

Submission to the ACCC

Background

1. On 18 February 2016 the ACCC:
 - (a) decided to grant interim authorisation to the Applicants,¹ subject to the imposition of a condition; and
 - (b) published its Draft Determination in which the ACCC proposes to grant authorisation to the Applicants for a period of five years, subject to the imposition of a condition,in respect of the applications for authorisation which were submitted to the ACCC by the Applicants on 15 October 2015.
2. The Applicants have provided submissions to the ACCC, in response to the ACCC's Draft Determination and the submissions provided to the ACCC by third parties, on 4 and 11 March 2016 respectively.
3. The ACCC has invited the Applicants to provide a further submission to the ACCC with respect to whether the proposed condition of authorisation should be amended so as to require the Applicants to update previously disclosed Maintenance Information, even where they do not disclose that information amongst themselves (i.e. by one of the LNG producers to at least one of the other LNG producers).

Applicants' Submission

4. The Applicants rely on the submissions they have previously made to the ACCC in relation to this issue.² Those submissions are supplemented by the contents of this submission.
5. When considering an application for authorisation, the ACCC must consider whether public benefits from the proposed conduct would outweigh any detriment constituted by any lessening of competition from the conduct. In this case, the ACCC has identified that the conduct would be likely to achieve:

"a number of public benefits, particularly in relation to increasing the efficiency of undertaking LNG maintenance and reducing the likelihood of major disruptions to domestic gas markets, which could occur if multiple maintenance events at the Applicants' facilities overlap".³
6. The ACCC has also stated that the proposed conduct would give rise to "potentially significant information asymmetry detriments", but that it considers that the proposed condition on authorisation identified in the ACCC's draft decision would address this concern:⁴

"Subject to the proposed condition of authorisation, the ACCC is satisfied that the proposed conduct is likely to result in a public benefit that would outweigh the likely public detriment."

¹ Australia Pacific LNG Pty Limited Project (**APLNG**), the Queensland Curtis LNG Project (**QCLNG**) and the Gladstone LNG Participants (**GLNG**).

² See the Applicants' Submission to the ACCC dated 4 March 2016 at [4] - [6] and the Applicants' Submission to the ACCC dated 11 March 2016 at [16] - [19].

³ ACCC, *Draft Determination and Interim Authorisation - Applications for authorisation A91516 & A91517*, 18 February 2016, p i.

⁴ *Ibid*, p ii.

7. Therefore, the Applicants are concerned that the ACCC has indicated, at this late stage that the proposed condition of authorisation may not be acceptable unless it includes an obligation on the parties not only to publish the information that they disclose among themselves when jointly scheduling maintenance, but also to update that information (once published) for the benefit of the broader market, even in circumstances where the parties have not disclosed any updated information among themselves.
8. The Applicants consider that there is no principled justification for imposing such a requirement as:
- (a) The ACCC previously sought the proposed condition in order to rectify an information asymmetry as between the parties to the authorised conduct and the domestic gas market at large. It is uncontroversial that the proposed condition already does that, and the ACCC expressly recognised this in its draft decision.
 - (b) What the ACCC is proposing now is an additional obligation to publish to the domestic gas market *more* information than is disclosed between the parties pursuant to the conduct to be authorised. The ACCC has justified this proposal on the basis that the information published pursuant to the proposed condition would be misleading if it was not updated. This concern is misconceived – the terms of the proposed condition endorsed by the ACCC in its draft decision expressly state (clause 6) that the parties would publish the information necessary to rectify the information asymmetry along with an express statement identifying the date at which the information is current, warning that the information is subject to change. Information published with that very clear explanation would not be misleading: it is unambiguously a representation as to information that is accurate at a particular point in time, but may not be accurate in the future. By including these words in the draft condition, the parties in fact pre-empted and resolved the precise concern the ACCC now seeks to identify.
 - (c) Given that the draft condition already deals with the substance of the ACCC's concern, it is difficult to see on what principled basis the ACCC can justify seeking to impose on the parties an ongoing obligation to publish information that will not be exchanged between the parties pursuant to the authorised conduct. The proposed addition to the condition is in no way referable to any lessening of competition from the conduct (which the ACCC has already considered to be adequately addressed by the proposed condition), and the ACCC has already expressed the view that the public benefits from the conduct to be authorised outweigh any such lessening.
9. The ACCC has not identified justification for exercising its discretion to impose an additional condition in these circumstances. Further, there are very strong reasons why the ACCC should not exercise its discretion in this way. In particular:
- (a) The additional condition is entirely unrelated to the analysis of benefits or detriments arising from the conduct.
 - (b) The additional condition is entirely unrelated to the conduct for which the parties seek authorisation – rather, it would impose a quasi-regulatory obligation on the parties, in circumstances where that obligation would not regulate the conduct sought to be authorised, but rather would regulate conduct that the proposed condition has, at the request of the ACCC, grafted on to the conduct sought to be authorised.
 - (c) The Applicants operate in an industry which is subject to close and ongoing regulatory review and reform, not least as a result of the ACCC's inquiry into the east coast gas market, and the AEMC's ongoing East Coast Wholesale Gas Market and Pipeline Frameworks review. The issue of information publication is being actively considered by the AEMC. If it is considered desirable that the Applicants be subject to additional reporting obligations to publish information to the gas

market at large, then this should be advocated through the appropriate regulatory reform processes. The authorisation process is not such a process. The Applicants are concerned that this process is being used to impose an ad hoc, supplementary regulatory regime where separate and more appropriate regulatory reform mechanisms are readily available.

- (d) The continued use of the authorisation process to deal with wider issues unrelated to the conduct for which the Applicants seek authorisation could lead to a situation where the benefits of the authorisation for the Applicants are outweighed by the commercial disadvantages arising from broad information-publication requirements, especially when they are specific to a single group of participants in the Australian market, and when information is accessible not only domestically, but by participants in the global LNG market.

Under this scenario, the Applicants could be discouraged from engaging in authorised conduct, and instead plan shutdowns in isolation. Accordingly, there would be no requirement to publish any information about maintenance shutdowns.