



Variation to Price Cap Exemption Granted 3 May 2023 – Decision pursuant to section 22(1) of the *Competition and Consumer (Gas Market Emergency Price) Order 2022* on the application by Shell Energy Australia Pty Ltd for a variation to its exemption from the Price Cap

26 July 2023

Pursuant to section 22(1) of the *Competition and Consumer (Gas Market Emergency Price) Order 2022* (Cth) (**the Order**), the Australian Competition and Consumer Commission (**the ACCC**)¹, has decided to vary the Price Cap exemption (**the Exemption**) granted to Shell Energy Australia Pty Ltd (ACN 085 757 446, ABN 18 085 757 446) (**SEAu**) on 3 May 2023.

The varied Exemption is in force from 26 July 2023 and ceases to be in force at the end of 23 December 2023.

Statement of Reasons

Summary

On 7 June 2023, Shell Energy Australia Pty Ltd (SEAu) requested a variation to their exemption from the Order due to concerns that directions issued by AEMO under section 91AF of the National Gas Law to SEAu may cause it to contravene condition 2 of the Exemption.

The ACCC is satisfied that:

- Under the varied Exemption, SEAu will continue not to have access to regulated gas produced by other Shell-owned regulated gas producers, Walloons or Arrow Energy, unless required to comply with a direction issued by AEMO under section 91AF(1) of the National Gas Law (NGL).
- Under the varied Exemption, SEAu's business operation will continue not to include the production of regulated gas or arise from access to regulated gas produced by other Shell-owned regulated gas producers, Walloons or Arrow Energy, unless otherwise directed by AEMO under section 91AF(1) of the NGL.
- There has not been any material change in SEAu's circumstances since the commencement of the Order.
- Varying the Exemption to remove any potential conflict arising from a Direction made by AEMO under section 91AF of the NGL is consistent with the object of Part IVBB of the *Competition and Consumer Act 2010* (Cth) (CCA).

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

Legislative framework

1. On 16 December 2022, the CCA was amended to include Part IVBB to enhance the welfare of Australians through the regulation of the Australian gas market, and in particular, to limit increases in gas prices.²
2. The Order, made pursuant to 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. Pursuant to section 19(1) of the Order, the ACCC 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 section 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.
4. Pursuant to section 22(1) of the Order, the ACCC may vary or revoke an exemption in relation to a person if the ACCC is satisfied that it is appropriate to do so, having regard to the matters in section 19(2) of the Order.

The Exemption

5. On 13 January 2023, SEAu applied to the ACCC under section 18(1) of the Order for an exemption from subsections 8(1), 8(2) and 8(3) of the Order.
6. On 3 May 2023, the ACCC granted SEAu the Exemption, pursuant to section 19(1) of the Order. Conditions imposed on that exemption were made pursuant to section 20(2) of the Order. The Exemption was granted in relation to the application of the price cap under each of sections 8(1), 8(2) and 8(3) of the Order.
7. The Exemption granted to SEAu on 3 May 2023 is accessible via the ACCC Gas Price Cap Exemptions Register: <https://www.accc.gov.au/public-registers/gas-price-cap-exemptions-register/shell-energy-australia-pty-ltd>

Variation

8. On 27 April 2023, section 91AF of the National Gas Law (**NGL**) commenced. This provision extends AEMO's powers to maintain and improve the reliability and adequacy of the supply of natural gas by empowering it to issue directions to gas market participants for one of the following purposes:
 - (a) to maintain and improve the reliability of the supply of natural gas within the east coast gas system

² CCA s 53.

- (b) to maintain and improve the adequacy of the supply of natural gas within the east coast gas system.

Without limitation, a direction may relate to one or more of the following:

- the operation, maintenance or use of any equipment or installation
 - the control of the flow of natural gas
 - any other matter that may affect the reliability or adequacy of the supply of natural gas within the east coast gas system.
9. On 7 June 2023, SEAu contacted the ACCC to advise of its concern that a direction by AEMO under this provision may cause SEAu to breach condition 2 of the Exemption. Specifically, if that direction had the effect of directing (directly or indirectly) any of the following parties to enter into an agreement, or arrangement, to supply SEAu with gas:
- any Shell Upstream gas production companies or any wholly-owned Shell regulated gas producers
 - Walloons or any affiliates of Walloons; or
 - Arrow Energy or its subsidiaries.
10. The ACCC acknowledges SEAu's concerns and notes that, under section 91AF(1), AEMO could issue a direction that could potentially conflict with condition 2 of the Exemption.
11. Condition 2 of the Exemption is extracted below:

2.0 Gas agreements and trades

- 2.1 The Exempted Party must not enter into any new arrangements, however described, including transaction notices, that facilitate supply of gas to the Exempted Party by:
- 2.1.1 any Shell Upstream gas production companies or any wholly-owned Shell regulated gas producers
 - 2.1.2 Walloons or any affiliates of Walloons; or
 - 2.1.3 Arrow Energy or its subsidiaries.
- 2.2 The Exempted Party must maintain AEMO-administered trading restrictions that prevent it from being matched with Walloons through the Wallumbilla or Moomba Gas Supply Hubs.
- 2.3 The Exempted Party must not coordinate its purchases of regulated gas through the Wallumbilla and Moomba Gas Supply Hubs, Brisbane, Sydney and Adelaide Short Term Trading Markets, and Victorian Declared Wholesale Gas Market (the Trading Markets) with Walloons or its affiliates or Arrow Energy or its subsidiaries.
- 2.4 The Exempted Party must not enter into any agreements in the Wallumbilla or Moomba Gas Supply Hubs that have the purpose of facilitating supply to the Exempted Party by Walloons or any affiliate of Walloons.
- 2.5 The Exempted Party must not enter into any agreements or arrangements, however described, that relate to the price for the purchase or sale of natural gas from the Trading Markets with:

- 2.5.1 any Shell Upstream gas production companies or any wholly-owned Shell regulated gas producers
 - 2.5.2 Walloons or any affiliates of Walloons excluding any agreements or arrangements with Shell Energy Retail Pty Ltd or Powershop Australia Pty Ltd; or
 - 2.5.3 Arrow Energy or any affiliate of Arrow Energy.
12. To ensure SEAu is not in a position of conflict and that it is able to comply with the conditions in the Exemption in the event that an AEMO direction is issued under section 91AF(1), the ACCC considers it appropriate to vary the Exemption.

Consideration for variation to the Exemption

13. The ACCC is satisfied that it is appropriate to vary the Exemption. The ACCC has made this decision based on information available at this time and has had regard to the matters prescribed in section 19(2) of the Order, as required by section 22(1) of the Order.

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

14. The ACCC is satisfied that the variation of the Exemption granted to SEAu will continue to ensure that SEAu does not have access to regulated gas produced by an affiliate, unless otherwise directed by AEMO under section 91AF(1) of the NGL.

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

15. The ACCC is satisfied that a variation of the Exemption will continue to ensure that no proportion of SEAu's business operations is represented by regulated gas production or arises from access to regulated gas produced by an affiliate, unless otherwise directed by AEMO under section 91AF(1) of the NGL.

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

16. The ACCC has not identified any material changes in SEAu's circumstances since the Order commenced and since being granted the Exemption on 3 May 2023.

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

17. 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.
18. The ACCC considers that varying the Exemption to account for the possibility of an AEMO direction under section 91AF(1) of the NGL is consistent with the object of Part IVBB of the CCA. This is because directions under section 91AF(1) of the NGL are intended to mitigate the risk of shortfalls in gas supply in the east coast gas system, which can be expected to enhance the welfare of Australians. Such shortfalls in gas supply, if they were to arise, would likely lead to higher gas prices for consumers, which would be inconsistent with the object of Part IVBB of the CCA.
19. A variation to the Exemption allowing SEAu to comply with an East Coast Gas System Direction issued either directly to SEAu, or to a Shell-owned regulated gas producer, including Arrow Energy and Walloons, under section 91AF(1) of the NGL, can therefore be considered consistent with the object of Part IVBB of the CCA.

20. The ACCC has therefore decided to remove any potential conflict with condition 2 of the Exemption by:
- providing for a limited carve-out from this condition where AEMO issues a direction under section 91AF(1) of the NGL that requires SEAu to acquire regulated gas from Shell-owned regulated gas producers, including Arrow Energy and Walloons; and
 - requiring any trade, arrangement or agreement entered into by SEAu with Shell-owned regulated gas producers in compliance with such a direction to comply with the Price Cap (subject to the exceptions in sections 11-16 of the Order).
21. At all other times, the Exemption will continue to prevent Shell-owned regulated gas producers, including Arrow Energy and Walloons, from making gas sales to end users via SEAu, whether directly or via third parties or the trading markets.
22. The ACCC is satisfied that this variation to the Exemption will continue to prevent SEAu from engaging in any new arrangements for supply to SEAu from regulated gas producers that are Shell group companies and/or Arrow Energy, unless otherwise directed to do so by AEMO through an East Coast Gas System Direction.
23. The ACCC is also satisfied that varying the Exemption to require SEAu to do the following during the period in which the Exemption is in force, or where any part of the supply of gas is to occur within the period in which the Exemption is in force, is necessary for the ACCC to monitor and identify conduct that may be non-compliant with the conditions of the Exemption:
- SEAu must promptly notify the ACCC if it is required by an East Coast Gas System Direction to enter into a trade or agreement for the supply of any volume of gas; and
 - SEAu must report to the ACCC the volume and price of the gas supplied or to be supplied under that agreement, within 10 business days of the direction being received from AEMO.
24. In the ACCC's view, this variation will ensure that the Exemption continues to reflect the basis on which SEAu 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

25. The ACCC remain satisfied that SEAu as a gas aggregator and trader, faces different cost structures than regulated gas producers. The ACCC has taken into account these differences in deciding that it is satisfied that a variation to the Exemption should be granted to SEAu.

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

26. The ACCC considers it appropriate to vary the Exemption granted to SEAu, having regard to the matters in section 19(2) of the Order and based on the information available at this time.
27. The ACCC considers that the additional condition set out below is appropriate and reasonable to ensure that granting this exemption is consistent with the object of Part IVBB of the CCA.

Condition 4 – Compliance with directions issued pursuant to section 91AF(1) of the National Gas Law

28. The ACCC grants this exemption on condition that SEAu provides that:
- a. In the event that the Exempted Party is required to acquire regulated gas from a person identified in paragraph 2.1 of the Exemption to comply with a written direction issued by the Australian Energy Market Operator (the **AEMO**) pursuant to section 91AF(1) of the National Gas Law³ (an **East Coast Gas System Direction**):
 - i. Conditions 2.1 to 2.5 of the Exemption do not apply to the extent necessary to enable the Exempted Party to comply with the East Coast Gas System Direction; and
 - ii. any trade, arrangement or agreement entered into by the Exempted Party in compliance or purported compliance with the East Coast Gas System Direction must comply with section(s) 8(1), 8(2) and 8(3) of the Order, subject to the exceptions in sections 11-16 of the Order.
 - b. The Exempted Party must:
 - i. promptly notify the ACCC where the Exempted Party is required by an East Coast Gas System Direction to enter into a trade or agreement for the supply of any volume of gas during the period in which this Exemption is in force, or where any part of the supply of gas is to occur within the period in which this Exemption is in force; and
 - ii. report to the ACCC the volume and price of the gas supplied or to be supplied under that agreement, within 10 business days of receiving that direction by the AEMO.

³ National Gas (South Australia) Act 2008 (SA) Schedule.