



## Decision under sections 19 and 20 of the *Competition and Consumer (Gas Market Emergency Price) Order 2022* on the application by Powershop Australia Pty Ltd for an exemption from the 'Price Cap' under s 18.

**3 May 2023**

Pursuant to subsection 19(1) of the *Competition and Consumer (Gas Market Emergency Price) Order 2022* (Cth) (the Order), the Australian Competition and Consumer Commission (**the ACCC**)<sup>1</sup>, has decided to grant Powershop Australia Pty Ltd (ABN 41 154 914 075) (**the Applicant**) a Price Cap exemption (**the Exemption**) from subsections 8(1), 8(2) and 8(3) of the Order.

The Exemption is in force during the period from 3 May 2023 and ceases to be in force at the end of 23 December 2023.

### Statement of Reasons

#### Summary

The ACCC is satisfied that:

- Powershop Australia Pty Ltd (Powershop) is not a regulated gas producer within the meaning of the Order.
- Powershop is an affiliate of a regulated gas producer within the meaning of the Order.
- The primary business of Powershop Australia is attributable to its activities as a gas retailer.
- Granting a conditional exemption to Powershop subject to specified conditions would not undermine the object of Part IVBB of the *Competition and Consumer Act 2010*. Not granting an exemption, if it leads to SER not competing in the retail market for supply to commercial and industrial customers, may lead to a lessening of competition in the retail market and result in higher prices.
- Granting an exemption to Powershop with appropriate conditions is appropriate and would not have any material adverse impact on gas prices for customers in Australia.

#### Legislative Framework

1. On 16 December 2022, the *Competition and Consumer Act 2010* (Cth) (**CCA**) was amended to include Part IVBB ('**Gas Market**') to enhance the welfare of Australians through the regulation of the Australian gas market and in particular, to limit increases in gas prices.<sup>2</sup>

<sup>1</sup> The power to grant an exemption in writing from any or all of subsections 8(1), (2) and (3) of the Order was delegated to the ACCC on 23 December 2022.

<sup>2</sup> CCA s 53.

2. The *Competition and Consumer (Gas Market Emergency Price) Order 2022* (**'Order'**), made under section 53M of the CCA, commenced on 23 December 2022. The Order prohibits regulated gas producers and affiliates of regulated gas producers from making certain offers on a gas trading exchange, entering into agreements to supply regulated gas, or supplying regulated gas under such agreements, at a price above \$12 per gigajoule (GJ) (known as the **'Price Cap'**) for a period of 12 months.
3. Under subsection 19(1) of the Order, the Australian Competition and Consumer Commission (**'ACCC'**)<sup>3</sup> may grant an exemption, in relation to a person, if they have made an application under section 18 of the Order and the ACCC is satisfied that it is appropriate to do so having regard to the following matters outlined in subsection 19(2) of the Order:
  - (a) if the person is a regulated gas producer – the volume of regulated gas produced by the person;
  - (b) if the person is a regulated gas producer – the proportion of the business operations of the person represented by the business of producing regulated gas that it carries on;
  - (c) any material changes in the person's circumstances since the commencement of the Order;
  - (d) the object of Part IVBB of the CCA;
  - (e) any other matter that the ACCC considers to be relevant.

### **The application**

4. On 13 January 2023, pursuant to subsection 18(1) of the Order, Powershop Australia Pty Ltd (Powershop) applied for an exemption (the Application) from Price Cap as prescribed in subsections 8(1), (2) and (3) of the Order.
5. Shell Energy Retail Pty Ltd (**Shell Energy Retail**) and Shell Energy Australia Pty Ltd (**SEAu**) also submitted applications for exemption from the Order on 13 January 2023.
6. SEAu provided additional information to the ACCC on 27 January 2023 (**Further Information Response**) to support Powershop's exemption application.
7. SEAu provided a response to the ACCC's further request for additional information on 24 January 2023, 2 February 2023 and 14 February 2023 (**Additional Information Response**) to support Powershop's exemption application.

### **Factual background**

8. Powershop is a wholly-owned subsidiary within the Shell Group. Shell Energy Australia Pty Ltd (SEAu) is the holding company for Powershop (and for Shell Energy Retail).<sup>4</sup>
9. Powershop states that it is a gas and electricity retailer and that it supplies gas to small customers (as defined in the National Energy Retail Rules and the Energy Retail Code of Practice).<sup>5</sup>
10. Powershop states that it holds a gas retail licence in Victoria and gas retail authorisations in Queensland, New South Wales, the Australian Capital Territory and South Australia.<sup>6</sup>

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<sup>3</sup> The power to grant an exemption in writing from any or all of subsections 8(1), (2) and (3) of the Order was delegated to the ACCC on 23 December 2022 per the *Competition and Consumer (Gas Market Emergency Price) Delegations 2022*.

<sup>4</sup> See Attachments C and E to Powershop's application and Annex 1 to the SEAu's Additional Information Response.

<sup>5</sup> Powershop application, response to Part A, Q3.

<sup>6</sup> Powershop application, response to Part A, Q3.

11. Powershop submits that while it does not have any direct interest in the production of regulated gas, it is 'related to Shell entities that are regulated gas producers' (the 'Shell upstream gas production companies'), and is therefore an 'affiliate' for the purposes of sections 8 and 9 of the Order.<sup>7</sup> These companies include QCLNG and Walloons.<sup>8</sup>
12. Walloons is a joint venture between Shell entity QGC (75%) and CNOOC (25%). Each of the Shell upstream gas production companies sells 100% of gas produced by it to Walloons.<sup>9</sup> Walloons also acquires gas from Shell's joint venture with APLNG.<sup>10</sup>
13. Powershop submits that it is not a vertically integrated gas retailer. It would satisfy the retailer exception in section 16 of the Order, if not for the fact that the annual turnover test is applied on a corporate group basis rather than at the level of its specific gas business. When the annual turnover test is applied on a corporate group basis rather than at the level of the specific gas business, it incorporates the substantial gas production and domestic sales of Walloons as a related entity.
14. Powershop states that it does not have in place any current or planned gas supply arrangements with the Shell upstream gas production companies or Walloons for 2023.<sup>11</sup> Powershop further states that it purchases all of its gas as a market participant from third parties directly from the Short Term Trading Market (STTM) and the Victorian Declared Wholesale Gas Market (DWGM).<sup>12</sup>
15. Powershop states that SEAU provides Powershop with a load following financial hedge to allow Powershop to manage its floating price risks on the STTMs and DWGM, and further states that this arrangement does not involve the physical supply of gas by SEAU to Powershop.<sup>13</sup> This arrangement may involve SEAU selling into the STTMs and DWGM while Powershop is purchasing from these markets in order to manage this price risk.
16. Powershop submit that they do not consider Arrow Energy Holdings Pty Ltd (**Arrow Energy**) to be an affiliate for the purposes of the Order.
17. Arrow Energy is a 50-50 joint venture between SEHAL (the holding company for SEAU, which is the holding company for Powershop) and PetroChina Company Limited (**PetroChina**). Powershop do not have supply agreements in place with Arrow Energy for 2023.
18. While the ACCC accepts that Arrow Energy is not an affiliate of Powershop, the ACCC understands that QCLNG (an affiliate of Powershop under the Order) has rights to gas produced by Arrow Energy under exclusivity arrangements entered into with Arrow Energy (for supply from the Surat Gas Project).<sup>14</sup>

## Consideration

19. The ACCC is satisfied that it is appropriate to grant a conditional exemption to Powershop. The ACCC has made this decision based on information available at this

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<sup>7</sup> Powershop application, response to Part B, Q1.

<sup>8</sup> See Attachment C to Powershop's application.

<sup>9</sup> See Attachments C and E to Powershop's application.

<sup>10</sup> See Attachment E to the Applicant's application.

<sup>11</sup> Powershop application, response to Part B, Q1.

<sup>12</sup> Powershop application, response to Part A, Q4.

<sup>13</sup> Powershop application, response to Part B, Q1.

<sup>14</sup> ACCC, Gas Inquiry Interim Report July 2022, p. 101, <https://www.accc.gov.au/system/files/ACCC%20Gas%20Inquiry%20-%20July%202022%20interim%20report%20-%20FINAL.pdf>.

time and has had regard to the matters prescribed in subsection 19(2) of the Order and the Application and Further Information Response provided.

**Section 19(2)(a) – For a regulated gas producer – Volume of regulated gas produced**

20. Powershop states that it is an affiliate of a regulated gas producer within the meaning of the Order.<sup>15</sup>
21. However, Powershop submits that it does not have any direct interest in the production of regulated gas.<sup>16</sup> It is not a regulated gas producer, and it does not produce any volumes of regulated gas.
22. The ACCC is satisfied that the conditions that apply to the exemption granted to Powershop will ensure that Powershop continues not to have access to regulated gas produced by an affiliate.

**Section 19(2)(b) – For a regulated gas producer – Proportion of business operations represented by the production of regulated gas**

23. The ACCC accepts that Powershop is an affiliate of a regulated gas producer and is not a regulated gas producer within the meaning of section 5 of the Order. On that basis, the ACCC understands that no portion of its business operations relate to its own production of regulated gas.
24. The ACCC is satisfied that the conditions that apply to the exemption granted to Powershop will ensure that no proportion of Powershop's business operations is represented by regulated gas production or arises from access to regulated gas produced by an affiliate.

**Section 19(2)(c) – Any material changes in circumstances since 23 December 2022 (the commencement of the Order)**

25. Powershop has not identified any material changes in its circumstances since the Order commenced.

**Section 19(2)(d) – Object of Part IVBB of the CCA**

26. The object of Part IVBB of the CCA is to enhance the welfare of Australians through regulation of the Australian gas market, including limiting increases in gas prices.
27. Powershop is a significant gas retailer to small customers. It submits that the Exemption is required to enable it to compete effectively in the retail market, and that, if the Exemption is not granted, there will be a lessening of competition in the retail market for small customers.
28. The ACCC considers that exemption is consistent with the object of Part IVBB of the CCA where it enables SER to compete effectively in the retail market for small customers and provided it does not result in any significant volumes of regulated gas for sale to wholesale customers being sold above the Price Cap. The ACCC is concerned to ensure that exemption does not facilitate other Shell-owned regulated gas producers, including Arrow Energy, making gas sales to end users via Powershop, whether directly or via third parties or the trading markets, at prices above the Price Cap.
29. Such conduct would be contrary to the object of Part IVBB of the CCA and contrary to the basis on which the ACCC has determined that it is appropriate for Powershop to be granted an exemption.

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<sup>15</sup> Powershop application, response to Part A, Q1.

<sup>16</sup> Powershop exemption application, response to Part B, Q1.

30. The ACCC therefore proposes to grant the Exemption subject to conditions which prevent SER from engaging in any new arrangements for supply to Powershop from regulated gas producers that are Shell group companies. These conditions reflect the basis on which Powershop has sought an exemption, which is that its business does not relate to the sale of regulated gas by these entities.

**Section 19(2)(e) – Other relevant matters that the ACCC considers to be relevant**

31. Powershop submits that as a gas retailer who sources supply from the STTMs/DWGM, it faces different cost structures than regulated gas producers. The ACCC has taken into account these differences in deciding that it is satisfied that a conditional exemption should be granted to Powershop.

**Section 20(2) – Conditions imposed on Price Cap exemption**

32. The ACCC considers it appropriate to grant a conditional exemption to Powershop, having regard to the matters in subsection 19(2) of the Order and based on the information available at this time.
33. Material changes in Powershop’s circumstances could impact the appropriateness of it holding the Exemption, including a change to the role of SER as a supplier of regulated gas to small customers. The ACCC considers that conditions to inform the ACCC of any such change and to address the potential for Powershop to enter into arrangements to secure additional regulated gas from Shell group companies are necessary.
34. The ACCC also considers that conditions are required for the ACCC to monitor and identify conduct that may constitute non-compliance with the conditions of the Exemption. As the Exemption will only operate for a limited time, it is important that any information sought by the ACCC be provided promptly.
35. The ACCC considers that the conditions set out below are appropriate and reasonable to ensure that granting this exemption is consistent with the object of Part IVBB.

***Condition 1 – Notification of Material Change***

36. The ACCC grants this Exemption on condition that Powershop notifies the ACCC if there has been a material change to its circumstances or the information provided to the ACCC in support of its application for an exemption, as soon as practicable and no later than 5 business days from the change.

***Condition 2 – Gas agreements and trades***

37. The ACCC grants this exemption on condition Powershop does not seek to purchase gas from Walloons, Arrow Energy or any other Shell-owned regulated gas producers during the period of the Exemption and that:
- a. Powershop does not enter into any new arrangements, however described, agreed during the period of this exemption that facilitate or provide for the supply of gas from any affiliated regulated gas producers (including QCLNG) to Powershop, either directly, via third parties or via the Wallumbilla and Moomba Gas Supply Hubs.
  - b. Powershop does not enter into any new arrangements, however described, agreed during the period of this exemption that facilitate or provide for the supply of gas from Walloons, or any related parties of Walloons, to Powershop,

either directly, via third parties or via the Wallumbilla and Moomba Gas Supply Hubs.

- c. Powershop does not enter into any new arrangements, however described, agreed during the period of this exemption that facilitate or provide for the supply of gas from Arrow Energy Limited, or any related parties of Arrow Energy Limited, to Powershop, either directly or via third parties.
- d. Powershop does not enter into any new arrangements, however described, agreed during the period of this exemption that relate to the price for the purchase or sale of natural gas from the AEMO trading markets with any Shell upstream gas production companies, or any Shell-owned regulated gas producers
- e. Powershop does not enter into any new arrangements, however described, agreed during the period of this exemption that relate to the price for the purchase or sale of natural gas from the AEMO trading markets with Walloons, or any related parties of Walloons
- f. Powershop does not enter into any new arrangements, however described, agreed during the period of this exemption that relate to the price for the purchase or sale of natural gas from the AEMO trading markets with Arrow Energy Limited, or any related parties of Arrow Energy Limited.
- g. Powershop is unable to coordinate its purchases of regulated gas through a trading market with Walloons, Arrow Energy or their affiliates.

***Condition 3 – Provision of information to monitor compliance with condition 2***

38. The ACCC grants this exemption on condition that Powershop provides:

- a. any information requested by the ACCC in relation to its compliance with a condition to this exemption within a reasonable timeframe and no later than 10 business days after the request is received;
- b. any gas supply agreement it enters into for supply of gas to Powershop by a Shell group company, or the supply of gas by Powershop to a gas buyer (equivalent to 0.5 PJ per annum), that is not a 'small customer', as soon as practicable and no later than 10 business days after it is agreed;
- a. by the fifth of each month, a summary of all trades (including price and counterparty) in the
  - i. Brisbane, Sydney and Adelaide STTMs; and
  - ii. Victorian DWGM