



Australian Energy Market Operator Limited – application for authorisation (AA1000586)

Interim authorisation decision

27 October 2021

Decision

1. The Australian Competition and Consumer Commission (the **ACCC**) has granted interim authorisation with conditions in relation to the application for authorisation AA1000586 lodged by the Australian Energy Market Operator Limited (**AEMO**) on 15 October 2021. AEMO seeks authorisation on behalf of itself, 'AEMO Industry Participants'¹ and 'Future AEMO Industry Participants'.²
2. Interim authorisation is granted to enable AEMO, AEMO Industry Participants and Future AEMO Industry Participants (as defined at paragraph 5) to discuss, enter and give effect to any contract, arrangement or understanding for certain maintenance coordination and information sharing arrangements (as defined at paragraphs 6 to 9) provided in each case, the purpose for doing so is to ensure the safe, secure and reliable operation of Australia's energy systems, and minimise the risk of any electricity outages, during the COVID-19 pandemic.
3. Interim authorisation is granted with the conditions set out at paragraph 23.
4. Interim authorisation commences immediately and remains in place until it is revoked, the application is withdrawn or the date the ACCC's final determination comes into effect.

The application for authorisation

5. AEMO is the independent market and system operator for gas and electricity systems across Australia. The application is made on behalf of:
 - AEMO and its related bodies corporate
 - participants in Australian electricity markets and participants with a registration exemption for the National Electricity Market (NEM) and their related bodies corporate (**AEMO Industry Participants**) and
 - other entities that become participants registered in the NEM, participants with a registration exemption for the NEM, or participants registered in the Western

¹ Participants as at 7 October 2021 are listed at Appendix B to AEMO's application for authorisation AA1000586, 15 October 2021.

² Defined at paragraph 1.1 of AEMO's application for authorisation AA1000586, 15 October 2021, p. 3.

Australian Electricity Market, as notified by AEMO to the ACCC (**Future AEMO Industry Participants**).

6. 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 (the **2020 Authorisation**). The 2020 Authorisation expired on 31 May 2021.
7. The current application relates to the electricity system only and excludes arrangements relating to gas. AEMO seeks authorisation to discuss, enter into or give effect to any contract, arrangement or understanding between them, or engage in any conduct, related to:³
 - *Co-ordinating repairs and maintenance* - planning for and/or minimising any disruptions to electricity supply, for example, by coordinating scheduling of any repairs, maintenance and other works requiring outages
 - *Sharing essential personnel* - sharing information and/or entering into common arrangements in relation to essential employees and contractors to ensure there are sufficient personnel to maintain and operate electricity infrastructure
 - *Sharing essential inputs* - sharing information about the availability of, and/or entering into arrangements to share, essential inputs for electricity production, generation, transmission, distribution and supply systems and infrastructure, such as parts, equipment or specialised resources necessary for essential maintenance, as well as other consumable materials necessary for the operation of their facilities (but in all cases excluding fuel for thermal generators), and
 - *Sharing information regarding ongoing operation* - sharing information about the ongoing availability, performance and/or operation of their facilities and any risks to ongoing availability, performance and/or operation,

provided in each case, the purpose for doing so is to ensure the safe, secure and reliable operation of Australia's energy systems, and minimise the risk of any electricity outages, during the pandemic (the **Proposed Conduct**).

8. The Proposed Conduct is limited to:⁴
 - discussions, conduct, contracts, arrangements and/or understandings which AEMO is either a party to or has facilitated, or
 - discussions, conduct, contracts, arrangements and/or understandings to which AEMO is not a party but which are carried out for the purposes of implementing arrangements which AEMO has been a party to or facilitated
 - where discussions relate to a specific state or territory jurisdiction - discussions attended by a senior officer of the relevant state or territory government department with responsibility for energy, or their delegate, or
 - where conduct, contracts, arrangements and/or understandings relate to a specific state or territory jurisdiction - conduct, contracts, arrangements and/or understandings which have been agreed to by, or arise out of a discussion attended

³ AEMO's application for authorisation AA1000586, 15 October 2021, p. 5.

⁴ Ibid.

by, a senior officer of the relevant state or territory government department with responsibility for energy, or their delegate.

9. Further, the Proposed Conduct does not involve entering into any contracts, arrangements or understandings regarding the wholesale or retail price of energy. Nor is it intended that AEMO, AEMO Industry Participants and Future AEMO Industry Participants would share confidential information relating to retail pricing matters, cost or profits.⁵
10. The Proposed Conduct is a temporary measure, and not compulsory. Any AEMO Industry Participant or Future AEMO Industry Participant can opt out of any proposed collaboration.
11. AEMO suggests that authorisation be granted with 2 conditions requiring AEMO to regularly report to the ACCC, and for the immediate termination of any arrangements entered into upon the expiry of any authorisation.⁶ These conditions were imposed under the 2020 Authorisation. The 2020 Authorisation included two additional conditions which are no longer relevant due to the narrower scope of the current application – namely, it no longer applies to gas systems, and future parties are now defined in the application for authorisation.
12. AEMO seeks authorisation for 12 months, commencing from the date of any interim authorisation.

The 2020 Authorisation and rationale for the Proposed Conduct

13. AEMO submits that the 2020 Authorisation worked well to allow AEMO and electricity industry participants to meet, have open discussions and agree solutions to address the challenges posed and risks created by the COVID-19 pandemic, particularly in relation to maintenance activities. Monthly reports of those meetings are available on the ACCC's [Authorisations public register](#).
14. AEMO submits the Proposed Conduct will assist it and the industry participants to better manage the ongoing circumstances associated with the pandemic that threaten completion, or timely completion, of scheduled and/or emergency maintenance to Australia's electricity systems. These circumstances include:
 - border controls and quarantine - electricity industry maintenance often requires a highly specialised workforce, with contractors often travelling between states (or internationally) to undertake maintenance work. Interstate teams and international specialists may be unable or unwilling to travel, must quarantine for extended periods if they do travel, or are unable to travel quickly, for example, in response to emergency maintenance requirements
 - health impacts on the workforce - essential workers or contractors responsible for maintenance or repairs may become unavailable as a result of being unwell due to COVID-19 or being required to isolate as a result of being a close contact. Unavailability for these health reasons has the potential to unexpectedly disrupt planned maintenance, and make emergency maintenance more difficult to undertake in a timely way
 - parts shortages due to ongoing disruptions to local and international supply chains.

⁵ Ibid.

⁶ Other than any provisions dealing with ongoing confidentiality obligations.

15. Further, AEMO advises that there has now been nearly two years of reduced maintenance work on Australia's electricity systems, with many large scheduled maintenance projects deferred due to the challenges associated with the pandemic outlined above. As a result, there is now a large volume of scheduled maintenance required to be undertaken on Australian electricity systems. Such a large volume of maintenance needs to be carefully managed to ensure supply into the grid continues to meet consumer demand.
16. The current maintenance backlog is compounded by the fact that the industry is heading into the peak summer season (November to March), where limited maintenance usually occurs due to the high demand for energy over this period.

The authorisation process

17. AEMO Industry Participants could be considered competitors in the generation, transmission, transportation and/or supply of electricity in Australia, as well as the acquisition of maintenance services. Coordination between competitors risks contravening the competition provisions of the *Competition and Consumer Act 2010* (Cth) (the **Act**).
18. Authorisation provides protection from legal action for conduct that may otherwise breach the competition provisions in Part IV 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.

Request for interim authorisation

19. 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 Proposed Conduct while the ACCC is considering the substantive application.
20. AEMO requested interim authorisation for the Proposed Conduct. AEMO submits that urgent interim authorisation is justified for the following reasons:
 - The supply of electricity is essential to consumers. Disruptions of electricity caused by the pandemic would adversely affect consumers and consumer sentiment, businesses, the economy and the provision of essential services by governments.
 - The Proposed Conduct will allow AEMO and participants to start working together immediately to ensure the ongoing safe, secure and reliable operation of Australia's electricity systems. For example, it would enable AEMO and the participants to:
 - i co-ordinate their maintenance activities, so as to minimise the risk of supply shortfalls
 - ii share and co-ordinate their use of essential workers and contractors to address risks created by workers being required to isolate and border restrictions, and
 - iii share and co-ordinate their use of parts, equipment and other essential resources necessary for maintenance activities.

Consultation

21. 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 and the fact that no concerns have been received in relation to the operation of the 2020 Authorisation. The ACCC will now consult on AEMO's application for authorisation.
22. 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 [Authorisations public register](#).

Reasons for decision

23. The ACCC grants interim authorisation to AEMO and the participants for the Proposed Conduct with the following conditions:
 - **Condition 1: Reporting requirements** – AEMO must comply with the Reporting and Communications Protocol⁷ outlined at Attachment A. This protocol includes AEMO providing monthly reports to the ACCC about the material decisions or arrangements made at meetings for the preceding month, allows the ACCC to observe these meetings and request additional information about the Proposed Conduct.
 - **Condition 2: Agreements not to endure beyond authorisation period** – Any contract, arrangement or understanding entered into 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.
24. In granting interim authorisation, the ACCC considers that:
 - The ACCC authorised the same conduct (as it applied to electricity) in 2020. The ACCC has not received any concerns from interested parties about the operation of the 2020 Authorisation.
 - While some states and territories are currently in a 'reopening phase' of responding to the COVID-19 pandemic, the ACCC accepts there are ongoing circumstances (outlined at paragraph 14) which may threaten the completion, or timely completion of emergency or scheduled maintenance of electricity facilities, and therefore, the reliable supply of electricity. Together with the large backlog of deferred scheduled maintenance and the imminent peak 'summer season', the ACCC considers there is some urgency to enable AEMO and industry participants to resume coordinated discussions under the Proposed Conduct.
 - It is unlikely that interim authorisation will materially alter the competitive dynamics in any market. Interim authorisation is granted to allow AEMO and industry participants to coordinate in relation to a narrow range of conduct. Therefore, if the ACCC does not ultimately grant authorisation, the markets would be able to return to substantially their current state.

⁷ AEMO proposed the Reporting and Communications Protocol, which is virtually identical to the protocol contained in the ACCC's determination for the 2020 Authorisation, as part of its application for authorisation AA1000586, 15 October 2021, Appendix A, p. 13.

- In its 2020 Authorisation, the ACCC concluded that the Proposed Conduct (as it applied to electricity systems) 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 costly delays to maintenance. Interim authorisation is likely to result in these public benefits, compared to the current situation where AEMO conducts more limited bilateral information exchanges in relation to maintenance scheduling, which does not allow for industry agreement.
- AEMO is required to provide regular reports to the ACCC and the ACCC may observe meetings. The ACCC can revoke interim authorisation at any time should it have concerns.
- It is unlikely that any interested party would be harmed if interim authorisation is granted.

Reconsideration of interim authorisation

25. 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 the final authorisation will be granted.

Attachment A: Reporting and communications protocol

Purpose

1. This is the Reporting and Communications Protocol referred to in condition 1 of the interim authorisation granted by the ACCC on 27 October 2021 in respect of proposed arrangements between AEMO and certain electricity industry participants for the purpose of dealing with the effects of the COVID-19 pandemic on Australia's energy systems (***Interim Authorisation***).
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 use its best endeavours to provide no later than the first Thursday of each month (or if not a business day in Sydney, on the next business day) a report to the ACCC setting out each material contract, arrangement, understanding or decision made by AEMO and AEMO Industry Participants (and any Future AEMO Industry Participants) in the previous month that involves the Authorised Interim Conduct, including:
 - a) the dates of all material decisions, contracts, arrangements or understandings formed that rely on the Interim Authorisation,
 - b) the parties to each material decision, contract, arrangement or understanding formed that rely on the Interim Authorisation,
 - c) what topics were discussed at meetings where those material decisions, contracts, arrangements or understandings were formed, 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 COVID-19 pandemic that the relevant decision, contract, arrangement or understanding seeks to address and how it will be addressed,
 - e) where possible a non-confidential version of the report for publication on the public register

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. An ACCC representative may elect to attend any meeting or call where it is intended that material decisions, contracts, arrangements or understandings may be formed as an observer for the purpose of observing that the relevant conduct of those groups which might give rise to concerns under Part IV of the CCA notwithstanding the Interim Authorisation granted on 27 October 2021. Where reasonably practicable, 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) where material decisions, contracts, arrangements or understandings are expected to be formed. The ACCC will give AEMO notice in advance of its proposed representative at the relevant meeting or call.
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.