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Inquiry into Competition and Consumer (Gas Market Code) Regulations 2023

Attention: Senate Economics Legislation Committee Secretariat

The ACCC welcomes the opportunity to provide a submission to the Senate Economics Legislation Committee's inquiry into the Competition and Consumer (Gas Market Code) Regulations 2023.

The Code commenced on 11 July 2023. The Code is made under the *Competition and Consumer Act 2010* with the purpose of facilitating a well-functioning domestic wholesale gas market with adequate gas supply at reasonable prices and on reasonable terms.

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

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

ACCC role under the Code

Enforcement

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

- issue infringement notices
- issue public warning notices in appropriate circumstances
- seek orders for redress or loss suffered by third parties
- apply to the Federal Court for injunctions, community service orders, probation for up to 3 years, orders to disclose information and corrective advertising orders.

The Code contains various ‘deemed exemptions’ from certain requirements in the Code for suppliers who meet certain criteria. In addition to the automatic deemed exemptions, a person may apply for a conditional Ministerial exemption from certain requirements in the Code. A Ministerial exemption may be granted subject to conditions, and suppliers to whom it is granted must comply with those conditions.

The ACCC is not responsible for granting exemptions. To obtain a conditional Ministerial exemption, producers must apply to the Minister for Climate Change and Energy, who together with the Minister for Resources will have joint responsibility for making exemption decisions. The ACCC has a role enforcing compliance with a condition specified in a Ministerial exemption.

Transparency and reporting

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

The Code provides for the ACCC to make determinations on certain matters in relation to the Code, including information to be reported to the ACCC.

The Code also requires the ACCC to publish certain information relating to deemed exemptions and Ministerial exemptions. However, the ACCC must not publish the information if doing so would prejudice the commercial interests of the supplier in a substantial way or is contrary to the public interest.

Reasonable price

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

Compliance and Enforcement Guidelines

On 15 August 2023 the ACCC released Compliance and Enforcement Guidelines (Guidelines) on the Code to assist the gas industry to understand its obligations and the ACCC’s approach to enforcement and compliance. The Guidelines were informed by engagement with gas market participants on where further guidance would assist.

The Guidelines summarise the Code’s key requirements, available exemptions, the prohibition on avoidance schemes and consequences for non-compliance including penalties. They set out the ACCC’s approach to enforcement and compliance of the Code and also section 53ZQ of the CCA (which relates to conduct engaged in for the purpose of avoiding the Code).

Certain provisions in the Code are subject to significant civil penalties which can be imposed by the Federal Court. These include:

- Negotiation requirements
- Procedural rules for agreements
- Price rules

- Good Faith requirements
- Record keeping, information and publication
- Compliance with exemption conditions
- Obligation to provide additional or corrected information in relation to applications.

If the ACCC considers a person may have engaged in a contravention of section 53ZQ of the CCA or the Code, the ACCC may take the matter to court. Contraventions of section 53ZQ and certain Code provisions attract the maximum civil penalties available under the CCA with the highest set at the greater of \$50 million, or three times the value of the benefit obtained, or 30% of annual Australian turnover of the corporation in the preceding 12 months if the value of the benefit cannot be determined. These are:

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

The Guidelines are available on the ACCC's website, together with details about how to report suspected breaches of the Code including avoidance schemes. The ACCC will monitor and enforce compliance with the Code, including compliance with the conditions of any Ministerial exemptions.

Transparency and reporting

The Code requires covered suppliers to publish information about future planned EOI processes, and the volumes of uncontracted gas that the supplier expects it will have a right to supply, including when and how much of this gas the supplier intends to offer into the east coast gas market.

The Code also sets out record keeping, reporting and publication obligations to support compliance monitoring and enforcement activities. Covered suppliers are required to:

- make and keep written records for certain periods of time in the form (if any) approved by the ACCC. The ACCC may determine any additional information that must be recorded, and the period which those records must be kept.
- publish or provide the ACCC with a range of information including available gas, gas EOI, gas initial offers, buyer gas final offers, gas final offers, agreements to supply regulated gas, and conditional Ministerial exemptions.¹

Suppliers who consider they are covered by the retailer exemption are required to report certain information to the ACCC to demonstrate that the deemed exemption applies.

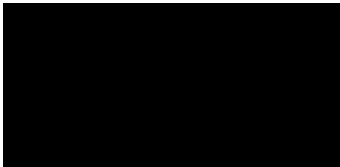
Small suppliers who produce less than 100 PJs of gas a year are required to provide certain information to the ACCC in writing and in the form (if any) approved by the ACCC, to demonstrate to the ACCC that the deemed exemption applies. Small suppliers must also provide the ACCC with a notice if they form an intention to enter into an agreement, or if they enter into an agreement, to supply gas to another person who intends to export that gas from Australia.

¹ The requirements to provide EOIs, offers and gas supply agreements are subject to the ACCC making a determination under the Code.

The ACCC may disclose information collected under the Code to the Minister administering Part IVBB of the Act (currently the Treasurer), the Minister for Climate Change and Energy, the Resources Minister, the Industry Minister and their departments for use in administration of the Code, the Australian Domestic Gas Security Mechanism and development of relevant policy, without the need to re-collect the information and impose additional regulatory burden.

The ACCC considers that the transparency and reporting framework established under the Code should improve transparency and the bargaining power of gas users, and support the purpose of the Code to facilitate a well-functioning domestic wholesale gas market with adequate gas supply at reasonable prices and on reasonable terms.

Yours sincerely



Mick Keogh
Acting Chair
Australian Competition and Consumer Commission