



29 February 2008

Manager, MCE Secretariat
Dept of Resources, Energy and Tourism
GPO Box 1564
CANBERRA ACT 2601

Dear Sir

Re: Rules Provisions to empower a Gas Bulletin Board

As requested by MCE Energy Market Reform Bulletin Number 113, the Australian Pipeline Industry Association (APIA) provided the attached submission to VENCORP. However, we are also writing to you as there are a number of matters in the Rules and the Law that extend the application of the Gas Market Leaders Group Final Report on the Bulletin Board beyond the policy matters recommended by the GMLG and endorsed by the MCE.

These are matters not raised in the Final Report and are key matters of regulatory principle and design which require consideration by the MCE SCO, and possibly the MCE itself.

In particular, we are concerned about the design of the Rules in relation to Bulletin Board Operator's functions and responsibilities in regard to:

- the Registration of participants,
- the creation and amendment of Procedures with limited oversight; and
- cost control.

This submission addresses these points, many of which were addressed more broadly in APIA's 19 February 2008 submission, on the Exposure Draft of the National Gas Law to empower a Bulletin Board, which is attached at Appendix A.

Feel free to contact me to discuss APIA's submissions to this process.

A handwritten signature in black ink, appearing to read 'Cheryl Cartwright'.

Cheryl Cartwright
Chief Executive

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29 February 2008

Mr. John Savage
By email : John.savage@vencorp.com.au

Dear John

Rules Provisions to empower a Gas Bulletin Board

Introduction

As sought by the MCE Energy Market Reform Bulletin Number 113, the Australian Pipeline Industry Association (APIA) provides the following written submission on the Draft Bulletin Board Rules.

In general APIA believes that the Rules faithfully reflect the Final Report by the Gas Market Leaders Group. However, there are a number of items in the Rules that were not considered in the Final Report and go to matters of appropriate regulatory principle and design in relation to the functions of the Bulletin Board Operator. In particular, we are concerned about Bulletin Board Operator's functions in regard to:

- the Registration of participants,
- the creation and amendment of Procedures with limited oversight; and
- incurring costs on behalf of others.

The first two matters were raised in APIA's 19 February 2008 submission on the "Exposure Draft of the National Gas Law to empower a Bulletin Board" (attached at Appendix A). The third issue is a related matter that is not addressed in the NGL. Overall the draft Rules propose that the Bulletin Board Operator take on decision-making roles that are:

- unnecessary,
- inappropriate to the role of a Bulletin Board Operator; and /or
- roles for which the Rules provide minimal guidance or constraint.

Both Appendix A and this submission should be read together when considering this issue.

This submission consists of two parts, firstly comments on major issues and secondly comments on other relevant items which are sufficiently important to consider in drafting final Rules.

Part A – Matters of Regulatory Principle and Design

Function of the BB Operator

As set out in APIA's submission¹ on the NGL provisions, the draft Rules include functions for the BB Operator that go beyond those envisaged in the GMLG Final Report and beyond the functions and powers provided for in the Law.

¹ Australian Pipeline Industry Association response to the Exposure Draft of the National Gas Law and Rule Provisions to empower the Bulletin Board, APIA submission to MCE, 19 February 2008

1. Registration Function (Rules 8 – 16)

Requirement to Register and Applications for Registration

APIA believes the Registration requirements in Rule 8 are appropriate and deal with registration and revocation of registration. However, Rule 9 contains a number of elements that are unnecessary. There is no need for the BB Operator to close off the possibility of registration if information is not provided within what is a very limited time frame. There is no need for such a timeframe closing off registration at all. The BB Operator should simply not register an applicant where insufficient information has been provided to support the registration.

Applications for Exemptions and Appeals (Rules 10 to 16)

Decisions to exempt assets from the BB and declare which assets are BB Participants are both unnecessary and inappropriate as a matter of regulatory principle and design.

The criteria in the Rules, defining which parties are BB participants, should simply be matters of fact and require no discretion. The Rules are clear, except for the matter of aggregation of small producer sites in a region. In APIA's view this can be easily resolved by derivation of appropriate criteria in the Rules. There should not be an option for the BB Operator to, in effect, take on the role of a regulator by exercising a discretion to impose on a party an obligation to provide information.

The role of regulator for the energy market has already been determined by COAG and the MCE to be the AER. Expanding the BB Operator's role to include regulatory decisions, or similar decisions requiring the exercise of discretion, is simply inappropriate.

To address this issue Rules 10 to 16 should be deleted (Refer to APIA's submission on the Law).

2. Bulletin Board Procedures

As identified in APIA's 19 February submission (page 2) the inclusion in the Rules of a role for the BB Operator to amend the BB Procedures is inconsistent with the NGL and represents inappropriate regulatory design. In order to reflect the NGL and sound regulatory design principles the BB Procedures should be included as part of the Rules and amended where necessary by the AEMC.

This inclusion of an expanded role for the BB Operator was not canvassed as part of the public Bulletin Board consultation. Should this proceed in the way presently set out in the Rules, APIA will be seeking discussions with the MCE and the proposed BB Operator as a matter of priority before a final decision is reached.

It should be noted that Pipeline entities are a large contributor to the information flow for the Bulletin Board and APIA is concerned that should there be amendments to Bulletin Board procedures by the BB Operator, Pipeline entities could incur unreasonable system costs and be locked into unreasonable administrative practices. This is particularly so as Pipelines are unlikely to be the beneficiaries of the Bulletin Board.

An example of this point is the method of delivery of information. It was agreed by the Bulletin Board Working Group that a low cost method (ie CSV files) would be used to provide the Operator with information. The Operator should not be in a position to "upgrade" the method of delivery when such an upgrade would require Pipelines to upgrade IT systems to accommodate the change for no compensation or allowance for pass through of costs.

3. BB Operator incurred costs

There is no requirement for the BB Operator to only incur costs which are prudent and efficient. Regulated market participants that provide monopoly services are required to only incur costs which are prudent and efficient. However, in the BB situation, participants are obliged to pay the costs of the service provided by the BB. It is therefore essential that there

is a commensurate obligation and discipline on the BB Operator, to only incur costs which are prudent and efficient, as the BB Operator is not only a monopoly service provider, but also the provider of a service that some participants are required to pay for.

APIA further submits that in addition to the principle that only prudent and efficient costs should be incurred by the Operator, these should be the only costs that the BB Operator can recover from participants.

In addition, there is no clear process for ensuring that costs are only incurred in relation to matters that are relevant to the function of the Bulletin Board, and where the BB Operator is a body which performs other functions there should be a degree of scrutiny, via an audit, to ensure that only costs relevant to the Bulletin Board are being charged to Bulletin Board participants.

Part B - General Drafting matters

Definitions

“BB Pipeline (b), BB Production Facility, BB Shipper and BB Storage facility should all now reference to the Law rather than the Rules.

“gas storage facility” should include mention of the fact that gas is withdrawn into the facility as well as injected from the facility.

“nominations” should be “means *natural gas* quantities nominated by shippers to the pipeline operator to be delivered by the *BB Pipeline*”

“non-material” - to the extent that the Operator may have a role in amending the Procedures, non-material does not need to be defined and should be interpreted within the context in which it is found.

Rules 2 – 4

APIA has argued (see Appendix A) that Rules 2 to 4 are more appropriate to be included in the Law than the Rules as they are matters that should not be able to be changed by a Rule change process. Placing these sections in the Law affects drafting and cross referencing.

Rule 8

The Operator should not only operate the Bulletin Board in accordance with the BB Procedures, but also the Law and the Rules. This is not clear from the Rules.

Provision of Information (Division 5)

There should be clarity about what occurs if information is not available or cannot be communicated where there is a reasonable explanation (eg loss of SCADA, IT failure and electrical blackout).

In *force majeure* situations or similar situations a rule should apply so that participants are made aware that the Bulletin Board has not been updated due to a physical failing.

Peak day demand information (Rule 39)

It is anticipated that the Operator will make a forecasts of peak day data, and with this in mind there needs to be clear criteria set out for deriving this forecast and clear Rules and or Procedures should be established regarding reliance on the forecast and accountability for the forecast.

Emergency Information (Rule 40)

As currently drafted the BB Operator or Jurisdictions provide information to this page. The data elements of this page are controlled under the Procedures. As noted above, the Procedures can currently be changed quite freely. This raises concerns about the both the establishment of systems to provide information and the appropriateness of the information that may be sought.

The BB operator or Jurisdiction must take legal responsibility for the validity and accuracy of information to be published under this Division

Criteria for Exemption Rules Rule 10(5)

APIA has sought Rules 10 to 16 be removed. However if these Rules are to remain the criteria for exemption should be widened to include pipelines which although they have a nameplate rating of above 20 TJ a day, have not supplied above 20 TJ a day in the previous 2 years. This avoids unnecessary reporting and administration for pipelines which are effectively not used or are otherwise underutilised. Similar criteria could apply to production facilities.

Expert Review (Rule 16)

APIA has sought Rules 10 to 16 be removed. However if these Rules are to remain, 5 business days in Rule 16 to lodge an objection notice is too short and should be increased to 10 business days.

Feel free to contact me to discuss APIA's submissions to this process.

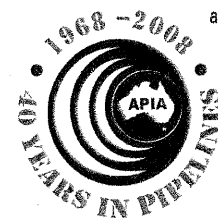


Cheryl Cartwright
Chief Executive

Cc: MCE Secretariat
Att: Appendix A.

Appendix A

**Australian Pipeline Industry response to the Exposure Draft of
the National Gas Law and Rule Provisions to empower a
Bulletin Board**



19 February 2008

Manager, MCE Secretariat
Dept of Resources, Tourism and Energy
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Australian Pipeline Industry Association response to the Exposure Draft of National Gas Law and Rule Provisions to empower a Bulletin Board

With regard to the above Exposure Draft, the Australian Pipeline Industry Association (APIA) makes the following points:

1. Appropriate functions and powers for the Bulletin Board Operator

APIA is concerned about the broad powers provided to, and the lack of oversight of, the Bulletin Board (BB) Operator. Under the Law and Rules as currently drafted there is reason for concern that the Operator may become a *de facto* regulator and rule maker, as well as an Operator. This multiplicity of roles has the potential for conflict and may result in suboptimal rule creation and sub-optimal operation.

APIA notes inconsistencies between the draft Law and Rules in respect of the functions of the Operator. Sections 180 and 181 of the Law identify the substantive powers and functions of the BB Operator. However, the functions of the BB Operator included in the draft Rules are:

- i) registering participants;
- ii) making decisions about who may and who must be registered as BB participants and who may be exempt and declared a BB participant; and
- iii) the content of BB procedures.

These are not identified in section 180. While it may be argued that section 180(f) provides for additional functions to be conferred on the BB Operator, the additional functions arising from the application of 180(f) contained in the Rules should be consistent with those functions in 180(a) – (e) and not substantive new functions such as those identified above.

Importantly, Item 33 of Schedule 1 makes it clear that such matters are to be matters of Rules because it provides that the AEMC may make Rules about "Principles to be applied, and procedures to be followed, by the Bulletin Board Operator in exercising a power of function in relation to the Bulletin Board".

It is clear from this that the NGL provisions for the Bulletin Board do not contemplate the functions and powers contained in the NGR.

Registration Function

In respect of the registration function, APIA submits that the legislative design for the NGL and the NGR provisions need amendment.

APIA accepts that it is necessary and appropriate for the BB Operator to register those who participate in the operation of the Bulletin Board in order for it to function appropriately. This is simply a matter of effective administration of its role. However, the function of deciding who may be registered, who must register, who may be declared a mandatory BB participant and who may be exempted is both unnecessary and inappropriate.

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In the first instance the decisions about these matters can, or should be, simple and clear. That is, the entity concerned will either meet or not meet the criteria set out in the Rules. This does not require a formal decision to be made by the BB Operator effectively approving or otherwise when registration should occur and when it should not. When a registration application occurs it should be accepted, unless as a matter of fact the applicant does not qualify. If the BB Operator is aware that there is an entity which meets the criteria of a compulsory BB participant that has not registered, it can advise them that they need to register. Exemption should not be required as the person will either meet the criteria or not.

The current approach of conferring these additional functions on the BB Operator implies that discretion needs to be applied when, in fact, no discretion is required. Moreover it is inappropriate, for the BB Operator as the operator of an information-provision application, to be given a regulatory function of exercising such discretion.

APIA submits that to correct this inappropriate legislative design, section 180 of the Law should include an additional function of registration of participants, and the functions of exemption and declaration of BB participants (Rules 10 -14) should be removed from the draft NGR. In addition, the registration process (Rules 8 and 9) should be simplified to:

- require BB participants to register if the compulsory BB participant criteria are met;
- for the BB Operator to register applicants that meet the criteria; and
- for the BB Operator to not register applicants that don't meet the criteria.

Bulletin Board procedures function

In respect of the registration function, APIA submits that the legislative design for the NGL and the NGR provisions need amendment.

Clearly there is a need for detailed procedures for operation of the Bulletin Board. These procedures must be adhered to by both the BB Operator and those that provide it with information so that it can function effectively. This is recognised in the NGL where it specifies that Rules may be made about procedures and principles to be used by the BB Operator.

The draft Rules appear not to recognise the intended function of the Rules. That function being to establish or vary procedures to be used by the BB Operator and to determine the principles to be applied in exercising its powers. The fact that the draft NGR delegate procedure-making to the BB Operator and contain no principles about exercise of this (and any other) function is a major shortcoming of the Rules as proposed. It is appropriate that the NGL does not contemplate the BB Operator establishing and varying procedures. This would effectively be delegation of rulemaking to the BB Operator, which would violate the accepted principles of the hierarchy of legislation. APIA submits that this principle be maintained and that the NGR be amended to both include principles for the BB Operator and to establish the BB procedures to be followed by the BB operator and BB information providers.

Even if the NGL was to confer on the BB Operator a function of developing and varying procedures (which APIA maintains would be inappropriate) the Rules fail in the following respects:

- they do not provide guidance about what the procedures may be about;
- they do not include principles or criteria for determining the content of the procedures, and, in fact, give unilateral decision-making power to the BB operator;
- they do not provide for a process for varying the procedures; and
- they do not provide a simple and effective mechanism for review of unreasonable or inappropriate decisions about the content of the BB procedures.

APIA understands that the BB Operator will be the appropriate party to make procedural and administrative decisions about practical operation of the Bulletin Board.

However, APIA proposes that the Rules be amended to remove the provisions for the BB Operator to vary the BB procedures and that the BB procedures be included in the Rules.

This would ensure that the BB Operator is not burdened with regulatory decision-making or rule-making accountabilities.

An alternative which compromises this principle, but ensures that the BB Operator's role in procedure-making is clearly defined and understood, would be for the NGL to specify procedure-making as one of its functions and the NGR to include provisions that specify:

- the scope of the procedures;
- the principles and criteria for making and varying the procedures;
- the full process for making/varying the procedures; and
- a simple and effective review mechanism.

This issue of Operator powers is of particular importance to pipeline companies as they are a key information provider to the Operator, with higher levels of responsibility, Bulletin Board related cost and Bulletin Board prominence than wholesalers, retailers, generators and major users. Under the draft Law, as it stands, pipeline companies may be subject to unnecessary regulatory intrusion and costs through the activities of an unchecked Operator who is provided with a range of powers, producing a *de facto* rule maker and regulator.

Further, at the recent consultation forums, a draft Bulletin Board presentation indicated that the Operator will more prominently highlight pipeline information collected, even though it will also collect similar information from producers and storage operators. This increases pipeline companies' concerns that the Operator will use procedures to develop and implement *de facto* policy not contemplated in the Law or Rules.

While APIA will be commenting on the Rules in due course, we seek that the discretionary powers of the Operator be more tightly directed under the Law, and governance and procedural change provisions be tightened.

2. Liability

APIA has been actively involved in the Gas Market Leaders Group process and was under the impression that the GMLG had accepted that the Bulletin Board proceed on a "no-liability" basis. This is an important point, as information that is collected will be readily broadcast.

Currently, pipeline information is maintained internally.

Further, Bulletin Board pipelines will have to forward forecast nominations for customers. The pipeline companies' experience is that such forward nominations are often inaccurate. As this information is provided by the customers, the pipeline companies should not be held responsible for its accuracy.

With these points in mind, we remain extremely concerned regarding terms used in the draft Law, such as, "material particular", "knows is false or misleading" and "negligence".

In particular

- the reference to false information in section 186 should be clarified. Pipeliners are required to aggregate and pass through wholesaler nominations to the Operator. The pipeliner should not be liable for any third-party information error or inaccuracy if they are performing routine addition of information supplied. The pipeliner should not be required to verify or interrogate information produced by shippers. To the extent any information is false or misleading, the liability should pass to the entity which produced the information, not the pipeliner who aggregates the information.
- the reference to negligence in Section 187 should either be removed or amended to gross negligence only. As the Law stands, an innocent error could be viewed as negligence. There should be a clear distinction between genuine errors and bad faith and knowingly providing false and misleading information, which is tantamount to fraud and deception.

APIA proposes the following alternative wording for sections 186 and 187:

Section 186

A person must not give Bulletin Board information to the Bulletin Board operator that the person knows is false or misleading in a material particular, but will not be liable for information provided by third parties and only collated by the person who provides information to the Bulletin Board operator.

Section 187

(1) A person who gives Bulletin Board information to the Bulletin Board operator does not incur any civil monetary liability for an act or omission in giving that information unless the act or omission is done or made in bad faith or through gross negligence.

(2) The civil monetary liability for an act or omission of a kind referred to in subsection (1) may not exceed the prescribed maximum amount.

3. General Drafting Issues

In addition to the major issues raised above APIA makes the following points.

Definitions

"Producers"

- Removal from 128(4) would be the wrong action as it is relevant to Part 4.1 of the NGL.
- This definition in the Bulletin Board Chapter should be moved into Part 4.1 of the NGL.

"uncovered Pipeline user"

- (b) of the definition seems incorrect as it includes users that have an access right under an access determination.
- As an access determination can only apply to a covered pipeline, b) should be deleted.

Section 2 – 4

Sections 2 to 4 of the Rules are properly Law provisions rather than Rules provisions.

As noted previously, APIA is concerned about the broad powers of the operator and the lack of oversight of the operator.

Section 181 of the draft Law should be amended to ensure the Operator only acts to meet the Rules and the Operator does not seek to create additional procedures which have the effect of being Rules. Possible wording to address this issue is:

Section 181

*The Bulletin Board operator has the power to take all procedural steps necessary **and** convenient to be done for or in connection with the performance of its functions, consistent with, and within the scope of, the Law and the Rules.*

Failing this, APIA urges that the oversight of the Operator be increased or appeal provisions in relation to Operator activities be introduced or strengthened.

Section 186 – 189

Under some access arrangements, the relevant queuing policy will require an access request be submitted for the provision of the Bulletin Board information.

There needs to be clarity on the operation of an access arrangement with Bulletin Board rules.

Section 189

"Rendering services to the Bulletin Board operator" could be open to an interpretation that the term includes pipelines who provide information to the Operator. Under this interpretation a pipeliner could then be prevented from using that information other than in accordance with the provisions of section 189.

Pipelines are providing information they use in the normal course of business and should not be prevented by Rule confidentiality provisions from using that information in order to undertake their normal business.

APIA seeks that this issue be addressed by including wording noting that, for the avoidance of doubt, a pipeliner or producer who is providing information to the Bulletin Board operator is not "rendering a service" under the Law.

Conclusion

APIA has strong concerns about the broad powers provided to the Operator, and the lack of oversight of the Operator, under the Law and Rules as currently drafted. APIA considers that the Operator could become a *de facto* regulator and rule maker, as well as an Operator. This multiplicity of roles has the potential for conflict and may result in sub-optimal rule creation and operations.

In addition, APIA is also concerned that the current liability provisions do not adequately protect information providers, such as pipeline companies.

While APIA will be commenting on the Rules in due course, we seek that the discretionary powers of the Operator be more tightly directed under the Law, and governance and procedural change provisions be tightened.

Yours sincerely



Cheryl Cartwright
Chief Executive