

Legislative Council—No 204

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South Australia

**National Gas (South Australia) (Pipelines
Access—Arbitration) Amendment Bill 2017**

A BILL FOR

An Act to amend the *National Gas (South Australia) Act 2008*.

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The Parliament of South Australia enacts as follows:

Part 1—Preliminary

1—Short title

This Act may be cited as the *National Gas (South Australia) (Pipelines Access—Arbitration) Amendment Act 2017*.

2—Commencement

This Act will come into operation on a day to be fixed by proclamation.

3—Amendment provisions

In this Act, a provision in Part 2 amends the *National Gas Law* set out in the Schedule to the *National Gas (South Australia) Act 2008*.

Part 2—Amendment of *National Gas (South Australia) Act 2008*

4—Insertion of section 83A

Before section 84 insert:

83A—Special information and transparency requirements relating to non-scheme pipelines

- 15 (1) In this section—
non-scheme pipeline means—
- (a) a transmission pipeline that is not a scheme pipeline; and
 - (b) a distribution pipeline that is not a scheme pipeline.
- 20 (2) Without limiting any other provision, the Rules may provide for such things as—
- (a) the collection, disclosure, verification, management and publication of information in relation to services that may be provided by a non-scheme pipeline; and
 - (b) without limiting paragraph (a), requirements about the
25 information that must be provided by service providers in relation to access (or potential access) to services provided by means of any non-scheme pipeline, including information about—
 - 30 (i) the terms and conditions on which the service provider is prepared to make a non-scheme pipeline available for use by others; and
 - (ii) the procedures that the service provider will apply in determining a proposal for access to a non-scheme pipeline; and

- 5
- (iii) relevant prices, costs and methodologies associated with gaining access to (and using) a non-scheme pipeline and relevant or related services; and
- (iv) access contracts and arrangements used (or required to be used) by the service provider; and
- (c) without limiting paragraphs (a) and (b), information to be provided by a service provider in response to a request for access to services provided by means of a non-scheme pipeline; and
- 10 (d) requirements to ensure that information is accurate and complete; and
- (e) requirements that relate to any matter that is contemplated by Chapter 4 Part 2 (as if a reference to a covered pipeline service provider in that Part were a reference to a service provider in relation to a non-scheme pipeline and subject to any modifications made by the Rules and subject to such other necessary alterations and modifications so as to apply those requirements in relation to non-scheme pipelines); and
- 15
- (f) the imposition or recovery of costs associated with any matter referred to in a preceding paragraph or otherwise associated with facilitating access (or potential access) to services provided by means of a non-scheme pipeline.
- 20
- (3) Nothing in subsection (2) limits any power to grant an exemption from complying with a provision, or part of a provision, of the Rules.
- 25 (4) A reference in subsection (2) with respect to gaining access (or potential access) to services provided by means of a non-scheme pipeline includes a reference to services that will require an extension to, or expansion of the capacity of, a non-scheme pipeline.

5—Substitution of heading to Chapter 6

Heading to Chapter 6—delete the heading and substitute:

Chapter 6—Access disputes—scheme pipelines

6—Insertion of Chapter 6A

5 After section 216 insert:

Chapter 6A—Access disputes—non-scheme pipelines

Part 1—Interpretation and application

216A—Definitions

10 In this Chapter—

access determination means a determination of an arbitrator under Part 3 and includes a variation under Part 5;

15 *access dispute* means a dispute between a user or prospective user and a service provider about 1 or more aspects of access to a pipeline service provided by means of a non-scheme pipeline (subject to the operation of section 216C(2));

dispute hearing means a hearing conducted by an arbitrator under this Chapter for the purpose of making an access determination;

20 *distribution pipeline* means a pipeline that is classified in accordance with this Law or the Rules as a distribution pipeline and includes any extension to, or expansion of the capacity of, such a pipeline that, by operation of an access arrangement or access determination, is to be treated as part of the pipeline;

25 *non-scheme pipeline* means a pipeline to which this Chapter applies by operation of section 216C;

party, in relation to an access dispute, has the meaning given by section 216I;

prospective user has the meaning given by section 216B;

scheme administrator means the AER;

30 *transmission pipeline* means a pipeline that is classified in accordance with this Law or the Rules as a transmission pipeline and includes any extension to, or expansion of the capacity of, such a pipeline that, by operation of an access arrangement or access determination, is to be treated as part of the pipeline;

35 *user* means a person who—

- (a) is a party to a contract with a service provider under which the service provider provides or intends to provide a pipeline service to that person by means of a non-scheme pipeline; or

- (b) has a right under an access determination to be provided with a pipeline service by means of a non-scheme pipeline.

216B—Meaning of prospective user

- (1) For the purposes of this Chapter, a prospective user is a person who seeks or wishes to be provided with a pipeline service by means of a non-scheme pipeline.
- (2) To avoid doubt, a user is also a prospective user for the purposes of this Chapter if the user seeks or wishes to be provided with a pipeline service by means of a non-scheme pipeline other than a pipeline service already provided to them under—
 - (a) a contract; or
 - (b) an access determination.
- (3) Subsection (2)(b) does not limit the operation of Part 5.

216C—Application of Chapter

- (1) Subject to subsection (2), this Chapter applies to and in relation to—
 - (a) a transmission pipeline that is not a scheme pipeline; and
 - (b) a distribution pipeline that is not a scheme pipeline.
- (2) This Chapter does not apply to or in relation to—
 - (a) a pipeline, or part of a pipeline, excluded from the operation of this Chapter by the Rules; or
 - (b) a pipeline within a class or group of pipelines excluded from the operation of this Chapter by the Rules; or
 - (c) a pipeline service (including in relation to a specific pipeline, or part of a specific pipeline) excluded from the operation of this Chapter by the Rules.

216D—Application of this Chapter to disputes arising under Rules

The provisions of this Chapter applicable to the determination of an access dispute apply, subject to such modifications as may be prescribed by the Rules, to the determination of any dispute arising under any provision of the Rules specified in the Rules for the purposes of this section.

216E—Chapter does not limit how disputes about access may be raised or dealt with

This Chapter is not to be taken to limit how a dispute about access to a pipeline service may be raised or dealt with.

Part 2—Negotiation of access

216F—Access proposals

5 The Rules may contain provisions for or with respect to seeking access to a pipeline service provided or to be provided by means of a non-scheme pipeline (or by part of a non-scheme pipeline or by an extension to, or expansion of the capacity of, a non-scheme pipeline).

216G—Duty to negotiate in good faith

10 A prospective user or user seeking access to a pipeline service provided or to be provided by means of a non-scheme pipeline (or by part of a non-scheme pipeline or by an extension to, or expansion of the capacity of, a non-scheme pipeline), and the service provider for the relevant non-scheme pipeline, must negotiate in good faith with each other about whether access can be granted and, if so, the terms and conditions for the provision of access to the prospective user or user (as the case requires).

216H—Notification of access dispute

- 20 (1) Subject to this section, if a prospective user or user (as the case requires) and a service provider cannot agree about 1 or more aspects of access to a pipeline service after a request has been made in accordance with the Rules, the prospective user or user, or the service provider, may notify the scheme administrator, in writing, that an access dispute exists.
- 25 (2) A notification must include, in accordance with the Rules, information about—
- (a) the matters (if any) on which agreement has been reached; and
 - (b) the matters that are in dispute; and
 - (c) any other matter specified by the Rules.
- 30 (3) A notification must be accompanied by the fee set by the Rules (if any).
- (4) A notification cannot be made under this section if the access dispute relates to a matter excluded from arbitration under this Chapter by the Rules.

216I—Parties to an access dispute

35 The parties to an access dispute are—

- (a) the parties to the negotiations that gave rise to the access dispute under section 216H(1); and
 - (b) if the scheme administrator is of the opinion that the resolution of the access dispute may involve requiring another person to do something and that it is appropriate that the person be joined as a party—that other person.
- 40

Part 3—Reference of dispute to arbitration

216J—Reference of dispute

- (1) If the scheme administrator receives notification of an access dispute under Part 2, the dispute must be referred to arbitration.
- 5 (2) The scheme administrator must give notice of the referral of an access dispute to arbitration to the parties to the negotiations that gave rise to the access dispute and, if relevant, to any other person who will be a party to the access dispute.

216K—Selection of arbitrator

- 10 (1) The parties to an access dispute may agree to appoint, in accordance with the Rules, the arbitrator for the purposes of an access dispute that is to be referred to arbitration under this Part.
- (2) If the parties do not agree to the appointment of an arbitrator within a period specified by the Rules, the arbitrator will be a person selected by the scheme administrator after consultation with the parties to the access dispute.
- 15 (3) The arbitrator must be a person who—
- (a) is independent of the parties to the dispute; and
 - (b) is properly qualified to act in the resolution of the dispute; and
 - 20 (c) has no direct or indirect interest in the outcome of the dispute.
- (4) If for some reason an arbitrator does not complete an arbitration, the parties may agree, in accordance with the Rules, to make a fresh appointment and, in default of agreement within a period specified by the Rules, the scheme administrator may, after consultation with the parties, make the appointment.
- 25

216L—Determination of access dispute

- 30 (1) Unless an arbitration is terminated under another provision of this Chapter, the arbitrator must make a determination on access by the prospective user or user (as the case requires) (including a determination that does not require a service provider to provide access to any pipeline services).
- 35 (2) A determination may deal with any matter relating to access by the prospective user or user to the pipeline services specified by the Rules for the purposes of this subsection (and the arbitrator must not make a determination that is inconsistent with the Rules or goes beyond the matters specified by the Rules).
- 40 (3) The Rules may also, in connection with the making of an access determination, contain provisions for or with respect to such things as—
- (a) the form of any determination; and

- (b) the content of any determination, including as to the giving of reasons; and
- (c) the time within which a determination must be made; and
- (d) the process for making a determination; and
- (e) when a determination takes effect; and
- (f) the giving of notice of the making of a determination.

216M—Principles to be taken into account

The arbitrator must, when making a determination on access, take into account any pricing or other principle specified in the Rules.

216N—Restrictions on access determinations

- (1) The arbitrator must not make an access determination that would have any of the following effects:
- (a) preventing a user obtaining a sufficient amount of a pipeline service under a contract or previous access determination to be able to meet the user's reasonably anticipated requirements, measured at the time that the access dispute was notified;
- (b) preventing a prospective user or user from obtaining, by the exercise of a pre-notification right, a sufficient amount of a pipeline service to be able to meet the prospective user's or user's actual requirements;
- (c) depriving a person of a relevant protected contractual right.

- (2) In this section—

pre-notification right means a right under a contract, or under an access determination, that was in force at the time when the access dispute was notified under section 216H;

relevant exclusivity right means an express contractual right that—

- (a) prevents a service provider supplying pipeline services to persons who are not parties to the contract; or
- (b) limits or controls a service provider's ability to supply pipeline services to persons who are not parties to the contract,

but does not include a user's contractual right to obtain a certain amount of pipeline services;

relevant protected contractual right means a right under a contract (other than a relevant exclusivity right) that was in force immediately before notification of an access dispute under section 216H.

216O—Arbitrator's power to terminate arbitration

- (1) An arbitrator may determine not to proceed with an arbitration (and terminate the proceedings under this Chapter) if the arbitrator considers that—
- 5 (a) the notification of the dispute was vexatious; or
- (b) the subject matter of the dispute is trivial, misconceived or lacking in substance; or
- (c) the party who notified the access dispute did not negotiate in good faith; or
- 10 (d) there is some other good reason why the arbitration should not proceed.
- (2) Furthermore, the arbitrator may at any time terminate an arbitration without making an access determination if the arbitrator considers that—
- 15 (a) the prospective user or user seeking access is not engaging in the arbitration in good faith; or
- (b) the terms and conditions on which access is to be granted should be governed by an existing contract or determination.
- (3) The arbitrator may also at any time terminate an arbitration if the arbitrator considers that a specified dispute termination circumstance has occurred.
- 20 (4) In subsection (3), a *specified dispute termination circumstance* is a circumstance specified by the Rules as being a circumstance, the occurrence of which, entitles the arbitrator to terminate an access dispute without any further step being taken.
- 25

216P—Access seeker's right to terminate arbitration

- (1) The prospective user or user seeking access to pipelines services under this Chapter may terminate the arbitration before an access determination is made by the arbitrator.
- 30 (2) The arbitration is terminated under this section by giving notice of termination to—
- (a) the arbitrator; and
- (b) the other parties to the arbitration; and
- (c) the scheme administrator.
- 35

Part 4—Compliance with access determinations

216Q—Compliance with access determinations

- (1) Subject to the Rules and to subsection (2), an access determination is enforceable as if it were a contract between the parties to the access determination.

- 5 (2) A prospective user or user of a pipeline service to which an access determination relates is not bound to seek access to the service (but if access is sought or obtained then the prospective user or user (as the case requires) is bound by any relevant provision of the access determination).

Part 5—Variation of access determinations

216R—Variation of access determinations

- 10 (1) An access determination may be varied by agreement between all parties to the access determination.
- (2) The Rules may also contain provisions with respect to seeking variations to an access determination.
- 15 (3) The provisions of this Chapter about the arbitration of an access dispute apply with necessary modifications to a proposal under the Rules to vary an access determination or to a dispute arising out of such a proposal.

Part 6—Hearing procedures

216S—Hearing procedures

Chapter 6 Part 6 applies to an arbitration under this Chapter—

(a) as if—

- 20 (i) a reference in that Part to a dispute hearing were a reference to a hearing conducted by an arbitrator for the purposes of making an access determination under this Chapter; and
- 25 (ii) a reference in that Part to a party or parties were a reference to a party or the parties to an arbitration under this Chapter; and
- (iii) a reference in that Part to the dispute resolution body were a reference to an arbitrator under this Chapter; and
- 30 (iv) a reference in that Part to an access dispute were a reference to an access dispute under this Chapter; and

(b) subject to the exclusion of sections 206 and 207, and subject to any other exclusion prescribed by the Regulations; and

35 (c) subject to any modifications prescribed by the Regulations; and

(d) with such other necessary alterations and modifications.

Part 7—Miscellaneous matters

216T—Correction of access determinations for clerical mistakes etc

5 The Rules may make provision with respect to correcting the following in an access determination:

- 6 (a) a clerical mistake;
- 7 (b) an error arising from an accidental slip or omission;
- 8 (c) a material miscalculation of figures or a material mistake in
9 the description of any person, thing or matter referred to in
10 an access determination;
- 11 (d) a defect in form.

216U—Reservation of capacity during an access dispute

15 A service provider who is in an access dispute with a user must not, without the consent of the user, alter the rights that the user has to use the capacity of the non-scheme pipeline during the period of the dispute.

216V—Costs of arbitration

- 20 (1) Subject to this section, the costs of an arbitration under this Chapter (including costs associated with the arbitration process and the cost of the arbitrator) will be shared equally between the parties to the arbitration.
- 25 (2) The Rules may make provision with respect to the costs of an arbitration under this Chapter, including rules that provide for a different approach to allocating costs under subsection (1) in specified circumstances.
- 30 (3) Costs payable to an arbitrator are a debt due to the arbitrator and may be recovered by the arbitrator in a court of competent jurisdiction.
- (4) Despite anything in a preceding subsection, the parties to an arbitration will bear their own costs.

7—Amendment of section 271—Enforcement of access determinations

Section 271—after subsection (4) insert:

- (5) A reference in this section to an access determination includes a reference to an access determination under Chapter 6A.

8—Insertion of section 294F

After section 294E insert:

294F—South Australian Minister to make initial Rules relating to access to non-scheme pipelines

- 5 (1) The Minister in right of the Crown of South Australia administering Part 2 of the *National Gas (South Australia) Act 2008* of South Australia (the *South Australian Minister*) may make Rules on any 1 or more of the following subjects:
- 10 (a) access proposals, access disputes and arbitrations under Chapter 6A;
- (b) the subject matter of a new head power added to Schedule 1 by the Pipelines Access/Arbitration amendments;
- (c) any other subject contemplated by, or consequential on, the Pipelines Access/Arbitration amendments.
- 15 (2) Rules may only be made under subsection (1) on the recommendation of the MCE.
- (3) Section 74(3) applies to Rules made under subsection (1) in the same way as it applies to Rules made by the AEMC.
- 20 (4) As soon as practicable after making Rules under subsection (1), the South Australian Minister must—
- (a) publish notice of the making of the Rules in the South Australian Government Gazette stating the date of commencement or, if they commence at different times, various dates of commencement; and
- 25 (b) making the Rules publicly available.
- (5) The South Australian Minister may, by a later notice published in the South Australian Government Gazette, vary a commencement date fixed under subsection (4)(a) or this subsection.
- 30 (6) Once the first Rules have been made under subsection (1), no further Rules can be made under that subsection.
- (7) Rules in the nature of a derogation may be made under this section even though no request has been made for the derogation.
- (8) In this section—
- 35 *Pipelines Access/Arbitration amendments* means the amendments made to this Law by the *National Gas (South Australia) (Pipelines Access—Arbitration) Amendment Act 2017*.

9—Amendment of Schedule 1—Subject matter for the National Gas Rules

- (1) Schedule 1, item 37—after "access determinations" insert:
under Chapter 6 or 6A

(2) Schedule 1, item 38—after "access determination" insert:

under Chapter 6 or an arbitrator to make an access determination under Chapter 6A

(3) Schedule 1, item 39—after "access determinations that may be made" insert:

under Chapter 6 or 6A

(4) Schedule 1—after item 48 insert:

48A For the purposes of items 40 to 47 (inclusive)—

- (a) a reference to the dispute resolution body will be taken to include a reference to an arbitrator under Chapter 6A; and
- (b) a reference to an access determination will be taken to include a reference to an access determination under Chapter 6A; and
- (c) a reference to a covered pipeline will be taken to include a reference to a non-scheme pipeline under Chapter 6A.