recommends that IPART require amendment of clause 4 of schedule 2B to indicate that an application of a user for a service in the circumstances contemplated by clause 4 is not subject to the queuing policy of the access arrangement.

### *Ambiguity as to the period of continuation of a service*

In its preliminary analysis, The Allen Consulting Group noted that in respect of the right of a user under clause 3 to have a service continue after the expiry of the service agreement, the period over which the service may be continued is not specified, and it is thus ambiguous whether a service thus continued will continue indefinitely or whether the continuation is for a particular term.

AGLGN submits that the continuation of service is intended to be possible for the period of the access arrangement, i.e. until the revisions commencement date. The Allen Consulting Group considers that it is not reasonable that this limit on the period of continuation of a service is not made clear. It is recommended that IPART require amendment of clause 3 of schedule 2B to indicate the period over which the service may be continued.

### *Continuation of a Managed Capacity Service*

In its preliminary analysis, The Allen Consulting Group noted that it is not clear, under clause 5 of schedule 2B, whether in the event that under a Managed Capacity Service the if the maximum quantity metered at the delivery point in the 12 months ending 2 months prior to the expiry of the term is greater than the MDQ, the user has a right to continue to receive the Managed Capacity Service in accordance with clause 3, or whether the user must either elect to receive a Capacity Reservation Service or request a Managed Capacity Service in accordance with a request for service under Schedule 6.

AGLGN submits that:

- the intent of clause 5 is that a users rights to request an extension of term under clause 3 are for an extension of up to the same capacity entitlement (MDQ and MHQ, excluding short term services) as exists at expiry;
- the qualifications concerning the extension of managed capacity services are added to clarify that there is no automatic entitlement to increased capacity where necessary to maintain the same service type;
- these qualifications are consistent with the queuing policy so that any requirement to increase capacity is subject to a new request for service and therefore subject to the queuing policy should a queue exist.

AGLGN maintains that this clause is not ambiguous and provides for the reasonable interests of users and the service provider.

The Allen Consulting Group has reconsidered clause 5 of schedule 2A in light of AGLGN's submission and accepts the clause is not ambiguous or otherwise unreasonable.

*Continuation by AGLGN of gas deliveries after expiry of a service agreement*

Clause 7 of schedule 2B provides for AGLGN, at its discretion, to continue to deliver gas to an end customer in the event that the service agreement with the user previously supply gas to that customer expires. In its preliminary analysis, The Allen Consulting Group indicated that clause 7 does not appear to contemplate the circumstance where the expiry date of a service agreement occurs after the revisions commencement date.

AGLGN has submitted a clarifying explanation of clause 7, indicating that clause 7 does not relate to a continuation of a service per se, but rather a decision by AGLGN to continue to deliver gas to an end customer in circumstances where the service agreement with the user previously supply gas to that customer expires.

The Allen Consulting Group has reconsidered clause 5 of schedule 2A in light of AGLGN's submission and accepts that the relativity of the date of expiry of the service agreement and the revisions commencement date is not a relevant consideration in respect of clause 7.

*Relevance of schedule 2B to the Meter Data Service and Gas Swap Service*

Sections 2.6 and 2.7 of the access arrangement indicate that the terms and conditions for the Meter Data Service and the Gas Swap Service include the provisions of Schedule 2B. In its preliminary analysis, The Allen Consulting Group queried the relevance of the provisions of schedule 2B to these services.

AGLGN has submitted that there is not direct relevance of the provisions of schedule 2B to the Meter Data Service and Gas Swap Service. On this basis, and for the purposes of clarity, it is recommended that AGLGN require amendment of the access arrangement such that schedule 2B does not comprise part of the terms and conditions for the Meter Data Service and Gas Swap Service.

## 4.25 Schedule 3: gas balancing

### *Proposed terms and conditions*

Schedule 3 sets out terms and conditions in relation to gas balancing.

The schedule is divided into two parts. Part A sets out terms and conditions that operate in circumstances where there is an operational balancing agreement ("OBA") in place, which is an agreement between pipeline/network owners to cooperate in the management of the pipeline/network interfaces. Part B sets out terms and conditions that operate where there is no OBA in place.

A general provision at the commencement of Schedule 3 indicates that both of parts A and B of the schedule will not have effect if alternative arrangements are put in place under an "approved scheme", which in effect means alternative arrangements put in place under the Gas Retail Market Business Rules and administered by the Gas Market Company. It is indicated that the provisions of parts A and B of Schedule 3 will cease to operate subject to AGLGN's approval of the alternative arrangements.

Clause 2 of Part A of Schedule 3 indicates that under an OBA "the nominations of Users of the Network and Shippers in the pipelines are deemed to flow into the Network for the purposes of Network imbalance calculation and pipeline delivery invoicing and balancing. User imbalances will exist in the Network. These imbalances will reflect the difference between each Users cumulative confirmed nomination and cumulative actual withdrawals from the Network. User imbalances are corrected through nominations or through the nomination process or through settlement between individual participants and the Network."

The remaining clauses of Part A set out provisions in relation to:

- requirements for users to make nominations of "forecast requirements" for receipt points prior to each gas day and for AGLGN to advise each user of an adjusted requirement for each receipt point that takes into account the user's forecast requirement, settlement of the users prior imbalance account, and an amount of gas necessary to satisfy other aggregate needs of the relevant network section to ensure safety and reliability (clauses 4 to 12);
- determination of a user's prior imbalance account, and for a user to be required to provide AGLGN with a "user's fiduciary guarantee" in relation to the user's prior imbalance account (clauses 13 to 16); and
- a requirement that in relation to participant banking, the user comply with provisions of the Network Code and the GRMBRs (clause 17).

Part B of Schedule 3 sets out provisions that, in addition to similar provisions to those set out in Part A, address determination of withdrawal and input quantities for each user, and a right of AGLGN to purchase "operational balancing gas" and to sell this gas to relevant users.

### *Initial submissions*

The provisions of Schedule 3 were addressed in submissions made by EnergyAustralia and TXU. Both of these submissions address the prospect that the Gas Market Company will in 2004 introduce alternative arrangements for gas balancing that will replace the provisions of Schedule 3. EnergyAustralia indicates that gas balancing arrangements implemented under the current access arrangement, which were implemented in November 2003 after cessation of operation of a previous operational balancing agreement, have not operated satisfactorily.

- **EnergyAustralia**

  10. Operational Balancing Requirements

  When the EGP began operating in November 1999, an Operational balancing Agreement (OBA) was agreed between EGP (Duke), MSP (APT) and AGLGN to ensure balancing between systems (for example, the volume of gas injected into the distribution network (by the Shippers on behalf of the Retailers) is equal to the volume of gas withdrawn by the end-use customers). This arrangement operated satisfactorily until November 2003 when Duke withdrew from the OBA. The market had to rely on the operational balancing arrangements that are contained within the 2003 Access Arrangement – the so called 'Fallback' arrangements.

In the few months that the 'Fallback' arrangements have been operating many participants have expressed dissatisfaction with these arrangements. As a consequence, the NSW Gas Market Company has initiated an industry working group to develop alternative arrangements.

From this process, an industry agreed alternative should be available by mid 2004, and EnergyAustralia would like to see this industry agreed alternative incorporated into the 2003 Access Arrangement.

- **TXU**

TXU believes an alternative arrangement to the Operational Balancing Agreement (OBA) should be included as part of the Access Arrangements. Workshops will commence shortly on the Business Rules that will review alternative balancing arrangements to those that currently form a part of the Access Arrangements. Under the current arrangements, AGLGN must approve any alternative arrangements to the current scheme, which will be subject to the alternative arrangement meeting the operational requirements of the network. TXU believes that the alternatives to the OBA currently being discussed as part of the Business Rules could form part of AGLGN's new Access Arrangements.

### *Preliminary analysis*

As explicitly recognised by Schedule 3 of the proposed access arrangement, gas balancing is a matter that may be addressed by arrangements outside of the access arrangement. The submissions from EnergyAustralia and TXU indicate that the Gas Market Company has initiated a process to develop these alternative arrangements.

Given the history of an OBA being, until recently, in place for the AGLGN network and the prospects for a new agreement to be established in the near future, The Allen Consulting Group considers that the appropriate context within which to assess the reasonableness of provisions of Schedule 3 is as a reserve provision to operate in the event that an OBA is not in place. It is also noted that some provisions related to gas balancing, in particular nomination requirements, are also addressed by the GRMBRs and hence the provisions of Schedule 3 should also be assessed in the context of terms and conditions established under the access arrangement being subordinate to provisions of the GRMBRs (as discussed in section of this report.

The provisions for gas balancing proposed under Schedule 3 are essentially similar to the provisions under the current access arrangement, which have been used to govern gas balancing since the cessation of the original OBA. While EnergyAustralia submits that there is some dissatisfaction with the operation of gas balancing under these provisions, there is no suggestion that the provisions have been inadequate as reserve provisions. Given this, The Allen Consulting Group is of the view that the provisions of Schedule 3 can be regarded as reasonable, subject to Part B of Schedule 3 remaining a reserve provision in the event that an OBA is not in place (in accordance with the recommendations made in section 3.5 of this report for the terms and conditions under the access arrangement to fall away in the event that the relevant matters become addressed by the GRMBRs).

It is noted that the general provisions of Schedule 3 indicate that the displacement of Schedule 3 by an OBA and other arrangements that may be put in place by the Gas Market Company is subject to AGLGN's approval. This provision for AGLGN's approval is not considered to be of significance since an OBA could not be established without unanimous agreement of AGLGN and owners of transmission pipelines that supply gas to the AGLGN network.

#### *Further submissions*

- **Energy Australia**

  EnergyAustralia supports this conclusion [of The Allen Consulting Group].

AGLGN has indicated separately from submissions that Section B of schedule 3 sets out gas balancing with no Operational Balancing Agreement in place, and that this clause clearly establishes that Part B can only ever act as a reserve provision in the event that an OBA is not in placet.

#### *Final analysis and recommendations*

In its preliminary analysis, The Allen Consulting Group concluded that it should be clear in schedule 3 that balancing arrangements under the access arrangement should only operate where there is no operational balancing agreement established under the GRMBRs. AGLGN has indicated that the balancing arrangements set out in schedule 3 operate to this effect. The Allen Consulting Group accepts this submission.

### 4.26 Schedule 4: operational principles

#### *Proposed Terms and Conditions*

Schedule 4 of the proposed access arrangement sets out terms and conditions in relation to two matters of the operation of the AGLGN network: load shedding and establishment of receipt points.

The provisions of Schedule 4 relating to load shedding establish principles for:

- the priority order in which gas deliveries to customers may be reduced or curtailed and, in reverse order, restored;
- requirements for users to provide AGLGN with emergency contacts for non-tariff customers and to participate in emergency load management systems;
- provision for AGLGN to suspend deliveries to a delivery point if a user fails to comply with the provisions for load shedding; and
- a limitation of liability of AGLGN in relation to load shedding: "AGLGN will not be liable for any losses, liabilities or expenses incurred by the User and/or the Users' Customers arising from load shedding. The User will be liable for and indemnify AGLGN against any claims made by the User's customers (including against the User) arising out of AGLGN's implement action of load shedding procedures.

The provisions of Schedule 4 relating to establishment of receipt points establish principles in relation to:

- requirements for a user to enter into an agreement with AGLGN in relation to establishment of a new receipt point;
- technical requirements for the design of receipt points;
- requirements in relation to cathodic protection of the receipt point facilities;
- arrangements between AGLGN and the owner of a receipt point to enter into arrangements with AGLGN for installation and operation of the receipt point.

### *Initial submissions*

The load shedding principles of Schedule 4 were addressed in submissions of Alinta/Duke Energy, Energy Markets Reform Forum, Energy Advice Pty Ltd and EnergyAustralia. These submissions raised concerns in relation to three aspects of the load shedding principles.

- The load shedding principles and priorities do not recognise the cause of the need to shed loads, and the load shedding priorities should, for example, provide for loads that are supplied from a particular transmission pipeline or a particular gas supplier to be shed in priority to other loads where a failure of that pipeline or supplier gives rise to the need for load shedding (Alinta Duke Energy, Energy Markets Reform Forum, Energy Advice Pty Ltd, EnergyAustralia).
- The load shedding principles and priorities do not establish an appropriate priority for delivery of gas to embedded networks (Energy Advice Pty Ltd).
- The ability of AGLGN to shed load should be limited to defined emergency situations and should not apply to reductions in gas supply that occur other than as a result of an emergency (EnergyAustralia).

None of the submissions made on the proposed access arrangement addressed the operation principles relating to receipt points.

- **Alinta / Duke Energy**

  The second aspect of the proposed Access Arrangement that Alinta wishes to comment on relates to the proposed load shedding provisions contained in Schedule 4 of the Access Arrangement. Alinta notes that the proposed priorities do not take into consideration the fact that AGLGN is supplied with gas from a number of gas fields and transmission pipelines. It is Alinta's view that the proposed approach would have an adverse impact on incentives to diversify supply, and in turn, an adverse impact on investment in developing gas fields.

  Alinta believes that a more appropriate load shedding mechanism is one that recognises the cause of a load shedding event. That is, there should be a casual relationship between load shedding events and those users that are curtailed. This causal relationship can be accommodated in practical terms by matching up users with their shippers. Where a shipper is unable to deliver sufficient quantities of gas which non-delivery then results in a load shedding event (whether because of problems with a gas field or a transmission pipeline) then it should be the users of that shipper that should be curtailed first.

Alinta understands that the information necessary to give effect to this approach is already available to AGLGN. Alinta recognises that this causal relationship could not and in fact should not apply to tariff customers and hospitals and essential service sites (that is, proposed load shedding priorities 9 and 10). It should, however, apply to all other users. As noted above, implementing such a causal relationship would provide the incentives to ensure diversity of supply (and therefore greater system security) while encouraging the development of and operation of a national market for natural gas -the latter being one of the overarching objectives of the Gas Access Regime.

- **Energy Markets Reform Forum**

  The EMRF has been dissatisfied with the load shedding arrangements recently as a result of the Moomba incident earlier in the year.

  IPART should require AGLGN to provide new load shedding arrangements in the 2004 Access Arrangements that recognize:-

  the availability of alternative sources of gas supply; and

  the availability of alternative transmission routes.

  The load shedding arrangements must not be anti-competitive and favour particular entities' but must incorporate sufficient priority for the sanctity of contract principle and the recognition of (gas) property rights.

  IPART to require that new load shedding arrangements be developed in the 2004 Access Arrangements and certain principles must be enshrined in the arrangements.

- **Energy Advice Pty Ltd**

  5. INTERCONNECTION OF EMBEDDED NETWORK SERVICES

  …

  5.3 Load Shedding Priority for Embedded Network Users

  It is accepted that prospective users of the AGLGN and Embedded Networks connected to the AGLGN will be subject to load shedding arrangements – as long as prospective users are not unfairly disadvantaged under the load shedding priority allocated under a connection agreement between AGLGN and the Embedded Network Operator.

  The Access Arrangement states:

  "Unless there is an agreement on load shedding between AGLGN and the Embedded Network Operator, the Embedded Network Operator will be subject to Load Shedding priority 2 as described in Schedule 4. Network transportation services for the delivery of gas to the Embedded Network Delivery Point will be subject to the same Load Shedding priority." (pages 32 and 33).

  An issue which emerges from the above statement is whether it is reasonable to apply priority 2 to a user of the Embedded Network simply because of a failure of AGLGN and the Embedded Network Operator to reach agreement on the issue. We are of the opinion that all Users of the AGLGN, whether or not they happen to utilise an Embedded Network, should have the same Load Shedding arrangements/principles applied.

Schedule 4: Operational Principles – Load Shedding states:

"This policy will apply to all Local Network and Trunk Services, irrespective of the Receipt Point of user's upstream arrangements."

That statement should be extended to include "downstream arrangements." The contract users served by an Embedded Network should, for the purposes of load shedding, be treated exactly the same as AGLGN's other customers. It should be mandatory for Embedded Network Operators and AGLGN to apply the AGLGN Load Shedding priorities to contract users of the Embedded Network as if they were exclusively served by the AGLGN. It is not acceptable to potentially leave certain contract users unduly exposed simply because they are being supplied from an Embedded Network. Such a position would not exclude the Embedded Network Operator from initiating different arrangements where load shedding was required due to circumstances exclusive to the Embedded Network.

6. LOAD SHEDDING POST-MOOMBA INCIDENT

Schedule 4: Operational Principles – contains the Load Shedding Priorities 1-10. We are of the view that there needs to be a higher level of communication and transparency in relation to the rules of curtailment and where particular sites fit in relation to the load shedding priorities.

Of particular concern – and one which IPART needs to satisfy itself that the issue is being properly implemented – is the issue of curtailment where there has been as interruption to a supply source.

The Moomba incident on 1 January 2004 clearly highlighted conflict within industry as to the reasonable implementation of load shedding principles. AGLGN interpreted the supply shortfall caused by the interruption to supply from Moomba as a potential delivery constraint in the network – and sought to implement curtailment across all contract users and sites served by the network.

A number of parties have expressed serious concern with this approach. No emergency provisions were invoked by the State Government, and in any event, should this not have been treated as a supply interruption rather than a distribution problem?

Fortunately, the situation eventuated where only a small number of customers were required to curtail – note that it is not clear whether they were curtailed by AGL Retail or AGLGN. However, it was very close to a higher level of load shedding being invoked by AGLGN.

Is it appropriate to curtail all contract users of the network if only one of the supply sources was affected. For example, a contract user sourcing its gas from the Gippsland Basin via the EGP was being treated the same as contract users sourcing gas from a retailer supplied from Moomba (ie AGL Retail).

It is a reasonable question to ask whether AGLGN's interpretation advantaged AGL Retail's customers to the potential detriment of, for example, EnergyAustralia's customers.

This issue is one which IPART should consider and provide direction to AGLGN and guidance to the market generally.

- **EnergyAustralia**

  6. Load shedding

  6.1 Relevant events

  It is not clear from the current provisions that AGLGN can only shed load when there is an actual emergency. It could include an event that is essentially a user's upstream contractual problem. The load shedding principles should be restricted to system wide, serious emergencies – not contractual problems.

  Load shedding is provided for in Schedule 4 of the Access Arrangement. Schedule 4 gives AGLGN a wide scope in which to initiate a load shedding procedure. The 'Policy' section enables AGLGN to shed load in the event of a 'gas supply reduction' or a 'prospective gas supply reduction', with neither of these phrases being defined.

  Amendments have been suggested in Attachment B that confine the circumstances in which AGLGN can shed load to 'emergency' situations.

  A section entitled 'Contacting Users' has also been added, which ensures that AGLGN will, where possible, notify Users of load shedding.

  6.2 Revise load shedding priority

  The recent Moomba incident (Jan 2004) highlighted the fact that the current load shedding provisions are inadequate, yet the 2003 Access Arrangement proposes no change. The load shedding provisions should be updated to reflect alternative sources of gas supply, and alternative transmission routes, that have become available in recent years.

  EnergyAustralia believes that the current load shedding principles do not provide any incentive for users to diversify their sources of supply. Under the current load shedding priorities, there is potential for customers serviced from a particular gas basin, by a particular transmission pipeline, to be curtailed as a result of supply issues with another gas basin and/or transmission pipeline, despite the fact that their source of supply and transmission route is unaffected.

  The situation should be remedied by adopting a different load shedding priority where a supply issue arises from one of the major gas basins and/or transmission pipelines supplying the AGLGN distribution network. Load shedding priorities should be revised in line with the following principle:

  1. current load shedding priorities 1-8 for customers of the affected basin/transmission pipeline should be applied initially as necessary to reduce demand to be in (acceptable) balance with injections;

  2. customers being supplied by unaffected gas basins and transmission pipelines would not be curtailed unless sufficient demand reduction cannot be achieved by step 1. If such further curtailment is necessary then current load shedding priorities 1-8 should apply to all 'unaffected' customers

  3. Current priorities 9 and 10 should remain in place across the whole customer base.

  EnergyAustralia also believes that there is some ambiguity with the load shedding priorities 1-8, opening an opportunity for possible rationalisation of these priorities.

[EnergyAustralia suggests the following different provisions in Attachment B of its submission]

ATTACHMENT B

LOAD SHEDDING

This policy will apply to all Local Network and Trunk Services, irrespective of the Receipt Point or User's upstream arrangements.

Policy

AGLGN may initiate a load shedding procedure to preserve the integrity of the Network in the following circumstances:

• if there is material damage to the Network;

• if directed to do so by any government or regulatory agency;

• if a force majeure event occurs which affects AGLGN's ability to deliver gas to Users; or

• in the event of an Emergency or for reasons of health or safety.

In initiating load shedding, AGLGN will use reasonable endeavours to minimise the disruption to operations at Users' sites and limit load shedding to the extent necessary to deal with the above circumstances.

Load Shedding

Load shedding is defined as a controlled interruption to, or reduction in, the delivery of gas to Customers.

Ranking and Priorities

Load shedding will be implemented by AGLGN according to the following schedule of priorities:

[as per Schedule 4]

Priority will be determined by the usage specified in the Schedule to the Service Agreement, or if no usage is specified, by AGLGN. Users must inform AGLGN of any changes in priority due to changes in customer usage. Users shall respond to requests from AGLGN for information on priorities and customer emergency contacts within a reasonable period of time.

Contacting Users

Where practicable, AGLGN will notify the User which gas supply points it will interrupt or reduce and the order in which it proposes to interrupt or reduce those points prior to the load shedding.

Restoration of Service

Where feasible, supply will be restored in reverse order to that in which load shedding was implemented.

Emergency contacts for Customers

Users must ensure that they advise AGLGN of emergency contacts for Customers at Non-Tariff Delivery Points and ensure that such contact details are current at all times.

Users must advise of emergency Contact details for communication between AGLGN and the User during load shedding. User emergency contact personnel must be available to assist AGLGN during load shedding if required.

Emergency Load Management Systems (ELMS)

Site and Network information is maintained through ELMS, in consultation with Users, and is used as the basis for the load shedding.

ELMS is the process of contacting Customer sites to notify them of an interruption to their gas supply as a result of a problem with the delivery of gas, and reconnecting them when delivery capability has been restored. All Users of the Network will be required to participate in and comply with the scheme.

ELMS is an AGLGN computer based system used as an aid in contacting and recontacting Customer sites in the event of a supply failure. Information on the ELMS system relating to a User is available to the User on request.

Suspension

If a User fails to comply with the load shedding procedures set out in this Schedule 4, AGLGN may suspend the delivery of Gas to a Delivery Point.

Liability

AGLGN will not be liable for any losses, liabilities or expenses incurred by the User and/or the Users' Customers arising from load shedding. The User will be liable for and indemnify AGLGN against any claims made by the User's customers (including against the User) arising out of AGLGN's implementation of load shedding procedures.

[Additional definition in Schedule 1:]

"Emergency" means an event or circumstance which it would be reasonable to believe constitutes a situation which may:

(a) threaten the personal safety of any person;

(b) cause material damage to the Network or threaten system security; or

(c) cause material damage to any property, plant or equipment.

### *Preliminary analysis*

The load shedding principles set out in Schedule 4 indicate the manner in which AGLGN would unilaterally determine to reduce or curtail deliveries of gas to customers in instances where the capacity of the AGLGN network to deliver gas is compromised by a reduction in the supply of gas to the network.

Energy Australia has questioned whether the load shedding principles should be limited in application to load shedding occurring in response to defined emergency situations and should not apply to reductions in gas supply that occur other than as a result of an emergency.

The interruption of gas deliveries in emergency events is addressed by clause 52 of Schedule 2A, which gives AGLGN powers to interrupt gas deliveries as it sees fit in cases of emergency or risk of injury to persons or damager to property. It is notable that no submissions on the proposed access arrangement have taken issue with this broad power of AGLGN.

It thus appears that while AGLGN may apply the load shedding principles of Schedule 4 in the event of an emergency, broader discretion may be exercised (clause 52 of Schedule 2A) in interrupting gas deliveries. The load shedding principles appear to be intended to apply in instances of an inadequate supply of gas to the network, as indicated in the second paragraph of Schedule 4.

In addressing a shortage of gas supply, the load shedding principles establish a schedule of reliability of gas deliveries for customers of different types. The reliability of gas deliveries is not a matter that individual customers can contract for directly, but rather is determined by the characteristics of each customer in respect of the nature of the end use of gas. The schedule of reliability appears to have been determined taking into account a judgement by AGLGN of the levels of costs that would be incurred in reducing gas deliveries to customers of different characteristics, and also technical issues associated with the practicality of reducing gas deliveries to different customers. Thus for example, customers for which load may be reduced without exposure of the customer to damage to product or plant would be subject to load shedding before customers that would be exposed to such damage. Furthermore, gas deliveries to homes and small businesses (under the tariff services) would be the last in order for load shedding, possibly reflecting the practical difficulty, as well as the potential health and safety concerns, of interrupting supplies to these gas customers.

In principle, an alternative mechanism of determining customer priorities in respect of load shedding and the reliability of gas deliveries would be for customers to contract with gas retailers, and hence indirectly with AGLGN, for particular reliabilities of supply and for these contracts to determine the schedule of load shedding priorities.

The load shedding principles of the nature proposed by AGLGN, rather than a contractual determination of relative reliability of deliveries, is common practice in electricity and gas distribution in Australia. Whether this is the most efficient means of determining relative reliability of gas deliveries to customers is a mute point and not within the scope of this study to determine. On the basis of common practice in the electricity and gas industries, however, The Allen Consulting Group is satisfied that the establishment of a schedule of reliability in the access arrangement is reasonable.

On a related matter, several submissions on the proposed Access Arrangement expressed concern that the load shedding principles and priorities do not recognise the cause of the need to shed loads, and the load shedding priorities should, for example, provide for loads that are supplied from a particular transmission pipeline or a particular gas supplier to be shed in priority to other loads where a failure of that pipeline or supplier gives rise to the need for load shedding. Submissions indicate, correctly, that establishing a consequential linkage between the cause of a shortage in gas supply and the priority of gas customers in respect of supply interruptions would be consistent with establishing incentives for users to seek reliability in gas supplies. However, the information requirements and contractual arrangements to implement such a linkage may be complex; for example where a user sources gas from a number of gas sources for provision to different customers without any explicit designation of a gas from a particular source to particular customer. The Allen Consulting Group considers that arrangements contemplated by submissions are more in the nature of a system of commercial contracts for establishing delivery reliabilities and load shedding priorities, as described above. Again, while determination of the practicalities and merits of such a system may inform efficient development of gas markets, it is beyond the scope of the current study. It also would represent a significant change in the market for gas and gas-distribution services that would warrant consideration outside of consideration of the terms and conditions of the proposed access arrangement.

A third matter raised in submission relates to the load-shedding priority for the supply of gas to embedded networks. Under Schedule 4, the second of 10 load types in order of priority of load shedding comprises delivery points that serve more than one customer, and where no arrangement exists between AGLGN and the operator of the facilities beyond the delivery point for shedding loads served by those facilities. This priority relates to, in effect, embedded networks.

Further provisions relating to the priority of load shedding of embedded networks exists under the terms and conditions indicated for the non-reference service "interconnection of embedded network service":

- "The Embedded Network Operator will be subject to load shedding arrangements. The Embedded Network Operator must have facilities available to it to reduce or discontinue the withdrawal of Gas if called upon to do so."
- "Unless there is an agreement on load shedding between AGLGN and the Embedded Network Operator the Embedded Network Operator will be subject to Load Shedding priority 2 as described in Schedule 4. Network transportation services for the delivery of Gas to the Embedded Network Delivery Point will be subject to the same Load Shedding priority."

The Allen Consulting Group concurs with the view expressed in submissions that the load shedding priority established for embedded networks does not establish an appropriate priority for delivery of gas to embedded networks. The determination of a load shedding priority for embedded networks as a separate class of delivery points is inconsistent with the determination of load shedding priorities for other customers, in that the former is determined on the basis of the identity of the User while the latter are based on the characteristics of the end-use customer of gas. The determination of a load shedding priority for embedded networks as a separate class of delivery points fails to give recognition to the economic and practicality criteria that informed the establishment of load-shedding priorities for other end-use customers of gas.

The implied provision for the owner of an embedded network and AGLGN to make an agreement in relation to load shedding appears to contemplate the inadequacy of establishing a load shedding priority for an embedded network as a single entity. It may be that AGLGN envisages that such agreements would take into account factors such as the characteristics of gas use in the embedded network, although the nature of the agreements is not explained.

It is the view of The Allen Consulting Group that the load-shedding priority given to embedded networks is unreasonable for the reasons given above. This could be addressed by more explicit requirements under the terms and conditions for the interconnection of embedded network service for an agreement between the owner of the embedded network and AGLGN in relation to load shedding. However, for the reasons outlined in section 3.4 of this report, IPART may have limited ability under the Code to require such amendment of the access arrangement as the interconnection of embedded network service is a non-reference service.

A final matter in relation to the load shedding principles is the limitation of liability of AGLGN for "any losses, liabilities or expenses incurred by the User and/or the Users' Customers arising from load shedding". As with other provisions of the terms and conditions relating to liability, The Allen Consulting Group recommends that IPART seek legal advice on the reasonableness of this provision. However, The Allen Consulting Group considers that the provision may be unreasonably broad and should be explicitly limited in effect to circumstances where the AGLGN acts in good faith and in accordance with the principles of the Access Arrangement.

The operational principles relating to the establishment of new receipt points describe technical requirements for new receipt points and establish a requirement for a party establishing a new receipt point to enter into arrangements with AGLGN for the installation and operation of the receipt point facilities. None of the submissions made on the proposed access arrangement addressed these provisions and The Allen Consulting Group considers the provisions to be reasonable.

### *Further submissions*

- **AGLGN (10 September 2004)**

  AGLGN agrees to amend this provision [in relation to limitation of liabilities arising from load shedding].

- **TXU**

  AGLGN should engage a transparent process in the event of a gas shortfall so that all market participants can be assured that they are being treated in a fair and equitable manner. A process similar to the VENCorp tables provides a useful model.

- **Energy Australia**

  Load Shedding: At page 80 of ACG's report, ACG recommends that the limitation of AGLGN's liability in respect of load shedding be confined to circumstances where the AGLGN acts in good faith and in accordance with the principles of the Access Arrangement. This recommendation has been accepted by AGLGN. However, clause 60 of the AA would have a similar effect to the adoption by AGLGN of ACG's recommendation. This only reinforces our view that IPART ought to require AGLGN to consolidate all the liability provisions in the one section of the AA.

  …

  EnergyAustralia is of the view that at the very least the circumstances in which AGLGN can shed load (whether under the load shedding principles or schedule 2A) should be more clearly defined in the AA.

### *Final analysis and recommendations*

In its preliminary analysis, The Allen Consulting Group concluded that the provisions for load shedding set out in schedule 4 may not adequately deal with the priority of load shedding for gas delivery to embedded networks, nor appropriately recognise the cause of a gas supply shortfall in determining the customers affected by load shedding. However, The Allen Consulting Group determined that these matters cannot be dealt with solely through the terms and conditions for reference service, and hence the terms and conditions could not be found to be unreasonable for reason of not dealing with the matters.

No further submissions were made on these matters and The Allen Consulting Group maintains the views as expressed in the preliminary analysis.

EnergyAustralia has, however, indicated that the terms and conditions should be amended to make it clear when AGLGN can shed loads, or otherwise suspend deliveries in accordance with relevant provisions of schedule 2A.

In light of the submission from EnergyAustralia, The Allen Consulting Group has reviewed the proposed terms and conditions for reference services and notes that there is no explicit provision for AGLGN to suspend deliveries of gas to delivery points for reason of a general shortfall of gas supply in the distribution system. The Allen Consulting Group concurs with Energy Australia that any such right of AGLGN to shed loads should be made explicit and the absence of such provisions in the terms and conditions could be reason to find the terms and conditions unreasonable.

As an additional matter in relation to the load shedding principles, The Allen Consulting Group addressed the limitation of liability of AGLGN for "any losses, liabilities or expenses incurred by the User and/or the Users' Customers arising from load shedding". The Allen Consulting Group considered this provision to be unreasonably broad and should be explicitly limited in effect to circumstances where the AGLGN acts in good faith and in accordance with the principles of the Access Arrangement. The Allen Consulting Group maintains this recommendations and AGLGN has indicated willingness to make the necessary amendment.

*Chapter 5*

# Service-specific terms and conditions

## 5.1 Introduction

Section 2 of the proposed access arrangement (the services policy) describes the reference services proposed by AGLGN. The descriptions of each of the reference services address a number of matters under the heading of "terms and conditions".

The matters addressed under the heading of "terms and conditions" for each of the reference services are not entirely in the nature of terms and conditions that may be expected to form part of a service agreement. Rather, many of the matters addressed are more in the nature a description of the reference services. As such, the "terms and conditions" indicated for each service are considered to contain some elements that should be examined by IPART in respect of the requirements of the Code for a services policy, and other elements that should be examined under the requirements of the Code for terms and conditions on which each reference service will be provided.

The matters addressed under the heading of "terms and conditions" for each of the reference services are examined below. In each case, a determination is made as to whether the matter is one relevant to the services policy, or is a statement of terms and conditions on which the service is provided. As a general rule, a matter was considered to comprise a term and condition where it would act to specify rights and obligations of AGLGN or the user *after* a service agreement for the relevant service has been entered into.

## 5.2 Availability

### *Consideration as an element of the services policy or terms and conditions*

For each of the Reference Services, statements are made as to the availability of each of the services. Availability of a service to a user depends on characteristics of the user in respect of the quantity of gas taken at the relevant receipt point(s); requirements to take a service in conjunction with another service; the nature of other services provided to the same delivery point(s); geographical location of the delivery point(s); and availability of metering equipment at the delivery point(s).

For the Trunk Capacity Reservation Service, the Trunk Managed Capacity Service and the Trunk Throughput Service, there is an indication under the heading of "availability" that the services may be taken as forward-haul or back-haul services.

The matters addressed under the heading of "availability" are considered to specify the eligibility of a user for a particular service and, in part, to describe the nature of each service.

### *Initial submissions*

No submissions made on the proposed access arrangement addressed "availability" as either an element of the description of reference services or an element of the terms and conditions.

#### *Preliminary analysis*

As the matters relating to availability were considered relevant to the requirements under the Code in respect of the services policy and not the terms and conditions for reference services, these matters were considered in the assessment of terms and conditions for reference services. It was noted, however, that submissions made on the proposed access arrangement raised several concerns in relation to the availability of reference services, particularly in relation to the requirement that each of the "pairs" of trunk and local network reference services are only available as a "coupled" set of services.

#### *Further submissions*

No further submissions were made in respect of the separate availability of trunk and local network services.

#### *Final analysis and recommendations*

It is indicated in this report that the matter of trunk and local network services being available as individual reference services is a matter that should be addressed by IPART in relation to the services policy. It is noted that the submission from Macquarie Generation describes proposals for establishment of electricity generation plants that would be supplied with gas directly from the AGLGN trunk system. In addition to the prospect of embedded networks taking gas directly from the trunk system, this is a further example of potential demand for a trunk reference service that is not tied to a local network reference service.

### 5.3 Delivery point / receipt point

#### *Consideration as an element of the services policy or terms and conditions*

For each of the reference services providing for gas transportation, statements are made as to the manner in which receipt points and delivery points are specified in a service agreement. For some services, receipt points are deemed to occur at certain locations based on the location of delivery points.

As the locations of delivery points and receipt points affect the tariff to be paid by a user, and hence the obligations of a user under a service agreement, these provisions are considered to comprise part of the terms and conditions for each reference service.

The provisions for determination of receipt points and delivery points for each reference service are summarised in Table 5.1, below.

Table 5.1

**DETERMINATION OF RECEIPT POINTS AND DELIVERY POINTS**

| Reference Service | Receipt Point(s) | Delivery Point(s) |
|---|---|---|
| Capacity Reservation Service | | |
| Local Network Capacity Reservation Service | The local network receipt point for each delivery point will be determined in accordance with the table in Section 3.3 and/or Schedule 7, except for the Wilton-Wollongong Network Section where Users must nominate either the local network receipt point at Wollongong established with the Wilton-Wollongong Trunk Section or the local network receipt point at Port Kembla established with the Eastern Gas Pipeline. | Not addressed – assumed to be nominated by the user. |
| Trunk Capacity Reservation Service | Specified by the user. | Specified by the user |
| Managed Capacity Service | | |
| Local Network Managed Capacity Service | The local network receipt point for each delivery point will be determined in accordance with the table in Section 3.3 and/or Schedule 7, except for the Wilton-Wollongong Network Section where Users must nominate either the local network receipt point at Wollongong established with the Wilton-Wollongong Trunk Section or the local network receipt point at Port Kembla established with the Eastern Gas Pipeline. | Not addressed – assumed to be nominated by the user. |
| Trunk Managed Capacity Service | Specified by the user. | Specified by the user |
| Throughput Services | | |
| Local Network Throughput Service | The local network receipt point for each delivery point will be determined in accordance with the table in Section 3.3 and/or Schedule 7, except for the Wilton-Wollongong Network Section where users must nominate either the local network receipt point at Wollongong established with the Wilton-Wollongong Trunk Section or the local network receipt point at Port Kembla established with the Eastern Gas Pipeline. | Not addressed – assumed to be nominated by the user. |
| Trunk Throughput Service | Specified by the user. | Specified by the user |
| Multiple Delivery Point Services | | |
| Local Network Multiple Delivery Point Service | Not addressed – assumed to be as for the Capacity Reservation Service, Managed Capacity Service or a Throughput Service as per the designation of delivery points. | Not addressed – assumed to be nominated by the user. Delivery points are listed in a schedule to the service agreement, and additional delivery points may be added at any time prior to the revisions commencement date. |
| Trunk Multiple Delivery Point Service | Specified by the user for each delivery point. | Nominated by the user. Additional delivery points may be added at any time prior to the revisions commencement date. |

| | | |
|---|---|---|
| Tariff Service | | |
| Local Network Tariff Service | Determined in accordance with the table in Section 3.3 and/or Schedule 7, except for the Wilton- Wollongong Network Section where users must nominate either the local network receipt point at Wollongong established with the Wilton-Wollongong Trunk Section or the local network receipt point at Port Kembla established with the Eastern Gas Pipeline. | Specified by the user. The User may from time to time add tariff delivery points to the list, in accordance with the access procedures set out Schedule 6. The user may at any time delete a Tariff delivery point from the service agreement by giving at least three business days notice to AGLGN. |
| Trunk Tariff Service | Specified by the user. | Multiple delivery points may be nominated by the user. the user may from time to time add nominated delivery points to the list, in accordance with the access procedures set out Schedule 6. The user may at any time delete a nominated delivery point from the service agreement by giving at least three business days notice to AGLGN. |
| Meter Data Service | Not applicable | Not applicable |
| Gas Swap Services | Not applicable | Not applicable |

### *Initial submissions*

No submissions on the proposed access arrangement address the service-specific terms and conditions relating to designation of receipt points and delivery points.

### *Preliminary analysis*

The determination of receipt points and delivery points for each of the proposed reference services is considered to be generally in accordance with the nature of the reference services offered. That is, for delivery points nominated by the user on the local network, receipt points from the trunk system are deemed to occur within the local area, defined by postcode. For delivery points nominated by the user on the trunk system, receipt points are also nominated by the user.

These provisions continue from the current access arrangement and in the absence of submissions from users on these provisions they are considered to be reasonable, with the exception of determination of delivery points for the Local Network Multiple Delivery Point Service and Trunk Multiple Delivery Point Service. The terms and conditions for these services provide that additional delivery points may be added to the service agreement at any time prior to the revisions commencement date (i.e. the date of commencement of the next access arrangement period). There are three aspects of these provisions that are considered unreasonable.

- There is no provision for the removal of delivery points from the service agreement. The absence of provision for the removal of delivery points from the service agreement is contrary to the operation of a competitive market in the retail supply of gas to customers, whereby a customer may change its retail supplier of gas, with a corresponding change in the user requiring delivery of gas to the relevant delivery point. It was recommended that IPART find the absence of such provision to be unreasonable and seek amendment to make appropriate provision for the removal of delivery points from a service agreement. It was also noted that the provision for removal of delivery points is provided for in AGLGN's General Terms and Conditions for Non-Tariff Services and General Terms and Conditions for Tariff Services, as published on AGLGN's web site.

- There is no obvious reason why provision for addition of additional delivery points to a service agreement should be limited to the period of the agreement prior to the revisions commencement date stated in the access arrangement, particularly as the term of a service agreement for a Multiple Delivery Point Service is indefinite. It was recommended that, in the absence of justification, IPART find the limit on the time period for addition of delivery points to a service agreement to be unreasonable and seek amendment of the provision to remove the limit.

- There are ambiguities in the provisions relating to the determination of delivery points and receipt points for the Trunk Capacity Reservation Service, Trunk Managed Capacity Service and Trunk Throughput Service. For these services it is unclear whether, under each service, gas may be transported to one or multiple delivery points under a single service agreement, as provisions refer variously to "*the* delivery point" and "*each* delivery point". It is envisaged that the intention is for these services to only accommodate a single delivery point under a single service agreement. However, as the ambiguity in these provisions may be considered unreasonable, it was recommended that IPART seek amendment of the relevant provisions.

### *Further submissions*

- **AGLGN (10 September 2004)**

  [Absence of provision for removal of delivery points from a service agreement for a multiple delivery point service]

  AGLGN agrees to amend this provision, although it does not agree that the existing provision is contrary to the operation of a competitive gas market.

  [There is no obvious reason why addition of delivery points should be limited to periods prior to the revisions commencement date.]

  The effect of the limitation on the addition of delivery points is to qualify a user's right to add a delivery point to a Multiple Delivery Point Service Agreement to "at any time" within the term of the proposed AA.

  As ACG observe, the Multiple Delivery Point Service has an indefinite term. AGLGN maintain that it is reasonable to limit the addition of delivery points to periods within the term of the AA and that it is also reasonable for this limitation to be set out in the AA for clarity.

[There are ambiguities relating to the determination of delivery points and receipt points for the Trunk capacity reservation trunk managed capacity and trunk throughput service.]

AGLGN accepts ACG's view that the use of "each" and "the" could be ambiguous.

### *Final analysis and recommendations*

The preliminary analysis of the terms and conditions identified three matters relating to the determination of receipt points and delivery points that could be held to be unreasonable.

Firstly, the absence of provision under the multiple delivery point service for deletion of delivery points from the service agreement was considered unreasonable. AGLGN has submitted that while the access arrangement does not provide for the deletion of delivery points from Trunk and Local Network Multiple Delivery Point Service, this is provided for in other arrangements with Users. AGLGN has also indicated that it would not object to inclusion of a condition in the access arrangement that reflects these arrangements, although the nature of the arrangements is not described. In the absence of consideration of these arrangements, The Allen Consulting Group maintains the recommendation that IPART seek amendment of the terms and conditions to make appropriate provision for the removal of delivery points from service agreements for the Trunk and Local Network Multiple Delivery Point Services.

Secondly, for the Multiple Delivery Point Services it was considered unreasonable that addition of delivery points to a service agreement should be limited to periods prior to the revisions commencement date. AGLGN has indicated that the limitation on addition of delivery points to a service agreement is used to ensure that the term of service agreements coincides with the term of the access arrangement. This matter was discussed above in relation to extensions to the term of service agreements (section 4.24), where it was concluded, as a general principle, that it is not unreasonable for AGLGN to not provide for extension of terms of service agreements beyond the revisions commencement date for the access arrangement. With the Multiple Delivery Point Services there is not, however, a predetermined term of a service agreements. Rather, a service agreement remains in force indefinitely as long as there is a delivery point under the service agreement. In this circumstance, there is no scope for a service agreement to expire or be renewed coincident with revisions to the access arrangement. As such, there is not apparent reason for the constraint on addition of delivery points to a service agreement and this may be held to be unreasonable. The Allen Consulting Group recommends that the terms and conditions for the Local Network Multiple Delivery Point Service and Trunk Multiple Delivery Point Service should be amended to make provision for deletion of delivery points from service agreements during the term of the agreements.

Thirdly, the preliminary analysis noted ambiguities in the provisions relating to the determination of delivery points and receipt points for the Trunk Capacity Reservation Services, Trunk Managed Capacity Services and Trunk Throughput Services. For these services it is unclear whether, under each service, gas may be transported to one or multiple delivery points under a single service agreement, as provisions refer variously to "*the* delivery point" and "*each* delivery point". AGLGN acknowledges this ambiguity in its submission the ambiguity indicated by The Allen Consulting Group, but does not indicate how the ambiguity may be resolved. It is recommended that IPART require amendment of the terms and conditions for the Trunk Capacity Reservation Services, Trunk Managed Capacity Services and Trunk Throughput Services to make it clear that a service agreement for these services may provide for gas to be delivered to only a single delivery point.

## 5.4 MDQ and MHQ

### *Consideration as an element of the Services Policy or terms and conditions*

For each of the reference services providing for gas transportation, provision are made under the descriptions for specification of levels of MDQ and MHQ, which comprise limits on AGLGN's obligations to deliver gas to the delivery point.

As these provisions establish obligations for the user and AGLGN under a service agreement, they are considered to comprise part of the terms and conditions for each reference service.

### *Proposed Terms and Conditions*

The provisions for determination of MDQ and MHQ for each reference service are summarised in Table 5.2, below.

In addition to determination of MDQ and MHQ for each reference service, there is also a statement made that AGLGN's obligation to deliver gas is limited to MDQ in any day and MHQ in any hour, where these limits are specified

Under the heading of MDQ and MHQ, there is also an additional term specified for the Local Network Throughput Service, indicating that where the user withdraws less than 10TJ of gas in any contract year, the user will pay for delivery of 10TJ of gas in that contract year (calculated on a pro-rata basis as if the consumption had been equal in each month during the contract year).

Table 5.2

**DETERMINATION OF MDQ AND MHQ**

| Reference Service | Initial Specification | Opportunity for Change |
|---|---|---|
| Capacity Reservation Service | | |
| Local Network Capacity Reservation Service | Users will be required to specify a level of MHQ and MDQ for each contract year which fairly reflects the maximum hourly and daily requirements at the delivery point, based on prior consumption where that information is available. | Where new equipment is commissioned at a new or existing delivery point, or daily metering has not been installed at a delivery point at the commencement of a service agreement, the user may increase the MDQ specified in the service agreement once. An increase to the MDQ must be made within three months of the later of the commencement date of the service agreement and the date on which daily metering data became available. An increase will be subject to the queuing policy. An increase in MDQ will be deemed to take effect from the commencement date of the service agreement. |
| Trunk Capacity Reservation Service | MHQ and MDQ specified in the Corresponding Local Network Service will apply. | An MDQ increase for the Corresponding Local Network Service will apply (where the MDQ is increased as the result of commissioning of new equipment or installation of daily metering). |
| Managed Capacity Service | | |
| Local Network Managed Capacity Service | Users will be required to establish a level of MHQ which reflects the maximum hourly requirement at the delivery point, based on prior consumption where that information is available.<br>Users will be required to specify a level of MDQ which reflects the maximum daily requirement at the delivery point and is equal to or greater than the previous maximum quantity. | None |
| Trunk Managed Capacity Service | The MHQ and MDQ specified in the Corresponding Local Network Managed Capacity Service will apply. | None |
| Throughput Services | | |
| Local Network Throughput Service | Users will be required to specify a level of MHQ and MDQ which fairly reflects the maximum Hourly and daily requirements at the delivery point, based on prior consumption where that information is available. | None |
| Trunk Throughput Service | The MHQ and MDQ specified in the Corresponding Local Network Service will apply. | None |
| Multiple Delivery Point Services | | |
| Local Network Multiple Delivery Point Service | Not addressed – assumed to be as for the Capacity Reservation Service, Managed Capacity Service or a Throughput Service as per the designation of delivery points. | Not addressed – assumed to be as for the Capacity Reservation Service, Managed Capacity Service or a Throughput Service as per the designation of delivery points. |
| Trunk Multiple Delivery Point Service | Not addressed – assumed to be as for the Capacity Reservation Service, Managed Capacity Service or a Throughput Service as per the designation of delivery points. | Not addressed – assumed to be as for the Capacity Reservation Service, Managed Capacity Service or a Throughput Service as per the designation of delivery points. |

| | | |
|---|---|---|
| Tariff Service | | |
| Local Network Tariff Service | For any new delivery point where the MHQ is expected to exceed $6m^3$/Hour, users will be required to specify a level of MHQ which fairly reflects the maximum hourly requirement at the delivery point. | None |
| Trunk Tariff Service | The MHQ (if any) specified under the Local Network Tariff Service will apply. | None |
| Meter Data Service | Not applicable | Not applicable |
| Gas Swap Services | Not applicable | Not applicable |

### *Initial submissions*

The provisions under the terms and conditions specific to each reference service and relating to the setting of MDQ and MHQ were addressed in the submission from EnergyAustralia. EnergyAustralia made the submission in respect of the Capacity Reservation Service, querying the reason why provision is made for MDQ to be increased only once (where new equipment is commissioned at a new or existing delivery point, or daily metering has not been installed at a delivery point at the commencement of a service agreement) and whether this reflects a general lack of provision for a user to vary the MDQ.

- **EnergyAustralia**

  Capacity reservation service

  • (Page 4) - The third dot point provides for the user to specify a MDQ and MHQ for each contract year. The next dot point provides for a MDQ to be increased once. That suggests that otherwise a user cannot vary the MDQ. Is this the case? If so, EnergyAustralia queries whether this lack of flexibility is consistent with principles of the Access Code?

### *Preliminary analysis*

The provisions under the terms and conditions specific to each reference service and relating to the setting of MDQ and MHQ are considered to provide for the setting of MDQ and MHQ where these limits are relevant to the particular reference service, and in a manner consistent with the nature of each reference service.

Provisions for the specification of MDQ and MHQ, and for AGLGN's obligation to deliver gas to extend only to these limits, are also made in Schedule 2B of the proposed access arrangement for all services except the Tariff Reference Services (for which the specification of MDQ is not relevant). An inconsistency was noted to exist in the statements of AGLGN's obligation to deliver gas: in Schedule 2B AGLGN's obligation to deliver gas to a delivery point extends to MDQ and MHQ *plus* any authorised overrun for the delivery point. The provision for authorised overrun is not explicitly stated in the terms and conditions specified in relation to each reference service. Although it is indicated for the Capacity Reservation Services that any purchase by the User of summer tranche capacity, short term capacity or additional capacity has the effect of increasing MDQ, it is not clear that this automatically implies that the consideration of MDQ in respect of AGLGN's obligation to deliver gas necessarily includes authorised overrun. This ambiguity was considered to be unreasonable. It was recommended that IPART seek amendment of the access arrangement to address this inconsistency.

In regard to EnergyAustralia's submission querying the opportunity of users to change MDQ under a service agreement, it is not apparent that such opportunity exists under the Capacity Reservation Services. This is not necessarily unreasonable. Contracting for a specified level of capacity for a defined term is consistent with the nature of such services in both gas transmission and distribution, and has a role in allocating risk of changes in demand to the user. For users requiring flexibility in the level of MDQ, or requiring an absence of an MDQ limit on gas deliveries, the Managed Capacity Service and the Tariff Service may meet this requirement, as may the opportunities to secure summer tranche capacity, short term capacity or additional capacity under the Capacity Reservation Services It is also open to a user with a service agreement for a Capacity Reservation Service to enter into a further service agreement for additional capacity at a delivery point.

### *Further submissions*

- **AGLGN (10 September 2004)**

  AGLGN agrees to clarify this provision [concerning AGLGN's obligations to deliver gas up to the MDQ as stated in the Services Policy, and AGLGN's obligation to deliver gas up to the MDQ plus any authorised overrun in schedule 2B].

### *Final analysis and recommendations*

In its preliminary analysis, The Allen Consulting Group indicated that terms and conditions for each reference service that set out the stated obligations of AGLGN to deliver gas may be regarded as unreasonable for reason of ambiguity. AGLGN acknowledged the ambiguity in relation to this matter and indicated a willingness to make necessary amendments to the terms and conditions to resolve the ambiguity. The Allen Consulting Group therefore maintains the conclusions of the preliminary analysis and recommends that IPART require amendment of sections 2.1, 2.2, 2.3 and 2.5 of the access arrangement are amended to clearly state that AGLGN's obligation to deliver gas extends to MDQ and MHQ including any authorised overrun.

## 5.5 Overruns

### *Consideration as an element of the services policy or terms and conditions*

For each of the reference services providing for gas transportation, terms and conditions provide a description when an overrun is deemed to have occurred, and indicate whether charges are payable in respect of any overrun.

As these provisions define obligations for the user under a service agreement (in respect of the payment of charges for overruns), they are considered to comprise part of the terms and conditions for each reference service.

### *Proposed Terms and Conditions*

For each of the Capacity Reservation Services, Managed Capacity Services and Throughout Services, overrun is defined having occurred where withdrawal at a delivery point exceed the MHQ in any hour or MDQ in any day, and it is indicated that overrun may be authorised or unauthorised. For Tariff Services, overrun is defined having occurred where withdrawal at a delivery point exceeds the MHQ in any hour, and it is indicated that overrun may be authorised or unauthorised.

Charges are indicated to be payable in respect of overrun for the Capacity Reservation Services.

### *Initial submissions*

The provisions under the terms and conditions specific to each reference service and relating to overruns were addressed in the submission from EnergyAustralia. EnergyAustralia queries whether it is necessary to include the concept of overruns and authorised overruns in the terms and conditions for services where there are no charges levied in respect of overruns.

- **EnergyAustralia**

  (b) Managed Capacity Services

  • (Page 11) If there are no charges for overruns, must they be authorised at all?

  …

  (c) Throughput Services

  • (Page 15) - The service is described as transportation to the delivery point with charges determined on the basis of throughput but a minimum annual bill based on 10 TJ per annum. It also provides that there are no charges for overruns. Are overruns relevant in the throughput service context? Is it throughput in the sense of quantity rather than capacity (ie MDQ)? If so then this should be stated.

  …

  (d) Tariff Services

  • (Page 22) It states that overrun will have occurred if withdrawals exceed the MHQ in any hour. As a practical matter, how will anyone know this? What is the consequence of the overrun in this instance?

#### *Preliminary analysis*

The provisions of the terms and conditions specific to each service that relate to overruns are considered reasonable, as is the provision for imposition of charges in respect of overruns by users of the Capacity Reservation Services.

EnergyAustralia queries whether the definition of overruns and provision for authorised overruns has meaning in the absence of charges for overruns or, in the absence of an ability to detect when an overrun occurs. It is noted that definition of an authorised overrun has meaning in the context of AGLGN's obligation to delivery gas: under Schedule 2B, AGLGN's obligation to deliver gas extends to MDQ plus authorised overrun.

#### *Further submissions*

No further submissions on the terms and conditions of the proposed access arrangement addressed the terms and conditions relating to definition of overruns for specific reference services.

#### *Final analysis and recommendations*

The Allen Consulting Group maintains the view set out in the preliminary analysis.

### 5.6 Metering

#### *Consideration as an element of the services policy or terms and conditions*

For each of the Local Network Reference Services, terms and conditions indicate the nature of metering that will occur for the service, indicating in each case that:

- basic metering equipment will be provided in accordance with Schedule 2A; and
- where AGLGN offers a meter data service as a reference service, the Local Network Service must be taken in conjunction with the meter data service.

The first of these provisions is a declaration of a requirement to comply with terms and conditions for each service as described in Schedule 2A and is not considered in itself to add to the terms and conditions for the reference services. The second provision indicates that two reference services must be taken jointly by a user. This is considered to be a matter for consideration in respect of the services policy of the proposed access arrangement.

Terms and conditions relating to metering are also set out in the description of the Meter Data Service. Provisions under the heading of terms and conditions set out obligations of AGLGN in relation to metering activities at delivery points, meter reading frequencies, communications systems and provision of users with metering information. As these provisions establish obligations of AGLGN under a services agreement, they are considered to comprise part of the terms and conditions for reference services. These terms and conditions are addressed further in this section.

### *Proposed terms and conditions*

The terms and conditions of the Meter Data Service set out in section 2.6 of the proposed access arrangement establish requirements for metering for non-tariff and tariff delivery points as follows.

- Non-tariff delivery points
  - Quantities of gas passing through the meter each day will be recorded by AGLGN and metering information made available to AGLGN, the user and other parties as permitted by the user at the users cost or in accordance with the requirements of the Code.
  - Provision for AGLGN to read meters daily or monthly depending upon the technical and commercial feasibility of establishing communications facilities at the delivery point;
  - Provision for the user to take information from measuring commitment if the user requires information more frequently that daily.
- Tariff delivery points
  - Provision for AGLGN to read meters at 30 day intervals for delivery points for which gas delivery is greater than 1 TJ per year, or 91 days for delivery points for which gas delivery is less than 1 TJ per year.
  - Provision for AGLGN to determine a meter reading cycle in consultation with the user, and for a user to request a change in the meter reading cycle.
  - Provision for AGLGN to provide information on meters and meter readings to users within 7 business days of reading of the meter.

### *Initial submissions*

Submissions on the terms and conditions of the Meter Data Service were received from Energy Advice Pty Ltd and Energy Australia, although the only substantive submission was that from Energy Advice Pty Ltd.

Energy Advice Pty Ltd submits that the access arrangement, presumably through the terms and conditions for the Meter Data Service, should explicitly provide for metering data to be provided to customers as well as users.

- **Energy Advice Pty Ltd**

  9. ACCESS TO METER DATA

  Direct access to meter data by contract users has been a concern to many large contract users for a number of years.

  While we welcome AGLGN's comments on data availability, "the information in relation to such quantities will be accessible to AGLGN, the User and other persons permitted by the User, at the User's cost, or in accordance with the requirements of the National Code." (Page 26 of Access Arrangement), AGLGN's proposal does not, where a particular retailer is the User contracting with AGLGN, readily or automatically allow the customer (or the customer's authorised representative) to gain direct access independent of the customer's retailer.

Contract users require metering data for a number of reasons, including internal energy management, monitoring and reporting and account auditing. Furthermore, on occasions, contract users may not wish to flag their intention to their retailer by having to seek data from AGLGN via the retailer.

This submission asserts that contract users should have a right to access their metering data directly from AGLGN, with AGLGN having an obligation to provide that data independent from and without the permission of their retailer (ie the User under the Access Arrangement).

It should not be difficult for AGLGN to provide such a service:

• for an agreed period;

• in a form (electronic or hard copy); and

• at daily/monthly intervals as required,

directly to contracts users.

This submission seeks that contract users have entitlement to – and direct access to – dailyload data and that AGLGN provide a Metering Data Service independent from retailers.

In conjunction with the comments above in relation to metering contestability, opening up access to meter data will improve energy management process for contract users in the future. These same contract users already have the right to choose their preferred meter provider in relation to electricity – this has been contestable for a number of years – and certain meter providers provide data streams to contract users on a daily or as required basis. It is appropriate to implement processes to support similar competition for metering services and data access for contract users in the gas market.

- **EnergyAustralia**

  (e) Meter Data Service

  • (page 26) – it deals with availability of on-site data and communications equipment but not meter reading. The issue of availability of communication is also dealt with in the first dot point on page 27.

### *Preliminary analysis*

The terms and conditions of the Meter Data Services set out provisions for AGLGN to read meters and provide meter information to users. These provisions are descriptive of metering practices that provide generally for a range of metering frequencies for different sized customers of gas. These provisions are considered to be in accordance with common industry practice for gas distribution systems and thus to be reasonable.

Energy Advice Pty Ltd submits that more explicit provision should be made for metering information to be provided to gas customers as well as users. The terms and conditions contemplate that information may be provided to parties other than the user, which would suggest that AGLGN itself contemplates information being provided to the customer, but there is no explicit obligation on AGLGN to provide information to customers. The Allen Consulting Group did not consider that the proposed provisions are unreasonable, nor that it would be possible to require that AGLGN provide information to gas customers under a service agreement between AGLGN and a user. Rather it was considered that a gas customer desiring access to metering information should ensure access to this information under its contract with the user.

A further matter of relevance to the terms and conditions of the Meter Data Service is that metering functions are addressed by the Gas Retail Market Business Rules. The GRMBRs contemplate, at some time in the future, parties other than AGLGN being able to provide metering services in a contestable market for these services. The provision of the Meter Data Service by AGLGN thus constitutes an element of the proposed Access Arrangement that interacts with the GRMBRs and may become contrary to the GRMBRs when and if contestable provision of metering services is introduced. In this regard, it was noted that the terms and conditions of the Meter Data Service are a part of the terms and conditions of reference services that interact with the GRMBRs and hence should recognise the operation of the GRMBRs as contemplated in section 3.5 of this report.

### *Further submissions*

- **EnergyAdvice**

  Allen Consulting Group noted EnergyAdvice's comments re need for access to meter data, but stated "does not consider the proposed provisions are unreasonable, going on to say "Rather it is considered that a gas customer desiring access to metering information should ensure access to this information under its contract with the User."

  this is exactly the point we want to argue against. Meter data should be direct and timely – not via a third party – and if AGLGN can't or won't provide that data directly to customers, then introduce meter contestability. Customers are already paying mete data fees – but not getting access to their data.

  EnergyAdvice works with major gas customers on a day-to-day basis – perhaps Allen Consulting group doesn't understand the implications of this issue.

#### *Final analysis and recommendations*

In the preliminary analysis of the terms and conditions, The Allen Consulting Group noted that the terms and conditions for each reference service and relating to metering are a part of the terms and conditions of reference services that interact with the GRMBRs. In section 2.6 of the proposed access arrangement. AGLGN indicates that the Meter Data Service will cease to be offered as a reference service, and at AGLGN's discretion, as a service, on the date of the enactment of provisions under the GRMBRs that permits the provision of meter reading or on-site data and communication by a person other than AGLGN. This provision has the effect of the Meter Data Service falling away when supplanted by relevant provisions under the GRMBRs. This is consistent with the recommendations of The Allen Consulting Group in relation to the interaction of the GRMBRs and the proposed access arrangement as set out in section 3.5.

In its further submission, Energy Advice reiterated its earlier submission requesting that consideration be given for the terms and conditions for reference services to make provision for end customers of gas to have access to metering data. In view of Energy Advice's further submission, The Allen Consulting Group has given this matter further consideration, but maintains the view that because AGLGN would not normally have any direct contractual relationship with an end customer of gas that is not also a user of the gas network, it would not be appropriate (or indeed necessarily possible) to require that the terms and conditions for the reference services seek to impose an obligation on AGLGN to provide metering information directly to end customers.

### 5.7 Term

#### *Consideration as an element of the services policy or terms and conditions*

For each of the reference services for gas transportation, terms and conditions indicate the minimum and/or maximum term of the service agreement. As the term is an explicit provision of a service agreement it is considered to be part of the term and conditions.

#### *Proposed Terms and Conditions*

The minimum and/or maximum terms of service agreements for reference services, and other provisions for determination of terms, are set out in Table 5.3.

Table 5.3

**TERM OF SERVICE AGREEMENTS**

| Reference Service | Minimum Term | Maximum Term |
|---|---|---|
| Capacity Reservation Services | 1 year | 2 years |
| Managed Capacity Services | 1 year | 1 year |
| Throughput Services | 1 year | 1 year |
| Multiple Delivery Point Services | Remains in force for as long as there is a delivery point listed | |
| Tariff Service | From the commencement date to the earlier of the revisions commencement date or the date on which all delivery points have been deleted from the schedule annexed to the service agreement, or such other date as agreed by AGLGN and the user.<br>If a user wishes to continue to receive Local Network Tariff Services beyond the Revisions Commencement Date, the user will be required to enter into a services agreement effective as at the date of the revisions commencement date. | |
| Meter Data Service | The term of any Meter Data Service will be from the commencement date of the services until the expiry date of the Local Network Reference Services for that delivery point, or the termination date under the Meter Data Service Agreement, which will be no later than the termination of the Local Network Reference Services for the delivery point. | |
| Gas Swap Services | The term of the service will expire on the expiry date of the user's last remaining Trunk non-tariff reference service. | |

### *Initial submissions*

The term of service agreements was addressed in submissions made on the proposed access arrangement by Energy Advice Pty Ltd, TXU and EnergyAustralia. All of these parties submit that term of contracts for the non-tariff services should not have a minimum period, but rather should be more flexible in the sense of being able to be terminated at any time to accommodate such events as demand for gas by a project operating for a period of time less than the minimum contract term, a change in the scale of operations of a gas customer, and a change by a gas customer in that customer's gas retailer.

- **Energy Advice Pty Ltd**

  10. FLEXIBILITY IN TERM OF SERVICE AGREEMENTS

  It is noted that AGLGN seeks to retain the standard term for the Capacity Reservation Service and other Reservation Services to be for a "minimum of one year and a maximum of two years from the commencement of the Service." We understand that the principle of the Capacity Reservation Service is peak day demand based and does not include seasonal charging components, and therefore requires – from AGLGN's viewpoint – booking period of no less than an annual basis to preserve the charge basis. Accordingly, AGLGN might have the view that a minimum annual term is required to prevent "gaming" – in the sense of only booking capacity in peak demand periods.

  However, this principle does not automatically flow into requiring a term to be a minimum one year and a maximum of two years. A customer may require a shorter, in between or longer period:

  - to align with a gas supply arrangement which is not for one or two years;
  - to complete a short-term infrastructure project, eg. temporary asphalt plant;

- where the site or facility is to be shutdown or significantly reduce its operations; or
- to change its future supply requirements, for example via a decision to fully cease taking a particular AGLGN service and taking a service from an Embedded Network.

IPART should require AGLGN to act reasonably in allowing cancellation of services, in particular where a service is no longer required. For example:

• Requiring a contract user to pay out the remainder of a term if a plant closes is punitive. The particular site may have been in operation for a number of years when a decision is made to partially or fully close operations.

• In the case of Embedded Networks, maintaining that a contract user cannot transfer at their preferred timing could be construed as unreasonably impeding competition.

In both of the above examples, it is not reasonable for the contract user to have to pay out to AGLGN for a further term beyond the closure or transfer dates (as applicable) as it is clearly not "gaming" the capacity booking.

From a contract user's point of view, fixed one or two-year service agreements tend to frustrate the cost effectiveness of gas, having to pay for a period of service they may not require. Where customers contract with retailers and the period of service booked by them with AGLGN is not consistent with the term of the gas supply arrangement, retailers require that customers reimburse them for AGLGN costs should the gas supply arrangement terminate early and, in some cases, where the customer fails to renew a gas supply arrangement nor transfers to another retailer. There needs to be greater flexibility in the term of service agreements to cater for customer's needs and not just what AGLGN perceives as its needs.

The question of whether having a fixed term contract is appropriate should also be considered. In Victoria, GasNet charges apply monthly but users can terminate the service effective the end of a month without penalty. AGLGN's fixed term service agreements require contract users to pay for the service for the fixed term notwithstanding the service is not required. Contract users may, because of a downturn in demand for their product, find they either have to reduce production requiring lower quantities or even closing a production facility. We contend there is a need for such contract users to have options to deal with the unexpired term of the service agreement such as assigning it. Contract users are currently required to pay the charges for the unexpired term with no way of extracting any value from the charges payable.

We request that AGLGN and IPART examine options for providing some relief for contract users who find themselves with excess capacity and/or unexpired term of service under service agreements.

- **TXU**

TXU believe that the proposed Access Arrangement should provide greater flexibility with respect to reservation services. The proposed arrangements require customers to commit to the specified MDQ for a minimum period of 12 months irrespective of the period of the supply contract remaining between the customer and their retailer. This essentially means that customers will not be able to adjust their MDQ within 12 months of the termination of their supply contract. TXU believes the Access Arrangements should provide customers with the flexibility to adjust their MDQ for a minimum period of less than 12 months.

- **EnergyAustralia**

  Under Schedule 2B of the Access Arrangement, the user nominates its capacity reservation for estimated MHQ and MDQ for each non-tariff delivery point for the term. AGLGN is only offering agreements for non-tariff reference services of a minimum of one year and a maximum of two years (depending on the particular service).

  Schedule 2A provides that the user will be invoiced not less frequently than monthly. Under the current non-tariff agreements, users pay a MDQ and MHQ charge for each delivery point calculated on an annual basis which is then billed monthly. The minimum one year term suggests that the user will be required to pay the full charge even if the customer transfers or ends its service during the term.

  In these circumstances, the user must still pay the full annual charge but is entitled to a rebate from AGLGN equal to the charges payable by the other party during the remaining term of the agreement between the user and AGLGN. EnergyAustralia is of the view that users should not be required to pay charges once a delivery point is transferred to another user as AGLGN will receive the charges from that other user.

  …

  (a) Capacity reservation service

  • (Page 4) - The term of the service will be for a minimum of one year and a maximum of two years. Does this mean that a service could be provided for a term of, say 15 months? The fact that a term must be for at least one year seems to lead to the conclusion (in the transportation agreements) that network charges must be paid for the entire year. This is the case even if the delivery point is transferred to another user.

  • These requirements are restrictive. AGLGN's obligation to deliver gas should be based on the availability of capacity rather than subjecting end users to inflexible restrictions without good reason.

  …

  (b) Managed Capacity Services

  • (Page 12) Provides for the term of the service to be one year from the commencement of the service to the delivery point. As above is this necessary? Is any more flexibility possible? What if a user would like the service to be provided for two or three years? What happens at the end of the year? Does the user have to apply for the service?

### *Preliminary analysis*

For the non-tariff reference services (the Capacity Reservation Service, Managed Capacity Service and Throughput Services), AGLGN has proposed minimum contract terms of one year. Several parties making submissions on the proposed access arrangement have taken issue with the minimum term for these contracts, submitted that the minimum terms does not provide users with desired flexibility in contracting for gas distribution services.

Under the capacity management policy of the proposed access arrangement, AGLGN indicates that the network is to be managed as a contract carriage pipeline, a determination that is at the discretion of the pipeline owner under section 3.8 of the Code (subject to permission from the relevant Minister or Ministers for any proposal by the pipeline owner to manage the pipeline as a market carriage pipeline). The non-tariff reference services proposed by AGLGN are consistent with this capacity management policy, involving provision of gas distribution services under service agreements that involve a User entering into a contract for rights to utilise a specified amount of pipeline capacity.

A minimum term for service agreements is common practice for pipelines regulated under the Code that are managed as contract carriage pipelines. These minimum terms have the effect of allocating to the user the risk of changes in gas demand during the term of the contract. In turn, the sheltering of the service provider from this risk is a matter that should be recognised in the rate of return determined for the purposes of calculating reference tariffs (through consideration of the lower sensitivity of revenues and returns of the service provider to fluctuations in economic activity and hence a lower asset beta in a CAPM determination of a weighted average cost of capital). Users also have a number of means of limiting their exposure to risks of changes in demand, including the ability to trade unused capacity. Moreover, the proposed minimum term of service agreements is relatively short (at one year) which itself limits the exposure to risks of changes in demand.

For these reasons, The Allen Consulting Group considers that the proposed minimum terms for service agreements are reasonable.

### *Further submissions*

- **EnergyAustralia**

  EnergyAustralia does not agree that the minimum term is common for contract carriage pipelines. There is no minimum term for the Adelaide metropolitan network in South Australia. Also, even if the minimum term is accepted, is it reasonable AGLGN be able to recoup double network charges for a delivery point as is currently the case?

- **Energy Advice**

  Allen Consulting Group argues that one year minimum term is reasonable because minimum terms are common practice, have the effect of allocating to the use the risk of changes in gas demand, shelters AGLGN re their rate of return, the minimum term is relatively short, and users have a number of means of limiting their exposure to risks of change in demand, including the ability to trade unused capacity.

  Our response is by way of an example: If a plant shuts down anywhere in the AGLGN network – noting that the service is for a delivery point at that particular site – how can the user or the customer trade the unused capacity? There is no ability to trade Local Capacity Service where you cannot move capacity from one location to another – unless it is immediately upstream of the plant on the network (and the other upstream site is uncontracted). That is not possible. Furthermore, is Allen Consulting Group saying that it is OK for a customer to have to wear up to one year's network charges – and these can run into hundreds of thousands of dollars – because minimum terms are common practice – when there is no ability to trade or offset such liability. AGLGN gets all the upside in demand – but doesn't get all the downside.

The argument that minimum terms are common practice is incorrect. There is no such minimum period that applies in Victoria under either transmission or distribution networks. If a site closes and/or meter is removed, charges cease to apply.

### *Final analysis and recommendations*

In its preliminary analysis on minimum terms for service agreements, The Allen Consulting Group concluded that the minimum terms proposed by AGLGN for service agreements are reasonable, taking into account that:

- section 3.8 of the Code clearly places it at the discretion of the service provider as to whether a pipeline is operated as a contract carriage pipeline or market carriage pipeline, and the decision by AGLGN to operate the distribution system as a contract carriage pipeline implies that there will be minimum terms of contracts under which Users will reserve capacity;
- the minimum terms of contracts proposed by AGLGN are relatively short and in accordance with common industry practice for gas pipelines; and
- users also have a number of means of limiting there exposure to risks of changes in demand, including the ability to trade unused capacity.

EnergyAustralia and Energy Advice have made further submissions indicating that the proposed minimum terms of contract for reference services are unreasonable.

Energy Australia contends that the minimum terms of contact are not supported by precedent in Victoria or South Australia where no minimum terms of contract apply. The Allen Consulting group does not accept this contention. In Victoria, the gas transmission and distribution systems are operated as market carriage pipelines rather than contract carriage pipelines, with the result that services are not provided on the basis of contracts that reserve capacity for individual users. In South Australia, the distribution system is operated as a contract carriage pipeline. A minimum contract term of one year is specified for the demand haulage service that provides for transport of gas to large commercial customers.

Energy Advice contends that capacity trading does not provide a means for a user to manage risk of stranded contracted capacity as a service agreement provides for transport of gas to a particular delivery point, for which there may be no alternative customer. This contention is also not valid. As required by the Code, the trading policy for AGLGN's distribution network provides for a change in gas delivery point under a service agreement.

The Allen Consulting Group therefore maintains the view that the proposed minimum terms for service agreements are reasonable.

## 5.8 Summer, short-term and additional capacity

### *Consideration as an element of the services policy or terms and conditions*

Under the terms and conditions for the Capacity Reservation Services, provision is made for the user to increase the contracted capacity under the service agreement by one of three means: "summer tranche capacity", "short term capacity" and "additional capacity". As the ability of a user to increase its contracted capacity under a service agreement by these means represents rights under a service agreement, the relevant provisions are considered to comprise terms and conditions for the Capacity Reservation Services.

### *Proposed terms and conditions*

The terms and conditions for the Capacity Reservation Services provide three means by which a user of these services may increase the level of contracted capacity for part of the term of the service agreement:

- summer tranche capacity, whereby the user may increase the MDQ for periods of one or more whole months between 1 October and 30 April;
- short term capacity, whereby the user may increase the MDQ for periods of between one week and four weeks for certain purposes; and
- additional capacity, whereby the user may increase the MDQ for a period of at least one year.

### *Initial submissions*

None of the submissions made on the proposed access arrangement raised substantive issues on the provisions for increases in capacity under the Capacity Reservation Services. EnergyAustralia submits that provisions for "additional capacity" are unclear in regard to whether additional capacity comprises an increase in MDQ under the existing service agreement, or whether the increase in capacity is gained under a further service agreement. Energy Australia also submits that the Capacity Reservation Services should include a "wider variety" of terms for increases in capacity, although not indicating what further terms are contemplated.

- **EnergyAustralia**

  Capacity reservation service

  • (Page 7) - There is a reference to a service agreement for additional capacity for a delivery point. Does this mean that the user must enter into a separate agreement for additional capacity?

  …

  • Although a summer tranche capacity service provides for short term supply, the main capacity reservation service should include a wider variety of terms.

### *Preliminary analysis*

The provisions under the terms and conditions of the Capacity Reservation Services for users to increase the contracted capacity on a short term basis are considered to be consistent with the nature of the service (i.e. that the user contract for a level of capacity for a fixed term) while providing for some flexibility in the level of contracted capacity. The flexibility in the level of contracted capacity is consistent with making efficient use of the capacity of the network (through allowing summer tranche capacity to be obtained during summer months when delivery of gas through the network would otherwise decrease as less gas is used for space heating), providing for additional gas requirements due to unforeseen increases in gas demand (through short term capacity), and providing for an effective increase in contracted capacity under the service agreement (through additional capacity). In general, these provisions are considered both reasonable and desirable.

There are, however, some ambiguities in the provisions for increasing contracted capacity that cause some elements of the provisions to be considered unreasonable.

- In relation to short term capacity, the terms and conditions include provision that:

  > Notwithstanding that a Request for Short Term Capacity is accepted, the User will be liable for and indemnify AGLGN against all losses, liabilities and expenses incurred as a result of the User exceeding the MDQ applicable at the time it utilised the capacity unless the capacity was taken at that time as an Authorised Overrun.

  It is unclear from this provision whether the "MDQ" referred to includes or excludes the short term capacity. It is also unclear whether, even if a request for short term capacity is approved, a further application for authorised overrun must be approved in respect of the capacity. It is recommended that IPART seek amendment of this provision (that appears in two places in respect of short term capacity) to clarify that the term "MDQ" includes any short term capacity.

- In relation to additional capacity, it is ambiguous (as Energy Australia submits) whether additional capacity is obtained under the existing service agreement or under a further service agreement. It is recommended that IPART seek amendment of the terms and conditions relating to additional capacity to remove this ambiguity.

### *Further submissions*

- **AGLGN (10 September 2004)**

  AGLGN agrees to clarify this provision [relating to description of capacity reservation services].

- **Orica**

  Orica would like to comment on a recent denial for a Short-Term Capacity request to AGLGN, the request was made under the following cause of the Access Arrangement.

  > Section 2.1 Capacity Reservation Service – Terms and Conditions, Short term Capacity for Users Supplying Customers above 30 TJ per annum at a Delivery Point.

> "Users supplying a Customer at a single Delivery Point which is reasonably expected to withdraw an amount in excess of 30 TJ per Contract Year may obtain Short Term Capacity for such Delivery Points on the terms set out below:
>
> • A User may increase the MDQ to cover the Customer's reasonable requirements during periods of equipment failure, commissioning or additional production following equipment failure, and events such as the re-firing of furnaces after re-builds or at start-ups after non-scheduled plant maintenance, where such activity occurs less frequently than once every year."

The interpretation on the above cause would seem to be of a general nature however AGLGN the network operator denial Orica request for this service because AGLGN considered Orica's request was outside the parameter detailed above.

Orica is requesting IPART make the following amendments to the above cause so that Orica and other customers are not relying on AGLGN's interpretation of the cause.

Proposed Amendments

> "A User may increase the MDQ to cover the Customer's ~~reasonable requirements during periods of equipment failure, commissioning or additional production following equipment failure, and events such as the re-firing of furnaces after re-builds or at start-ups after non-scheduled plant maintenance~~ additional operational requirements, where such activity occurs less frequently than once every year."

Orica believes the proposed changes better reflect the intent of the Access Arrangement and removes the requirement for AGLGN to approve the parameters for the request.

The requirements to amend the above clause is made more important because the Access Arrangement allows the customer to, "Request for Short Term Capacity maybe made in advance or at any time within one month after the capacity or any part of it has been used by the user."

Subjected to all other conditions governing the supply of Short Term Capacity the customer request for this service after the gas has been consumed should not be subjected to AGLGN interpretation of the allowable parameters for the increased MDQ.

Orica has no objections to the other conditions governing the supply of Short Term Capacity namely,

• Cost for additional MDQ

• Duration of 1 to maximum of 4 weeks.

• Maximum of one request every 12 months.

Orica supports these conditions because they stop Customers from abusing the intent of the service.

### *Final analysis and recommendations*

In its preliminary analysis of the terms and conditions, The Allen Consulting Group noted ambiguities in the provisions for a user of the Capacity Reservation Service to obtain summer, short-term and additional capacity. The ambiguities existed in respect of whether a user's MDQ for a Capacity Reservation Service includes summer, short-term and additional capacity, and whether additional capacity is obtained under an existing service agreement or new service agreement. The Allen Consulting Group recommended that IPART require amendments to the proposed access arrangement to remove these ambiguities. AGLGN has indicated agreement to these amendments which are:

- section 2.1 of the proposed access arrangement should be amended so as to explicitly indicate that the MDQ under a service agreement for Capacity Reservation Services includes capacity obtained as summer, short term or additional capacity; and
- section 2.1 of the proposed access arrangement should be amended so as to explicitly indicate that additional capacity for Capacity Reservation Services is obtained under an existing service agreement.

In its further submission, Orica has raised a further issue with the provisions relating to short term capacity. Orica contends, in effect, that AGLGN unnecessarily constrains a user's eligibility for short term capacity by indicating specific uses of gas for which short term capacity may be obtained. Orica contends that eligibility should be broader and relate to a requirement for gas arising from "additional operational requirements, where such activity occurs less frequently than once every year".

It is notable in relation to Orica's submission, that the AGLGN gas network is unusual amongst Australia gas distribution systems through it being operated as a contract carriage pipeline, and for most reference services a user has a contracted reserved capacity and pays a tariff based, in part, on the reserved capacity. The access arrangement makes limited provision for a user to purchase capacity on a short term basis, such as through a service in the nature of a spot service. In view of these characteristics of the access arrangement, it is a reasonable expectation that the access arrangement should make some provision for a user to increase gas deliveries in circumstances where gas demand increases temporarily for extraordinary reasons. The Allen Consulting Group concurs with Orica in the view that these circumstances should not be circumscribed by the description of activities for which gas delivered under short term capacity may be used.

The Allen Consulting therefore recommends that IPART seek amendment of section 2.1.1 under the heading of *Short Term Capacity for Users Supplying Customers above 30TJ per annum at a Delivery Point* such that the second bullet point reads "A User may increase the MDQ to cover the Customer's additional operational requirements, where such activity occurs less frequently than once every year".

## 5.9 Gas swap service

### *Consideration as an element of the services policy or terms and conditions*

The Gas Swap Service proposed by AGLGN is a reference service that is available to users of the non-tariff trunk reference services (Trunk Capacity Reservation Service, Trunk Managed Capacity Service and Trunk Throughput Service) that enables users of these services to change the receipt point at which gas is delivered to the network, or transfer gas from one user to another, after that gas has been received into the network. As the Gas Swap Service comprises a set of rights of users under a service agreement for reference services, the provisions that describe the gas swap service are considered, in effect, to comprise terms and conditions for the related reference services.

### *Proposed terms and conditions*

The terms and conditions for the Gas Swap Service set out a number of requirements for users that are participating in the gas swap, and obligations of AGLGN in respect of the gas swap.

- Users are required to notify AGLGN of an intended gas swap prior to commencement of the day of the swap.
- Where a gas swap is between two users, both the transferor and recipient of the gas are required to notify AGLGN.
- AGLGN is not obliged to recognise a gas swap where the notifications of the transferor and the recipient are not consistent and directly reciprocal transactions, or where information is not provided in formats or timetables other that as specified by AGLGN.
- For Gas swaps within the same trunk zone, AGLGN will accept the gas swap where:
  - the transferor of gas has arrangements in place for receipt of gas into the network at the receipt point at which the swapped gas is received into the network;
  - the recipient of gas has arrangements in place for transport of gas through the network from the "principal receipt point" specified under the relevant service agreement; and
  - the aggregate of all nominations by all users for delivery of gas to the receipt point at which the swapped gas is received into the network does not exceed the operational limitations of the Network.
- For gas swaps across different trunk zones, AGLGN will accept the gas swap where:
  - the transferor of gas has a service agreement in place for receipt of gas into the network at the receipt point to which the swapped gas is transferred (the alternate receipt point);
  - the total of the gas transferred to a zone and the gas otherwise delivered to the zone by the transferor must not exceed the aggregate MDQ of all non-tariff trunk services for the transferor for that zone; and

  - the recipient of gas is required to have arrangements in place for transport of gas through the network from the principal receipt point.

- The users that are party to the gas swap are responsible for the timing and coordination of gas swap notifications and gas balancing nominations to ensure that their daily withdrawal requirements and completed gas swaps reflect their arrangements for delivery of gas to receipt points for each day.

- The user will be liable for and required to indemnify AGLGN against any costs, penalties, expenses or any other loss of damage suffered or incurred by AGLGN from a gas swap, whether or not the gas swap is accepted by AGLGN for a particular day.

### *Initial submissions*

The terms and conditions of the Gas Swap Service were addressed in submissions on the proposed access arrangement from EnergyAustralia and Origin Energy.

EnergyAustralia indicates support for the inclusion of the Gas Swap Service as a reference service in the access arrangement, but indicates that the limitations on gas swaps are overly restrictive. EnergyAustralia also questions the reasonableness of tariffs for the service and the limited description of the notification process.

Origin Energy questions whether gas swaps may create a liability of the users for goods and services tax.

- **EnergyAustralia**

  (f) Gas swap service

  - At a conceptual level EnergyAustralia is supportive of a gas swap service. It would be administratively easier for a user to manage its gas portfolio on a short term basis between multiple sources.
  - Currently, in order to regulate the balance between Wilton and Horsley Park deliveries, we need to establish (and pay a fixed fee for) trunk haulage service between Wilton and Horsley Park. In order to manage the underlying split between receipt points, we usually need to "move/allocate" customers at the retail transfers level with AGLGN to a specific receipt point. This is an administratively cumbersome process. Being able to manage gas from multiple sources at a receipt point wholesale level is more elegant and more reflective of actual arrangements.
  - Having said that, the gas swap service proposed in the 2003 Access Arrangement is not as flexible as it should be. Particularly, the limitation on the Transferor that the total quantity of gas be no greater than the aggregate MDQ booking of non-tariff trunk services in the zone. This excludes the volume (implied MDQ) of the tariff load and limits the ability to swap gas between zones, particularly if the user has a much higher proportion of load in one zone versus another.
  - The open-ended indemnity/liability on gas balancing, regardless of whether AGLGN accepts the transaction or not, is very one-sided in favour of AGLGN. This is yet another risk to the user.
  - In addition, it can be argued that the gas swap service is being used as a mechanism to collapse zonal charges and provide even more costs to customers who inject gas from the EGP (who are required to pay even more for a section of the pipeline that they do not use). This is discussed in more detail above.

- Is a non-tariff trunk service something the user must book and pay for additional to individual non-tariff reference service MDQ bookings? Or is this incorporated with end user bookings - should be given the diversity benefit being captured by AGLGN on the trunk system.
- The swap transaction charge seems high at $0.0385/GJ, around 1% of the gas + transport cost of gas - suggest a fixed transaction cost + a lower variable charge.
- The notification process should be included.
- (Page 28) - Can the gas swap service be part of a multiple delivery point service agreement? Or will it be necessary for a user to enter into a separate agreement with AGLGN for this service?
- (Page 29) - The second dot point provides that AGLGN is not obliged 'to acknowledge gas swaps'. What is the effect of this? What does it mean if AGLGN does not acknowledge a gas swap?

- **Origin Energy**

  Origin notes that although no cash is exchanged in a gas swap, gas may be defined as a "consideration" under GST legislation therefore producing a requirement to issue Tax Invoices.

  There is no mention of invoicing principles for gas swaps in the Access Arrangement. Further development is required to comply with GST legalisation.

  TXU

  Whilst the introduction of gas swaps represents an additional service to the access arrangements that may provide retailers with some additional flexibility to manage their retail position, TXU is concerned that the lack of flexibility associated with the gas swap service as provided in the proposed Access Arrangements will limit the potential benefits of such a system. TXU believes that users are unreasonably burdened by liabilities and costs associated with the service, irrespective of their use of it. TXU would like to see more flexible conditions applied to gas swaps in the Access Arrangements.

### *Preliminary analysis*

The proposed Gas Swap Service was not a service offered under the current access arrangement and has been introduced under the proposed access arrangement. EnergyAustralia appears to welcome the inclusion of this service into the access arrangement and no submission indicates any opposition to the service.

EnergyAustralia and TXU have submitted, however, that the ability to engage in gas swaps is inappropriately restrictive.

The restrictions on gas swaps are not entirely clear from the terms and conditions, however it appears that gas swaps may only occur whether both the transferor and recipient of gas have service agreements in place for both the receipt point from which gas is transferred and the receipt point at which gas is received into the network (noting that under a user swap at a single receipt point, the two may not differ). The reasons for this restriction are not apparent. It is recommended that IPART seek further information from AGLGN on the intended purpose and operation of the Gas Swap Service to enable these limitations to be understood and to enable a determination to be made on the reasonableness of the limitations.

EnergyAustralia has also raised a number of other concerns in relation to the Gas Swap Service.

Firstly, EnergyAustralia submits that the requirement that users indemnify AGLGN against any costs, penalties, expenses or any other loss of damage suffered or incurred by AGLGN from a gas swap is unreasonably broad. This liability provision was addressed in section 4.18 of this report.

Secondly, Energy Australia submits that the notification process for gas swaps should be included in the terms and conditions for the Gas Swap Service. The proposed terms and conditions currently indicate that notification is required prior to the day on which the gas swap takes place and according to the timetable and format specified by AGLGN. While there may be some benefit in the "timetable and format" comprising part of the terms and conditions for the Gas Swap Service, these may be viewed as part of an administrative processes for obtaining the service, in the nature of a service request form. There is no obvious reason to consider that specification of these components of the notification process outside of the terms and conditions is unreasonable.

Thirdly, EnergyAustralia indicates that the provisions for the Gas Swap Service include the statement that "AGLGN is not obliged 'to acknowledge gas swaps" and queries the meaning of this statement. The provision that EnergyAustralia refers to reads in full "AGLGN is not obliged to acknowledge Gas Swaps where the Transferor of the Gas and the Recipient of the Gas notifications proposing and accepting a Gas Swap are not consistent and directly reciprocal transactions or where information is provided in formats or timetables other than as specified by AGLGN". The entire provision referred to by EnergyAustralia thus indicates that AGLGN is not obliged to acknowledge gas swaps where the notifications by the transferor and recipient of gas do not comply with the explicit requirements of AGLGN. This provision is considered reasonable.

Energy Australia also raises issues in its submission in regard to the charges for the Gas Swap Service. These are matters relating to reference tariffs and not addressed in this report.

Origin Energy raises concerns about the potential for a gas swap to create liabilities for goods and services tax. As noted above in relation to title to gas (section 4.20), any potential implications of a gas swap for liabilities for goods and services tax would be a matter for determination with the Australian Taxation Office. The Allen Consulting Group does not consider that this is a matter that should be investigated or resolved as part of assessment of the proposed access arrangement.

TXU submits that users are unreasonably burdened by liabilities and costs associated with the service. The liabilities associated with the gas swap service were addressed in relation to liability under the terms and conditions in section 4.18 of this report.

### *Further submissions*

- **Country Energy**

  The proposed Gas Swap Service is an interesting and possibly advantageous inclusion to the access arrangement. While we appreciate the merits of flexibility to support the evolving gas market, we agree with Allen Consulting Group's recommendation that IPART 'seeks further information from AGLGN on the intended purpose of, and operation of the Gas Swap Service to enable these limitations to be fully understood and to enable a determination to be made on the reasonableness of the limitations'.

  Only when greater detail has been provided on the operational complexity of the Gas Swap Service, will Country Energy be in a position to comment on the Service's potential commercial benefit or detriment.

  Our preferred position is for the proposed Gas Swap service to remain as a component in the new access arrangement (once comments made in point 3 above have been addressed) with the differential cost remaining for the three zones being discussed, allowing the original "natural advantage" to remain as originally conceived by EGP.

- **Origin**

  Aggregation of Delivery Zones

  Origin is in favour of AGLGN's proposal to aggregate the three delivery zones into one and believes that this initiative will effectively facilitate a gas swap market.

Separately from submissions, AGLGN has indicated that the actual requirements of the gas swap service in this respect are as follows.

a) The recipient of gas has a service agreement in place for the transportation of gas through the network from the Principal Receipt Point. In the absence of a gas swap, this user would be delivering gas into the network at this receipt point, therefore this requirement does not impose any additional obligation on the user.

b) The transferor of gas has network transportation arrangements in place for receipt of gas into the network at the receipt point at which gas is actually to be received. In the case of a receipt point swap, this would require the transferor of gas to have arrangements in place to receive gas at the alternate receipt point under a service agreement. In the absence of a gas swap the user would be delivering gas for its own use at this receipt point, and therefore this requirement is consistent with a users general obligations under a service agreement and does not impose any additional obligation on the user.

c) In the case of a receipt point swap the transferor and recipient must respectively have network transportation arrangements in place for the alternate and primary receipt points. The existing provisions do not require both users have transportation arrangements for the alternate receipt point.

### *Final analysis and recommendations*

The further information provided by AGLGN clarifies that a gas swap service does *not* require that participants in the gas swap each have transportation agreements in place for both receipt points affected by the gas swap. This appears to be consistent with the expected benefits of the gas swap service to users: that a user may be able to have gas received into the network at a different receipt point than permitted under its existing service agreement by having that gas received at the different receipt point under the provisions of the service agreement of another user. If the additional explanation provided by AGLGN has been interpreted correctly, then, while the provisions for gas swap service remain difficult to understand, the provisions appear reasonable.