



Draft Determination

Application for authorisation
lodged by
the Australian Energy Market Operator Limited
in respect of
certain coordination and information sharing arrangements relating to
maintenance of electricity systems during the COVID-19 pandemic

Authorisation number: AA1000586

Date: 15 December 2021

Commissioners: Keogh
Rickard
Brakey
Ridgeway

Summary

The ACCC proposes to grant authorisation, with conditions, to enable the Australian Energy Market Operator Limited (AEMO), and current and future electricity industry participants, to coordinate and share information relating to the maintenance of electricity systems for the purpose of ensuring their safe, secure and reliable operation and minimise the risk of any outages, during the COVID-19 pandemic.

The ACCC previously granted authorisation, with conditions, for similar gas and electricity maintenance coordination and information sharing arrangements for the purpose of responding to issues arising from the COVID-19 pandemic (the 2020 Authorisation). The 2020 Authorisation expired on 31 May 2021. AEMO's current application relates to the electricity system only.

The ACCC considers that the arrangements are likely to result in public benefits from providing greater capacity to ensure the ongoing safety, security and/or reliability of Australia's electricity systems to deal with issues arising from the COVID-19 pandemic, and reducing costly delays to maintenance.

The ACCC considers that the proposed coordination and information sharing is likely to result in some public detriment by reducing competition for maintenance services and other inputs. However, the ACCC considers that the detriment resulting from coordination in respect of these services is outweighed by the likely public benefit.

The proposed conditions require AEMO to regularly report to the ACCC about material decisions or arrangements discussed at industry coordination meetings, and for the immediate termination of any arrangements entered into upon the expiry of ACCC authorisation. Interim authorisation was granted with the same conditions on 27 October 2021.

The ACCC proposes to grant authorisation until 27 October 2022.

The ACCC invites submissions in relation to this draft determination by 27 January 2022 before it proceeds to make its final decision.

1. The application for authorisation

1.1. On 15 October 2021 the Australian Energy Market Operator Limited (AEMO) lodged application for authorisation AA1000586 with the Australian Competition and Consumer Commission (the ACCC) under subsection 88(1) of the *Competition and Consumer Act 2010* (Cth) (the Act). The application is made on behalf of:¹

- AEMO and its related bodies corporate
- participants in Australian electricity markets and participants with a registration exemption for the National Electricity Market (NEM) and their related bodies corporate² (AEMO Industry Participants) and
- other entities that become participants registered in the NEM, participants with a registration exemption for the NEM, or participants registered in the Western Australian Electricity Market (WEM), as notified by AEMO to the ACCC (Future AEMO Industry Participants).

¹ AEMO's application for authorisation AA1000586, 15 October 2021, p. 3.

² These participants and members registered and exempted as at 7 October 2021 are listed in [Appendix B](#) of AEMO's application for authorisation AA1000586, 15 October 2021.

- 1.2. AEMO, AEMO Industry Participants, and Future AEMO Industry Participants seek authorisation for certain maintenance coordination and information sharing arrangements (as defined at paragraphs 1.9 to 1.12) relating to maintenance of electricity systems during the COVID-19 pandemic. AEMO seeks authorisation to engage in the proposed conduct for 12 months from the date of any interim authorisation granted by the ACCC.
- 1.3. The parties could be considered competitors in the generation, transmission, transportation and/or supply of electricity in Australia, as well as the acquisition of maintenance services. Coordination between competitors risks contravening the competition provisions of the Act. The ACCC may grant authorisation, which provides businesses with protection from legal action under the competition provisions in Part IV of the Act for arrangements that may otherwise risk breaching those provisions, but are not harmful to competition and/or are likely to result in overall public benefits.
- 1.4. In 2020, the ACCC granted authorisation, with conditions, for similar coordination and information sharing arrangements (the **2020 Authorisation**).³ The 2020 Authorisation covered both gas and electricity systems in Australia and expired on 31 May 2021. The current application relates to electricity systems only, but AEMO otherwise seeks authorisation for the same arrangements.
- 1.5. AEMO submits the proposed arrangements will assist it and industry participants to better manage the ongoing circumstances associated with the pandemic that threaten completion, or timely completion, of scheduled and/or emergency maintenance to Australia's electricity systems. These circumstances include:⁴
 - Border controls and quarantine - electricity industry maintenance often requires a highly specialised workforce, with contractors travelling between states (or internationally) to undertake maintenance work. Interstate teams and international specialists may be unable or unwilling to travel, must quarantine for extended periods if they do travel, or are unable to travel quickly, for example, in response to emergency maintenance requirements.
 - Health impacts on the workforce - essential workers or contractors responsible for maintenance or repairs may become unavailable because they are unwell due to COVID-19, or required to isolate as a result of being a close contact. Unavailability for these health reasons has the potential to disrupt planned maintenance, and make emergency maintenance more difficult to undertake in a timely way.
 - Parts shortages due to ongoing disruptions to local and international supply chains.
- 1.6. Further, AEMO advises that there has now been nearly two years of reduced maintenance work on Australia's electricity systems, with many large scheduled maintenance projects deferred due to the challenges associated with the pandemic – namely, a lack of specialist parts due to global supply chain issues, and an inability to access international and local contractor expertise. As a result, there is now a large volume of scheduled maintenance required to be undertaken on Australian electricity systems. Such a large volume of maintenance needs to be carefully managed to ensure supply into the grid continues to meet consumer demand.⁵

³ ACCC [Determination](#) in relation to application for authorisation AA1000484, 17 September 2020.

⁴ AEMO's application for authorisation AA1000586, 15 October 2021, p. 7.

⁵ Ibid.

- 1.7. The current maintenance backlog is compounded by the fact that the industry is heading into the peak summer season (November to March), where limited planned maintenance usually occurs due to the high demand for energy over this period. AEMO advises that a hot summer could stress plant, increasing the risk of unplanned maintenance which increases the likelihood of forced outage rates.⁶

The Proposed Conduct

- 1.8. AEMO is the independent market and system operator for gas and electricity systems across Australia.

- 1.9. AEMO seeks authorisation to enable it and AEMO Industry Participants and Future AEMO Industry Participants to discuss, enter into or give effect to any contract, arrangement or understanding between them, or engage in any conduct, related to:⁷

- *Co-ordinating repairs and maintenance* - planning for and/or minimising any disruptions to electricity supply, for example, by coordinating scheduling of any repairs, maintenance and other works requiring outages
- *Sharing essential personnel* - sharing information and/or entering into common arrangements in relation to essential employees and contractors to ensure there are sufficient personnel to maintain and operate electricity infrastructure
- *Sharing essential inputs* - sharing information about the availability of, and/or entering into arrangements to share, essential inputs for electricity production, generation, transmission, distribution and supply systems and infrastructure, such as parts, equipment or specialised resources necessary for essential maintenance, as well as other consumable materials necessary for the operation of their facilities (but in all cases excluding fuel for thermal generators), and
- *Sharing information regarding ongoing operation* - sharing information about the ongoing availability, performance and/or operation of their facilities and any risks to ongoing availability, performance and/or operation,

provided in each case, the purpose for doing so is to ensure the safe, secure and reliable operation of Australia's energy systems, and minimise the risk of any electricity outages, during the pandemic.

- 1.10. The conduct is limited to:⁸

- discussions, conduct, contracts, arrangements and/or understandings which AEMO is either a party to or has facilitated
- discussions, conduct, contracts, arrangements and/or understandings to which AEMO is not a party, but which are carried out for the purposes of implementing arrangements which AEMO has been a party to or facilitated
- where discussions relate to a specific state or territory jurisdiction - discussions attended by a senior officer of the relevant state or territory government department with responsibility for energy, or their delegate

⁶ Ibid, pp 7-8.

⁷ AEMO's application for authorisation AA1000586, 15 October 2021, p. 5.

⁸ Ibid.

- where conduct, contracts, arrangements and/or understandings relate to a specific state or territory jurisdiction - conduct, contracts, arrangements and/or understandings which have been agreed to by, or arise out of a discussion attended by, a senior officer of the relevant state or territory government department with responsibility for energy, or their delegate.
- 1.11. Authorisation is not sought to enter into any contracts, arrangements or understandings regarding the wholesale or retail price of energy. Nor is it intended that AEMO, AEMO Industry Participants and Future AEMO Industry Participants would share confidential information relating to retail pricing matters, cost, or profits.⁹
- 1.12. This conduct is a temporary measure, and not compulsory. Any AEMO Industry Participant or Future AEMO Industry Participant can opt out of any proposed collaboration.¹⁰
- 1.13. The conduct as described at paragraphs 1.9 to 1.12 is referred to in this draft determination as the **Proposed Conduct**.
- 1.14. AEMO submits that authorisation be granted with two conditions requiring AEMO to regularly report to the ACCC, and for the immediate termination of any arrangements entered into upon the expiry of any authorisation.¹¹ These conditions were imposed under the 2020 Authorisation. The 2020 Authorisation included two additional conditions which are no longer relevant due to the narrower scope of the current application – namely, it no longer applies to gas systems, and future parties are now defined in the application for authorisation.

Interim authorisation

- 1.15. At the time of lodging the application, AEMO requested interim authorisation to enable the parties to engage in the Proposed Conduct while the ACCC considered the substantive application. On 27 October 2021 the ACCC granted interim authorisation, with conditions, in accordance with section 91(2) of the Act.
- 1.16. Interim authorisation remains in place until the date the ACCC's final determination comes into effect, the application for authorisation is withdrawn, or until interim authorisation is revoked.
- 1.17. A copy of the ACCC's interim authorisation decision is available from the ACCC's [Authorisations Public Register](#).

2. Background

AEMO's role in the Australian energy market

- 2.1. AEMO's role is to oversee the operations and security of the NEM power system in eastern and south-eastern Australia and the WEM in Western Australia. AEMO also manages a variety of gas trading markets and infrastructure.
- 2.2. AEMO seeks to promote efficient investment in, and efficient use of, gas and electricity for the long-term interests of Australian consumers in relation to price, quality, safety, reliability and security.¹²

⁹ Ibid.

¹⁰ AEMO's application for authorisation AA1000586, 15 October 2021, p. 6.

¹¹ Ibid.

¹² AEMO's website: 'What we do', <https://aemo.com.au/about/what-we-do>, viewed on 3 November 2021.

- 2.3. AEMO's responsibilities include monitoring supply and demand, voltage and frequency, and managing planned and unplanned outages and emergencies. AEMO manages the Gas Short Term Trading Market, the Gas Supply Hubs and Pipeline Capacity Trading, as well as retail markets in electricity and gas. To achieve this, AEMO monitors system performance and security, and manages the essential services that support a secure electricity system, such as regulating balancing, frequency control, inertia and system strength, voltage management and system restart capabilities.¹³
- 2.4. Forecasting and modelling of potential (or developing) changes is critical to AEMO's work. AEMO produces short-term, long-term and operational predictions of demand and supply, and provides information to market participants about forecast risks to supply. AEMO also assesses and plans for the impact that operational changes will have on the system, such as planned outages, the connection of new generators and gas supply levels.¹⁴
- 2.5. If an energy-related event or emergency were to occur, AEMO is responsible for restoring energy systems to a secure operating state as soon as is safely possible – for example, load shedding (as a last resort measure) or the purchase of ancillary services. AEMO is also responsible for coordination and management of emergency arrangements across the NEM, WEM and gas markets in eastern and south-eastern Australia, including collaborating with governments, emergency services and energy industry participants during major disruptions of energy supply.¹⁵

The 2020 Authorisation (AA1000484)

- 2.6. On 17 September 2020 the ACCC granted authorisation, with conditions, to enable AEMO and participants in the Australian gas and/or electricity markets to cooperate to ensure the ongoing safety, security, or reliability of Australian energy systems during the COVID- 19 pandemic by: sharing information regarding ongoing operation at their facilities; co-ordinating repairs and maintenance; sharing essential personnel; and sharing essential inputs.
- 2.7. The [2020 Authorisation](#) was subject to 4 conditions, which provided transparency in relation to the conduct and minimised the risk and extent of potential public detriment. In particular, the conditions imposed: reporting requirements on AEMO; particular reporting requirements on conduct undertaken by Liquefied Natural Gas (LNG) producers; required that agreements formed under the authorisation not endure beyond the period of authorisation; and set out a process for adding other industry participants to the authorisation.
- 2.8. The ACCC granted authorisation for 12 months, and the 2020 Authorisation expired on 31 May 2021.

The experience under the 2020 Authorisation

- 2.9. AEMO submits that the 2020 Authorisation worked well to allow it, and electricity industry participants to meet, have open discussions, and agree on solutions to address the challenges posed by the COVID-19 pandemic.

¹³ Ibid.

¹⁴ Ibid.

¹⁵ Ibid.

2.10. In accordance with the reporting condition¹⁶ imposed by the ACCC under the 2020 Authorisation, AEMO provided regular public reports to the ACCC outlining the details of regular meetings attended by it and relevant industry participants during the term of authorisation. AEMO's reports are available from the ACCC's [Authorisations Public Register](#) for the 2020 Authorisation.

2.11. In particular, AEMO, generators and relevant government departments met regularly in Victoria and Queensland, and less often in South Australia, to coordinate and share information about:

- specific planned outages, including timing and resources needed
- how scheduled maintenance was progressing, and possible disruptions to those plans
- processes for energy sector workers to apply for specialist worker permits to enable them to travel from declared COVID-19 hotspots
- practical COVID-19 health and safety implications for worksites, including permit management and contract tracing
- essential inputs – one generator was able to quickly locate a new alternative local supplier of a major part that would ordinarily be sourced from Germany but was unavailable to import due to the pandemic, and therefore avoiding an extended outage which was at risk of overlapping other scheduled outages.¹⁷
- summer preparedness – including presentations from AEMO on weather forecasts, updates about the Victorian supply/demand balance, ongoing impact of the COVID-19 pandemic, and special briefings with emergency management services and NEM participants.

3. Consultation

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

3.2. The ACCC invited submissions from a range of potentially interested parties including major electricity retailers and generators, relevant industry associations or peak bodies, consumer groups, state and federal government and relevant regulatory bodies.

3.3. The ACCC received two public submissions from interested parties in relation to the application from the **NSW Department of Planning, Industry and the Environment**, and the **Australian Small Business and Family Enterprise Ombudsman**. Both support the ongoing authorisation of the Proposed Conduct.

3.4. Public submissions by AEMO and interested parties are available from the ACCC's [Authorisations Public Register](#) for this matter, and are summarised where relevant in section 4 of this draft determination.

¹⁶ Under the conditions of interim authorisation, AEMO was originally required to provide weekly reports to the ACCC (as per the Reporting and Communications Protocol of 8 April 2020, and the Reporting and Communications Protocol of 8 May 2020), and then on a monthly basis (as per the Reporting and Communications Protocol, Attachment A to the Final Determination of 17 September 2020).

¹⁷ AEMO's application for authorisation AA1000586, 15 October 2021, p. 8.

4. ACCC assessment

- 4.1. The ACCC's assessment of the Proposed Conduct is carried out in accordance with the relevant authorisation test contained in the Act.
- 4.2. AEMO sought authorisation for the Proposed Conduct that would or might constitute a cartel provision within the meaning of Division 1 of Part IV of the Act; may constitute exclusive dealing (section 47); and may substantially lessen competition or be concerted practices within the meaning of section 45 of the Act. Consistent with 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 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

- 4.3. To assess the likely effect of the Proposed Conduct, the ACCC identifies the relevant areas of competition likely to be impacted.
- 4.4. AEMO submits that AEMO Industry Participants may compete in relation to:
 - the generation, transmission, transportation and/or supply of electricity in Australia; and/or
 - the procurement of maintenance services, spare parts and/or equipment to supply electricity in Australia.
- 4.5. The ACCC considers that the primary area of competition likely to be impacted by the Proposed Conduct is input markets to the electricity supply chain, including for services such as maintenance and spare parts. The ACCC notes that there are likely to be flow on effects in the generation, transmission, and supply of electricity in Australia.

Future with and without the Proposed Conduct

- 4.6. In applying the authorisation test, the ACCC compares the likely future with the Proposed Conduct that is the subject of the authorisation to the likely future in which the Proposed Conduct does not occur.
- 4.7. Absent the Proposed Conduct, AEMO submits that it and electricity industry participants may be unable to coordinate certain activities to ensure the safe, secure and reliable supply of energy during the pandemic.¹⁸
- 4.8. Since the expiry of the 2020 Authorisation, AEMO advises that, consistent with its statutory role, it met with electricity industry participants to discuss maintenance issues on a bilateral basis. In its experience, AEMO considers these bilateral discussions are not adequate for dealing with the ongoing challenges created by the COVID-19 pandemic – that is, they do not allow for timely information exchange, coordination, and agreement between participants.¹⁹
- 4.9. While AEMO already has certain emergency powers to deal with immediate threats to power system security and interruptions to supply, the existing emergency management arrangements (including those reflected in the national electricity rules

¹⁸ AEMO's application for authorisation AA1000586, 15 October 2021, p. 10.

¹⁹ AEMO's application for authorisation AA1000586, 15 October 2021, p. 9.

which enable AEMO to intervene to ensure power system security in certain circumstances) are not well suited to dealing with the needs surrounding the ongoing pandemic, and would need to be adapted. This includes less reliance by AEMO on bilateral consultations and the adoption of a more coordinated approach and agreement with electricity industry participants to take urgent action.²⁰

4.10. The ACCC considers that without the Proposed Conduct, AEMO will continue to use its existing powers to deal with any COVID-19 related issues that arise in the electricity system and that fall within the scope of the Proposed Conduct. This would involve AEMO liaising and negotiating with individual industry participants on a bilateral basis in order to achieve some degree of coordination, but any forward scheduling of maintenance could only be undertaken in response to an imminent threat to system security.

4.11. In the future with the Proposed Conduct, the ACCC considers AEMO and AEMO Industry Participants would be able to coordinate to mitigate or resolve COVID-19 related issues in the energy system that fall within the scope of the Proposed Conduct. This coordination is beyond AEMO's existing powers and so would better allow a collective and more rapid response to COVID-19 related maintenance and supply issues in the system.

Public benefits

4.12. 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 in considering public benefits:

...we would not wish to rule out of consideration any argument coming within the widest possible conception of public benefit. This we see as 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.²¹

4.13. The ACCC has considered the following public benefits:

- greater capacity to ensure the ongoing safety, security and/or reliability of Australia's electricity systems and
- reducing costly delays to maintenance.

Greater capacity to ensure the ongoing safety, security and/or reliability of Australia's electricity system

4.14. AEMO submits that working together with electricity industry participants under the Proposed Conduct will allow them to seek to address the challenges to maintenance and security of electricity supply posed by the ongoing COVID-19 pandemic. In particular, the Proposed Conduct would enhance the security of electricity supply in the following ways:²²

- Coordinating repairs and maintenance – for example, if a generator requires an outage unexpectedly for emergency repair work, other generators might agree to reschedule their planned maintenance to avoid risks to system security.

²⁰ AEMO's application for authorisation AA1000586, 15 October 2021, p. 10.

²¹ 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.

²² AEMO's application for authorisation AA1000586, 15 October 2021, p. 8.

- Sharing essential personnel – for example, if one generator brings a specialist team from interstate or overseas to undertake a particular type of work, that generator may share information about the contractors being in the area with other generators. Other generators may wish to take advantage of the contractors being in the area by undertaking similar works themselves. The generators may reach an agreement to share the time of the contractors and the costs of their visit to the area.
- Sharing essential inputs – through electricity industry participants being able to share information about the availability of and/or enter into arrangements to share essential inputs.
- Sharing information regarding ongoing operation – through electricity industry participants sharing information related to ongoing availability, performance and operation of their facilities, including any upcoming risks, which is central in helping to schedule maintenance works.

4.15. The NSW Department of Planning, Industry and Environment (**DPIE**) submits that the Proposed Conduct will enable a ‘swift response to generator unplanned outages and critical worker resource constraints that might otherwise lead to energy supply scarcity.’ In particular, the DPIE submits:²³

Generators typically rely on a common pool of specialist workers that support critical maintenance works across jurisdictions. Public Health Order constraints and jurisdictional border restrictions have further limited the available pool of workers across the National Electricity Market. The scheduling and planning of outages requires closer coordination to ensure that reliance of staff that are subjected to Public Health Orders across jurisdictions and its impacts are understood.

Generators have also required operations and control room staff to work in separate teams in isolation to manage COVID-19 risks. This approach resulted in lesser deputy and back-up staffing options and also constraints with roster management due to fatigue management policies. Infrastructure owners will benefit by being able to share critical operational staff under constraints to ensure continuity of supply.

ACCC view

4.16. The ACCC considers that the Proposed Conduct will improve the ability for AEMO and AEMO Industry Participants to respond to impacts of the ongoing COVID-19 pandemic on Australia’s electricity systems. Should such impacts occur, and as experienced under the 2020 Authorisation, AEMO will be able to convene relevant groups to quickly share critical information and, where necessary, collectively agree to specific responses. Such collective action is unlikely to be achieved absent the authorisation, or is unlikely to be achieved quickly as AEMO would need to work individually with each industry participant.

4.17. This enhanced capacity to respond to impacts of the COVID-19 pandemic reduces the potential for the pandemic to give rise to outages or other system security issues. Improvements to system security, safety and reliability flow onto economic benefits by avoiding outages for consumers and businesses, and minimising damage to energy system infrastructure through system instability.

4.18. The ACCC therefore considers that the Proposed Conduct is likely to result in a public benefit in the form of providing greater capacity to ensure the ongoing safety, security and/or reliability of Australia’s electricity system.

²³ Submission from NSW Department of Planning, Industry and Environment, 29 October 2021, p. 1.

Minimising costly delays to maintenance

- 4.19. As advised by AEMO, there is currently a backlog of maintenance due to nearly two years of reduced maintenance work on Australia's electricity systems, with many large scheduled maintenance projects deferred due to the challenges associated with the pandemic. This backlog is compounded by the fact that the industry is currently in the peak summer season (November to March), where limited planned maintenance usually occurs due to the high demand for energy over this period. In addition, hot weather conditions can stress plant, which increases the risk of unplanned maintenance which in turn increases the likelihood of forced outages.
- 4.20. DPIE submits that in NSW, large scale generator outages and site construction works were delayed or scaled back due to Public Health Order constraints. For example, the EnergyAustralia Mount Piper Power Station outage that was originally scheduled for September to November 2021.²⁴
- 4.21. In addition, DPIE advises that:²⁵
- Outages that proceeded were subject to longer outage schedules or reduced scope of works due to COVID-19 Safety Plans, which required the segregation of workers, isolation of work areas and staggering of work shifts resulting in lower activity. These factors required outage scheduling and prioritisation to be more collaborative, given generators are now having to schedule outages across the financial year, rather than the traditional "shoulder" periods.
- 4.22. The Australian Small Business and Family Enterprise Ombudsman submits that the Proposed Conduct will facilitate 'the efficient management of the maintenance backlog' which will benefit the Australian economy by limiting power outages and disruption to businesses.²⁶

ACCC view

- 4.23. The ACCC considers the ongoing circumstances associated with the pandemic, and the existing maintenance backlog, is likely to make maintenance activities within Australia's electricity systems more difficult to plan for, including responding to unplanned outages during the summer period, and has the potential to cause delays and extended outages at specific generators. Such delays or outages at specific generators would impose costs to those generators. These costs will likely be passed through to consumers.
- 4.24. Under the 2020 Authorisation, Victorian and Queensland generators met regularly to share information and coordinate in relation to their maintenance schedules (as outlined at paragraph 2.11). The ACCC considers the Proposed Conduct is likely to reduce the potential for COVID-19 to cause delays or extended outages at specific generators. AEMO Industry Participants should be able to coordinate a maintenance schedule that minimises the potential for delays to cascade and create overlapping, expensive outages. Sharing information will better allow participants to find appropriately skilled labour and components in the unique COVID-19 circumstances.
- 4.25. In normal market conditions, the ACCC would generally take the view that competition between generators is likely to be superior in allocating maintenance labour and components. However, the COVID-19 pandemic has caused, and is likely to continue to cause, supply issues to these markets, such as forcing large teams of skilled labour

²⁴ Submission from NSW Department of Planning, Industry and Environment, 29 October 2021, p. 1

²⁵ Ibid.

²⁶ Submission from the Australian Small Business and Family Enterprise Ombudsman, 11 November 2021, p. 1.

to quarantine for periods of time, or travel restrictions. Given the potentially high cost of delays to maintenance, the ACCC considers that there is public benefit in the parties being able to reduce maintenance delays during the pandemic.

ACCC conclusion on public benefit

4.26. The ACCC considers that the Proposed Conduct is likely to result in public benefits from providing greater capacity to ensure the ongoing safety, security and/or reliability of Australia's electricity systems, and from reducing costly delays to maintenance.

Public detriments

4.27. 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.²⁷

4.28. The ACCC has considered the following public detriments:

- reduced competition in wholesale electricity markets and
- reduced competition for maintenance services and other inputs.

Reduced competition in wholesale electricity markets

4.29. AEMO submits the purpose of the Proposed Conduct is to maximise electricity supply by reducing outages. For the reasons identified by the ACCC in its 2020 Authorisation, it submits that the Proposed Conduct is unlikely to result in a substantial lessening of competition in wholesale electricity markets.

4.30. The Australian Small Business and Family Enterprise Ombudsman submits that risks of any potential anti-competitive outcomes in the electricity market are effectively mitigated by ACCC oversight of the Proposed Conduct under the Reporting and Communications Protocol.²⁸

ACCC view

4.31. The ACCC considers that sharing commercially sensitive information regarding ongoing operations of facilities, including generators, could lessen competition in wholesale electricity markets.

4.32. The transparency afforded to AEMO Industry Participants over the operations of their competitors could facilitate anti-competitive and inefficient behaviours. For example, the bidding behaviour of generators may change if they learn through the Proposed Conduct that a particular competitor's plant is suffering technical issues.

4.33. Further, such detriments may be increased through information asymmetries. Because the information that is shared under the Proposed Conduct may not otherwise be publicly available, AEMO Industry Participants may be able to use market sensitive information to their advantage and to the disadvantage of non-participants in the arrangements. Where some businesses have access to more or better information

²⁷ Re 7-Eleven Stores (1994) ATPR 41-357 at 42,683.

²⁸ Submission from the Australian Small Business and Family Enterprise Ombudsman, 11 November 2021, p. 1.

than their rivals the resulting information asymmetry can act as a barrier to competition for the less informed business and have a distortionary effect on the market.

4.34. However, in the circumstances the ACCC considers the risk of a lessening of competition occurring in the wholesale supply of electricity is limited for the following reasons:

- The targeted and narrow scope of the Proposed Conduct – namely, the Proposed Conduct does not involve entering into contracts, arrangements or understandings regarding the wholesale price of electricity, or involve the discussion of retail pricing matters
- Any risk of information asymmetry between parties involved in the Proposed Conduct and parties not involved is negligible because the Medium Term Projected Assessment of System Adequacy process (MTPASA)²⁹ provides for the publication of generator availability information at the individual participant and plant unit level.
- Participants are not able to conduct discussions or reach agreements without the oversight of AEMO and a senior officer of the relevant state or territory government department with responsibility for energy (or their delegate) in attendance.
- The Proposed Conduct is temporary and voluntary, with AEMO Industry Participants and Future AEMO Industry Participants able to opt out at any time.

4.35. Further, in its application AEMO committed to provide transparency over the Proposed Conduct through regular public reporting and ACCC oversight (as outlined in the Reporting and Communications Protocol at Attachment A of this draft determination), and for the immediate termination of any arrangements entered into upon the expiry of any authorisation period. The ACCC considers this further reduces the risk and extent of the likely public detriment from the Proposed Conduct.

4.36. Therefore, the ACCC considers that while the Proposed Conduct could potentially lead to public detriments by reducing competition in wholesale electricity markets, the risk of such detriments eventuating is low, and would not persist long-term.

Reduced competition for maintenance services and other inputs

4.37. AEMO submits that the Proposed Conduct will not result in a meaningful reduction in competition for the acquisition of maintenance services for the following reasons:³⁰

- the markets in which maintenance services are acquired are national or even international in scope and
- the Proposed Conduct involves a possible temporary exchange of information and sharing of maintenance services.

²⁹ In August 2020, changes to the National Electricity Rules introduced by the Australian Energy Market Commission took effect, which increase the transparency of information made available to all industry participants.

³⁰ AEMO's application for authorisation AA1000586, 15 October 2021, p. 11.

ACCC view

- 4.38. By allowing AEMO Industry Participants to coordinate their repairs and maintenance, enter common arrangements and share information about essential inputs and personnel, the ACCC considers the Proposed Conduct is likely to reduce competition for the supply of maintenance services and other inputs.
- 4.39. However, given the unique circumstances of the COVID-19 pandemic, the ACCC considers this likely public detriment is mitigated by the temporary nature of the Proposed Conduct, including AEMO's commitment that any agreements entered into will immediately terminate at the end of any authorisation period.

ACCC conclusion on public detriment

- 4.40. For the reasons outlined above, the ACCC considers that the Proposed Conduct is unlikely to result in public detriments from reducing competition in wholesale electricity markets.
- 4.41. The ACCC considers that the Proposed Conduct is likely to lead to some public detriment as a result of a lessening of competition for the acquisition of maintenance services and other inputs.

Balance of public benefit and detriment

- 4.42. The ACCC considers that the Proposed Conduct is likely to result in public benefits from providing greater capacity to ensure the ongoing safety, security and/or reliability of Australia's electricity systems, and from reducing costly delays to maintenance.
- 4.43. The ACCC considers that there are a number of factors that mitigate the risk of anticompetitive detriment arising from the Proposed Conduct, including the targeted purpose and narrow scope of the Proposed Conduct for dealing with issues associated with the pandemic, and the proposed conditions of authorisation (discussed in section 5 of this determination).
- 4.44. Having said this, the ACCC considers that the Proposed Conduct is likely to result in some public detriment as a result of a lessening of competition for maintenance services and other inputs. However, the ACCC considers that the detriment resulting from coordination in respect of these services is outweighed by the public benefit that such coordination brings by reducing disruption to the system and costly delays to generators during the pandemic.
- 4.45. For the reasons outlined in this draft determination, and with the proposed conditions, the ACCC is satisfied that the Proposed Conduct is likely to result in a public benefit and that this public benefit would outweigh any likely detriment to the public from the Proposed Conduct.

Length of authorisation

- 4.46. The Act allows the ACCC to grant authorisation for a limited period of time.³¹ 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.

³¹ Subsection 91(1)

- 4.47. In this instance, AEMO seeks authorisation ‘on a temporary basis in order to ensure the safe, secure and reliable supply of electricity notwithstanding the pandemic.’³² In particular, AEMO seeks authorisation to engage in the Proposed Conduct for 12 months from the date of any interim authorisation decision by the ACCC.³³
- 4.48. The DPIE submits that from a NSW perspective, authorisation of the Proposed Conduct may need to be in effect until at least 30 June 2023, due to the legacy impacts of COVID-19 on the required maintenance for major generation assets in the NEM.
- 4.49. In the context of the ongoing and uncertain nature of the COVID-19 pandemic, the ACCC considers that authorisation until 27 October 2022 is reasonable and appropriate to ensure the Proposed Conduct delivers a net public benefit for the proposed duration of authorisation.
- 4.50. The ACCC invites further submissions on this proposed duration of authorisation in response to the draft determination.

5. Draft determination

The application

- 5.1. On 15 October 2021, AEMO lodged application AA1000586 with the ACCC, seeking authorisation under subsection 88(1) of the Act.
- 5.2. AEMO seeks authorisation for Proposed Conduct (as described at paragraphs 1.9 to 1.12) in respect of certain coordination and information sharing arrangements relating to the maintenance of electricity systems during the COVID-19 pandemic.
- 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 Proposed 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 Proposed Conduct.
- 5.5. For the reasons outlined in this draft determination, and with the proposed conditions outlined at paragraph 5.7, the ACCC is satisfied, in all the circumstances, that the Proposed 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 Proposed Conduct, including any lessening of competition.
- 5.6. Accordingly, the ACCC proposes to grant authorisation with conditions.

³² AEMO’s application for authorisation AA1000586, 15 October 2021, p. 10.

³³ The ACCC granted interim authorisation, with conditions, to application AA1000586 on 27 October 2021.

Proposed conditions of authorisation

5.7. The ACCC proposes to impose the following conditions of authorisation to ensure transparency over the Proposed Conduct and that there are no long-term anticompetitive effects:

- **Condition 1: Reporting requirements** – AEMO must comply with the Reporting and Communications Protocol³⁴ (at Attachment A of this draft determination). This protocol includes AEMO providing monthly reports to the ACCC about the material decisions or arrangements made at meetings for the preceding month, allowing the ACCC to observe these meetings, and providing any additional information requested by the ACCC about the Proposed Conduct.
- **Condition 2: Agreements not to endure beyond authorisation period** – Any contract, arrangement or understanding entered into in reliance on the proposed authorisation must provide for its immediate termination (other than any provisions dealing with ongoing confidentiality obligations) upon the expiry or revocation of the interim authorisation or proposed authorisation.

5.8. The legal protection provided by the authorisation does not apply if any of the conditions are not complied with.³⁵

Conduct which the ACCC proposes to authorise

5.9. The ACCC proposes to grant authorisation AA1000586 to enable AEMO and electricity industry participants to coordinate and share information relating to the maintenance of electricity systems for the purpose of ensuring the safe, secure and reliable operation of Australia's energy systems, and minimising the risk of any electricity outages, to deal with issues arising from the COVID-19 pandemic (as described at paragraphs 1.9 to 1.12, and defined as the Proposed Conduct).

5.10. Under section 88(2) of the CCA, the proposed authorisation extends to:

- AEMO and its related bodies corporate
- participants in Australian electricity markets and participants with a registration exemption for the National Electricity Market (**NEM**) and their related bodies corporate³⁶ (**AEMO Industry Participants**) and
- other entities that become participants registered in the NEM, participants with a registration exemption for the NEM, or participants registered in the Western Australian Electricity Market (**WEM**), as notified by AEMO to the ACCC (**Future AEMO Industry Participants**).

5.11. The Proposed Conduct may involve a cartel provision within the meaning of Division 1 of Part IV of the Act; may constitute exclusive dealing (section 47); and may substantially lessen competition or be concerted practices within the meaning of section 45 of the Act.

5.12. The ACCC proposes to grant authorisation AA1000586 until 27 October 2022.

³⁴ AEMO proposed the Reporting and Communications Protocol, which is virtually identical to the protocol contained in the ACCC's determination for the 2020 Authorisation, as part of its application for authorisation AA1000586, 15 October 2021, Appendix A, p. 13.

³⁵ Section 88(3) of the Act.

³⁶ These participants and members registered and exempted as at 7 October 2021 are listed in Appendix B of AEMO's application for authorisation AA1000586, 15 October 2021.

5.13. This draft determination is made on 15 December 2021.

6. Next steps

- 6.1. The ACCC now invites submissions in response to this draft determination by 27 January 2022. 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.

Purpose

1. This is the Reporting and Communications Protocol referred to in condition 1 of the ACCC's interim authorisation decision of 27 October 2021 and draft determination of 15 December 2021 in respect of proposed arrangements between AEMO and certain electricity industry participants for the purpose of dealing with the effects of the COVID-19 pandemic on Australia's energy systems (**Interim Authorisation and Proposed Authorisation**).
2. Capitalised terms used but not defined in this document have the meaning given in the Interim Authorisation and Proposed Authorisation.

AEMO's reporting commitments

3. While AEMO engages in conduct enabled by the Interim Authorisation and Proposed Authorisation, AEMO will use its best endeavours to provide no later than the first Thursday of each month (or if not a business day in Sydney, on the next business day) a report to the ACCC setting out each material contract, arrangement, understanding or decision made by AEMO and AEMO Industry Participants (and any Future AEMO Industry Participants) in the previous month that involves the conduct enabled by the Interim Authorisation and Proposed Authorisation, including:
 - a) the dates of all material decisions, contracts, arrangements or understandings formed that rely on the Interim Authorisation,
 - b) the parties to each material decision, contract, arrangement or understanding formed that rely on the Interim Authorisation,
 - c) what topics were discussed at meetings where those material decisions, contracts, arrangements or understandings were formed, and/or the material content of those contracts, arrangements, understandings or decisions, including key details such as the relevant products or services, quantities, timings, and financial or other compensation,
 - d) a description of the issues arising from the COVID-19 pandemic that the relevant decision, contract, arrangement or understanding seeks to address and how it will be addressed,
 - e) where possible a non-confidential version of the report for publication on the public register

Information requested and concerns raised by the ACCC

4. The ACCC may request additional information regarding conduct enabled by the Interim Authorisation and Proposed Authorisation. AEMO, any AEMO Industry Participant and any Future AEMO Industry Participant must promptly provide any further information requested by the ACCC.
5. An ACCC representative may elect to attend any meeting or call where it is intended that material decisions, contracts, arrangements or understandings may be formed as an observer for the purpose of observing that the relevant conduct of those groups which might give rise to concerns under Part IV of the CCA notwithstanding the Interim Authorisation and Proposed Authorisation. Where reasonably practicable, AEMO will

provide the ACCC with advance notice as soon as reasonably practicable of any meetings or calls (including recurring meetings and ad hoc meetings) where material decisions, contracts, arrangements or understandings are expected to be formed. The ACCC will give AEMO notice in advance of its proposed representative at the relevant meeting or call.

6. Any notice or request for information under paragraphs 4 to 5 should be provided to the contact person nominated by AEMO for the purposes of this Reporting Protocol.

Confidentiality

7. Unless stated otherwise, AEMO asks that the ACCC receive any information provided under this Reporting Protocol on a confidential basis in accordance with the ACCC's statutory obligations on the basis set out below:
 - a) there is no restriction on the internal use, including future use, that the ACCC may make of the information consistent with its statutory functions;
 - b) the confidential information may be disclosed to the ACCC's external advisors and consultants on condition that each such advisor or consultant is informed of the obligation to treat the information as confidential; and
 - c) the ACCC may disclose the confidential information to third parties (in addition to its external advisors or consultants) if compelled by law or in accordance with section 155AAA of the CCA.
8. Nothing in paragraph 7 limits AEMO's obligations under paragraph 3 above.