

Our Ref: 14479133
Contact Officer: Jeremy Llewellyn
Contact Phone: (07) 3835 4610

21 October 2022

Level 17, Casselden
2 Lonsdale Street
Melbourne Vic 3000
GPO Box 520
Melbourne Vic 3001
tel: (03) 9290 1800
www.aer.gov.au

Submitted electronically via: gas@industry.gov.au

Consultation – Extension of AEMO functions and powers

Attention: Energy Ministers Secretariat

The Australian Energy Regulator (**AER**) welcomes the opportunity to provide a submission on the draft National Gas Regulations and Rules in relation to the extension of AEMO functions and powers to manage east coast gas supply adequacy.

Please find below the AER's submission, which addresses the following aspects of the proposed framework:

- disclosure obligations;
- LNG facility obligations;
- gas reliability and supply adequacy conferences;
- AEMO's directions power;
- civil penalty provisions and proposed tiering; and
- the dispute resolution framework for compensation claims.

All references below to rules are to the National Gas Rules (**NGR**).

Disclosure obligations (*consultation paper, question 6*)

The AER considers that greater transparency in the east coast gas market will improve AEMO's ability to monitor threats to gas supply adequacy in the east coast gas market. The AER supports the additional disclosure obligations on certain industry participants and AEMO's ability to seek additional, ad-hoc information relevant to its system adequacy function.

For AEMO to monitor gas supply adequacy effectively, we consider information disclosure requirements as part of the *Transparency* element of the regulatory framework should be subject to information standards. For example, requiring information to:

- be prepared, published and maintained in accordance with the practices, methods and acts that would reasonably be expected from an experienced and competent person engaged in the ownership, operation or control of the entity, acting with all due skill, diligence, prudence and foresight (examples of this kind of wording are in the information standards applying to data submissions under Part 18 (Gas Bulletin Board), Part 20 (STTM) and Part 24 (Capacity Auction) of the rules);
- not be false or misleading (e.g. Part 25 (Capacity Auction), rule 663 of the rules);

- be best estimates of supply or withdrawals (e.g. Part 20 (STTM), rule 410 of the rules).

The Part 18, 20, 24 information standards reflect a known benchmark standard which industry should be meeting for existing data and a general information standard which could be extended to these new provisions. Further, as occurs under other parts of the NGR including the STTM where bids are subject to both specific rule 410 requirements and a general information standard, these provisions could be subject to more targeted prohibitions and standards as noted above.

LNG facility obligations *(consultation paper, question 6)*

Draft rule 689(a) requires each owner, operator or controller of an LNG facility to disclose information to AEMO on its volume of forecast supply into the domestic market from the facility. The AER notes that gas may not always be supplied from an LNG facility. We recommend that the obligation apply only to the owner, operator or controller of an LNG facility that supplies to domestic gas consumers.

Gas reliability and supply adequacy conferences *(consultation paper, question 10)*

Draft rule 693(1) states that without the explicit agreement of AEMO, information obtained at a conference must not be disclosed if not publicly available. The AER considers that the information obtained at a proposed gas reliability and supply adequacy conference should be made available to the AER and the ACCC.

We acknowledge the importance of conferences in proactively addressing emerging threats to gas supply and support the utility of the existing approach in the Gas Supply Guarantee. However, gas reliability and supply adequacy conferences may allow for cooperation among businesses, which could lead to coordinated conduct and a concomitant lessening of competition.

Confidential treatment of the information obtained in conferences may be necessary due to the commercially sensitive nature of information potentially discussed in a conference. However, with consideration of the point on potential coordinated conduct, we recommend the contents of the confidential conferences be made available to the AER in a timely manner. The AER suggests that draft rule 689(2) should obligate AEMO to make a record of the conference, including information obtained at the conference, available to the AER and the ACCC.

AEMO's directions power

The AER considers that in due course, consideration could be given to whether it would be beneficial to include a clause obliging market participants to not engage in behaviour which causes a direction to be made without reasonable cause. We note that the National Electricity Rules (NER) include a clause to the effect that market participants must not by any act or omission, whether intentionally or recklessly, cause or significantly contribute to the circumstances causing a direction to be issued, without reasonable cause (clause 4.8.9(c2)). We are considering the operation of this clause in the context of the electricity market events of June 2022, and our findings may inform the further development of the draft Bill, Rules and Regulations.

Civil penalty provisions and proposed tiering

The AER generally agrees with the proposed civil penalty provisions and tiering of those provisions as set out on page 28 of the consultation paper. In relation to draft rule 692(3), we note that there is a discrepancy between the tiering in the consultation paper and the draft

rule itself. We consider this draft rule is more appropriately classified as a tier 2 civil penalty provision as the obligation is administrative in nature.

If an information standard is added to draft rule 683(2), we consider that this draft rule is more appropriately classified as a tier 1 civil penalty provision as the obligation is related to supply security and reliability. This will also make the rule consistent with the penalty provision that relates to the BB information standard.

In addition to these proposed civil penalty provisions, there are a number of additional draft rules that we propose be considered as civil penalty provisions – in particular, draft rules 683(3) and 684-689. Draft rule 683(3) is a general reporting obligation, similar to draft rule 683(2), while draft rules 684-689 appear central to the objective of allowing AEMO to adequately forecast available east coast market gas supply and provide appropriate directions to adequately alleviate any shortfalls.

In **Attachment A**, we provide detailed comments on the proposed civil penalty provisions in the consultation draft, as well as the additional draft rules we have identified as potential civil penalty provisions.

Dispute resolution framework

Division 4 of Part 27 of the draft rules provides a proposed dispute resolution framework for compensation claims relating to financial detriment arising from AEMO's proposed new directions powers.

Overall, the AER considers that the proposed framework could be more flexibly drafted to better facilitate the timely and effective resolution of compensation claims. We provide our specific comments on the proposed framework below.

Timeframe to establish a dispute resolution panel (DRP)

The proposed framework requires a relevant entity to:¹

- give notice to AEMO of a claim for compensation no later than 10 business days after the date on which the detriment is suffered; and
- specify a date, no later than 30 business days after the day on which the detriment is suffered, from which AEMO has 5 business days to request the Adviser establish a DRP and refer the claim to the Adviser.

Draft rule 697(4) then requires the Adviser to establish a DRP within 5 business days of the request from AEMO.

The AER's view is that the timing for the Adviser to establish a DRP should not be hardwired but be dependent on relevant entities and AEMO agreeing on the parameters of the claim(s) or notifying the Adviser that such agreement cannot be reached. AEMO and affected parties sometimes require more time to discuss the nature and scope of the claim with the Adviser, and for the Adviser to determine the number and constitution of DRP members. The AER considers this process may be curtailed by an inflexible statutory timeframe.

We suggest the rule could be drafted such that the Adviser is to establish a DRP within 5 business days of the relevant entities and AEMO agreeing on the parameters of compensation or notifying the Adviser such agreement cannot be reached. Alternatively, if it

¹ Draft rule 696(3).

is preferred not to make the timeframe dependent on discussion of these parameters, the AER considers it would be appropriate to provide at least 15 business days for the Adviser to establish a DRP after being notified by AEMO. This provides more time for the Adviser, AEMO and affected parties to consider the matters outlined above. It also takes into account that the Adviser may be simultaneously managing other disputes under draft Part 27 as well as under other parts of the NGR and NER.

Allocation of costs of Adviser and DRP (consultation paper, question 18)

Draft rule 697(7) provides the costs of the Adviser and the DRP must be borne by AEMO unless allocated to another party for reasons including delay of process.

The AER observes this is inconsistent with the current NER and current NGR, which allow AEMO to pass on both compensation claim amounts and DRP and Adviser costs. AEMO functions as a not-for-profit market body responsible for managing various Australian gas and electricity markets, including ensuring the security and reliability of the power system. The AER considers the “pass on” mechanism reflects AEMO’s role through the following principles:

- AEMO should not incur costs for making decisions which financially impact individual participants, where these decisions are made in accordance with its functions and powers to support security and reliability.
- Participants should share the costs of keeping the relevant energy system secure and reliable, including the costs associated with the compensation claim process.

In light of these principles, the AER considers it would be appropriate for AEMO to be able to pass through DRP and Adviser costs and payment of the compensation claim under the proposed framework unless otherwise directed by a DRP at the DRP’s discretion.

Claim compensation threshold (consultation paper, question 19)

Draft rule 696(1) sets a minimum claim threshold of \$20,000 for a relevant entity to make a claim for compensation.

The AER agrees that a minimum claim threshold is appropriate. However, the AER considers the draft rule should be amended to allow the DRP to add one or more parties with claims less than \$20,000 to an existing similar claim if the DRP is of the view that there is no detriment to the process or material increase in cost of hearing the claim. This acknowledges that the incremental cost of adding another party in such circumstances is often minimal.

Next steps

We look forward to continuing to work with the Energy Senior Officials on the draft Regulations and Rules. If you have any queries relating to this submission, please contact Jeremy Llewellyn at Jeremy.Llewellyn@aer.gov.au.

Yours sincerely



Rowena Park
General Manager, Compliance and Enforcement
Australian Energy Regulator

Attachment A – AER comments on civil penalty provisions for draft Bill, Rules and Regulations

Provision	Obligation	Proposed Tier	AER position	Comment
Provisions proposed as civil penalty provisions in consultation draft				
Section 91AF(8)	A person to whom a direction under this section applies must comply with the direction	Tier 1	Tier 1	Agree - Supply security and reliability – important to AEMO’s ability to operate the power system [Note consultation paper refers to section 91AF(9) but this appears to be in error – consultation draft refers to section 91AF(8)]
Rule 683(2)	Disclosure obligations	Tier 2	Tier 1	More appropriately a tier 1 provision if an information standard is added to this rule. Submission of data in accordance with an information standard relates to supply security and reliability and should be consistent with rule 165(1) of the NGR which relates to the BB information standard.
Rule 691	Attendance and participation at gas reliability and supply adequacy conference	Tier 1	Tier 1	Agree - Supply security and reliability – important to AEMO’s ability to operate the system; also unacceptable market participant behaviour – failure to comply with specific direction by regulator
Rule 692(3)	Register of participants – relevant entity must give written notice of contact details to AEMO within 14 days of change	Tier 1 (draft rule); Tier 2 (consultation paper)	Tier 2	More appropriately a tier 2 provision – relates to market administration, in particular inadequate record keeping or administrative processes. While AEMO does need to be able to contact participants to convene a conference, the nature of the obligation is seen as administrative
Rule 693(1)	Disclosure and use of information obtained at conferences	Tier 1	Tier 1	Agree - unacceptable market participant behaviour – failure to comply with specific direction by regulator; also adverse market impact – potential distortion of market
Additional provisions that could be considered as civil penalty provisions				
Rule 683(3)	Disclosure obligations – requirements to update information required to be provided to AEMO	N/A	Tier 2	Obligation is similar to draft rule 683(2) and comparable others in NGR – concerns general reporting obligations to regulator

Provision	Obligation	Proposed Tier	AER position	Comment
Rule 684	Gas powered generator must provide forecasts to AEMO	N/A	Tier 1	<p>These provisions appear central to the objective of the draft Rules in allowing AEMO to adequately forecast the available supply of gas in the east coast market and provide appropriate directions to adequately alleviate any shortfalls.</p> <p>They are similar in nature to existing provisions in the NGR that are classified as Tier 1 provisions due to their objective of supply security and reliability – specifically AEMO's ability to operate the system.</p>
Rule 685	Retailers who sell gas must provide forecasts to AEMO	N/A	Tier 1	
Rule 686	Bulletin Board large user facilities must provide forecasts to AEMO	N/A	Tier 1	
Rule 687	Bulletin Board reporting entities must provide forecasts to AEMO	N/A	Tier 1	
Rule 688	Owner, operator or controller of a natural gas industry facility must provide details of maintenance work expected to be carried out over 24 months	N/A	Tier 1	
Rule 689	Owner, operator or controller of LNG facility must provide forecasts to AEMO	N/A	Tier 1	