



# ***Major Energy Users Inc.***

13 October 2021

Australian Competition and Consumer Commission  
Level 4  
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Canberra ACT 2601

By email: [gas.inquiry@accc.gov.au](mailto:gas.inquiry@accc.gov.au)

**ACCC Gas Inquiry 2017-2025  
Review of upstream competition and timeliness of supply  
Response to the ACCC Issues Paper September 2021**

The Major Energy Users (MEU) is pleased to respond to the ACCC review of the upstream competition and timeliness of supply gas in the east coast gas market.

## **About the MEU**

The MEU was established by very large energy using firms to represent their interests in the energy markets. With regard to all of the energy supplies they need to continue their operations and so supply to their customers, MEU members are vitally interested in four key aspects – the cost of the energy supplies, the reliability of delivery for those supplies, the quality of the delivered supplies and the long-term security for the continuation of those supplies.

Many of the MEU members, being regionally based, are heavily dependent on local staff, suppliers of hardware and services, and have an obligation to represent the views of these local suppliers. With this in mind, the members of the MEU require their views to not only represent the views of large energy users, but also those interests of smaller power and gas users, and even at the residences used by their workforces that live in the regions where the members operate.

It is on this basis the MEU and its regional affiliates have been advocating in the interests of energy consumers for over 20 years and it has a high recognition as providing informed comment on energy issues from a consumer viewpoint with various regulators (ACCC, AEMO, AEMC, AER and regional regulators) and with governments.

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The MEU points to the reality that gas prices in the east coast domestic market are too high, especially for a nation that is currently the largest exporter of LNG in the world – the ACCC has highlighted this in its regular interim reports on the east coast gas market. Further, the ACCC also highlights that the price of gas on the east coast is consistently higher than the cost of production, implying that there is limited competition in the supply of gas.

The MEU has sought feedback from its members about the issue of gas supply and consistently the feedback points to excessive prices and predominantly only short-term contracts being available at acceptable prices.

The MEU considers the key issue is that, although there are massive quantities of gas available on the east coast, there is a deficient supply of gas available for domestic use and an insufficient diversity of producers – increased diversity of suppliers might, at least partially, address this inequity. Even prior to the advent of LNG liquefaction trains at Gladstone, the upstream gas supply was concentrated but commodity prices were relatively low. Fast forward to 2021 and there is still concentrated ownership of upstream supply but with much higher prices. This is effectively a purely a demand side shock with the producers benefitting considerably at the expense of domestic consumers from a resource that is owned by all Australians. The impact of this inequity is to reduce the competitiveness of downstream domestic production and severely impact domestic job creation.

It is with thoughts and observations in mind, that the MEU has prepared the attached response to the ACCC questions raised in its Issues Paper on upstream competition and timeliness of supply in gas production for domestic use.

If you would like to discuss this matter further or for us to explain our views in more detail so we request you contact our Public Officer (David Headberry) on [REDACTED] or at [REDACTED] to arrange a time for this to occur.

Yours sincerely

[REDACTED]

David Headberry  
Public Officer



# Review of upstream competition and timelines of supply: Issues Paper

## Attachment 1: Response template due 15 October 2021

**Stakeholder name: Major Energy Users**

	Questions	Feedback
<b>Box 3.1: Questions on government processes</b>		
1.	<p>Are there any other government processes that may affect the degree of upstream competition and/or the timeliness of supply?</p> <p>If so, please set out what they are and the effect that they may have on competition or supply.</p>	<p>There is such a clear shortage of gas available for domestic use on the east coast of Australia to effectively ensure there is adequate competition of supply. This is not just insufficient inter-company competition, but there is also insufficient competition between sources of gas when recognising that inter-basin competition is impacted by the cost of transport. For example, competition between Bass Strait and Bowen basin is constrained due to the high costs of transport between the two sources.</p> <p>This leads to a view there is need for greater harmonisation of approach between all gov'ts as to how to establish the rights to a tenement and holding it. This means that "use it or lose it" controls need to be harmonised and for the requirements to put pressure onto tenement holders to maximise their efforts to get gas to the market and so increase competition.</p> <p>The decision to allow so many east-coast export facilities to be constructed was a massive failure by earlier gov'ts as this has been the single most significant cause of the current difficulty being faced by domestic gas users. All future tenements and those held but not being developed should be allocated only for domestic supply.</p>
2.	<p>Should governments explicitly consider diversity and efficiency, or the potential impacts on competition, when awarding acreage?</p> <p>If not, please explain why not.</p>	<p>As the ACCC identifies, there is a clear lack of competition in domestic gas supply. To overcome this, increasing competition is the key factor. Gov'ts must act proactively to ensure there is increased competition between producers and ensure there are adequate risk adjusted future reserves and resources to meet the needs of the domestic market.</p>
3.	<p>Should governments employ a more proactive approach when:</p> <p>(a) specifying the timeframes for exploration, appraisal and/or production and/or approving exploration or retention permit renewals where they have the discretion to do so?</p> <ul style="list-style-type: none"> <li>If so, what is this likely to entail?</li> </ul>	<p>Yes, to both questions.</p> <p>There needs to be a regime designed with tighter timeframes coupled with appropriate incentives and consequences so that developers/prospective producers look to develop and bring new gas supplies to the domestic market as soon as possible.</p> <p>To ensure that gov'ts are not "played off" against each other State and Commonwealth regulatory processes need redesigning and harmonisation.</p>



	Questions	Feedback
	<ul style="list-style-type: none"> <li>If not, please explain why not.</li> </ul> <p>(b) approving, monitoring and enforcing compliance with work programs?</p> <ul style="list-style-type: none"> <li>If so, what is this likely to entail?</li> <li>If not, please explain why not.</li> </ul>	
4.	<p>What other ways could state, territory or Commonwealth governments encourage:</p> <ul style="list-style-type: none"> <li>greater diversity in the upstream segment of the market?</li> <li>more timely supply of gas to market?</li> </ul>	<p>The SA gov't introduced an incentive scheme to encourage new exploration, and this is in the process of delivering increased competition. Similar investment incentive schemes (both State based and/or Commonwealth) should be developed and implemented with the proviso that there should be harmonisation of these to minimise cross border issues.</p>
<p><b>Box 3.2: Questions on barriers faced by producers</b></p>		
5.	<p>Are there any other barriers that producers face when developing tenements that have not been identified in section 3.2 (for example, access to drilling or other appraisal related services) that may affect upstream competition and/or the timeliness of supply?</p> <p>If so, please explain what these barriers are and the effect that they can have on upstream competition and/or the timeliness of supply?</p>	<p>The MEU agrees with the ACCC about the risks faced by producers in their endeavours to find new gas supplies.</p> <p>In addition to the points made by the ACCC, there is no doubt that, in the future, in order to reduce carbon emissions, less gas will be permitted for use in the domestic market for electricity generation, industrial processes and for residential use. This means producers (and transport asset providers) will be faced a declining market. Further they will be faced with ESG risks for their scope 1 and 2 emissions and the impact of their customers' scope 3 emissions.</p> <p>A future cost on carbon emissions is also possible/probable.</p> <p>Increased competition from the burgeoning renewable electricity market, and perhaps the introduction of hydrogen, will further limit their markets.</p> <p>All of these will impact project economics and financial returns.</p>
6.	<p>Are there any effective ways to reduce the following barriers:</p> <ul style="list-style-type: none"> <li>land access, environmental and other regulatory approvals?</li> <li>access to capital and other commercial barriers?</li> <li>access to infrastructure?</li> </ul>	<p>Streamlined regulatory process, having one department/agency deal with land and environmental approvals for development permitting activities, should be examined along with a national <u>harmonised</u> approach for permit approvals. Approaches might include:</p> <ul style="list-style-type: none"> <li>Benchmarking approval processes against other jurisdictions internationally to adopt an 'international best practice' process for approvals.</li> <li>Provision of State and/or Commonwealth investment incentives and/or concessional loans such as that instituted in SA. State and/or Commonwealth gov'ts could use their favourable credit ratings, balance sheets, and become a low-cost financier for exploration and development projects. This should reduce financing barriers.</li> </ul>

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		<ul style="list-style-type: none"> <li>State or Commonwealth direct investment or support to alleviate physical access issues in processing and transport resources. This would readily allow joint access to a number of producers of necessary assets when separate provision is uncommercial for the producer. This was the approach used by gov'ts in the 1960s (Vic, Qld), 1970s (SA) and 1980s (WA, Qld) to provide transport assets.</li> <li>Another alternative is that State and/or Commonwealth Governments provide credit enhancement options to prospective developers/producers not only to support financing for development and production, but also for joint processing and transport.</li> </ul>
7.	Should the owners of upstream infrastructure (e.g. gathering pipelines, gas processing facilities and/or water processing facilities) that have spare capacity be required to provide third party access on reasonable terms?	<p>Yes</p> <p>An access regime for the gathering lines should be based on fair and reasonable terms developed under part 23 of the gas rules. They could also be subjected to the pipeline capacity auction process to ensure use of scarce resources are optimised.</p> <p>Third party access to gas and water processing facilities should be developed and administered by the ACCC, as occurs for some other infrastructure facilities.</p>
8.	Are there other ways to improve third party access to upstream infrastructure on reasonable terms?	Regulatory intervention (or the threat of it) and a legislated independent price/access determination process will incentivise common use of scarce resources.
9.	Would third party access to any other infrastructure (e.g. LNG processing facilities, storage facilities etc.) facilitate more upstream competition and/or the more timely development of supply into the domestic market?  If so, please identify the infrastructure and the benefits that third party access would provide.	<p>Yes</p> <p>For processing and storage facilities third party access would facilitate upstream competition as there would be a greater diversity in participants active in the market.</p>
<b>Box 4.1: Questions on JV arrangements</b>		
10.	Are there any aspects of JV arrangements not identified in section 4.1 that may adversely affect upstream competition and/or the timeliness of supply?  If so, please explain what they are and how they may affect upstream competition and/or the timeliness of supply.	The corporate strategy of the parent company of each individual JV entity is also a factor that will impact a JV bringing gas to market. Ultimate parent company strategy may not be aligned for a geographical region impacting the JV's local strategy. This issue might become more important as pressures increase on the parent companies for carbon emission reductions.
11.	Are there any measures that could be put in place to address the potentially negative aspects	Through a competition test or in the permitting process, a requirement could be added that limits the extent that prospective partners having involvements in multiple JV partnerships.



	Questions	Feedback
	of JVs identified in section 4.1 or in your response to question 10?	Tenements could have requirements limiting additional members to a JV or a 'sunset date' for development of the gas by the JV.
12.	<p>Are there provisions in the contractual arrangements that underpin JVs that can adversely affect competition and/or the timeliness of supply?</p> <p>If so, how could this be addressed? Is there, for example, a best practice JV arrangement that would prevent this occurring?</p>	<p>Restrictive or exclusive arrangements should be assessed.</p> <p>Tenement approvals could have a requirement that should a JV be proposed, then the JV contract terms and conditions should be reviewed by the ACCC to assess whether they would "<i>substantially lessen competition</i>"</p>
13.	<p>Are there any approaches (either in place, or that could be put in place) designed to help level the playing field between larger and smaller producers in the same JV?</p> <p>Please explain how these approaches work.</p>	A market power test could be a requirement for obtaining, holding and developing a lease. Such a test could be carried out by an independent assessor (nominated by the gov't providing the lease or preferably by the ACCC). This would allow assessment (potentially with enforced divestment) as to whether the conduct of the larger player or the terms and conditions of the JV, result in the larger player causing a lessening in competition.
14.	<p>Do you consider that proposals by larger producers to enter into JV arrangements (or farm into existing JV arrangements) should be subject to mandatory notification requirements and ACCC consideration?</p> <p>Please explain your response to this question.</p>	<p>Yes – see comments to Q12 and Q13 above</p> <p>There may need to be a threshold level of the production above which the ACCC would review the competition risk (see also comments above).</p>
15.	Is any other form of oversight of JV arrangements required?	It is essential that commercial arrangements lead to the best outcome for consumers so constraints on the JV partners should be limited and only just sufficient to ensure the issues noted in the Issues Paper, and in comments above, do not lead to a concentration of competition.
<b>Box 4.2: Questions on mergers and acquisitions</b>		
16.	<p>Section 4.2 sets out how mergers and acquisitions of individual tenements can affect competition and/or the timeliness of supply. Are there any other ways in which mergers and acquisitions could affect competition and/or the timeliness of supply that have not been identified?</p> <p>If so, please explain what they are and the effect that they can have on upstream competition and/or the timeliness of supply?</p>	<p>The MEU has noted that, all too frequently, ACCC concerns about mergers/acquisitions are challenged in the courts, often leading to an overturning of the ACCC decision. This implies that despite ACCC concerns about lessening competition, the current laws are insufficient for the ACCC to achieve the goals of the M&amp;A laws, and ensure that competition is not reduced. Also concerning is that the laws are focused on lessening competition rather than increasing competition.</p> <p>That the ACCC chair has raised concerns about the competition laws is welcomed by the MEU as the MEU has raised some competition concerns about M&amp;A in the wider energy markets, where some ACCC decisions have been overturned in the courts. The MEU cites the example of the AGL acquisition of Macquarie Generation which the ACCC opposed on competition lines, but the court overturned the ACCC decision after it assessed the public interest was</p>



	Questions	Feedback
		<p>achieved by a higher sale price rather than recognising the benefits to consumers of increased competition.</p> <p>The MEU considers that this same issue applies in the upstream gas industry where gas producers seek to increase their profitability by M&amp;A activity even if this results in a loss of competition. The MEU notes that smaller producers could welcome being merged/acquired by a larger producer as this might result in a better outcome for its shareholders. This might be a reason for smaller producers/tenement holders for not wanting a limitation of M&amp;A activity.</p> <p>Overall, the MEU supports a tightening of the M&amp;A laws to reflect the needs for increasing competition in the energy sector.</p>
17.	<p>Do you think the current merger regime has been working effectively to date?</p> <p>If not, please explain why not.</p>	<p>See response to Q16 above</p> <p>Others have observed that in Australia there are a number of industry sectors that are concentrated or highly concentrated and remain so. This implies there is a problem with competition law. However, the MEU experience is specifically limited to the energy sector and has no views as to the effects of the M&amp;A laws in other sectors.</p>
18.	<p>Do you think the current merger regime can work effectively in the highly concentrated upstream market?</p> <p>If not, please explain what changes you think are required?</p>	<p>The fact that the gas market is still highly concentrated despite some efforts by state gov'ts to increase competition in the sector, implies that either the gas production sector has attributes that do not encourage competition and/or that the laws are inadequate.</p>
<b>Box 4.3: Questions on joint and separate marketing</b>		
19.	<p>Are there any aspects of joint marketing by unincorporated JVs not identified in section 4.3 that may adversely affect upstream competition and/or the timeliness of supply? If so, please explain (with examples if possible):</p> <ul style="list-style-type: none"> <li>• what they are</li> <li>• how they may effect upstream competition and/or the timeliness of supply</li> <li>• any measures that may be able to address them.</li> </ul>	
20.	<p>What are the factors that may make establishing balancing arrangements difficult in one case, and easier in another? How has this changed over time?</p> <p>Please provide examples if possible.</p>	



	Questions	Feedback
21.	<p>In what circumstances do you consider allowing producers to jointly market gas would be beneficial?</p> <p>Please provide examples of current producers that are jointly marketing their gas and what you consider the likely impact would be on competition or the timeliness of supply if they were to separately market.</p>	
22.	<p>Do you consider the current competition laws are sufficient to respond to the issues around joint marketing by unincorporated JVs?</p> <p>Please explain your answer including, if relevant, any changes you think may be required.</p>	<p>The MEU points out that JV marketing is effective when there is a monopsony or highly concentrated buyers. In the past 2 decades, buyer competition has increased markedly despite little reduction in competition at the producer level which remains highly concentrated.</p> <p>If the ACCC has sufficient power to ensure that the JV marketing of gas does not impinge on competition, then it appears that the current laws might be adequate. While the MEU is aware that some of the historic joint marketing activities have reduced in more recent years, even so the gas market is still highly concentrated.</p> <p>If the current voluntary reduction of joint marketing is reversed, the real test will be if the ACCC can prevent the reversion to joint marketing or if its decision is overturned in the courts.</p>
23.	<p>Are there any aspects of the arrangements relating to the sale of gas by incorporated JVs that may affect upstream competition and/or the timeliness of supply? If so, please explain (with examples if possible):</p> <ul style="list-style-type: none"> <li>• what they are</li> <li>• how they may effect upstream competition and/or the timeliness of supply</li> <li>• any measures that may be able to address them.</li> </ul>	See comments above
24.	<p>Do you consider the current competition laws are sufficient to respond to the issues around the arrangements relating to the sale of gas by incorporated JVs?</p> <p>Please explain your answer including, if relevant, any changes you think may be required.</p>	See comments above





	Questions	Feedback
<b>Box 4.4: Questions on exclusivity provisions</b>		
25.	<p>Section 4.4 describes how exclusivity provisions in GSAs between producers may restrict upstream competition.</p> <ul style="list-style-type: none"> <li>• Are there any other ways that these provisions might restrict competition? If so, please explain what they are.</li> <li>• Are there any competition or efficiency benefits associated with these types of provisions?</li> </ul>	<p>Exclusivity provisions can be more than formal written agreements so the ACCC should look to see if there are times when the same effect is occurring and assess if there are “understandings” between the producers.</p> <p>Any activity which has the effect of reducing competition in markets is a detriment to consumers. If the outcome of an agreement is a loss of an additional provider in a part of the market that could otherwise be served, then this reduces competition</p> <p>The MEU cannot envisage any agreement that removes a supplier from part of the market, that would deliver a benefit to consumers.</p>
26.	<p>If exclusivity provisions are restricting competition, how should this be addressed?</p>	<p>The ACCC should follow these exclusivity provisions (formal and “understandings”) through, using existing legislation. If this does not resolve the problem, then the legislation should be evaluated (as in responses to Q12, Q13 and Q16)</p>
27.	<p>Should producers only be allowed to enter into exclusivity arrangements if they have sought and obtained authorisation from the ACCC before doing so? Please explain your reasons.</p>	<p>Yes.</p> <p>For the ACCC to approve an exclusivity arrangement, it is expected this would be after the ACCC has carried out a competition test and assessed there was a net benefit by allowing the exclusivity.</p>
<b>Box 4.5: Questions on decisions on when to develop new sources</b>		
28.	<p>Section 4.5 sets out some of the technical, commercial and strategic factors that may affect producers' decisions about when to develop new sources of supply and the timeliness with which gas is brought to market. Are there any other factors that may influence these decisions?</p>	<p>The MEU can see a number of additional reasons as to whether a potential project, though economic and financeable, might not proceed, including</p> <ul style="list-style-type: none"> <li>• The need by the producer for essential facilities (processing, transport, etc) to be provided by another party (including by a competitor) using spare capacity available.</li> <li>• Environmental factors – ESG risk and community/investor/shareholder activism causing reputational risk and potentially financeability risks (eg a bank not willing to lend for a project that increases carbon emissions)</li> <li>• Government policy - ‘de-gasifying’ the economy in favour of hydrogen and electrification such as currently being contemplated by the Victorian gov’t.</li> <li>• Stranded asset risks (including processing and transportation) where migration away from using natural gas causes underutilisation of assets and/or reduced asset values.</li> </ul>
29.	<p>Section 4.5 also outlines some of the reasons why larger producers may want to ‘bank’ or ‘warehouse’ gas. Are there any other reasons</p>	<p>The MEU considers this “warehousing/banking of gas” is an explicit market power issue and would to some extent be addressed by a “use it or lose it” provision in the tenement licence.</p>



	Questions	Feedback
	why they may want to withhold supply in this manner?	See responses above which provide observations about tenement rights, obligations and conditions, and gov't controls to ensure that needed gas can be delivered to market.
30.	If gas is being 'banked' or 'warehoused' how do you think this should be addressed?	<p>The ACCC has already taken action on shippers that were hoarding gas and this has been further discouraged by pipeline capacity auctions.</p> <p>While hoarding of gas ("banked" and "warehoused") is not illegal, just as occurred with pipeline capacity hoarding, the ACCC should monitor and investigate situations where this might be occurring and implement actions (perhaps along the lines of those used to overcome pipeline hoarding) to ensure that competition is improved.</p>