



# Draft Determination and interim authorisation

Application for revocation of A91136, A91137, A91138, A91170 and  
A91171

and the substitution of authorisation AA1000445

lodged by

Australian Energy Market Operator Limited

in respect of

the operation of Chapter 5 and Chapter 6 of the Retail Market  
Procedures and the associated deeds

Authorisation number: AA1000445

Date: 29 August 2019

Commissioners: Keogh

Court

Ridgeway

## Summary

The ACCC proposes to grant authorisation to enable the Australian Energy Market Operator Limited (AEMO) (the Applicant) to operate Chapter 5 and Chapter 6 of version 6 of the Retail Market Procedures (RMP) and the associated deeds. The RMP and associated deeds are the rules under which the gas retail market systems are operated in Western Australia.

This conduct has been authorised in some form since 2004 and re-authorisation is sought on substantially the same terms and in respect of substantially the same conduct as currently authorised.

The ACCC proposes to grant re-authorisation for 10 years.

The ACCC has also granted interim authorisation to enable AEMO to continue operate Chapter 5 and Chapter 6 of the RMP while the ACCC is considering the substantive application.

The ACCC invites submissions in relation to this draft determination before making its final decision.

## 1. The application for revocation and substitution

- 1.1. On 13 June 2019, the Australian Energy Market Operator Limited (**AEMO**) (the **Applicant**) lodged an application to revoke authorisations A91136, A91137, A91138, A91170 and A91171 and substitute authorisation AA1000445 for the ones revoked (referred to as re-authorisation) with the Australian Competition and Consumer Commission (the **ACCC**).
- 1.2. AEMO is seeking re-authorisation to operate Chapter 5 and Chapter 6 of the Retail Market Procedures (**RMP**) and the associated deeds for 10 years (the **Conduct**). This application for re-authorisation AA1000445 was made under subsection 91C(1) of the *Competition and Consumer Act 2010* (Cth) (the **Act**).
- 1.3. The existing authorisations are due to expire on 17 September 2019 and AEMO is seeking re-authorisation to continue to operate Chapter 5 and Chapter 6 of the RMP on substantially the same terms as currently authorised. Given this imminent expiry of the current authorisation, AEMO has also requested interim authorisation to enable it to continue to operate Chapter 5 and Chapter 6 of the RMP and the associated deeds while the ACCC is considering the current application for re-authorisation.
- 1.4. Authorisation provides businesses with legal protection for arrangements that may otherwise risk breaching the law but are not harmful to competition and/or are likely to result in overall public benefits.

## The Conduct

- 1.5. Currently, AEMO is authorised to operate Chapter 5 and Chapter 6 of the RMP and the associated deeds (the Swing Service Provision Umbrella Deed (**SSPUD**) and the Swing Service Provision of Last Resort Umbrella Deed (**SSPOLRUD**)). However, authorisation does not extend to AEMO to engage in any contract, arrangement or understanding that is not constituted by or required under Chapter 5 and Chapter 6 of the RMP, the SSPUD and the SSPOLRUD.
- 1.6. The parties to the arrangements and conduct for which re-authorisation is sought are:

- AEMO,
- each other person who is or becomes party to the Retail Market Agreement<sup>1</sup>, and
- each other person who currently or in the future participates in the Western Australian retail gas market pursuant to the RMP<sup>2</sup>, including gas transmission operators and prescribed persons<sup>3</sup>

each as a Retail Market Participant.

- 1.7. AEMO is seeking re-authorisation in respect of version 6 of the RMP. Version 6 contains two changes to the version previously authorised. Updates have been made to:
- clause 255 in Chapter 5 relating to an obligation on pipeline operators to inform AEMO of special circumstances when gas is prevented from being delivered in accordance with a shipper or swing service provider's request, and
  - clause 323A in Chapter 6 relating to the requesting of meetings with the Compliance Panel at the request of AEMO or a scheme participants.
- 1.8. AEMO submits that neither of these changes materially impact either the provision of the swing service or the compliance arrangements currently authorised.
- 1.9. Re-authorisation is sought for 10 years.

## 2. Background

### AEMO as administrator of the Retail Market Scheme

- 2.1. AEMO was established by the Australian Ministerial Council on Energy (now the Council of Australian Governments Energy Council) in 2009. It operates energy markets and systems and delivers planning advice in eastern, south-eastern and Western Australia. AEMO is a not-for-profit company, governed by a board of independent directors and comprised of both government and industry members.
- 2.2. AEMO is the operator of the retail gas market in Western Australia. Its role is to enable the delivery of gas, support contractual relationships, ensure customer transfers take place smoothly, and operate the mechanism by which retailers settle gas supply and transmission contracts.
- 2.3. Legislation requires that there be an approved Retail Market Scheme (**RMS**) for each gas distribution network, which must consist of:
- an entity to administer the scheme (being AEMO),
  - the Retail Market Agreement between gas market participants (including gas retailers and distributors) and AEMO, and

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<sup>1</sup> Current parties to the Retail Market Agreement are set out in Schedule 1 of AEMO's application, available on the ACCC's [Public Register](#). They include retailers, shippers, swing service providers and pipeline and network operators.

<sup>2</sup> Current participants in the Western Australian retail gas market pursuant to the RMP are set also out in Schedule 1 of AEMO's application. They include retailers and pipeline and network operators.

<sup>3</sup> Prescribed persons are self-contracting users, shippers and swing service providers: *Energy Coordination (Retail Market Schemes) Regulations 2004* (WA).

- a set of Retail Market Procedures, which deal with the transfer of customers, gas imbalances, and dispute resolution and compliance (among other things).<sup>4</sup>

## Chapter 5 – Allocation, Reconciliation and Swing

- 2.4. Chapter 5 relates to allocation, reconciliation and swing service. It sets out the processes for managing the daily allocations of gas usage to retailers and to enable settlement of gas supply and transmission contracts. Specifically:
- Balancing processes are designed so that the gas injection and withdrawal quantities across each sub-network for each day are always in balance (i.e. total injections equal total withdrawals).
  - Allocation quantities are calculated for each retailer based upon actual injection quantities from each pipeline and the nominated withdrawal quantities from each sub-network. AEMO determines the retailer's estimated total withdrawals at each sub-network for each day, which is reconciled to account for data changes from the past 425 days.
  - The reconciliation process is a forward process (i.e. today's errors are fixed the day after tomorrow), where estimations used for today's allocations are fixed over the 28 days commencing the day after tomorrow.
- 2.5. Chapter 5 contains procedures for AEMO to allocate 'swing service' to retailers for each gas day. A swing service is created on sub-networks that are supplied by more than one gas transmission pipeline. It arises where the retailer's actual withdrawals on a sub-network differ from their nominated injections from a particular transmission pipeline – essentially, it is the difference between what is ordered by a retailer for its customers on one pipeline and what is delivered to its customers from the other pipeline.
- 2.6. The swing service retroactively balances the mismatch between a retailer's arranged gas injections and its customers' withdrawals. A positive swing service amount is referred to as 'loan' and a negative swing service amount is a 'park'.
- 2.7. The swing service requires both physical and financial settlement: retailers must take back the park or repay the loan volume, and pay the swing service provider that provided the park or loan a fee. There are three ways in which a retailer can pay for a swing service:
- a) Retailers can make an off-market contractual arrangement with a shipper to obtain swing service. Off-market procurement has the advantages of a known supplier and price.
  - b) If additional swing service is required, this can be procured from the AEMO bid stack process. Swing Service Providers (**SSPs**) submit bids to AEMO setting out the price and volume of the swing service they are prepared to offer and AEMO uses these to calculate the market clearing price for the swing service. Once the bids are cleared, the swing service is provided in accordance with the terms of the SSPUD.
  - c) If all swing service volumes in the bid stack are purchased and a retailer still requires additional swing service, this is supplied by the Swing Service Provider of Last Resort (**SSPOLR**) that has contracted with AEMO to provide

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<sup>4</sup> Energy Coordination Act 1994 (WA) section 11ZOF.

an unlimited last resort bid, according to the terms of the SSPOLRUD. Because the SSPOLR faces additional risk in providing the unlimited bid, the SSPOLR bid is generally higher than other swing service bids in the bid stack.

## Provisions requiring authorisation

2.8. The particular aspects of Chapter 5 that AEMO identifies as requiring authorisation are:

- AEMO's ability to require certain parties to make a 'swing service causation compensation payment', and
- the operation of the swing service bid stack and entering into the SSPUD and SSROLRUD.

2.9. Chapter 5 allows AEMO to require certain parties to make a 'swing service causation compensation payment' where AEMO considers that person has materially contributed to the causation of a swing service. This provides a deterrent to 'gaming' the swing service payments and a way to claw back any gains made by retailers from such activity. AEMO submits that enforcing such judgment may involve AEMO and market participants engaging in conduct in contravention of section 45 or the cartel provisions of the Act.

2.10. AEMO submits that the operation of the swing service bid stack and entering into the SSPUD and SSROLRUD may constitute AEMO and gas market participants entering into contracts, arrangements or understandings that restrict dealings or affect competition, or of fixing, maintaining or controlling the price of swing service in contravention of section 45 and the cartel provisions of the Act. In particular, the price information supplied to subscribers and provisions allowing withdrawal and variation of bids could inadvertently involve AEMO and gas market participants contravening the Act. AEMO also submits that these processes may involve participants engaging in exclusive dealing to the extent that swing service providers offer services on condition that retailers acquire services from AEMO (in contravention of section 47 of the Act).

## Chapter 6 – Compliance

2.11. The compliance process under Chapter 6 works as follows:

- a) AEMO has established an independent Compliance Panel that has authority to make determinations on apparent RMP breaches by AEMO or retail gas market participants, including the imposition of financial penalties.
- b) The Compliance Panel can delegate decision-making authority to AEMO on whether an apparent breach by AEMO or a retail gas market participant is 'material'.
- c) Participants may report any alleged breach of the RMP to AEMO. AEMO will investigate any compliance matters and publish a 'Notice of Apparent Procedure Breach' notifying participants and asking whether they have been materially impacted by the apparent breach.
- d) If the alleged breach is material, then if it is: (i) by AEMO, retailers or a network operator AEMO will refer it to the Compliance Panel; or (ii) by a pipeline operator or prescribed person, AEMO will refer it to the Economic Regulation Authority of Western Australia (**ERA**).

2.12. The Compliance Panel constituted under Chapter 6 is able to make determinations including the imposition of financial penalties on gas market participants or AEMO and can order a gas market participant or AEMO to take action or cease action, to ensure compliance with the RMP.

### Provisions requiring authorisation

2.13. AEMO submits that the compliance procedures in Chapter 6 of the RMP may involve AEMO and gas market participants engaging in conduct in contravention of section 45 of the Act or exclusive dealing in contravention of section 47 of the Act.

### Previous authorisations

2.14. In 2003 and 2004, gas market participants in Western Australia and South Australia worked with their respective state governments to prepare for the practical implementation of full retail contestability of gas markets in each state. This included the establishment on 8 January 2003 of the Retail Energy Market Company Ltd (**REMCo**) (which was to serve as the market administrator for retail gas markets in both jurisdictions) and the development of the Retail Market Rules (which were to apply in both jurisdictions).

2.15. On 28 July 2004, the ACCC granted authorisations A40090-A40092 to REMCo to operate Chapter 5 and Chapter 6 of the Retail Market Rules and the associated ancillary deeds in Western Australia and South Australia until 31 May 2009.

2.16. On 26 August 2009, the ACCC granted re-authorisation to REMCo for these arrangements (authorisations A91136, A91137, A91138, A91170 and A91171). Re-authorisation was granted until 17 September 2019 in Western Australia. In South Australia, re-authorisation was granted for the earlier of 10 years or until REMCo's South Australian functions transferred to AEMO. This transfer occurred on 1 October 2009 and the authorisations ceased to have effect in relation to South Australia from this date.

2.17. In July 2016, REMCo sought a minor variation to authorisations A91136, A91137, A91138, A91170 and A91171 to enable the transfer of REMCo's functions as operator of the Western Australian retail gas market to AEMO, and to make administrative amendments to the Retail Market Rules to remove redundant or spent provisions. This included the renaming of the Retail Market Rules as the Retail Market Procedures. The ACCC decided to vary the authorisations as proposed by REMCo on 21 September 2016.

## 3. Consultation

3.1. A public consultation process informs the ACCC's assessment of the likely public benefits and detriments from the Conduct.

3.2. The ACCC invited submissions from a range of potentially interested parties including participants in the Western Australian retail gas market, and industry and consumer bodies.<sup>5</sup>

3.3. The ACCC received two submissions from interested parties in relation to the application.

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<sup>5</sup> A list of the parties consulted and the public submissions received is available from the ACCC's [Public Register](#).

- 3.4. Alinta Energy supports the application for re-authorisation, submitting that Chapter 5 and Chapter 6 of the RMP are essential to the operation of the Western Australian retail gas market, that re-authorisation will have no likely negative effect on market competition and that there is a net public benefit offered by the current retail gas market arrangements.
- 3.5. Simply Energy supports the need to have the authorisation in place, but submits that it would like to see more rigour around AEMO's arrangements for consulting participants on potential non-compliance and stronger arrangements around the application of competition principles. Simply Energy's submission is discussed in further detail in paragraphs 4.22-4.27 and 4.35-4.36.
- 3.6. Public submissions by the Applicant and interested parties are on the [Public Register](#) for this matter.

## 4. ACCC assessment

- 4.1. The ACCC's assessment of the Conduct is carried out in accordance with the relevant authorisation test contained in the Act.
- 4.2. AEMO has sought re-authorisation for Conduct that:
  - would or might constitute a cartel provision within the meaning of Division 1 of Part IV of the Act,
  - may substantially lessen competition within the meaning of section 45 of the Act, and
  - may constitute exclusive dealing within the meaning of section 47 of the Act.
- 4.3. Consistent with subsection 90(7) and 90(8) of the Act,<sup>6</sup> the ACCC must not grant authorisation unless it is satisfied, in all the circumstances, that the conduct would result or be likely to result in a benefit to the public, and the benefit would outweigh the detriment to the public that would be likely to result (authorisation test).

### Relevant areas of Competition

- 4.4. To assess the likely effect of the Conduct, the ACCC will identify the relevant areas of competition likely to be impacted.
- 4.5. AEMO submits that the area of competition remains the market for the supply and sale of retail gas in Western Australia, as adopted by the ACCC in authorisations A91136, A91137, A91138, A91170 and A91171.
- 4.6. The ACCC considers the relevant area of competition affected by the Conduct is the market for the supply and sale of retail gas in Western Australia.

### Future with and without the Conduct

- 4.7. In applying the authorisation test, the ACCC compares the likely future with the Conduct that is the subject of the authorisation to the likely future in which the Conduct does not occur.

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<sup>6</sup> See subsection 91C(7).



- 4.8. AEMO considers the most likely counterfactual is a less efficient gas market which impacts on and impedes competition in the market. In particular:
- Balancing, allocation, and reconciliation would not occur under the RMP but would still be required. The swing service volumes would be unlikely to be quantified or allocated between retailers in an efficient way creating inefficiencies and cross subsidies in the market.
  - Retailers would no longer have the incentive to make accurate daily forecasts. This would result in a less efficient gas system and less efficient use of limited pipeline capacity.
  - There would be less available pipeline capacity which could cause existing retailers to exit the market or increase the price of pipeline capacity, thereby limiting competition in the market and increasing prices for consumers.
  - Alternative mechanisms for enforcing the RMP and for ensuring that the retail markets continue to operate effectively would need to be developed. These would be costly and require significant industry consultation resulting in increased time and cost to all participants. AEMO considers that it is unlikely that such mechanisms, if they could be developed, would be as efficient as the current arrangements.
- 4.9. The ACCC's notes AEMO's submission that Chapter 5 and Chapter 6 of the RMP in their current form best promote an efficient Western Australian retail gas market.
- 4.10. The ACCC considers that without the Conduct AEMO would need to make changes to those provisions of Chapter 5 and Chapter 6 of the RMP that may raise concerns under the Act. The form such changes would need to take is uncertain but they may render the RMP less effective.

## Public benefits

- 4.11. The Act does not define what constitutes a public benefit. The ACCC adopts a broad approach. This is consistent with the Australian Competition Tribunal (the **Tribunal**) which has stated that the term should be given its widest possible meaning, and includes:
- ...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principal elements ... the achievement of the economic goals of efficiency and progress.*<sup>7</sup>
- 4.12. The ACCC has considered the following public benefits:
- facilitation of full retail contestability in the Western Australian retail gas market,
  - efficiency of the Western Australian retail gas market, and
  - a mechanism for enforcing the RMP (compliance procedures).

## Facilitation of full retail contestability

- 4.13. AEMO submits that the RMP have been instrumental in facilitating full retail contestability. AEMO notes that the RMP:

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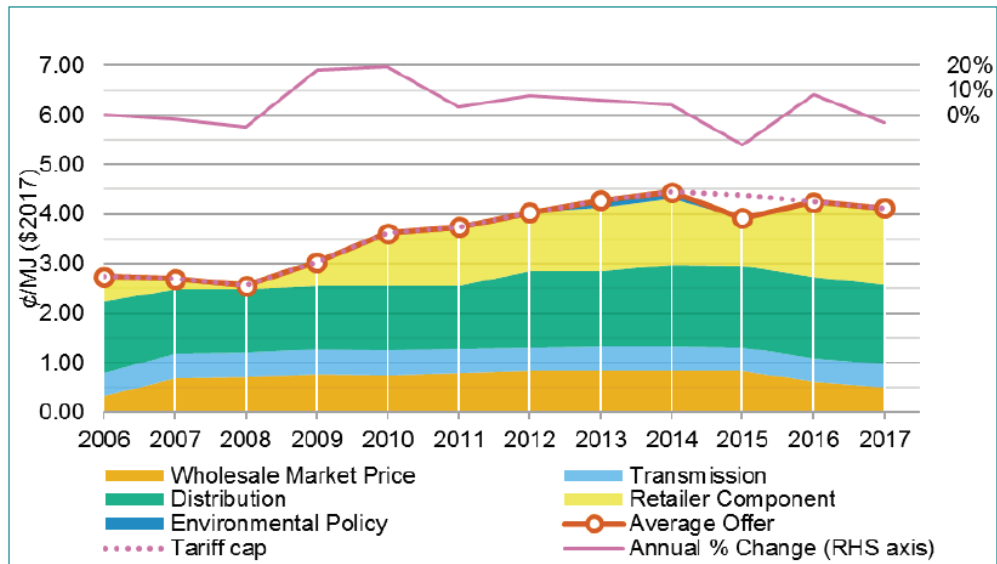
<sup>7</sup> Queensland Co-operative Milling Association Ltd (1976) ATPR 40-012 at 17,242; cited with approval in Re 7-Eleven Stores (1994) ATPR 41-357 at 42,677.



- contain the process by which customers are able to transfer from one retailer to another, and ensure that the retailer and customer transfer process is managed efficiently and effectively, that transfers take place smoothly, and all gas usage is correctly billed and accounted for, and
- provide the mechanism by which retailers are able to settle gas supply and transmission contracts (contained in Chapter 5).

4.14. AEMO submits that:

- figures for residential and business gas customers per retailer from 2009 to 2018 show an increase in the number of retailers supplying customers in Western Australia, and a subsequent decrease in the level of market concentration. This increased choice of gas retailers for residential customers has resulted in downward pressure on bills (through for example, the discounts on offer, including long-term discounts on gas bills in the order of 20 to 30 per cent) and other incentives such as no lock-in contracts and no exit fees,
- the effect of competition facilitated by the Western Australian RMS has seen dramatic price decreases in the residential market. AEMO submits the below chart<sup>8</sup>, which shows that from 2008 to 2014 the tariff cap and average offer in the Western Australian residential gas market increased each year, but have both since fallen with, AEMO submits, the increase in competition between retailers, and
- figures for existing customer transfers from 2013-14 to 2017-18 show that customer churn has increased significantly as a result of new entrants in the market, and is at a similar rate to New South Wales and South Australia.



4.15. The ACCC considers the swing service provisions will continue to contribute to promoting full retail contestability, which in turn contributes to improved and more competitive retail gas services in Western Australia. The ACCC considers that any benefits of increased efficiency and competition will likely be passed onto consumers. In particular, efficient balancing and allocation processes are likely to incentivise retailers to make accurate forecasts and result in an efficient use of pipeline capacity.

<sup>8</sup> Oakley Greenwood, *Gas Price Trends Review 2017*, version 2.1, March 2018, p. 215.

## Efficiency of operation of the WA retail gas market

4.16. AEMO submits that the swing service provisions of the RMP will continue to contribute to promoting efficiency in the Western Australian retail gas markets by:

- providing a formal mechanism for recovering the cost of swing service
- allocating the cost of swing service to the parties responsible for the need for swing service, thereby creating incentives for retailers to improve the accuracy of their gas forecasting, leading to improved operational efficiency of the pipelines and gas subnetworks and more efficient utilisation of pipeline capacity, and
- supporting system integrity and increased efficiency in the provision of gas carriage services, which has ultimately resulted in improved services provided to retailers and customers.

4.17. AEMO submits that there have been no material changes to the operative swing service provisions of the RMP since the 2009 authorisation. It remains an important mechanism to ensure efficiency in the retail gas market. As such, this efficiency will continue to provide a significant public benefit.

4.18. AEMO further submits that it has significant expertise and experience in performing the swing service calculation, having performed the calculation as a service to REMCo before it took over operation of the Western Australian retail gas market.

4.19. The ACCC considers that the swing service provisions of the RMP will continue to contribute to efficiency in the Western Australian retail gas market.

## Compliance with the gas market rules

4.20. AEMO submits that the compliance procedures in Chapter 6:

- provide for an expedient and transparent process for the resolution of disputes between retail gas market participants
- contain the mechanism for enforcement of the RMP.

4.21. AEMO notes that the compliance procedures were amended as part of the transfer of responsibility from REMCo to AEMO in 2016. In approving these amendments, the ERA stated that:

- the changes to the compliance process will not negatively affect the efficiency of the process and may even increase the efficiency of the process,
- the changes to the compliance process could make it more independent, and
- with the amendments to the compliance process, the provisions of the scheme will ensure regulation of the market and that market operation is open and competitive, efficient, and fair to gas market participants and their customers.<sup>9</sup>

4.22. Simply Energy raised the following concerns regarding Chapter 6 of the RMP:

- Where a participant refers a matter of potential non-compliance to AEMO, AEMO must send a notice to all participants and invite them to comment. This invites

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<sup>9</sup> Economic Regulation Authority, *Decision to Approve Transition of Operation of WA Gas Retail Market Scheme to AEMO*, October 2016, p 9.

competitors to disclose potential impacts that are not contemplated by the procedures – such as competition issues and consent arrangements – which undermines competition and focuses AEMO’s attention on disputes between parties, instead of compliance.

- Under Chapter 6, AEMO can be delegated the task of determining whether the impact of a breach is ‘material’, which can result in a potential penalty of \$50,000 per breach. However, the impacts of a breach may be difficult to quantify; and the procedures have no method or measure for AEMO to determine whether the impact of a breach is ‘material’, which inappropriately allows competitors to influence the nature of enforcement. While the Compliance Panel may make the final order, if determined to be a transaction breach there could be a significant volume and consequent financial impact.
- The maximum financial penalty of \$50,000 is excessive when compared to similar regimes (for example, Victoria’s Essential Services Commission can issue penalties of \$20,000 for similar material non-compliance). This is somewhat excessive in the context of the above overlapping obligations, especially regarding consent (of which the procedures only relate to obtaining consent to transfer and not the retail contract in its entirety).

4.23. In response, AEMO submits that:

- it does not agree with Simply Energy’s view that modifying clauses in Chapter 6 addressing compliance and interpretation, so as to align them with other markets, would materially benefit the Western Australian market. AEMO has no current plans to propose significant changes to Chapter 6 RMP and considers that clauses 328A to 330 (relating to AEMO seeking information from participants regarding an alleged breach and making determinations on material matters) have proven to be a cost-effective and transparent mechanism for determining whether an alleged breach of the RMP material, and
- while it is theoretically possible for a competitor to influence the nature and impact of enforcement, which could result in a significant volume and consequential financial impact on the affected party, a right of appeal exists and the independent Compliance Panel (clause 332(b) of the RMP) will make the final determination in relation to any financial penalty.

4.24. More generally, AEMO submits that many of the matters raised by Simply Energy would be more appropriately addressed in a procedure change request to amend the RMP (under Chapter 9). This process ensures that all market participants and interested parties are consulted on changes and that the changes are consistent with the objectives of RMP.

4.25. The ACCC considers that the compliance procedures provide an effective dispute resolution process and mechanism for enforcing the RMP.

4.26. The ACCC notes Simply Energy’s concerns that issues may arise concerning how the compliance procedures operate. The ACCC has not, however, been presented with any substantive evidence or examples of competitors influencing the nature of enforcement. While it is possible that competitors may seek to influence the process in the manner described by Simply Energy, the ACCC considers that AEMO, and the Compliance Panel, are well placed to have regard to these issues in making determinations. No evidence has been presented to suggest that this is not the case.

4.27. Should concerns arise that market participants are gaming the compliance procedures, the ACCC is able to review the authorisation at any time.

## Public detriments

4.28. The Act does not define what constitutes a public detriment. The ACCC adopts a broad approach. This is consistent with the Tribunal which has defined it as:

*...any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency.<sup>10</sup>*

4.29. AEMO submits that the RMS and the authorised RMP will give rise to minimal public detriments.

## Additional costs to consumers

4.30. AEMO notes that when the 2009 applications for authorisation were lodged, potential public detriments in the form of increased costs to consumers, as a result of the costs of market operator charges, swing services charges and dispute resolution charges being passed on to them, were considered. AEMO submits that there is no evidence to suggest that since the arrangements have been in place any additional costs to consumers have resulted. AEMO submits that the level of competition in the retail gas market has increased and the price of gas in the market has significantly declined since authorisation was first granted.

4.31. AEMO submits that (similar to the previous market operator REMCo) it operates on a cost-recovery basis only (it is a not-for-profit company) and generates revenue from the Western Australian retail gas market participants to cover the capital and operating costs associated with administration of the RMP.

4.32. AEMO notes that since it took over administration of the Western Australian retail gas market in October 2016:

- 'Registration' and 'Service' fees have been static (from the levels that were being charged by REMCo), and
- the 'Market Share Charge' that was previously set by REMCo was reduced by AEMO from 0.30815 (\$ per customer per month) to 0.13485 (\$ per customer per month) for the 2017-2018 budget, and has since been static.

4.33. The ACCC has previously concluded that significant effort had been made to minimise the costs of operating the Retail Market Rules (now the RMP). The ACCC has not received any information that suggests that AEMO will not continue to endeavour to contain operational costs.

4.34. The ACCC considers that any potential detriments associated with AEMO's charges are negligible relative to the efficiency and competition gains which are likely to be achieved by Chapter 5 and Chapter 6 of the RMP.

## The RMP auditing and efficacy provisions

4.35. Simply Energy submits that Chapter 7 of the RMP requires participants to undertake a negative assurance audit on consumer consent to ensure retailers have procedures in place that facilitate compliance. However, it notes that the ERA imposes licence

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<sup>10</sup> Re 7-Eleven Stores (1994) ATPR 41-357 at 42,683.

conditions on retailers to undertake more comprehensive assurance audits on multiple licence conditions, making AEMO's audit somewhat redundant and highlighting the misalignment between the RMP and regulatory regime for that market.

4.36. The ACCC notes that AEMO is not seeking authorisation for Chapter 7 of the RMP. The ACCC also notes that the ERA has not raised concerns with this requirement. The ACCC considers that Chapter 9 of the RMP (procedure change process) provides an appropriate framework for considering changes to the RMP of this nature.

### Balance of public benefit and detriment

4.37. For the reasons outlined in this draft determination, the ACCC is satisfied that the Conduct is likely to result in a public benefit and that this public benefit would outweigh any likely detriment to the public from the Conduct.

### Length of authorisation

4.38. The Act allows the ACCC to grant authorisation for a limited period of time.<sup>11</sup> This enables the ACCC to be in a position to be satisfied that the likely public benefits will outweigh the detriment for the period of authorisation. It also enables the ACCC to review the authorisation, and the public benefits and detriments that have resulted, after an appropriate period.

4.39. In this instance, AEMO seeks re-authorisation for 10 years.

4.40. AEMO submits that:

- the RMP have operated well for the past 15 years, and the regulatory and governance structure of the market has been generally settled during that time and enjoys broad support by retail gas market participants,
- the 10-year period is appropriate as the RMP will continue to have a procedure change process in Chapter 9 which allows amendment of the RMP to update them, or address any concerns of a retail gas market participant that the RMP could be operating more efficiently,
- it is important for the market to have certainty concerning the status of the RMP which promotes a competitive market and a 10-year authorisation will provide that certainty, and
- given there are no known reform initiatives relating to the Western Australian retail gas market, the current arrangements remain fit for purpose and are not considered by market participants or industry as contributing to any public detriment.

4.41. Given the assessment of public benefits and detriments likely to result from the Conduct, the ACCC proposes to grant re-authorisation for 10 years.

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<sup>11</sup> Subsection 91(1)

## 5. Draft determination

### The application

- 5.1. On 13 June 2019, AEMO lodged an application to revoke authorisations A91136, A91137, A91138, A91170 and A91171 and substitute authorisation AA1000445 for the ones revoked (referred to as re-authorisation). This application for re-authorisation AA1000445 was made under subsection 91C(1) of the Act.
- 5.2. AEMO seeks re-authorisation to enable it to operate Chapter 5 and Chapter 6 of version 6 of the Retail Market Procedures and the associated deeds.
- 5.3. Subsection 90A(1) of the Act requires that before determining an application for authorisation, the ACCC shall prepare a draft determination.

### The authorisation test

- 5.4. Under subsections 90(7) and 90(8) of the Act, the ACCC must not grant authorisation unless it is satisfied in all the circumstances that the Conduct is likely to result in a benefit to the public and the benefit would outweigh the detriment to the public that would be likely to result from the Conduct.
- 5.5. For the reasons outlined in this draft determination, the ACCC is satisfied, in all the circumstances, that the Conduct would be likely to result in a benefit to the public and the benefit to the public would outweigh the detriment to the public that would result or be likely to result from the Conduct, including any lessening of competition.
- 5.6. Accordingly, the ACCC proposes to grant re-authorisation.

### Conduct which the ACCC proposes to authorise

- 5.7. The ACCC proposes to revoke authorisations A91136, A91137, A91138, A91170 and A91171 and grant authorisation AA1000445 in substitution. The substitute authorisation is to enable AEMO to operate Chapter 5 and Chapter 6 of version 6 of the RMP and the associated deeds.
- 5.8. The authorisation is expressed to apply to or in relation to:
  - AEMO
  - each other person who is or becomes party to the Retail Market Agreement, and
  - each other person who currently or in the future participates in the Western Australian retail gas market pursuant to the RMP, including gas transmission operators and prescribed persons.
- 5.9. The Conduct may involve a cartel provision within the meaning of Division 1 of Part IV of the Act or may have the purpose or effect of substantially lessening competition within the meaning of section 45 of the Act or may constitute exclusive dealing within the meaning of section 47 of the Act.
- 5.10. The ACCC proposes to grant authorisation AA1000445 for 10 years.
- 5.11. This draft determination is made on 29 August 2019.

## 6. Interim authorisation

- 6.1. Authorisations A91136, A91137, A91138, A91170 and A91171 expire on 17 September 2019. AEMO requests interim authorisation to continue to operate Chapter 5 and Chapter 6 of the RMP and the associated deeds while the ACCC is considering the substantive application.
- 6.2. AEMO submits that interim authorisation is necessary to ensure that the Western Australian retail gas market continues to operate efficiently, and market participants and consumers have certainty as to the operation of the market.
- 6.3. The ACCC has decided to suspend the operation of authorisations A91136, A91137, A91138, A91170 and A91171 and grant interim authorisation in substitution for the authorisation suspended. The ACCC has decided to grant interim authorisation for the following reasons:
  - interim authorisation will preserve the status quo, allowing AEMO to continue to operate Chapter 5 and Chapter 6 of the RMP and the associated deeds,
  - no objections have been raised to the application for interim authorisation,
  - the Conduct has not changed substantively since it was first authorised in 2004, and
  - the ACCC's preliminary assessment, described in this draft determination, is that the Conduct is likely to result in public benefits that would outweigh any likely public detriment.
- 6.4. Interim authorisation will remain in place until the date the ACCC's final determination comes into effect or until interim authorisation is revoked.

## 7. Next steps

- 7.1. The ACCC now invites submissions in response to this draft determination. In addition, consistent with section 90A of the Act, the applicant or an interested party may request that the ACCC hold a conference to discuss the draft determination.