

**Draft**  
**Associate Contract Guidelines**

**July 2001**



**INDEPENDENT PRICING AND REGULATORY TRIBUNAL**  
**OF NEW SOUTH WALES**

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## 1. Introduction

- 1.1 These Guidelines have been prepared by the Independent Pricing and Regulatory Tribunal of New South Wales (the **Tribunal**). They are designed to provide information and guidance to Service Providers, and interested parties in relation to Associate Contracts under the *National Third Party Access Code for Natural Gas Pipeline Systems* (the **Code**)<sup>1</sup>. These Guidelines are also intended to provide some indication of the matters that the Tribunal may consider when asked to approve an Associate Contract. The Tribunal intends to revise these Guidelines from time to time to ensure their on-going relevance and to reflect important industry and other developments.
- 1.2 A process for 'informal notification' is also set out in these Guidelines. The Tribunal encourages informal discussions with a Service Provider on a 'without prejudice' basis before an application is lodged for approval of an Associate Contract, in order that some guidance may be provided to a Service Provider as to what information and consultation is likely to be required before the Tribunal decides whether to approve the proposed Associate Contract.
- 1.3 The types of information which will assist the Tribunal to determine whether an Associate Contract may substantially lessen, prevent or hinder competition are also set out in these Guidelines. Where the Tribunal considers that a proposed Associate Contract warrants detailed scrutiny, it will request more detailed information from a Service Provider.

### Associate Contracts under the Code

- 1.4 Clauses 7.1 to 7.6 of the Code deal with the approval of 'Associate Contracts' entered into by an owner or operator of a gas pipeline. Clause 7.1 of the Code provides that:
- A Service Provider must not enter into an Associate Contract without first obtaining the approval of the Relevant Regulator. The Relevant Regulator must not refuse to approve an Associate Contract unless it considers that the contract would have the effect, or would be likely to have the effect, of substantially lessening, preventing or hindering competition in a market.*
- 1.5 A 'Service Provider' is the person who is, or is to be, the owner or operator of the whole or any part of a pipeline or proposed pipeline. There are currently three distribution pipeline network owners in New South Wales that fall within the definition of Service Provider in the Code. They are AGL Gas Networks Limited, Great Southern Energy Gas Networks and Albury Gas Company. Other distribution pipeline network owners in New South Wales may fall within the definition of Service Provider in the Code in the future.
- 1.6 The Tribunal is the Relevant Regulator in relation to distribution pipelines that are located wholly within New South Wales, and distribution pipelines which are

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<sup>1</sup> The New South Wales government enacted the *Gas Pipelines Access (New South Wales) Act 1998* under an agreement between the Council of Australian Governments. The *Gas Pipelines Access Act* applies Schedule 1 of the *Gas Pipelines Access (South Australia) Act 1997* and the Code as laws of New South Wales.

located in other states as well as New South Wales but which are most closely connected with New South Wales.

- 1.7 The Tribunal's function is to assess the future competitive effect of a proposed Associate Contract. It is not part of the Tribunal's function to consider the competitive effect of Associate Contracts that have been executed prior to approval being sought. In the Tribunal's view, a failure to seek approval of an Associate Contract prior to entry into an Associate Contract is a contravention of the Code for which penalties may apply. This is discussed further in paragraph 13. In addition the service provider may be required to take immediate steps to remedy the breach. For example, by terminating all existing arrangements and implementing new arrangements that are submitted to the Tribunal for approval.

## **2. What is an associate contract?**

- 2.1 The Code sets out the definition of an 'Associate Contract' as:

- (a) *a contract, arrangement or understanding between the Service Provider and an Associate in connection with the provision of a Service; or*
- (b) *a contract, arrangement or understanding between the Service Provider and any person in connection with the provision of a Service which provides a direct or indirect benefit to an Associate and which is not an arm's length transaction.*

- 2.2 'Service' is defined in the Code as a service provided by means of a pipeline covered by the Code.

- 2.3 It is important to note that an 'Associate Contract' under the Code includes arrangements and understandings as well as formal contracts. The Tribunal considers that Associate Contracts include any proposed variation to agreed contracts or other such arrangements or understandings. Thus the Associate Contract provisions in the Code apply to those arrangements or understandings which are not written down or executed as a formal agreement, but which relate to the provision of a Service under the Code.

- 2.4 The Tribunal expects that Service Providers will forward to it all contracts, arrangements or understandings which are potentially 'Associate Contracts' for consideration under the Code. Where a Service Provider is not certain as to whether a proposed contract is in fact subject to these provisions it is strongly recommended that they contact the Tribunal to establish whether they should lodge an application.

## **3. What is an associate?**

- 3.1 The expression 'Associate' is defined under the Code with reference to certain sections of the Corporations Law. The following persons are 'Associates' of a body corporate under this section:

- a director or secretary of the body corporate
- a related body corporate
- a director or secretary of a related body corporate

- a holding company of the body corporate
- a subsidiary of the body corporate
- a subsidiary of a related body corporate, and
- a subsidiary of a holding company of the body corporate.

3.2 On the basis of the above, the Tribunal considers that an 'Associate' can be an individual person: e.g. a secretary or director of the Service Provider, or a director or secretary of a body corporate that is related to the Service Provider. The term can also refer to a body corporate that is 'related' to the Service Provider according to section 50 of the Corporations Law.

#### 4. Arrangements that benefit associates

4.1 As noted in paragraph 2.1(b), a contract, arrangement or understanding may also be considered an Associate Contract if it is between a Service Provider and a person for the provision of services via a covered pipeline which provides a benefit to an Associate and which is not an arms length transaction. It is not necessary that the contract or arrangement be between the Service Provider and the Associate.

4.2 The Tribunal recognises that the expression “not an arm’s length transaction” as used in the Code is ambiguous. It may refer to a transaction between a Service Provider and another person who are not at arms length. Alternatively it may refer to a transaction which is not conducted at arms length, whether or not the parties themselves would be described as at arms length from each other. The Tribunal prefers the latter approach. This is supported by the fact that the transaction need not be with an Associate and only need benefit an Associate. The focus is therefore on the manner of their dealings with each other.

4.3 In this context, what is a non arms length transaction is a question of fact. A relevant consideration is the circumstances surrounding each individual transaction. The purpose of the inquiry is to ascertain whether the transaction was one that was the product of real bargaining between the parties. Relevant considerations include the terms of the transaction, its purpose, the manner in which it was negotiated, the relative bargaining power of the parties and the commercial imperatives. A transaction may not be regarded as being at arms length if key terms including price are predominantly influenced by the relationship between the parties or between the parties and the Associate. It should also be remembered that the object of the inquiry is to identify whether an Associate Contract exists and to then assess whether the contract substantially lessens, prevent or hinders competition in a market.

#### 5. Information to be provided in application for approval

5.1 **The Tribunal will accept an application for approval of an Associate Contract *only* if it contains the following information:**

- a covering letter from the Service Provider stating that it wishes to apply for approval of an Associate Contract under the Code
- the name, address and ACN of the Service Provider
- the name, title and contact details of the person or persons authorised by the Service Provider to provide more information in relation to the application

- the name, address, contact details and ACN (where applicable) of the other party or parties to the proposed Associate Contract
  - the name, address and contact details of any end user customers named in the Associate Contract
  - a description of the basis on which the contract, arrangement or understanding is an 'Associate Contract' for the purposes of the Code
  - where the Associate Contract is entered into with a person that provides a benefit to an Associate, but is a non arm's length transaction, a description of all the direct or indirect benefits that will accrue to the Associate
  - a description of business carried on by all parties to the proposed Associate Contract
  - a description of the proposed Associate Contract and its commercial rationale
  - an outline of which charges in the Associate Contract are reference tariffs. If any charges are not reference tariffs, an outline of those charges and the basis upon which they were reached
  - a copy of the proposed Associate Contract
  - a copy of any other documents or correspondence, eg letters of offer, which reduce any of the particulars of the Associate Contract to writing
  - an outline of any differences (and the rationale for the differences) in tariffs, terms and conditions between the Associate Contract and:
    - (i) tariffs, terms and conditions (if known) that might be negotiated by other parties in respect of similar contracts, and
    - (ii) reference tariffs, terms and conditions that may be applicable to other customers.
  - an outline of any of the terms and conditions of the Associate Contract that were offered to other parties, and the names and addresses of these parties
  - an indication of any documents or information that are supplied under an obligation of confidentiality and those which are provided for public release (see paragraph 12.2).
- 5.2 Where the Tribunal considers that a Service Provider has not provided a complete application, it will indicate to the Service Provider what further documents and information are required by the Tribunal for it to consider that an application is complete.
- 5.3 **The Tribunal will notify the Service Provider once it considers that a full application has been provided. The notice will record the date on which an application was received by the Tribunal, and this date will be the date on which the application was received for the purposes of the Code.**
- 5.4 Where an Associate Contract provides for the supply of services at the Reference Tariff, clause 7.2 provides that the Tribunal, as Relevant Regulator, may make a decision under clause 7.1 without conducting public consultation. In other situations the Tribunal may engage in public consultation as it sees fit.

- 5.5 As a general guide, where the Tribunal has received an application for approval of an Associate Contract and decides that it is not necessary to undertake public consultation and/or request further information from the Service Provider, the Tribunal will inform the Service Provider within 21 days that the Associate Contract has been approved.
- 5.6 Unless the Tribunal notifies the Service Provider that it does not approve the Associate Contract within 21 days of receiving the Service Provider's application to enter into the Associate Contract, the Code provides that the Tribunal is deemed to have approved it.
- 5.7 Where the Tribunal exercises its discretion to engage in public consultation (and it may do so even where an Associate Contract provides for the supply of services at the Reference Tariff) it is allowed 49 instead of 21 days to consider an Associate Contract. The type of public consultation which the Tribunal undertakes may include consultation with:
- competitors
  - producers, transmission operators and suppliers
  - customers, including end use customers
  - industry associations
  - government agencies and departments, and
  - consumer groups.
- 5.8 The Tribunal will maintain a public record of all applications and submissions received in respect of a proposed Associate Contract (subject to the Tribunal's acceptance of any confidentiality claims - see section 13 below). The information on the public record will generally be available on the Tribunal's website. The Tribunal encourages any interested party who wishes to comment on an application for approval for an Associate Contract to provide a written submission to the Tribunal.

## **6. Provision of further information**

- 6.1 Where a Service Provider considers the Tribunal may require additional information, it is encouraged to include a detailed 'supporting submission' with its application.
- 6.2 A supporting submission to the Tribunal may include the following information:
- a response to issues raised by the Tribunal during any informal notification process
  - a description of the market definition or definitions which it considers the Tribunal should adopt to ascertain whether the Associate Contract has the effect or likely effect of substantially lessening or preventing or hindering competition
  - the facts and contentions relied on to support the market definition or definitions, and
  - an outline the facts and contentions relied upon by the Service Provider to support the position that the Associate Contract will not result in a

substantial lessening, preventing or hindering of competition in the relevant market or markets.

- 6.3 The supporting submission may address relevant issues in sections 9 and 10 of these Guidelines.
- 6.4 The provision of a supporting submission will lessen the likelihood of a formal request for further information by the Tribunal under clause 7.4(b) of the Code which in turn may influence the timing of the Tribunal's decision.
- 6.5 Despite the participation of a Service Provider in the informal notification process and the provision of a supporting submission, the Tribunal may exercise its discretion to request further information and/or engage in public consultation, before deciding whether to approve the Associate Contract.
- 6.6 **If the Tribunal considers that it requires more information, it will notify the Service Provider in writing. The clock will stop for the purpose of the Code upon the Tribunal issuing this notice. The Tribunal will shortly thereafter issue a written request identifying the information required**
- 6.7 The Tribunal may choose to issue more than one information request where it requires more information from a Service Provider to establish whether the proposed Associate Contract will have the effect or likely effect of substantially lessening competition in a market.
- 6.8 The clock will 'restart' for the purposes of the Code only once the Tribunal considers it has received the information requested and has provided the Service Provider with written acknowledgement that all the requested information has been received.
- 6.9 The Tribunal also has information gathering powers in section 41 of the *Gas Pipelines Access Law* which are separate from and additional to its powers under clause 7.4 of the Gas Code. These are set out in more detail in paragraph 13.1.

## **7. Process of 'informal notification' of a proposed associate contract**

- 7.1 The Tribunal considers it useful to identify what information it may require before the formal Associate Contract process commences.
- 7.2 Toward that end, the Tribunal encourages a process of 'informal notification'. This would involve informal discussions on a 'without prejudice' basis between the Tribunal and a Service Provider on the terms and conditions of a proposed Associate Contract, before the Service Provider formally lodges an application with the Tribunal.
- 7.3 Where the Service Provider provides the Tribunal with sufficient information about the proposed Associate Contract, the Tribunal may provide some guidance to the Service Provider as to the extent of:
- the information and documentation that it will require before making its decision, and
  - the extent of any public consultation.



7.4 A Service Provider will be able to take these discussions into account when determining whether a supporting submission should accompany its application to the Tribunal for approval of an Associate Contract.

## 8. Defining a market

8.1 The Code does not set out a definition of 'market', nor does it establish how the dimensions of a particular market are to be established. However, given the common language used in the Code and the *Trade Practices Act 1974* (Cth) (the **Act**) the Tribunal considers that the approach taken to market definition under the Act is an appropriate approach under the Code.

8.2 In *Re Queensland Co-Operative Milling Association Ltd, Defiance Holdings Ltd*<sup>2</sup> the Trade Practices Tribunal stated that:

*A market is the field of actual and potential transactions between buyers and sellers amongst whom there can be strong substitution, at least in the long run, if given a sufficient price incentive. (at 17,247)*

8.3 The steps involved in determining a market were outlined in *Re Tooth & Co Pty Ltd; Re Tooheys Ltd*<sup>3</sup>:

- identification of the areas of close competition relevant to the goods and services under consideration
- comprehension of the maximum range of business activities and the widest geographical area within which, given sufficient price incentive, there will be cross-elasticity of demand and supply
- consideration of the long term substitution possibilities as opposed to the short term possibilities
- identification of where there is such a break in substitution possibilities that firms within the defined area would collectively have substantial market power
- consideration of whether the field of substitution contains submarkets, and
- consideration of the multi-dimensional nature of a market.

8.4 A market is generally taken to have four dimensions:

- product
- geographic
- functional, and
- time.

8.5 Under the Code the Tribunal cannot approve an Associate Contract if it considers the Associate Contract has the effect or likely effect of substantially lessening, preventing

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<sup>2</sup> [1976] ATPR 40-012.

<sup>3</sup> [1979] ATPR 40-113.

or hindering competition in a market, that is, **any** market. It is important to note that:

- an Associate Contract may affect competition in more than one market
- the Service Provider and the Associate may operate in separate markets, and/or
- the effect on competition may be in the same or different markets to those in which the Service Provider and/or the Associate operate.

**9. Relevant markets in the gas industry**

9.1 A number of decisions have been made by courts, the Australian Competition Tribunal and the Tribunal in relation to the gas industry<sup>4</sup>. From those decisions the Tribunal has formulated a number of working market definitions to assist Service Providers in preparing their applications.

9.2 Where a market includes the sale of natural gas, the Tribunal invites comment as to whether separate markets for the wholesale and retail sales of gas should be considered.

9.3 In the absence of any submissions to the contrary, the Tribunal will consider whether any of the following 'working market definitions' are appropriate for its consideration of the competitive effects of a proposed Associate Contract.

**Table 1 Working market definitions**

| <b>Working market definition</b>                        | <b>Product dimension</b>               | <b>Geographic dimension</b>                | <b>Functional dimension</b>  | <b>Temporal dimension</b> |
|---|--|--|--|---------------------------|
| <b>Sale of natural gas in South East Australia</b>      | Natural gas                            | South East Australia                       | Sales to contract and contestable tariff customers, including at retail and wholesale levels | 10-15 years               |
| <b>Supply of gas distribution services</b>              | Gas distribution services              | [To be determined on a case by case basis] | Distribution   | 10-15 years               |
| <b>Supply of gas transmission services</b>              | Gas transmission services              | [To be determined on a case by case basis] | Transmission   | 10-15 years               |
| <b>Supply of gas production and processing services</b> | Gas production and processing services | [To be determined on a case by case basis] | Production and processing  | 10-15 years               |
| <b>Supply of gas exploration services</b>               | Gas exploration services               | [To be determined on a case by case basis] | Exploration  | 10-15 years               |

<sup>4</sup> See, for example, *Re AGL Cooper Basin* (1997) ATPR 41-593, *Re Duke Eastern Gas Pipeline Pty Ltd* [2001] ACompT 2 and *AGLGN and AGLES&M proposed deed: Statement of Reasons for Decision*, Tribunal, 9 February 2001.

9.4 The Tribunal recognises that markets are dynamic in character and that it may be appropriate to adopt a market definition that is different to any of the 'working market definitions' above when considering a proposed Associate Contract. The Tribunal may therefore adopt a different market definition to any mentioned in these Guidelines. The Tribunal welcomes any comments a Service Provider may have on the market definition that should be adopted when considering a particular Associate Contract.

10. **Determining whether an associate contract will substantially lessen, prevent or hinder competition in a market**

10.1 Associate Contracts have the potential to confer a competitive advantage on the parties involved, resulting in a substantial lessening of competition. The Tribunal encourages Service Providers (and other market participants) to provide information as to:

- tariffs, terms and conditions (if known) that might be negotiated by other parties in respect of similar contracts, and
- reference tariffs, terms and conditions that may be applicable to other customers of the Service Provider.

10.2 It is important to note that the test which the Tribunal is required to adopt when considering approval of an Associate Contract is whether a contract, arrangement or understanding has effect or likely effect, and not the **purpose**, of substantially lessening competition.<sup>5</sup>

10.3 The following statement by Smithers J in *Dandy Power Equipment Pty Limited v Mercury Marin Pty Limited*<sup>6</sup> is a helpful guide as to what may constitute a substantial lessening of competition in a relevant market:

*To apply the concept of substantially lessening competition in a market, it is necessary to assess the nature and extent of the market, the probable nature and extent of competition which would exist therein but for the conduct in question, the way the market operates and the nature and extent of the contemplated lessening... 'Substantially' is a word the meaning of which in the circumstances in which it is applied must, to some extent, be of uncertain incidence and a matter of judgment. There is no precise scale by which to measure what is substantial.*

*Although the words 'substantially lessened in a market' refer generally to a market, it is the degree to which competition has been lessened which is critical, not the proportion of that lessening to the whole of the competition which exists in the total market. Thus a lessening in a significant section of the market, if a substantial lessening of otherwise active competition may, according to the circumstances, be a substantial lessening of competition in a market.*

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<sup>5</sup> This distinguishes the Associate Contract provisions of the Code from some provisions in the Act, which deal with the anti-competitive purpose or effect of a contract, arrangement or understanding. For example, section 45 (contracts, arrangements or understandings that affect competition) and section 47 (certain types of exclusive dealing).

<sup>6</sup> (1982) ATPR 40-315. The case was brought under section 47 of the Act.

- 10.4 The Tribunal will assess the likely effect on competition of a proposed Associate Contract by considering:
- (a) the likely future state of competition in any relevant markets in the event that the Associate Contract is entered into, in comparison with
  - (b) the likely future state of competition in any such markets if the Associate Contract is not entered into.
- 10.5 **The Tribunal considers that the duration of an Associate Contract may have an impact on the extent to which competition would be lessened if the Associate Contract were entered into. As such, where an Associate Contract extends for a period longer than anticipated by the Access Arrangement for the relevant pipeline, the Tribunal encourages a Service Provider to provide reasons as to why the duration of the Associate Contract extends beyond this time.**
- 10.6 In order to satisfy the Tribunal that a proposed Associate Contract is not likely to result in a substantial lessening of competition, a Service Provider may wish to provide the Tribunal with certain undertakings. For example, it may undertake to the Tribunal that the terms and conditions of an Associate Contract will be offered to other retailers and/or end users. While the Code does not require a Service Provider to provide undertakings, it may be the case that an Associate Contract's potential impact on competition is such that the Tribunal may not be in a position to grant approval absent undertakings.
- 10.7 Where a Service Provider has already taken action to lessen the potential anti-competitive impact of an Associate Contract, evidence of this should be provided to the Tribunal. For example, a Service Provider should provide any evidence that terms and conditions which were the same or similar to those in the Associate Contract were offered to other parties.
- 10.8 The Tribunal is not required to have regard to a specific set of factors when considering whether an Associate Contract will have the effect of substantially lessening competition in a market. However, the Tribunal considers that section 50(3) of the Act (which relate to the assessment of whether mergers will have the effect of substantially lessening competition) provides a helpful guide as to what factors may be relevant in the analysis of proposed Associate Contracts. The following factors from this subsection are relevant to the consideration of the effect or likely effect of a proposed Associate Contract on competition:
- the height of barriers to entry to the market
  - the level of concentration in the market
  - the degree of countervailing power in the market, including the potential for a company to 'by-pass' products or services
  - the extent to which substitutes are available in the market or are likely to be available in the market
  - the dynamic characteristics of the market, including growth, innovation and product differentiation, and
  - the nature and extent of vertical integration in the market.

*Barriers to entry*

- 10.9 The Explanatory Memorandum in relation to the enactment of section 50 of the Act defines barriers to entry as follows:

*Barriers to entry can be any feature of a market that places an efficient prospective entrant at a significant disadvantage compared with incumbent firms, including, for example, the presence of economies of scale or scope, control over essential inputs or government regulations which restrict entry into the market. Barriers to entry can include barriers to exit, such as high 'sunk' costs. Properly understood, the height of barriers to entry represents the ease with which new firms can enter or leave the market now or in the future.<sup>7</sup>*

- 10.10 If barriers to entry are low, the threat of entry by new suppliers will achieve competitive conduct.

*Market concentration*

- 10.11 Market concentration is a necessary, but not sufficient, indication that firms within the market may have market power. A firm with market power may be able to restrict output and charge more, a situation which will not occur in a competitive market.

- 10.12 The Tribunal notes that in the gas industry there are different measures of market share that may be relevant, including by capacity, sales volume, and/or sales values.

*Countervailing power*

- 10.13 Countervailing power exists where an acquirer of products or services has market power and/or it can 'bypass' the products or services offered by a supplier. Countervailing power constrains the ability of a supplier to charge more and produce less.

*Availability of substitutes*

- 10.14 Two products may be more, or less, substitutable for each other. Products which are more substitutable for each other provide a greater competitive constraint on each other than two products which are substitutable to a lesser extent. The more "homogenous" a product is, the greater the competitive constraint which competing suppliers of that product exercise upon each other in the market.

- 10.15 Natural gas is a homogenous product. From an end-user's perspective, there are little if any characteristics that differentiate the quality of the gas supply from different vendors. Gas transportation services also are generally only differentiated through the terms and conditions relating to supply.

*Dynamic characteristics of the market*

- 10.16 Firms may develop new products or services, or new technology, which enable them to provide a more effective service or improve their cost efficiency. The Tribunal

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<sup>7</sup> Trade Practices Legislation Amendment Bill 1992 (Cth), Explanatory Memorandum, paragraph 18.

recognises the importance of innovation in the competitive process and as such welcomes comments on how it may affect competition in gas markets over the relevant time period.

*Vertical integration*

- 10.17 Where firms are vertically integrated, they may be in a position to deny other non-integrated firms access to inputs or essential distribution outlets, or to make them available to non integrated firms only on less favourable terms.
- 10.18 Where there is a high level of vertical integration in a gas market, the potential for an Associate Contract to have the effect of substantially lessening competition by preventing or hindering a non Associate company from competing in an upstream or downstream market may be significant.

**11. Notification of the Tribunal's decision**

- 11.1 The Tribunal will provide reasons of its decision to approve or not approve an Associate Contract.
- 11.2 The Tribunal will provide copies of its decision to the Code Registrar, as required under the Code.

**12. Confidentiality of material provided to the Tribunal**

- 12.1 The Code provides that where a person furnishes information or a document to the Relevant Regulator, the Relevant Regulator must not disclose the contents of this document if:
- the person has claimed that the document (or part of the document) is of a confidential or commercially sensitive nature, at the time the document was furnished, **and**
  - the Relevant Regulator is of the opinion that the disclosure of the document or part of the document would be unduly harmful to the legitimate business interests of the Service Provider, or a User<sup>8</sup> or Prospective User<sup>9</sup>.
- 12.2 These provisions do not apply where a document is supplied under section 41 of the *Gas Pipelines Access Law*.<sup>10</sup>

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<sup>8</sup> A 'User' is defined in the Code to mean a person who has a current contract for a Service or an entitlement to a Service as a result of an arbitration.

<sup>9</sup> A 'Prospective User' is defined in the Code to mean a person who seeks or who is reasonably likely to seek to enter into a contract for a Service and includes a User who seeks or may seek to enter into a contract for an additional Service.

<sup>10</sup> In this situation where the person a indicates that the document is confidential or commercially sensitive the Tribunal must not disclose it unless it is of the opinion:

- that the disclosure of the information or document would not cause detriment to the person supplying it or to the person from whom that person received it; or
- that, although the disclosure of the information or document would cause detriment to such a person, the public benefit in disclosing it outweighs the detriment.

See section 42 *Gas Pipelines Access Law*.

- 12.3 Where a Service Provider considers that any documents or information provided to the Tribunal is confidential or commercially sensitive, the Tribunal recommends that this be clearly stated in writing at the time that it is provided, and that the Service Provider details any potential detriment which it believes would flow from disclosure.
- 12.4 Subject to the *Freedom of Information Act 1989* (NSW) or other legislation, the Tribunal will give the person who has made the claim for confidentiality ( or any other person who might be adversely affected), an opportunity to make a submission. The time within which submissions will be required will depend on the time by which a decision must be made by the Tribunal in order to avoid a deemed approval of an Associate Contract.
13. **Information gathering powers and sanctions for non compliance with the code**
- 13.1 Section 41 of the New South Wales *Gas Pipelines Access Law* allows the Tribunal to require the production of information or copies of documents where it has reason to believe that a person has information or a document that may assist it in the performance of its prescribed duties. The Tribunal considers that this may include a situation where a person has information or a document that may assist in determining whether an Associate Contract would have the effect, or would be likely to have the effect, of substantially lessening, preventing or hindering competition in a market.
- 13.2 Unlike the information gathering powers which the Tribunal has in respect of a Service Provider under clause 7.4(b) of the Code, section 41 does not provide that the 'clock stops' in relation to the consideration of an Associate Contract upon a section 41 notice being issued.
- 13.3 Where it believes that a contravention of clause 7.1 has occurred, the Tribunal may apply to the Court for:
- a civil penalty, and/or
  - declaration and consequential relief.
- 13.4 If the Court is satisfied that there has been a contravention, it may order a civil penalty up to \$100,000 having regard to 'all relevant matters' including the nature and extent of the breach and of any loss or damage suffered by reason of the contravention, and the circumstances in which the contravention took place.
- 13.5 If the Court declares that a Service Provider has contravened clause 7.1, it may also make an order requiring the Service Provider to take such action, or adopt such a practice, as the Court requires for remedying the contravention or preventing a recurrence of the contravention.
- 13.6 The Tribunal may consider recommending that the Court order that a Service Provider and/or the Associate take action to remedy a contravention of the Code. Such action can include:

- placing an advertisement, in a form approved by the Tribunal, admitting the contravention and outlining the action that the Service Provider and/or Associate will take to remedy the contravention
- providing an undertaking that the Service Provider and/or Associate will include a standard condition in all Associate Contracts to the effect that the Tribunal's approval is a condition precedent to the operation of the Contract
- providing an undertaking to furnish the Tribunal with executed copies of Associate Contracts, to demonstrate that executed documents conform with an approval granted by the Tribunal, and/or
- providing an undertaking that the all customers of gas transportation services will be notified that they are free to seek gas supply arrangements with a company not associated with the transportation service provider
- obtaining an independent review of its compliance systems to prevent contraventions of its associate contract obligations, and undertaking all recommended corrective action to its systems.