AUSTRALIAN COMPETITION & CONSUMER COMMISSION

Compliance and enforcement guidelines on the Gas Market Code

November 2023

Acknowledgment of country

The ACCC acknowledges the traditional owners and custodians of Country throughout Australia and recognises their continuing connection to the land, sea and community. We pay our respects to them and their cultures; and to their Elders past, present and future.

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Contents

1. Introduction

A mandatory gas market code

The gas market code[1] (the Code) commenced on 11 July 2023. The Code is made under the *Competition and Consumer Act 2010* (CCA).[2]

As stated in the Explanatory Statement,[3] its purpose is to facilitate a well-functioning domestic wholesale gas market with adequate gas supply at reasonable prices and on reasonable terms for both suppliers and buyers.

The Code covers negotiation and agreements for the supply of regulated gas between covered suppliers and buyers in the east coast gas market and contains the following key requirements, subject to various exemptions:

- **Price rules** – prohibition on supply over the reasonable price, initially set at $12/GJ.
- **Good faith obligations** – parties to negotiations and agreements must deal with each other in good faith.
- **Negotiations** – various requirements for expressions of interest (EOIs), offers and negotiations.
- **Transparency** – record keeping, reporting and publication obligations for suppliers.

Geographic scope

The Code applies to the interconnected east coast gas market which connects Queensland, the Northern Territory, South Australia, New South Wales, the Australian Capital Territory, Victoria and Tasmania (east coast gas market). It does not apply to Western Australia which is physically separated from the interconnected east coast gas market.[4]

Transition period

The Code does not apply to agreements to supply regulated gas entered into in the period of 12 months that started on 23 December 2022, where those agreements are subject to the price cap contained in the *Competition and Consumer (Gas Market Emergency Price) Order 2022* (Temporary Price Order), or to an EOI, offer or negotiation related to such an agreement.

There is a transition period of 2 months before most obligations contained in the Code take effect. However only certain provisions apply to agreements where the negotiations leading to the agreement took place before or during the transition period.[5] The Code also applies to contracts

1 *Competition and Consumer (Gas Market Code) Regulations 2023.*

2 Section 53L of the CCA provides that regulations may prescribe matters required or permitted by the CCA to be prescribed by a gas market code.

3 Explanatory Statement, *Competition and Consumer (Gas Market Code) Regulations 2023.*

4 Section 9 of the Code.

5 The provisions are: the price rules (sections 26–29); the good faith requirement for agreements (section 31); and the record keeping obligation for agreements (section 33(2)(k). Other provisions of the Code also apply to these agreements to the extent that they relate to the price rules, the good faith obligation for agreements or the record keeping obligation for agreements.

made before 11 July 2023 and varied after the transition period, where the variation includes a provision that determines the price of the gas to be supplied.

Role of the ACCC

It is the ACCC's role to enforce compliance with the Code. Significant penalties apply for contraventions in addition to other enforcement options available to the ACCC. The ACCC also has the power to:

- issue infringement notices
- issue public warning notices in appropriate circumstances
- apply to the Federal Court for injunctions, community service orders, probation for up to 3 years, orders to disclose information and corrective advertising orders.

The ACCC's role in enforcing compliance with conditions to Ministerial exemptions is discussed at page 7 of these Guidelines.

The Code allows the ACCC to change the reasonable price by making a determination specifying the price that it considers is a reasonable price for regulated gas.[6] The ACCC cannot make a determination within the period of 2 years starting from the commencement of the Code unless the ACCC considers there has been substantial change in the market conditions for regulated gas, or the Energy Minister and Resources Minister jointly notify the ACCC in writing that it may make a determination. If the ACCC makes a determination, it cannot make a further determination within the period of 2 years starting after that date unless either of those same circumstances apply. Before making any determination, the ACCC must consult with the public about its reasons for considering that a price it specifies is a reasonable price.[7]

The ACCC also has a role in relation to the Code's transparency requirements, with specified information to be reported to the ACCC and certain information to be published by the ACCC.

The Code provides for the ACCC to make determinations on certain matters in relation to the Code, including in relation to information to be reported to the ACCC. The ACCC has not made any determinations prior to publication of these Guidelines.

About these Guidelines

These Guidelines are a summary of the Code's key requirements, containing general information and do not constitute legal advice. Parties should refer to the precise terms of the Code to assess its application to their particular circumstances and obtain legal advice if necessary. The Guidelines also provide a summary of the consequences for non-compliance with the Code and outline the exemptions available. They also set out the ACCC's approach to enforcement and compliance of the Code and section 53ZQ of the CCA (which relates to conduct engaged in for the purpose of avoiding the Code).

All references in these Guidelines to section numbers are references to provisions of the Code, unless otherwise stated.

The ACCC will separately publish information about the record keeping, reporting and publication obligations of the Code.

6 See Section 29 of the Code.

7 The ACCC can make determinations under Sections 15, 19, 21, 29, 33–38, 40–41; see also Section 23 of the Code.

2. Who does the Code apply to?

Scope of the Code

Covered suppliers in the east coast gas market are subject to various requirements in the Code. A covered supplier is:

- a regulated gas producer,[8] or
- an affiliate of a regulated gas producer who has an agreement in force[9] for the supply of gas from the regulated gas producer or another affiliate of the regulated gas producer (affiliate supply agreement), or
- an affiliate of a regulated gas producer with no affiliate supply agreement in force but who has:
  - entered into another agreement to supply the gas acquired under an affiliate supply agreement to another person, and that other agreement is in force, or
  - intends to enter into another agreement to supply the gas acquired under an affiliate supply agreement to another person.

Suppliers can apply for a conditional Ministerial exemption from specific aspects of the Code. The Department of Climate Change, Energy, the Environment and Water has published information about the process for applying for a conditional Ministerial exemption.[10]

The requirements in the Code to negotiate and deal in good faith, discussed at page 14 of these Guidelines apply to both covered suppliers and buyers in relation to the supply of regulated gas covered by the Code.

Deemed exemptions

The Code contains various 'deemed exemptions' from requirements in the Code. The table below summarises the conditions required to be met for those exemptions to apply and the provisions in the Code from which a party will be exempt. Suppliers should take particular care when assessing their eligibility for a deemed exemption and seek legal advice in relation to their circumstances. Additionally, suppliers should be aware that if circumstances change and an applicable exemption no longer applies, they will need to ensure compliance with the Code in relation to conduct occurring after that time.

8 As defined in Sections 4 and 5 of the Code.

9 Section 6(1)(b)(iii) of the Code states that this agreement must not be a mandatory government agreement.

10 https://www.energy.gov.au/government-priorities/energy-markets/gas-markets/conditional-exemptions-mandatory-gas-code- conduct.

Threshold	Exemptions
Supplier proposes to supply or supplies regulated gas for **less than 12 months**.	Negotiation requirements for EOIs, initial offers and final offers. Procedural rules for a supply agreement.
Where a supplier issues an EOI to **2 or fewer persons.**[11]	Negotiation and reporting requirements for EOIs.
Where the buyer intends, at the time an offer is made or an agreement entered into, to **export** the regulated gas from Australia in a liquid state.	Negotiation requirements for initial and final offers. Procedural and price rules[12] and the good faith and reporting requirements for a supply agreement.
An EOI, initial or final offer or supply agreement if supply is under a **gas swap agreement**. A gas swap is an agreement to swap a quantity of regulated gas at one location for the same quantity of regulated gas at a different location, or to swap the same quantity of gas at the same location but at a different time.[13]	Negotiation requirements for EOIs, initial offers and final offers. Procedural and price rules and good faith and reporting requirements for a supply agreement.
An EOI, initial or final offer or supply agreement if supply is under a **foundational agreement or a gas master supply agreement**. A foundational agreement is an agreement for the supply of regulated gas where all the regulated gas will be sourced from undeveloped reserves, future development of contingent resources or prospective resources.[14] A gas master supply agreement is not defined in the Code and is a well-understood industry term.[15] Foundational agreements and gas master supply agreements are different to agreements to supply regulated gas generally. For example, foundational agreements have different terms and negotiation timeframes to agreements to supply regulated gas from established fields.[16]	Negotiation requirements for EOIs, initial and final offers. Procedural rules for a supply agreement.
Subordinate contracts or **transaction notices** under a gas master supply agreement where the price of the gas is determined in the master or another agreement and the subordinate contract or transaction notice does not include a provision determining price.	Procedural rules and price rules for a supply agreement (apart from section 28).

11 Section 46 of the Code.

12 Sections 24–29 of the Code. The procedural rules in sections 24 and 25 require a supplier to issue a final offer before entering into an agreement, and that the agreement must include certain terms.

13 Section 4 of the Code, definitions.

14 Section 4 of the Code, definitions.

15 Explanatory Statement, *Competition and Consumer (Gas Market Code) Regulations 2023*, p 40.

16 Explanatory Statement, *Competition and Consumer (Gas Market Code) Regulations 2023*, p 40.

A supply agreement if it results directly from a **transaction on a gas exchange** that is: ▪ A declared wholesale gas market within the meaning of the National Gas Law (for example the Victorian Declared Wholesale Gas Market), or ▪ a short-term trading market, within the meaning of the National Gas Law (for example, the Adelaide, Brisbane and Sydney Short Term Trading Markets).	Procedural and price rules[17] and good faith and reporting requirements for a supply agreement.
Certain transactions that occur on **gas trading exchanges.**[18] There is an automatic bid matching process with anonymity of bidders on a gas trading exchange for transactions that are not pre-matched trades or broker pre-matched trades.[19] For transactions that are not pre-matched trades and broker pre-matched trades, buyers and sellers are automatically matched on the gas trading exchange. While a supplier must not offer to supply regulated gas at a price exceeding a reasonable price, a buyer may still offer to buy above the reasonable price. This may result in a supplier being matched with a buyer and automatically entering into an agreement exceeding a reasonable price. Suppliers should take particular care when assessing the applicability of this exemption by ensuring they consider all relevant definitions, including those in the Code, Part IVBB and the relevant gas trading exchange agreement; for example, the Gas Supply Hub Agreement which is available on AEMO's website.	Price rules contained in subsections 26(1) and 27(1) do not apply if: ▪ Agreement results directly from a transaction on a gas trading exchange that is not a pre-matched trade or broker pre-matched trade; or ▪ Agreement results directly from a transaction on a gas trading exchange that is a pre-matched trade or broker pre-matched trade and does not exceed the prescribed short-term supply period. Price rules contained in subsection 28(1) do not apply if: ▪ Offer to supply does not exceed the prescribed short-term supply period; or ▪ Offer to supply is for a transaction that is a pre-matched trade or broker pre-matched trade (however, note that a resulting agreement is not exempt if it exceeds the prescribed short-term supply period). *Note: the prescribed short-term supply period in subsections 52(2) and (3) requires all the regulated gas to be supplied under the agreement, or in accordance with the offer, by the end of the third gas day after the agreement is entered into, or the offer is made (i.e. by the end of three gas days). A gas day means the period of 24 hours starting at 6 am Australian Eastern Standard Time.*

17 Sections 24–25 of the Code describes procedural rules, while Section 26 to 29 of the Code describes the price rules. The procedural rules require a supplier to issue a gas final offer in relation to an agreement before entering into the agreement (section 24), and to include in the agreement the terms specified in section 25.

18 The term gas trading exchange means a gas trading exchange established by AEMO under subsection 91BRK(1) of the National Gas Law, which is commonly referred to as the Gas Supply Hub (or GSH).

19 Explanatory Statement, *Competition and Consumer (Gas Market Code) Regulations 2023*, p 43.

Retailer exemption applies where, at the time, the person: ▪ holds a retailer authorisation within the meaning of the National Energy Retail Law as it applies in a State or a Territory, or ▪ is a retailer within the meaning of the *Electricity Industry Act 2000* (Vic), or ▪ holds a licence authorising the person to sell gas by retail under the *Gas Industry Act 2001* (Vic), and ▪ no more than 50 per cent of their annual turnover[20] during the most recent relevant financial year is attributable to business operations related to the production, supply and acquisition of gas carried on by the person. The annual turnover for gas-related business operations is to be considered broadly by reference to the aggregate of supplies made by the person and related bodies corporate during the relevant financial year.[21]	Negotiation requirements and procedural and price rules and good faith and reporting requirements for agreements.

20 As defined in the *Corporations Act 2001*.

21 Explanatory Statement, *Competition and Consumer (Gas Market Code) Regulations 2023*, p 44.

Small suppliers supplying the domestic market applies where, at the time: - the amount of counted gas a supplier has produced in the most relevant recent calendar year is nil, or is less than 100 petajoules, and - the supplier has not entered into an agreement to supply regulated gas with a person before the commencement of the Code that has been varied on or after commencement to increase the amount of regulated gas to be supplied to that person and who intended at the time the agreement was varied to export that gas from Australia, and - the supplier has not otherwise entered into an agreement (excluding an agreement of a kind specified in section 55(3) of the Code)[22] to supply regulated gas with a person on or after the commencement of the Code with a person who at that time intended to export the regulated gas from Australia. Counted gas includes: - Regulated gas produced by the small supplier or a related body corporate, and - The amount of gas covered by an agreement that gives the small supplier or a related body corporate a right to ownership (or the value of sale) of a particular amount of regulated gas produced in the east coast gas market by other parties under that agreement. If a supplier is a party to such an agreement and also a party to a joint sale or marketing agreement, then the production of the collective parties is attributed to the supplier.[23]	Price rules for agreements.
A proposed supply, or supply, of regulated gas under a **mandatory government agreement**. The Code defines a mandatory government agreement as an agreement for the supply of regulated gas that a person has entered into because of a direction issued under the National Gas Law.	Negotiation requirements, good faith and reporting requirements for EOIs, initial and final offers. Procedural and price rules, good faith and reporting requirements for a supply agreement.
Where a **conditional Ministerial exemption** has been granted and remains in force (see below).	The provisions of the Code specified in the exemption.

22 For the purpose of determining whether a supplier would lose the small supplier exemption as the result of entering into an agreement to supply regulated gas to a person who intends to export that gas, subsection 55(3) of the Code provides that small suppliers will not lose their small supplier deemed exemption status if that agreement is a gas swap agreement, a mandatory government agreement or an agreement mentioned in section 51 or subsection 52(1) or (2) of the Code. Note section 51 covers an agreement to supply regulated gas resulting directly from a transaction on a gas exchange (e.g. STTMs or the DWGM). Subsection 52(1) covers an agreement to supply gas resulting directly from a transaction on a gas trading exchange (e.g. Gas Supply Hub) that is not a Pre-matched or Broker Pre-matched Trade. Subsection 52(2) covers an agreement to supply gas resulting directly from a transaction on a gas trading exchange that is a Pre-matched or Broker Pre-matched Trade where the gas is supplied by no later than the end of the third gas day starting after the agreement is entered into.

23 Explanatory Statement, *Competition and Consumer (Gas Market Code) Regulations 2023*, p 47.

Conditional Ministerial exemptions

In addition to deemed exemptions, a person may apply for a conditional Ministerial exemption from the requirements in the Code.

Applicants for conditional Ministerial exemptions must ensure that information provided in a Ministerial exemption application is, and remains, complete and correct. If the party becomes aware that information included in an application, or information, or a document given in relation to an application, was incomplete or inaccurate, and the party fails to give the relevant complete and corrected information and documents as soon as practicable after becoming so aware, there will be a contravention of the Code that is subject to a civil penalty. This obligation also applies to applications to vary or revoke a conditional Ministerial exemption.

A Ministerial exemption may be granted subject to conditions, and the person (or persons) to whom it is granted must comply with those conditions. The ACCC will enforce compliance with a condition specified in a Ministerial exemption. The maximum civil penalties for non-compliance with a Ministerial exemption are the greater of $50 million, or 3 times the value of the benefit obtained, or 30% of annual Australian turnover of the corporation in the preceding 12 months if the value of the benefit cannot be determined: see Appendix A.

The Department of Climate Change, Energy, the Environment and Water has published information about the Ministerial exemptions process, including application forms. These forms describe the process for how to submit an application, what matters the Minister may take into account in deciding an application and if an exemption is granted, how to vary or revoke an exemption. For more information see this link.

3. Price rules

The price rules in the Code require covered suppliers that are not subject to an exemption to offer a reasonable gas price when entering into or, in certain circumstances, varying an agreement for the supply of regulated gas. The gas price does not include the price payable for the provision of transportation services or storage services.

The price rules also apply to an offer on a gas trading exchange for the supply of regulated gas.

The price rules do not apply to the following offers and transactions on a gas trading exchange:

- agreements resulting directly from transactions on gas trading exchanges, if they are not pre-matched or broker pre-matched trades
- agreements resulting directly from pre-matched trades and broker pre-matched trades on gas trading exchanges, provided the gas is to be supplied before the end of the third gas day starting after that time, and all of the gas is delivered in that time
- offers to supply gas, on terms for supply by the end of the third gas day starting after the offer is made, and all of the gas is supplied within that time
- offers for a transaction that is a pre-matched trade or a broker pre-matched trade.

In assessing whether the price rules have been contravened in relation to offers on a gas trading exchange, the ACCC will use data collected by AEMO (as operator of the GSH) to identify any supplier not subject to a relevant exemption that is making offers and entering into agreements to supply gas at a price in excess of the reasonable price.

The initial reasonable price for regulated gas is **$12 per gigajoule (GJ)**.[24]

Should the ACCC make any future determination to change the reasonable price, the ACCC will consult before doing so and may take into account:

- the extent to which the determination would promote the following in the parts of Australia to which the Code applies:
  - a workably competitive market for regulated gas
  - the affordability and availability of regulated gas
  - the sufficiency or adequacy of investment in, and the production of, regulated gas to meet demand
- the effect or expected effect of other related decisions or government policies
- any other matter the ACCC considers relevant.

The price rules are civil penalty provisions. The maximum penalties for non-compliance are up to the greater of $50 million, 3 times the value of the benefit obtained, or 30% of annual Australian turnover of the corporation in the preceding 12 months if the value of the benefit cannot be determined: see Appendix A.

24 Section 29(2)(a) of the Code.

Examples

Example 1: Transport costs

Background

The ACCC has observed it is common for gas supply agreements to sell gas at a nominated delivery point.

Suppliers may enter into agreements for the supply of gas on an ex-plant basis (i.e. at the exit flange of the processing plant and the connected transmission pipeline).[25] Where they do so, the supply agreement should not include any transportation costs.

Alternatively, suppliers may enter into agreements for the supply of gas to a point downstream of their processing plant (e.g. at trading locations such as Wallumbilla, Culcairn, the Short Term Trading Markets or intermediate receipt points on transmission pipelines). This may involve the use of one or more transmission pipelines to transport the gas to this point.[26] In this scenario, there may or may not be separate transportation charges levied by the producer in addition to the price payable for the regulated gas.

Section 4(3) of the Code makes clear that references to the price for supply of regulated gas do not include the price payable for the provision of transportation services or storage services in relation to the regulated gas.

The Code also requires any initial offer, final offer or agreement that provides for transportation or storage services to separately identify the prices applicable to those services.[27]

Scenario 1

Supplier A is located at Moomba (South Australia) and carries on a business of producing regulated gas subject to the Code and does not have an exemption from the price rules.

Supplier A enters into an agreement with Buyer A for the supply of regulated gas at the exit flange of the Moomba plant at $12/GJ. This does not contravene the price rules.

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25 There are also gathering pipelines (or gathering systems), which form part of the upstream producing operation and are used to take gas from the point the gas is extracted to the production facility. In a similar manner to gas processing costs, the costs associated with gathering pipelines are recovered by producers through the gas price. These costs would be expected therefore to form part of the price cap.

26 **Transmission pipelines** are used to transport gas at high pressure from production facilities to an interconnecting transmission pipeline, the entry point of a gas distribution network (city gate) or to users that are directly connected to the transmission pipeline (e.g. gas powered generators and large C&I users). Some of the main transmission pipelines in the east coast include the South West Queensland Pipeline, the Roma to Brisbane Pipeline, the Moomba to Sydney Pipeline, the Eastern Gas Pipeline, the Moomba to Adelaide Pipeline (MAP), the Port Campbell to Adelaide (PCA) Pipeline and the Victorian Declared Transmission System. Transmission pipelines may be supported by other infrastructure, such as compression facilities. For example, to transport gas from some locations around Wallumbilla to Moomba requires the use of the compression facilities at Wallumbilla.

27 Sections 16(2)(i), 20(2)(h) and 25(2)(h) of the Code.

Scenario 2

Supplier B is located in the Roma area of Queensland and carries on a business of producing regulated gas subject to the Code and does not have an exemption from the price rules.

Supplier B enters into an agreement with Buyer B for the supply of regulated gas at Wallumbilla (which is downstream of the ex-plant point at Roma) at $13/GJ, with $12.50/GJ to be paid for the regulated gas and $0.50/GJ to be paid to transport the gas from Roma to Wallumbilla.

Supplier B would contravene the price rules for entering into an agreement where the price for regulated gas exceeded the reasonable price.

Example 2: Variation to a gas supply agreement

Supplier A carries on a business of producing regulated gas subject to the Code and does not have an exemption from the price rules.

Supplier A has an existing agreement under which it supplies gas to Buyer A that was entered into prior to the commencement of the Code.

After expiry of the transitional period of the Code, the parties enter into a variation of the agreement which includes a provision determining the price of gas supplied.

The varied contract and the provisions determining price will need to comply with the price rules.

4. Good Faith

Good faith in negotiations and agreements

The Code requires gas market participants who negotiate or deal with each other in relation to agreements for the supply of regulated gas to do so in good faith, where no relevant exemption applies. This includes acting in good faith in:

- pre-contractual negotiations including EOIs, initial offers and final offers[28]
- exercising rights or performing obligations under an agreement[29]
- dealing with or resolving complaints or disputes arising under or in connection with the agreement[30]
- varying or terminating the agreement.[31]

The good faith obligations apply to dealings in relation to any agreement entered into after the transition period, including where negotiations took place before or during the transition period.[32] The good faith obligations do not apply to negotiations entered into after the transition period for an EOI or offer issued before or during the transition period.[33]

Contravention of the good faith obligations is a civil penalty provision. The maximum penalties for non-compliance are up to the greater of $50 million, or 3 times the value of the benefit obtained, or 30% of annual Australian turnover of the corporation in the preceding 12 months if the value of the benefit cannot be determined. The Explanatory Statement states that the intention for imposing such penalties is to reflect the importance of addressing the imbalance in bargaining power and promoting honest and fair dealings between sellers and buyers of gas.[34] For further information on penalties: see Appendix A.

When is a party not acting in good faith?

The Code imposes a requirement upon parties in certain circumstances to deal in good faith "within the meaning of the unwritten law from time to time"[35] which refers to historical judge-made law, known as the 'common law'.

The concept of good faith is not one that is capable of a precise and universal definition and its application is assessed by reference to relevant context and circumstances. An obligation to act in good faith is generally understood to require a party to:

- to act honestly, and refrain from acting badly or dishonestly
- to act fairly and reasonably, and refrain from acting arbitrarily or for some irrelevant purpose
- to have due regard to the rights and interests of the other party.

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28 Section 30(1)(a) of the Code.

29 Section 31(2)(a) of the Code.

30 Section 31(2)(b) of the Code.

31 Section 31(2)(c) of the Code.

32 Section 7(6) of the Code.

33 Section 7(7) of the Code.

34 Explanatory Statement, *Competition and Consumer (Gas Market Code) Regulations 2023*, p 24.

35 Section 30(1)(c) and Section 31(1)(c) of the Code.

However, the obligation does not:

- require a party to act in the interests of the other party, or
- prevent a person from acting in their own legitimate commercial interests. [36]

Whether a party is acting in 'good faith' will depend on the context and agreement (if there is one in place), including whether it is making an honest and genuine attempt to resolve differences by discussion and compromise in the context of showing a faithfulness and fidelity to the agreement.

A party is likely to be negotiating or dealing in good faith where it makes an honest and genuine assessment of its rights and obligations and negotiates by reference to such, acts with fidelity to the agreement and acts reasonably and with fair dealing by considering the legitimate interests of the parties and the objective of the agreement.

A party is not likely to be acting in good faith where they act dishonestly or fail to have regard to the legitimate interests of the other party, where they act with an ulterior motive or intentionally to undermine or deny the other party the benefits of a contract.

The Code contains a non-exhaustive list of matters that the courts may have regard to in determining whether a person deals in good faith with another person in relation to negotiations or an agreement, as summarised below:[37]

- the extent to which the person has acted honestly
- in the case of dealing in relation to an agreement – whether the person has tried to cooperate with the other party to achieve the purposes of the agreement
- the extent to which the person has not acted arbitrarily, capriciously, unreasonably, recklessly or with ulterior motives
- the extent to which the person has acted in a way that constitutes retribution against the other party for past disputes with the other party (including disputes in mediation or arbitration)
- the nature of the person's relationship with the other party (including the extent to which the person has conducted the relationship without duress)
- the extent to which the person's relationship with the other party has been conducted in recognition of the need for certainty regarding the risks and costs of supplying or acquiring regulated gas
- the extent to which the person has undermined, or denied the other party, a benefit of any agreement
- any other relevant matter.

The good faith obligation under the Code applies to both parties regarding the negotiation and performance of an agreement.

36 Section 30(3) and Section 31(4) of the Code.

37 Section 32, Explanatory Statement, *Competition and Consumer (Gas Market Code) Regulations 2023*, p 24.

Examples

Example 3: Good Faith in Negotiations – negotiating a price increase

Scenario 1

Buyer A has an existing contract with Supplier A for regulated gas at a particular price and wishes to extend the supply contract for another year. Supplier A notifies Buyer A that they are happy to vary the existing contract but there will be an increase in price. Supplier A explains to Buyer A the reasons why they believe there should be an increase in price.

Buyer A doesn't immediately agree to the price increase and explains that it needs continued supply to meet its customer demands. The parties enter into negotiations.

During negotiations, both parties respond promptly to communications with each other and engage on key issues impacting the agreement, including the price of gas and quantities to be supplied. Both parties make reasonable counter-offers. This allows parties to make timely progress on the negotiations. The parties ultimately agree to a price increase acceptable to both parties that allows the contract to be extended to meet Buyer A's customer requirements.

We consider that both parties have acted in good faith by acting honestly and reasonably during negotiations for the variation of the contract and paying attention to each other's interests to progress negotiations in a timely manner.

Scenario 2

Buyer B has an existing contract with Supplier B for regulated gas at a particular price that has been extended several times in previous years and wishes to extend the supply contract for another year. Supplier B informs Buyer B that it is happy to extend the contract but that the price will be significantly increased. Buyer B doesn't immediately agree to the price increase. The parties enter into negotiations.

Supplier B knows that Buyer B urgently needs the extension of supply to meet its customer demand and takes longer than needed to respond during negotiations so that Buyer B will not have time to explore alternative supply options. Supplier B tells Buyer B that it has another purchaser willing to pay a higher price, when that is not the case, with the aim of pressuring Buyer B to agree. Buyer B agrees to the full price increase even though it considers the price to be excessive and is not able to explore a more competitive price from an alternative supplier.

We consider that Supplier B has not acted in good faith by acting dishonestly, not having regard to the buyer's interests and by acting with an ulterior motive during negotiations for the variation of the contract.

5. Negotiations

Overview

The requirements for negotiations and agreements are intended to reduce the imbalance in bargaining power between buyers and suppliers and establish minimum conduct and process standards for contractual negotiations.[38]

The below is a summary of the stages of negotiation and the requirements for each are discussed further below.

EOI	An EOI seeks interest in the supply of gas from potential buyers. An EOI is issued by the supplier and must remain open for a specified open period.
EOI open period	Open period must be at least 20 business days after the EOI is issued (the open period).
EOI gas response period	Starts on the day after the end of the gas EOI open period and ends either: ▪ 25 business days later, or ▪ 35 business days later if more than 24 other persons each give the supplier notice in writing of their interest in further negotiations in relation to the EOI.[39]
Buyer notice of interest in further negotiations	Can be issued at any time during EOI open period.
Supplier notice of whether successful or not in EOI	Provided by the supplier within an EOI gas response period.
Gas initial offer	An initial offer is an offer of basic terms forming the basis for negotiations. It must remain open for at least 15 business days after issue, or another date set by the supplier and a potential buyer in writing.
Buyer may give a notice to obtain a final offer	Following negotiations, a buyer may request a final offer from the supplier.
Final gas offer can be issued by supplier or can be given by the buyer	A final offer is an offer made in a form that is capable of being accepted, and if accepted gives rise to a binding agreement to supply gas. Instead of requesting a final offer from the supplier, a buyer may issue its own buyer final gas offer.
Agreement	Concludes negotiations, but parties must continue to deal with each other in fulfilling contractual obligations.

38 Explanatory Statement, *Competition and Consumer (Gas Market Code) Regulations 2023*: "While the gas market code will place obligations on both suppliers and buyers, such as obligations to deal with each other in good faith, greater obligations are placed on suppliers to help address imbalances in bargaining power in the domestic wholesale market", p 1.

39 See the definition of gas EOI response period in section 4 of the Code.

Expressions of interest

Where a supplier issues an EOI to more than 2 people[40] it must:

- Publish the EOI on its website at the same time that it issues the gas EOI, and in a legible, prominent and unambiguous way.[41]
- Specify the following:[42]
  - the quantity of gas intended to be supplied
  - the annual quantity of gas intended to be supplied (if the EOI contemplates including an annual supply requirement in an agreement)
  - the period over which the gas is intended to be supplied, including the dates when supply will commence and cease, or a method for calculating them
  - the delivery points of the gas intended to be supplied
  - the last day the EOI is open
  - details of any condition precedent to the supply of gas.
- Keep the EOI open through the open period until a date specified in the EOI, which must be at least **20 business** days after the EOI is issued.[43]

Response to an EOI

If a potential buyer gives the supplier a notice during the open period stating an interest in further negotiations, the supplier must notify the potential buyer within a specified period (the gas EOI gas response period) that they have been successful or not successful in relation to the EOI.[44]

If a potential buyer is successful in the EOI, the supplier must give the buyer, within the gas EOI response period:

- a gas initial offer[45]
- a gas final offer, if the potential buyer has given the supplier a notice in writing for the purposes of obtaining a gas final offer.[46]

A supplier is not required to provide an offer if it does not receive any response from the potential buyer during the gas EOI open period (other than a notice that the potential buyer has an interest in further negotiations).[47]

40 Section 46 of the Code provides for a deemed exemption for EOIs made to 2 or fewer people. Further detail can be found in the deemed exemptions section of this Guideline, beginning at page 6.

41 Section 11 of the Code.

42 Section 10(2) of the Code.

43 Section 10(2)(e), Section 10(3) and Section 12 of the Code.

44 Section 13 of the Code.

45 Section 14(d)(i) of the Code.

46 Section 14(d)(ii) of the Code

47 Section 14(2) of the Code.

Initial offer

If a supplier provides a potential buyer with an initial offer after the transition period in the Code, certain requirements apply unless the initial offer relates to an EOI issued before or during the transition period.

An initial offer must remain open for a specified period of at least **15 business days** after the day on which the supplier issues the gas initial offer, unless:

- the initial offer is varied or reissued, or
- the supplier and the potential buyer fix a specified day, in writing, before the supplier issues the initial offer.

An initial offer must not be withdrawn or terminated before the end of the gas initial offer open period or, if relevant, the gas initial offer response period,[48] unless a material change affects the supplier's ability to supply gas in accordance with the initial offer.[49]

An initial offer must specify the following:[50]

- quantity of gas intended to be supplied
- if annual supply requirements are contemplated, the annual quantity of gas intended to be supplied
- the intended degree of flexibility in determining the quantity of gas (including conditions relating to load factor)
- the period over which the gas is to be supplied (the dates that supply will commence and cease, or a method for calculating them)
- the delivery points for the supply of gas
- the price or price structure intended to apply to the supply of the gas (including details about any intended take or pay conditions or any intended price escalation mechanisms)
- the last day of the initial offer open period
- any conditions precedent to the supply of gas
- whether the initial offer includes transportation or storage services
- if it does include transportation or storage services, the price or a price structure intended to apply to those services (including any price escalation mechanism applying to those prices).

If a potential buyer gives notice in writing to the supplier[51] stating that it is interested in receiving a gas final offer[52], the supplier must issue a final offer. However, this requirement does not apply if the potential buyer gives the supplier a buyer gas final offer.[53]

48 The gas initial offer response period is the period that starts on the day after the potential buyer gives the supplier a notice in writing stating they have an interest in receiving a gas final offer and ends after at least 30 business days or a later day as decided by the supplier and potential buyer: see section 4 of the Code.

49 Section 19 of the Code. See also page 23 of these Guidelines.

50 Section 16(2) of the Code.

51 The notice must be given during the gas initial offer open period: see section 18 of the Code.

52 See the next section: a gas final offer is an offer to supply regulated gas that: (a) is in a form that is capable of being accepted; and (b) if accepted, gives rise to a binding agreement to supply regulated gas: see section 4 of the Code for definitions.

53 A buyer gas final offer is an offer to acquire regulated gas that: (a) is in a form that is capable of being accepted; and (b) if accepted, gives rise to a binding agreement to acquire regulated gas: see section 4 of the Code for definitions.

Final offer

If a supplier makes a final offer on or after the commencement of the Code, certain requirements apply, unless it relates to an EOI or initial offer issued before or during the transition period.[54]

The final offer must be accompanied by a notice in writing from the supplier setting out the last day of the gas final offer open period.[55] This period must be at least **15 business days** after the supplier issues the final offer, unless the supplier and potential buyer specify otherwise in writing before the final offer is issued.[56] The final offer must not be withdrawn or terminated before the end of the period, unless a material change affects the supplier's ability to supply gas in accordance with the initial offer.[57]

A final offer must specify the following:[58]

- the quantity of gas intended to be supplied
- if annual supply requirements are contemplated, the annual quantity of gas intended to be supplied
- the intended degree of flexibility in determining the quantity (including conditions relating to load factor)
- the period over which the gas is intended to be supplied, including the dates that supply will commence and cease, or a method for calculating them
- the delivery points for gas supply
- the price or price structure that applies to the supply of gas (including details about any intended take or pay conditions or any intended price escalation mechanisms)
- the payment terms for the supply of gas
- if transport and storage is included, the price or price structure intended to apply to the provision of those services (including the effect of any price escalation mechanism applying to those prices)
- the circumstances in which the supplier or potential buyer may vary the terms of the agreement
- a protocol for the supplier and the potential buyer to notify each other, within a reasonable time, of any major interruptions that may affect the supplier's ability to supply or the potential buyer's ability to accept regulated gas
- the consequences if the gas is not delivered by the supplier or not accepted by the potential buyer
- the circumstances under which the supplier or potential buyer may terminate an agreement
- the consequences of a breach of the agreement to supply gas
- procedures for resolving disputes arising under the agreement.

54 Section 7(3) of the Code.

55 Section 20(3)(a) of the Code.

56 Section 20(3)(b) of the Code.

57 Section 19, of the Code and see also page 21 of these Guidelines.

58 Section 20(2) of the Code contains the requirements for content.

Material change in circumstances

Where there is a material change in a supplier's circumstances some requirements of EOIs, initial offers and gas final offers may not apply.[59]

The Code indicates that a material change occurs in the following limited circumstances:[60]

- a change to an approval (or a new requirement for approval) under a law that affects the supplier's ability to supply the gas
- a change in an existing legal obligation (or the imposition of a new legal obligation) on the supplier affecting its ability to supply the gas
- the person to whom an initial offer or final offer was issued becomes insolvent;
- equipment needed to produce gas has become unavailable due to circumstances that could not have been reasonably foreseen by the supplier
- a service needed to deliver the gas becomes unavailable due to circumstances that could not have been reasonably foreseen by the provider of the service
- a technical or operational issue that could not have been reasonably foreseen by the supplier has had a substantial effect on the supplier's ability to supply the gas
- the gas has been sold to another person.

In enforcing these requirements in the Code, the ACCC will have regard to whether a supplier is able to evidence a material change in circumstances. A party should seek legal advice when considering if there is a material change in their circumstances.

Concluding an agreement to supply gas

The Code contains requirements for an agreement to supply gas made after the transition period, unless the agreement relates to an EOI, an initial offer or a final offer issued before or during the transition period.[61]

A supplier that enters into an agreement to supply gas must issue a final offer, in relation to the agreement, to the buyer before entering into the agreement, unless the buyer has provided the supplier a buyer gas final offer.[62]

An agreement to supply gas must specify the following:[63]

- the quantity of gas to be supplied under the agreement
- if relevant, the annual quantity of gas to be supplied
- the degree of flexibility in determining the quantity of gas (including conditions relating to load factor)
- the period over which the gas is to be supplied, including the dates that supply will commence and cease (or a method of calculating these dates)
- the delivery points for gas supply

59 Section 15(a)(i), Section 19(a), Section 21(2)(a) of the Code.

60 Section 22 of the Code.

61 Section 7(4) of the Code.

62 Section 24(1) and (2) of the Code. The term "buyer gas final offer" is defined in section 4.

63 Section 25(2) of the Code.

- the price or price structure that applies to the supply of gas (including details about any take or pay conditions or any price escalation mechanisms)
- the payment terms for the supply of gas
- if transport and storage is included, the price or price structure intended to apply to the provision of those services
- the circumstances (if any) in which the supplier or buyer may vary the terms of the agreement
- a protocol for the parties to the agreement to notify each other (within a reasonable time) of any major interruptions that may affect the supplier's ability to supply or the buyer's ability to accept gas
- the consequences (if any) if the gas is not delivered by the supplier or not accepted by the buyer
- the circumstances under which the supplier or buyer may terminate an agreement
- the consequences of a breach of the agreement to supply gas
- procedures for resolving disputes arising under the agreement.

6. Transparency

Summary

Record keeping, publication and reporting obligations apply to suppliers and the ACCC may:

- specify in writing the manner and form in which certain records are to be made and kept
- make determinations specifying deadlines for giving certain information and, in some cases, specifying the kinds of information to be published or reported.

The ACCC will publish separate information on record keeping and reporting obligations.

Record keeping requirements

A supplier must keep written records of the following for **6 years**:[64]

- EOIs, initial offers and final offers that did not proceed to an agreement
- EOIs, initial offers and final offers that proceeded to an agreement
- each buyer gas final offer given to the supplier that has or has not proceeded to an agreement, regardless of whether offer was withdrawn or terminated
- all documents exchanged between the supplier and the person with whom the supplier has negotiated, including each version of an EOI, initial offer, buyer gas final offer and final offer, and if negotiations did not proceed to an agreement – documents and information containing reasons why it did not
- names of all parties that stated an interest in further negotiations in relation to an EOI
- each agreement to supply regulated gas entered into by the supplier
- all supplier documents created, obtained or held relating to supply, price and marketing of gas
- any other information specified in a determination made by the ACCC.

Suppliers should ensure they seek legal advice when assessing their own record keeping requirements.

Supplier to publish information about available gas

A supplier must publish on its website, as soon as practicable after the day after the end of the transition period, the following information:

- a statement that the information is published for the purposes of the Code
- each EOI it intends to issue (including volume of gas proposed to be supplied in accordance with the EOI and the period over which it will be supplied), apart from any EOIs subject to the exemption in section 46 for EOIs made to 2 or fewer persons
- volumes of uncontracted gas it is likely to have available

64 Section 33 of the Code.

- the volume of that uncontracted gas it is likely to have available for EOIs, initial offers and final offers
- the volume of that uncontracted gas to be supplied under an agreement it intends to enter into
- any other information specified in a determination by the ACCC.

The information must:

- relate to the 24 month period starting on that day (or to subsequent 24 month periods starting on days specified by the ACCC in any determination)
- be published in a legible and prominent way.[65]

The ACCC may approve in writing how the information is to be displayed.

Reporting to the ACCC

Reporting available gas

A supplier must report to the ACCC:

- Information it is required to publish on its website as set out above.
- Whether the supplier intends in that 24 month period:
  - to issue an EOI, initial or final offer for uncontracted gas
  - to supply any uncontracted gas in that 24 month period.
- Any other information specified by any determination made by the ACCC.

The notice must be given to the ACCC as soon as practicable after the day after the end of the transition period, or a day set out in any determination made by the ACCC.

Reporting EOIs, offers and agreements

The following information must be reported to the ACCC by a **supplier** in relation to EOIs, offers and agreements covered by the Code, unless otherwise exempt as noted in the exemptions section of these Guidelines:

EOIs – if a supplier issues an EOI	A notice in writing within **3 business days** of issue of the EOI: ■ stating that the notice is given for the purposes of the Code ■ setting out the date on which the supplier issued the gas EOI. A copy of the EOI, to be provided on or before the deadline specified in any ACCC determination.

65 Section 34(10) of the Code.

Offers – if a supplier issues an initial offer or final offer, or it is given a buyer gas final offer	A copy of the gas initial offer, gas final offer or buyer gas final offer and a notice in writing: ▪ stating that the notice is given for the purposes of the Code ▪ stating the date on which the supplier: – issued an initial offer or final offer – received a buyer gas final offer. To be provided on or before the deadline specified in any ACCC determination.
Agreements – where an agreement is entered into	A copy of the agreement and a notice in writing: ▪ stating that the notice is given for the purposes of the section ▪ stating the date on which the supplier entered into the agreement. To be provided on, or before, the deadline specified in any ACCC determination.

Reporting compliance with Ministerial conditional exemptions

A supplier subject to conditions in a Ministerial exemption must provide a notice to the ACCC in writing[66]

- stating that the notice is given for the purposes of the Code
- setting out information to demonstrate that it has complied with the conditions of its exemption during:
  - the 3 month period beginning on the day the conditional Ministerial exemption was granted, or
  - a subsequent 3 month period, if the conditional Ministerial exemption was in force at a time during that subsequent 3 month period.

Reporting on application of retailer exemption

If, immediately after the end of the transition period, a supplier is covered by the retailer exemption it must provide the ACCC notice in writing within **3 business days** of the end of the transition period that it is covered by the exemption.

If a supplier becomes covered by the retailer exemption at a later date, it must provide the notice within 3 business days of being covered.

The notice must include:

- a copy of any retailer authorisation or licence, or (in the case of a retailer under the Electricity Industry Act 2000 (Vic)) a link that allows access to its licence)
- information to demonstrate that no more than 50% of its annual turnover during the most recent relevant financial year is attributable to its business operations related to the production, supply and acquisition of gas
- a statement that the notice is given for the purposes of section 40 of the Code, and

66 See Part 8 of the Code.

- information of a kind specified in any determination made by the ACCC.

If a supplier is a covered supplier at the time after the end of the transition period but subsequently ceases to be covered by the retailer exemption, it must provide the notice within 3 business days that states that fact.

All notices given to the ACCC in relation to reporting on retailer exemption must be in writing, and the ACCC may approve in writing how the information is to be displayed in the notification.

Small supplier exemptions

A supplier covered by the small supplier exemption must give the ACCC a written notice in an approved form on or before:

- the third business day after the relevant calendar year
- 23 December 2023, if the calendar year is the most recent calendar year that ended on or before the Code commenced on 11 July 2023.

The notice must include:

- a statement that the notice is given for the purposes of the Code
- information demonstrating that the amount of relevant gas (called 'counted gas')[67] produced in the most recent calendar year is nil or less than 100PJ
- information of a kind specified in a determination made by the ACCC.

Subject to some exceptions,[68] a supplier covered by the small supplier exemption must also notify the ACCC in writing where it forms the intention to enter into an agreement to supply gas to a potential buyer, and the potential buyer intends to export it from Australia. The supplier must provide the ACCC a notice in an approved form describing:

- the intention of the supplier
- the intention of the buyer, and
- other information of a kind specified in a determination made by the ACCC.

An obligation in substantially similar terms applies if the small supplier enters into an agreement to supply gas to a buyer, and the buyer intends to export the gas from Australia.

A small supplier must provide the information to the ACCC on or before the third business day after the relevant calendar year if the small supplier:

- forms an intention to enter into an agreement to supply gas to a potential buyer, or
- enters into an agreement to supply gas to a buyer, and
- the buyer or potential buyer intends to export the gas from Australia.

67 See Section 55(4) of the Code for the definition of 'counted gas'.

68 This obligation does not apply to gas swap agreements, mandatory government agreements, agreements resulting from transactions on a gas exchange, or agreements resulting from a transaction on a gas trading exchange covered by sections 52(1) and (2) of the Code.

Joint ventures

Parties to a joint venture may notify the ACCC in writing that a specified person will publish or report the information required by the Code on behalf of the joint venture, and that this written notice has effect for a specified period. If the ACCC receives such a notice, any statements maintained on a website or notice given to the ACCC by the specified person will be treated as though it was published or given by each of the suppliers, to the extent it specifies that it relates to the joint venture.[69]

Disclosure and publication by the ACCC

The ACCC must publish information identifying exempted small suppliers and suppliers named in a conditional Ministerial exemption (together with certain details about the Ministerial exemption). The ACCC may publish the information in a manner it considers appropriate as soon as practicable after receiving it.

The ACCC must not publish the information if doing so:[70]

- would prejudice the commercial interests of the supplier in a substantial way, or
- is contrary to the public interest.

The ACCC will publish the relevant information on its public register on a dedicated page containing information on exemptions under the Code.

The Code also expressly provides for the ACCC to disclose information given to it under Part 6 of the Code for the purposes of:

- administering Part IVBB of the CCA
- administering Division 6 of Part 3 of the Customs (Prohibited Exports) Regulations 1958) known as the Australian Domestic Gas Security Mechanism
- developing government policy in relation to regulated gas.

This information may be disclosed to:

- the Minister administering Part IVBB of the Act
- the Energy Minister
- the Resources Minister
- the Industry Minister
- the Departments administered by those Ministers.

69 Section 44(3) of the Code.

70 The ACCC must apply procedural fairness when making decisions about whether to publish information: see section 155AAA of the CCA.

7. Avoidance Schemes

Section 53ZQ of the CCA prohibits schemes to avoid the application of civil penalty provisions in the Code.[71] It applies to a person where they enter into, begin to carry out, or carry out a scheme, and it would be reasonable to conclude that their purpose for engaging in the conduct was to avoid the application of a civil penalty provision in the Code.

Section 4F of the CCA defines 'purpose', so that conduct will contravene section 53ZQ if:

- one purpose for engaging in the conduct is to avoid the application of a civil penalty provision of the Code, and
- that purpose is a substantial purpose for engaging in the conduct.

The ACCC will monitor market performance and the conduct of market participants to identify suspected avoidance.

The ACCC will investigate any conduct suspected to constitute an avoidance scheme, which may include conduct devised to avoid the application of the Code.

Contravention of the prohibition against avoidance schemes is a civil penalty provision. The maximum penalties for non-compliance are the greater of $50 million, or 3 times the value of the benefit obtained, or 30% of annual Australian turnover of the corporation in the preceding 12 months if the value of the benefit cannot be determined: see Appendix A.

Examples

Example 4: Avoidance Schemes – Price rules

The ACCC will investigate conduct where an arrangement may have been entered into for the purpose of avoiding the price rules of the Code.

Scenario 1

Supplier A carries on a business of producing regulated gas subject to the Code and does not have an exemption from the price rules.

Supplier A commences negotiations for the supply of gas to Buyer A. Supplier A proposes to enter into an agreement under which the price payable for regulated gas is $12/GJ, which is the relevant reasonable price. Supplier A seeks to impose an additional charge of $8/GJ for transport of the gas. The additional charge is far in excess of the cost of transporting gas between the 2 locations and double the transport cost charged by Supplier A to Buyer A in a recently expired agreement entered into prior to the Code.

This results in a delivered cost of gas to Buyer A of $20/GJ. The additional transport cost does not reflect the actual price of transport and it is reasonable to conclude that it has been imposed for the purpose of avoiding the price rules in the Code.

In these circumstances Supplier A has likely engaged in conduct constituting an avoidance scheme for the purposes of section 53ZQ.

71 The Code is "a gas market instrument" for the purposes of section 53ZQ of the CCA.

Scenario 2

Buyer B is in negotiations with Supplier B who does not have an exemption from the price rules. Buyer B explains that because of the nature of its business it requires flexibility in its contract quantity and requests a 90% take or pay provision, which is consistent with what Supplier B has historically employed in its agreements with Buyer B. Supplier B says it is now only prepared to offer 100% take or pay.

Supplier B deliberately offers a higher take or pay percentage than the customer's reasonable commercial supply requirements. Buyer B eventually agrees to enter a 12-month supply contract, which commences at a time where the price rules under the Code are in operation.

At the end of the 12-month contract term, Buyer B has only taken 90% of the contracted quantity of gas. However, Buyer B is nonetheless required to pay for 100% of the contracted quantity.

If the price per GJ for the quantity of gas taken by Buyer B exceeds the reasonable price and Supplier B deliberately requires the inclusion of a 100% take or pay provision in circumstances where it would be reasonable to conclude that it did so for the purpose of avoiding the application of the price rules in the Code, this would amount to Supplier B entering into or carrying out an avoidance scheme in contravention of section 53ZQ of the CCA.

Other example scenarios where parties may seek to avoid the price rules include a supplier's use of:

- variable price arrangements
- new or significantly higher fees or charges
- new or significantly higher costs for offering volume flexibility
- where it would be reasonable to conclude that the conduct was engaged in for the purpose of avoiding a civil penalty provision of the Code.

8. ACCC's enforcement approach

Investigation and enforcement action

The ACCC is responsible for investigating and enforcing the provisions of the CCA, including those contained in Part IVBB and the Code. Failure to comply may result in the ACCC taking enforcement action against a gas market participant. A contravention of the Code is deemed to be a contravention of the CCA.

The ACCC's primary objective is to ensure compliance with the CCA. The ACCC uses a variety of tools and approaches to encourage compliance and prevent contraventions of the CCA, including industry engagement and monitoring, education initiatives and enforcement action when appropriate.

The ACCC regularly receives reports or complaints from businesses, consumers and other interested stakeholders about conduct that may contravene the CCA. The ACCC assesses these allegations in accordance with its Compliance and Enforcement Policy and Priorities[72].

The CCA provides for a range of enforcement remedies, including financial penalties. If the ACCC considers a person may have engaged in a contravention of section 53ZQ of the CCA or the Code, the ACCC may take the matter to court. Contraventions of section 53ZQ and the following provisions under the Code attract the maximum penalties available under the CCA with the highest set at the greater of $50 million, 3 times the value of the benefit obtained, or 30% of annual Australian turnover of the corporation in the preceding 12 months if the value of the benefit cannot be determined:

- requirements relating to good faith dealings in negotiations or in relation to an agreement
- entering into an agreement or supplying under an agreement at a price that exceeds the Code's pricing requirements (without an exemption)
- failing to comply with a condition imposed as part of an exemption from the Code's pricing requirements.

Other enforcement options available to the ACCC include:

- resolving the matter administratively
- infringement notices
- public warning notices
- third-party redress orders
- court enforceable undertakings (section 87B).

The ACCC exercises its enforcement and compliance powers independently and in the public interest. Further information is available in the ACCC's Accountability Framework for Investigations.[73]

In deciding the appropriate compliance and enforcement response the ACCC considers the following non-exhaustive factors:

- conduct that is of significant public interest or concern
- conduct resulting in substantial consumer or small business detriment

72 See https://www.accc.gov.au/about-us/accc-priorities/compliance-and-enforcement-policy-and-priorities.

73 ACCC, Accountability Framework for Investigations, April 2019. Available at https://www.accc.gov.au/publications/the-acccs-accountability-framework-for-investigations.

- national conduct by larger traders
- conduct involving a significant new or emerging market issue or where our action is likely to have an educative or deterrent effect
- where our action will assist to clarify aspects of the law.

In addition to these matters, when considering its response to possible contraventions of the Code and section 53ZQ, the ACCC will have regard to:

- the nature of the alleged conduct, including the commercial substance of what is occurring, including where a party acts with disregard
- whether a contravention has occurred as a result of something beyond a business's control
- the entirety of the relevant facts and circumstances relating to a contracting arrangement including the context of any previous contracts or other practices of the business and of the industry prior to the Code coming into effect
- the extent to which the business has taken reasonable steps to ensure compliance, and the willingness of the business to take action to address the conduct
- the extent to which the alleged conduct has caused or is likely to cause significant harm, such as the effect on supply adequacy and security of gas supply to the domestic market as well as the importance of access to reasonably priced gas for customers in Australia
- the likely impact of the alleged conduct on outcomes in the market.

Information gathering powers

The ACCC will use a range of tools to gather information and documents to investigate alleged contraventions of the Code or section 53ZQ, and to monitor compliance with the Code. These will include:

- actively monitoring pricing in the market and analysing contract information
- reviewing complaints from industry participants, prioritising those which indicate blatant conduct in breach of the Code or conduct which may constitute an avoidance scheme
- if a person is required under the Code to keep, generate or publish information or a document, the ACCC may also use its powers under section 53ZT requiring the person to provide the information or documents to the ACCC within a specified period and in a specified manner
- where statutory requirements are met, obtaining information, documents and evidence through the use of the ACCC's compulsory powers. Further information about this process is available in our Section 155 Guidelines[74] and Information Policy.[75]

74 ACCC, ACCC Guidelines—use of s. 155 powers, June 2019. Available at https://www.accc.gov.au/publications/accc-guidelines-use-of-s-155-powers.

75 ACCC/AER, ACCC and AER information policy: collection and disclosure of information, June 2014. Available at https://www.accc.gov.au/publications/accc-aer-information-policy-collection-and-disclosure-of-information.

Appendix A – Penalty tiers in the Code

The Gas Market Conduct has 3 penalty tiers. Tiers 2 and 3 refer to penalty units which are set out in the *Crimes Act 1914*. The penalties at each of the 3 tiers can only be imposed by a court. The ACCC may also apply to the Federal Court for other orders, such as injunctions. For penalties related to infringement notices, see below.

Tier 1	The maximum penalty for a body corporate the greater of: - $50 million, or - if the court can determine the value of the benefit obtained directly or indirectly by the body corporate, and any of its related bodies corporate, and that are reasonably attributable to the contravention, then 3 times the value of that benefit, or - if the court cannot determine the value of the benefit, then 30% of the body corporate's adjusted turnover.[76] The maximum penalty for an individual is $2,500,000.
Tier 2	The maximum penalty for a body corporate is 6,000 penalty units. The maximum penalty for an individual is 1,200 penalty units
Tier 3	The maximum penalty for a body corporate is 3,000 penalty units The maximum penalty for an individual is 600 penalty units

The table below summarises the relevant civil penalty provisions for the Code with the corresponding penalty tier:

Type of civil penalty provision	Relevant sections	Penalty tier
Negotiation requirements	Sections 10–21	**Tier 2**
Procedural rules for agreements	Sections 24–25	**Tier 2**
Price rules	Sections 26–28	**Tier 1**
Good Faith requirements	Sections 30–31	**Tier 1**
Record keeping, information and publication	Sections 33–41	**Tier 3**
Compliance with exemption conditions	Section 73	**Tier 1**
Obligation to provide additional or corrected information	Section 74	**Tier 3**

76 Adjusted turnover is the sum of the values of all the supplies that the body corporate, and its related bodies corporate, have made, or are likely to make, during the 'breach turnover period' relevant to the contravention, subject to some exceptions: see section 4 of the Competition and Consumer Act for the exceptions to 'adjusted turnover', and 'breach turnover period'.

The table below summaries the relevant civil penalty provisions in the Part IVBB of the CCA:

Type of civil penalty provision	Relevant sections	Penalty tiers
Avoidance schemes	Section 53ZQ	**Tier 1**
Compliance with notices	Section 53ZV	**Tier 3**
False or misleading information	Section 53ZW	**Tier 3**

Infringement notices

Where the ACCC has reasonable grounds to believe a person or corporation has breached a civil penalty provision in either Part IVBB of the CCA or the Code, except for sections 30–31 (good faith obligations), the ACCC can issue an infringement notice.[77] The penalty amount for each infringement notice is fixed, being:

(a) for a corporation, whether or not they are publicly listed, 600 penalty units, and

(b) for individuals: 60 penalty units.[78]

77 Section 53ZK(2) of the CCA.

78 Section 53ZK(3) of the CCA.

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