



7 October 2022

Department of Climate Change, Energy, the Environment and Water
GPO Box 3090
Canberra, ACT 2601

23 Marcus Clarke Street
Canberra ACT 2601
GPO Box 3131
Canberra ACT 2601
tel: (02) 6243 1111
fax: (02) 6243 1199
www.accc.gov.au

By email: gas@industry.gov.au

Extension of AEMO Functions and Powers

Attention: Energy Ministers Secretariat

The ACCC recognises the need for considered policy measures to address issues in the east coast gas market. However, we have material concerns with the breadth and unqualified nature of the proposed extension to AEMO's functions and powers.

As such, we welcome the opportunity to provide a submission to the Department of Climate Change, Energy, the Environment and Water's (the Department) consultation on proposed extension (provided in attachment A).

The ACCC has reported extensively in recent years on the worsening supply outlook for the east coast gas market. We acknowledge the severity of the impacts that may arise from the forecast supply shortfall from 2023 (with supply risks elevated during the peak winter demand season). This worsening supply outlook will mean that AEMO is likely to play an increasingly important role in ensuring a secure, resilient and flexible east coast gas market.

While the ACCC acknowledges the rationale for the new functions and powers, we have concerns about the breadth of those proposed powers, the lack of guidance on how these powers would be exercised, and the absence of methodology for and certainty of the costs of likely intervention and how the costs would be borne.

We encourage Energy Ministers to consider limiting the new functions and powers to those required to address and ameliorate immediate, shorter-term risks to system security and reliability of supply that are unlikely to subside without intervention, arising from unforeseen disruptions in gas supply (such as for example gas processing plant outages).

We submit that measures to address more fundamental structural supply issues arising over the medium to longer term should be developed through a more considered and robust rule and regulation process over a longer period. The process used to develop the 'Reliability and Emergency Reserve Trader (RERT) scheme provides a model for how this process could be undertaken, and a model for the types of measures that we submit should be considered in the medium to longer term with respect to the east coast gas market.

Such a process would allow for a robust evaluation of the costs of such measures, which will ultimately be borne by gas consumers. It would also allow for supply adequacy and reliability standards to be clearly defined, with relevant standards/thresholds informed by a measured cost-benefit analysis.

As to the specific functions and powers provided for in the draft Bill, we are concerned about the proposed breadth of the directions and trading power given the distortionary effects and unintended consequences that these types of regulatory interventions can give rise to. In our view, if such a power is to be provided for it should be an emergency power only, with its use restricted to where there is a short-term threat to system security or the reliability of supply that is unlikely to subside without intervention. This is akin to the power that AEMO has in the Declared Wholesale Gas Market and, in our view, would minimise the risks associated with this type of regulatory intervention in the market.

We anticipate that the objective is to transition to the market being able to operate in accordance with usual market forces and competitive dynamics, without regulatory intervention. Such a broad power able to be exercised in any circumstance creates significant uncertainty as to regulatory risk in the market, may impact investment incentives for entry and expansion in the market particularly where the costs of such measures and how they will be calculated and borne is not clear.

In addition to limiting the scope of this power, we encourage consideration of appropriate governance and accountability measures. These would include a requirement to seek the lowest cost solution when deciding on a direction to issue to a market participant, as well as a requirement for intervention reports to be published whenever a direction is made to market participants.

The ACCC strongly supports the proposed 'transparency' functions to allow AEMO to better monitor the east coast gas market, which will allow threats to system security (as well as broader supply issues) to be more readily identified. In principle, these transparency requirements should seek to avoid duplication with existing disclosure obligations to minimise additional administrative burden on market participants.

We also support the proposal for AEMO to identify and communicate threats to system security to the market.

However, we have concerns about the potential risks associated with the proposed Gas Supply Adequacy and Reliability Conferences, which are anticipated to occur amongst small groups of market participants, confidentially without transparency and may result in arrangements being put in place which could have unintended consequences and which may facilitate broader coordinated conduct between market participants.

Entering into these types of arrangements without Authorisation also risks breaking the restrictive trade practices provisions in Part IV of the *Competition and Consumer Act 2010* (CCA) if they amount to cartel conduct, or have the purpose, effect or likely effect of substantially lessening competition.

We note that ACCC Authorisation is a process for gaining an exemption from Part IV of the CCA. By seeking an exemption, and demonstrating the necessary public benefit and protections to continuing competitive business operations, AEMO and/or parties who participate in the Gas Supply Adequacy and Reliability Conferences may be able to eliminate the risk of legal action associated with their participation.

We also consider that, in principle, information on potential threats should be published and made available to all market participants, including any information discussed at the conferences, to provide transparency and predictability to market participants. Proposed requirements for conference attendees to not disclose confidential information discussed at the conferences would not support this. These types of confidentiality requirements may provide some market participants with information not available to the market as a whole, resulting in an increased risks of insider trading in gas derivatives markets.

On additional cost recovery and compensation functions, there is a potential for significant costs to arise from the exercise of the new proposed functions and powers. These costs will ultimately be borne by gas buyers and consumers. Further detail should therefore be provided on how compensation is to be determined, recovered and paid to parties affected. Distributional impacts on small users should also be considered when apportioning costs.

The ACCC extends an offer to meet with the Department of Climate Change, Energy, the Environment and Water and would welcome the opportunity to assist Energy Ministers to refine the drafting of the proposed Bill to extend AEMO's functions and powers.

Yours sincerely



Anna Brakey
Commissioner
Australian Competition and Consumer Commission

Attachment A – Extension of AEMO Functions and Powers - Stakeholder feedback template

Submission from Australian Competition and Consumer Commission

A. Proposed initial reforms

Number	Question	Reference to section in the draft bill/regulations/rules (if applicable)	Feedback
Overarching functions			
Question number			
1	Do stakeholders have any comments on the scope of AEMO's new reliability and supply adequacy functions and the related rule-making powers as outlined in the draft Bill?		<p>We acknowledge the challenges and wide-ranging impacts likely to result from the forecast supply shortfall from 2023. In our view, the proposed extensions to AEMO's functions and powers are broad, and it is important to ensure that these functions and powers do not:</p> <ul style="list-style-type: none"> • distort either market outcomes or investment incentives • impose unnecessary administrative burden and costs on market participants • give rise to additional risks and uncertainty. <p>The ACCC supports the proposed 'transparency' function, which would enable AEMO to:</p> <ul style="list-style-type: none"> • identify potential threats to system security, supply adequacy and reliability in a more timely manner • convey this information to market participants and policy makers to help facilitate more informed and efficient decision-making across the supply chain and the adoption of market led solutions. <p>However, it would appear that some of the proposed transparency provisions in the draft rules duplicate existing disclosure obligations, are not well targeted and could impose unnecessary administrative burden on some participants, the costs of which would ultimately be borne by consumers. We would therefore suggest that care be taken to ensure that the transparency related obligations are appropriately targeted, fit for purpose and minimise costs to consumers. See our responses to questions 6, 7 and 8 for more detail.</p> <p>In our view, there are merits in the proposed 'signalling' function, but we are concerned about the potential for the Gas supply Adequacy and Reliability Conferences to be used to facilitate signalling or coordinated behaviour by market participants, insider trading and/or other conduct that could adversely affect the market. Competitors participating in these types of conferences also risk breaching parts of the <i>Competition and Consumer Act 2010</i> (CCA). We would therefore suggest further consideration be given to how these conferences are to be conducted and how these risks can be addressed. See our response to question 10 for more detail.</p>

Number	Question	Reference to section in the draft bill/regulations/rules (if applicable)	Feedback
			<p>The ACCC has concerns about the proposed breadth of the directions and trading power given the distortionary effects and unintended consequences that this type of power could give rise to. In our view, if such a power is to be provided for in the NGL/NGR then it should be an emergency power only with its use restricted to where there is a short-term threat to system security or the reliability of supply that is unlikely to subside without intervention (i.e. it should not be used to address structural demand-supply imbalances because other tools would be required to address this issue). This is akin to the power that AEMO has in the DWGM (see rule 343) and, in our view, would minimise the risks associated with this type of regulatory intervention in the market. See our response to question 11 for more detail.</p> <p>Measures to address more fundamental structural supply issues arising over the medium to longer term should be developed through a more considered and robust process over a longer period. The process used to develop the 'Reliability and Emergency Reserve Trader (RERT) scheme provides a model for how this process should be undertaken, and a model for the types of measures that should be considered in the medium to longer term with respect to the east coast gas market.</p> <p>Noting that there has been little time to respond to the draft Bill, the ACCC would welcome the opportunity to discuss these comments and how they may be taken forward. We note that while the objective is to reach agreement on the proposed law changes on 28 October 2022 that further time is available for discussion of the draft rules (intended to be resolved by the December Ministers' meeting).</p>
2	Does the definition of east coast gas system exclude anything that should come within scope of the new function?		n.a.
3	Do stakeholders consider any additional requirements should be specified in the rules in relation to the manner in which AEMO exercises its functions?		<p>To provide market participants with the guidance they require in relation to the proposed new functions, either the NGL or the NGR should:</p> <ul style="list-style-type: none"> clearly define what is meant by supply adequacy and reliability with relevant standards/thresholds informed by a measured cost-benefit analysis. specify the circumstances in which AEMO can use the new 'signalling', 'directions and trading' powers (noting that there appears to be an assumption that there is a hierarchy for these new powers, but this is not reflected in either the draft Bill or the draft rules)¹ establish the thresholds for supply inadequacy and reliability threats that may lead AEMO either to:

¹ For example, the consultation paper notes that if the market cannot resolve a threat, the reforms ensure AEMO has the ability to intervene by issuing directions or trading in gas to the extent necessary to address the threat. However, this is not reflected in the draft Bill or the draft Rules. It is possible therefore that AEMO could decide to trade gas or issue directions without having sought a market response.

Number	Question	Reference to section in the draft bill/regulations/rules (if applicable)	Feedback
			<ul style="list-style-type: none"> – signal a supply adequacy or reliability threat or risk; or – intervene in the market by issuing directions or trading in gas or gas services. • require the least cost solution to be chosen when an intervention occurs • provide for more accountability and transparency in relation to the use of the new powers and any interventions it undertakes in the market.
4	Do stakeholders consider that AEMO should develop any specific procedures or guidelines for its new functions?		<p>In our view, the NGL and NGR are the most appropriate tools to use to set out how AEMO is to exercise its functions, with procedures and guidelines being left to address any technical details that are not appropriately dealt with in the NGL or NGR (e.g. the timing of submissions of information under the transparency rules). This is particularly the case for the types of powers that are being contemplated in the draft Bill. Put simply, we don't consider it appropriate for the scope of powers to be set out in procedures. Rather, this should be set out clearly in either the NGL or NGR.</p> <p>From an accountability perspective, the rules should require the market to be informed of any directions issued to market participants and why the direction was made. This could be achieved by requiring AEMO to publish an intervention report (similar to what is required under Part 19 of the NGR), which could also set out AEMO's assessment of the relevant costs and benefits arising from any market intervention it has undertaken.</p>
5	Do you think a review of this regulatory package after three years is appropriate?		On the understanding that a RIS is not being undertaken for this package, we consider it appropriate for the regulatory package to be reviewed after three years and subject to a post implementation RIS.
Transparency – Regarding the proposed additional information requirements set out in Table 1 of the consultation paper:			
6	Do the proposed additional reporting requirements provide sufficient daily and monthly information to enable AEMO to monitor and signal potential threats to east coast gas system adequacy over a sufficient forecast period?		<p>Based on our review of the draft rules in Part 27 it would appear that there are some gaps in the information that would be required to monitor and signal potential threats to supply adequacy. For example, under the draft rules:</p> <ul style="list-style-type: none"> • BB reporting entities would be required to report on the proportion of gas they expect to purchase from a STTM or gas exchange, but not the DWGM • Gas powered generators, retailers and BB large user facilities would have to report on average demand, but not on peak demand, which is more likely to affect an assessment of supply adequacy and reliability.
7	Do stakeholders have any comments about the proposed additional information reporting and disclosure arrangements, and		<p>It would appear from our review of the draft rules in Part 27 that some of the proposed transparency requirements may:</p> <ul style="list-style-type: none"> • duplicate existing disclosure obligations, which will give rise to unnecessary costs that will ultimately be passed through to consumers

Number	Question	Reference to section in the draft bill/regulations/rules (if applicable)	Feedback
	related transitional timeframes?		<ul style="list-style-type: none"> • not be well targeted and may result in either AEMO being unable to obtain the information it requires, or obligations being imposed on parties that are unable to comply with the requirements. For instance, it would appear that: <ul style="list-style-type: none"> • There is some duplication in the following reporting obligations: <ul style="list-style-type: none"> – draft rules 684 and 686 appear to overlap (i.e. because gas powered generators are also BB large user facilities) – the requirement for BB reporting entities under draft rule 687 to report on uncontracted capacity would appear to overlap with the requirement in Part 18 of the NGR for these entities to publish a 36-month outlook of uncontracted capacity – draft rules 686 and 688 appear to overlap (i.e. because a BB large user facility is also a natural gas industry facility).² • The following reporting obligations are not well targeted and may need to be clarified: <ul style="list-style-type: none"> – Draft rule 687 requires BB reporting entities to provide a range of information, but it is possible that some BB reporting entities will be unable to provide this information because this term is defined in Part 18 to include allocation agents, parties to BB capacity transactions, gas field owners and facility developers. It may therefore be better to use the term BB facility rather than BB reporting entity. – Draft rule 689 requires the owner, operator or controller of an LNG facility to provide a range of information, but depending on how an LNG project has structured its operations, it is possible that entity responsible for selling gas to the domestic market may not be the same entity that owns, operates or controls the LNG facility. This may need to be addressed through the definition of LNG facility.³ This definition may also need to be amended to clarify whether it is intended to capture LNG export facilities, LNG import facilities and/or LNG storage facilities.
8	Should there be any specific limits on who should be captured by disclosure obligations or ways to minimise compliance obligations such as thresholds, reporting party definitions, or links to other		<p>The obligation in draft rule 688 for all natural gas industry facilities to report on maintenance will impose unnecessary costs on small facilities (i.e. facilities with a nameplate capacity less than 10 TJ/day) that are unlikely to influence the market (noting the definition of natural gas industry facility also includes user facilities).</p> <p>To address this, we would suggest restricting this obligation to BB facilities (defined in Part 18 as a BB production facility, a BB pipeline, a BB storage facility, a BB compression facility, a BB large user facility or an LNG processing facility) because to become a BB facility, the facility must have a nameplate</p>

² Note that recent amendments to the NGL have defined natural gas industry as a pipeline, a compression service facility, a gas processing plant, an LNG facility, a storage facility, a user facility.

³ Note that under the new transparency rules, the term 'LNG export facility' is used to refer to the facility for the processing of natural gas to LNG and loading of the LNG onto a ship. It does not therefore necessarily capture the entire LNG project.

Number	Question	Reference to section in the draft bill/regulations/rules (if applicable)	Feedback
	regulatory reporting requirements?		capacity of 10 TJ/day or more. This will provide for a more targeted reporting of maintenance and minimise the reporting burden for market participants.
Transparency – regarding the further more granular information set out in the consultation paper (subject to further consultation in 2023):			
9	What are your views on: a) The categories of information, and are they appropriate for real-time or hourly reporting? b) What is the optimal approach to the collection of the categories of information listed in the interests of minimising costs and ensuring efficient data transfer?		We do not have any specific comments on this question.
Signalling – regarding the signalling framework which aims to provide a practical but flexible approach to allow AEMO to notify market participants of threats to system reliability and supply adequacy:			
10	What are your views on formalising and extending AEMO’s ability to hold Gas Supply Adequacy and Reliability Conferences?		<p>As noted in response to Question 1 above, there is a risk that the proposed Gas supply Adequacy and Reliability Conferences could facilitate signalling or coordinated behaviour by market participants, insider trading and/or other conduct that could adversely affect the market. Depending on what is discussed in these conferences, participants may also risk breaching parts of the <i>Competition and Consumer Act 2010 (CCA)</i> and obligations under other legislative instruments, including the NGL/NGR, NEL/NER and the Corporations Act.</p> <p>Further consideration should therefore be given to:</p> <ul style="list-style-type: none"> • how these conferences are to be conducted, including whether there should be independent oversight (e.g. by the AER or the ACCC) • how the risks outlined above can be ameliorated • whether authorisation should be sought under the CCA. <p>As to the proposal that conference attendees maintain confidentiality, it is worth noting that this could adversely affect the market if it results in attendees having access to market sensitive information that is not available to other market participants. To overcome this issue, the rules should require any information discussed at the conferences to be made publicly available. While this will not fully address</p>

Number	Question	Reference to section in the draft bill/regulations/rules (if applicable)	Feedback
			the potential for signalling by market participants, it will ensure that the conferences do not provide an advantage to a subset of market participants.
Directions Powers – regarding the initial broad powers to be provided to AEMO to take necessary action to manage the risk of gas supply shortfalls in winter 2023:			
11	Are there particular principles which should guide AEMO's expanded powers of direction?		<p>As noted in response to question 1 above, the ACCC has significant concerns with the proposed breadth of the proposed direction and trading power given the distortionary effects and unintended consequences that this type of power could give rise to</p> <p>As we understand s. 91AF of the draft Bill, AEMO would be able to give written directions to a relevant entity to “maintain or improve the reliability of supply” or to “maintain or improve the adequacy of supply”. In our view, this sets too low hurdle for such a significant regulatory intervention and could have a range of distortionary effects on the market. It could, for example, impede the efficient allocation of gas across the market. It could also adversely affect competition in key parts of the supply chain, discourage efficient investment and/or prompt some users to decide to switch away from gas due to the uncertainty associated with this power.</p> <p>We would therefore suggest that if such a power is to be provided for in the NGL then it should be an emergency power only. Specifically, we would suggest that the power only be capable of being exercised where there is a short-term threat to system security or the reliability of supply arising from an unforeseen disruption in gas supply that is unlikely to subside without intervention. The scope of this proposed emergency power is akin to the power AEMO has successfully used in the DWGM to manage supply disruptions and would, in our view, minimise the risks associated with this type of regulatory intervention in the market as outlined above.</p> <p>We would also recommend that further guidance be provided in the NGR on:</p> <ul style="list-style-type: none"> • the circumstances in which AEMO would be able to use this emergency power (i.e. after issues have been signalled to the market and the market has failed to respond) • the types of directions AEMO could make (either reducing demand or increasing supply or a mix of instruments to address actual threats to supply or reliability) • the term over which these directions could apply, which should be limited to the period over which the supply adequacy and/or reliability risk is expected to persist • the matters AEMO should be required to consider before deciding to issue a direction, noting that there may be a range of directions that could be made and that, in principle, the least cost option should be selected. <p>This guidance could be modelled on rule 343, which sets out similar matters regarding AEMO's directions power in the DWGM.</p>

Number	Question	Reference to section in the draft bill/regulations/rules (if applicable)	Feedback
			From a transparency and accountability perspective, the NGR should also require intervention reports to be published if a direction is made (similar to what is required under rule 351) so that the market is informed of any formal directions issued to market participants and why the direction was made.
12	Are there any other approaches that could be undertaken to elicit market responses ahead of directions powers?		See response above.
13	How should AEMO work with stakeholders in giving directions?		We do not have any specific comments on this question.
14	Are there technical matters that should be considered in the issuing of directions powers?		We do not have any specific comments on this question.
15	Are there any entities that should not be subject to directions or certain types of directions?		We do not have any specific comments on this question.
Cost recovery and compensation			
16	Do the proposed changes to the cost recovery framework enable AEMO to appropriately recover costs in relation to its east coast gas market reliability and supply adequacy functions?		We do not have any specific comments on this question.
17	What costs should parties who must comply with directions be able to seek compensation for? (e.g. direct costs, opportunity costs)		We do not have any specific comments on this question.
18	How should the costs of compensation be apportioned		There appears to be potentially significant costs resulting from some of the proposed functions and powers. Either the NGR or AEMO guidelines should provide further details on how it would determine,

Number	Question	Reference to section in the draft bill/regulations/rules (if applicable)	Feedback
	and recovered from the market?		recover and pay compensation to affected parties. Consideration should also be given to distributional impacts on small users when apportioning the costs.
19	Should there be financial limits on individual claims, or on claims overall within a financial year?		We do not have any specific comments on this question.
20	Is the proposed \$35m initial trading allocation appropriate?		We do not have any specific comments on this question.
21	How should the trading function be funded?		We do not have any specific comments on this question.
22	What principles, if any, should guide AEMO's trading functions?		We do not have any specific comments on this question.

B. Proposed civil penalty provisions

Section 3 of the consultation paper sets out the proposed sections of the draft Bill or Rules that will be subject to civil penalty provisions and what level of penalty would apply. Please reference the specific sections of the draft Bill or Rules if you would like to provide feedback.

Section or rule	Feedback on proposed tiers
n.a.	We do not have any specific comments at this stage but note that it would appear that the reference in the National Gas Regulations to s. 91AF(9) should be to s. 91AF(8), because this is the provision that sets out the obligation to comply with a direction.

C. Feedback on proposed changes to the National Gas Law, Regulations and Rules

Attachment A of the consultation paper contains the proposed regulatory amendments to give effect to the policy intent set out in the consultation paper. Comments specific to particular sections of the draft Bill, Regulations and Rules should be provided in sections C of this template.

Question /Section	Feedback
Feedback on proposed changes to the National Gas Law	
S. 91AF	The word 'whether' seems to be missing from s. 91AF(3)(a) ('the matters that AEMO may or must consider in determining whether....')
Schedule 1 [item 13 of draft Bill]	We query whether the rule making power in item 9 should extend to all large users, so that obligations can be imposed on LNG exporters and other large users.
Feedback on proposed changes to the National Gas Regulations	
s. 91AF(9)	It would appear that the reference in the National Gas Regulations to s. 91AF(9) should be to s. 91AF(8), because this is the provision that sets out the obligation to comply with a direction.
Feedback on proposed changes to the National Gas Rules	
Rules 682-689	As noted in response to question 7, there is overlap in the categories identified in draft rule 682, with gas powered generators and LNG export facilities also being BB large user facilities and natural gas industry facilities also including BB large user facilities. See also earlier comments in response to questions 7-8 on the specific issues identified with these transparency related rules.
Rule 687(2)(a)	Rule 687(2)(a) introduces a new concept for the minimum amount of LNG to be kept in the tank: 'tank heel'. Under the new transparency rules, the term 'cushion gas' has been used and we suggest that this be dealt with consistently across parts of the rules to avoid any confusion.

D. Future reliability and supply adequacy reforms

Section 4 of the consultation paper outlines future additional reliability and supply adequacy reform works which will require further technical analysis, stakeholder consultation and detailed policy design. If you have comments on any of the additional future work streams, please do so in the table below.

Number	Question	Feedback
In relation to the proposed reliability and supply adequacy reforms outlined in Section 4 of the consultation paper, please provide initial feedback on the merits of these proposals, noting formal consultation will occur in 2023, when the policy design process has been further progressed.		
23	In your opinion, are any of these proposals more or less important to address reliability and supply adequacy concerns?	The ACCC supports the proposed implementation of a Projected Assessment of System Adequacy (PASA) process and 'lack of reserve' framework used in the electricity market as part of future reliability and supply adequacy reforms. We would suggest that in the interim, there should be an obligation requiring AEMO to publish information on potential threats to the domestic market as a whole. This is required to ensure that some market participants are not informed of potential threats, while others are not.

Number	Question	Feedback
24	Are there any practical issues arising from any of these proposals? If so, please elaborate on your concerns.	We do not have any specific comments at this stage.
25	Are there any other reliability and supply adequacy proposals that should be considered as part of this work?	We do not have any specific comments at this stage.

E. General feedback on timing and next steps required

Please elaborate if you would like to provide general feedback on the timing and next steps required regarding this work.

Topic	Feedback
Consultation timing	<p>We strongly encourage Energy Ministers to consider limiting AEMO's new functions and powers to those required to address and ameliorate immediate, shorter-term risks to system security and reliability of supply that is unlikely to subside without intervention, arising from unforeseen disruptions in gas supply.</p> <p>Measures to address more fundamental structural supply side issues should be developed through a more considered and robust process over a longer period. It should also involve a Regulatory Impact Statement so that the costs and benefits of further regulatory intervention can be properly evaluated.</p>