Pipeline Regulation Consultation Regulation Impact Statement – Stakeholder feedback template

Submission from: The Australian Competition and Consumer Commission

This template is to assist you to provide feedback on the COAG Consultation RIS titled *Options to improve gas pipeline regulation*. The template focuses on the questions asked through the RIS, which seek your views on issues which are central to the identified problems and proposed options. You may not wish to answer each question and there is no obligation to do so. If you wish to provide additional feedback outside the template, wherever possible please reference the relevant question to which your feedback relates. Thank you for your feedback.

Chapter 5: Effectiveness of Part 23

No.	Questions	Feedback (for submission)
1	If you are a shipper that has negotiated with the operator of a non-scheme pipeline since August 2017, or a service provider of a non-scheme pipeline, how effective do you think Part 23 has been in terms of:	n.a.
	(a) enabling shippers to make more informed decisions about whether to seek access and to assess the reasonableness of a service provider's offer?	
	(b) reducing the information asymmetries and imbalance in bargaining power that shippers can face in negotiations?	
	(c) facilitating timely and effective commercial negotiations between shippers and service providers?	
	(d) constraining the exercise of market power by service providers during negotiations by providing for a credible threat of intervention by an arbitrator?	
	(e) enabling disputes that cannot be resolved through negotiations to be resolved in a cost-effective and efficient manner?	

No.	Questions	Feedback (for submission)
2	Do you agree with the observations and recommendations made by:	
	(a) respondents to the OGW shipper survey (see section 5.1)? If not, please explain why not.	The OGW shipper survey identified many of the same issues that were raised in our July 2019 report regarding: ▪ the usability, accessibility and quality of information reported by pipeline operators in relation to their pipelines that are subject to Part 23 ▪ the preliminary enquiry process, and ▪ the exemptions available to single shipper pipelines and small pipelines under Part 23. We agree with the observations made regarding these matters and the proposal by shippers to address some of the perceived deficiencies with the information and to make the information more accessible and usable.
	(b) the Brattle Group in its review of the financial information (see section 5.2)? If not, please explain why not.	We agree with the observations that the Brattle Group made about the quality, reliability, usability and accessibility of the financial information reported by pipeline operators, many of which were very similar to the observations contained in our July 2019 report. We also agree with the Brattle Group's recommendation that: ▪ changes be made to the financial reporting guideline for non-scheme pipelines and the reporting template, to improve the consistency, transparency and reliability of the reported information (including the basis of preparation), and ▪ pipeline operators be required to provide an indication of whether future expenditure requirements are likely to be in line with, significantly above, or below the recent expenditure reported in their recovered capital value calculations. Together with our recommendations on how the financial information should be improved, these measures can be expected to improve the quality, reliability, usability and accessibility of the reported information. We also consider there would be value in the relevant regulator developing a template that shippers can use, in conjunction with the financial reporting, to calculate the access price benchmarks that the Brattle Group refers to in section IV of its report. In our view, this would greatly enhance the usability of the financial information that pipeline operators are currently required to report, by enabling the cost based information to be easily converted into a price that can then inform a shipper's negotiations.
	(c) the ACCC in its review of the operation of Part 23 (see section 5.3)? If not, please explain why not.	As noted in our July 2019 report, while Part 23 appears to be working as intended, we have identified a number of significant problems with the information published by pipeline operators to date, including instances where serious errors have been made and inflationary measures used. The publication of inaccurate information severely undermines the benefits of Part 23 and has the potential to mislead shippers in their negotiations with pipeline operators.[1] To address these issues, we recommended a range of improvements to Part 23 that are intended to: ▪ pose more of a constraint on the behaviour of pipeline operators, by providing for greater oversight and prescription of the information to be reported by and removing the discretion to treat access requests as preliminary enquiries, and ▪ empower shippers by improving the quality, reliability and usability of the information reported by pipeline operators and ensuring the threat of arbitration is credible for all shippers. These recommendations are set out in Table 6.4 of our July 2019 report. We understand these recommendations are reflected in policy options 2-4 of the Consultation RIS.

[1] See, ACCC, Gas Inquiry 2017-20 Interim Report, July 2019, Chapter 6.

No.	Questions	Feedback (for submission)
3	Are there any changes that you think need to be made to Part 23 to make it more effective or efficient in terms of achieving its stated objective (i.e. to facilitate access at prices and on other terms and conditions that, so far as practical, reflect the outcomes of a workably competitive market)?	In addition to the recommendations contained in our July 2019 report, we are of the view that there would be value in applying some of the safeguards that currently apply under light regulation to Part 23, particularly given some of the behaviour we have observed over the course of the inquiry and the potential for pipeline operators to be vertically integrated. The safeguards that should also apply under Part 23, include those provisions in the NGL and NGR that are intended to prevent pipeline operators from engaging in: ▪ conduct that would prevent or hinder access to the pipeline services ▪ inefficient price discrimination ▪ other behaviour that could adversely affect competition in a related market by carrying on a related business, or conferring an advantage on an associate, and ▪ bundling of services unless it is "reasonably necessary". We also suggest that the application of the information standard in Part 23 be extended to other aspects of Part 23.[2] Currently this information standard only applies to the upfront information disclosure requirements in Division 2 of Part 23 and the access offer information provisions in rule 562. It does not, however, apply to the information that pipeline operators may provide prospective shippers when enquiries are made or when an access offer is made. There is a risk therefore that pipeline operators could mislead prospective shippers through these processes. The extension of the information standard to these provisions should reduce this risk. In addition to these changes, we support the proposals to strengthen Part 23 by: ▪ removing the coverage test as a gateway to full regulation, so that the threat of a heavier handed form of regulation being applied to a pipeline is more credible, and ▪ according the regulator greater responsibility for monitoring the behaviour of pipeline operators and allowing the regulator to refer pipelines for a form of regulation assessment if it suspects market power is being exercised. Together these two measures should pose more of a constraint on the behaviour of pipeline operators.

[2] The access information standard is set out in rule 551(2) of the NGR and requires, among other things, that information is not false or misleading in a material particular. It should be noted that under rule 551(1) of the NGR the requirement to prepare, publish and maintain information in accordance with the access information standard is a civil penalty provision.

Chapter 6: Potential problems and objectives of action

No.	Questions	Feedback
4	Do you agree with the problems that have been identified and what effect do you think they could have on shippers, service providers, the relevant regulator, consumers and/or other gas market participants?	Section 6.1 of the Consultation RIS identifies a number of potential problems with the current regulatory framework, which principally relate to: (a) the threshold that has been adopted for regulation (b) the forms of regulation that can be applied to a pipeline (c) the information disclosure obligations applying under the various forms of regulation, and (d) the negotiation frameworks and dispute resolution mechanisms applying under the various forms of regulation With the exception of the following, we agree with the problems identified in section 6.1: ▪ We do **not** agree that the current requirement for all pipelines providing third party access to, at a minimum be subject to Part 23, gives rise to over-regulation, because Part 23 (even in the strengthened form proposed in the Consultation RIS) is relatively light handed. That is, while the information disclosure provisions in Part 23 may impose some costs on pipeline operators, the costs and risks associated with arbitration mechanism are likely to be very low because this mechanism is unlikely to be triggered if market power is not being exercised. ▪ We do **not** agree that the application of Part 23 (even in the strengthened form proposed in the Consultation RIS) to pipelines that have a greenfield exemption but are providing third party access will distort the incentives pipeline operators have to invest in new pipelines. As noted in our July 2019 report, we sought internal documents from pipeline operators as part of our review of the operation of Part 23 and found no evidence to suggest that Part 23 is deterring investment. Rather, we found evidence that pipeline operators were investigating a range of publicly announced and other pipeline investments that would be captured by Part 23. It is also noteworthy that no greenfield exemptions have been sought in the last five years, but new pipelines have continued to be built over this period, indicating that investment is occurring without having to rely on the greenfield incentive. It is difficult therefore to see how Part 23 can distort an incentive that is not being relied upon. As to the effect the other problems in section 6.1 could have on the market, it is clear from the analysis we have undertaken to date, that if these other problems are not addressed, then they could: ▪ result in under-regulation, which would leave shippers more exposed to exercises of market power ▪ allow pipeline operators' market power to be further entrenched over time ▪ impose unnecessary search and transaction costs on shippers and hinder their ability to negotiate effectively with pipeline operators ▪ undermine the credibility of the threat of arbitration and the constraint it is intended to impose on pipeline operators ▪ impose unnecessary costs on regulators, shippers and pipeline operators, and ▪ distort investment decisions. In the ACCC's view, these are significant problems that should be addressed through amendments to the regulatory framework.

No.	Questions	Feedback
5	Are there any other problems that you think should be considered as part of the RIS (e.g. access to regional pipelines)? If so, please set out what they are, what effect you think they could have on shippers, service providers, the relevant regulator, consumers and/or other gas market participants, and how you think the problem should be addressed.	In our July 2019 report, we noted that concerns continued to be raised about the ability of shippers to access some regional pipelines and that we intended to investigate this further. The results of our investigation and our recommendations on how to address the issues we have identified will be set out in detail in our January 2020 report. In short, we are recommending that, as part of this RIS process, consideration be given to amending the NGL and/or NGR to: 1. include a capacity surrender mechanism that would provide for the release of capacity by an incumbent retailer to other shippers, and 2. prohibit behaviour that would prevent or hinder access to the pipeline or mislead prospective shippers about the availability of capacity. In addition, we suggest that consideration be given to simplifying the process for classifying a pipeline as either a distribution or transmission pipeline. While there has been little need to worry about this issue in the past, the application of some of the recent reforms now turn on whether a pipeline is classified as a distribution pipeline or a transmission pipeline (e.g. the capacity trading reforms, the Bulletin Board reporting obligations, and some of the information disclosure requirements under full and light regulation, and Part 23). In some areas of the NGR, this classification decision is left to pipeline operators, while in other cases a decision must be made by the NCC using criteria set out in the NGL. In our view, there would be value in a single process being adopted, using fact based criteria to determine whether a pipeline is a distribution or transmission pipeline. For example, the decision could be made on the basis of operating pressures and/or the classification specified in the pipeline's licence. The adoption of these type of criteria would provide greater certainty to pipeline operators and shippers about the classification and avoid any potential gaming that may otherwise occur (e.g. to seek to change the classification of a transmission pipeline to a distribution pipeline to avoid being subject to Bulletin Board reporting obligations and the capacity trading reforms).
6	Are there any other objectives that you think the Energy Council should be pursuing? If so, please set out what they are.	The ACCC agrees with the objectives of Energy Council action, which are to promote the NGO by implementing a more efficient, effective and integrated regulatory framework that supports the operation of the gas market and the long term interests of gas users, whilst also being fit for purpose, targeted and proportionate to the issues it is intended to address.

Chapter 7: When a pipeline should be subject to regulation and how decisions should be made

No.	Questions	Feedback
7	Do you think that the current threshold for regulation (i.e. all pipelines providing third party access are subject to regulation) is giving rise to over-regulation (see sections 7.2.1 and 7.3.1), or do you think the current threshold should be maintained?	In the ACCC's view, the current threshold for regulation is appropriate. While, in principle, there is a risk that the extension of Part 23 to all pipelines providing third party access could result in 'over regulation', in practice we do not consider this to be a significant risk given the relatively light handed nature of Part 23 (even in its strengthened form). As noted in our response to question 4, while the information disclosure element of Part 23 may impose some costs on pipeline operators, the costs and risks associated with the arbitration mechanism are likely to be very low (if not negligible) in those cases where a pipeline operator is not exercising market power. This is because it is highly unlikely that the arbitration mechanism would be triggered by a shipper if market power is not exercised by a pipeline operator, given the costs the shipper will incur and the uncertainty embodied in the Part 23 pricing principles. In relation to the information disclosure obligations under Part 23, the current disclosure requirements are broadly consistent with what we would expect organisations operating in a workably competitive market to make available to their customers and prospective customers. We do not therefore view the costs associated with making this information available as an undue impost on pipeline operators. Rather, we consider it an ordinary cost of business that is crucial to enabling more balanced negotiations to occur between pipeline operators and shippers. Finally, we note that the current threshold for regulation in Australia is less interventionist than the threshold used in a number of other countries, including the United States and Canada, where all pipelines are required to provide third party access on non-discriminatory terms.
	(A) If you think it is giving rise to over-regulation: (a) How significant do you think this issue is and what are the consequences likely to be?	As noted above we do not consider the current approach is giving rise to over-regulation.
	(b) Do you think the risk of over-regulation should be addressed by: (i) including an exemption mechanism in the regulatory framework to enable pipelines that do not have substantial market power to obtain an exemption from regulation? (ii) limiting the application of regulation to those cases where it is established that the pipeline has substantial market power? (iii) another means?	The ACCC does not support a general ability for pipelines providing third party access to seek an exemption from regulation. This is because, even if a pipeline was found to not have substantial market power, shippers using this pipeline are still likely to face information asymmetries and imbalances in bargaining power when negotiating with the pipeline operator. In our view, these issues are best addressed through the application of the strengthened Part

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	(B) If you think that (i) or (ii) should be implemented, do you think the test for establishing whether a pipeline has substantial market power should be based on the combined market power-NGO test proposed by the ACCC (see Box 7.6)? (a) If so, do you think the onus of demonstrating this test is met (or not met) should sit with the decision-maker or the service provider? (b) If not, please explain why and what test you think should be employed.	23 to these pipelines, which, as noted above, is relatively light handed in nature and not unduly onerous on pipeline operators. In our view, the creation of a 'safe harbour' framework would also introduce undue administrative expense and complexity. If, notwithstanding the views set out above, a decision was made to introduce a safe harbour, then, in our view : ▪ The test used to determine whether an exemption is granted should be based on option (i) and use the combined market power-NGO test that we proposed in the 2015 Inquiry. ▪ The onus of demonstrating this test is met or not met should rest with the relevant decision-maker, but to overcome the information asymmetries the decision-maker is likely to face the regulatory framework should: – accord the relevant decision-maker compulsory information gathering powers so that it can gather the information it requires to make a decision, and – allow the relevant decision-maker to find that the test is satisfied if the pipeline operator does not provide it with the information it requires to determine whether or not it does have substantial market power. ▪ - we understand that this approach is used in the US and is also appropriate to use in this context, given the information asymmetries a decision-maker, shippers and other stakeholders can face when assessing whether or not the test is met. If this test was to be used in this manner, then there may be value in allowing the relevant decision-maker to provide more prescription (e.g. in a guideline) on how the test is to be applied and the matters relevant to the consideration.[3]
8	Do you think the application of Part 23 to pipelines providing third party access that have obtained a greenfield exemption is distorting investment incentives for greenfield pipelines (see sections 7.2.2 and 7.3.2), or do you think the current approach should be maintained?	As noted in our response to question 4, we have not seen any evidence to suggest that that the application of Part 23 to pipelines with a greenfield exemption is distorting investments in new pipelines. To the contrary, our review of pipeline operators' internal documents revealed that pipeline operators had invested in a number of pipelines following the introduction of Part 23 and were also investigating a range of other pipeline investments that would be captured by Part 23.[4]
	If you think it is distorting investment incentives: (a) How significant do you think this issue is and what are the consequences likely to be?	As noted above we do not consider the current approach is affecting greenfield incentives.

[3] We understand that FERC has done something similar in the US, with its guidance material requiring consideration to be given to the pipeline's market share, the degree of market concentration, the potential for pipelines to engage in coordinated conduct, the constraints on the pipeline operator's market power, including the availability of good alternatives, the potential for entry, the countervailing power of shippers and any other constraints on the ability or incentive to exercise market power. This is similar in many ways to the ACCC's merger guidelines.

[4] ACCC, Gas inquiry report 2017-2020 Interim Report, July 2019, pp. 159-160.

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	(b) Do you think this issue should be addressed by: (i) providing these pipelines with a full exemption from regulation? (ii) providing these pipelines with an exemption from the Part 23 arbitration mechanism, but not from the disclosure and negotiation elements of Part 23? (iii) another means?	For the reasons set out above, we do not consider any of these measures are necessary and are of the view that the current approach should be maintained. That is, pipelines that satisfy the greenfield exemption criteria should be able to obtain an exemption from full regulation, but if they are providing third party access they should be subject to the strengthened Part 23. This is because, prospective users of these pipelines are likely to face the same imbalance in bargaining power and information asymmetries as shippers on other pipelines. It is important therefore that the safeguards provided by Part 23 are also available to these users. As noted in response to question 7, Part 23 (even in its strengthened form) is relatively light handed. We would not therefore expect the application of Part 23 to these pipelines to be onerous for the pipeline operators, particularly if they are not exercising market power.
9	Why do you think: (a) the greenfield exemptions in the NGL have not been used by a greater number of service providers?	n.a.
	(b) the CTP provisions in the NGR have not been used by a greater number of shippers or governments?	While a number of pipelines have been developed over the last 20 years through competitive processes conducted by shippers (e.g. producers, GPGs, retailers), none of these proponents have had recourse to the CTP provisions in the NGR. One potential reason for this is that there is no benefit to a shipper in making the outcomes of its competitive process available to other prospective users of the pipeline. This is particularly the case where the shipper competes with other pipeline users (e.g. if the shipper is a producer then it may not want other producers in the region to be able to access capacity at the same price it does).

No.	Questions	Feedback
10	Do you think the greenfield exemptions and CTP provisions should be retained in the regulatory framework, or do you think: (a) changes to the greenfield exemptions and/or CTP provisions are required? (b) the greenfield exemptions and/or CTP provisions should be replaced with another mechanism that would provide potential developers with greater certainty as to how new pipelines will be treated from a regulatory perspective, while also protecting potential users of these pipelines from exercises of market power?	The ACCC supports the inclusion of the following mechanisms in the regulatory framework: ▪ A greenfield exemption that allows proponents to obtain an exemption from full regulation for up to 15 years if the relevant decision-maker is satisfied the pipeline will not have substantial market power and an exemption would be consistent with the National Gas Objective (NGO). The main difference between this proposal and the current exemption, is that the coverage test would be replaced with the combined market power-NGO test. ▪ A competitive tender mechanism that allows the outcomes of 'competition for the market' to be locked in for a period of time and available to all shippers, where there has been effective competition for the development of a pipeline. Given the limited incentives shippers may have to use these provisions, we suggest that the successful pipeline operator also have the opportunity to have the outcomes of the competitive process locked in for up to 15 years, where it can be demonstrated that there was effective competition for the pipeline development. This could be done by codifying some of the criteria that would need to be met for a tender to be considered a competitive process in the NGR.
11	Do you think the current approach to seeking access to pipelines that are not providing third party access should be maintained (i.e. a decision must be made by the relevant Minister having regard to the NCC's recommendations and the coverage test), or do you think it should be mandatory for all pipelines to offer third party access on a non-discriminatory basis, as it is in the US and Canada (see sections 7.2.3 and 7.3.3)? Please explain your response to this question and set out what you think the costs, benefits and risks are likely to be of mandating third party access.	The ACCC understands from the information contained in the Consultation RIS that most of the pipelines that are not providing third party access are currently used to transport gas to dedicated end-user facilities, such as gas powered generators, mining sites and LNG facilities. Mandating that these pipelines provide third party access could impose some significant costs on the owners of these pipelines, with very little benefit if no-one actually seeks access. The ACCC therefore suggests a more measured approach be taken in relation to these existing pipelines, with the test for regulation (see response to question 12 for the ACCC's view on what form this should take) having to be satisfied before a pipeline operator is required to provide third party access. More generally, in relation to new pipelines, and in particular those pipelines that will be used to bring new sources of supply to market, we support these pipelines being: ▪ developed through a competitive process using, for example, the competitive tender provisions in the NGR, and ▪ required to be operated on a third party access basis (i.e. so all producers in the region have an opportunity to use the asset, which will reduce the unit cost of transporting gas).

No.	Questions	Feedback
12	If the current threshold for economic regulation is maintained and a test for regulation is only required for third party access and greenfield exemption decisions, which of the following tests do you think should be employed (see section 7.3.4) and why: (a) the coverage test; (b) an equivalent test to the recently amended Part IIIA test; (c) an NGO-style test; or (d) a combined market power-NGO test?	In our 2015 Inquiry, we found evidence of a large number of pipelines engaging in monopoly pricing to the detriment of economic efficiency and consumers more generally. We also found the ability and incentive for pipeline operators to engage in this behaviour was not being effectively constrained by the countervailing power of shippers, competition from other pipelines or energy sources, or the threat of regulation. As we noted in our 2015 Inquiry report, the threat of regulation was failing to impose an effective constraint on pipeline operators because the coverage test was not directed to the right market failure (i.e. monopoly pricing that results in economic inefficiencies with little or no effect on competition in dependent markets) and was unlikely therefore to be satisfied by most pipelines. To address this limitation, we suggested that the coverage test be replaced with a hybrid market power-NGO test. While the introduction of Part 23 has circumvented this issue to some extent, the coverage test still plays an important role in a number of areas of the regulatory framework. It is, for example, used to determine whether a pipeline that is not providing third party access should be required to do so. While this is more in keeping with the original purpose of the coverage test (i.e. a denial of access test), we agree with the observations contained in the Consultation RIS that even in this capacity the test may not yield outcomes that are consistent with the NGO. This is because, it would still have to be shown that access to the pipeline will promote a material increase in competition in another market. As the ACCC and the Productivity Commission[5] have previously observed, the problem with using competition as a proxy for efficiency is that competition and efficiency are not synonymous. That is, while competition may promote efficiency, significant efficiency improvements that are in the long-term interests of gas consumers can still be achieved through access without any change in competition in a related market. Given these limitations with the coverage test, we support a change from the current coverage test to the hybrid market power-NGO test that was proposed in our 2015 Inquiry (option (d)) and note that this test is more in keeping with the tests used internationally (e.g. in New Zealand and the United States). Our view is that this test, and its application, is likely to result in more efficient market outcomes and maximise the long term interests of consumers.

[5] Productivity Commission, Final Report—National Access Regime, 25 October 2013, p. 173 and Productivity Commission, Draft Report—National Access Regime, May 2013, p. 178.

No.	Questions	Feedback
13	Do you think the onus of demonstrating the test is met (or not met) should sit with the decision-maker or service provider?	Under the current regulatory framework the decision-maker bears the burden of establishing that all of the coverage criteria are met when an application is made to have a pipeline covered, or to have coverage revoked. This approach differs from the approach used in the US, with all interstate pipelines presumed to have substantial market power and the onus placed on the pipeline operator to demonstrate it lacks significant market power if it wants to be subject to market-based (unregulated) rates. As we noted in our 2015 Inquiry, the benefit of the US approach is that it overcomes some of the information asymmetries that the decision-maker can face when assessing whether the relevant test is met. As an alternative to reversing the onus of proof, the onus could sit with the decision-maker but the regulatory framework could overcome the information asymmetries by: ▪ according the relevant decision-maker compulsory information gathering powers so that it can gather the information it requires to make a decision, and ▪ allowing the relevant decision-maker to find that the test is satisfied if the pipeline operator does not provide it with the information it requires to determine whether or not it does have substantial market power. Our preference would be for the regulatory framework to be amended in this way, rather than adopting the US approach.
14	If a change is made to the governance arrangements, do you think the same organisation should also be responsible for making form of regulation decisions (see Chapter 8)?	The ACCC supports the proposal to require the same decision-making body to apply both the test for regulation and the form of regulation test, because it will be the most efficient option for all stakeholders, given that most of the facts and issues that need to be considered under the two tests will be very similar.
15	Are there any other problems with this aspect of the regulatory framework that have not been identified in this chapter? If so, please outline what they are and how you think they should be addressed.	Under options 2 and 3, a lot will turn on the definition of what constitutes the provision of third party access. It will be important therefore that this definition is sufficiently robust to ensure that: ▪ pipeline operators cannot restructure their operations so as to fall outside the scope of the regulatory framework, and ▪ once a pipeline starts to provide third party access (or is required to do so as a result of the application of the test for regulation), the pipeline cannot revert back to not providing third party access.

Chapter 8: Forms of regulation

No.	Questions		Feedback
16	Do you think the use of the coverage test as a gateway between Part 23 and full regulation is resulting in under-regulation? (A) If not, please explain why not.		The ACCC agrees that the use of the coverage test as a gateway between Part 23 and full regulation (and vice versa) could give rise to under-regulation under the current regulatory framework. The reasons for this are three-fold: First, the coverage test is not, as we noted in our 2015 Inquiry, designed to address the market failure that we have observed with pipelines, which is monopoly pricing that gives rise to economic inefficiencies, with little or no effect on competition in dependent markets. It is unlikely therefore that many pipelines will satisfy the coverage criteria, and, in particular criterion (a), which requires access to promote a *material increase* in competition in another market. Second, as the AEMC noted in its 2017-18 Economic Regulation Review, the counterfactual used for the assessment of the coverage test is no longer no regulation. Rather, it is the information disclosure and arbitration framework applying under Part 23. It has therefore become even more difficult to show that access will promote a material increase in competition in another market. Third, the asymmetric nature of the coverage test means that it is easier to move from full regulation to Part 23 than it is to move from Part 23 to full regulation (i.e. to move from Part 23 to full regulation all the coverage criteria must be satisfied, but to move the other way it is sufficient for one coverage criterion not to be satisfied). In the ACCC's view this is a significant deficiency in the current regulatory framework, that should be addressed so that the threat of a heavier handed form of regulation being applied to a pipeline is more credible.
	(B) If so:	(a) How significant do you think this issue is?	
		(b) Do you think the coverage test should be removed and a single test used for moving between the alternative forms of regulation? If so, do you think the single test should be based on: (i) the form of regulation test in s. 122 of the NGL (see section 3.1.1)? (ii) another test?	In the ACCC's view, the simplest way to address this deficiency in the current framework is to remove the coverage test and to instead rely on the existing form of regulation test in section 122 of the NGL (i.e. option (i)) when deciding whether a lighter or heavier handed form of regulation should apply. In the ACCC's view, the existing form of regulation test captures all the matters that are relevant to the decision of what form of regulation should apply, including: ▪ the degree of market held by the pipeline operator and the extent to which this power is likely to be constrained (e.g. by competition from other pipeline operators, energy sources, the threat of entry and/or the countervailing power of shippers), and ▪ the likely costs and benefits associated with the alternative forms of regulation.

No.	Questions		Feedback
		(c) Do you think: (i) the onus of demonstrating that a particular form of regulation should apply to a pipeline should sit with the applicant or decision-making body; or (ii) the onus should be on the service provider to demonstrate why a heavier handed form of regulation is not required?	In the ACCC's view, the decision-making body should have the discretion (as the NCC currently does), to determine what form of regulation to apply to a pipeline operator, having regard to the matters set out in the form of regulation test. While this determination would be informed by information provided by the pipeline operator, the applicant (if it is not the pipeline operator), shippers and other interested parties, the onus of demonstrating that one form of regulation or another should not, in the ACCC's view, reside with any of these parties. This is because the application of the form of regulation test is, in most cases, likely to require the various elements of the test to be carefully weighed up by the decision-maker (i.e. because some elements of the test may suggest a heavier handed form of regulation, while others may suggest a lighter handed form). While the ACCC does not consider it necessary to place the onus on either the pipeline operator or the applicant in this context, it suggests that the information asymmetries that the decisions-maker is likely to face when applying the test be addressed by: ▪ according the relevant decision-maker compulsory information gathering powers, so that it can obtain the information it requires to make a decision (the ACCC understands that the NCC does not currently have these powers, which means it is heavily reliant on the material provided by the pipeline operator and applicant, the veracity of which cannot necessarily be independently tested, and ▪ allowing the relevant decision-maker to find that full regulation should apply if the pipeline operator does not provide it with the information it requires to be satisfied that a heavier handed form of regulation should apply. In the ACCC's view, these are deficiencies in the current framework that should be addressed.
		(d) Do you think the relevant regulator should play a greater role in monitoring the behaviour of service providers and be able to refer pipelines for a form of regulation assessment if it suspects market power is being exercised?	Having performed a similar monitoring function over the course of the gas Inquiry and found the issues it has with pipeline operators' behaviour[6], the ACCC agrees there would be value in the relevant regulator: ▪ playing a greater role in monitoring and reporting regularly on the behaviour of pipeline operators, and ▪ being able to refer pipelines for a form of regulation assessment if it suspects market power is being exercised. Assuming the relevant regulator is appropriately resourced to carry out this function, this measure should impose greater discipline on pipeline operators, both in terms of their information disclosures and negotiations with shippers.
17	Do you agree that the inconsistencies and overlap between the three forms of regulation that are currently available under the regulatory framework are increasing the complexity and administrative burden for regulators, shippers and service providers? (A) If not, please explain why not.		As the ACCC has noted in prior submissions to the AEMC's Economic Review of Regulation, it considers that having three forms of regulation is unnecessarily complex, costly and confusing. While the ACCC understands that steps have recently been taken to improve light regulation, in its view the retention of this form of regulation, which currently only applies to 5.5 pipelines, ▪ increases the cost and complexity of the regulatory framework, without any clear corresponding benefit ▪ has the potential to cause confusion amongst users, which could be exploited by pipeline operators, and ▪ increases the potential for forum shopping, particularly if one regime is perceived to be less onerous than the other.
	(B) If so:	(a) How significant do you think this issue is?	

[6] See for example, ACCC, Gas inquiry 2017-2020 interim report, July 2019, Chapter 6.

No.	Questions		Feedback
		(b) If the number of forms of regulation was reduced to two, do you think:	The ACCC therefore supports the removal of light regulation.
		(i) the heavier handed form of regulation should be based on: - full regulation (i.e. negotiate-arbitrate with reference tariffs)? - direct price (revenue) control? - another form of regulation?	In the ACCC's view, full regulation is the appropriate form of regulation to apply in those cases where a heavier handed form of regulation is required. The ACCC also notes that recent changes to the NGR to require more reference services to be classified by pipeline operators should, if implemented as intended by the AEMC, result in full regulation moving closer to the direct price (revenue control).
		(ii) the lighter handed form of regulation should be based on: - the existing light regulation? - Part 23? - a strengthened Part 23 (i.e. the existing Part 23 plus the safeguards available under light regulation)? - another form of regulation?	In the ACCC's view, Part 23 provides a more effective constraint on the behaviour of pipeline operators and facilitates more effective negotiations between shippers and pipeline operators than the existing light regulation. The ACCC does, nevertheless, think there would be value in further strengthening Part 23 by extending the following safeguards that currently apply under light regulation to Part 23: ▪ the prohibition on pipeline operators preventing or hindering access, engaging in inefficient price discrimination and/or bundling services unless it is reasonably necessary, and ▪ the ring fencing and associate contract provisions, that are designed to ensure the separation of pipeline operations from associated businesses in other markets; The ACCC therefore supports a strengthened Part 23 framework being the 'lighter handed' form of regulation in the regulatory framework.
18	Do you think there is a case for adopting a different lighter handed form of regulation for distribution pipelines? If so, do you think it should be based on: (a) the Default Price Path (DPP) approach used in New Zealand? (b) the negotiated settlements approach used in the US and Canada? (c) another form of regulation? Please explain your responses to these questions.		Under the current regulatory framework, transmission and distribution pipelines are regulated in the same way. In the ACCC's view, there is no reason to depart from this approach. The ACCC does not therefore support the adoption of an alternative form of light regulation for distribution pipelines and notes that if this was to occur, then it could further complicate what is already a complex regulatory framework.

No.	Questions		Feedback
19	Do you think additional measures are required in the regulatory framework to deal with dynamic market power? (A) If not, please explain why not.		With the increased concentration of pipeline ownership in Australia, there is a risk that existing operators may try to prevent competition from other operators, by either not allowing interconnections, or by charging excessive prices for doing so. This may, in turn, result in the existing pipeline operators' market power becoming further entrenched. Given this risk, the ACCC agrees that there would be value in amending the regulatory framework to: ▪ provide for an explicit right to interconnect with a regulated pipeline, if the interconnection is technically feasible and would not adversely affect the safe and reliable operation of the pipeline, and ▪ set out the cost-based pricing principles that would apply to interconnections to regulated pipelines. The interconnection policy employed by FERC in the US, which is cited in the Consultation RIS, could be a useful starting point for the development of this policy. In relation to the incremental pricing proposal, the ACCC understands that this could involve some quite complex changes to the regulatory framework. It therefore suggests that further work be carried out to determine whether the proposed changes would be beneficial before considering implementing this option.
	(B) If so:	(a) Do you think the NGR should be amended to include:	
		(i) an explicit right to interconnection to regulated pipelines?	
		(ii) pricing principles for interconnections to regulated pipelines?	
		(b) Do you think the NGR should be amended to prohibit regulated pipelines from cross-subsidising new capacity by requiring incremental pricing to be used where the cost of an expansion or extension would otherwise result in the price of existing capacity increasing?	
20	Are there any other problems with this aspect of the regulatory framework that have not been identified in this chapter? If so, please outline what they are and how you think they should be addressed.		n.a.

Chapter 9: Information disclosure requirements

<table>
<tr><th>No.</th><th colspan="2">Questions</th><th>Feedback</th></tr>
<tr><td rowspan="2">21</td><td colspan="2">Do you think the limited information available on full regulation pipelines is hindering the ability of shippers to negotiate access to non-reference services or having any other adverse effects (see section 9.2.1)?
(A) If not, please explain why not:</td><td rowspan="2">The ACCC understands from the Consultation RIS that full regulation pipelines are not currently required to publish any information on the prices payable for non-reference services, or how these prices are calculated. They are also not required to publish any financial information that shippers could use to try and understand how cost reflective the prices offered by full regulation pipelines are.

This is a gap in the current framework that could hinder the ability of shippers to assess the reasonableness of the prices offered for non-reference services and make them more susceptible to exercises of market power.

While recent amendments to the rules that are intended to result in more services being classified as reference services, may address this to some extent, there are always likely to be non-reference services. This gap in the framework should therefore be addressed.

Another gap in the disclosure obligations under full regulation is that these pipelines are not currently required to publish historic financial information, as is required for pipelines under light regulation and Part 23. As we have previously noted, this information is required to enable users and prospective users to negotiate effectively with pipeline operators and to identify any exercise of market power more readily. Consistent financial information provision across different types of pipelines also reduces the risk that differences in reporting requirements could be used to mislead users about the cost of providing services on a particular pipeline, or be gamed in other ways by pipeline operators.</td></tr>
<tr><td>(B) If so:</td><td>(a) How significant do you think this issue is?</td></tr>
</table>

No.	Questions		Feedback
		(b) Do you think this issue should be addressed by requiring full regulation pipelines to publish the following information: (i) a description of all the reference and non-reference services offered by the pipeline (pipeline service information); (ii) the standing terms for non-reference services (i.e. the standard terms and conditions, the standing prices and methods used to calculate standing prices); (iii) information on the prices paid by shippers for each reference and non-reference service; (iv) historic demand information for each service offered by the pipeline; and (v) historic financial information for the pipeline on an annual basis in accordance with a financial reporting guideline published by the relevant regulator.	To address the deficiencies outlined above, we suggest that the information disclosure obligations that currently apply under Part 23 (as reflected in items (i)-(v)) be applied to all pipelines providing third party access, including those subject to full regulation.
22	Do you think the deficiencies that have been identified with the pricing methodologies and financial information published by service providers are limiting the reliance that shippers can place on this information and making them more susceptible to exercises of market power (see section 9.2.2)? (A) If not, please explain why not:		

No.	Questions		Feedback
	(B) If so:	(a) How significant do you think this issue is?	**Pricing methodologies** In our July 2019 report we found that the pricing methodologies published by most pipeline operators are inadequate and do not allow shippers to determine whether the standing prices reflect the application of the methodology, or to assess the reasonableness of these prices. Even with the use of the ACCC's information gathering powers, our analysis of the pricing methodologies took considerable time and involved consultation with a number of pipeline operators to try to understand the application of the methodologies and verify their application. Given our experience, we would expect shippers to also face considerable difficulties using the information published by some pipeline operators to verify and assess standing prices, which could, as the Consultation RIS notes, make them more susceptible to exercises of market power. **Financial information** There is currently considerable flexibility in the way in which some of the financial information (for example, recovered capital values) is reported by pipeline operators, which when coupled with the limited regulatory oversight of this information, may limit the reliance that shippers can place on it. This was highlighted in our July 2019 report, with our review of the recovered capital values published by a sample of 7 pipelines revealing that the values were overstated by up to 45 per cent (with over half of the sample being overstated by more than 20 per cent) as a result of errors and/or the adoption of a range of inflationary measures. The values were further overstated by the adoption of relatively high rates of return. Similar issues were also identified by the Brattle Group, through its review of the recovered capital values financial information. The Brattle Group also identified a number of other deficiencies with the financial reporting through its review of other aspects of the reporting. The issues that have been identified with the financial information are concerning and could make shippers more susceptible to exercises of market power (either because they are misled about the costs of providing the services, or they conclude that they cannot place any reliance on the information to assess the cost reflectivity of the prices offered).
		(b) Do you think the deficiencies that have been identified with the pricing methodologies should be addressed by amending the NGR to require: (i) service providers to publish the inputs used to calculate standing prices? (iii) the relevant regulator to publish a guideline on what information should be contained in the pricing methodology?	Consistent with the original intent of this disclosure requirement[7] and the recommendations contained in our July 2019 Report, the ACCC supports amending the NGR to require pipeline operators to publish the inputs used to calculate standing prices. This will allow shippers to properly assess the reasonableness of these prices and the underlying assumptions. The ACCC also supports requiring the relevant regulator to develop a guide that provides pipeline operators with greater guidance on what, at a minimum, the pricing methodology should include and sets out the reporting requirements if a pipeline operator amends the pricing methodology.

[7] Gas Market Reform Group, Gas Pipeline Information Disclosure and Arbitration Framework: Final Design Recommendation, June 2017.

No.	Questions		Feedback
		(c) Do you think the deficiencies that have been identified with the financial information should be addressed by requiring service providers to report on the extent to which future costs are likely to be in line with historic costs, and historic information on contracted capacity and volumes transported?	The ACCC understands that the Brattle Group has suggested that, in addition to reporting historic financial information, pipeline operators be required to report on the extent to which their future costs are likely to be in line with, significantly above or below the historic costs. The ACCC agrees with this suggestion and notes that it will provide shippers with a better understanding of whether historic costs provide a good basis for determining cost reflective prices, or if they should expect prices to increase or fall. If this suggestion is implemented, then it would be important to ensure that there is a sufficient degree of prescription in the financial reporting guidelines on how this information is reported, to ensure it is consistently reported and that pipeline operators do not mislead shippers about their future costs.
23	Do you think the deficiencies that have been identified with the weighted average prices are limiting the reliance that shippers can place on this information and making them more susceptible to exercises of market power (see section 9.2.2)? (A) If not, please explain why not.		The ACCC examined the weighted average prices (WAP) published by pipeline operators in our July 2019 Report and found that they are not meeting the stated objective of enabling shippers to quickly determine whether a pipeline operator's offer (including the standing price) is reasonable relative to what others are paying. More specifically we found that: ▪ WAPs are not always comparable to standing prices ▪ WAPs are often not representative of the prices paid by individual shippers and may therefore be misleading ▪ other issues, such as errors in WAPs, calculations being open to manipulation by pipeline operators and exemptions, may limit the reliance that can be placed on this information.
	(B) If so:	(a) How significant do you think this issue is?	In the ACCC's view this is a significant issue, particularly if shippers are expected to have recourse to this information when assessing the reasonableness of prices offered by pipeline operators.

No.	Questions		Feedback
		(b) Do you think the deficiencies should be addressed by requiring service providers to report: (i) the individual prices (plus key terms and conditions) paid by each shipper rather than weighted average prices; or (ii) the minimum and maximum prices paid for each service in addition to the weighted average prices?	The ACCC understands that two options for addressing the deficiencies with the WAPs are based on the options we identified in our July 2019 report. As we noted in that report: ▪ The publication of individual prices would provide shippers with a better basis on which to assess the reasonableness of a pipeline operator's offer. We understand, however, that concerns have previously been raised by some shippers about the effect that the publication of this information may have on competition in other markets. Other shippers, on the other hand, have noted the lack of transparency around individual prices may enable pipeline operators to engage in price discrimination. ▪ The publication of the minimum and maximum prices paid for each service, in addition to the WAP, is likely to pose fewer issues in other markets. While this option does not provide full transparency of prices, it would still enable prospective shippers to: identify the outliers that are influencing published WAPs; identify where published WAPs sit within the range of prices paid by shippers, and understand the extent to which price discrimination may be occurring. The ACCC has been unable to test these alternatives with shippers. It will be important therefore to consider the feedback provided by shippers on these two alternatives, before making a decision on how to address the identified deficiencies.
		If you are a shipper, please explain what, if any effect, the disclosure of individual prices may have on competition in the markets in which you compete.	n.a.
		If you are a service provider, please explain what effect the disclosure of individual prices or the price range may have on your incentive to offer prudent discounts to shippers.	n.a.
24	Do you think the quality and reliability issues identified by the ACCC are limiting the reliance shippers can place on the information reported by service providers and making them more susceptible to exercises of market power (see section 9.2.3)? (A) If not, please explain why not.		The ACCC reiterates our concerns regarding the quality and reliability of information published by pipeline operators. As noted in our July 2019 report, these issues have the potential to undermine the efficacy and intent of Part 23 and could make shippers more susceptible to exercises of market power.
	(B) If so:	(c) How significant do you think this issue is?	In the ACCC's view, this is a significant issue as highlighted by the level of overstatement of asset values we identified through our review of recovered capital values. As we pointed out in our July 2019 report, the publication of inaccurate information severely undermines the benefits of Part 23 and has the potential to mislead shippers in their negotiations with pipeline operators.

No.	Questions	Feedback
	(d) Do you think this issue should be addressed by implementing one or more of the following measures: (i) amending the NGR to provide for greater regulatory oversight of the information reported by service providers? (ii) amending the access information standard in the NGR to require information to be updated as soon as practicable if the information is found to no longer be accurate? (iii) increasing the penalties for breaches of the information disclosure obligations and the access information standard? (iv) the changes to the Financial Reporting Guideline identified by the ACCC and the Brattle Group (see Appendix B) should be implemented?	Consistent with the recommendations in our July 2019 report, we strongly support the proposals listed in (i)-(iv), which are intended to improve the quality and reliability of the reported information by providing for: ▪ greater regulatory oversight of the reported information ▪ more prescription on the information to be reported by pipeline operators (e.g. through changes to the financial reporting guidelines and the reporting template) ▪ the use of other measures to strengthen the reporting framework and to encourage pipelines operators to report accurate information (e.g. through amendments to the access information standard and increase the penalties for breaches of this standard and the disclosure obligations). In relation to the item (iv), we remain of the view that the proposed changes to the financial reporting guideline cannot wait for the RIS process to be completed, given the nature and scale of the issues we have identified. We therefore recommend that this guideline be amended as soon as practically possible, particularly given no consideration is being given to changing the financial reporting in the Consultation RIS. This timing will ensure the issues do not persist for an undue length of time and that shippers can have greater confidence in the reported information and more informed negotiations.
25	Do you think the current approach to reporting information should be maintained, or do you think: (a) the NGR should be amended to require the relevant regulator to prepare a guideline that sets out where and how the information is to be disclosed on a service provider's website and to inform the regulator whenever changes are made? (b) links to all the information reported by service providers should be published in a single location (e.g. the regulator's website, the Bulletin Board or AEMC register)? (c) all the information reported by service providers should be made available through a single repository? Please explain your response to this question and set out how significant you think the accessibility issue is for shippers.	There is currently no standard form for how information should be reported by pipeline operators on their websites, which can make it very difficult for shippers to locate information and for the relevant regulator to monitor compliance with the disclosure obligations. The ACCC therefore supports measures to improve the accessibility of this information. Of the three measures that have been identified, options (b) and (c) would have the greatest effect in terms of improving the accessibility of information. The cost of implementing these two options is, however, likely to be quite high, with the cost of option (c) being particularly high. The ACCC therefore suggests that option (a) be implemented. While this option does not provide for the centralisation of information it should provide for more consistency in where the information is published on a pipeline operator's website and will also allow the relevant regulator to more effectively monitor changes in the reported information.

No.	Questions	Feedback
26	Do you think, the current approach to reporting information should be maintained, or do you think the usability should be improved by requiring: (a) a summary tab to be included in the financial reporting template to provide a high level summary of the key financial and pricing information; and/or (b) a template to be developed to enable shippers to use the information published by service providers to calculate one or more the pricing benchmarks identified by the Brattle Group? Please explain your responses to these questions and set out how significant you think the usability issue is for shippers.	As noted in our July 2019 report, we have concerns with both the usability and accessibility of some of the information reported by pipeline operators. Similar concerns were also raised by shippers in the Oakley Greenwood survey and by the Brattle Group. To address these concerns, we recommended a range of improvements to the information reported under Part 23 and other measures to improve the usability and accessibility of this information. One of our key recommendations was to include a summary tab in the financial reporting template, to provide shippers with a 'quick glance' view of some of the key financial and pricing information. We therefore support the adoption of item (a). We also support the adoption of item (b). A pricing template, would be particularly beneficial to users, because it would allow them to transform the complex cost and demand information reported by pipelines operators into one or more cost-based pricing benchmarks that they could use to assess the cost reflective nature of the prices offered by a pipeline operator, which should aid negotiations.
27	Do you think the current exemptions from information disclosure under Part 23 should be retained, or do you think the scope should be amended to require exempt pipelines to publish a basic set of information?	In the ACCC's view, there would be value in requiring all pipelines that provide third party access to publish the basic set of information contemplated in the Consultation RIS. The requirement to publish this information will aid shippers by reducing the information asymmetries that they can face when negotiating with pipeline operators. It will also address the concerns that have previously been raised with us by a number of shippers about the exemptions that single shipper and small pipelines currently have from the obligation to publish standing prices and standard terms and conditions. The ACCC understands that in addition to this basic set of information, regulated pipelines would also be expected to report a range of financial and demand related information. Given the costs that can be associated with this type of reporting, the ACCC suggests that exemptions from publishing this information should continue to be available to single shipper and small pipelines to reduce the regulatory burden.
	If you think a basic set of information should be reported by all pipelines, what do you think it should include (e.g. pipeline service information, standing terms, the prices paid by other shippers, service availability and pipeline information)?	The ACCC agrees with the basic set of information that has been identified in the Consultation RIS, which includes: ▪ pipeline service information ▪ the standing prices and standard terms and conditions for each service offered by the pipeline ▪ a description of the method used to calculate the standing prices for each service, as well as information on the inputs used to calculate these prices ▪ the prices paid by other shippers for pipeline services ▪ pipeline information, and ▪ service availability information.

No.	Questions	Feedback
28	Do you think the size threshold used for exemptions under Part 23 should be retained, or do you think it should be aligned with the 10 TJ/day nameplate rating used for the purposes of full and light regulation, the Bulletin Board and the capacity trading reforms?	In the ACCC's view, there would be value in aligning the size threshold used for exemptions under the strengthened Part 23 with the 10 TJ/day nameplate rating threshold used for both the Bulletin Board and the capacity trading reforms. Apart from reducing the complexity of the broader regulatory arrangements, the adoption of a nameplate based rating will make it easier for the relevant regulator to determine whether an exemption should be granted.
29	Are there any other problems with the information disclosure requirements or exemptions that have not been identified in this chapter, or changes you think should be made to address the information deficiencies, accessibility, usability, reliability and quality issues outlined in section 9.2? If so, please explain what they are.	n.a.

Chapter 10: Negotiation frameworks and dispute resolution mechanisms

No.	Questions		Feedback
30	Do you think the differences in negotiation frameworks applying under Part 23 and full/light regulation is causing confusion, imposing unnecessary costs on negotiating parties or otherwise hindering the ability of shippers to negotiate access (see section 10.2.1)? (A) If not, please explain why not.		There are a number of differences between the negotiation frameworks applying under full/light regulation and Part 23 that are unrelated to the regulatory versus commercial nature of the negotiate-arbitrate models. The reason for these differences is unclear. It is, for example, unclear why different response time frames have been adopted under the negotiation frameworks. It is also unclear why a shipper in negotiations with a full/light regulation pipeline must ask the relevant regulator to obtain information on its behalf, rather than having a right to obtain the information itself as shippers have under Part 23. Setting this aside, the adoption of multiple negotiation frameworks can be expected to confuse shippers and pipeline operators about their rights and obligations during negotiations. It could also impose unnecessary costs on the negotiating parties. The ACCC therefore supports the adoption of a single negotiation framework that would apply under full/light regulation and Part 23. Of the options presented in the Consultation RIS, the hybrid option appears the most sensible and more likely to facilitate timely and effective negotiations, because it will: ▪ provide shippers with a better understanding of the process for seeking access (i.e. through the publication of a user access guide) ▪ remove any differences in the response and negotiation time frames across the forms of regulation ▪ allow shippers to obtain additional information directly from pipeline operators during negotiations, rather than having to ask the relevant regulator to obtain it on their behalf, and ▪ provide a clearer trigger for disputes (i.e. by specifying that if agreement is not reached within a certain period, the request will be taken to have been rejected thereby allowing a dispute to be triggered).
	(B) If so:	(a) How significant do you think this issue is? (b) Do you think this issue should be addressed by adopting a single negotiation framework that would apply under all negotiate-arbitrate models that is based on: (i) the approach currently applied under full and light regulation (see Table 10.1)? (ii) the approach currently applied under Part 23 (see Table 10.1)? (iii) a hybrid of the two frameworks as described in section 10.3.1?	
31	Do you agree with the ACCC that the preliminary enquiry process in Part 23 could delay a shipper's access to arbitration if negotiations fail and also allow service providers to avoid the rules relating to access requests (including response times)? (A) If not, please explain why not.		As noted in our July 2019 Report (see section 6.4.1), it appears that shipper requests are often treated by pipeline operators as 'preliminary enquiries', rather than formal access requests under Part 23. While it is unclear whether pipeline operators are encouraging shippers to do this, or if shippers are choosing to seek access in this way, the effect is the same. That is, the use of the preliminary enquiry process means that pipeline operators are not subject to the rules in Part 23 regarding the treatment of access requests (including the period of time in which they are required to respond) and negotiations. The use of the preliminary enquiry process can also delay a shipper's access to arbitration, because before it can trigger a dispute it must go through the negotiation process set out in Part 23.
	(B) If so:	(a) How significant do you think this issue is?	Through our assessment of requests and offers for the July 2019 report we observed a number of pipeline operators treating access requests as preliminary enquiries. Given this behaviour was not limited to one pipeline operator and can enable avoidance of some of the rules under Part 23, the ACCC is of the view that this issue warrants reform.

No.	Questions		Feedback
		(b) Do you think the preliminary enquiry process should be removed from Part 23?	The ACCC is of the view that the distinction between preliminary enquiries and formal access requests in Part 23 should be removed so that the rules regarding offers, negotiations and access to the arbitration mechanism apply to all requests made by shippers. This is equivalent to what currently applies to pipelines subject to full and light regulation.
32	Do you agree that the credibility of the threat of arbitration is weaker for smaller shippers (see section 10.2.2)? (A) If not, please explain why not.		In our July 2019 report, we noted that the credibility of the threat of arbitration may not be as strong for smaller shippers and, as a consequence, these shippers may have to pay more for transportation.[8] As we noted in this report, the threat may not be considered as credible by pipeline operators, because the costs to a smaller shipper of triggering an arbitration may outweigh the benefits, particularly if the shipper's demand is relatively small, or the use of gas is a small input to their end-use requirements. In our view this is a weakness in the current regulatory framework that should be addressed through the implementation of measures that improve the credibility of the threat for smaller shippers, particularly given the increasing number of smaller C&I users that are seeking to contract directly with pipeline operators.
	(B) If so:	(a) How significant do you think this issue is?	
		(b) Do you think the position of smaller shippers would be improved by: (i) making it easier for pipelines to move from lighter to heavier handed forms of regulation as set out in Chapter 8? (ii) requiring individual prices or maximum and minimum prices to be reported by service providers rather than weighted average prices (see Table 9.2)? (iii) improving the usability and accessibility of information reported by service providers in the manner set out in Table 9.2?	The ACCC agrees that making it easier for pipelines to move from lighter to heavier handed forms of regulation and greater monitoring by the relevant regulator should pose more of a constraint on the behaviour of pipeline operators and therefore improve the negotiating position of smaller shippers. The ACCC also agrees that greater visibility of the prices paid by other shippers (either through the publication of the minimum and maximum prices paid by shippers or individual prices) and improvements to the usability and accessibility of information should improve the negotiating position of smaller shippers. These measures should reduce the information asymmetries faced by smaller shippers and may, in the case of the price information, allow the smaller shippers to leverage off the bargaining power of larger shippers, particularly if pipeline operators are prevented from engaging in inefficient price discrimination. While these are important measures, the ACCC is of the view that further measures will be required if the threat of arbitration by a smaller shipper is to be considered credible.

[8] Through our review of pipeline operators access requests and offers, we did find some evidence of smaller C&I users having to pay more for transportation than larger C&I users in the access request and offer information provided by pipeline operators. See ACCC, Gas inquiry report 2017-2020 Interim report, July 2019, p. 157.

No.	Questions		Feedback
		(c) Do you think any of the following should occur to further strengthen the position of smaller shippers: (i) amend the cost provisions to prevent the dispute resolution body from awarding the service provider's costs against smaller shippers (relevant to full and light regulation only) and making smaller shippers pay more than half the dispute resolution body's costs? (ii) allow user groups to intervene in arbitral proceedings involving smaller shippers? (iii) give smaller shippers the option under Part 23 to have the dispute heard by the relevant regulatory dispute resolution body or a commercial arbitrator?	In our view, there would be merit in implementing: ▪ option (i) because it would reduce the cost burden that may otherwise be faced by smaller shippers; and ▪ option (ii) because it could enhance the bargaining power of smaller shippers. To enable user groups to play an active role under option (ii), some form of funding may need to be provided (this could potentially take a similar form to the model used for consumer groups, with funding provided via Energy Consumers Australia). In relation to option (iii), while the ACCC can see that this may be appealing to smaller shippers, it does represent a significant departure from the commercially-oriented intent of Part 23. The other problem with this option is that it may give rise to conflicts between the position the regulator takes when applying the regulatory-oriented principles under full/light regulation and the position taken when applying the more commercially focused pricing principles under Part 23. The ACCC does not therefore support this option. If, on the basis of stakeholder feedback, there is perceived to be a need for the regulator to be involved (or for there to be a credible threat that the regulator could be involved), we would suggest that consideration be given to allowing smaller shippers to elect to go to mediation before arbitration and having the regulator play the role of mediator. In contrast to the arbitration option, this option is less likely to give rise to the conflicts outlined above, because the regulator would not have to make a determination. Rather, the regulator's role would be to bring the parties together to try and resolve the dispute. If mediation fails, then the parties would be able to proceed to arbitration. If, notwithstanding the views above, a decision is made that smaller users should have the option to have the relevant regulator arbitrate the dispute, then we would suggest that in doing so, the relevant regulator be required to apply the commercially focused pricing principles in Part 23. We would also suggest that the NGL and/or NGR make it clear that the relevant regulator is not bound by any decision it makes as an arbitrator under Part 23 when performing its functions under full regulation.
		(d) If any of the measures outlined in (c) are implemented, how should 'smaller shipper' be defined? If you think it should be based on a size threshold, what threshold do you think should be adopted?	The ACCC is interested in stakeholder feedback on an appropriate threshold, particularly from smaller shippers and user associations. A size threshold based on gas consumption could potentially include large companies that only use a small amount of gas, which may not be appropriate.
33	Do you think:	(a) there are any other groups of shippers for whom the threat of arbitration may not be considered credible by service providers?	n.a.
		(b) there any other factors that may discourage shippers from threatening the use of arbitration?	n.a.

No.	Questions		Feedback
34	Do you agree that the limited guidance provided in the NGL/NGR on the matters to be considered by the dispute resolution body under full and light regulation as set out in section 10.2.3 are adversely affecting the efficiency, effectiveness and credibility of the dispute resolution mechanism applying to full and light regulation pipelines? (A) If not, please explain why not.		The ACCC agrees that the limited guidance currently provided to the dispute resolution body under full and light regulation on key issues, such as the matters to be considered by the arbitrator and the time frames within which decisions should be made, could discourage shippers from having recourse to this mechanism and therefore weaken the threat of arbitration. This issue was raised by a number of shippers during our 2015 Inquiry and at the time we noted that, while the threat of arbitration should in principle pose a constraint on pipeline operators, the costs and resources associated
		(a) How significant do you think this issue is?	

No.	Questions		Feedback
	(B) If so:	(b) Do you think these deficiencies should be addressed by amending the NGL/NGR to: (i) require the dispute resolution body to have regard to the NGO, the revenue and pricing principles, an applicable AA (where relevant), previous AAs or access determinations, pre-existing contractual rights and the price and revenue regulation provisions in Part 9 of the NGR? (ii) require the existence of a dispute to be made public and to set out the process for joining parties? (iii) introduce a 50-day fast-track option for certain disputes under full regulation? (iv) specify the maximum period of time to be taken by the dispute resolution body to resolve a dispute (e.g. 8 months or 12 months)? (v) only require the access determination to be binding on a shipper if the shipper decides to enter into a contract that reflects the access determination and to prevent a shipper that decides not to enter into such a contract from seeking arbitration for the same or a substantially similar service for 12 months? (vi) require the dispute resolution body to publish the access determination, statement of reasons, relevant financial calculations and information provided in the course of the dispute (subject to the confidentiality provisions in the NGL)?	with a dispute, coupled with the uncertainty surrounding the final outcome, could discourage shippers from triggering these provisions and make them more susceptible to exercises of market power. We understand that similar issues were raised with the AEMC during its 2017-18 Economic Regulation Review. We therefore agree that changes should be made to this dispute resolution mechanism to strengthen the credibility of the threat of arbitration. In particular, we agree that the dispute resolution mechanism should be modified to implement the solutions identified in (i),(ii), (iv),(v) and (vi). As we previously noted in our submission to the AEMC we have concerns about the proposed fast-track process identified in (iii) given our experience in being the arbitrator under a number of different regulatory regimes. In our experience, these arbitrations are unable to be completed in such a short timeframe. While we understand the fast track option would only be available for a limited number of disputes, this would, in our view, lead to the fast-track process being utilised infrequently and failing to act as a constraint on the exercise of market power of pipeline operators. In our view, a better solution would be to specify the maximum period of time to be taken by the dispute resolution body in all disputes, as suggested in (iv).
35	Do you have any concerns with the Part 23 pricing principles (see Box 10.1)?		The ACCC does not have any specific concerns with the Part 23 pricing principles at this stage. It does, however, think there may be value in providing greater clarity on how shared assets and costs are to be allocated between assets operated by a pipeline operator. Our views on this issue are set out below.

No.	Questions		Feedback
	If so:	(a) Please explain what your concerns are, how significant you think they are and what, if anything, you think could be done to address these concerns.	n.a.
		(b) Do you think these concerns will be addressed by making it easier for pipelines to move from lighter to heavier handed forms of regulation?	n.a.
		(c) Do you think there would be value in providing greater clarity in Part 23 about: (d) how prior regulatory decisions are to be accounted for by an arbitrator, in those cases where a pipeline has previously been subject to full regulation, particularly if it becomes easier to move between forms of regulation? (ii) shared costs are to be allocated between other assets that are operated by the service provider and between the services offered by the pipeline?	Through our review of a sample of pipeline operators' recovered capital values, we identified a number of issues with the way in which shared assets and costs were allocated between pipelines. The most notable of which was the pipeline operator that to allocate 90% of its shared assets to its Part 23 pipelines, even though it operated a large number of other infrastructure.[9] This example highlights the potential for pipeline operators to try and over-recover their shared assets and costs if clearer principles are not incorporated into the regulatory framework. It is important to note that this issue is not unique to Part 23. Rather, it also affects full/light regulation pipelines, because the rules applying to these pipelines do not provide guidance on how shared costs are to be allocated. This is in direct contrast to the National Electricity Rules, where the cost allocation methods used by regulated businesses must be approved by the AER. The ACCC suggests that consideration be given to implementing a similar approach in the National Gas Rules.
36	Are there any other problems with the negotiation frameworks and dispute resolution mechanisms that have not been identified in this chapter, or changes you think should be made to address the issues identified in section 10.2? If so, please explain what they are.		The ACCC suggests that as part of this RIS, consideration be given to extending the application of the access information standard in the NGR to other aspects of Part 23. Currently, this information standard only applies to the information disclosure requirements in Division 2 of Part 23 and the access offer information provisions in rule 562. It does not, however, apply to the information that pipeline operators may provide prospective shippers through a preliminary enquiry, or when making an access offer. In our view, there would be value in extending the application of this provision to these aspects of Part 23 and to the negotiation frameworks applying under full/light regulation to discourage pipeline operators from providing information that is false or misleading.

[9] ACCC, Gas inquiry report 2017-2020 Interim Report, July 2019, p. 150.

Chapter 11: Policy options

No.	Questions	Feedback
37	Of the four policy options that have been identified in Chapter 11, which option do you think should be implemented (i.e. Option 1, Option 2, Option 3 or Option 4) and why?	Option 3 removes the coverage test as a gateway to full regulation, so that the threat that a heavier handed form of regulation will be applied to a pipeline is more credible. The ACCC previously identified that the threat of regulation was failing to impose an effective constraint on the behaviour of a number of pipelines.[10] Under option 3, pipelines offering third party access will be subject to a strengthened form of Part 23 or full regulation with the form of regulation test the gateway from one form of regulation to another. The move to a combined market power-NGO test is significant and in line with the test the ACCC recommended in its first gas inquiry.[11] As noted in that inquiry, exercise of market power by pipeline operators may have an adverse impact on the economic efficiency of the east coast gas market and upstream and downstream markets, which can lead to poorer consumer outcomes.[12] A market power test is directed at improving overall market efficiency and will maximise consumer welfare across the economy. By moving to two forms of regulation from three, option 3 simplifies the regulatory framework, thereby reducing complexities and costs. This option also gives the regulator greater responsibility for monitoring pipeline operator behaviour and allows the regulator to refer pipelines for a form of regulation assessment if it suspects market power is being exercised. The additional oversight should provide incentives for pipeline operators to comply with existing regulation, to prevent more heavy handed regulation being applied. Option 3 also strengthens the negotiation frameworks and dispute resolution mechanisms, while standardising the information pipeline operators must publish. It will require all pipelines, irrespective of their size and number of shippers, to publish a basic set of access information, including information on service availability, the service provider's standing prices, the pricing methodology, and information on the prices paid by other shippers.
38	If there are other policy options or refinements to these policy options that you think should be considered, please explain what they are, what they would involve and what the advantages, disadvantages, costs, benefits and risks are with these options.	The ACCC considers that a number of minor refinements should be made to option 3 to: ▪ enhance the competitive tender provisions (see response to question 10) ▪ include interconnection principles, including pricing principles (see response to question 19) ▪ remove the proposal for the regulator to act as arbitrator under Part 23 for disputes involving smaller shippers (see response to question 32) ▪ remove the fast track arbitration option (see response to question 34) ▪ include a capacity surrender mechanism that would provide for the release of capacity by an incumbent retailer to other shippers (see response to question 5) ▪ extend the application of the access information standard to information that pipeline operators provide during preliminary enquiries and when making an access offer (see response to question 36) ▪ provide greater guidance in the NGR on how shared assets and costs are to be treated under the strengthened Part 23 and full regulation (see response to question 35)

[10] ACCC, *Inquiry into the east coast gas market*, April 2016, p. 121.

[11] ACCC, *Inquiry into the east coast gas market*, April 2016, pp. 138-140.

[12] ACCC, *Inquiry into the east coast gas market*, April 2016, p. 92.

No.	Questions	Feedback
		▪ include a single process using fact based criteria to determine whether a pipeline is a distribution or transmission pipeline (see response to question 5).
39	Do you agree with the advantages, disadvantages, costs, benefits and risks that have been identified for each option in sections 11.2-11.4? If not, please set out what other advantages, disadvantages, costs, benefits and/or risks that you think are associated with each option?	The ACCC broadly agrees with the way in which the costs, benefits, risks, advantages and disadvantages of each option have been characterised in the Consultation RIS.
40	If you think any of the policy options out in Chapter 11 could be implemented through alternative means (i.e. non-regulatory), please explain how you envisage this would work.	n.a.
41	If options 2, 3 or 4 were implemented and 'light regulation' removed, which of the following transitional arrangements do you think should be employed for the 5.5 pipelines that are currently subject to this form of regulation: (a) grandfather the existing light regulation arrangements until an application is made for the form of regulation to change on the 5.5 pipelines? (b) deem all light regulation pipelines to be subject to full regulation? (c) deem all light regulation pipelines to be subject to the new lighter handed form of regulation (i.e. the strengthened Part 23)? (c) require the decision making body to carry out an assessment of whether the pipelines should be subject to the heavier handed or lighter handed form of regulation using the form of regulation test?	If light regulation is to be removed, then in the ACCC's view the 5.5 pipelines that are currently subject to light regulation should be deemed to be subject to the strengthened Part 23 (i.e. option (c)). Such an approach would be consistent with the fact that the NCC has previously formed the view, applying the same form of regulation test that would apply under the new regulatory framework, that the pipelines should not be subject to full regulation. While we understand that circumstances may have changed since the NCC made its original decision in relation to these pipelines, there is an avenue under options 2-4 for interested parties to apply to the decision-maker to have a heavier handed form of regulation applied to the pipeline if Part 23 is not considered appropriate. This ability, coupled with the proposal under options 3 and 4 for the relevant regulator to more actively monitor the behaviour of pipeline operators and to be able to refer pipelines for a form of regulation decision, in effect, minimises the risks associated with deeming the existing light regulation pipelines be subject to full regulation. We note the particular case of the Carpentaria Gas Pipeline, which is subject to a derogation that requires the pipeline to be subject to 'light regulation' until May 2023. In this case, the Queensland Government could consider amending its regulation to either remove the derogation, or to replace the term 'light regulation' with Part 23.
42	Are there any other transitional arrangements that need to be considered? If so, please outline what they are.	If a decision is made to implement any of the options in the Consultation RIS then a range of transitional arrangements are likely to be required. Rather than trying to speculate what would be required under each of these options, we suggest that this be considered once the final option has been identified.