



# Determination

Application for revocation of A91516 and A91517 and the substitution of authorisation AA1000544 lodged by Australia Pacific LNG Pty Limited & Ors in respect of coordination of the timing and scheduling of maintenance events at their LNG facilities on Curtis Island

Authorisation number: AA1000544

Date: 5 August 2021

Commissioners:

Keogh  
Rickard  
Brakey  
Ridgeway

## Summary

The ACCC has decided to grant re-authorisation to enable Australian Pacific LNG Pty Ltd, QCLNG Operating Company Pty Ltd, GLNG Operations Pty Ltd and their subsidiaries (the Applicants) to coordinate the timing and scheduling of maintenance events at their LNG facilities on Curtis Island in order to limit the extent to which scheduled maintenance works occur concurrently. This conduct has been authorised with a condition since 6 May 2016.

The ACCC considers that the Conduct (as defined at paragraph 1.8) is likely to continue to give rise to a number of public benefits, in particular: reducing volume and price volatility events in domestic gas markets (which could occur if multiple maintenance events at the Applicants' facilities overlap), reduced need to employ wasteful last resort gas management techniques, and reduced negative impacts of maintenance events on the local Gladstone community.

Under the Conduct, the Applicants gain knowledge of all planned LNG facility downtime associated with maintenance, and therefore know when domestic markets may be affected by each Applicant's activities such as selling excess gas into domestic markets when facilities are offline for maintenance or purchasing gas from domestic markets when ramping up LNG production. This may give the Applicants the ability to trade advantageously in these markets, to the detriment of non-LNG participants.

In 2016 the ACCC imposed a condition of authorisation requiring the Applicants to publicly disclose maintenance schedule information that they have shared with one another, and to ensure that information remained accurate. This was intended to give all market participants access to information regarding the maintenance scheduled at the Applicants' facilities and therefore address the competitive detriment arising from the information asymmetries.

New Gas Transparency Measures which would require the Applicants to report scheduled maintenance events, as currently takes place under the condition, are expected to be introduced under the National Gas Law by the end of 2022. The ACCC considers that these measures, once in place, will address these information asymmetries in many circumstances, by ensuring all market participants have access to the same information about scheduled maintenance.

However, the ACCC notes that in some circumstances information asymmetry would remain, because the Gas Transparency Measures are expected to only require the Applicants to notify about events within a 12-month forecast window. In contrast, the ACCC's 2016 condition of authorisation required the Applicants to publicly disclose information they had shared with each other, irrespective of the timeframe.

The ACCC considers there is likely to be some public detriment arising from this residual information asymmetry.

In order to address the public detriment arising from the Applicants having information that is not available to other market participants, the ACCC has decided to grant re-authorisation with a condition which requires the Applicants to publicly disclose maintenance schedule information that they have shared with one another. With this condition, the ACCC considers that the Conduct is likely to result in a public benefit that would outweigh the likely public detriment.

The ACCC has decided to grant re-authorisation with condition for 5 years, until 31 August 2026.

## 1. The application for authorisation revocation and substitution

- 1.1. On 24 February 2021, Australia Pacific LNG Pty Limited & Ors lodged an application to revoke authorisations A91516 and A91517 and substitute authorisation AA1000544 for the ones revoked (referred to as re-authorisation) with the Australian Competition and Consumer Commission (the **ACCC**). Re-authorisation is sought to coordinate the timing and scheduling of maintenance events at the LNG facilities on Curtis Island for 5 years, (subject to a change in the previous condition of authorisation concerning transparency measures). The existing authorisation for this conduct expires on 6 May 2021.
- 1.2. This application for re-authorisation AA1000544 was made under subsection 91C(1) of the *Competition and Consumer Act 2010* (Cth) (the **Act**).
- 1.3. The ACCC may grant authorisation, which provides businesses with legal protection from legal action under the competition provisions in Part IV of the Act specified in the authorisation 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. Because the existing authorisation was expected to expire before the ACCC would make a final decision about the application for re-authorisation, interim authorisation was sought to continue to engage in the Conduct while the ACCC is considering the substantive application. On 5 May 2021, interim authorisation was granted under subsection 91(2) of the Act.<sup>1</sup> Interim authorisation will remain in place until the date the ACCC's final determination comes into effect, the application for authorisation is withdrawn, or until the ACCC decides to revoke interim authorisation.

### The Applicants

- 1.5. The application for re-authorisation is made on a joint basis by LNG producers and their subsidiaries who operate respective LNG facilities on Curtis Island in the Port of Gladstone (**LNG Facilities**), which involves the extraction and processing of natural gas including coal seam gas and its conversion to LNG for export. The LNG producers and their subsidiaries are:
  - **Australia Pacific LNG Pty Ltd and its subsidiaries**
  - ConocoPhillips Australia Operations Pty Ltd
  - **QCLNG Operating Company Pty Ltd**
  - QGC Common Facilities Company Pty Ltd
  - Capricorn Participant Pty Ltd as trustee of the Capricorn Participant Trust
  - QGC Train 1 Pty Ltd
  - CNOOC QCLNG Pty Ltd
  - QGC Train 2 Pty Ltd
  - Tokyo Gas QCLNG Pty Ltd
  - QGC Train 1 Tolling Pty Ltd
  - QGC Train 2 Tolling Pty Ltd
  - QGC Train 2 Tolling No. 2 Pty Ltd

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<sup>1</sup> See ACCC draft determination of 5 May 2021.

- CNOOC QGLNG Tolling Pty Ltd
- **GLNG Operations Pty Ltd**
- Santos GLNG Pty Ltd
- PAPL (Downstream) Pty Limited
- Total GLNG Australia
- KGLNG Liquefaction Pty Ltd.

(collectively referred to as the **Applicants** or **LNG Producers**).

- 1.6. Each of the Applicants is comprised of a number of joint venture parties. Some of these joint venture parties also participate in domestic gas markets: For example, Origin Energy is a joint venture participant of APLNG but also competes separately in the domestic gas market.

## The Conduct

- 1.7. The Applicants wish to continue to discuss, make and give effect to arrangements regarding the sequencing and timing of scheduled maintenance works, and associated shutdowns and outages, at each of the LNG Facilities, in order to limit the extent to which scheduled maintenance works occur concurrently at the LNG Facilities.

- 1.8. Aside from proposed changes to the condition of authorisation outlined below at paragraph 1.12, the Applicants have not sought to change any aspect of the Conduct from that authorised, with a condition, in 2016. Re-authorisation is therefore sought for the Applicants to engage in the following conduct:

(a) To make and give effect to arrangements or understandings among the Applicants regarding the sequencing and timing of the conduct of scheduled maintenance at the LNG Facilities, including the sequencing and timing of shutdowns and partial plant outages associated with such maintenance by:

- i. identifying the maintenance requirements for each of the LNG Facilities, including the scope and expected duration of maintenance campaigns and any shutdowns or partial plant outages associated with those maintenance campaigns;
- ii. classifying maintenance campaigns (e.g. major and minor);
- iii. working to identify optimal maintenance windows having regard to factors such as climate, safety considerations and local resource constraints;
- iv. scheduling maintenance in such a way as to minimise contractor mobilisation and demobilisation costs;
- v. developing a process to:
  - A. Nominate preferred dates for planned maintenance;
  - B. Negotiate and agree the proposed dates for planned maintenance at each of the LNG Facilities;
  - C. Inform one another of ad hoc unplanned maintenance requirements;
  - D. Consult about variations to any maintenance dates;

- E. Resolve conflicts where maintenance dates overlap; and
  - F. Prepare and agree a schedule recording the planned maintenance dates for each LNG Facility.
- (b) To exchange information for the purpose of making and giving effect to the arrangements and understandings referred to in paragraph (a) - including information about:
- i. Maintenance techniques and operational processes, including personnel requirements, specialist equipment and the use, storage, transport and disposal of hazardous chemicals;
  - ii. Potential resource constraints associated with particular shutdown windows (e.g. accommodation) and discussing mitigation options; and
  - iii. Disclosing the names of the maintenance contractors who have been appointed by each Party to perform the relevant LNG Facility maintenance, subject to applicable third party confidentiality restrictions.

(collectively, the **Conduct**).

- 1.9. The Conduct is intended to increase the efficiency of undertaking LNG gas maintenance and reduce the likelihood of major disruptions to domestic gas markets which could occur if multiple maintenance events at the Applicants' facilities overlap.

### ***Condition proposed by Applicants***

- 1.10. The existing (2016) authorisation was granted with a condition which requires the Applicants to publicly disclose maintenance schedule information that they have shared with one another, and to ensure that information remains accurate.<sup>2</sup>
- 1.11. With the Conduct, the Applicants would gain knowledge of all planned LNG facility downtime associated with maintenance and would therefore know when domestic markets may be affected by each Applicant's activities. Because of this, in 2016, the ACCC imposed a condition to give all market participants access to information regarding the maintenance scheduled at the Applicants' facilities.
- 1.12. In essence, the Applicants propose to be bound by the existing condition of authorisation until proposed amendments to the National Gas Law (**NGL**) come into effect, which the Applicants submit is expected to be during the course of 2021 and 2022. The amendments to the NGL are expected to give effect to a package of measures designed to enhance transparency in the gas market (**Gas Transparency Measures**).
- 1.13. The Applicants submit that if implemented, the Gas Transparency Measures will require them to report publicly on a range of information that is more onerous than the current condition of authorisation. In particular, the Applicants will be further subject to Part 18 of the Rules concerning the reporting requirements of the Gas Bulletin Board and for their LNG Facilities to report the following information:
- the nameplate capacity of the connection point to the LNG Facility and the nameplate capacity of the LNG Facility
  - detailed facility information (i.e. the name of the pipeline and delivery points to which the facility is connected)

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<sup>2</sup> See ACCC Final Determination A91516 & A91517, 14 April 2016, Attachment A.

- the short and medium term capacity outlook for the LNG Facility, which will require the reporting of scheduled maintenance events
  - daily gas consumption by the LNG Facility.
- 1.14. The Applicants submit that medium term reporting will require the reporting of scheduled maintenance events, as currently takes place under the condition, and that the Gas Transparency Measures will provide a greater level of visibility of the Applicants' operations to the market than is presently available under the condition. However, the ACCC notes that the Gas Transparency Measures are not expected to cover the period of time beyond 12 months into the future. This issue is discussed at paragraphs 3.3 and 4.43.

## 2. Industry Overview

- 2.1. The Applicants own and operate LNG facilities on Curtis Island, just north of Gladstone, Queensland. The facilities take gas principally extracted from coal seams in the Surat and Bowen basins, transport it to Curtis Island via a series of pipelines, and then convert it into LNG via an LNG train. From Curtis Island, the LNG is loaded onto ships and exported.
- 2.2. The Applicants' LNG Facilities are currently the only LNG export facilities on Australia's east coast.
- 2.3. The LNG export industry on Curtis Island is considerably larger than the existing gas industry on Australia's east coast. According to data presented in the 2021 Gas Statement of Opportunities, in 2020, daily gas demand at the Applicants' facilities was around 3650 TJ. The average daily demand across the rest of the east coast of Australia was around 1550 TJ.<sup>3</sup>
- 2.4. The Applicants' LNG production facilities at Curtis Island are the final step of a supply chain that starts with coal seam gas wells in the Surat and Bowen basins and ends in LNG being exported via ships. Each of the Applicants is largely vertically integrated throughout this supply chain; each applicant owns the upstream coal seam gas wells, much of the relevant gas transportation infrastructure, the LNG production trains, storage tanks, and export facilities.
- 2.5. The Applicants can also buy and sell gas in domestic gas markets and in bilateral private purchase/supply contracts with other domestic gas providers/acquirers. While domestic trading is not the primary focus of the projects, the Applicants may participate in domestic gas deals to acquire gas for export or to sell excess gas that cannot be processed or stored at their facilities.
- 2.6. The Applicants can have significant impacts on domestic markets because of their large production capacity relative to the rest of the market. If an Applicant decides to sell excess gas in domestic markets, this may result in dramatic price reductions. Similarly, the Applicants can significantly increase the market price for gas if they need to acquire gas to make up for short-falls from their own gas wells.
- 2.7. The Applicants may choose to sell excess gas in domestic markets during maintenance events. Maintenance typically involves taking an LNG train offline (or reducing its capacity), and if gas flowing to the LNG train cannot be slowed or stored, the gas may be redirected to domestic markets for sale.

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<sup>3</sup> AEMO, Gas Statement of Opportunities, March 2021, derived from Figure 5.



- 2.8. The Applicants may also choose to acquire gas from domestic markets at the conclusion of a maintenance event. Acquiring gas from nearby markets can assist the LNG train return to peak production quickly.
- 2.9. The domestic markets in which the Applicants are most likely to participate are nearby gas trading markets such as the Wallumbilla Gas Hub (Wallumbilla) and Brisbane Short-Term Trading Market (Brisbane STTM).
- 2.10. Other gas trading markets across the east coast may also be impacted. For example, if the Applicants direct excess gas into Wallumbilla, the low prices there may induce gas to be purchased and transferred to other east coast markets in NSW, Victoria, and South Australia. Similarly, large changes to supply or demand at Wallumbilla or the Brisbane STTM can impact the National Electricity Market as the price of gas in these markets affects the cost of producing electricity in gas-fired generators.

### 3. Consultation

- 3.1. The ACCC undertakes public consultation to inform our assessment of the likely public benefits and detriments from the Conduct.
- 3.2. The ACCC invited submissions from a range of potentially interested parties, including LNG train maintenance service providers, participants in domestic energy markets and relevant state and federal government and regulatory bodies.
- 3.3. Prior to the draft determination the ACCC received one submission, from Origin Energy. While Origin Energy generally supports the application, it expressed concern that transparency measures under the NGL would only require a medium term capacity outlook for 12 months ahead. This is in contrast to the existing condition, which does not limit the maintenance information the Applicants are required to make available to a specific timeframe. Origin Energy submits that there should not be any disparity in the information possessed by LNG exporters and the rest of the market and that this is crucial in assisting market participants to manage their own portfolios.
- 3.4. In response, the Applicants submit that Origin Energy's submission infers there should be two forms of reporting, which would not only create inefficiency but could also result in inconsistency and disparity between the two information sets. They further submit that this could result in misunderstandings and market confusion.
- 3.5. The Applicants also submit that Origin Energy has not explained why the Applicants' medium term capacity outlook beyond 12 months is a crucial input to the management of Origin Energy's portfolio or how it relies on longer term capacity forecasting by the Applicants. The Applicants submit that market information posted significantly in advance of the activity is inherently changeable. There are many reasons why changes to capacity outlook in the medium term can occur and that these matters become more certain as shut down planning is developed.
- 3.6. The Applicants submit that reporting under the Gas Transparency Measures (under the NGL) is expected to be consistently more accurate, given the 12 month outlook period and the requirement for continuous reporting. The Applicants also note that similar concerns have not been raised by other market participants. And that the Applicants remain committed to public reporting and that reporting under the Gas Transparency Measures '...will continue to provide the market with the information it seeks in the most transparent, workable and reliable manner.'
- 3.7. On 5 May 2021 the ACCC issued a draft determination proposing to grant re-authorisation, with condition, for 5 years. A pre-decision conference was not requested

following the draft determination. However, further submissions were received from Origin Energy, AEMO and the Applicants concerning the proposed condition and information disclosure. Origin Energy reiterated the importance of information disclosure and the potential harm to gas trading markets. AEMO expressed concerns about potential duplication of reporting and the importance of timely and accessible information. AEMO and the Applicants have identified possible solutions to these issues that has led to a minor clarifying amendment to the condition proposed in the draft determination. The submissions are discussed further in section 4.

- 3.8. Public submissions by the Applicants and interested parties are on the [Public Register](#) for this matter.

## 4. ACCC assessment

- 4.1. The ACCC's assessment of the Conduct is carried out in accordance with the relevant authorisation test contained in the Act.
- 4.2. The Applicants have sought authorisation for Conduct that would or might constitute a cartel provision within the meaning of Division 1 of Part IV of the Act and may substantially lessen competition within the meaning of section 45 of the Act. Consistent with subsection 90(7) and 90(8) of the Act<sup>4</sup>, the ACCC must not grant authorisation unless it is satisfied, in all the circumstances, that the conduct would result or be likely to result in a benefit to the public, and the benefit would outweigh the detriment to the public that would be likely to result (authorisation test).

### Relevant areas of competition

- 4.3. To assess the likely effect of the Conduct, the ACCC will identify the relevant areas of competition likely to be impacted. In this instance, the ACCC considers that the precise definition of the relevant areas of competition is not required for assessing the Conduct. The ACCC can consider the areas of competition in a broad sense when assessing any public benefits or detriments likely to arise from the Conduct.
- 4.4. The ACCC has assessed the Conduct in the context of the following areas of competition:
- LNG facility maintenance services in Australia. These services are supplied by a range of Australian and international specialists, and utilised by LNG producers in Western Australia, the Northern Territory, and Gladstone; and may be utilised by future LNG production projects during the period of authorisation.
  - Various markets for inputs to the supply of maintenance services in Australia, including transport and accommodation services.
  - The wholesale supply of natural gas (domestic and export) on the east coast of Australia.
  - Industries on the east coast of Australia for which wholesale gas is an input to production, including gas-fired electricity generation and retail gas supply.

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<sup>4</sup> See subsection 91C(7).



## Future with and without the Conduct

- 4.5. In applying the authorisation test, the ACCC compares the likely future with the Conduct that is the subject of the authorisation to the likely future in which the Conduct does not occur.
- 4.6. With the Conduct, the Applicants will coordinate on the scheduling of maintenance events. They will also exchange information about contractors they have engaged and maintenance techniques they have employed.
- 4.7. In the future without the Conduct, it is likely that each applicant would schedule their own maintenance individually as coordination is likely to raise concerns under the Act.
- 4.8. In their original application for authorisation in in 2016, the Applicants submitted that they have some ability to infer each other's maintenance events from:
  - discussions with maintenance service providers about their availability
  - observing preparatory activity on Curtis Island
  - observing previous maintenance events and projecting likely future maintenance times, and
  - bilateral approaches from other Applicants offering to supply gas for discreet periods of time (i.e. when their facilities are offline for maintenance).
- 4.9. In addition, the anticipated changes to the NGL concerning transparency would, from the time they were introduced, provide an additional direct source of information about planned maintenance events. While the precise timing is still to be confirmed, the Applicants submit that changes to the NGL, National Gas Rules (**NGR**) and other consequential changes are expected to be implemented through 2021/22. The ACCC also notes that the scope of the Gas Transparency Measures has been largely settled.<sup>5</sup>
- 4.10. One alternative to the Conduct would be to individually publish each Applicant's maintenance schedules, which would help identify overlaps. However, this would not be as effective or efficient as the Conduct in coordinating a schedule of maintenance. Without coordination, the Applicants would not be able to discuss among themselves the best way to coordinate dates so that overlaps are removed. There may be additional effort and expense in changing the timing of maintenance once it becomes known that there are overlapping schedules and the risk of overlapping maintenance events would still be present.
- 4.11. In addition, the likely future without the authorisation does not involve the Applicants sharing information about contractors they have engaged and maintenance techniques they have employed. The Applicants may be able to obtain some of this information through other channels (e.g. discussions with maintenance service providers), but these channels are unlikely to be as effective as the proposed conduct in disseminating relevant maintenance information between the Applicants.

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<sup>5</sup> The Gas Transparency Measures were developed following recommendations to enhance gas market transparency made by the Australian Energy Market Commission (AEMC) in 2016 and by the ACCC and the Gas Market Reform Group (GMRG) in 2018/2019. For further information about implementation, see: Measures to Improve Transparency in the Gas Market Proposed legal package to give effect to Decision Regulation Impact Statement Consultation paper, November 2020.

## 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 the term should be given its widest possible meaning, and includes:

*...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principal elements ... the achievement of the economic goals of efficiency and progress.*<sup>6</sup>

4.13. The ACCC has considered the following public benefits relevant to the Conduct:

- reducing volume and price volatility in domestic gas markets
- reducing the need to employ wasteful, last resort gas control techniques
- reducing the costs and downtime associated with maintenance, and
- reducing the negative impact of maintenance events on third parties and the local community.

### **Reducing volume and price volatility in domestic gas markets**

4.14. One of the gas management options available to Applicants during a maintenance event is selling excess gas in domestic markets. In particular, the Brisbane STTM and Wallumbilla markets are physically connected to the Applicants' LNG Facilities at Curtis Island, as well as their CSG wells in the Surat and Bowen basins.

4.15. As detailed at paragraph 2.3, the daily volume of gas flowing to Curtis Island is significantly larger than the daily gas used by the rest of Australia's eastern states. Accordingly, the Applicants can have significant impacts on the volume of gas supplied to domestic trading markets, which can cause drastic changes to market prices.

4.16. Exposure to this volatility impacts the operational decisions of market participants. For example, an electricity generator with both coal and gas-fired stations needs to regularly select its optimal generation mix. Significant changes in price can result in these operational decisions becoming inefficient, which reduces the affected market participants' ability to minimise costs and compete effectively. If these events pose significant operational risk to market participants, they may decide to invest more in non-gas operational technologies when, absent the additional price volatility, gas options would have been most efficient.

4.17. The Applicants have a number of gas management options available to them, including selling to domestic markets. As such, individual maintenance events may not require a LNG facility to sell gas in domestic markets. However, the impact on domestic markets is likely to be greater if multiple LNG Facilities are offline simultaneously because it is more likely that large quantities of excess gas will be redirected to domestic markets.

4.18. Similarly, when LNG Facilities are ramping up production after a maintenance event, they may purchase gas from the domestic market in order to get sufficient quantities of gas flowing to their facilities quickly. A situation where multiple LNG Facilities are simultaneously ramping up production post-maintenance would likely result in substantial increases to domestic gas prices.

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<sup>6</sup> Queensland Co-operative Milling Association Ltd (1976) ATPR 40-012 at 17,242; cited with approval in Re 7-Eleven Stores (1994) ATPR 41-357 at 42,677.

4.19. Coordination between the Applicants is likely to minimise occurrences of simultaneous maintenance events at Curtis Island, and therefore reduces the potential for significant volume and price volatility in domestic markets that has the potential to reduce efficiency.

### **Reduced need to employ wasteful, last resort gas control techniques**

4.20. During maintenance events (and other LNG facility downtime), gas from the Applicants' respective CSG wells will still be flowing towards Curtis Island. This gas will need to be managed by the Applicants until their facilities return to operation. The Applicants have a number of options for managing their gas during LNG facility downtime, including selling gas on domestic trading markets, selling gas as part of bilateral supply agreements, and storing gas at Curtis Island and other storage facilities.

4.21. Two gas flow management options that are particularly wasteful and carry environmental risks are turning down CSG wells and flaring gas.

4.22. Turning down CSG wells is a technique to physically slow the flow of gas from wells. Each well will have a different capacity to be turned down, depending on the well's characteristics. However, turning down a CSG well is generally considered risky as it can result in permanent reduction of the flow from the well, or in the well becoming 'shut-in'—meaning the flow of gas stops completely. Once a well is shut-in it may not be possible to re-open the flow of gas, or re-opening the well may be costly.

4.23. Turning down a CSG well is therefore an undesirable gas management technique as it risks permanent damage to the well and potentially losing the gas reserves entirely.

4.24. Flaring gas is simply burning off excess gas. The gas supply chain has regular flaring points built into it to release pressure if needed. There are flaring points at Curtis Island.

4.25. Flaring gas is both wasteful and environmentally damaging, as flared gas releases pollution.

4.26. The ACCC considers that coordination between the Applicants is likely to reduce the likelihood of multiple LNG Facilities being offline simultaneously, and therefore reduce the quantities of gas that need to be redirected. By avoiding situations where very large quantities of gas need to be redirected, the Conduct should reduce the need for inefficient, last resort gas management techniques such as turning down wells and flaring gas.

### **Reducing maintenance downtime and costs**

4.27. Coordination between the Applicants will reduce the likelihood that multiple LNG trains are offline simultaneously. This reduces the potential for key maintenance service providers to be occupied at other facilities, and therefore is likely to reduce the downtime associated with maintenance at the Applicants' facilities.

4.28. The Conduct may allow LNG facility maintenance services to be acquired at lower cost. Many key maintenance service providers will need to travel (potentially from overseas) to service the Applicants. Coordination between the Applicants may allow them to schedule a sequence of maintenance events at Curtis Island that lowers travel costs and therefore reduces overall maintenance costs. However, the ACCC also notes the Applicants' submission that when 'considering all maintenance contractors used by the Applicants during the period of Authorised Conduct, there was limited

overlap of suppliers suggesting that a wide range of service providers are being awarded contracts for maintenance events'.<sup>7</sup>

- 4.29. In 2016, the ACCC considered that it may be more feasible for maintenance service providers to establish a dedicated local labour force at Gladstone if the work is sequenced rather than coinciding. A local labour force would further reduce mobilisation and demobilisation costs for the Applicants, and may also reduce the need to procure ancillary services such as temporary accommodation. The Applicants submit that up to 70% of labour is now sourced locally with specialist services flown in as required. And further, that service providers including UGL, Enermech and Kaefer now have a permanent presence in Gladstone.
- 4.30. Having regard to the limited overlap of suppliers used by the Applicants and the significant local workforce now employed to conduct maintenance the ACCC considers that coordinating the scheduling of maintenance events at Curtis Island is likely to facilitate, to a limited extent, shorter, more efficient maintenance events at each Applicant's facilities.

### **Reduced negative impact of maintenance events on third parties and the local community**

- 4.31. The Applicants submit that each of them, along with the Queensland government and relevant regulators, has been concerned to manage the impact of the development and operation of the LNG Facilities on local communities and infrastructure in the Gladstone region, in particular, accommodation, transport, logistics and emergency services. This concern is reflected in the conditions on which environmental and other government approvals have been granted for the LNG Facilities, and the steps taken by the Applicants and relevant regulators to manage congestion in the Gladstone port area and township.
- 4.32. The Applicants submit that it will be important to continue to co-ordinate on these matters to ensure that these benefits continue to accrue. The Conduct covers ongoing matters, such as congestion on roads and demands on local services, which mean that it will be important for the Applicants to continue to co-ordinate as they have to date.
- 4.33. The ACCC accepts that maintenance events can also stretch local resources such as accommodation, transport, logistics and emergency services. The ACCC considers that coordination between the Applicants will reduce the likelihood of simultaneous maintenance events at Curtis Island, and therefore reduce the negative impact of maintenance events on local communities. Avoiding these situations is likely to reduce costs and other negative impacts for third parties and the local community.

### **Public detriments**

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

*...any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency.*<sup>8</sup>

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<sup>7</sup> Applicants' submission, 24 February 2021, section 4.2.

<sup>8</sup> Re 7-Eleven Stores (1994) ATPR 41-357 at 42,683.

4.35. The ACCC has considered the following public detriments:

- information asymmetry between the Applicants and participants in domestic gas markets
- reducing competition for maintenance services, and
- potential to facilitate unauthorised coordination.

### **Information asymmetry**

4.36. In 2016, interested parties raised significant concerns about the potential for the Conduct to create damaging information asymmetries in domestic gas markets. These concerns focused on the Applicants' participation in domestic gas markets, particularly the gas hub at Wallumbilla and the Brisbane Short-Term Trading Market. When the Applicants' facilities go offline (e.g. for maintenance), they may sell excess gas in these domestic markets, sometimes in very large quantities. Similarly, at the conclusion of downtime, the Applicants may purchase gas from domestic markets when ramping up LNG production. These activities can drastically affect market prices.

4.37. Under the Conduct, the Applicants will gain knowledge of all planned LNG facility downtime associated with maintenance, and will therefore know when domestic markets may be affected by each Applicant's activities. This may give the Applicants the ability to trade advantageously in these markets, to the detriment of non-LNG participants.

4.38. The ACCC considers that the Conduct gives rise to potentially significant information asymmetry problems which are likely to generate significant competitive detriments. For this reason, the ACCC previously granted authorisation with a condition. The condition required the Applicants to publicly disclose maintenance schedule information that they have shared with one another, and to ensure that information remained accurate. This was intended to give all market participants access to information regarding the maintenance scheduled at the Applicants' facilities and therefore address the competitive detriment arising from the Conduct.

4.39. With the condition of authorisation, the ACCC was satisfied that the conduct was likely to result in a public benefit that would outweigh the likely public detriment.

4.40. As discussed at paragraphs 1.12 - 1.14, Gas Transparency Measures are due to be implemented as part of amendments to the NGL. The Applicants submit that these transparency measures will require the Applicants to report a greater level of detail than that required under the condition of authorisation from 2016. As such, the Applicants submit that once implemented, the Gas Transparency Measures will address the information asymmetry that the condition imposed in 2016 was intended to address, and therefore, the condition will no longer be necessary.

4.41. The ACCC considers that the reporting required by the condition imposed in 2016 has addressed the information asymmetry problem, and associated public detriment, discussed at paragraphs 4.37 - 4.38.

4.42. The ACCC notes that the Gas Transparency Measures were developed following recommendations made by the Australian Energy Market Commission (AEMC) in 2016 and by the ACCC and the Gas Market Reform Group (GMRG) in 2018/2019. The ACCC considers that once implemented the Gas Transparency Measures will remove a number of information asymmetries between the Applicants and other market participants about scheduled downtime of the LNG facility and the associated public detriment.

- 4.43. However, the ACCC notes there are circumstances where the Gas Transparency Measures would not require the Applicants to publicly disclose information they have shared with each other as part of the Conduct. Even with the Gas Transparency Measures fully operational, the Conduct will result in information asymmetry whenever information is shared between the Applicants about events that are outside the 12-month window specified under the 'medium term capacity outlook'. The information the Applicants share about maintenance that is scheduled to take place in more than 12 months' time is not expected to be reported under the Gas Transparency Measures.
- 4.44. The ACCC notes that information reported in relation to scheduled maintenance is subject to change, and the further out the reporting the less reliable the information is. Accordingly, relying on information about maintenance schedules further than 12 months out carries some inherent risk. However, the ACCC considers there is likely to be some public detriment arising from this residual information asymmetry.
- 4.45. In the draft determination, the ACCC proposed to grant re-authorisation with the same condition imposed in 2016, requiring the Applicants to publicly disclose maintenance schedule information that they have shared with one another. The ACCC invited submissions on this issue and received submissions from Origin Energy, AEMO and the Applicants:

### ***Origin Energy***

- Origin Energy supports the approach set out in the draft determination and reiterated that the condition is 'a critical remedy for the information asymmetry that would arise where LNG producers are privy to knowledge pertaining to market supply/demand dynamics that is not publicly known'.

### ***AEMO***

- AEMO submits that the 12-month reporting period is when the biggest impact on gas prices is likely to occur as this is when demand-supply imbalances of the LNG export facilities impact on domestic markets. However, AEMO also acknowledged that there may be commercial negotiations that occur outside this 12-month reporting period, when LNG facility operators may have information that is not known to other market participants.
- AEMO notes that improvements to systems and processes are expected to be implemented as part of the Gas Transparency Measures, particularly concerning the collection of information as part of the Medium Term Capacity Outlook (**MTCO**). MTCO is information about matters expected to affect the daily capacity of an LNG facility for an outlook period of 12 months beyond the required short term capacity outlook. AEMO recommends using the MTCO submission functionality to report maintenance information on the Gas Bulletin Board (as required under the Gas Transparency Measures and the proposed ACCC condition) as it will remove duplication, improve clarity and automation, and ensure consistency in reporting to and by AEMO.
- AEMO considers that there is no need to amend the proposed condition of authorisation to allow for maintenance information to be submitted via the MTCO submission functionality. However, AEMO has suggested amending clause 5(a) of the proposed condition to make this more explicit.

### ***Applicants***

- The Applicants submit that they understand AEMO would be able to facilitate reporting under the MTCO submission functionality, including allowing the

Applicants to provide information about scheduled maintenance activities to be performed in a period beyond 12 months, where that is required by the condition of authorisation. The Applicants submit that this approach would satisfy the reporting obligations under the condition of authorisation and remove the risk of reporting duplication and improve the efficiency of the disclosure requirements.

- Specifically, by the commencement of the Gas Transparency Measures, the Applicants submit that AEMO could amend the MTCO submission functionality to enable the Applicants to provide:
  - (a) information identifying their particular LNG Facility (as currently required by paragraph 2(a) of the Condition), and
  - (b) their reasonable expectation of the dates when scheduled maintenance activities will occur that have been the subject of conferral between the Applicants, and the reasonable expectation of the impact of such activities on capacity, as expressed in terajoules on those dates (as currently required by paragraph 2(b) of the Condition).
- The Applicants submit they would be satisfied if, following the implementation of the Gas Transparency Measures, compliance with the condition of authorisation would be achieved by reporting either to the Gas Bulletin Board as currently occurs, or via the MTCO as proposed by AEMO.

4.46. The ACCC has decided to require information disclosure in accordance with the condition proposed in the draft determination (and in 2016), subject to a minor amendment to explicitly state that the Applicants would satisfy the reporting obligation where they provide the information required to be disclosed under the condition via the MTCO submission functionality when the Gas Transparency Measures are implemented. The ACCC supports the approach proposed by AEMO and the Applicants to improve reporting mechanisms such that the risk of duplication and inconsistency is removed. The ACCC also agrees with the Applicants, that the reporting obligations under the condition could be met through the existing processes and mechanisms, or via the MTCO submission functionality when full information disclosure is enabled (including beyond the 12-month reporting window of the Gas Transparency Measures).

### **Reducing competition for maintenance services**

4.47. Coordination of maintenance events by the Applicants involves the Applicants sharing information about service providers. This could reduce competition between the Applicants when attempting to secure maintenance service providers during their preferred maintenance windows. Maintenance service providers may find their negotiating position weakened as the timing for when their services are required will already have been allocated between the Applicants.

4.48. However, maintenance service providers did not raise concerns with the ACCC about coordination between the Applicants reducing their ability to compete for contracts.

4.49. In 2016 the ACCC considered that the proposed conduct may result in fewer opportunities for maintenance service providers to win contracts with the Applicants. For example, if coordination between the Applicants resulted in a sequence of maintenance events occurring at Curtis Island one after the other (as was foreshadowed in the applications), the contractor selected to carry out the first



maintenance event was likely to have an advantage when bidding for the subsequent maintenance events.

- 4.50. If a single service provider is regularly awarded the contracts for all maintenance events then, over time, this may result in less competition for the supply of maintenance services. However, the ACCC notes the Applicants' submission in respect of the current application that there has been limited overlap of suppliers and that a large range of service providers are being awarded contracts for maintenance events.
- 4.51. The ACCC also notes that the Applicants have an incentive to promote competition among maintenance service providers, as creating a dominant service provider would limit the Applicants' choice and likely increase their costs.
- 4.52. The ACCC considers that to the extent there is any reduction in competition among maintenance service providers as a result of the Conduct, it is unlikely to be significant.

### **Potential to facilitate unauthorised coordination**

- 4.53. As with any application for coordinated conduct, authorisation raises the potential for coordination beyond the scope of the conduct authorised. While the Conduct is narrowly defined to discussing information such as maintenance timing and information about contractors each Applicant has engaged, these discussions may give rise to opportunities to inquire about the details of bids received from maintenance service providers and prices paid for services. This could lead to coordination on prices or the joint acquisition of maintenance services. Such conduct would significantly reduce the ability of service providers to compete for contracts at Curtis Island and secure business on fair and reasonable terms.
- 4.54. The Applicants submit that there has been no such unauthorised coordination during the authorisation period, nor any complaints about such conduct. And further, that the Applicants fully understand their broader obligations to comply with the Act, in particular, to avoid any sharing of information beyond the scope of the authorised conduct.
- 4.55. The ACCC notes that no concerns about such collusion have been raised during the period of the current authorisation. The ACCC also notes that such conduct would not be protected from prosecution under the proposed authorisation, and may breach the Act.
- 4.56. The ACCC also considers that the Applicants' application for re-authorisation suggests that they are aware of their responsibilities under the Act, which also lessens the likelihood of unauthorised coordination between them.

### **Balance of public benefit and detriment**

- 4.57. The ACCC considers that the Conduct is likely to result in public benefits in the form of:
- reducing inefficiencies arising from significant volatility events in domestic gas markets
  - reducing the need to employ wasteful, last resort gas control techniques
  - reducing the costs and downtime associated with maintenance, and
  - reducing the negative impact of maintenance events on third parties and the local community.

- 4.58. However, the ACCC considers that the Conduct is also likely to generate potentially significant information asymmetry that is likely to be detrimental to competition in domestic energy trading markets. In particular, the Applicants will gain knowledge of all planned LNG facility downtime associated with maintenance, and will therefore know when domestic markets may be affected by each Applicant's activities. This gives the Applicants the ability to trade advantageously in these markets, to the detriment of non-LNG participants.
- 4.59. The ACCC considers that once implemented, the Gas Transparency Measures will remove a number of information asymmetries between the Applicants and other market participants about scheduled downtime of the LNG Facility and the associated public detriment. However, the ACCC notes that there are circumstances when the Gas Transparency Measures would not require the Applicants to publicly disclose information they have shared with each other as part of the authorised conduct and therefore will not address the information asymmetry. In particular, whenever the Applicants share information about maintenance that is scheduled to take place in more than 12 months' time. This is because the Applicants are not expected to be required to report this information under the Gas transparency Measures.
- 4.60. The ACCC has therefore decided to impose a condition of authorisation, as discussed at paragraphs 4.36 - 4.46. The condition requires the Applicants to publicly disclose all maintenance schedule information that they have shared with one another (including, for the avoidance of doubt, maintenance schedule information that goes beyond a 12 months' period outlook), and ensure that information remains accurate. This is intended to give all market participants access to information regarding the maintenance scheduled at the Applicants' LNG Facilities and therefore address the anti-competitive detriments arising from the Conduct. As noted in paragraph 4.46, the ACCC expects the Applicants will continue to report using existing processes via the Gas Bulletin Board until the Gas Transparency Measures are implemented, and the MTCO submission functionality enables the Applicants to disclose all relevant information as required under the condition.
- 4.61. For the reasons outlined in this determination, the ACCC is satisfied, with the condition of authorisation, that the Conduct is likely to result in a public benefit and that this public benefit would outweigh any likely detriment to the public from the Conduct.

## Length of authorisation

- 4.62. The Act allows the ACCC to grant authorisation for a limited period of time.<sup>9</sup> This enables the ACCC to be in a position to be satisfied that the likely public benefits will outweigh the detriment for the period of authorisation. It also enables the ACCC to review the authorisation, and the public benefits and detriments that have resulted, after an appropriate period.
- 4.63. In this instance, the Applicants seek re-authorisation for 5 years.
- 4.64. The ACCC notes that there remains a degree uncertainty about the development of the LNG industry in conjunction with its impact and domestic gas markets more broadly.
- 4.65. As such, the ACCC has decided to re-authorise the Conduct for a further 5 years.

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<sup>9</sup> Subsection 91(1)

## 5. Determination

### The application

- 5.1. On 24 February 2021 the Applicants lodged an application to revoke authorisations A91516 and A91517 and substitute authorisation AA1000544 for the ones revoked (referred to as re-authorisation). This application for re-authorisation AA1000544 was made under subsection 91C(1) of the Act.

### The authorisation test

- 5.2. The ACCC must not make a determination revoking an authorisation and substituting another authorisation unless satisfied that it would not be prevented under section 90(7) of the Act from making a determination granting the substituted authorisation, if it were a new authorisation sought under section 88.<sup>10</sup> Under subsections 90(7) and 90(8) of the Act, the ACCC must not grant authorisation unless it is satisfied in all the circumstances that the Conduct is likely to result in a benefit to the public and the benefit would outweigh the detriment to the public that would be likely to result from the Conduct.
- 5.3. For the reasons outlined in this determination, and with the condition at Attachment A to this determination, the ACCC is satisfied, in all the circumstances, that the Conduct would be likely to result in a benefit to the public and the benefit to the public would outweigh the detriment to the public that would result or be likely to result from the Conduct, including any lessening of competition.
- 5.4. Accordingly, the ACCC has decided to grant re-authorisation with the condition at Attachment A of this determination.

### Conduct which the ACCC has decided to authorise

- 5.5. The ACCC has decided to revoke authorisations A91516 and A91517 and grant authorisation AA1000544 with the condition at Attachment A, in substitution to enable the Applicants to coordinate the timing and scheduling of maintenance events at their LNG Facilities as described in paragraphs 1.5 and 1.8 and defined as the Conduct.
- 5.6. The Conduct may involve a cartel provision within the meaning of Division 1 of Part IV of the Act or may have the purpose or effect of substantially lessening competition within the meaning of section 45 of the Act.
- 5.7. The ACCC has decided to grant re-authorisation AA1000544 with the condition at Attachment A until 31 August 2026.

## 6. Date authorisation comes into effect

- 6.1. This determination is made on 5 August 2021. If no application for review of the determination is made to the Australian Competition Tribunal it will come into force on 27 August 2021.

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<sup>10</sup> Section 91C(7) of the Act

## Attachment A – Condition of authorisation

1. The purpose of this condition is to make publicly available "Maintenance Information" (as defined in paragraph 2) that an LNG producer the subject of this condition (an **LNG Producer**) discloses to another LNG Producer in the course of scheduling maintenance activities pursuant to the Conduct.
2. Subject to paragraph 8 below, each LNG Producer must publish the following information (Maintenance Information):
  - a. the LNG Producer's reasonable expectation of the dates when the Scheduled Maintenance Activities (as defined in paragraph 4) will commence and conclude; and
  - b. whether the Scheduled Maintenance Activities are expected to involve any of the following:
    - i. Shutdown of one half or less of an LNG train;
    - ii. Shutdown of greater than one half of an LNG train but not greater than one LNG train;
    - iii. Shutdown of greater than one LNG train but not greater than one and a half LNG trains; or
    - iv. Shutdown of greater than one and a half LNG trains

where such Maintenance Information has been disclosed by an LNG Producer to another LNG Producer as part of the Conduct as soon as is practicable after, but within 2 business days of, the disclosure to the other LNG Producer(s). For the avoidance of doubt, the information to be published pursuant to this paragraph does not include preliminary discussions between LNG Producers for the purpose of determining possible dates for Scheduled Maintenance Activities.

3. For the purposes of this requirement of publication, an LNG Producer will reasonably expect the occurrence of Scheduled Maintenance Activities when the LNG Producer has undertaken sufficient planning to define the scope of the shutdown of one or more of its LNG trains (including any partial shutdowns) associated with the Scheduled Maintenance Activities and has confirmed the availability of contractors for the proposed shutdown period.
4. For the purposes of this requirement of publication, Scheduled Maintenance Activities means the performance of scheduled maintenance activities at an LNG Facility:
  - a. involving the complete or partial shutdown of an LNG train; and
  - b. where the shutdown is expected to have a duration of a minimum of 1 day.
5. The LNG Producer will satisfy the publication requirement under paragraph 2 if it:
  - a. provides the Maintenance Information to the Australian Energy Market Operator (AEMO) who accepts receipt of the Maintenance Information and publishes it on the Natural Gas Services Bulletin Board (Bulletin Board) or similar publication, which will include via the Medium Term Capacity Outlook submission functionality pursuant to the Gas Transparency Measures arising from impending amendments to the National Gas Law; or

- b. if the Maintenance Information is not published via the means outlined in paragraph 5.a above, publishes the Maintenance Information on its internet website in a manner that is easily accessible to interested parties.
6. It is acknowledged that the Maintenance Information published by the LNG Producer may be subject to change for a number of operational or commercial reasons. The provision of the Maintenance Information by the LNG Producer may be made subject to the following disclaimer:

*"[insert name of LNG Producer] provides the Maintenance Information on the basis that the information:*

  - *is provided in good faith and is published as a condition of the Authorisation granted by the ACCC; and*
  - *is based on [insert name of LNG Producer]'s reasonable expectations and is subject to change."*
7. Subject to paragraph 8 below, each LNG Producer must, as soon as is practicable, amend and/or update its published Maintenance Information as necessary to ensure that the published Maintenance Information continues to accurately reflect the LNG Producer's reasonable expectations about Scheduled Maintenance Activities.
8. The LNG Producers will comply with the requirements in paragraphs 2 and 7 unless and until:
  - a. they are required to publish the Maintenance Information or information substantially the same as the Maintenance Information in compliance with another statutory or regulatory obligation including, but not limited to, an obligation of publication arising under the National Gas Law or the National Gas Rules (or any regulation, rule, procedure or instrument made thereunder) and:
    - i. one or more LNG Producers have notified the ACCC, in writing, of the relevant statutory or regulatory obligation, including details of the publication requirement; and
    - ii. the ACCC has advised, in writing, that the publication requirement in paragraph 2 of this condition no longer applies; or
  - b. the ACCC has otherwise advised, in writing, that the requirements in paragraphs 2 and 7 of this condition no longer apply.
9. For the avoidance of doubt, in this condition 'LNG Producer' means each or any of the Applicants identified in paragraph 1.5 of the determination granting authorisation AA1000544.