

20 April 2004

Dr Tom Parry
Chairman
Independent Pricing and Regulatory Tribunal
PO Box Q290
QVB Post Office NSW 1230

Dear Dr Parry

Re: AGLGN December 2003 Access Arrangement

EnergyAustralia welcomes the opportunity to provide comment on revisions to the (Access Arrangement of AGL Gas Networks Limited (**AGLGN**) submitted in December 2003 (**2003 Access Arrangement**)).

EnergyAustralia believes the correct regulatory framework is crucial to promote competition and further to develop the natural gas industry in NSW. As one of the major energy retailers requiring access to AGLGN's distribution network, EnergyAustralia is well placed to provide comments on the practical consequences of the current Access Arrangement and AGLGN's proposed changes to the regime.

Attachment 1 provides more detailed comments on areas of concern to EnergyAustralia arising from its review of the 2003 Access Arrangement. The main points are summarised below.

EnergyAustralia's primary concern is AGLGN's proposal to collapse the current three Trunk Capacity Reservation Charge zones between Wilton and Horsley Park into a single zone. This is anti-competitive, inefficient and forces retailers who are supplied via the Eastern Gas Pipeline (EGP) to subsidise sections of the Trunk System that they do not use. This proposal favours users (currently most are related businesses of AGLGN) of the Moomba – Sydney Pipeline over users of the Eastern Gas Pipeline (section 3.3). Such a proposal is unacceptable in a competitive and ring-fenced gas market where transmission, distribution and retail functions are carried out by separate entities and no longer within the control of a monopoly service provider.

Other concerns with the 2003 Access Arrangement include:

- ◆ significant increases in capital expenditure without any significant increases in forecast demand, nor offsetting reductions in operating expenditure (section 2);
- ◆ inflexibility in reference service conditions;
- ◆ onerous liability and indemnity provisions (section 9) ;

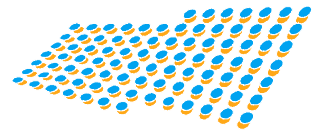
- ◆ inability of load shedding arrangements to take account of alternative supply sources and transportation routes (section 6.1);
- ◆ high levels of marketing expenditure compared with other distribution businesses (section 2.4); and
- ◆ significant increases in metering costs for contract customers (section 3.6).

EnergyAustralia may provide additional supporting information in relation to these issues in due course.

If you have any further queries in relation to this submission, please do not hesitate to contact me on (02) 9269 4911 or Don Anderson, Manager – Gas Business Development on (02) 9269 4965.

Yours sincerely,

Nick Saphin
General Manager Retail & Marketing



EnergyAustralia[™]

ATTACHMENT 1 - COMMENTS ON REVISIONS TO THE AGLGN ACCESS ARRANGEMENT 2003

1. Basis for EnergyAustralia's comments

EnergyAustralia is the largest electricity entity in NSW and currently provides retail gas services to a substantial number of large and small retail customers in NSW. EnergyAustralia has been a customer/user of the distribution network owned by AGL Gas Networks Limited (**AGLGN**) since November 1999.

Since the introduction of retail competition in the NSW gas market, EnergyAustralia has emerged as the principal competitor to AGLGN's affiliated retail business, AGL Energy Sales & Marketing. Consequently, EnergyAustralia is in a unique position to provide comments regarding the operation of the current AGLGN Access Arrangement.

AGLGN has submitted the draft 2003 Access Arrangement (**2003 Access Arrangement**) in accordance with *the National Third Party Access Code for Natural Gas Pipeline Systems (Access Code)*. The Access Code aims to facilitate market development, prevent abuse of monopoly power, promote competition, provide rights of access to natural gas pipelines on fair terms and provide dispute resolution facilities. Considering the requirements outlined in the Access Code, EnergyAustralia believes that the access arrangement for NSW's largest gas distribution business should provide a suitable framework to:

- ◆ facilitate the development of the natural gas market in Australia;
- ◆ promote competition – including retail (and shipper) competition and facilitate the development of basin-on-basin and pipeline-on-pipeline competition;
- ◆ ensure affiliated upstream or downstream businesses do not receive any unfair advantage;
- ◆ allow sufficient flexibility for users to manage their gas supply needs;
- ◆ provide transparent and cost-reflective separation of transmission and distribution businesses;
- ◆ allocate revenue between assets and markets in a way that reflects the costs of providing those services;
- ◆ provide tariffs that are commensurate with other service providers in the Australian market and are consistent with incentive-based regulation; and
- ◆ provide a fair revenue return to the owners of the business.

The comments provided in this submission to the Independent Pricing and Regulatory Tribunal (**IPART**) are framed against this background.

Part A is an analysis of the determination of total revenue. Part B covers EnergyAustralia's analysis of the Reference Tariffs and Reference Tariff Policy. Part C contains EnergyAustralia's comments on the Reference Services and terms and conditions.

PART A – DETERMINATION OF TOTAL REVENUE

2. DETERMINATION OF TOTAL REVENUE

2.1 General

In real 2004-05 dollars, AGLGN has forecast a decline in total revenue in 2004-05, followed by a modest growth rate of around 2.1% over the next four years.

Specific issues are considered in more detail below.

2.2 Capital Expenditure

In real 2004-05 dollars, capital expenditure is forecast to increase by 21% in 2004-05 and 37.7% in 2005-06, compared to a reduction of actual capital expenditure in the 2000-04 regulatory period.

The capital underspend in the current regulatory period has been justified in the 2003 Access Arrangement by the deferral of a number of projects (such as the Sydney Primary Main project), reduced meter replacement and deferral of IT system replacement.

However, EnergyAustralia notes that the demand forecasts for new residential customer connections and average gas usage per customer do not show a substantial increase. Therefore, IPART should be satisfied that the additional capital expenditure foreshadowed by AGLGN can be fully justified by the deferred capital expenditure.

2.3 Operating Expenditure (Non Capital Costs)

AGLGN has proposed a reduction in the assumed annual efficiency factor for controllable costs (excluding marketing) from the 3% in the Final Decision 2000 to 1.5%. This reduction was on the basis that it was not considered realistic to achieve 3% annual efficiency savings indefinitely.

However, AGLGN has proposed strong growth in capital expenditure in the next regulatory period, particularly in 2004-05 and 2005-06, primarily as a result of the deferral of previous projects.

Given the substantial additional capital expenditure allocated to the deferred primary main proposal (\$50 million), the renewal of networks reaching the end of their economic lives (\$39 million) and replacement of ageing IT equipment (\$39 million), it is expected that there would be a significant offsetting reduction in maintenance expenditure associated with these assets. However, this reduction does not seem apparent in the operating expenditure figures that are forecast to increase over the next regulatory period in real terms.

2.4 Marketing costs

AGLGN has proposed that marketing costs be retained at the 2004 level in real dollars (ie. \$13.1 million) plus the addition of \$3 million per annum to promote the conversion of existing gas customers, who do not use gas for water heating, to the use of gas water heating appliances.

EnergyAustralia is concerned that this may reverse the objectives of the 2000 Final Decision, where AGLGN's marketing expenditure was substantially reduced on the basis that it was significantly higher than industry benchmarks.

Based on the proposed AGLGN figures, marketing expenditure in 2004-05 (\$16.5 million in total) will represent 14% of total operating expenditure. By comparison, EnergyAustralia's electricity network business expenditure in 2004-05 is forecast at \$1.8 million, which represents 0.6% of total operating expenditure. This is a considerable difference, even if it is acknowledged that gas distribution businesses may need to promote more energy efficient appliances. As AGLGN's gas distribution network was built before the electricity distribution network, the argument that substantial distribution marketing expenditure is necessary to entice customers away from electricity is questionable. If gas distribution network costs are substantially higher than benchmark costs for electricity distribution networks, this disparity will result in a regulatory imposed skewing of electricity and gas competition in the residential energy market.

EnergyAustralia understands that a large proportion of AGLGN's marketing expenditure is used to provide customer rebates for new connections to the distribution network. This expenditure may be justified by AGLGN on the grounds that the rebate is available to all retailers in the market on a non-discriminatory basis. However, the reality is that AGL Energy Sales & Marketing has been virtually the sole beneficiary to date, and is likely to remain the dominant beneficiary for the next regulatory period. Thus this high level of marketing expenditure is effectively a cross subsidy for AGLGN's associated retail business.

Therefore, EnergyAustralia believes that allowable marketing expenditure that is to be used to encourage new connections to the distribution network should be reduced significantly from the 2003-04 benchmark level of marketing costs.

However, other marketing expenditure that is specifically targeted at the development/installation of new technologies that are beneficial from an environmental and/or energy efficiency perspective (such as gas chillers) should be allowable and should be a significant amount (\$8 to 10 million). This would encourage greater utilisation of the existing asset in an environmentally beneficial way rather than simply encouraging expansion of the asset in a way which benefits both AGLGN and its associated retail entity.

2.5 Rate of Return

AGLGN has proposed a pre-tax real rate of return of 7.85%, using the Capital Asset Pricing Model to determine the Weighted Average Cost of Capital.

In deliberating on the appropriate cost of capital for AGLGN, IPART needs to be cognisant of the risks faced by the business, as well as current economic and market conditions. However, due to recent energy market reforms and the shift towards a convergence of electricity and gas

markets, AGLGN now operates in a national energy market. This convergence of markets is set to increase over the next five years. Therefore, it is reasonable to expect that the risks faced by AGLGN, along with the investment returns required by shareholders, should be consistent with those faced by other gas and electricity distribution businesses in Australia.

Higher population growth, rising energy demand (especially during peak periods) and the growing need to be internationally competitive have increased pressure for further investment in essential energy market infrastructure. In recent times, regulatory risk and the growing litigious nature of regulatory decisions in Australia has had an adverse impact on investment incentives – a finding that has been highlighted in many recent energy market reviews (such as the Productivity Commission's review of the National Gas Access Regime).

IPART needs to ensure that rates of return are sufficient to promote appropriate investment levels in essential energy infrastructure to ensure security of supply in NSW, resulting in lower consumer prices in the longer term. However, it is equally as important to ensure that there is no regulatory-imposed skewing of returns such that investment is artificially enticed away from electricity infrastructure - where there is an urgent need at the present time - towards the gas market.

Therefore, EnergyAustralia strongly believes that IPART should ensure consistency in the rates of return between the electricity and gas distribution networks under its regulatory control. AGLGN's allowed return on capital should be equivalent to that granted to for NSW electricity Distribution Network Service Providers in the 2004 Final Determination.

PART B – REFERENCE TARIFFS AND REFERENCE TARIFF POLICY

3. Cost and Revenue Allocation

3.1 Methodology

The cost allocation and revenue allocation methodology used by AGLGN to allocate total revenue between assets and market segments is similar to the Final Decision 2000 methodology.

Some key areas of difference are outlined below.

3.2 Capital cost allocation to customer segments

In the 2003 Access Arrangement, AGLGN has allocated Local Network capital costs to the contract and tariff market segments based on diversified Maximum Daily Quantity (MDQ) for each Local Network for each segment. Although this is consistent with the methodology used to allocate Trunk system capital costs to the contract and tariff markets, it is a change from the methodology used in the Final Decision 2000. In the Final Decision 2000, Local Network capital costs were allocated to the contract market based on the Depreciated Optimised Replacement Cost (DORC) value, with shared costs on capacity allocated at system MDQ. The tariff market was assigned the write down of the DORC values to the Initial Capital Base (ICB) value¹.

¹ In its submission to the 2000 review, AGLGN originally proposed to allocate Local Network capital costs to the contract market on the basis of the stand alone costs of supplying that market (the balance of costs was allocated to the tariff market).

This proposed change has resulted in a 2% reduction in the proportion of Local Network capital costs allocated to the contract market (and corresponding increase to the tariff market) between 2003-04 and 2004-05.

EnergyAustralia has no objection to AGLGN's proposed change in allocation methodology, as MDQ is likely to provide a more realistic split of the costs incurred by the market segments compared with the 2000 Final Decision methodology. The latter method is more likely to provide a cross subsidy to the tariff market.

3.3 Collapsing of Trunk Zones

In the 2003 Access Arrangement, AGLGN has proposed collapsing the number of trunk zones used to determine the Trunk Capacity Reservation Charges from 7 (currently numbered 1 to 7) to 5 (classified A to E). This two-zone reduction is to be achieved by collapsing the three zones spanning from Wilton to Horsley Park (Wilton, West Hoxton and Horsley Park) to a single zone (zone A). Therefore, for a customer delivering gas into the Sydney Local Network, the same Trunk Capacity Reservation Charge will apply regardless of whether the customer's receipt point is at Wilton via the Moomba to Sydney Pipeline (MSP), or Horsley Park via the Eastern Gas Pipeline (EGP).

EnergyAustralia strongly opposes this proposed change and believes that the current 7-zone system should continue to apply. It is EnergyAustralia's firm view that this is the most important issue to be resolved in this review.

The introduction of the new zone A will result in a 105.4% increase in trunk charges in 2004-05 (in real 2004-05 dollar terms) for Sydney contract customers receiving gas at Horsley Park via the EGP (see Table 1 below).

Table 1: Increase in Trunk Capacity Charges for Contract Customers Receiving Gas at Horsley Park via the EGP.

(Trunk Charges – \$/GJ of MDQ per annum expressed in real 2004/2005 dollars)

EGP Supply into Sydney	Current 2003-04 Tariffs	Proposed 2004-05 Tariffs	Difference, \$	Difference, %
Zone 3/Zone A	6.563	13.477	6.914	105.4%

At face value alone, a cost increase of this magnitude should be unacceptable in a single year on the basis of the resulting negative impact on customers. However, such an increase is even less justifiable considering that there is no corresponding rise in costs associated with supplying these customers foreshadowed in the 2003 Access Arrangement. Further, the proposed increase is inequitable, as only customers transporting gas via the EGP will face cost rises. Sydney Contract customers transporting gas along the MSP will actually experience a 16% real reduction in trunk charges in 2004-05. This represents price discrimination against EGP customers.

In order to develop an interconnected, competitive natural gas pipeline system, it is essential that there is pipeline on pipeline competition and competition among gas shippers and retailers. The trunk zones should not be rearranged on a basis that penalises customers who can

bypass sections of the trunk system, thereby eliminating a source of competitive difference for businesses sourcing gas via the EGP in competition with AGLGN's affiliated retail and wholesale businesses.

In addition, the new zone A is significantly less cost-reflective than the current three zone arrangement for the Wilton to Horsley Park section of the trunk system, particularly for EGP customers. This is not consistent with the allocation of revenue principles outlined in the Access Code. Section 8.38 states that the portion of revenue that a Reference Tariff should be designed to recover should include:

- (a) all of the Total Revenue that reflects costs incurred (including capital costs) that are directly attributable to the Reference Service; and
- (b) a share of the Total Revenue that reflects costs incurred (including capital costs) that are attributable to providing the Reference Service jointly with other Services, with this share to be determined in accordance with a methodology that meets the objectives in section 8.1 and is otherwise fair and reasonable.²

A customer transporting gas along the MSP and delivering gas into the Sydney local network uses approximately 51 kilometres of the trunk system (the length of the Wilton to Horsley Park section of the trunk system) and a single Trunk Receiving Station (TRS) facility. By contrast, a customer transporting gas along the EGP and delivering gas into the Sydney local network does not use the Wilton to Horsley Park section of the trunk pipeline system at all, but enters the trunk system 'downstream' of Horsley Park via a single TRS facility.

Cost reflectivity became an issue in the 2000 Access Arrangement review when AGLGN first proposed to move from the previous "follow the molecule" approach towards the zonal system of trunk charges. At that time, users of the AGLGN system argued, quite justifiably, that there should be no trunk zone charge at all for customers who received gas at Horsley Park via the EGP and delivered gas in the Local Network main into Sydney. Users argued that no part of the trunk system was effectively being used. AGLGN justified the zonal charge on the basis that customers within the Sydney receive did not receive gas through a single Trunk Receiving Station (TRS) at Horsley Park, due to the system configuration.

On the basis that it is questionable to apply the current zone 3 trunk charge for such a small use of the trunk system, it is completely improper to apply a zone charge to EGP users that incorporates use of the entire trunk section from Wilton to Horsley Park.

EnergyAustralia also notes that AGLGN originally submitted a reduced number of pricing zones (ie. less than seven) in its initial submission to the 2000 Access Arrangement review. In response to this proposal, there were concerns regarding the large size of the zones and the fact that users who injected gas to Horsley Park and whose delivery point was the local Sydney Network main should have to pay any trunk charge at all. AGLGN was forced to increase the number of pricing zones to seven in response to concerns in submissions and at the 2000 Pricing Forum.

AGLGN has indicated that the new zone A will assist with the introduction of the proposed new gas swap service. However, in practice, the collapsing of the current trunk zones 1-3 will have a detrimental impact on pipeline-on-pipeline competition in the natural gas market. This is

² Access Code, pp. 60-61.

contrary to the fundamental objectives of the Access Code, which include facilitating the development of a national gas market and promoting a competitive market for natural gas in which customers may choose suppliers, including producers, retailers and traders.

EnergyAustralia is aware that AGLGN's affiliated retail business currently sources the majority of its gas supplies from the Cooper Basin via the MSP. Therefore, AGLGN's affiliated retail and wholesale businesses will be the dominant beneficiaries from the proposed anti-competitive trunk charge reductions, while trunk charges for competing retail or wholesale business shipping gas from the EGP will more than double.

Table 2 outlines the effect of the proposed change on the charges for customers who are supplied via the EGP compared to customers supplied by the MSP (the latter accounts for the majority of AGLGN's affiliated retailer's customers).

Table 2: Differential - Trunk Charges - EGP And MSP - \$/GJ Per Day
2004-05 real dollars
Tariff Comparison (\$/GJ per day)

Source	Current, 2003-04 tariffs		Proposed, 2004-05 tariffs		Difference \$
	Zones	\$	Zones	\$	
AGL Charges to Newcastle					
Source	Zones		Zones		
EGP at HP	3-6	\$0.3109	A-D	\$0.3188	\$0.0079
MSP at Wilton	1-6	\$0.3368	A-D	\$0.3188	-\$0.0181
EGP Differential	1-2	\$0.0260		\$0.0000	-\$0.0260
AGL Charges to Sydney					
Source	Zones		Zones		
EGP at HP	3	\$0.0180	A	\$0.0369	\$0.0189
MSP at Wilton	1-3	\$0.0439	A	\$0.0369	-\$0.0070
EGP Differential	1-2	\$0.0260		\$0.0000	-\$0.0260

The planned new zone A will also have an adverse impact on economic efficiency, as EGP customers will face higher input costs of production as a result of an inefficient, non-cost reflective change in pricing methodology. There will be a corresponding transfer of revenue to AGLGN, resulting in excess monopoly profits. EnergyAustralia considers that AGLGN will gain unjustifiable revenue from the collapsing of the current zones 1-3 to a single zone A.

3.4 Allocation of total capital and operating costs to each Trunk Zone

In the 2003 Access Arrangement, AGLGN has allocated capital and operating costs for each Trunk pipeline to the various zones according to physical characteristics within each zone – for example, the number of pipes and number of valves. In the Final Decision 2000, total capital costs for each zone was allocated on the basis of the relative share of the DORC value. Operating costs were allocated on the basis of the relative share of ORC values.

The proposed new allocation methodology has had the effect of a slight reduction in the share of costs allocated to the Wilton to Horsley Park, and a corresponding increase among the remaining zones between Horsley Park and Newcastle.

This methodology appears to be reasonable. However the pricing, and any associated price zoning, needs to ensure that the recovery of these costs is cost reflective.

3.5 Allocation of Contract Market Local Network Capital Costs to Price Zones

AGLGN has used a Fully Distributed Costs (FDC) methodology based on MDQ reservations to allocate costs to the local area network zones of Sydney and Newcastle, consistent with the methodology used in the 2000 Final Decision. However, in the 2003 Access Arrangement, AGLGN has moved away from this method. AGLGN states that the Wollongong contract market has a characteristic of high MDQ demand that is supplied using a very small proportion of the network. Hence, the FDC methodology would result in an erroneously high proportion of the capital costs being allocated to the contract market. Therefore a "share of assets" methodology (similar to that described for the contract market postcode allocation) using the engineering flow model of the optimised Wollongong network is used to determine a more cost reflective allocation of the local network between contract and tariff market.

This has had the effect of reducing the share of local network costs allocated to the Wollongong contract market (and increasing tariff market costs) compared to the previous review.

It is unclear from the information provided as to the effect on prices. However, EnergyAustralia notes that the high MDQ figures through the Local Network Zones are clearly at odds with the reduction of more than 50% MDQ flow through the trunk section. This issue is discussed in more detail under the demand forecast section.

3.6 Allocation of metering costs into contract and tariff markets

The 2003 Access Arrangement shows an increase in metering charges for contract customers and a decrease to tariff customers.

Capital metering costs are allocated to contract and tariff markets on the basis of existing regulatory values of meters. Operating metering costs are assumed to be allocated on the basis of Activity Based Costing.

This is an area of concern for EnergyAustralia.

3.7 Demand Forecasts

EnergyAustralia is aware that, as a matter of process, IPART will engage a consultant to review demand forecasts.

EnergyAustralia believes that the gas market will continue to grow in the future as new sources of supply (for example, coal seam methane developments) become viable and an increasing number of gas appliances are installed in new residential developments.

3.8 Breakdown of demand forecasts into trunk and local networks

EnergyAustralia notes that the forecast demand figures for the Wilton to Wollongong Trunk pipeline do not appear to be intuitively correct. According to the current Access Arrangement Information, in 2003-04, booked MDQ to Wollongong was 7,908 GJ from 16 customer sites. By contrast, in the 2003 Access Arrangement, customer numbers have risen to 19, but total booked MDQ has decreased by 51.6% to 3,824 GJ. This equates to a 59.3% reduction in booked MDQ per customer.

EnergyAustralia is aware that demand forecasts are subject to error. In addition, it is also acknowledged that contract demand varies significantly between customer sites, so that the loss of a major customer and the addition of new smaller customers can result in a lower volume of MDQ.

However, the trunk contract demand figures in the 2000 Access Arrangement allowed for the loss of EGP foundation customers at Port Kembla (supplied directly via the Local Network), which caused reductions to the MDQ figures between 1999-2000 and 2000-01. Furthermore, the contract market is a mature market, making the forecasting process more reliable.

Given that MDQ has been used by AGLGN to allocate costs between market segments, and the lower MDQ figures have resulted in a shift of revenue from the contract to the tariff markets, it may be advisable for IPART or its consultant to ensure the validity of these forecasts.

PART C – REFERENCE SERVICES

4. Form and substance of Access Arrangement is unclear

4.1 General

It is EnergyAustralia's view that both the form and substance of the 2003 Access Arrangement are unnecessarily clumsy, complicated and difficult to comprehend. The layout of the document and the way it is drafted constitute a barrier to entry and, in EnergyAustralia's view, is contrary to the principles of the Access Code. Users and their advisers must invest substantial time in understanding how the 2003 Access Arrangement is intended to operate and this makes negotiations difficult. If implemented EnergyAustralia's comments would make the 2003 Access Arrangement more user-friendly and accessible.

4.2 Form

The layout of the 2003 Access Arrangement is confusing and repetitive. The use of dot points (rather than numbered paragraphs) makes it difficult to identify particular principles. 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.

4.3 Substance

Examples of how the substance of the 2003 Access Arrangement is confusing are set out below.

(a) Description of services

The services policy in section 2 provides that all users of a service will be required to enter into a service agreement specific to that user and that service. At the same time there is a multiple delivery point service. EnergyAustralia queries why a multiple delivery point service is required as a separate service when it is not actually a separate service?

EnergyAustralia is of the view that it would be simpler to remove the provisions throughout the document that require a user to enter into a separate Service Agreement for each service. That way there would be no restriction on how the number of reference services covered by individual Reference Service Agreements.

Also, it is not clear whether a multiple delivery point services agreement could also include the terms and conditions upon which a gas swap service could be provided. This point should be clarified.

(b) New delivery points and existing delivery points

In section 2 (Availability of services) there is a reference to existing delivery points and new delivery points. These are not defined. It is not clear why there is a distinction between the two in this context. Also, it says that all local network reference services are available to delivery points existing on the network where reference services are provided 'at the date this Access Arrangement takes effect'.

Does this mean that the services are not available to new delivery points (ie that come into existence after the access arrangement revisions take effect)? If this is the case then is this consistent with the principles of the Access Code? AGLGN should be asked to explain why the distinction is made and confirm that local network reference services will be provided to all delivery points whether in existence at the date the revisions take effect or after this date.

(c) Definition of reference services

The definitions of capacity reservation service and managed capacity service are essentially circular. They are defined as the services described in sections 2.1.1 and 2.1.2 and 2.1.1 and 2.2.2 respectively. In these sections the local network services are described as follows:

A Local Network Capacity Reservation Service is 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 including options for Summer Tranche Capacity, and Short Term Capacity with Charges determined on the basis of capacity reservation and Charges payable for Overruns.

A Local Network Managed Capacity Service is 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 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.

For a new user, it is not clear what services AGLGN provides. The distinction between the two seems to be options for additional capacity and charges for overruns. It is not clear what is meant by 'capacity' as the capitalised term from the definitions section is not used. The second

definition refers to MDQ in the definition. Should this qualification be more appropriately located in the terms and conditions section? What does it mean for the MDQ for a capacity reservation service? The definitions of the services should be clarified and treated consistently.

(d) 'Tariff Services' and 'Non-Tariff Services'

The terms 'Tariff' and 'Non-Tariff' should not be used in the context of delivery points as in the Access Code it means the price for a service. It is confusing to use these terms in this context.

(e) Flexibility - Corresponding trunk service for each local network service

Generally, a user can request a service for a year at a time. This seems to be unnecessarily inflexible. AGLGN should explain why a user could not request a service for, say, 3 years? Or 6 months?

5. Terms and conditions of Reference Services

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.³ 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

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.”⁴

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.⁵

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

(b) Examples

Security

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.”

³ On page 4, in respect of the capacity reservation only it states that ‘an overrun will occur’. This is slightly different from the other two services. It is assumed that this difference was not intended.

⁴ QCA’s Final Decision on Proposed Access Arrangements for Gas Distribution Networks, October 2001, p 55.

⁵ For example, see the ICRC’s comments at p29 of its Issues Paper relating to ActewAGL’s proposed Access Arrangement.

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.

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.⁶

Accounts and payments

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.

Rebate provisions

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

⁶ QCA's Final Decision on Proposed Access Arrangements for Gas Distribution Networks, October 2001, p 55.

be required to pay charges once a delivery point is transferred to another user as AGLGN will receive the charges from that other user.

(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.

5.3 Reference services– specific issues

(a) 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?
- (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.
- (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?
- (Page 9) - There is a statement that the trunk exit zone for each nominated delivery point is referenced in section 3.3 – what does this mean?
- Although a summer tranche capacity service provides for short term supply, the main capacity reservation service should include a wider variety of terms.

(b) Managed Capacity Services

- (Page 11) If there are no charges for overruns, must they be authorised at all?
- (Page 12) The dot point under metering provides that basic metering equipment will be provided in accordance with the conditions in Schedule 2A. There is already a statement that Schedule 2A applies to the service so query whether this is necessary.
- (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?

(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?
- As for services above, there is no need to repeat that Schedule 2A applies in respect of metering.

(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.

(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?

(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.

(h) Potential new services

- Capacity trading service– EnergyAustralia believes that there should be a capacity trading regime in the trunk system as this is a standard feature of other transmission pipelines. This will allow users more efficiently to manage their MDQ. AGLGN could facilitate this service by the use of electronic bulletin boards.
- 'As available' service – EnergyAustralia believes that the range of services offered on AGLGN's trunk system should align with those offered by other transmission pipeline services. Therefore, there is merit in AGLGN considering the introduction of 'As Available' services on its trunk system. This service would differ from the trunk throughput services as similar services are offered on the EGP and the MSP.

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.

7. Part 3E - Variations to reference tariffs

Under Part 3E of the 2003 Access Arrangement, AGLGN is able to vary Reference Tariffs in certain circumstances.

There are a number of issues with Part 3E:

- it appears that AGLGN is not required to seek regulatory approval for the above variations; section 3.12 merely requires AGLGN to 'notify' the relevant regulator of the variations;
- the lack of prior notification to users in relation to variations such that users are able to pass through the variations to their customers;
- it is not clear whether cost reductions will also be passed through; and
- the scope of the cost pass-through events is exceptionally broad, particularly the unforeseen external event head. Users require more certainty. There is concern regarding the non-specific and broad nature of the mechanism.

Section 8.3A of the Code provides that a Reference Tariff may only be varied within an Access Arrangement Period through the implementation of the Approved Reference Tariff Variation Method as provided for in sections 8.3B to H. A critical feature of sections 8.3B to H is the need to notify the regulator of the proposed variation and the ability of the regulator to disallow that variation. This latter aspect is not expressly reflected in the Access Arrangement (although that may be the intention).

Furthermore, IPART should be consistent between regulated distribution networks in allowing such pass through mechanisms. For example, in its Draft Determination on electricity network prices, IPART denied EnergyAustralia the ability to pass through unforeseen expenditure. AGLGN are claiming automatic pass through of regulatory events and insurance events – EnergyAustralia would strongly oppose asymmetric treatment of these costs between electricity and gas networks for regulated businesses falling within IPART’s jurisdictional control.

In **Attachment C**, EnergyAustralia proposes a redraft of clause 3.12 of Part 3E to provide for prior notice to users of proposed variations, the possibility of pass through of cost reductions and to reflect the regulator’s ability to disallow variations. The changes are modelled on the Victorian Access Arrangements.

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**.

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.

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.

ATTACHMENT A

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).

[The following is a mark up of clause 17 from General Terms and Conditions for Tariff Reference 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.

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.

ATTACHMENT C

PART 3E: VARIATIONS TO REFERENCE TARIFFS

3.12 Notification

If AGLGN proposes to vary the Reference Tariffs in accordance with the variation methods set out in Section 3.11, AGLGN must:

- (a) provide a statement to the Relevant Regulator containing the information required by the National Code; and
- (b) notify affected Users of the proposed variation,

at least 30 Business Days prior to the proposed effective date of those variations.

3.13 Obligations of the Relevant Regulator

- (a) If the Relevant Regulator receives a statement under clause 3.12, the Relevant Regulator must decide whether the Variation Event specified in the statement occurred or is continuing, and if the Relevant Regulator decides that the Variation Event occurred or is continuing, the Relevant Regulator must decide:

- (1) the Pass Through Amount; and
- (2) the basis on which the Pass Through Amount is to apply,

and notify AGLGN in writing of the Relevant Regulator's decision.

- (b) If the Relevant Regulator does not give a notice to AGLGN under paragraph (a) within 30 Business Days of receiving a statement from AGLGN under clause 3.12, on the 31st Business Day after receiving the statement from AGLGN under clause 3.12 the Relevant Regulator is taken to have notified AGLGN of its decision under paragraph (a) that the Pass Through Amount and the basis on which the Pass Through Amount is to apply are as specified in the statement given by AGLGN under clause 3.12.

3.14 Powers of the Relevant Regulator where a Variation Event occurs

- (a) If a Variation Event occurs and AGLGN is likely to be affected by the Variation Event but does not give the Relevant Regulator a statement under clause 3.12 concerning the Variation Event, the Relevant Regulator may decide on a Pass Through Amount and the basis on which the Pass Through Amount is to apply.
- (b) Where under paragraph (a) the Relevant Regulator decides on a Negative Pass Through Amount, the Relevant Regulator:
 - (1) may decide to require AGLGN to pass through the Negative Pass Through Amount decided by the Relevant Regulator on the basis decided by the Relevant Regulator; and
 - (2) where the Relevant Regulator decides to require AGLGN to pass through the Negative Pass Through Amount, the Relevant Regulator must notify AGLGN in writing of the Negative Pass Through Amount,

the basis on which the Negative Pass Through Amount is to apply and the reasons for the Relevant Regulator's decision.

3.15 Factors which the Relevant Regulator must consider

In deciding the Pass Through Amount and the basis on which the Pass Through Amount is to apply under clauses 3.13 and 3.14, the Relevant Regulator must ensure that the financial effect on AGLGN associated with the Variation Event concerned is economically neutral taking into account:

- (a) the relative amounts of Reference Services supplied to each User;
- (b) the time cost of money for the period over which the Pass Through Amount is to apply;
- (c) the manner in which and period over which the Pass Through Amount is to apply;
- (d) the financial effect to AGLGN associated with the provision of Reference Services directly attributable to the Variation Event concerned, and the time at which the financial effect arises;
- (e) the amount of any change in another tax or cost of AGLGN which, in the Relevant Regulator's opinion, was introduced as complementary to the Variation Event concerned;
- (f) the effect of any other previous Variation Event since the later of the date on which:
 - (1) this Access Arrangement takes effect; and
 - (2) the last decision made under clauses 3.13 and 3.14(b);
- (g) any Pass Through Amount applied under this Part 3E relating to a previous Variation Event which resulted in AGLGN recovering an amount either more or less than the financial effect on AGLGN of that previous Variation Event; and
- (h) any other factors the Relevant Regulator considers relevant.

3.16 When AGLGN applies a Pass Through Amount

- (a) AGLGN:
 - (1) may, after:
 - (A) receipt of a notice from the Relevant Regulator or a deemed receipt of a notice under clause 3.13 as to a Positive Pass Through Amount; and
 - (B) notifying its Users of:

- (i) the Positive Pass Through Amount which the Relevant Regulator has approved or is deemed to have approved; and
- (ii) the basis on and date from which the Service Provider will apply the Positive Pass Through Amount,

apply the Positive Pass Through Amount specified in the notice to Users on the basis indicated in the notice; and

- (2) must, after receipt of a notice or deemed receipt of a notice from the Relevant Regulator, under clause 3.13, or after receipt of a notice under clause 3.14 as to a Negative Pass Through Amount apply the Negative Pass Through Amount on the basis decided by the Relevant Regulator.
- (b) The Pass Through Amount must be:
- (1) shown separately on each User's invoice; or
 - (2) otherwise identified in a manner approved by the Relevant Regulator.
- (c) AGLGN can only seek to reclaim from Users' Positive Pass Through Amounts in respect of Services provided from the time that AGLGN:
- (1) notified its Users under paragraph (a); and
 - (2) started showing or identifying the Positive Pass Through Amount as required under paragraph (b).

Where:

Variation Event means one of the events described in 3.11(a), (b) or (c).

Negative Pass Through Amount means, in relation the occurrence of a Variation Event, an amount that AGLGN is required to pay to its Users or a factor by which the amounts the User is required to pay the Service Provider are reduced.

Pass Through Amount means either a Positive Pass Through Amount or a Negative Pass Through Amount.

Positive Pass Through Amount means, in relation the occurrence of a Variation Event, an amount that a User is required to pay to AGLGN or a factor by which the amounts the User is required to pay the Service Provider are increased.

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 $\frac{3}{4}$ of a day, rounded up to the nearest whole number¹.

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 Overrun 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):

¹ For example, if the Term is 20 Months, the Charge Number is 15, being 9 plus (8 x 3/4). If the term is 21 1/2 Months, the Charge Number is 17, being 9 plus (10 x 3/4 rounded up to the nearest whole number).

- (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 time-weighted average Annual Unit Charge for Capacity² 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 smallest³;
 - (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;

² Time weighting is required to reflect the fact that the Annual Unit Charge for Capacity may change in the course of the Period.

³ For example, if the Charge Number was 12 and there were 13 overrun Days, with daily overrun quantities of 9, 3, 2, 8, 8, 6, 5, 3, 7, 6, 2, 4 and 5, then the ranking would be 9, 8, 8, 7, 6, 6, 5, 5, 4, 3, 2, 2 and the Relevant Quantity would be 8.

- (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)

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 goods⁴ 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

⁴ The definition of "goods" in clause 4 of the *Trade Practices Act 1974* includes gas.

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 lock-in 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.⁵

- 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 is intended to operate in respect of capacity that the User utilized prior to the request for additional capacity being accepted, or for capacity used

⁵ See pages 6, 7 and 8 of the Access Arrangement.

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, EnergyAustralia 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 re-supply 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 losses 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

- 52 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.
- 53 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.
- 54 A party (the "**First Party**") shall not be liable to the other party ("**the Second Party**") whether in contract, tort, statute 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.
- 55 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.