



APIA Submission on Draft Compliance Guidelines 21 August 2008

The Australian Pipeline Industry Association (APIA) - the peak national body representing the interests of Australia's high-pressure transmission pipeline sector - welcomes the opportunity to comment on the Australian Energy Regulator's (AER) draft annual compliance guideline, dated July 2008 (Draft Guideline).

It is noted that the Draft Guideline has been prepared by the AER to:

- provide information to service providers and interested parties in regard to the annual compliance information to be provided by relevant service providers to the AER under the National Gas Law (NGL) and the National Gas Rules (NGR) (called the "annual compliance process" under the Draft Guideline); and
- outline the general requirements under the NGL and NGR regarding covered pipeline service providers and also specific compliance issues in relation to certain types of covered pipeline service providers (other than those that are contained in specific access arrangements for covered pipelines)

Overarching Issues

APIA has concerns that, while the stated aim of the annual compliance process is "to continue the ringfencing reporting obligations of service providers required under the...Code", the proposed obligations for information provision increase reporting requirements and introduce an extra level of regulation beyond that of the Code and what was intended with the introduction of the NGL and NGR.

The proposed regime is disproportionate, given the history of industry performance in relation to ringfencing. .

Before commenting on specific aspects of the Draft Guideline, there are a number of relevant overarching issues .

1. It appears that the AER has not given consideration to alternative, lighter-handed means of compliance reporting. While the discussion paper, released with the Draft Guideline, mentions a more intrusive approach, APIA submits that consideration should be given to less intrusive approaches such as:
 - a. conducting periodic enquiries directed at specific obligations under the NGL and NGR
 - b. requiring service providers to report by exception on their compliance with obligations under the NGL and NGR. (It is noted that this approach has been adopted for other compliance regimes.)

2. The current ownership structure of the gas transmission pipeline industry is very different from the structure that existed when the Gas Code was developed and when the NGL and NGR were being drafted. In particular, there have been substantial changes over the past decade and there are presently no covered transmission pipeline service providers¹ which have associates that are major retailers, wholesalers or producers. (Some service providers may have associates that do buy and sell gas, but these activities are relatively minor and are due typically to grandfathered contracts or the needs of specialised gas applications such as NGV or co-generation).
3. APIA submits that the level of detail to be included in the report to be provided as part of the annual compliance process is unwarranted. This is so for the following reasons:
 - a. It is more detailed than what was required to be included in the ringfencing compliance report provided by service providers to the ACCC under the Gas Code.
 - b. The broad compliance obligations of the NGL and NGR are not materially different from those in the Gas Code, and there is no evidence to suggest an increased risk of non compliance, therefore, the reporting requirements should not increase. However, the proposed guidelines do increase reporting requirements and provide an additional unnecessary compliance layer. Such a requirement is beyond the ACCC's requirements under the GPAL and Code.
 - c. There was no evidence of material non compliance by pipeline service providers with ringfencing and confidentiality obligations under the Gas Code, as evidenced by the ACCC ringfencing compliance reports. As there is no evidence of material non-compliance, it would seem that increased reporting requirements are unnecessary;
 - d. As noted above, many of the requirements of the annual compliance process (in particular the ringfencing requirements) were developed at a time when many pipelines were owned by vertically integrated corporations – in particular the owners were related to retail and wholesale businesses that used the pipeline and whose competitors used the pipeline – leading to possible favouritism, for example, of a particular retailer. However, as stated above, this is no longer the case. As such, any change to the ringfencing guidelines should encourage a relaxation in reporting requirements, as there is no incentive for a service provider with no associated retailer or wholesaler to treat any one party more or less favourably than any other party;

¹ APIA understands that in the Eastern states the only distribution businesses with substantial associated retailers are Country Energy and ActewAGL, and both of these companies are best characterised as regional operations.

- e. Much of the AER's proposal is based on statutory powers which are discretionary in nature. Given the above points, APIA submits that the need to exercise these discretionary powers is not warranted.
4. It is noted that, as the Draft Guideline is intended to be a regulatory information instrument, its content must be reasonably necessary in order to enable the AER to perform its functions and powers (see sections 45 and 48 NGL). The Draft Guideline does not demonstrate why the intrusive level of compliance reporting proposed in the Draft Guideline is reasonably necessary for the performance of the AER's functions or powers under the NGL and NGR. APIA submits that, in light of the matters identified in item 1 above, it should demonstrate this.

Response to specific issues in Draft Guideline

Turning to specific issues in the Draft Guideline and the Annual Compliance Order (as Attachment A), APIA makes the following comments:

1. The period to which the Annual Compliance Order relates:

The Draft Guideline acknowledges that, even though it may be different from a service provider's annual financial reporting period, there will be a requirement for service providers to provide the information and documentation outlined in the Annual Compliance Order for the 12-month period from 1 July to 30 June each year, consistent with the ACCC's past practice under the Gas Code (see the introduction to section 4 of the Draft Guideline).

While APIA does not believe such extra information is necessary, any extra wide-ranging information should not be included in the annual compliance process. As some of the additional compliance requirements are dependent upon the financial arrangements for the service provider, it makes more sense for the compliance process to be staggered throughout the year. This is elaborated upon below.

2. Date for compliance with the Annual Compliance Order

APIA submits that reporting on 31 July for a July-June year is too early. Typically financial results are released to markets in August and accounts may not be finalised and lodged with ASIC until October. If the AER is seeking to receive financial results before they are released to financial markets, this would create significant disclosure issues for service providers.

Alternatively, if the request is for the most recent ASIC accounts lodged as at 31 July, this will result in accounts which are almost one year old in most instances (depending on entities reporting timeframes). APIA understands that other regulatory accounting reports are lodged with regulator on 31 October each year. This date may be more appropriate.

In addition, APIA submits that staggering compliance reporting throughout the year may lead to more efficient use of a service provider's compliance resources throughout each year.

3. Duration of the Annual Compliance Order

The Draft Guideline provides that the AER anticipates that the Annual Compliance Order will remain in place for a number of years until it is revoked and/or replaced with another relevant regulatory information instrument or an alternative annual compliance process.

This is inappropriate. APIA submits that the Draft Guideline should have a maximum life, rather than an open ended life with the ability to be amended over time.

4. AER's process for assessment of the response to the Annual Compliance Order

If the AER is likely to find that, as a result of a service provider's response to the Annual Compliance Order, the relevant service provider is not complying with one or more aspects of the NGL or NGR and this is likely to be prejudicial to the service provider, the rules of procedural fairness require the AER to provide the service provider with an opportunity to respond to the likely finding of non compliance.

The proposed process outlined in the Draft Guideline does not provide for this. It should include this as a step in the process.

5. The discussion paper accompanying the Draft Guideline appears to be raising the issue of evolving the ringfencing reports into performance reports over time. APIA opposes pipeline performance reporting beyond that required to support access arrangement benchmarking. Such reports are unlikely to take into account valid issues relevant to the comparison of pipelines.

6. APIA notes that the Annual Compliance Order in the Draft Guideline envisages service providers will need to report on matters that originated from the AER itself (eg any additional ringfencing obligations and associate contract approvals). It is also noted that such a report will need to include information that is already publicly available (eg whether the access arrangement is already on the service provider's website). APIA questions why such information should be included in this report, particularly when the AER is proposing that it be submitted under a statutory declaration.

Response to Draft Guideline Appendix A Attachment 1

1. Section 2.1 - It is noted that the AER is proposing to require service providers to include an organisation chart. APIA seeks an explanation as to how this would assist the AER to undertake its statutory functions,

even for the purpose of assessing whether the service provider is involved in a related business.

2. Section 2.2 should be amended to require the information currently contemplated only if relevant. Section 2.2 (a) would require service providers to provide a list of associates which would be irrelevant.
3. Section 2.5 – APIA seeks an explanation as to the rationale for this requirement, particularly given the requirement in Rule 33 of the NGR that details of new and varied associate contracts must be provided to the AER.
4. Section 3.3 (incorrectly marked as 3.2 Confidentiality) requires a service provider to provide the AER with any relevant policy or procedure for handling confidential information. The AER, in the absence of evidence of non compliance with the ringfencing and confidentiality obligations under the Gas Code, should not require a service provider to provide positive confirmation of arrangements in place to ensure that it will comply with a statutory obligation.
5. Sections 2.3b) and d) – APIA seeks further explanation as to how this would operate in consolidated group accounting structures and/or structures with a deed of cross guarantee.
6. Given the initial intention of the NGL was to move to a lighter-handed regulatory regime, it is not clear why the information order (or the draft information order) contemplates requiring the statutory declarations at clause 6. This requirement should be removed in favour of a lighter-handed approach, particularly given that the power to require a statutory declaration is discretionary.

Additional Issues

In addition to issues raised in the Draft Guideline, the following issues should also be considered by the AER as part of its process:

1. Whether transmission and distribution should necessarily be covered by the same order as they can be very different activities.
2. How the reporting for year 2008-9 will be addressed. Given the guideline is undergoing a consultation and finalisation process throughout 2008-9, it is possible that reporting for 2008-9 may be compromised as the parameters of the reporting are not certain and, consequently, data is not collected.
3. APIA submits that the AER must consider the additional cost of compliance with the order relative to the costs involved in the processes followed under the Gas Code.

Summary

In light of the above comments, APIA proposes the following:

1. The AER should give consideration to alternative, less intrusive, forms of compliance reporting such as:
 - a. conducting periodic enquiries directed at specific obligations under the NGL and NGR; and
 - b. requiring service providers to report by exception on their compliance with obligations under the NGL and NGR.
2. In the event of there being complaints or other valid concerns, the AER has discretion to seek further information or introduce a stricter form of compliance reporting.
3. APIA recognises that light regulation requires additional reporting requirements and does not oppose these being sought.

APIA's members would appreciate the opportunity to meet with AER staff to progress the issues raised in this submission.