



**Australian Energy Market Operator Limited –
Application for authorisation AA1000618
Interim authorisation decision
1 July 2022**

Decision

1. The Australian Competition and Consumer Commission (the **ACCC**) has decided to grant interim authorisation with conditions in respect of the application for authorisation AA1000618, lodged by the Australian Energy Market Operator Limited (**AEMO**) on 29 June 2022. The ACCC grants authorisation to AEMO, AEMO's related bodies corporate, 'AEMO Industry Participants' and 'Future AEMO Industry Participants'.¹
2. The ACCC grants interim authorisation for the Authorised Conduct as specified in paragraph 27, subject to the restrictions outlined in paragraphs 28-30.
3. In summary, interim authorisation is granted to enable AEMO, 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 any conduct related to certain coordination and information sharing activities that have the purpose of ensuring the safe, secure and reliable operation of energy systems for the benefit of both competition and consumers, minimising the risk of energy outages, ensuring the continued operation and integrity of the National Electricity Market (**NEM**), and occur within certain limitations and circumstances.
4. Interim authorisation is granted with the conditions set out at paragraph 32. The ACCC may authorise a Committee or Division of the ACCC, a member of the ACCC or a member of the ACCC staff, to exercise a decision making function under the conditions of this interim authorisation on its behalf.
5. The ACCC grants interim authorisation in relation to Division 1 of Part IV of the *Competition and Consumer Act 2010* (Cth) (the **Act**) and sections 45(1), 46(1) and 47(1) of the Act.
6. Interim authorisation commences immediately and remains in place until it is revoked, the application for authorisation is withdrawn, or the date the ACCC's final determination comes into effect.

The application for authorisation and urgent interim authorisation

7. AEMO is the independent market and system operator for gas and electricity systems across Australia. AEMO's application is made on behalf of:
 - AEMO and its related bodies corporate
 - participants in Australian gas and/or electricity markets (other than Western Australia), being parties with a registration or a registration exemption from the

¹ 'AEMO Industry Participants' and 'Future AEMO Industry Participants' are each defined at paragraph 7. Participants as at 24 June 2022 are listed in Schedule 1 of AEMO's application for authorisation dated 29 June 2022.

NEM, and registered participants under the National Gas Rules (other than those registered in respect of operations only in Western Australia), and their related bodies corporate² (**AEMO Industry Participants**), and

- other entities that become participants registered in the NEM, participants with a registration exemption for the NEM, or registered participants under the National Gas Rules (other than those registered in respect of operations only in Western Australia), and their related bodies corporate, as notified in writing by AEMO to the ACCC (**Future AEMO Industry Participants**)

(together, the **Participants**).

8. In 2020, the ACCC granted authorisation (AA1000484) with conditions to AEMO and industry participants for similar cooperation and information sharing arrangements for the purpose of responding to issues arising from the COVID-19 pandemic in the operation of gas and electricity systems (collectively referred to as energy systems). This authorisation expired on 31 May 2021.
9. In February 2022, the ACCC granted authorisation (AA1000586) with conditions to AEMO and industry participants for substantially the same cooperative arrangements to respond to COVID-19 issues as in 2020, but in relation only to the electricity industry.
10. The current application relates to the operation of the gas and electricity systems and seeks authorisation for somewhat broader arrangements which include coordinating in deferring non-essential works and managing system stability, prompted by a broader range of challenges including reduced availability of gas and coal due to the Russian invasion of Ukraine, extreme or unusual weather events or conditions, and higher than usual unplanned outages, as well as the ongoing impacts of the COVID-19 pandemic on labour, supply chains, and maintenance schedules.
11. AEMO seeks authorisation for the Participants to discuss, enter into or give effect to any contract, arrangement or understanding between them, or engage in any conduct, related to:
 - a) Co-ordinating repairs and maintenance – planning for and/or minimising any disruptions to energy supply, for example, by coordinating scheduling of any repairs, maintenance and other works requiring outages;
 - b) Sharing essential personnel – sharing information and/or entering into common arrangements in relation to essential employees and contracts to ensure there are sufficient personnel to maintain and operate energy infrastructure;
 - c) Sharing essential inputs – 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 and infrastructure, including:
 - water, gas, coal, diesel, and other fuel for generators (**Generator Fuel**)
 - services for the transport of Generator Fuel
 - parts, equipment or specialised resources necessary for essential maintenance, and

² The participants and members registered, or with an approved exemption, in respect of markets and systems operated or managed by AEMO can be found in the lists at the following links:

<https://aemo.com.au/energy-systems/electricity/national-electricity-market-nem/participate-in-the-market/registration>

<https://aemo.com.au/learn/market-participants/gas-market-participants>

- other consumable materials necessary for the operation of such facilities (including odourant in the case of natural gas).
- d) Sharing information regarding ongoing operation – sharing information about the ongoing availability, performance and/or operation of their energy facilities and any risks to ongoing availability, performance and/or operation
- e) Deferring non-essential works – sharing information, and/or entering into arrangements, to defer activities and/or projects not essential to maintaining the safe, secure and/or reliable operation of energy markets, or
- f) Managing system stability – sharing information and/or entering into common arrangements in order to manage electricity system stability from a technical perspective as a result of changes in system supply and/or demand, including for example managing generation profiles,

provided:

- the purpose for doing so is either to:
 - ensure the safe, secure and reliable operation of Australia’s energy systems, and minimise the risk of any energy outages for the benefit of both competition and consumers, during the period of the authorisation, and/or
 - ensure the continued operation and integrity of the NEM and wholesale gas markets in Australia (excluding WA) for the benefit of both competition and consumers, during the period of the authorisation, and
- in the case of paragraphs 11(c) to 11(f), AEMO considers the conduct in question is reasonably necessary to address a critical risk of energy outages or significant disruption to the operation of the NEM or wholesale gas markets, and
- in relation to 11(c), the sharing of gas or diesel (including transportation) as an input is limited to sharing between gas-fired generators, and
- in relation to 11(d), this conduct does not include the sharing of specific generators’ wholesale price, costs and margins

(the **Proposed Conduct**).

12. AEMO describes that the Proposed Conduct would be limited to discussions, conduct, contracts, arrangements and/or understandings to which AEMO or its related bodies corporate, is either a party to 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
- a lawyer with expertise in competition law, approved by the ACCC, must attend, with the purpose of observing and ensuring the conduct engaged in does not go beyond the purposes of the meetings or discussions or breach the Act
- the ACCC will be provided with advance notice of the meeting, attendees, 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, or their delegate, will be provided with advance notice of the meeting, attendees, agenda and invited to attend.

13. 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 gas or the wholesale or retail price of electricity.
14. AEMO advises the Proposed Conduct is a temporary measure and is not compulsory. Any AEMO Industry Participant or Future AEMO Industry Participant can opt out of any proposed collaboration.
15. AEMO suggests that authorisation be granted with three conditions requiring certain reporting, compliance with conditions imposed by other authorisations, and the immediate termination of any agreement, arrangement or understanding entered into in reliance on authorisation of the Proposed Conduct upon expiry or revocation of the authorisation.
16. AEMO seeks authorisation until 31 March 2023.

Background

17. AEMO submits that Australia's energy system and industry are currently facing unprecedented challenges, which are contributing to reduced energy availability at higher prices across Australia (excluding Western Australia), creating risks of electricity and gas outages. These challenges include:
 - the Ukraine conflict, which has resulted in a reduction in availability and contributed to an increase in the price of gas and coal for thermal electricity generators
 - the impact of high rainfall and floods in New South Wales and Queensland, which has reduced the production by open cut coal mines in these areas
 - extreme and/or unusual weather conditions, which increase demand for electricity and reduced output of renewable energy
 - a significant number of planned and unplanned outages, resulting in higher than usual decrease in generation capacity
 - the impact of the COVID-19 pandemic on specialised labour and global supply chains, due to essential workers having to isolate due to COVID-19, the delayed arrival of essential workers from overseas due to travel restrictions, and the delayed arrival of essential parts due to supply chain issues, and
 - delays and deferral of some maintenance during the last two years, as a result of the COVID-19 pandemic, which impact the stability of the system during peak summer period.
18. AEMO advises that, using its existing powers, it has undertaken a number of last resort actions to ensure the ongoing supply of reliable, secure and sustainable energy, particularly to avoid load shedding, blackouts, and supply interruptions. For example, it has implemented administered price caps for both gas and electricity, issued directions, repeated Lack of Reserve Level 3 notices, and suspended the NEM spot market. AEMO submits that, while these measures address the immediate risk of unsecure and unreliable energy supply, they are largely reactive, insufficient for the purposes of managing the risks created by the current market conditions, unsustainable on a longer term basis, increase the risk of system security and reliability longer term, and are inefficient and generally expensive, adding to consumer price shocks.
19. The ACCC considers that the current set of market conditions is likely to represent a significantly greater risk to the energy system and markets than those present in relation to AEMO's previous COVID-19 related authorisations, because of the additional impacts of the Russian invasion of Ukraine on the global supply and price of essential inputs, the state of maintenance of ageing coal plants, their increased age, and insufficient development of alternative generation sources.

The authorisation process

20. Authorisation provides protection from legal action for conduct that may otherwise breach the competition provisions of the Act. Broadly, the ACCC may grant authorisation if it is satisfied that the benefit to the public from the conduct outweighs any public detriment, including from a lessening of competition. The ACCC conducts a public consultation process to assist it to determine whether a proposed arrangement results in a net public benefit.

Interim authorisation

21. Section 91 of the Act allows the ACCC, where it considers it appropriate, to grant interim authorisation. This allows the parties to engage in the Authorised Conduct while the ACCC is considering the substantive application.
22. AEMO submits that urgent interim authorisation is justified because the Proposed Conduct will allow the Participants to take immediate action together to address and proactively manage the acute and immediate threats to reliable and secure energy created by the rapidly changing current market conditions, including by:
- reducing the risk of overlapping maintenance activities affecting the supply of both gas and electricity
 - reducing the risk of unnecessary outages or extended periods of maintenance caused by lack of personnel and/or a generator being unable to obtain essential inputs, especially at critical times
 - facilitating the Participants taking action to overcome any threat to supply identified through the sharing of information (for example, deferring maintenance), and
 - reducing the risk of system instability by allowing AEMO Industry Participants to enter into arrangements and share information to manage system stability from a technical perspective.

Consultation

23. The ACCC has not conducted a public consultation process in respect of the request for interim authorisation due to the urgency of AEMO's request for interim authorisation. The ACCC also notes that no concerns have been raised in relation to the operation of the previous, similar authorisations, AA1000484 and AA1000586. The ACCC will now consult on AEMO's application for authorisation.
24. Should anyone have concerns about the impact of this interim authorisation, please raise them immediately with the ACCC. The ACCC is able to vary or revoke this interim authorisation at any time.
25. Further information in relation to the application for authorisation, including any public submissions received by the ACCC as this matter progresses, may be obtained from the ACCC's website www.accc.gov.au/authorisations.

The authorised conduct

26. The **Authorised Conduct** is the conduct specified in paragraph 27, subject to the restrictions outlined in paragraphs 28-30.
27. The ACCC grants authorisation for the Participants to discuss, enter into or give effect to any contract, arrangement or understanding between them, or engage in any conduct, related to:

- a) Co-ordinating repairs and maintenance – planning for and/or minimising any disruptions to energy supply, for example, by coordinating scheduling of any repairs, maintenance and other works requiring outages
- b) Sharing essential personnel – sharing information and/or entering into common arrangements in relation to essential employees and contracts to ensure there are sufficient personnel to maintain and operate energy infrastructure
- c) Sharing essential inputs – 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 and infrastructure, including:
 - water, gas, coal, diesel, and other fuel for generators (**Generator Fuel**)
 - services for the transport of Generator Fuel
 - parts, equipment or specialised resources necessary for essential maintenance, and
 - other consumable materials necessary for the operation of such facilities (including odourant in the case of natural gas).
- d) Sharing information regarding ongoing operation – sharing information about the ongoing availability, performance and/or operation of their energy facilities and any risks to ongoing availability, performance and/or operation
- e) Deferring non-essential works – sharing information, and/or entering into arrangements, to defer activities and/or projects not essential to maintaining the safe, secure and/or reliable operation of energy markets, or
- f) Managing system stability – sharing information and/or entering into common arrangements in order to manage electricity system stability from a technical perspective as a result of changes in system supply and/or demand, including for example managing generation profiles,

provided:

- g) the purpose for engaging in the conduct is either to ensure:
 - the safe, secure and reliable operation of Australia’s energy systems, and minimise the risk of any energy outages for the benefit of both competition and consumers, during the period of the authorisation, or
 - the continued operation and integrity of the NEM and wholesale gas markets in Australia (excluding WA) for the benefit of both competition and consumers, during the period of the authorisation, and
- h) in the case of paragraphs 27(c) to 27(f), AEMO considers the conduct is reasonably necessary to address a critical risk of energy outages or significant disruption to the operation of the NEM or wholesale gas markets, and
- i) in relation to 27(c), the sharing of gas or diesel (including transportation) as an input is limited to sharing between gas-fired generators, and
- j) in relation to 27(d), this conduct does not include the sharing of specific generators’ wholesale prices, costs or margins.

28. The Authorised Conduct is limited to discussions, conduct, contracts, arrangements and/or understandings to which AEMO or its related bodies corporate, is either a party to or has facilitated. Where the Authorised 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, agenda and invited to attend, and
- where the Authorised 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, or their delegate, will be provided with advance notice of the meeting, attendees, agenda and invited to attend.

29. Where the conduct described in paragraph 27 will involve a contract, arrangement or understanding between competing AEMO Industry Participants or Future AEMO Industry Participants, then authorisation is only granted to give effect to such a contract, arrangement or understanding to the extent it falls within the scope of a contract, arrangement or understanding recorded in a record made by AEMO (or its legal representative) in accordance with Condition 5 below.

30. Authorisation is not granted 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 gas or the wholesale or retail price of electricity.

31. The Authorised Conduct is substantially similar to the Proposed Conduct for which AEMO seeks authorisation, but is subject to additional restrictions as set out above and in the conditions the ACCC has imposed, in order to achieve transparency and clarity of the conduct authorised.

Granting of conditional interim authorisation

32. The ACCC grants interim authorisation for the Authorised Conduct with the following conditions:

Condition 1 – Reporting requirements: AEMO must comply with the Reporting and Communications Protocol³ outlined at Schedule 1. This protocol includes AEMO providing regular reports to the ACCC about the material decisions or arrangements made at meetings during the preceding period, allows the ACCC to observe meetings and request additional information about the Authorised Conduct.

Condition 2 – Compliance with conditions imposed by other authorisations: Where the Authorised Conduct in this interim authorisation overlaps with conduct authorised under other authorisations, parties to those other authorisations must continue to comply with any conditions imposed by those authorisations while they remain in force, which include:

- where the Authorised Conduct involves the scheduling of maintenance at LNG facilities in Western Australia or the Northern Territory, authorisation AA1000396
- where the Authorised Conduct involves the scheduling of maintenance at LNG facilities in Queensland, authorisation AA1000544, and
- where the Authorised Conduct involves parties registered or exempt from registration in the NEM, authorisation AA1000586 (as noted above in paragraph 9).

³ AEMO proposed the Reporting and Communications Protocol, which is substantially the same as the protocol contained in the ACCC's determination for similar authorisations in 2020 and 2022, AA1000484 and AA1000586.

Condition 3 – Agreements not to endure beyond authorisation period: Any contract, arrangement or understanding entered into in reliance on the interim authorisation or final 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) and upon expiry or revocation of any final authorisation.

Condition 4 – Presence of competition lawyer: Where the Authorised Conduct involves a meeting or discussion between AEMO Industry Participants 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 the interim authorisation and risks of breaching the Act.

Condition 5 – 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 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.

Reasons for decision

33. AEMO Industry Participants could be considered competitors in:

- the generation, transmission, transportation and/or supply of electricity and gas in Australia, and/or
- the procurement of essential inputs for energy production, generation, transmission, distribution and supply systems and infrastructure.

34. Coordination between competitors risks contravening the competition prohibitions of the Act.

35. In granting interim authorisation, however, the ACCC has taken into account that:

- The ACCC has authorised similar conduct to enable the parties to respond to conditions created by the COVID-19 pandemic, in 2020 and 2022. The ACCC has not received any concerns from interested parties about the operation of these authorisations.
- There are ongoing circumstances (outlined at paragraph 17) which create a real risk to the reliable supply of energy. Together with the large backlog of deferred scheduled maintenance and the current high winter demand, the ACCC considers benefits will arise from Participants being able to discuss and agree how best to coordinate some activities under the Authorised Conduct.
- AEMO has advised that their existing powers are largely reactive and insufficient for the purposes of managing the risks created by the current market conditions (as described in paragraph 17).

- There is a risk of a lessening of competition in any situation where competitors share commercially sensitive information, coordinate, and/or share inputs. Further, such information sharing and coordination creates a risk of collusion or coordinated conduct beyond that authorised. Under the current circumstances, there is also an increased risk of anti-competitive harm.⁴ However, these risks are reduced by the Authorised Conduct requiring that coordination discussions between industry participants can only occur with AEMO and potentially an official from the relevant jurisdiction(s) energy department present. To further manage these risks, AEMO has suggested, and the ACCC has imposed, reporting conditions to improve transparency, and require oversight of discussions through the attendance of a lawyer with competition law expertise, and the ACCC having the option to observe meetings. The ACCC will be monitoring the impacts of the conduct on competition and its effectiveness in delivering claimed benefits, and can vary or revoke interim authorisation at any time.
- In its 2020 and 2022 authorisations, the ACCC concluded that similar conduct was likely to result in public benefits from providing greater capacity to ensure the ongoing safety, security and/or reliability of Australian energy systems, and minimising disruptions arising from uncoordinated activities. The ACCC currently considers that interim authorisation here is also likely to result in these public benefits, compared to a situation where AEMO conducts more limited bilateral information exchanges in relation to maintenance scheduling and/or makes use of the last resort and other reactive actions available to AEMO in the absence of the Authorised Conduct.

Reconsideration of interim authorisation

36. The ACCC may review the interim authorisation at any time. The ACCC's decision in relation to the interim authorisation should not be taken to be indicative of whether or not final authorisation will be granted.

⁴ <<https://ministers.treasury.gov.au/ministers/jim-chalmers-2022/media-releases/letter-acc-electricity-and-gas-price-rises>>; <<https://www.accc.gov.au/media-release/accc-updates-on-recent-electricity-market-challenges>>

Purpose

1. This is the Reporting and Communications Protocol referred to in condition 1 of the ACCC's interim authorisation decision of 1 July 2022 (**Interim Authorisation**) in respect of proposed arrangements between AEMO and certain industry participants for the purpose of dealing with the effects of unprecedented challenges which are contributing to reduced energy availability at higher prices across Australia (excluding Western Australia) (**Current Market Conditions**).
2. Capitalised terms used but not defined in this document have the meaning given in the Interim Authorisation.

AEMO's reporting commitments

3. While AEMO engages in conduct enabled by the Interim Authorisation, AEMO will provide each fortnight (or such other period as the ACCC may approve) a report to the ACCC setting out each contract, arrangement, understanding or material decision in the previous period that involves the conduct enabled by the Interim Authorisation, including:
 - a) the dates of all contracts, arrangements or understandings and material decisions that relies on the Interim Authorisation
 - b) the parties to each contract, arrangement or understanding and material decision that relies on the Interim Authorisation
 - c) what topics were discussed at meetings where those contracts, arrangements or understandings and material decisions were made, and/or the material content of those contracts, arrangements, understandings or decisions, including key details such as the relevant products or services, quantities, timings, and financial or other compensation
 - d) a description of the issues arising from the Current Market Conditions that the relevant decision, contract, arrangement or understanding seeks to address and how it will be addressed, and
 - e) where possible a non-confidential version of the report for publication on the public register.
4. For the avoidance of doubt, the AEMO's reports under this protocol must include all records made pursuant to condition 5 of the Interim Authorisation.

Information requested and concerns raised by the ACCC

4. The ACCC may request additional information regarding conduct enabled by the Interim Authorisation. AEMO, any AEMO Industry Participant and any Future AEMO Industry Participant must promptly provide any further information requested by the ACCC.
5. AEMO will provide the ACCC with advance notice as soon as reasonably practicable of any meetings or calls (including recurring meetings and ad hoc meetings) engaged in as part of the Proposed Conduct, and an ACCC representative may elect to attend a meeting or call. The ACCC will give AEMO notice in advance of its proposed representative at the relevant meeting or call, where reasonably practicable to do so.

6. Any notice or request for information under paragraphs 4 to 5 should be provided to the contact person nominated by AEMO for the purposes of this Reporting Protocol.

Confidentiality

7. Unless stated otherwise, AEMO asks that the ACCC receive any information provided under this Reporting Protocol on a confidential basis in accordance with the ACCC's statutory obligations on the basis set out below:
 - a) there is no restriction on the internal use, including future use, that the ACCC may make of the information consistent with its statutory functions;
 - b) the confidential information may be disclosed to the ACCC's external advisors and consultants on condition that each such advisor or consultant is informed of the obligation to treat the information as confidential; and
 - c) the ACCC may disclose the confidential information to third parties (in addition to its external advisors or consultants) if compelled by law or in accordance with section 155AAA of the CCA.
8. Nothing in paragraph 7 limits AEMO's obligations under paragraph 3 above.