



Australian Government

**Department of Climate Change, Energy,
the Environment and Water**

Mandatory code of conduct for the east coast gas market

Consultation paper

April 2023

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1. Summary

On 9 December 2022, the Prime Minister announced a suite of measures to shield Australian families and businesses from the worst impacts of predicted energy price spikes caused by Russia's illegal invasion of Ukraine and the consequent pressure on global energy markets.

These measures included introducing a mandatory code of conduct for the wholesale gas market with a central objective of facilitating a well-functioning domestic east coast gas market with adequate supply at reasonable prices and on reasonable terms for both producers and consumers.

An initial consultation process ran from 9 December 2022 to 7 February 2023, with over 60 stakeholder submissions received. This included practical feedback from experiences implementing the previous Voluntary Code of Conduct, as well as observations on how to implement the proposed policy objectives in a manner that promotes policy certainty and stability.

This feedback has informed the detailed design of the draft Competition and Consumer (Gas Market Code) Regulations 2023 (the Code) which is the focus for this round of consultation.

The Government now invites feedback on the proposed approach which has the following features:

- The code will ensure domestic prices are reasonable by establishing a price anchor through:
 - a price cap, initially set at \$12/GJ.
 - conditional exemptions from the price cap for producers on the basis of satisfactory voluntary enforceable supply commitments or being a small producer who exclusively supplies the domestic market.
- The code will ensure negotiations between users and producers take place on a level playing field by introducing conduct requirements.
 - These provisions will apply to all gas producers and address bargaining power imbalances between producers and gas users and establish minimum conduct and process standards for commercial negotiations.
- A strong penalty regime will be enforced by the ACCC to ensure compliance with the Code, including compliance with the full conditions of any supply commitments entered into by producers.
- Gas producers will be required to publish details on the uncontracted gas they have available and when this would be brought to the domestic market over the forward 12 months to provide greater market transparency.

The proposed approach establishes a clear price anchor, incentivises producers to commit more gas to the domestic market and supports good faith negotiations so gas users can secure gas supply contracts at reasonable prices. It also supports producers to continue to meet their existing contractual obligations, including long-term foundational contracts with international partners.

The approach to implementing reasonable pricing outlined in this consultation paper and draft code improves upon the approach outlined in the December 2022 consultation paper, following

substantial consultation with gas producers and users. In particular, it is proposed that reasonable pricing is implemented using a price anchor and supply commitments, instead of relying on binding arbitration, as was proposed in December 2022. This implementation improvement is considered to provide greater certainty to gas market participants.

The Government is seeking views from gas market participants on this approach, including the merits of the proposed approach to reasonable pricing relative to the original framework proposed in December 2022, as well as submissions from large gas providers on the supply and price commitments they would be prepared to make in the context of the proposed exemption framework.

Submissions from stakeholders are sought by **5pm AEST, 12 May 2023**, and can be made via the [Department of Climate Change, Energy, the Environment and Water Consultation Hub](#).

Large gas producers are asked to make submissions on the supply and price commitments they would be prepared to make in the context of the proposed exemption framework by **5pm AEST, 8 May 2023**, to facilitate consideration ahead of the conclusion of the consultation period.

Submissions will be shared with other Commonwealth agencies including the Treasury, the Department of Industry, Science and Resources, and the Australian Competition and Consumer Commission where necessary for the purposes of this consultation. All information (including name and address details) contained in submissions will be made available to the public on the Department of Climate Change, Energy, the Environment and Water and Treasury websites, except where stakeholders indicate that all or part of a submission is to remain in confidence. Legal requirements, such as those imposed by the *Freedom of Information Act 1982*, may affect the confidentiality of your submission.

Enquiries relating to this consultation process can be directed to gasmandatorycode@dcceew.gov.au.

2. Policy context

Russia's invasion of Ukraine in February 2022 upended global gas markets and led to sustained high international gas prices throughout 2022.

The current energy crisis was unforeseen and its economic impact on Australia and comparable countries has been considerable. European gas prices peaked at over \$120/GJ in September 2022 with the North East Asia price also rising above \$90/GJ in that month. While international prices have since moderated, ACCC's netback price analysis indicates that they will likely average around \$20/GJ for the next two years and volatility in international energy prices will continue while global uncertainty remains.

The Government responded to these pressures in December 2022 with the imposition of a temporary domestic gas price cap on supply from existing fields and by launching consultations on a Mandatory Gas Code of Conduct with price and conduct provisions.

2.1 Policy objectives

The policy objectives for the code include:

- Addressing bargaining power imbalances between producers and buyers in the domestic wholesale gas market;
- Providing a framework to ensure that domestic prices reflect reasonable levels governed by Australian market fundamentals; and
- Maintaining incentives for investment in supply sufficient to meet ongoing demand.

To achieve these policy objectives, the following criteria have been considered in designing the code:

- Being effective at ensuring that domestic wholesale gas prices are reasonable.
- Being targeted and fit-for purpose, to minimise any distortionary impacts in energy markets and related markets.
- Allowing producers to make a reasonable return on investments, retain incentives for investment and ensure sufficient domestic supply and diversity of producers.
- Being capable of implementation in a clear, workable way which provides certainty and allows for a functioning gas market.
- Allowing producers to continue to meet their existing contractual obligations, including long-term foundational contracts with international partners.
- Allowing consumers to access gas at reasonable prices governed by Australian market fundamentals, as well as on reasonable contract terms.
- Supporting Australia's emissions reduction target and the transition of our domestic energy markets.

The proposed code has drawn on these criteria and feedback received during the first round of consultation.

3. Scope of code and conduct provisions

3.1 Proposed scope of application of the code

Following consideration of stakeholder feedback, it is proposed that the Code cover new wholesale supply contract negotiations between gas producers and buyers for natural gas in the east coast gas market. Relevant parts of the Code align with the *Competition and Consumer (Gas Market Emergency Price) Order 2022* (Price Order), including its geographic application to the interconnected east coast gas market, with some variation in approach that is outlined below. As per the Price Order, the Code is not proposed to apply to gas exchange transactions on declared wholesale gas markets or short term trading markets, anonymous trades or pre-matched trades on gas exchanges of three days or less.

Supply agreements between gas users and producers sit at the core of the market and – as noted by the ACCC in recent Gas Inquiry reports – the value of gas supplied under these agreements broadly underpins prices paid by end users. Actions which influence the supply and price of gas sold by producers will therefore work directly to address price and supply concerns throughout the east coast gas market.

The Code is not proposed to apply to the sale of gas by retailers and some other intermediaries. The Australian Energy Regulator (AER) has identified the recent 2022 retail price increases have largely been driven by surging wholesale commodity prices. The application of the Code to wholesale level transactions is expected to deliver reasonable prices in new supply agreements which will flow through to retail supply contracts.

The ACCC, the AER and other market bodies will monitor how costs are passed through to retail customers. The Government can consider creating a new code covering retailer sales in a future process should evidence arise that retailers are not offering gas at efficient or competitive prices to users.

3.1.1 Good faith

The good faith framework will apply to both pre-contractual negotiations and post-contractual obligations. The inclusion of obligations to deal in good faith is intended to promote honest and fair dealings between producers and buyers of gas. Deterring a party from acting dishonestly or failing to have regard to the legitimate interests of the other party, and penalising such conduct, is a foundational concept behind several other industry codes made under the *Competition and Consumer Act 2010*.

Consistent with the approach adopted in other good faith provisions in industry codes, the concept of good faith is not defined prescriptively but is broadly drawn from the common law. To provide additional clarity, the Code also includes a list of factors, drawn from the Voluntary Code of Conduct and other industry codes, which can be taken into account when determining whether a producer or buyer has acted in good faith towards the other party. These include the extent to which parties have:

- acted honestly;

- cooperated to achieve the purposes of the agreement;
- not acted arbitrarily, capriciously, unreasonably, recklessly or with ulterior motives;
- acted in a way that constitutes retribution against the other person for past disputes;
- conducted the relationship without duress;
- recognised the need for certainty regarding the risks and costs of supplying or acquiring regulated gas; and
- undermined, or denied the other party, a benefit of any agreement.

A similar approach to that outlined above was considered in the context of the 2021 Attorney General’s Department Inquiry into the use of the term good faith in civil penalty and offence provisions in Commonwealth legislation.¹ The Department’s final report included an overall conclusion that:

“The inquiry did not identify any systemic concerns with the use of the term good faith in civil penalty and criminal offence provisions in Commonwealth legislation. While the term does not have a universally accepted definition and its meaning is largely context and case dependent, the overwhelming feedback from stakeholders was that obligations arising from the term’s use were generally well-understood. The term was also acknowledged across policy areas as effective in determining proscribed conduct where invoked. In addition, stakeholders presented strong views against exhaustive or universal codification across Commonwealth legislation.”

Acting in good faith is a core requirement of the Code, and therefore the maximum penalty for contravening the provision would be set at the highest level of penalties that apply to the Code. Acting in accordance with legitimate commercial interests would not be considered a breach of good faith.

Further guidance on the operation of the good faith framework can be provided by the ACCC through its compliance and enforcement guidance material.

Questions for stakeholders

- Do you have any comment on the proposed approach to ‘good faith’ in the exposure draft Code?
- Are the factors listed in the exposure draft Code appropriate to the gas industry?
- Do you have any alternative or additional suggestions?

3.1.2 Expressions of interest

The Code will impose specific requirements for producer-initiated expression of interest processes. To maintain flexibility, the Code does not mandate that gas must be offered through EOI processes,

¹ Attorney General’s Department (2021). *Inquiry into the use of the term good faith in civil penalty and offence provisions in Commonwealth legislation*.

however, it does require all gas producers to publish information on expected EOI processes, and the amount of uncontracted gas they have available over a 12-month period on their websites, including details on how much of that gas is expected to be offered to the domestic market.

Prescribed requirements for EOI processes will build on those contained in the Voluntary Code of Conduct and are designed to support negotiations between gas producers and buyers in negotiating wholesale gas supply contracts. If producers release an EOI that relates to a proposed supply period of gas for 12 months or longer, the Code prescribes minimum timelines for how long the EOI is open, and maximum timelines for producers to assess the EOI and notify purchasers whether they can progress to negotiation of an agreement and provide an offer. Application of EOI requirements to supply agreements of 12 months or longer, rather than to agreements of lesser duration, is aimed at ensuring the Code requirements are proportional and aligned to the duration of supply.

The proposed requirements aim to build flexibility into the EOI process. In particular, the proposed approach provides more time for producers to assess submissions if the number of applications is high.

Specifically, the Code proposes that:

- EOIs must be published on producers' websites and must include specific information in relation to:
 - Volume of supply;
 - Period of supply;
 - Delivery point;
 - Other key terms and conditions;
 - Tenement information, or location of gas if known at the time of the EOI; and
 - A point of contact for the EOI.
- The 'EOI open period' (the period the EOI remains open for buyers to express interest) runs for a minimum of 20 business days.
- The 'EOI response period' is a maximum 25 business days and starts the day after the end of the gas EOI open period, with the ability to extend to 35 business days if there are more than 24 applications. Within this period, producers must:
 - assess EOI responses received during the EOI open period
 - inform each party that expressed interest in the outcome of the EOI process whether or not they are successful
 - issue either an initial or final offer to a buyer that is successful, depending on the user's requirements (see 3.3.3 and 3.3.4)
- Within the EOI open period and EOI response period:
 - An EOI must not be withdrawn or terminated unless certain limited circumstances arise.
 - If an EOI is withdrawn or terminated, the producer must notify buyers that have expressed interest and publish the withdrawal or termination on their website.

The provisions aim to provide an adequate level of flexibility to parties to an EOI process, while ensuring that parties have sufficient certainty about when these processes will occur, how they will be run, and how outcomes will be communicated.

The Code does not preclude buyer-initiated EOIs or requests for tender. We are seeking feedback on whether or not the process for buyer initiated EOIs should be prescribed within the Code. Good faith provisions would still apply to negotiations for supply arising from these types of processes.

Questions for stakeholders

- Does the proposed approach strike the right balance between prescription and flexibility, and accommodate typical commercial processes?
- Are the proposed EOI timeframes and information requirements suitable?
- Are the circumstances specified in the Code that form the basis on which a producer may withdraw from an EOI process appropriate?
- Is the exclusion of specific timelines and process steps for contracts under 12 months appropriate? Noting good faith provisions apply to contracts under 12 months, are any other protections required?
- Should the Code also prescribe a process and apply civil penalties to buyer-initiated EOIs?
- Do you have any additional comments on what is proposed?

3.1.3 Initial Offer

The notification of successful EOI participants triggers commencement of the 'initial offer' phase of the process.

The Voluntary Code did not make a distinction between an initial offer or a final offer. Feedback from a producer that had sought to comply with the requirements of the Voluntary Code recommended this distinction is made as it more closely resembles a commercial negotiation process and allows for producers and buyers to engage in a 'back-and-forth' prior to finalising an agreement consistent with the needs of both parties. The proposed Code therefore sets out requirements relating to initial and final offer stages.

In the context of an EOI process, the initial offer stage is linked to the outcome of the EOI process. Producers would be required to provide successful EOI participants an initial offer, which includes general supply terms (this could be, for example, in the form of a general term sheet), unless the buyer agrees to receive a final offer and skip the initial offer step. This initial offer would be provided within the EOI response period at the same time as notifying the buyer that they are a successful EOI respondent.

The requirements around initial offers will also apply to bi-lateral negotiations instigated outside an EOI process – that is, the Code will require an offer that constitutes an initial offer (for supply for a period of 12 months or more whether or not it follows an EOI process) to comply with certain requirements.

Under the Code, an initial offer would not constitute a full, executable gas supply agreement but would be a document that forms the basis of subsequent negotiations leading towards entering into such an agreement.

An initial offer will be required to contain specific information.

- The initial offer must specify information including:

- the quantity of the gas proposed to be supplied
- the intended degree of flexibility in determining that quantity (including take or pay conditions or load factor)
- the term (time period) over which the gas is proposed to be supplied
- the proposed delivery point(s)
- the price, price range, price structure and price escalation mechanisms
- if the producer is offering to provide transportation or storage services

The Code also specifies other process requirements in relation to initial offers:

- The initial offer remains open for a minimum of 15 business days, commencing on the day after the offer is made. This period is defined as the ‘initial offer open period’ and is designed to provide sufficient time for the buyer to confirm interest in the producer’s initial offer and negotiate other customised terms.
 - The last day of the initial offer open period must be included in the initial offer (and must be a minimum of 15 business days)
 - These timeframes can be extended by mutual agreement.
 - The timeframes can also be reset if, for example, the buyer seeks further customised conditions which would dictate the issuing of an amended initial offer. If this occurs, the initial offer open period would reset to a further minimum 15 business day period (or longer as specified in the offer).
- An initial offer must not be withdrawn by a producer unless certain circumstances exist:
 - The buyer decides to withdraw from the negotiation process.
 - There is mutual agreement between the producer and buyer to the withdrawal or termination.
 - Where the producer cannot reasonably continue as a result of:
 - a material change in the producer’s circumstances such that the regulated gas in the EOI could not be supplied in the proposed time period, or
 - a material change in the producer’s financial circumstances/business structure that will affect supply.
- If a buyer gives written notice that they are interested in receiving a ‘final offer’ in relation to an initial offer during the initial offer open period this will trigger further ‘final offer’ requirements, including an obligation to issue a final offer to the buyer during the initial offer response period. These requirements are discussed further below.

We are seeking feedback on whether the proposed approach strikes the right balance between prescription and flexibility and accommodates typical commercial processes.

Questions for stakeholders

- Are the proposed timeframes and information requirements for EOIs and initial offers suitable?
- Are there any situations not already reflected in the Code in which a producer would, at the completion of an EOI process (i.e. upon notification of successful EOI applicants), not be in a position to make an initial offer to successful applicants?
- Do the flexibility provisions (i.e. to restart the initial offer clock or allow for extension of timeframes by mutual agreement) support typical commercial negotiations between parties at this stage?

- What circumstances not already reflected in the Code would result in a producer having to withdraw an initial offer?
- Do you have any additional comments on what is proposed?

3.1.4 Final offer

All producers are expected to comply with certain requirements relating to the issue of a final offer covering contracts of 12 months or longer before entering an agreement, even if they did not issue an EOI or initial offer.

A buyer's written acceptance or confirmation of interest in a producer's initial offer commences the final offer phase. Also, following an EOI in which a buyer was found successful, and if agreed by the buyer, a final offer can also be issued without having first issued an initial offer.

The final offer will differ from the initial offer as it must be, by definition, capable of acceptance. That is, it must be in the form of a final contractual agreement containing substantially more detailed information on price, terms and conditions than an initial offer and, if executed, will give rise to a binding agreement to supply gas.

Timeframes are specified for the final offer stage with the aim of ensuring that negotiations are conducted in an efficient and timely manner, while allowing sufficient time for negotiation and other processes required for both a producer to make a final offer and for a buyer to decide whether to accept it. This includes recognising that issuing a final offer may involve senior level decision making or Board processes. The option for additional time to consider a final offer is also allowed for by agreement between the negotiating parties.

The following provisions are proposed for the final offer stage:

- If a buyer confirms interest in receiving a final offer during the initial offer open period, the producer is required to issue the final offer within 30 business days, commencing the day after the buyer confirms they want to receive one. The producer and the buyer can agree in writing to a later date. This period is the initial offer response period. However, if a successful buyer confirms interest in receiving a final offer in relation to an EOI, the producer must issue the final offer during the EOI response period (see 3.3.2).
- The final offer must contain certain information (this aligns with the requirements for an agreement and is broadly consistent with the approach set out in the Voluntary Code).
 - the quantity of gas intended to be supplied;
 - terms and conditions in determining that quantity (including take or pay conditions, delivery points or [load factor]);
 - the intended degree of flexibility in determining that quantity (including take or pay conditions or load factor);
 - the time period over which the gas is intended to be supplied;
 - the price, price structure and price escalation mechanisms intended to apply;
 - if the producer is offering to provide transportation or storage services;
 - circumstances in which the producer or the buyer may vary the terms of an agreement;
 - procedures for resolving disputes under the agreement.

- Commencing the day after the final offer is issued, the buyer will have a minimum of 15 business days to consider and accept the final offer, or to seek further negotiation. This is the final offer open period.
 - The producer must specify the end of the final offer open period in a notice accompanying the final offer. The producer can specify a period that is longer than 15 business days.
 - The specified acceptance period can be further extended by mutual agreement.
 - The timeframes can also be reset if the buyer seeks further changes to the final offer which requires the final offer to be re-issued – this would follow with a further minimum 15 business day response period.
- The producer must not terminate or withdraw the final offer unless certain circumstances are met including:
 - The buyer decides to withdraw
 - There is mutual agreement between the producer and buyer to withdraw
 - Where the producer cannot reasonably continue as a result of:
 - material change in the producer's circumstances such that the regulated gas in the final offer could not be supplied and the producer has made reasonable efforts to make that supply possible, or
 - material change in the producer's financial circumstances/business structure that will affect supply and the producer has made reasonable efforts to make that supply possible.
- If a final offer is withdrawn the producer must notify the buyer.

While the Code specifies a minimum period during which a final offer must remain open for acceptance (which may be extended by mutual agreement), there is no obligation on a buyer to accept such a final offer. However, if the final offer open period lapses without such an agreement, any negotiations that follow are no longer subject to timing requirements in the Code – that is, further 'final offers' could be issued, but those offers would no longer be subject to minimum final offer open period requirements.

Once a buyer agrees to the final offer, the requirements for a final gas supply agreement apply. The Code does not specify timing for this stage on the basis that parties at the final offer stage are well progressed in negotiations and will be motivated to agree a supply arrangement in due course. It should be noted that general good faith provisions will apply to these interactions and final agreements must also comply with the minimum content requirements set out in the Code.

We are seeking feedback on whether the proposed approach strikes the right balance between prescription and flexibility and accommodates typical commercial processes.

Questions for stakeholders

- Is the definition of a final offer and when this stage commences clear?
- Are the proposed timeframes and information requirements for a final offer suitable?
- Do the flexibility provisions (i.e. to restart the clock or allow for extension of timeframes by mutual agreement) support typical commercial negotiations between the parties at this stage?
- Are timing or other operational provisions necessary for the process following acceptance of a final offer and finalisation of a supply agreement?

- Do you have any additional comments on what is proposed?

4. Pricing framework

4.1 Approach to ensuring reasonable prices

The Government's objectives are to achieve adequate domestic supply of gas, at reasonable prices and on reasonable terms, while ensuring Australia delivers on energy supply commitments to trading partners. This consultation paper and draft Code builds on the December consultation paper by providing detail on how reasonable pricing would be implemented.

The draft Gas Code proposes ensuring domestic prices are reasonable by establishing a price anchor of \$12/GJ for commercial negotiations. Together with conduct provisions, the price anchor would be established through:

- A price cap, which is to be set at \$12/GJ and subject to a review commencing by 1 July 2025.
- A process for qualifying for exemptions from it on the basis of making satisfactory enforceable supply commitments, or being a small producer who exclusively supplies the domestic market.

This approach to implementing reasonable pricing improves upon the approach outlined in the December 2022 consultation paper, following substantial consultation with gas producers and users. In particular, the use of the price anchor and binding supply commitments replace the binding arbitration framework proposed in December 2022. This implementation improvement is considered to provide greater certainty to gas market participants.

All producers will be required to publish details on the uncontracted gas they have available and when this would be brought to market over the forward 12 months on 1 January and 1 July each year.

The proposed approach aims to ensure Australian gas prices are driven by Australian market fundamentals and costs, rather than international factors. It will also reduce the cost and improve the timeliness of negotiations for the supply of gas. The approach aims to be flexible to ongoing market dynamics while providing the overarching protection of the price cap for users.

The proposed approach also reflects the importance of providing producers with policy certainty to engage in long term investments. The draft Code allows producers to enter into multi-year enforceable commitments with Government, providing certainty around price regulation.

Together with proposed conduct provisions contained in the Code, the price anchor is expected to significantly improve the users' bargaining position, materially boost gas supply and overcome forecast shortages over the medium term, delivering reasonably priced gas to domestic users. By doing so, this approach will ensure that Australia delivers on energy supply commitments to trading partners and reduce the risk of the Australian Domestic Gas Security Mechanism (ADGSM) being triggered.

4.1.1 Application of the price cap

The Gas Code will include a price cap which will be subject to a review commencing by 1 July 2025, as part of a broader review of the code. It will apply to gas sold in the wholesale contract market within the scope of the Code unless producers qualify for an exemption.

It is proposed the initial price cap level under the Code is maintained at \$12/GJ on the advice of the ACCC and market analysis which indicates that it:

- Balances the importance of affordable gas prices for Australian households and businesses against the need for gas producers to make a reasonable return to continue supplying gas
- Incentivises new investment to ensure the Australian gas market remains well-supplied, and supports affordable market prices in the medium to long term
- Is supported by production cost estimates developed for AEMO's latest Gas Statement of Opportunities (GSOO) for new supply²
- Broadly aligns with the price of gas in the east coast market in late-2021 and early-2022, prior to Russia's invasion of Ukraine driving international and domestic gas prices higher
- Reflects the cost of provision for Australian gas from Australian producers to Australian users, rather than reflecting the international price which, based on ACCC's netback price analysis, will average around \$20/GJ until 2025.

It is proposed that the ongoing responsibility for determining the price would reside with the ACCC. The ACCC will only be able to make a price determination within 2 years of the commencement of the Code if there has been a substantial change in market conditions including price or supply or the Minister for Climate Change and Energy notifies the ACCC that it may make a determination. Similarly, once a determination is made, the ACCC cannot make a further determination within 2 years of the commencement of that determination unless there has been a substantial change in market conditions or the Minister for Climate Change and Energy notifies the ACCC that it may make a determination. This will ensure the Code continues to effectively deliver a reasonable price and support ongoing investment in supply.

In setting the price (undertaking the price determination process), the Code sets out matters to which the ACCC may have regard, including:

- the extent to which the decision would promote:
 - a workably competitive domestic market;
 - the affordability and availability of domestic gas supply;
 - the sufficiency or adequacy of investment in, and production of, natural gas to meet domestic demand.
- the effect or expected effect of other related decisions or government policies;
- any matter the ACCC considers relevant.

In determining the price, the Code will require the ACCC to publish and consult on the proposed price and the reasons for this price. In making a final determination, the ACCC will be required to consider responses to the consultation draft.

² Rystad Energy (2023) for AEMO's Gas Statement of Opportunities March 2023 at <https://aemo.com.au/en/energy-systems/gas/gas-forecasting-and-planning/gas-statement-of-opportunities-gsoo>

Questions for stakeholders

- Do you think the proposed approach will support the adequate supply of gas to the domestic market, at reasonable prices and on reasonable terms over the short and longer term, and how does this compare to the approach outlined in the December 2022 consultation paper?
- Do you think the price cap set at \$12/GJ is appropriate to achieve this objective?
- Do you have any comments on how price reviews are conducted?
- Do you have any other comments?

4.1.2 Exemptions from the price cap

An exemptions framework is proposed to incentivise producers to supply gas to the domestic market in a manner which supports the achievement of reasonable prices for domestic gas users.

4.1.2.1 Conditional exemptions

Large producers, defined as those who produced at least 100PJ of gas in the preceding financial year, and small producers who sell some of their supply for export will be eligible to apply for an exemption from the Code's pricing provisions if they negotiate a satisfactory enforceable domestic supply commitment. These commitments could include conditions relating to volume, price, new production, conditions on how gas is offered to the market or other similar matters. Unlike the commitments to *offer* gas made through the Heads of Agreement process, domestic supply commitments would need to involve firm commitments to *supply* gas in order to be considered satisfactory.

The Minister for Climate Change and Energy and the Minister for Resources (the Ministers) would be jointly responsible for determining whether and on what basis to grant a conditional exemption. In considering an exemption, the Ministers would be required to consult with the Treasurer, Minister for Industry and the ACCC, and may have regard to a range of factors including:

- the extent to which the decision would promote:
 - a workably competitive domestic market;
 - the affordability and availability of domestic gas supply;
 - the sufficiency or adequacy of investment in, and production of, natural gas to meet domestic demand.
- the effect or expected effect of other related decisions, government policies and impact on trade and exports;
- any other matter considered relevant.

If the Ministers grant a conditional exemption it must be for a minimum of 12 months but may be granted for a longer period. If the producer has been granted a conditional exemption, it must report to the ACCC every quarter starting from when the exemption is granted, with evidence of compliance with the relevant conditions of the exemption.

To facilitate transparency and competition in the market the ACCC will publish the name of a producer to whom a conditional exemption has been granted, including the period of time for which the exemption has been granted, conditions that have been imposed on the exemption and whether an exemption has been revoked. The ACCC will not be permitted to publish information that substantially prejudices the commercial interests of a producer and is not in the public interest.

A failure to meet the voluntary domestic supply commitment by a gas producer would be subject to the loss of the conditional exemption and subsequent application of the price cap, penalties for non-compliance and other compliance avenues available to the ACCC under the Competition and Consumer Act (i.e. court enforceable undertakings). This will provide assurance that those commitments will be delivered and ensure that the east coast gas market is well-supplied with reasonably priced gas.

The Ministers or their departments may also publish a summary of the total annual domestic supply commitments made by gas producers. This aggregated information will serve to inform the market of the domestic supply commitments made for each calendar year to enable efficient market operation and planning.

4.1.2.2 Automatic exemptions

Small gas producers, defined as those who produced less than 100PJ of gas in the financial year preceding the commencement of the Code, would be deemed to be automatically exempt from the price cap if they also provide gas exclusively to the domestic market. This is because such supply contributions automatically support the reasonable pricing dynamics in the domestic market by increasing competition and market diversity.

Through its recent Gas Inquiry reports, the ACCC has emphasised the high degree of producer concentration in the east coast gas market and the importance of more effective competition and producer diversity for improving price and other supply outcomes for buyers.³ Small producers have strong incentives to negotiate reasonable prices with domestic users, do not wield market power and most have limited scope to supply the international market. The 100 PJ threshold reflects an observed step-difference in production volumes between the majority of smaller producers and a cohort of very large producers who have the production capacity and portfolio flexibility to address domestic market supply needs.

After registering with the ACCC that they are eligible for this exemption, these producers would be listed on a public register and automatically granted an exemption from the price cap each year. Producers will have an ongoing obligation to notify the ACCC of any change of circumstances which would make them ineligible for this exemption – for example, not selling exclusively to the domestic market.

A producer will lose their eligibility for an automatic exemption if they enter an agreement after the Code is in place with a company that intends to export the gas supplied under the agreement, or that exports gas supplied under the agreement after it has been executed. A producer would be subject to a positive and ongoing obligation to notify the ACCC as soon as practicable if this was the case.

Small producers that had entered into a contract for supply with an exporter (e.g. supply intended for export) prior to the commencement of the Code will retain eligibility to be automatically exempt

³ ACCC reported that the top five east coast producers accounted for 85 per cent of domestic gas production in 2021, and held 83 per cent of 2P reserves. ACCC *Gas Inquiry*, July 2022 interim report.

unless a further contract is struck with an exporter following commencement of the Code or pre-existing volume commitments are increased.

Examples of how the Exemption framework will apply

Producer A – Producer A has production interests in offshore Victoria with around 20 PJs of annual production which is sold entirely to buyers for domestic consumption (either for sale to retailers, commercial and industrial customers or for gas powered generation). As this producer is under the 100 PJs threshold and only sells to domestic customers, they are automatically deemed to be exempt from the price cap. Producer A is required to provide information to the ACCC on its eligibility for this exemption.

Producer B – Producer B has production interests in a number of gas fields across eastern Australia. It has production of around 20 PJs, sells gas to buyers in the domestic market and also sells gas to one of the LNG export projects at Gladstone. In this case, while Producer B's production is well under the 100 PJs threshold, they are selling gas to an LNG exporter. Producer B will not qualify for an automatic exemption to the price cap and will have to apply for a conditional exemption to the price cap under the process set out in the Code or comply with the price cap.

Producer C – Producer C has over 100 PJs of annual gas production. Producer C could sell all production to the domestic market, some production to the domestic market and some production to an LNG exporter or supply all of its production for LNG exports. As production exceeds the 100 PJ threshold, it will be required to seek a conditional exemption or comply with the price cap.

Questions for stakeholders

- Are the criteria and process for qualifying for exemptions clearly defined?
- Are the factors Ministers may consider in granting an exemption appropriate?
- Do you have any comments on what information should be published by the ACCC in relation to producers who are granted exemptions?
- Do you have any other comments?

5. Implementation and enforcement

5.1 Implementation timing and transitional arrangements

It is proposed the Mandatory Code will come into force in early June 2023. This includes:

- the conduct provisions governing the interaction between gas producers and buyers in relation to negotiations that commence after the Code commences;
- the automatic exemption for small gas producers providing all of their gas to the domestic market; and
- the opportunity for large gas producers and producers that sell to LNG exporters to seek a voluntary conditional exemption from the price obligations on the basis that they comply with conditions that reflect commitments.

It is proposed the new pricing requirement arrangements would apply once the current Price Order expires on 22 December 2023. If companies enter into an agreement under the Price Order prior to it ceasing, the Price Order would apply for gas supplied until 22 December 2023. For gas contracted for supply after 22 December 2023, the new pricing requirements in the Code would apply. Gas producers will have time to apply for an exemption to the new pricing arrangements, where applicable, to support 2024 contracting.

The Code will not retrospectively apply to contracts. Thus, agreements entered into prior to implementation of the Code will be unaffected by Code provisions once implemented.

Provisions in the Code will also enable negotiating processes that commenced prior to the Code to be concluded. Specifically, this includes initial or final offers made on or after the commencement of the Code if the offer relates to a process commenced before the commencement of the Code.

Automatic exemptions would apply immediately, but as outlined above would require small producers to register with the ACCC. Producers who are seeking a conditional exemption would apply to the Department of Climate Change, Energy, the Environment and Water for consideration by the Minister for Climate Change and Energy and Minister for Resources.

Questions for stakeholders

- Do you see any issues with the proposal to apply the new pricing rules after the current price cap arrangements contained in the Competition and Consumer (Gas Market Emergency Price) Order 2022 (Price Order) expire in December 2023?
- Should additional transitional arrangements be considered to ensure contract negotiations for new supply are not impacted?
- Do you have any other comments?

5.2 Reporting and record keeping

The Code includes reporting and record keeping requirements to support compliance monitoring and enforcement activities.

Producers will be required to publish the following on their website in an accessible manner and in a legible, prominent and unambiguous way:

- planned EOIs in the coming 12 months, and where known, the volumes and supply periods of those EOIs
- the volumes of uncontracted gas likely to be available in the next 12 months, including:
 - when, and how much they will be offering to the domestic market;
 - if known, where the gas that will be offered will be produced (i.e. the location, this may be a specific field etc.)

Producers will have to publish this information on 1 January and 1 July each year, starting in 2024.

Producers will be required to keep records, in writing, recording details regarding the following:

- all documents and information exchanged with a buyer relating to an EOI, initial offer or final offer (whether or not they reach an agreement) and negotiations relating to the supply of regulated gas with a buyer more broadly, including reasons why an agreement is not reached. This should include every version of an initial or final offer, including variations.
- any other documents or information relating to the supply/ price or marketing of regulated gas.

Questions for stakeholders

- Do you have any comments on the proposed reporting and record keeping requirements.

5.3 Penalties

5.3.1 Civil penalties

Under the *Competition and Consumer Act 2010*, enforcement options for contravention of relevant provisions of Part IVBB or a gas market instrument (such as the gas code) include civil penalties, infringement notices and orders. The framework for penalties and remedies is set out under Part VI of the *Competition and Consumer Act 2010*.

The Act provides that the Code may specify that a civil penalty applies to breaches of the rules. Where a civil penalty does apply, the relevant provision of the Code may specify a lower penalty amount than the default maximum. If the Code does not specify an amount, then the default maximum civil penalty for an individual is \$2,500,000, while the maximum for a body corporate is the greatest of:

- \$50 million;
- If the court can determine the value of the benefit obtained – three times the value of that benefit; and
- If the court cannot determine the value of the benefit obtained – 30% of the body corporate's adjusted turnover during the breach turnover period of the offence, act or omission.

This is the 1st tier of penalties under the Code. These penalties are consistent with the maximum penalties available in the *Competition and Consumer Act 2010* to deter anticompetitive behaviour and unfair activity. Those penalties were increased last year through the *Treasury Laws Amendment (More Competition, Better Prices) Act 2022*.

The above level of maximum penalties is also consistent with the maximum penalty that applies for breaching the Price Order and with the most significant penalties (including for good faith dealings) that apply in the news media and digital platforms mandatory bargaining code in Part IVBA of the *Competition and Consumer Act 2010*

Infringement notices are available as an alternative to civil penalties for use by the ACCC in relation to civil penalty provisions of the Code (other than in relation to good faith provisions) with a maximum penalty of 600 penalty units⁴ (currently \$165,000) for a body corporate and 60 penalty units (currently \$16,500) for an individual.

It is proposed that the following provisions have 1st tier civil penalties set at the default maximum, given they are core to ensuring the effectiveness of the Code:

- 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 a relevant automatic or conditional exemption)
- failing to comply with a condition imposed as part of an exemption from the Code's pricing requirements

Lower levels of maximum penalties will also apply to provisions where specified in the Code.

A 2nd tier of penalties of a maximum 6,000 penalty units (\$1.65 million) for a body corporate, and 1,200 penalty units (\$330,000) for an individual is proposed to apply to process requirements in relation to the negotiation process (EOI, initial offer, final offer).

A 3rd tier of penalties of a maximum 3,000 penalty units (\$825,000) for body corporates and 600 penalty units (\$165,000) for individuals will apply to requirements to publish information to provide transparency, keep records or to provide information to a regulator. This aligns with the penalties for non-compliance with ACCC information notices and false or misleading information in response to such notices under Part IVBB of the *Competition and Consumer Act 2010*.

The above maximum penalties are appropriate given the need to encourage compliance with the Code, noting the size of industry participants and the need for penalties to not be seen as a cost of doing business. Penalties are ultimately set by the Court, who will have discretion to set an appropriate penalty, within the limits prescribed, taking into account a range of case specific factors including the scale and egregiousness of the offence.

5.3.2 Court enforceable undertakings

The framework is intended to enable the ACCC to use its section 87B powers in the Competition and Consumer Act 2010 to accept an undertaking in relation to supply commitments provided as a condition to an exemption.

⁴ A penalty unit is currently \$275 and is subject to indexation.

Where an undertaking is provided to the ACCC this will enable the ACCC to apply to a Court directly for an order, including an order directing producers to comply with the undertaking, if they are considered by the ACCC to have breached the terms of the undertaking.

Questions for stakeholders

- Do you agree with the maximum penalties in the Code, including the allocation of provisions among the three penalty tiers?
- Do you have any other comments on enforcement regimes?

6. Review mechanism

6.1 Proposed review mechanism

The conduct provisions of the Mandatory Code are intended to be enduring. A review mechanism will be built into the Code to enable the Government to initiate a review of the operation of the Code to ensure it remains fit for purpose.

The review mechanism provides a basis to consider the merits of refining, strengthening or disabling aspects of the Code if they are no longer relevant or not achieving the Government's objectives of adequate supply, at a reasonable price on reasonable terms.

For example, improvements in market conditions may give rise to questions about whether the price control mechanisms remain relevant. The review mechanism enables aspects such as price controls to be modified or disabled.

The Code will mandate that a first review commence in the second half of 2025 but allows for the Minister for Climate Change and Energy and the Minister for Resources to initiate a review sooner (in consultation with the Minister for Industry and the Treasurer). Following the first review, the Ministers (again in consultation with other Ministers) could then initiate a review at any time. The Code specifies the review could be done by the ACCC or by a reviewer specified by the Ministers.

The review would include opportunities for interested parties to make written submissions, with a written report of the review provided to the Ministers.

Questions for stakeholders

- Do you agree a review mechanism is required and the proposed frequency is appropriate?
- What conditions would warrant a review being triggered?
- Do you have any other comments?