



19 February 2008

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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