



Draft Determination

Application for authorisation
lodged by
Australian Energy Market Operator
in respect of
coordination and information sharing for the purpose of ensuring
reliable operation of energy systems
Authorisation number: AA1000618

Date: 25 August 2022

Commissioners: Cass-Gottlieb
Rickard
Keogh
Brakey
Crone

Summary

The ACCC proposes to grant authorisation with conditions to enable AEMO and energy industry participants to engage in certain coordination, input sharing, and information sharing activities for the purpose of ensuring the reliable operation of energy systems.

In the context of the ongoing energy challenges, the ACCC considers that the arrangements are likely to result in public benefits through providing greater capacity to ensure the ongoing safety, security and reliability of Australia's energy systems.

However, the ACCC considers that, without appropriate clarity and oversight, the conduct has the potential to result in significant public detriment as a result of a lessening of competition in wholesale markets and for maintenance services and other inputs.

To address these concerns and reduce the risk of detriments, the ACCC proposes to authorise an altered form of the conduct with conditions. The conduct the ACCC proposes to authorise is set out in section 5 and defined as the Authorised Conduct.

The ACCC proposes to grant authorisation until 31 March 2023.

On 1 July 2022, the ACCC granted interim authorisation with conditions to allow the participants to engage in conduct substantially similar to the Authorised Conduct, while the ACCC considered the substantive application. Interim authorisation will remain in place until it is revoked, the application for authorisation is withdrawn, or the date the ACCC's final determination comes into effect.

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

1. The application for authorisation

- 1.1. On 29 June 2022, the Australian Energy Market Operator Limited (**AEMO**) lodged application for authorisation AA1000618 with the Australian Competition and Consumer Commission (the **ACCC**). AEMO seeks authorisation on behalf of itself and energy industry participants, to engage in certain coordination and information sharing activities for the purpose of ensuring reliable operation of gas and electricity systems (collectively referred to as energy systems). AEMO seeks authorisation until 31 March 2023.
- 1.2. This application for authorisation AA1000618 was made under subsection 88(1) of the *Competition and Consumer Act 2010* (Cth) (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 in the Act but are not harmful to competition and/or are likely to result in overall public benefits.
- 1.3. For the avoidance of doubt, authorisation does not override or exempt any parties from any other existing regulatory or legislative obligations (such as the treatment of confidential information).

The Applicants

- 1.4. AEMO is the independent market and system operator for gas and electricity systems across Australia.
- 1.5. AEMO's application is made on behalf of:
- itself and its related bodies corporate
 - participants in Australian gas and/or electricity markets (other than Western Australia), being parties with a registration or a registration exemption from the National Electricity Market (**NEM**), and registered participants under the National Gas Rules (other than those registered in respect of operations only in Western Australia), and their related bodies corporate (**AEMO Industry Participants**),¹ and
 - other entities that become participants registered in the NEM, participants with a registration exemption for the NEM, or registered participants under the National Gas Rules (other than those registered in respect of operations only in Western Australia), and their related bodies corporate, as notified in writing by AEMO to the ACCC (**Future AEMO Industry Participants**)

(together, the **Participants**).

The Proposed Conduct

- 1.6. AEMO is seeking authorisation to allow the Participants to discuss, enter into or give effect to any contract, arrangement or understanding between them, or engage in any conduct, related to:
- a) co-ordinating repairs and maintenance – planning for and/or minimising any disruptions to energy supply, for example, by coordinating scheduling of any repairs, maintenance and other works requiring outages
 - b) sharing essential personnel – sharing information and/or entering into common arrangements in relation to essential employees and contracts to ensure there are sufficient personnel to maintain and operate energy infrastructure
 - c) sharing essential inputs – sharing information about the availability of, and/or entering into arrangements to share sufficient quantities of, essential inputs for energy production, generation, transmission, distribution and supply systems and infrastructure, including:
 - water, gas, coal, diesel, and other fuel for generators (**Generator Fuel**)
 - services for the transport of Generator Fuel
 - parts, equipment or specialised resources necessary for essential maintenance, and
 - other consumable materials necessary for the operation of such facilities (including odourant in the case of natural gas).

¹ The participants and members registered, or with an approved exemption, in respect of markets and systems operated or managed by AEMO can be found in the lists at the following links:

<https://aemo.com.au/energy-systems/electricity/national-electricity-market-nem/participate-in-the-market/registration>

<https://aemo.com.au/learn/market-participants/gas-market-participants>

- d) sharing information regarding ongoing operation – sharing information about the ongoing availability, performance and/or operation of their energy facilities and any risks to ongoing availability, performance and/or operation
- e) deferring non-essential works – sharing information, and/or entering into arrangements, to defer activities and/or projects not essential to maintaining the safe, secure and/or reliable operation of energy markets, or
- f) managing system stability – sharing information and/or entering into common arrangements in order to manage electricity system stability from a technical perspective as a result of changes in system supply and/or demand, including for example managing generation profiles

provided:

- the purpose for doing so is either to:
 - ensure the safe, secure and reliable operation of Australia’s energy systems, and minimise the risk of any energy outages for the benefit of both competition and consumers, during the period of the authorisation, and/or
 - ensure the continued operation and integrity of the NEM and wholesale gas markets in Australia (excluding Western Australia) for the benefit of both competition and consumers, during the period of the authorisation, and
- in the case of paragraphs 1.6(c) to 1.6(f), AEMO considers the conduct in question is reasonably necessary to address a critical risk of energy outages or significant disruption to the operation of the NEM or wholesale gas markets, and
- in relation to 1.6(c), the sharing of gas or diesel (including transportation) as an input is limited to sharing between gas-fired generators, and
- in relation to 1.6(d), this conduct does not include the sharing of specific generators’ wholesale price, costs and margins

(the **Proposed Conduct**).

1.7. AEMO advises that the Proposed Conduct would be limited to discussions, conduct, contracts, arrangements and/or understandings to which AEMO or its related bodies corporate, is either a party to or has facilitated. Where the Proposed Conduct involves a meeting or discussions between AEMO Industry Participants or any Future AEMO Industry Participants, then:

- AEMO must attend
- only AEMO Industry Participants or Future AEMO Industry Participants invited by AEMO or its related bodies corporate may attend
- a lawyer with expertise in competition law, approved by the ACCC, must attend, with the purpose of observing and ensuring the conduct engaged in does not go beyond the purposes of the meetings or discussions or breach the Act
- the ACCC will be provided with advance notice of the meeting, attendees, agenda and invited to attend, and
- where the Proposed Conduct involves a meeting relating to a specific state or territory jurisdiction or jurisdictions, a senior officer of the relevant state or territory government department or departments with responsibility for energy, or their delegate, will be provided with advance notice of the meeting, attendees, agenda and invited to attend.

- 1.8. Authorisation is not sought to discuss, enter into or give effect to any contracts, arrangements or understandings or engage in any other conduct, regarding the wholesale or retail price of gas or the wholesale or retail price of electricity.
- 1.9. AEMO advises the Proposed Conduct is a temporary measure and is not compulsory. Any AEMO Industry Participant or Future AEMO Industry Participant can opt out of any proposed collaboration.
- 1.10. AEMO suggests that authorisation be granted with three conditions requiring certain reporting, compliance with conditions imposed by other authorisations, and the immediate termination of any agreement, arrangement or understanding entered into in reliance on authorisation of the Proposed Conduct upon expiry or revocation of the authorisation.

Interim authorisation

- 1.11. AEMO requested urgent interim authorisation to enable the parties to engage in the coordination and information sharing arrangements while the ACCC is considering the substantive application.
- 1.12. On 1 July 2022, the ACCC granted interim authorisation with conditions under subsection 91(2) of the Act. Interim authorisation will remain in place until it is revoked, the application for authorisation is withdrawn, or the date the ACCC's final determination comes into effect.
- 1.13. Interim authorisation was granted for arrangements substantially similar to the Proposed Conduct, with some further limitations and conditions.² The conditions in relation to interim authorisation are the same as those the ACCC proposes to impose in relation to the substantive authorisation, as set out below.

2. Background

- 2.1. Eastern Australia has been experiencing energy challenges as a result of a range of factors across the interconnected gas and electricity markets.³ These challenges are characterised by increased prices for consumers in relation to both electricity and gas, as a result of lower availability of energy and increased demand. Short-term markets have been volatile, threatening the reliability and stability of energy systems.⁴
- 2.2. AEMO submits that Australia's energy systems and industries are currently facing unprecedented challenges, which are contributing to reduced energy availability at higher prices across Australia (excluding Western Australia), creating risks of electricity and gas outages. These challenges include:
 - the Ukraine conflict, which has resulted in a reduction in availability and contributed to an increase in the price of gas and coal for thermal electricity generators

² See ACCC, Interim Authorisation Decision (1 July 2022). Available at: <https://www.accc.gov.au/public-registers/authorisations-and-notifications-registers/authorisations-register/australian-energy-market-operator-aemo-%E2%80%93-energy-industry-coordination>

³ See, e.g. <https://www.energy.gov.au/news-media/news/aemo-suspends-nem-wholesale-market>; <https://www.energy.gov.au/news-media/news/aemo-takes-steps-manage-tight-gas-supply>

⁴ Australian Competition and Consumer Commission, Inquiry into the National Electricity Market: addendum to the May 2022 report, 17 June 2022. Available at: <https://www.accc.gov.au/system/files/May%202022%20report%20-%20Addendum.pdf>

- the impact of high rainfall and floods in New South Wales and Queensland, which has reduced the production by open cut coal mines in these areas
 - extreme and/or unusual weather conditions, which increase demand for electricity and reduced output of renewable energy
 - a significant number of planned and unplanned outages, resulting in higher than usual decrease in generation capacity
 - the impact of the COVID-19 pandemic on specialised labour and global supply chains, due to essential workers having to isolate due to COVID-19, the delayed arrival of essential workers from overseas due to travel restrictions, and the delayed arrival of essential parts due to supply chain issues, and
 - delays and deferral of some maintenance during the last two years, as a result of the COVID-19 pandemic, which impact the stability of the system during the peak summer period.
- 2.3. AEMO advises that, using its existing powers, it has undertaken a number of last resort actions to ensure the ongoing supply of reliable, secure and sustainable energy, particularly to avoid load shedding, blackouts, and supply interruptions. For example, it has implemented administered price caps for both gas and electricity, issued directions, repeated Lack of Reserve Level 3 notices, and suspended the NEM spot market. AEMO submits that, while these measures address the immediate risk of unsecure and unreliable energy supply, they are largely reactive, insufficient for the purposes of managing the risks created by the current market conditions, unsustainable on a longer-term basis, increase the risk of system security and reliability longer term, and are inefficient and generally expensive, adding to consumer price shocks.

Previous authorisations

- 2.4. In 2020, the ACCC granted authorisation (AA1000484) with conditions to AEMO and industry participants for similar cooperation and information sharing arrangements for the purpose of responding to issues arising from the COVID-19 pandemic in the operation of energy systems. This authorisation expired on 31 May 2021.
- 2.5. In February 2022, the ACCC granted authorisation (AA1000586) with conditions to AEMO and industry participants for substantially the same cooperative arrangements to respond to COVID-19 issues as in 2020, but in relation only to the electricity industry. This authorisation expires on 27 October 2022.
- 2.6. The current application relates to the operation of the gas and electricity systems and seeks authorisation for broader arrangements which include coordinating in deferring non-essential works and managing system stability, prompted by a broader range of challenges including reduced availability of gas and coal due to the Russian invasion of Ukraine, extreme or unusual weather events or conditions, and higher than usual unplanned outages, as well as the ongoing impacts of the COVID-19 pandemic on labour, supply chains, and maintenance schedules.

- 2.7. AEMO advises that the operation of the wholesale electricity market is closely interlinked with the wholesale gas market, given gas is also a fuel for electricity generation, and that in the current application it is therefore necessary and appropriate to adopt a holistic approach that is tailored to the industry supply chain.

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 consumer groups, large energy users, state and federal government bodies, industry bodies, energy comparators, and industry participants (generators, maintenance service providers, distributors, network operators, and retailers).⁵
- 3.3. The ACCC received a submission from MGA Independent Retailers – a non-profit organisation representing independent grocery, liquor and timber and hardware store owners and operators across Australia – stating it has no objections to the interim authorisation. The ACCC received no other submissions in relation to the application and/or interim authorisation.

4. ACCC assessment

- 4.1. AEMO has sought authorisation for Proposed Conduct that would or might contravene provisions of the Act relating to cartel conduct (Division 1 of Part IV of the Act) and to contracts, arrangements or understandings, concerted practices, exclusive dealing and other conduct that has the purpose, effect or likely effect of substantially lessening competition (sections 45, 46 and 47 of the Act).
- 4.2. 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 will identify the relevant areas of competition likely to be impacted.
- 4.4. AEMO submits that the Participants may compete in relation to:
- the generation, transmission, transportation and/or supply of electricity and gas in Australia, and/or
 - the procurement of essential inputs for energy production, generation, transmission, distribution and supply systems and infrastructure.
- 4.5. The ACCC considers that the relevant areas of competition are likely to be, separately, the generation, transmission, and supply of electricity in Australia; and the extraction, transportation and supply of gas in Australia. Input markets to these supply chains, including for services such as maintenance, are also likely to be relevant to the Proposed Conduct.

⁵ A list of the parties consulted and the public submissions received is available from the ACCC's public register www.accc.gov.au/authorisationsregister.

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 application to the likely future in which the Proposed Conduct does not occur.
- 4.7. AEMO submits that, in the absence of the Proposed Conduct, Participants may be unable to coordinate certain of their activities in order to ensure the safe, secure and reliable supply of energy during the period of the requested authorisation. This would exacerbate the risk of outages and blackouts in circumstances where energy systems are already under pressure as a result of the current market conditions. AEMO submits that, accordingly, the ability of Participants to address these issues is likely to be less effective and less timely than if they are permitted to work together under the Proposed Conduct.
- 4.8. The ACCC considers that in the future without the Proposed Conduct, any issues that arise in the energy systems and fall within the scope of the Proposed Conduct would be managed to the best of AEMO's ability using its existing powers. AEMO may also liaise and negotiate with individual industry participants on a bilateral basis in order to achieve some degree of coordination, but without a collective, and likely more timely, response to mitigating or resolving issues in the energy systems that fall within the scope of the Proposed Conduct.

Public benefits

- 4.9. 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.*⁶

Minimising interruption to energy systems

AEMO submissions

- 4.10. AEMO submits that the Proposed Conduct will result in public benefit through helping to build resilience in the gas and electricity supply systems to minimise the risk of load shedding, blackouts and supply interruptions by:
 - reducing the risk of overlapping maintenance activities affecting the supply of both gas and electricity, through the more timely, effective and transparent identification and resolution of potential conflicts and coordination of maintenance than possible without the Proposed Conduct
 - reducing the risk of unnecessary outages or extended periods of maintenance caused by lack of personnel through sharing scarce skilled resources to deploy them where they are required most urgently to prevent or mitigate the impact of critical outages

⁶ 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.

- reducing the risk of outages arising from a generator being unable to obtain essential inputs such as Generator Fuel or the necessary haulage services, by sharing information about availability of such essential inputs or entering into arrangements to share or redeploy inputs
 - facilitating Participants taking action such as deferring or bringing forward maintenance, to overcome a threat to supply identified through the sharing of information (such as risks to ongoing availability)
 - reducing the risk of outages at critical times by allowing Participants to share information and enter into arrangements to defer non-essential works, and
 - reducing the risk of system instability, by allowing Participants to enter into arrangements and share information to manage system stability from a technical perspective.
- 4.11. AEMO submits that, absent the Proposed Conduct, its powers are largely reactive and insufficient for the purposes of managing the risks created by the current market conditions. AEMO submits that market interventions such as regular directions and reserve capacity activations are not sustainable on a longer term basis. They are inefficient and generally very expensive, adding to consumer price shocks and potentially increasing existing disruption. Other interventions could increase system security and reliability risks in the longer term.
- 4.12. AEMO submits that, under current market conditions, relying on bilateral discussions when dealing with critical incidents (or a series of critical incidents) is not efficient, is unlikely to achieve the necessary visibility of interactions across critical infrastructure, and runs the risk that a sufficient supply of energy is not achieved.
- 4.13. AEMO submits that the COVID-19 authorisations worked well, particularly in relation to maintenance activities, and allowed AEMO and industry participants to reach resolutions to ensure the ongoing safe, secure and reliable operation of energy systems and markets, without having to wait for imminent threats to system security.

ACCC assessment

- 4.14. The ACCC considers that the Proposed Conduct is likely to result in substantial public benefits by improving the ability of the Participants to respond to impacts of the current market conditions on Australia's energy systems and markets. The ACCC considers that the current set of market conditions is likely to represent a significantly greater risk to energy systems and markets than those present in relation to AEMO's previous COVID-19 related authorisations, because of the additional impacts of the Russian invasion of Ukraine on the global supply and price of essential inputs, the state of maintenance of ageing coal plants, their increased age, and insufficient development of alternative generation sources.
- 4.15. The Proposed Conduct will allow AEMO 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 relevant Participants, and/or rely on unilateral actions under its existing powers.
- 4.16. This enhanced capacity to respond to impacts of the current market conditions reduces the potential for outages or other system security issues. Improvements to system security, safety and reliability flow onto economic benefits by avoiding outages for consumers and producers, and minimises damage to energy system infrastructure through system instability.

Public detriments

4.17. 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.⁷

4.18. The ACCC has considered the following public detriments:

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

AEMO submission

4.19. AEMO submits that the Proposed Conduct is unlikely to alter the competitive dynamics in energy, and that markets will be able to return to substantially their current state once the period of authorisation ends. The overall purpose and effect of the Proposed Conduct is to maximise supply of energy by reducing outages for the benefit of both competition and consumers.

4.20. AEMO notes:

- the Proposed Conduct does not extend to entering into any agreement regarding the wholesale or retail price of electricity or the wholesale or retail price of gas
- the Proposed Conduct is not compulsory, and any AEMO Industry Participant or Future Industry Participant can opt out of any proposed collaboration the subject of this application
- the Proposed Conduct is limited to discussions, conduct, contracts, arrangements and/or understandings to which AEMO, the independent market operator, is either a party or has facilitated, and
- the period of authorisation is for a limited period until 31 March 2023.

4.21. AEMO submits the Proposed Conduct is unlikely to have a significant impact on the relevant markets related to the sharing of essential inputs, because:

- the sharing of inputs is limited to circumstances where AEMO has identified a critical risk of energy outages or significant disruption to the operation of the NEM or wholesale gas market, and
- the sharing of inputs relates to the sharing of 'surplus input' (i.e. allocating from one generator to another) and therefore it is unlikely to affect the total supply and demand for the input.

Reduced competition in wholesale energy markets

4.22. The ACCC considers that sharing commercially sensitive information regarding ongoing operations of facilities, sharing inputs and personnel, and reaching agreements regarding repairs, maintenance, and system management, could lessen competition in wholesale energy markets. Further, such information sharing and coordination creates a risk of collusion or coordinated conduct beyond that authorised.

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

- 4.23. The transparency afforded to 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. Producers may withhold supply in order to artificially inflate prices by manipulating the spot market.
- 4.24. Under the current market conditions, there is an increased risk of these forms of anti-competitive harm.
- 4.25. However, the ACCC acknowledges that the risk of a lessening of competition occurring in wholesale energy markets may be limited as:
- the conduct proposed to be authorised does not involve Participants entering into any contracts, arrangements, or understandings regarding the wholesale or retail price of energy, and does not include the sharing of Participants' wholesale price, costs and margins
 - the purpose for the sharing of information and resources, and coordination, is limited to ensuring safe, secure and reliable operation of energy systems, reducing the risk of energy outages, and ensuring the continued operation of the NEM, for the benefit of competition and consumers
 - coordination and information sharing is limited to actions AEMO considers to be reasonably necessary to address a critical risk of energy outages or significant disruption to energy markets (except in relation to coordination of repairs and maintenance, and sharing of essential personnel)
 - the Proposed Conduct stipulates that Participants are not able to conduct discussions or reach agreements without the oversight of AEMO
 - the ACCC and a senior officer of the relevant state or territory government department with responsibility for energy (or their delegate) will be invited to attend all meetings.
- 4.26. To further reduce the likely detriments to competition in wholesale energy markets, the ACCC proposes to impose a range of conditions, consistent with those imposed with the interim authorisation, and refinements to the description of the conduct it proposes to authorise. These proposed conditions provide increased oversight and transparency to the arrangements for which authorisation is sought (see paragraph 5.11).
- 4.27. The ACCC notes that a variation of the Proposed Conduct has been operating since the ACCC granted interim authorisation on 1 July 2022. The ACCC will continue to monitor the impacts of the interim authorisation on competition and its effectiveness in delivering claimed benefits and can vary or revoke interim authorisation at any time.

Reduced competition in maintenance and other inputs

- 4.28. The Proposed Conduct allows Participants to coordinate on a wide range of inputs including repairs and maintenance, essential personnel, generator fuel, transport for generator fuel, parts and equipment for essential maintenance, and other consumable materials.
- 4.29. A coordinated approach to allocating inputs may be less efficient in allocating goods and services to the most valuable use and may impact the revenue of providers of these goods and services.

- 4.30. The Proposed Conduct limits the sharing of gas and diesel as an input to only between gas-fired generators, which will somewhat reduce the likely detriments in relation to the supply of gas and diesel as an input more broadly.
- 4.31. Nevertheless, the ACCC considers that the Proposed Conduct is likely to lessen competition to some extent for the supply of each of these inputs.

ACCC conclusion on public detriment

- 4.32. Without appropriate oversight, the Proposed Conduct has potential to result in significant public detriment. The ACCC considers refinements to the conduct and conditions are necessary, including conditions additional to those proposed by AEMO, to address the risk of detriment and ensure sufficient transparency and clarity regarding the conduct that it proposes to authorise. The amended conduct (defined as the Authorised Conduct) and the proposed conditions are set out at paragraphs 5.6–5.11 below.
- 4.33. In summary, the key changes made to the Proposed Conduct are:
- as a matter of practicality, the requirement for a competition lawyer to attend all meetings has been removed from the Proposed Conduct and addressed in the conditions instead
 - an additional condition (**Condition 5**) has been added requiring AEMO to make and keep a contemporaneous record of:
 - the parties to any contract, arrangement or understanding
 - the nature and scope of the conduct the parties will engage in, and
 - the anticipated or agreed duration of the conductand make it available to the parties as soon as practicable
 - where the conduct will involve a contract, arrangement or understanding (**CAU**) between competing AEMO Industry Participants or Future AEMO Industry Participants, then authorisation is only proposed to be granted to give effect to such a CAU to the extent it falls within the scope of a CAU recorded in a record made by AEMO (or its legal representative) in accordance with Condition 5.
 - the restriction in relation to paragraph 1.6(d) which precludes the sharing of “specific generators’ wholesale price, costs and margins” has been expanded to include all Participants’ wholesale price, costs and margins.

Balance of public benefit and detriment

- 4.34. The ACCC considers that the Proposed Conduct is likely to result in substantial public benefits in the form of greater capacity to ensure the ongoing safety, security and reliability of Australia’s energy systems.
- 4.35. The ACCC considers there is a real risk the Proposed Conduct, particularly without the conditions and other refinements, could result in significant public detriment, primarily as a result of lessening competition in wholesale markets and for maintenance services and other inputs. With the conditions and refinements, the ACCC considers that the Proposed Conduct is still likely to result in some public detriment.
- 4.36. However, for the reasons outlined in this draft determination, and with the proposed conditions, the ACCC is satisfied that the amended form of the Proposed Conduct (set out below and defined as the Authorised Conduct) is likely to result in a public benefit

and that this public benefit would outweigh any likely detriment to the public from that conduct.

Length of authorisation

- 4.37. The Act allows the ACCC to grant authorisation for a limited period of time.⁸ 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.
- 4.38. In this instance, AEMO seeks authorisation until 31 March 2023.
- 4.39. AEMO submits that the risks which create the need for the Proposed Conduct will be present until at least the end of March 2023. AEMO submits that unseasonably high demand for energy during the current 'off peak' shoulder period makes essential maintenance less likely to occur, which in turn exacerbates the risk of unplanned outages occurring during the 'peak' summer period. For this reason, AEMO requests authorisation through the current 'off peak' season and upcoming 'peak' summer season.
- 4.40. Noting the impacts of the current market conditions appear likely to continue through the current 'off peak' and into the 'peak' summer period, based on the information currently before it, the ACCC proposes to grant authorisation until 31 March 2023.

5. Draft determination

The application

- 5.1. On 29 June 2022, AEMO lodged application AA1000618 with the ACCC, seeking authorisation under subsection 88(1) of the Act.
- 5.2. AEMO seeks authorisation for the Proposed Conduct as described at paragraph 1.6 above. Subsection 90A(1) of the Act requires that before determining an application for authorisation, the ACCC shall prepare a draft determination.

The authorisation test

- 5.3. 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.
- 5.4. For the reasons outlined in this draft determination, with the conditions, the ACCC is satisfied, in all the circumstances, that the Authorised Conduct (as defined in paragraphs 5.6–5.10 below) 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 Authorised Conduct, including any lessening of competition.
- 5.5. Accordingly, with the proposed conditions, the ACCC proposes to grant authorisation.

⁸ Subsection 91(1)

Conduct which the ACCC proposes to authorise

- 5.6. The ACCC proposes to grant authorisation AA1000618 with conditions to the Participants for the conduct specified at paragraph 5.6 below, subject to the restrictions outlined in paragraphs 5.7–5.10 (the **Authorised Conduct**).
- 5.7. The ACCC proposes to grant authorisation for the Participants to discuss, enter into or given effect to any contract, arrangement or understanding between them, or engage in any conduct, related to:
- a) coordinating repairs and maintenance – planning for and/or minimising any disruptions to energy supply, for example, by coordinating scheduling of any repairs, maintenance and other works requiring outages
 - b) sharing essential personnel – sharing information and/or entering into common arrangements in relation to essential employees and contracts to ensure there are sufficient personnel to maintain and operate energy infrastructure
 - c) sharing essential inputs – sharing information about the availability of, and/or entering into arrangements to share sufficient quantities of, essential inputs for energy production, generation, transmission, distribution and supply systems and infrastructure, including:
 - water, gas, coal, diesel and other fuel for generators (**Generator Fuel**)
 - services for the transport of Generator Fuel
 - parts, equipment or specialised resources necessary for essential maintenance, and
 - other consumable materials necessary for the operation of such facilities (including odourant in the case of natural gas).
 - d) sharing information regarding ongoing operation – sharing information about the ongoing availability, performance and/or operation of their energy facilities and any risks to ongoing availability, performance and/or operation
 - e) deferring non-essential works – sharing information, and/or entering into arrangements, to defer activities and/or projects not essential to maintaining the safe, secure and/or reliable operation of energy markets, or
 - f) managing system stability – sharing information and/or entering into common arrangements in order to manage electricity system stability from a technical perspective as a result of changes in system supply and/or demand, including for example managing generation profiles,
- provided:
- g) the purpose for engaging in the conduct is either to ensure:
 - the safe, secure and reliable operation of Australia’s energy systems, and minimise the risk of any energy outages for the benefit of both competition and consumers, during the period of the authorisation, or
 - the continued operation and integrity of the NEM and wholesale gas markets in Australia (excluding Western Australia) for the benefit of both competition and consumers, during the period of the authorisation, and

- h) in the case of paragraphs 5.7(c) to 5.7(f), AEMO considers the conduct is reasonably necessary to address a critical risk of energy outages or significant disruption to the operation of the NEM or wholesale gas markets, and
 - i) in relation to 5.7(c), the sharing of gas or diesel (including transportation) as an input is limited to sharing between gas-fired generators, and
 - j) in relation to 5.7(d), this conduct does not include the sharing of specific Participants' wholesale prices, costs or margins.
- 5.8. The Authorised Conduct is limited to discussions, conduct, contracts, arrangements and/or understandings to which AEMO or its related bodies corporate, is either a party to or has facilitated. Where the Authorised Conduct involves a meeting or discussions between AEMO Industry Participants or any Future AEMO Industry Participants, then:
- AEMO must attend
 - only AEMO Industry Participants or Future AEMO Industry Participants invited by AEMO or its related bodies corporate may attend
 - the ACCC will be provided with advance notice of the meeting, attendees, agenda and invited to attend, and
 - where the Authorised Conduct involves a meeting relating to a specific state or territory jurisdiction or jurisdictions, a senior officer of the relevant state or territory government department or departments with responsibility for energy, or their delegate, will be provided with advance notice of the meeting, attendees, agenda and invited to attend.
- 5.9. Where the conduct described in paragraph 5.7 will involve a contract, arrangement or understanding between competing AEMO Industry Participants or Future AEMO Industry Participants, then authorisation is only granted to give effect to such a contract, arrangement or understanding to the extent it falls within the scope of a contract, arrangement or understanding recorded in a record made by AEMO (or its legal representative) in accordance with Condition 5 below.
- 5.10. Authorisation is not granted to discuss, enter into or give effect to any contracts, arrangements or understandings or engage in any other conduct regarding the wholesale or retail price of gas or the wholesale or retail price of electricity.
- 5.11. Authorisation AA1000618 is proposed to be granted with the following conditions:
- **Condition 1 – Reporting requirements:** AEMO must comply with the Reporting Protocol (attached as a schedule to this draft determination). This protocol includes AEMO providing regular reports to the ACCC about the material decisions or arrangements made at meetings during the preceding period, allows the ACCC to observe meetings and request additional information about the Authorised Conduct.
 - **Condition 2 – Compliance with conditions imposed by other authorisations:** Where the Authorised Conduct in this draft determination overlaps with conduct authorised under other authorisations, parties to those other authorisations must continue to comply with any conditions imposed by those authorisations while they remain in force, which include:
 - where the Authorised Conduct involves the scheduling of maintenance at LNG facilities in Western Australia or the Northern Territory, authorisation AA1000396

- where the Authorised Conduct involves the scheduling of maintenance at LNG facilities in Queensland, authorisation AA1000544, and
- where the Authorised Conduct involves parties registered or exempt from registration in the NEM, authorisation AA1000586.
- **Condition 3 – Agreements not to endure beyond authorisation period:** Any contract, arrangement or understanding entered into in reliance on the interim authorisation or final 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 (unless another interim authorisation or final authorisation relating to that conduct is granted) and upon expiry or revocation of any final authorisation.
- **Condition 4 – Presence of competition lawyer:** Where the Authorised Conduct involves a meeting or discussion between AEMO Industry Participants or any Future AEMO Industry Participants, an external lawyer with expertise in competition law, engaged by AEMO and approved by the ACCC, must attend the meetings with instructions to immediately advise the attendees if, during the course of the meeting, they develop concerns that there is conduct occurring that is outside the scope of the authorisation and risks breaching the Act
- **Condition 5: AEMO to make and keep a record:** Prior to and at the time Participants give effect to any contract, arrangement or understanding between competing AEMO Industry Participants and/or Future AEMO Industry Participants, which has been discussed and/or entered into as part of the Authorised Conduct, AEMO (or its legal representative) must make and keep a contemporaneous record of:
 - the parties to the contract, arrangement and understanding
 - the nature and scope of the conduct the parties will engage in, and
 - the anticipated or agreed duration of the contract
 and make it available to the parties as soon as practicable.

5.12. The ACCC proposes to grant authorisation in relation to Division 1 of Part IV of the Act, and sections 45, 46 and 47 of the Act.

5.13. The ACCC proposes to grant authorisation AA1000618 until 31 March 2023.

5.14. This draft determination is made on 25 August 2022.

6. Next steps

6.1. 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.

Purpose

1. This is the Reporting and Communications Protocol referred to in condition 1 of the ACCC's interim authorisation decision of 1 July 2022 (**Interim Authorisation**) and authorisation decision of [date] 2022 (**Authorisation**) in respect of proposed arrangements between AEMO and certain industry participants for the purpose of dealing with the effects of unprecedented challenges which are contributing to reduced energy availability at higher prices across Australia (excluding Western Australia) (**Current Market Conditions**).
2. Capitalised terms used but not defined in this document have the meaning given in the Interim Authorisation or the Authorisation.

AEMO's reporting commitments

3. While AEMO engages in conduct enabled by the Interim Authorisation or Authorisation, AEMO will provide each fortnight (or such other period as the ACCC may approve) a report to the ACCC setting out each contract, arrangement, understanding or material decision in the previous period that involves the conduct enabled by the Interim Authorisation or the Authorisation, including:
 - a) the dates of all contracts, arrangements or understandings and material decisions that relies on the Interim Authorisation or the Authorisation
 - b) the parties to each contract, arrangement or understanding and material decision that relies on the Interim Authorisation or the Authorisation
 - c) what topics were discussed at meetings where those contracts, arrangements or understandings and material decisions were made, 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 Current Market Conditions that the relevant decision, contract, arrangement or understanding seeks to address and how it will be addressed, and
 - e) where possible a non-confidential version of the report for publication on the public register.
4. For the avoidance of doubt, the AEMO's reports under this protocol must include all records made pursuant to condition 5 of the Interim Authorisation or the Authorisation.

Information requested and concerns raised by the ACCC

5. The ACCC may request additional information regarding conduct enabled by the Interim Authorisation or the Authorisation. AEMO, any AEMO Industry Participant and any Future AEMO Industry Participant must promptly provide any further information requested by the ACCC.
6. 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) engaged in as part of the Authorised Conduct, and an ACCC representative may elect to attend a

meeting or call. The ACCC will give AEMO notice in advance of its proposed representative at the relevant meeting or call, where reasonably practicable to do so.

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