



# Draft Determination

Application for authorisation AA1000643

lodged by

the Australian Energy Market Operator

in respect of

coordination and information sharing for the purpose of scheduling

System Works in the National Electricity Market

Authorisation number: AA1000643

12 October 2023

Commissioners: Cass-Gottlieb

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## Summary

The ACCC proposes not to grant authorisation for coordination between AEMO and current and future AEMO Industry Participants on the scheduling of System Works (including associated information sharing).

The National Electricity Market is facing challenges as a result of the transition from reliance on thermal generation towards renewable electricity sources. These challenges are likely to increase as significant transmission construction and generation connection works continue at the same time as more synchronous generators are retired or are otherwise scaled back. In response to this, there are a number of energy market reforms currently being progressed by market bodies to better equip AEMO and industry to manage the National Electricity Market.

The ACCC does not consider that the Proposed Conduct will significantly increase AEMO's ability to manage the scheduling of System Works compared with AEMO's ability to do so under existing arrangements.

Specifically, the ACCC considers that AEMO has sufficient oversight to identify potential issues in the scheduling of System Works based on information currently collected. It can then use bilateral discussions and, where necessary, directions, to ensure the reliability and security of supply in the National Electricity Market. The ACCC does not consider that this ability would be significantly increased by the coordination proposed in the application for authorisation.

The ACCC notes that AEMO has recently gained additional information gathering powers and public reporting obligations that will allow market participants and the market more broadly to have greater visibility over the availability of generators. There are a number of further reforms that are soon to be implemented or that are currently being contemplated which the ACCC considers will further assist AEMO to manage the scheduling of System Works.

The ACCC has previously authorised similar cooperation and information sharing arrangements between AEMO and other industry participants on 3 occasions since 2020. The ACCC considers that this latest application for authorisation represents a significant shift from the short-term use of similar coordination in response to unprecedented or imminent threats to longer-term coordination between the participants beyond the powers already available to AEMO under the relevant regulatory frameworks to manage the impacts of the transition towards renewable electricity generation.

Based on the information currently before it, the ACCC considers that the Proposed Conduct would be likely to result in minimal public benefits, in circumstances where AEMO already has a number of tools to ensure the reliability and security of electricity supply in the National Electricity Market.

The ACCC considers that the Proposed Conduct has the potential to result in public detriment by lessening competition in wholesale electricity markets and for maintenance services. This is because information sharing and coordination between competitors increases the risk of collusion or coordinated conduct in circumstances where supply side issues (such as international fuel prices and significant outages of thermal generation) have, in recent times, contributed to increased electricity prices.

**On balance the ACCC is not currently satisfied, in all the circumstances, that the public benefit likely to result from the Proposed Conduct would outweigh the detriments to the public that would be likely to result from the conduct.**

**The ACCC invites further submissions in relation to this draft determination, particularly regarding the claimed public benefits, before it makes its final decision.**

## 1. The application for authorisation

- 1.1. On 7 June 2023, the Australian Energy Market Operator (**AEMO**) lodged application for authorisation AA1000643 with the Australian Competition and Consumer Commission (the **ACCC**). AEMO seeks authorisation on behalf of itself and electricity industry participants to engage in certain coordination and associated information sharing activities relating to outages.
- 1.2. AEMO seeks authorisation until 30 June 2026.
- 1.3. This application for authorisation was made under subsection 88(1) of the *Competition and Consumer Act 2010* (Cth) (the **Act**). If granted, an authorisation provides the relevant parties with protection from legal action under the specified provisions in Part IV of the Act in respect of the specified conduct. The ACCC has a discretion to grant authorisation, but must not do so unless it is satisfied in all the circumstances that the conduct would result in benefit to the public that would outweigh any likely public detriment (ss 90(7) and 90(8) of the Act (the **authorisation test**)).

### The Applicant

- 1.4. AEMO is the independent market and system operator for gas and electricity systems across Australia, including the National Electricity Market. AEMO's members include both government and industry participants.
- 1.5. AEMO's application for authorisation is made on behalf of:
  - AEMO and its related bodies corporate
  - participants in Australian electricity markets (other than in Western Australia), being parties with a registration in, or a registration exemption from, the National Electricity Market and their related bodies corporate (defined as **AEMO Industry Participants**)<sup>1</sup> and
  - other entities that become participants registered in the National Electricity Market or parties with a registration exemption from the National Electricity Market and their related bodies corporate, as notified in writing by AEMO to the ACCC (defined as **Future AEMO Industry Participants**)(together, the **Participants**).

### The Proposed Conduct

- 1.6. AEMO seeks authorisation to enable it and its related bodies corporate, AEMO Industry Participants and Future AEMO Industry Participants to discuss, enter into or give effect to any contract, arrangement or understanding between them, or engage in

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<sup>1</sup> Current AEMO Industry Participants as at 1 June 2023 are listed in Schedule 1 of AEMO's application or authorisation dated 7 June 2023.

any conduct, related to planning for and/or minimising any disruptions to electricity supply by:

- coordinating outages of generation, transmission and distribution assets for the purposes of repairs, maintenance, renewals, upgrades and new connections (**System Works**)
- sharing information in relation to essential employees and contractors to ensure there are sufficient personnel to undertake System Works
- sharing information about the availability of parts, equipment or specialised resources necessary for System Works
- sharing information about any risks to the ongoing availability, performance and/or operation of their energy facilities for the purposes of scheduling System Works
- sharing information about electricity system stability from a technical perspective for the purposes of scheduling System Works,

provided:

- the purpose for doing so is either to:
  - ensure the safe, secure and reliable operation of Australia's electricity systems, and minimise the risk of any energy outages, during the period of the authorisation and/or
  - ensure the continued operation and integrity of the National Electricity Market during the period of the authorisation and
- this conduct does not include the sharing of specific generators' wholesale prices, costs and margins,

(the **Proposed Conduct**).

1.7. On 4 July 2023, AEMO confirmed that references in the application to “energy systems” and “energy infrastructure” should be read as “electricity systems” and “electricity infrastructure”, noting that these references are not intended to cover gas systems or infrastructure.<sup>2</sup>

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

- AEMO must attend
- only AEMO Industry Participants or Future AEMO Industry Participants invited by AEMO or its related bodies corporate may attend
- the ACCC will be provided with advance notice of the meeting, attendees and agenda and invited to attend, and
- where the Proposed Conduct involves a meeting relating to a specific state or territory jurisdiction or jurisdictions, a senior officer of the relevant state or territory government department or departments with responsibility for energy,

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<sup>2</sup> A copy of this clarification is available on the ACCC's [public register](#).

or their delegate, will be provided with advance notice of the meeting, attendees and agenda and invited to attend.

- 1.9. Authorisation is not sought to discuss, enter into or give effect to any contracts, arrangements or understandings, or engage in any other conduct, regarding the wholesale or retail price of electricity.
- 1.10. AEMO submits that participation in the Proposed Conduct is not compulsory. Any AEMO Industry Participant or Future AEMO Industry Participant can opt out of any proposed collaboration.
- 1.11. AEMO submits that the Proposed Conduct is narrower than the previous authorisation (as outlined in paragraph 1.20 below) as the Proposed Conduct:
  - is limited to conduct related to electricity (i.e., does not include conduct related to gas)
  - is limited to discussions, conduct, contracts, arrangements and/or understandings related to System Works
  - does not cover entering into common arrangements in relation to sharing essential employees and contracts to ensure there are sufficient personnel to maintain and operate electricity infrastructure
  - does not cover sharing information about the availability of, and/or entering into arrangements to share sufficient quantities of, essential inputs for energy production, generation, transmission, distribution and supply systems infrastructure, including:
    - water, gas, coal, diesel and other fuels for generators (**Generator Fuels**)
    - services for the transport of Generator Fuel
    - parts, equipment or specialised resources necessary for essential maintenance of facilities for the transport of General Fuel, and
    - other consumable materials necessary for the operation of such facilities
  - does not cover entering into common arrangements in order to manage electric system stability from a technical perspective.
- 1.12. AEMO proposes that authorisation be granted with 3 conditions requiring certain reporting requirements, the immediate termination of any contract, arrangement or understanding entered into in reliance on any interim authorisation or final authorisation upon expiry or revocation of the authorisation and the presence of a competition lawyer at meetings or discussions between AEMO Industry Participants or any Future AEMO Industry Participants.
- 1.13. AEMO seeks authorisation until 30 June 2026.

### Interim authorisation

- 1.14. AEMO also requested urgent interim authorisation to enable the Participants to engage in the Proposed Conduct while the ACCC is considering the substantive application.

1.15. On 13 July 2023, the ACCC granted conditional interim authorisation in accordance with subsection 91(2) of the Act.<sup>3</sup>

1.16. The ACCC granted conditional interim authorisation to enable the Participants to discuss, enter into or give effect to any contract, arrangement or understanding between them, or engage in conduct, solely related to planning for and/or minimising any disruptions to electricity supply by:

- a. coordinating outages of generation, transmission and distribution assets for the purposes of repairs, maintenance, renewals, upgrades and new connections (**System Works**)
- b. sharing information in relation to essential employees and contractors to ensure there are sufficient personnel to undertake System Works
- c. sharing information about the availability of parts, equipment or specialised resources necessary for System Works
- d. sharing information about risks to the ongoing availability, performance and/or operation of their electricity facilities solely in order to facilitate the scheduling of System Works
- e. sharing information about electricity system stability from a technical perspective solely in order to facilitate the scheduling System Works,

provided:

- f. the purpose for doing so is either to:
  - ensure the safe, secure and reliable operation of Australia's electricity systems, and minimise the risk of any energy outages, during the period of the authorisation and/or
  - ensure the continued operation and integrity of the NEM during the period of the authorisation, and
- g. this conduct does not include the sharing of specific Participants' wholesale prices, costs and margins,  
(the **Authorised Conduct**).

1.17. Interim authorisation was granted with the following conditions:

- **Condition 1 – Reporting requirements:** AEMO must comply with the Reporting and Communications Protocol (as outlined at Schedule 1 of this decision). This protocol includes AEMO providing monthly reports to the ACCC about the contracts, arrangements or understandings made at meetings during the preceding period, allows the ACCC to observe meetings and request additional information about the Authorised Conduct.
- **Condition 2 – Agreements not to endure beyond authorisation period:** Any contract, arrangement or understanding entered into/arrived at in reliance on the interim authorisation must provide for its immediate termination (other than any provisions dealing with ongoing confidentiality obligations), upon the expiry or revocation of the interim authorisation (unless another interim authorisation or final authorisation relating to that conduct is granted).

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<sup>3</sup> A copy of the ACCC's decision is available on the ACCC's [public register](#).

- **Condition 3 – Presence of competition lawyer:** Where the Authorised Conduct involves a meeting or discussion between AEMO Industry Participants and/or any Future AEMO Industry Participants, an external lawyer with expertise in competition law, engaged by AEMO and approved by the ACCC, must attend the meetings with instructions to immediately advise the attendees if, during the course of the meeting, they develop concerns that there is conduct occurring that is outside the scope of the interim authorisation and risks breaching the Act.
- **Condition 4 – AEMO to make and keep a record:** Prior to or at the time Participants give effect to any contract, arrangement or understanding between competing AEMO Industry Participants and/or Future AEMO Industry Participants, which has been discussed and/or entered into and/or arrived at as part of the Authorised Conduct, AEMO (or its legal representative) must make and keep a contemporaneous record of:
  - the parties to the contract, arrangement and understanding
  - the nature and scope of the conduct the parties will engage in, and
  - the anticipated or agreed duration of the conduct
  - and make it available to the parties as soon as practicable.

1.18. Interim authorisation will remain in place until the date the ACCC’s final determination comes into effect, until the interim authorisation is revoked or the application for authorisation is withdrawn.

## Previous authorisations

- 1.19. Since 2020, the ACCC has granted authorisation to AEMO and other industry participants for similar cooperation and information sharing arrangements on 3 occasions.
- 1.20. Most recently, in November 2022, the ACCC granted authorisation (AA1000618) with conditions to AEMO and industry participants for cooperation and information sharing arrangements in both the electricity and gas industry. This application was made in response to the potential crisis in the energy sector that arose in May/June 2022 and the ongoing effects of the COVID-19 pandemic and the Russian invasion of Ukraine (the **Energy Crisis Authorisation**). The conduct authorised in the Energy Crisis Authorisation was broader than previous (COVID response) authorisations as it included potential coordination on the deferral of non-essential works and coordination for the purpose of managing system stability. The Energy Crisis Authorisation expired on 30 April 2023.

## 2. Background

2.1. The National Electricity Market is one of the largest interconnected electricity grids or power systems in the world; it interconnects the 6 eastern and southern states and territories of Australia and delivers around 80% of all electricity consumption in Australia.<sup>4</sup>

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<sup>4</sup> See <https://www.energy.gov.au/government-priorities/energy-markets/national-electricity-market-nem#:~:text=The%20NEM%20is%20a%20wholesale,not%20connected%20to%20the%20NEM.>

2.2. The National Electricity Market is a wholesale market through which generators and retailers trade electricity. The National Electricity Market operates as a 'spot market', or 'pool', in which power supply and demand are matched in real time through a centrally coordinated dispatch process that is managed by AEMO. Generators sell electricity to the pool and retailers buy electricity from the pool to on-sell to consumers.

## Regulation and oversight of the National Electricity Market

2.3. The *National Electricity Law*<sup>5</sup> establishes the governance framework and key obligations for the National Electricity Market, including AEMO's role and functions. This framework seeks to promote the efficient investment, operation and use of energy services for the long-term interests of consumers in relation to price, quality, safety, reliability and security; it also places responsibilities on market bodies that undertake relevant functions in the National Electricity Market to do so in a manner that will or is likely to contribute to the achievement of the National Electricity Objective.<sup>6</sup>

2.4. The *National Electricity Rules* are made under the *National Electricity Law* and govern the operation of the National Electricity Market. The National Electricity Rules determine how companies can operate and participate in the competitive generation and retail sectors, and also govern the economic regulation of electricity transmission and distribution networks.

2.5. Among other functions, the National Electricity Rules provide the regulatory framework and processes for market operations, power system security, network connections and access, pricing for network services in the National Electricity Market and national transmission planning.

2.6. The 3 main market bodies responsible for energy in Australia are:

- AEMO – responsible for managing the electricity and gas systems and markets across Australia. It manages the day-to-day operations of the National Electricity Market.
- Australian Energy Market Commission (**AEMC**) – responsible for making the rules which govern the electricity and gas markets, including the retail elements of those markets. The process the AEMC uses to consider rule changes to the National Electricity Rules are discussed in greater detail below. In addition to its rule making role, the AEMC conducts reviews and provides advice on energy market related matters for Ministers.
- Australian Energy Regulator (**AER**) – monitors and reports on the performance of the National Electricity Market. The National Electricity Law requires the AER to review the performance of wholesale electricity markets, including analysing and identifying whether there is effective competition and whether there are market features that may be detrimental to effective competition or the efficient functioning of the market. The AER also investigates and enforces compliance with the National Electricity Rules.

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<sup>5</sup> The National Electricity Law is contained in a Schedule of the *National Electricity (South Australia) Act 1996* (SA). The National Electricity Law is applied as law in New South Wales, Queensland, Victoria, South Australia, Tasmania and the Australian Capital Territory by application statutes. The Northern Territory has also applied the National Electricity Law with variations that cater to local requirements.

<sup>6</sup> The National Electricity Objective is: "...to promote efficient investment in, and efficient operation and use of, electricity services for the long term interests of consumers of electricity with respect to:

- price, quality, safety and reliability and security of supply of electricity
- the reliability, safety and security of the national electricity system."

- 2.7. Changes to the National Electricity Rules are considered by the AEMC. Any party, except for the AEMC itself,<sup>7</sup> can propose a change to the rules, with the AEMC receiving rule change requests from a variety of different proponents including governments, members of industry, consumer groups, regulatory market bodies, public advocacy groups, major energy user groups, business groups and individuals.

## Issues arising from the transition to renewable electricity

- 2.8. The National Electricity Market is an interconnected network that requires a number of essential system services (or ancillary services), such as frequency response, inertia and system strength, to help keep the electricity system operating in a safe, stable and secure operating state. Essential system services influence the ability of the network to balance supply and demand, deal with disruptions to this balance and address other technical issues in real time.
- 2.9. Many of these essential system services have traditionally been provided as a by-product of synchronous electricity generation (such as coal, gas and hydroelectric) and have historically been available in sufficient quantities without the need to actively source more. As synchronous generators reach their end of life or otherwise leave the National Electricity Market or reduce their operations, the supply of essential system services has been reduced and will continue to do so as we progress further into the transition to renewable generation.
- 2.10. Currently, most large-scale batteries, wind and solar generators do not provide or generate essential system services in the same way that synchronous generators do; they instead create greater demand for some essential system services.<sup>8</sup>
- 2.11. This means that new ways are needed to actively source, and pay for, these essential system services as the National Electricity Market moves away from synchronous generation and is increasingly reliant on renewable generation.
- 2.12. Increased reliance on renewable generation also brings further issues because much of it, particularly wind and solar, is inherently variable and unpredictable given it is dependent on weather conditions. This is in contrast with sources of synchronous electricity generation that are dispatchable, meaning that these generators can produce on demand and vary their power output according to market needs, instead of according to primary energy output availability (such as the sun and wind). As a result, throughout the transition and into the future, the National Electricity Market will require firm and flexible back-up and firming technology (such as battery storage, pumped hydro or gas generation) in order to ensure the reliability of electricity supply.
- 2.13. A symptom of these issues is that AEMO is increasingly having to intervene in the National Electricity Market using directions<sup>9</sup> to ensure that it is secure, with the number of directions issued by AEMO increasing from 5 in 2016 to 344 in 2020.<sup>10</sup> These

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<sup>7</sup> Except for minor and non-material changes: National Electricity Laws, s 91(2).

<sup>8</sup> AEMC, Efficient management of system strength on the power system, Rule determination, 21 October 2021, 4.

<sup>9</sup> The National Electricity Rules allow AEMO, subject to a number of requirements and pre-cursors, to issue directions to registered market participants (most often generators) to take action to maintain or re-establish the power system to a secure, satisfactory or reliable operating state. A registered market participant must use its reasonable endeavours to comply with AEMO's directions unless to do so would be a hazard to public safety, materially risk damaging equipment or contravene another law.

<sup>10</sup> Post-2025 Market Design Final advice to Energy Ministers, Energy Security Board, 27 July 2021.

directions were almost exclusively used to manage system security in South Australia.<sup>11</sup>

- 2.14. The AEMC has recently indicated that reliance on directions by AEMO in these circumstances, which are meant to be used a last resort measure, increases security risks on the power system because of inadequate transparency, increased administrative burden, does not provide certainty to participants, and does not support trials of new technologies to support power system security.<sup>12</sup> The AEMC stated that it considers there is a need to ensure that the future requirements of the power system are met by providing incentives for new entrants and existing participants to make investment decisions that would see system security provided in the longer term.<sup>13</sup>
- 2.15. Decarbonising the National Electricity Market will require the connection of an unprecedented amount of generation capacity at an unprecedented rate.<sup>14</sup> AEMO's 2022 Integrated System Plan forecasts that variable renewable energy generation capacity will need to triple between now and 2030.<sup>15</sup> This growth in generation capacity is being evidenced by the number of new projects seeking to connect to the National Electricity Market,<sup>16</sup> with an increase in the size of the connection queue from 389 projects in July 2022 to 524 projects in May 2023.<sup>17</sup>
- 2.16. Within its 2023 Electricity Statement of Opportunities, AEMO forecasts reliability gaps in all mainland regions in the next decade, with reliability risks in South Australia and Victoria forecast as early as the 2023-24 summer. In light of this, AEMO has identified an urgent need for the commitment and delivery of generation, transmission and storage projects and has indicated that it will be critical to ensure the ongoing availability of coal, gas and distillate fuels; without this, AEMO indicates that the reliability of the National Electricity Market will be at risk.<sup>18</sup> One of the factors identified within the 2023 Electricity Statement of Opportunities which has impacted AEMO's forecasting is higher rates of generator unplanned outages than has previously been forecast, reflecting recent trends of poor performance among some generator technologies.<sup>19</sup>
- 2.17. AEMO submits that Australia's electricity system and industry is currently in a period of transition, with a shift from reliance on thermal generation to diversified renewable electricity sources. AEMO advises that, during this period of transition, Australia's electricity industry is facing challenges that pose threats to reliable electricity supply across the National Electricity Market, including:
  - increasing reliance on a smaller number of significant generators, as a result of recent and forthcoming retirements of coal-fired generation

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<sup>11</sup> The disproportionate level of intervention in the South Australian market appears to be due to the fact that South Australia has a significantly higher percentage of renewable electricity penetration compared with other states in the National Electricity Market.

<sup>12</sup> AEMC, Improving Security Frameworks for the Energy Transition, Directions Paper, 24 August 2023.

<sup>13</sup> Ibid.

<sup>14</sup> AEMC, Enhancing investment certainty in the R1 process, Consultation paper, 17 August 2023.

<sup>15</sup> AEMO, 2022 Integrated System Plan, 30 June 2022, 10.

<sup>16</sup> Ibid, 36.

<sup>17</sup> AEMC, Enhancing investment certainty in the R1 process, Consultation paper, 17 August 2023.

<sup>18</sup> AEMO, 2023 Electricity Statement of Opportunities, 31 August 2023, 3.

<sup>19</sup> Ibid, 4.

- an aging fleet of remaining coal-fired generators that require more frequent and extended repairs and maintenance
- long lead times for planning System Works as a result of global supply chain issues relating to parts and equipment and ongoing labour shortages
- replacement renewable generation and firming capacity has not yet been developed to the extent that it can fully replace retired capacity
- increased incidence of extreme and/or unusual weather conditions and
- the connection of new renewable energy generators and consequential upgrades to the National Electricity Market's transmission infrastructure requiring extensive outages.

2.18. AEMO submits that, in combination, these factors mean that if outages associated from System Works occur in an uncoordinated way there is a real threat to reliability of electricity supply, risk of electricity outages and/or adverse impacts on wholesale electricity prices during the periods in which outages are occurring.

## Reforms in response to the transition

2.19. It is apparent that the National Electricity Market is facing challenges as a result of the transition towards renewable electricity. These challenges are likely to increase as significant transmission construction and generation connection works continue at the same time as more synchronous generators retire or otherwise scale back their operations. It has been widely recognised by industry and market bodies that AEMO will need the right tools to be able to manage the changing dynamics throughout the transition and beyond.

2.20. AEMO, together with industry and other market bodies, such as the Australian Energy Market Commission (**AEMC**), is responsible for delivering a number of the energy market reforms, known as the Post-2025 Reform Project. The reforms provide for changes to key elements of the market design to facilitate a transition towards a modern energy system capable of meeting the evolving wants and needs of consumers and the energy system itself, as well as enable the continued provision of the full range of services necessary to deliver a secure, reliable and lower emissions electricity system at least cost.

2.21. The ACCC considers that there are a number of reforms in the form of rule changes that have recently been completed or that are currently under consideration by the AEMC which are relevant to AEMO better coordinating outages and addressing system security issues more generally. These include the following rule changes:

- **Short Term Projected Assessment of System Adequacy**<sup>20</sup> – on 5 May 2022, the AEMC made a final rule change which makes a number of amendments to Short Term Projected Assessment of System Adequacy (**ST PASA**). Relevantly, these changes will require AEMO to publish, amongst other things, forecasts of generator availability and capacity information for each unit and station; this is information which AEMO already accesses however it is not currently publicly available.

The AEMC considered that these changes would promote reliability and security of the system at lowest cost by improving the information provided to market participants; this information will better inform the market of generation availability and will allow market participants to make more informed decisions

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<sup>20</sup> Further details of this project are available [here](#).

regarding scheduling planned maintenance and expected reliability and security conditions.

Under the final rule, these changes will be implemented by **31 July 2025**.

- **Medium Term Projected Assessment of System Adequacy**<sup>21</sup> – on 18 August 2022, the AEMC made a final rule change to improve the quality and transparency of information that is collected and published about the future availability of generators as part of the Medium Term Projected Assessment of System Adequacy (**MT PASA**).

Specifically, the rule builds on existing MT PASA requirements, which require generators to indicate how many megawatts they could make available each day over the medium term horizon (that is, between 7 days and 36 months into the future). In addition to providing this availability, the rule will require generators to also provide a:

- *unit state* – that is, a generating unit’s availability or unavailability and the reason for its availability or unavailability (i.e., whether unavailability is for economic or physical reasons)
- *unit recall time* – to indicate the period in which the plant could be made available under normal conditions after a period of unavailability.

These information and publication requirements largely commenced on **9 October 2023**.<sup>22</sup>

- **Improving Security Frameworks for the Energy Transition**<sup>23</sup> – the AEMC is currently considering a number of solutions that involve building on existing tools in the framework to allow the direct procurement of system security more quickly and easily. The AEMC considers that its proposed approach would address system security issues through the transition, reduce the regular and inefficient use of directions by AEMO, and provide better incentives for market participants to invest in providing system security in the longer term.

The AEMC released a direction paper on 23 August 2023, ahead of publishing a final determination in December 2023.

Within its direction paper, the AEMC indicated that it considered that these solutions will be set up in a manner to be able to adapt as the needs of the power system, and the understanding of it, develop in the longer term. These rule changes focus on:

- aligning the existing inertia and system strength frameworks
- removing the exclusion to procuring inertia network services and system strength in the network support and control ancillary services framework
- creating a new transition non-market ancillary services framework for AEMO to procure security services necessary for the energy transition

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<sup>21</sup> Further details of this project are available [here](#).

<sup>22</sup> Requirements for bi-directional units (meaning a unit that has both load and generation that does not refer to energy storage specifically) will not commence until 3 June 2024.

<sup>23</sup> Further details of this project are available [here](#).

- empowering AEMO to enable (or schedule) security services with a whole-of-NEM perspective
- improving directions transparency and compensation.

The AEMC's direction paper suggests that a majority of the solutions proposed would be implemented by the **end of 2025**.

### 3. Consultation

- 3.1. The ACCC invited submissions from a range of potentially interested parties including consumer groups, large energy users, state and federal government bodies, industry bodies and other industry participants (such as generators, maintenance service providers, distributors, network operators and retailers).
- 3.2. In response to the ACCC's invitation to make submissions on the application for authorisation, the ACCC received 1 confidential submission.

### 4. ACCC assessment

- 4.1. AEMO has sought authorisation for Proposed Conduct that would or might constitute a cartel provision within the meaning of Division 1 of Part IV of the Act and to contracts, arrangements or understandings, concerted practices and other conduct that has the purpose effect, or likely effect of substantially lessening competition within the meaning of sections 45 and 46 of the Act.<sup>24</sup>
- 4.2. Consistent with subsections 90(7) and 90(8) of the Act, the ACCC must not grant authorisation unless it is satisfied, in all the circumstances, that the conduct would result or be likely to result in a benefit to the public, and the benefit would outweigh the detriment to the public that would be likely to result.

#### Relevant areas of Competition

- 4.3. To assess the likely effect of the Proposed Conduct, the ACCC identifies the relevant areas of competition likely to be impacted.
- 4.4. The ACCC considers that the relevant areas of competition are likely to be:
  - generation, transmission, transportation and/or supply of electricity in Australia and/or
  - procurement of essential inputs (such as essential employees, contractors, parts, equipment or specialised resources necessary for System Works) for electricity production, generation, transmission, distribution and/or supply systems and infrastructure in Australia.<sup>25</sup>

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<sup>24</sup> AEMO initially also sought authorisation in respect of s 47 of the Act. On 4 July 2023, AEMO confirmed that it no longer seeks authorisation for s 47 and consider, in any event, that the proposed conduct will not involve exclusive dealing. This clarification is available on the ACCC's [public register](#).

<sup>25</sup> However, the ACCC considers that it is not necessary to precisely define the relevant markets for the purpose of considering this application for authorisation.

## Future with and without the Proposed Conduct

- 4.5. In applying the authorisation test, the ACCC compares the likely future with the Proposed Conduct that is the subject of the authorisation to the likely future in which the Proposed Conduct does not occur.
- 4.6. AEMO submits that, in the absence of the Proposed Conduct, the Participants may be unable to coordinate certain of their activities to ensure the safe, secure and reliable supply of electricity. AEMO submits that this would exacerbate the risk of outages and blackouts in circumstances where electricity systems are already under pressure as a result of the challenges described in paragraph 2.17 above.
- 4.7. Without authorisation, AEMO submits that the ability of the Participants to address issues that have the potential to impact the safety, security and/or reliability of Australia's energy supply is likely to be less effective and less timely than if the Participants are permitted to coordinate in the manner proposed.

### AEMO's current powers

- 4.8. AEMO submits that existing measures contained in the National Electricity Rules and the proposed measures under consideration by the AEMC cannot by themselves overcome the challenges described in paragraph 2.17. AEMO submits that addressing these challenges requires close to real-time sharing of information and multilateral coordination as contemplated by the Proposed Conduct.
- 4.9. AEMO submits that it does have some powers under the National Electricity Rules in approving outages for System Works purposes for transmission networks (but not for generators) and can give relevant instructions or directions to market participants based on its understanding of risks in the market in order to achieve its power system security responsibilities. AEMO however submits that it is only able to give directions and otherwise intervene in the market after taking a series of steps and at the latest possible time in order to give the market an opportunity to respond.
- 4.10. AEMO advises that, ordinarily, it obtains information through its Projected Assessment of System Adequacy, bidding systems and through bilateral discussions with relevant market participants.
- 4.11. AEMO has powers under the National Electricity Rules to assess and approve (or not approve) outages affecting transmission networks. Transmission Network Service Providers, and some distribution network service providers, enter proposed outages into the Network Outage Schedule. The Network Outage Schedule lists the planned network outages for work on the transmission system.<sup>26</sup>
- 4.12. In the medium term, AEMO conducts an analysis to determine the effect of an outage under various conditions and AEMO then communicates to the Transmission Network Service Providers that an outage will not be approved if specified conditions exist (such as in the event of particular weather conditions or an unplanned generator outage). In the short term, generally on the day of the network outage, AEMO makes a decision if the outage can proceed based on whether the specified conditions have in fact occurred. AEMO submits that, in those circumstances, the cancellation of an outage on the day can cause significant costs to be wasted if resources have already been deployed in the readiness for System Works.
- 4.13. The Projected Assessment of System Adequacy is the principal method that AEMO uses to forecast the adequacy of the power system to stay within the relevant reliability

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<sup>26</sup> Available here: <https://aemo.com.au/en/energy-systems/electricity/national-electricity-market-nem/data-nem/network-data/network-outage-schedule>.

standard and is one way in which AEMO obtains information about generator availability. AEMO is required to prepare these forward-looking projections in 2 time frames, being short term (covering a period of 6 trading days) and medium term (covering a period of up to 36 months). The objective of the Projected Assessment of System Adequacy is to provide information to the market on the expected level of short-term capacity reserve and allow the market to respond to the power system needs as well as allow participants to make decisions about supply, demand and transmission network outages over the medium term.<sup>27</sup>

4.14. In its administration of the Projected Assessment of System Adequacy, AEMO must, on a weekly basis, collect and analyse certain information from a variety of market participants<sup>28</sup> about their intentions for the relevant forward-looking period.<sup>29</sup> This includes information about maintenance scheduling, energy constraints and other conditions which could materially impact upon power system security and the reliability of electricity supply. AEMO must then:

- prepare the *unconstrained intermittent generation forecasts*<sup>30</sup> for the following 24 months and
- following analysis and assessment of this information, publish information that will inform the market regarding forecasts of supply and demand over both the short and medium-term outlook,<sup>31</sup> noting that AEMO is required to use its reasonable endeavours to ensure that it publishes sufficient information to allow the market to operate effectively with a minimal amount of intervention by AEMO.<sup>32</sup>

4.15. In the context of the Projected Assessment of System Adequacy, the ACCC notes the following:

- AEMO may publish additional updated versions of both the short-term and medium-term Projected Assessment of System Adequacy in the event of changes which, in the judgement of AEMO, are materially significant.<sup>33</sup>
- AEMO can, in certain circumstances, request any other information from certain market participants that is reasonable to assist it to meet its obligations to administer the Projected Assessment of System Adequacy. For example, AEMO may request Network Service Providers to provide any other information on planned network outages.<sup>34</sup>
- AEMO may request certain participants who may otherwise be exempt from providing information under the short-term Projected Assessment of System

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<sup>27</sup> National Electricity Rules, r 3.7.1(b).

<sup>28</sup> This includes Scheduled Generators, Market Customers, Transmission Network Service Providers and Market Network Service Providers, as defined in Chapter 10 of the National Electricity Rules.

<sup>29</sup> National Electricity Rules, r 3.7.1(c).

<sup>30</sup> This is a forecast of the available generating capacity of each *semi-scheduled generating unit*. A *semi-scheduled generating unit* is a unit, or part of a group of units, which has a nameplate rating of 30MW or greater where the output of the generating unit is intermittent: National Electricity Rules, r 2.2.7(a).

<sup>31</sup> This information is available here: <https://aemo.com.au/en/energy-systems/electricity/national-electricity-market-nem/nem-forecasting-and-planning/forecasting-and-reliability/projected-assessment-of-system-adequacy>.

<sup>32</sup> National Electricity Rules, r 3.7.1(d).

<sup>33</sup> National Electricity Rules, r 3.7.2(b) and 3.7.3(c).

<sup>34</sup> National Electricity Rules, r 3.7.1(e).

Adequacy to do so if AEMO considers it reasonably necessary for adequate power system operation and the maintenance of power system security and reliability of supply.<sup>35</sup>

- However, information collected that has been requested by AEMO is typically unable to be made publicly available by AEMO due to certain confidentiality arrangements within the National Electricity Rules.<sup>36</sup>
- 4.16. With regards to the Projected Assessment of System Adequacy, AEMO submits that the Projected Assessment of System Adequacy does not always adequately reflect delays with respect to planned outages; for example, in circumstances where a generator has not provided updated information because they do not yet know when the unit will be available. AEMO further submits that the Projected Assessment of System Adequacy also does not provide AEMO and market participants with contextual information about outages (for examples, issues that have arisen during planned maintenance) which can assist with the planning for System Works.
- 4.17. As discussed at paragraph 2.21 above, there are a number of reforms that are soon to be implemented or are currently under consideration that will build upon a number of these processes, particularly the Projected Assessment of System Adequacy.
- 4.18. The ACCC considers that these processes (including changes to these processes as discussed above at paragraph 2.21) provide AEMO with a framework to collate, visualise and plan required generator and transmission maintenance and other planned outages well in advance of them occurring.
- 4.19. More generally, much of the legislative framework that governs the National Electricity Market operates on the assumption that AEMO uses reasonable endeavours to ensure the market operates effectively with a minimal amount of intervention by AEMO. In the event that intervention by AEMO is necessary (such as to maintain power system security), AEMO has a number of different mechanisms that it can use to effectively ensure the secure and reliable operation of the National Electricity Market.<sup>37</sup>
- 4.20. Where AEMO determines that there is unlikely to be adequate generator availability and/or threats to the security of the system, AEMO can hold bilateral discussions with the relevant generators. If the issue is not resolved through bilateral discussion/s, AEMO has the power to issue directions to certain participants to take any action AEMO sees fit to remedy the issue.<sup>38</sup> AEMO does, however, submit that a generator can refuse to comply with a direction if there is a safety risk or a risk of damage to equipment if they were to operate.<sup>39</sup>
- 4.21. Directions are designed to be a last-resort mechanism and are not intended to be a primary mechanism to maintain the security of the system. Under the National Electricity Rules, there is a compensation scheme available to participants who are

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<sup>35</sup> National Electricity Rules, r 3.7.3(f).

<sup>36</sup> The AEMC has previously noted that, in the context of generator availability, this can make it challenging for market participants, policymakers and other stakeholders to remain appropriately informed about generator availability given information collected through AEMO requests is not made publicly available: AEMC, Enhancing information on generator availability in MT PASA, Rule determination, 18 August 2022.

<sup>37</sup> These include issuing directions, suspending the spot market, activating Reliability and Emergency Reserve Trade contracts and the mechanisms under the Power System Emergency Management Plan.

<sup>38</sup> AEMO submits that they cannot direct a generator to operate if it is listed as not available for direction via the Projected Assessment of System Adequacy.

<sup>39</sup> The ACCC also notes that a registered market participant is not required to comply with a direction by AEMO if doing so would contravene another law.

directed by AEMO to provide energy, market ancillary services and other security services.

- 4.22. The ACCC considers that, in the future without the Proposed Conduct, any issues that arise in the electricity systems and fall within the scope of the Proposed Conduct could be managed with AEMO's existing powers to a similar degree as the future with the Proposed Conduct. The ACCC considers that AEMO may also liaise and negotiate with generators and transmission network service providers on a bilateral basis in order to achieve some degree of coordination, but that this coordination may be somewhat less timely or efficient in mitigating or resolving issues in the electricity systems that fall within the scope of the Proposed Conduct.

## Public benefits

- 4.23. The Act does not define what constitutes a public benefit. The ACCC adopts a broad approach. This is consistent with the Australian Competition Tribunal (the **Tribunal**) which has stated that in considering public benefits:

*...we would not wish to rule out of consideration any argument coming within the widest possible conception of public benefit. This we see as anything of value to the community generally, any contribution to the aims pursued by society including as one of its principal elements ... the achievement of the economic goals of efficiency and progress.<sup>40</sup>*

## Minimising interruption to electricity systems

### AEMO submissions

- 4.24. As a result of the challenges outlined at paragraph 2.17, AEMO submits that if outages associated with System Works occur in an uncoordinated way there is a very significant risk of insufficient electricity being available to meet demand and/or adverse impacts on wholesale electricity prices during the periods in which outages are occurring.
- 4.25. AEMO submits that the Proposed Conduct will reduce the ongoing risks of electricity outages and will therefore result in public benefits in the following ways:
- **Coordinating scheduling of System Works:** As a result of the coordination of the scheduling of any outages for the purposes of System Works, AEMO submits that this will reduce the risk of overlapping outages arising from System Works affecting the supply of electricity. Although AEMO acknowledges that it could, absent the Proposed Conduct, work on a bilateral basis with individual participants using its current powers, it submits that the Proposed Conduct will allow for the timely, effective and transparent identification and resolution of potential conflicts.
  - **Sharing information in relation to essential personnel to undertake System Works:** AEMO submits that, by sharing information about essential personnel undertaking System Works, the Proposed Conduct will assist the Participants to identify necessary personnel and their availability so as to be able to plan System Works effectively and reduce the risk of unnecessary or extended outages because of an inability to undertake System Works. Some of the skills required to maintain Australia's energy systems are highly specialised with a limited number of people able to perform these services; as a result,

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

AEMO submits that sharing information in relation to essential personnel will ensure these skills are at the electricity facilities with the greatest need to reduce the risk of electricity outages.

- **Sharing information about essential inputs necessary for System Works:** AEMO submits that, by sharing information about the availability of, or limitations on, essential parts, equipment or specialised resources necessary for System Works, the Proposed Conduct will assist the Participants to secure essential inputs for System Works and reduce the risk of extended outages because of an inability to secure essential inputs necessary for System Works.
- **Sharing information regarding ongoing availability, performance, and operation of other generation facilities for the purposes of scheduling System Works:** AEMO submits that the Proposed Conduct will minimise risks to system availability by ensuring the scheduling of System Works takes into account information of any risks to ongoing availability, performance and operation of other generation facilities. As part of the Proposed Conduct, the Participants will be able to share information about any risks to the ongoing availability, performance and/or operation of their facilities for the purpose of scheduling System Works. Information on availability through AEMO's Projected System of System Adequacy systems is publicly available; however, AEMO submits that the Proposed Conduct would allow the Participants to provide further context regarding that information. AEMO submits that the purpose for doing so is to allow for the prioritisation of System Works by allowing Participants to factor in risks, especially the risks of breakdown of plant and equipment, for the purpose of reducing the likelihood of avoidable extended outages occurring.
- **Sharing information about system stability for the purposes of scheduling System Works:** AEMO submits that, by allowing the Participants to share information about electricity system stability from a technical perspective for the purpose of scheduling System Works, that this will allow AEMO and generators to ensure that essential synchronous generators remain online to provide necessary system strength.

4.26. AEMO submits that where there are potential risks and issues across the entire energy system, absent the Proposed Conduct, it does not have the visibility, time or resources to hold bilateral discussions (or a number of bilateral discussions) to gather the necessary information and consider the information before giving relevant directions. AEMO submits that relying on bilateral discussions when dealing with critical incidents (or a series of critical incidents) is not efficient, is unlikely to achieve the necessary visibility of key risks across critical infrastructure and increases the possibility that the required outcome, being the sufficient and reliable supply of energy, is not achieved.

4.27. In the event of a critical incident, AEMO submits that its options in refusing outages, issuing directions or otherwise intervening in the market can be limited. The ACCC understands that intervention by AEMO via formal directions typically arises in response to a crisis, such as weather events or unexpected shutdowns of generators, and that, in these circumstances, it can often be too late for AEMO to provide for an immediate fix. For example, coal fired generators have a long start-up time (of up to 48 hours) which means that AEMO would be unable to direct a certain generator to turn on immediately to provide necessary supply of electricity and/or essential system services to the network. In these instances, the ACCC understands that the ability of AEMO to respond to these incidents is often limited to directing rotational load

shedding<sup>41</sup> in the intervening period while a generator comes online, which results in the disconnection of electricity supply to a number of users.

- 4.28. AEMO further submits that its powers to intervene at or around the time of a critical incident cannot solely be depended upon to resolve system security and reliability issues. AEMO submits that it is instead preferable to prevent critical incidents from arising in the first place, particularly while the likelihood of incidents occurring is greater due to the structural changes occurring during the transition and an ongoing reliance on aging large generators to support the system while that transition occurs. AEMO submits that the Proposed Conduct enables it to more effectively plan for the medium term and thereby both reduce the likelihood of critical incidents occurring and ensure the remainder of the system is better prepared and more resilient to deal with these issues when they do occur.
- 4.29. AEMO submits that addressing these challenges requires close to real-time sharing of information and multilateral coordination as contemplated by the Proposed Conduct. With reference to AEMO's current powers (as discussed at paragraphs 4.8 – 4.21), AEMO submits that these measures are not of themselves effective to allow it to manage outages efficiently through unilateral directions and bilateral discussions and therefore cannot overcome the challenges created by the transition; AEMO submits that, only through the Proposed Conduct can the necessary exchange of information and coordination and planning occur.
- 4.30. AEMO acknowledges that, in the past, the greater simplicity and predictability of the electricity system, and the availability of many large synchronous generators providing redundancy, meant that slower bilateral discussions may have been adequate. However, AEMO submits that there is now not enough surplus capacity in the system to accommodate the inefficiencies of AEMO seeking to use existing, unilateral or bilateral measures to address these challenges and that to do so is wholly inadequate.
- 4.31. Regarding the Energy Crisis Authorisation, AEMO advises that the conduct that occurred pursuant to it was largely limited to fortnightly meetings of electricity generators to discuss System Works. AEMO submits that the Energy Crisis Authorisation worked well to provide timely information about System Works and, where necessary, allowed for steps to be taken to minimise threats to system reliability. AEMO submits that it was unaware of any anticompetitive detriments arising from these meetings and considers that the absence of situations in which it had to use its powers under the National Electricity Rules is indicative of the authorisation achieving its stated objectives. However, the ACCC notes that AEMO did not provide detailed information to support this contention. Further, AEMO considers that the conditions outlined in paragraph 2.17 above are likely to worsen over the near term and therefore the Proposed Conduct is likely to become even more critical in avoiding such situations moving forward.

#### ACCC's assessment

- 4.32. The ACCC considers that the current application for authorisation arises in a materially different context than earlier applications lodged by AEMO for similar coordination and information sharing and that this application seeks to address different issues than earlier applications. The ACCC considers that this application represents a shift from the short-term use of coordination in response to unprecedented or imminent threats to longer-term coordination between the Participants beyond the powers already

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<sup>41</sup> Load shedding is the controlled reduction of electricity supply to parts of the power system to protect system security and mitigate damages to infrastructure – it is a last resort measure to avert the risk of system collapse, physical damage to parts of the power system and long-term outages.

available to AEMO under the relevant regulatory frameworks to manage the impacts of the transition towards renewable electricity generation.

- 4.33. The ACCC acknowledges that, due to the transition to renewable generation, a lack of detailed information on generator availability is becoming an issue, where it had not been in the past, with this sort of information being particularly important as the mix of electricity generation in the National Electricity Market becomes more complex.<sup>42</sup>
- 4.34. As outlined in greater detail at paragraphs 4.8 – 4.21 above, AEMO already obtains a broad range of information from industry participants regarding System Works as a result of other processes it undertakes as the market operator, and it does have some powers that allow it to manage and coordinate System Works.
- 4.35. As a result of its processes, AEMO collects and analyses a significant amount of information regarding maintenance scheduling and other conditions which could materially impact upon power system security and the reliability of electricity supply up to 36 months in advance. The ACCC considers that this provides AEMO with sufficient visibility over, and opportunity to address, issues relating to the scheduling of System Works.
- 4.36. The ACCC considers that, utilising its current powers and information collected by other processes, AEMO already has access to a variety of tools which allow it to sufficiently manage System Works so as to address the risks posed by the transition and to ensure the secure and reliable supply of electricity in the National Electricity Market without the coordination contemplated by the Proposed Conduct.
- 4.37. Based on the information currently before it, the ACCC considers that the public benefits that may result from the Proposed Conduct, when compared with the future without it, are likely to be minimal in circumstances where AEMO has the ability to utilise a number of its different processes and powers and can interact bilaterally with Participants to manage System Works. The ACCC also does not consider that the Proposed Conduct is likely to allow AEMO to prevent these incidents from occurring or enable these to be better managed when they do occur, to any significantly greater degree than using its current powers.
- 4.38. The ACCC also considers that AEMO's ability to manage these issues will continue to increase as relevant rule changes are implemented, such as those to the MT PASA and ST PASA as well as the contemplated suite of changes that have been suggested by the AEMC to improve system security for the transition (detailed in paragraph 2.21 above).
- 4.39. The ACCC has attended some of the fortnightly meetings between industry participants within each jurisdiction which AEMO facilitates under the interim authorisation and has received regular reports on what has been discussed and agreed at similar meetings under the previous authorisations. Our experience has been that there has been limited or no discussion between the parties. The meetings have essentially involved AEMO stepping through all foreshadowed outages, using information obtained by AEMO that is largely (if not, wholly) publicly available, and confirming with relevant participants that the forecast timing for each is still current.
- 4.40. The ACCC considers that this process could be conducted bilaterally at little to no additional burden.
- 4.41. The ACCC acknowledges that, in the event of an emergency, if AEMO was to utilise the Proposed Conduct to facilitate more timely multilateral coordination and information sharing with a number of key people (such as generators and/or

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<sup>42</sup> AEMC, Enhancing information on generator availability in MT PASA, Rule determination, 18 August 2022.

transmission network service providers in a particular area) to work out how to best respond to the emergency, that this could potentially result in public benefits. However, the ACCC notes that AEMO has indicated that it does not intend to use the Proposed Conduct in those situations and has suggested that the coordination will largely be limited to the fortnightly meetings discussed at paragraph 4.39 above.

4.42. Based on the information currently before it, the ACCC does not consider that the Proposed Conduct significantly increases AEMO's ability to manage System Works such that it would further minimise interruption to electricity systems than is already possible using AEMO's existing powers. Accordingly, the ACCC considers that the Proposed Conduct would be likely to result in minimal public benefits.

## Public detriments

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

*...any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency.*<sup>43</sup>

4.44. The ACCC has considered the following public detriments:

- reduced competition in wholesale electricity markets
- reduced competition for maintenance services.

## AEMO's submission

4.45. AEMO submits that the Proposed Conduct is unlikely to alter the competitive dynamics in electricity markets as the overall purpose and effect of the Proposed Conduct is to maximise supply of electricity by reducing outages for the benefit of both competition and consumers.

4.46. In particular, AEMO submits:

- electricity is an essential service to the Australian community and close coordination by the Participants during the transition is essential to ensure the ongoing safe, secure and reliable supply of electricity during the period of the proposed authorisation
- the Proposed Conduct does not extend to entering into any agreement regarding the wholesale or retail price of electricity
- the Proposed Conduct is not compulsory, and any AEMO Industry Participant or Future AEMO Industry Participant can opt out of any proposed collaboration
- the Proposed Conduct is limited to discussions, conduct, contracts, arrangements and/or understandings to which AEMO is either a party or has facilitated
- the limitations of the Proposed Conduct and the addition of the proposed conditions, such as the requirement for a competition lawyer approved by the ACCC to attend, and for the ACCC and representatives of state governments

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

to be invited, removes any risk of meetings being used for purposes of coordination beyond the scope of the Proposed Conduct.

## **Reduced competition in wholesale electricity markets**

- 4.47. The ACCC considers that sharing a variety of commercially sensitive information regarding the ongoing operation of facilities and reaching agreements regarding System Works could lessen competition in wholesale electricity markets. Further, such information sharing and coordination increases the risk of collusion or coordinated conduct beyond that authorised.
- 4.48. The transparency afforded to the Participants over the operations of their competitors could facilitate anti-competitive and inefficient behaviours. For example, the bidding behaviour of generators may change if they learn through the Proposed Conduct that a particular competitor's plant is suffering technical issues or extended periods of outages. Other generators may then withhold supply in order to artificially inflate prices by manipulating the spot market which could potentially create further issues for the security and reliability of the supply of electricity.
- 4.49. The ACCC notes that, overall, the National Electricity Market is concentrated with a few large participants controlling significant generation capacity and output within each region. This concentration provides a number of participants with the potential to exercise market power; however, concentration is significantly lower in the middle of the day, as a result of the contribution from intermittent renewable energy like wind and solar where there is more diversity of ownership.<sup>44</sup> These trends are strengthening year on year as more renewable generation enters the market.<sup>45</sup>
- 4.50. Market participants are more likely to be able to exercise market power in a market with few participants, especially during periods of limited interconnector capacity, when demand is high, or when supply is constrained. While participants in the National Electricity Market may have an ability to exercise market power at times, they may not have an incentive to do so for a number of reasons, such as exposure to spot prices through contracting or vertical integration and government intervention.<sup>46</sup>
- 4.51. The ACCC notes that the performance of wholesale electricity markets can have a significant impact on retail prices and electricity bills for consumers; however we acknowledge that it is difficult to measure the extent of that impact given the way in which the National Electricity Market operates in practice.<sup>47</sup>
- 4.52. Within its most recent performance report, the Australian Energy Regulator noted the following:
- As the National Electricity Market continues to transition from a system dominated by large thermal generators to one that incorporates an increasing volume of widely dispersed intermittent renewable generators, significant new entry of large-scale solar and wind generation has increasingly put downward pressure on prices and reducing concentration in the market.<sup>48</sup>

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<sup>44</sup> AER, Wholesale electricity market performance report 2022, 1.

<sup>45</sup> Ibid, 28.

<sup>46</sup> Ibid, 28.

<sup>47</sup> Ibid, 9.

<sup>48</sup> Ibid, 1.

- Despite this, over the past 2 years, electricity prices in the National Electricity Market have, at times, increased to unprecedented levels as supply-side conditions, including increases in international fuel prices, significant outages of thermal generation and fuel supply problems, have put pressure on the market.<sup>49</sup>
- Movement in spot prices are not necessarily indicative of the state of competition or efficacy in the market. In fact, changes in supply conditions have predominantly contributed to a sustained increase in electricity prices in 2021-22.<sup>50</sup>
- A major contributor to the tight supply conditions over 2022 was a reduction in baseload generation availability as instances of outages increased.<sup>51</sup>

4.53. Given these tight supply conditions, the ACCC considers that the Proposed Conduct is capable of altering competitive dynamics in electricity markets and considers that the Proposed Conduct is likely to impact competition in the relevant markets.

4.54. However, the ACCC acknowledges that the risk of the Proposed Conduct lessening competition in wholesale energy markets may be limited in circumstances where:

- A variety of generation data, including maintenance information, is already publicly available on AEMO's website such as the short and medium-term forecast data prepared by AEMO as part of its Projected Assessment of System Adequacy.
- The purpose for the sharing of information and coordination is limited to ensuring the safe, secure and reliable operation of electricity systems, minimising the risk of any energy outages and/or ensuring the continued operation and integrity of the National Electricity Market.
- Discussions between AEMO Industry Participants and Future AEMO Industry Participants would only be allowed to occur within the limitations outlined in paragraph 1.8 – 1.10.
- The Participants would not be authorised to have discussions or reach agreements without the oversight of AEMO.
- If the Proposed Conduct involves coordination between AEMO Industry Participants and/or any Future AEMO Industry Participants, a lawyer with expertise in competition law will be present and the ACCC and a senior officer of the relevant state or territory government department with responsibility for energy (or their delegate) will also be invited to attend.
- The electricity market is overseen by a number of market bodies and is governed by a range of State and Territory legislation, including a national set of energy laws, rules and jurisdictional legislation, as well as guidelines, standards and procedures.

### **Reduced competition for maintenance services**

4.55. The Proposed Conduct allows Participants to coordinate on a wide range of matters relating to System Works, including the sharing of information in relation to essential

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<sup>49</sup> AER, Wholesale electricity market performance report 2022, 1.

<sup>50</sup> Ibid,

<sup>51</sup> Ibid,

employees and contractors and the availability of parts, equipment or specialised resources.

- 4.56. A coordinated approach on these types of matters may be less efficient in allocating goods and services to the most valuable use and may impact the revenue of providers of these goods or services.
- 4.57. While the Proposed Conduct would allow for information sharing in relation to essential employees and contractors, it does not cover entering into any common arrangements, which will somewhat reduce the likely detriments in relation to the supply of these services more.
- 4.58. Nevertheless, the ACCC considers that the Proposed Conduct is likely to lessen competition for the acquisition of maintenance services.

## Balance of public benefit and detriment

- 4.59. The ACCC acknowledges that the Proposed Conduct may create some efficiencies for AEMO in its management of System Works, and this would be likely to result in some public benefits. However, the ACCC considers these public benefits are likely to be minimal in circumstances where it does not consider that the Proposed Conduct significantly increases AEMO's ability to manage System Works such that it would further minimise interruption to electricity systems than is already possible using AEMO's existing powers.
- 4.60. The ACCC considers that the Proposed Conduct is likely to result in some public detriment as a result of lessening competition in wholesale electricity markets and for the acquisition of maintenance services.
- 4.61. For the reasons outlined in this draft determination, the ACCC is not currently satisfied, in all the circumstances, that the Proposed Conduct would be likely to result in a public benefit that would outweigh the likely detriment to the public from the Proposed Conduct.
- 4.62. The ACCC acknowledges AEMO's submission that measures short of multilateral coordination and real-time information sharing will not be sufficient to enable the Participants to manage challenges arising from the transition, and that, because of this, any policy and/or rule-based approaches are unlikely, in AEMO's opinion, to adequately address the array and scale of impact of unplanned issues with aging plants (such as unplanned outages or extreme and/or unusual weather conditions) that threaten system security and reliability and place pressure on a delicately balanced system.
- 4.63. AEMO, in support of its submission, referenced a report (entitled 'Assessment of preparedness of the NSW Energy Market: 2022/23') prepared by the Office of the NSW Chief Scientist and Engineer.<sup>52</sup> The report notes that, as the energy system undergoes a significant transition over the next decade, coordination efforts involving resource and information sharing activities between AEMO and industry participants will be needed to ensure the reliable operation of electricity and/or gas systems.<sup>53</sup>
- 4.64. The report recommends advocating for states and market bodies to explore the suitability of legislative arrangements to allow AEMO and industry to coordinate efforts

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<sup>52</sup> A copy of the report is available here: [https://www.chiefscientist.nsw.gov.au/\\_data/assets/pdf\\_file/0011/548525/NSW-Summer-Energy-Preparedness\\_2022\\_23.pdf](https://www.chiefscientist.nsw.gov.au/_data/assets/pdf_file/0011/548525/NSW-Summer-Energy-Preparedness_2022_23.pdf).

<sup>53</sup> NSW Chief Scientist and Engineer, *Assessment of preparedness of the NSW Energy Market: 2022/23* (7 November 2022), 37.

to address issues that may impact the safety, security and reliability of Australia's energy supply during a period when the system is facing significant challenges and risks.<sup>54</sup> The report notes that, if this was allowed for within the legal framework covering the gas and electricity markets, then authorisation of such conduct by the ACCC would not be required in order to cope with a foreseen and actual supply crisis.<sup>55</sup>

- 4.65. The report recommends that, any arrangements that provide for coordination, resource and/or information sharing should only be allowed if there is a clear and present threat to supply security, reliability or integrity of the markets and normal actions available to AEMO and/or market participants will not suffice.<sup>56</sup> The report indicates that checks and balances could be included, such the AER being satisfied that the threat identified by AEMO would not be likely overcome by normal actions and that the coordination and the sharing of resources and information is appropriate in the circumstances and agreeing to the timeframe for the arrangements to apply.<sup>57</sup>
- 4.66. In any event, the ACCC considers that regulatory changes are a more appropriate mechanism to address any shortfalls that may exist in the regulatory framework. The ACCC notes that it is open to AEMO and other market bodies to seek rule changes with the AEMC and/or other legislative arrangements.

## 5. Draft determination

### The application

- 5.1. On 7 June 2023, AEMO lodged application AA1000643 with the ACCC, seeking authorisation under subsection 88(1) of the Act.
- 5.2. AEMO seeks authorisation for the Proposed Conduct (as defined in paragraph 1.6). Subsection 90A(1) of the Act requires that before determining an application for authorisation, the ACCC shall prepare a draft determination.

### The authorisation test

- 5.3. Under subsections 90(7) and 90(8) of the Act, the ACCC must not grant authorisation unless it is satisfied in all the circumstances that the Proposed Conduct is likely to result in a benefit to the public and the benefit would outweigh the detriment to the public that would be likely to result from the Proposed Conduct.
- 5.4. For the reasons outlined in this draft determination, the ACCC is not satisfied, in all the circumstances, that the Proposed Conduct would be likely to result in a benefit to the public that would outweigh the detriment to the public that would result or be likely to result from the Proposed Conduct, including any lessening of competition.
- 5.5. Accordingly, the ACCC proposes to deny authorisation.
- 5.6. This draft determination is made on 12 October 2023.

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<sup>54</sup> NSW Chief Scientist and Engineer, *Assessment of preparedness of the NSW Energy Market: 2022/23* (7 November 2022), 37.

<sup>55</sup> *Ibid.*

<sup>56</sup> *Ibid.*

<sup>57</sup> *Ibid.*

## 6. Next steps

- 6.1. The ACCC now invites submissions in response to this draft determination. In addition, consistent with section 90A of the Act, the applicant or an interested party may request that the ACCC hold a conference to discuss the draft determination.