

## AEMC Rule Change request

Dispute resolution process under Part 15C and Compensation arrangements under the East Coast Gas System framework

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## Rule change proponents

The Honourable Chris Bowen MP, Minister for Climate Change and Energy

Address: c/o the Department of Climate Change, Energy, The Environment and Water

PO Box 6022

House of Representatives

Parliament House

Canberra ACT 2600

## Summary

In accordance with s 295 of the *National Gas Law* (NGL), I, the Hon Chris Bowen MP, Minister for Climate Change and Energy, request on behalf of the Energy Ministers' Sub-Group (EMSG) that the Australian Energy Market Commission (AEMC) consider making changes to the *National Gas Rules* (NGR) covering provisions contained in and related to Parts 15C and Part 27 Division 6 of the NGR. I lodge this request in my capacity as the chair of the EMSG. This request is developed in agreement with Ministers from each state and territory with portfolio responsibility for climate change and energy.

This request seeks amendments to the NGR with the aim of:

- refining the compensation and dispute resolution frameworks to provide clear and consistent arrangements so that the gas sector operates efficiently and effectively for the long-term interest of consumers;
- making any necessary changes to the Part 15C dispute resolution framework so it can be more effectively applied to assessment of compensation claims across various parts of the NGR where compensation claims may arise (e.g. Part 27 and Part 19);
- considering any bespoke amendments to the [East Coast Gas System Framework](#) (the ECGS framework) compensation arrangements (i.e. Part 27 Division 6) so it is fit for purpose; and
- consider, in light of any changes to the ECGS compensation framework, whether and to what extent consequential changes to other parts of the east coast gas market (such as the DWGM framework) may be required where appropriate, reflecting the differences in the operation of the different markets in the east coast gas system.

## Background and overview of proposed rule change request

On 12 August 2022, Energy Ministers agreed to take a range of actions to support a more secure, resilient and flexible east coast gas market, including the implementation of a reliability and supply adequacy framework that could be used to identify and respond to reliability and supply adequacy threats and better manage periods of volatility.<sup>1</sup>

Energy Ministers agreed to prioritise, as a matter of urgency, those elements of the framework required to enable AEMO to manage a projected supply shortfall in 2023.<sup>2</sup> In keeping with this, the reliability and supply adequacy framework is being developed in two stages, with:

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<sup>1</sup> Energy Ministers, Priority reforms for a more secure, resilient and flexible east coast gas market, 12 August 2022.

<sup>2</sup> *ibid*, p. 2.

- Stage 1 focused on ensuring AEMO can monitor and communicate emerging threats to the reliability and adequacy of gas supply and to respond to any such threats, including through powers of intervention if required; and
- Stage 2 focused on further measures to guide and frame how AEMO approaches its new functions and facilitate more efficient responses by market participants.

Energy Ministers agreed to this package of reforms under stage 1 on 15 February 2023, with Rules under this framework expected to be introduced in April 2023 or soon thereafter.

As noted in the 2022 ECGS framework [consultation paper](#), the initial set of ECGS amendment rules is a first step in the broader east coast gas system regulatory reform, with refinements expected to ensure the effective operation of the initial rules – this rule change request is part of this process.

A key element of the ECGS framework is the ability for AEMO to issue directions to relevant entities to the extent AEMO considers necessary to maintain and improve the reliability or adequacy of gas supply within the east coast gas system. Given the range of reliability or supply adequacy issues that could arise in future, the directions framework is necessarily broad. That is, AEMO is empowered to take a wide range of actions to ensure reliability and supply adequacy. For example, AEMO could seek to direct an entity to fill natural gas storage facilities, inject gas into the network, make transport capacity available or refrain from certain actions.

The ECGS framework is designed to ensure directions are not issued without due consideration of the consequences and minimising impacts. For example, AEMO must engage with entities before issuing a direction unless there is no time to do so in the context of a reliability or supply adequacy threat. However, it is recognised that the act of issuing directions to support the operation of the broader east coast gas system could impact disproportionately on specific market participants. That is, a gas market participant may be directed to take specific actions by AEMO that supports the operation of the overall system, but in complying with that direction the participant may be exposed to some financial loss. To that end, the ECGS framework contains a framework that aims to provide a mechanism to compensate those detrimentally impacted if AEMO issues a direction.

The ECGS compensation framework is set out in Part 27, Division 6 of the amended NGR. It broadly follows the existing DWGM compensation arrangements set out in Part 19, with the intention that, given the role of AEMO in the DWGM and ECGS frameworks is similar, the compensation framework arrangements should be consistent to the extent appropriate. For context, an outline of the existing compensations arrangements under the DWGM and ECGS framework is provided below.

#### **Outline of existing compensation arrangements under the DWGM**

- The DWGM allows a registered participant that suffers detriment through a market intervention (see rule 343) or in respect of application of administered price cap (see rule 350) to submit a claim for compensation for direct costs (see rule 237), with claims for compensation considered by dispute resolution panel that is established consistent with Part 15C of the NGR.
- The dispute resolution panel must make a determination on the amount of compensation to be paid to a Registered participant by AEMO, and the amount of funds to be collected by AEMO from Market Participants and the declared transmission system service provider to fund compensation payments (see rule 238).

- AEMO must make compensation procedures (see r237(10)) that describe the principles and methodology upon which the dispute resolution panel must use in determining compensation amounts under rule 238.

### **Outline of compensation arrangements under the ECGS framework**

- A relevant entity<sup>3</sup> may make a written compensation claim<sup>4</sup> (known as a notice of compensation) for financial detriment<sup>5</sup> exceeding \$5000 suffered by the relevant entity as a direct result of AEMO issuing an east coast gas system direction under s91AF of the NGL (see r704).
  - The notice of compensation (the claim) must be given to AEMO within 20 business days after the last day on which the relevant entity suffers the detriment, and contains information specified in the Procedures.
  - The following matters are non-claimable:
    - Loss of profit or opportunity; and
    - Indirect or consequential loss.
- Within 10 business days of receiving the notice, AEMO must (see r706(1)):
  - Request the Adviser<sup>6</sup> to establish a dispute resolution panel (DRP);
  - Refer the claim to the Adviser for determination by the DRP; and
  - Provide details of the nature of the claim to the Adviser.
- Within 5 business days of receiving the AEMO request, the Adviser must (see r706(2)):
  - Establish the DRP and provide details of the nature of the claim to the DRP;
- On referral of the claim, the DRP must (see r706(3)):
  - make a determination; and
  - notify the claimant and AEMO of the determination as soon as practicable, but no later than 30 business days after the information is provided to the panel.<sup>7</sup>
- In determining the amount of compensation payable by AEMO to the claimant, the DRP must have regard to (see r707(2)):
  - Whether the claimant failed to take reasonable action to mitigate the loss for which compensation is being claimed; or
  - The actions of the claimant (both before and after the direction was issued) contributed to or exacerbated the amount of compensation being claimed; or
  - The claimant received funds, payments, compensation or another financial benefit for undertaking the activity required by the direction.
- AEMO must make procedures to describe the manner, form and methodology of payments made by relevant entities to AEMO to recover the costs of compensation the DRP determines is payable. (see r707(8)-(10)).
  - In doing so, AEMO must have regard to minimising inequitable distributional cost impacts to the extent possible.

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<sup>3</sup> Has the meaning given in s91AF(8) of the NGL.

<sup>4</sup> A compensation claim notified under r704 is taken to be a relevant dispute to which the parties are AEMO and the relevant entity who gave AEMO the notice of compensation.

<sup>5</sup> Specified under r704(1) and (b) of the NGR, and determined by reference to matters set out under r704(5) of the NGR.

<sup>6</sup> Means a dispute resolution adviser appointed under r135G of the NGR. The is known as the [wholesale energy market dispute resolution adviser \(WEMDRA\)](#).

<sup>7</sup> This timeframe could be extended by the Adviser on the request of the DRP.

- AEMO must consult with the AEMC and the AER on the making of these Procedures.

In developing this framework, Energy Ministers aimed to ensure that:

- the governance arrangements for assessment of compensation claims, which are based on the dispute resolution panel process in Part 15C of the NGR that also applies to the DWGM, operated effectively for the purposes of the ECGS;
- the framework settings, including its application, operation and constraints, fairly balanced the competing priorities of the compensation framework, ensured procedural fairness and mitigated legal risks and issues associated with compensation claims; and
- the framework operated with sufficient transparency and simplicity, particularly in relation to the likely outcomes of a compensation claim process.

Given the accelerated development of the ECGS framework ahead of winter 2023, we now have opportunity to further consider the requirements outlined above. Additionally, utilising the dispute resolution framework under Part 15C as the foundation for the ECGS compensation framework creates a number of potential constraints as outlined below. For context, background information about the Part 15C framework and the wholesale energy market dispute resolution adviser (WEMDRA) is provided in **Attachment A**.

The ECGS compensation framework sets out a role for an independent third-party assessment panel (known as the DRP) in determining claims. The rules setting out the arrangements for establishing the DRP and its roles, responsibilities and limitations are drawn from Part 15C of the NGR (which is also deployed in relation to compensation claims under the DWGM rules), but with a significant number of variations. The need for variations and additional rules to disapply the provisions of Part 15C arise primarily because Part 15C is designed as a framework for the resolution of disputes. That is, while the resolution of a compensation claim benefits from the involvement of an independent third party, it does not necessarily have the tenor of characteristics of a dispute – the role and considerations of the third party in the context of a compensation claim can potentially be inconsistent with the role of a dispute resolution body. See Statement of Issues #1 for more detail.

Other matters that may be of merit for AEMC to consider any necessary rule changes include the scope of application of compensation framework, and the funding of compensation claims and framework. See Statement of Issues #2-3 for more detail.

To that end, it is considered appropriate to task the AEMC to consider making any necessary amendments to Part 15C so its utility can extend beyond current dispute resolution processes to more effectively cover compensation claims under the ECGS framework. This will necessitate consequential amendments to align the DWGM compensation framework to the extent appropriate, reflecting differences between the operation of the DWGM and the rest of the east coast gas system. The AEMC may also consider if amendments to the ECGS compensation framework should be made to ensure it is fit for purpose, should the AEMC consider it appropriate and beneficial to do so.

As set out in the Summary section, this rule change request seeks for AEMC to consider the best approach for the ECGS compensation arrangements and make necessary rule changes to rectify any potential deficiencies described in this request, through a combination of amendments to Part 15C

and/or Part 27 of the NGR and consider any consequential amendments to other Parts of the NGR where appropriate.

In considering this rule change request, Energy Ministers request the AEMC refine the NGR to:

- ensure the procedural and governance arrangements under the ECGS compensation framework are fit for purpose – this may entail amending the Part 15C framework or the development of a new framework separate to Part 15C;
- provide reasonable and proportionate access to compensation to parties detrimentally affected by AEMO’s exercise of directions powers under the ECGS framework;
- sufficiently incentivise behaviour that supports system reliability or adequacy through the compensation framework;
- ensure the compensation framework is sustainable – that is, access to compensation and the quantum of payments is subject to appropriate limits;
- provide funding arrangements for compensation payments that are fair and equitable given the nature of claims made and the role and circumstances of the relevant market participants required to fund the compensation claims.

Additionally, in addressing this rule change request, the AEMC should consider the following issues in consultation with industry, jurisdictions and other stakeholders:

- scope of application of the framework and the eligibility of claims in different scenarios;
- the appropriateness of governance and procedural requirements for the ECGS compensation framework;
- approaches to the equitable funding of compensation claims.

As there are differences in how the DWGM operates from the rest of the east coast gas market, it is expected that the AEMC will engage with jurisdictions in developing the rule change, to ensure that it accommodates the differences in how the gas markets operate in the adoptive jurisdictions while seeking to achieve the above objectives.

## Timing of implementation

It is anticipated AEMO’s directions powers, and resulting potential compensation claims, will most likely occur during winter peak periods when supply shortfall risks are the highest. Therefore, the interim compensation arrangements under the new framework (as set out in the initial rules) will apply from winter 2023.

Energy Ministers consider that the resolution of necessary rule changes under this process will ideally be completed and operationalised before winter 2024 if possible, ahead of possible supply shortfall risks.

High level policy design of the phase 2 gas reliability and supply adequacy reforms (phase 2 reform) is being developed with industry consultation anticipated in Q2 2023 and recommendations to Ministers in Q3 2023. As the phase 2 reform measures are further developed, Energy Senior Officials will consider whether there are any linkages to the compensation arrangements and dispute resolution framework and engage with the AEMC accordingly.

## Statement of issues

The EMSG has identified some aspects of the current compensation and dispute resolution framework that are not fully consistent with providing a framework that is clear, effective and enables appropriate compensation to be provided to market participants. Further information on these concerns that the EMSG seeks the AEMC to address in the rule change process are set out below:

### 1. Appropriate governance and procedural arrangements

The ECGS compensation framework sets out a role for an assessment panel in determining claims. Broadly, that role involves:

- Assessing the merits of a compensation claim (in accordance with the rules etc) and determine whether it is appropriate for compensation to be paid to a claimant;
- if the panel determines it is appropriate for compensation to be paid, determining the amounts of compensation to be paid by AEMO to the claimant; and
- notifying the claimant and AEMO of the determination within the timeframe provided for in the NGR.

The rules setting out the arrangements for establishing the panel and its roles, responsibilities and limitations are drawn from Part 15C of the NGR (which is also deployed in relation to compensation claims under the DWGM rules), but with a significant number of variations and limitations imposed to the original drafting. For example, a number of provisions in Part 15C are switched off when deployed in relation to Part 27.

This is necessary because Part 15C is designed as a framework for the resolution of disputes whereas Part 27 is established to manage a compensation claims assessment process. While both processes involve a third party assessment panel, under Part 27 the 'dispute' or compensation claim is not between two parties requiring independent mediation (as is the case under Part 15C), but between AEMO and an affected party (the claimant) who seek an expert assessment of liability and causality to establish potential compensation payments.

As the governance and procedural requirements of the compensation framework are partially tied to Part 15C, it is proposed the AEMC re-examine the governance and procedural approaches to ensure an optimal governance structure for determining compensation claims, with the view to ensuring the stated policy objectives are achieved.

In assessing and amending the current rules, the AEMC should consider:

- whether Part 15C should be amended or if a separate compensation framework should be developed to more effectively handle compensation arrangements set out under the relevant parts of the NGR (such as Part 27 and Part 19).
  - this should consider the roles of entities like the 'Adviser' and the 'Dispute Resolution Panel' (DRP) as currently defined in Part 15C – to determine whether and to what extent the roles of these entities are appropriate to the Part 27 and Part 19 compensation frameworks. For example, does the assessment of compensation claims require panel members with specialised expertise in compensation matters that are different to Part 15C panel members who have expertise in dispute resolution; and
- whether administration and process changes should be considered in the context of compensation arrangements compared to Part 15C, including:

- the time within which claims are made, considered, and determined;
- the time within which claims are referred to an Adviser and when a DRP must be established;
- the scope of powers of the entity responsible for determining compensation claims, including:
  - the ability to call on third parties or rely on information sourced from claimants or others;
  - the ability to join compensation claims.

Under Part 15C dispute resolution process, there are two stages of dispute resolution:

Stage 1:

- is designed to enable participants to resolve issues commercially on a without prejudice basis;
- allows the adviser (WEMDRA) to assist this process by facilitating meetings, or providing non-binding expert view on the issues under dispute;
- provides a framework to allow for escalation to stage 2 if required.

Stage 2:

- is designed to provide for escalation from Stage 1 where matters cannot be resolved;
- provides the opportunity for issues to be decided by an expert or panel of experts (DRP) which are binding on both parties to the dispute;
- allows WEMDRA to provide case management assistance, with the level of assistance dependent on the nature of the dispute.
- Within 30 business days of being served a Stage 2 notice, the adviser attempt to resolve the relevant dispute, or refer the relevant dispute to a DRP for determination.

In comparison, the ECGS compensation framework switches off the 2-stage dispute resolution process and does not provide WEMDRA a formal role to resolve a dispute. This is because in developing the Part 27 compensation framework, it is considered appropriate to provide the role of assessing claims to only the DRP – this is intended to maximise consistency in assessing compensation claims and ensure claims are processed in the most time efficient manner.

Instead, the ECGS compensation framework sets out the below process:

- Within 10 business days of receiving the notice, AEMO must:
  - Request the Adviser<sup>8</sup> to establish a dispute resolution panel (DRP);
  - Refer the claim to the Adviser for determination by the DRP; and
  - Provide details of the nature of the claim to the Adviser.
- Within 5 business days of receiving the AEMO request, the Adviser must:
  - Establish the DRP and provide details of the nature of the claim to the DRP.

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<sup>8</sup> Means a dispute resolution adviser appointed under r135G of the NGR. The is known as the [wholesale energy market dispute resolution adviser \(WEMDRA\)](#).

### *Issues 1.1 – Role of adviser and timeframe to establish a dispute resolution panel*

The AER<sup>9</sup> suggested that, in relation to the ECGS compensation framework, the timing for the Adviser to establish a DRP should not be hardwired in the rules, but instead be dependent on relevant entities and AEMO agreeing on the parameters of the claim or notifying the Adviser that such agreement cannot be reached. The AER noted that AEMO and affected parties may require additional time to discuss the nature and scope of the claim with WEMDRA, and for WEMDRA to determine the number and constitution of DRP members. It also noted that WEMDRA sometimes will be simultaneously managing multiple disputes under Part 27 and under other Parts of the NGR and National Electricity Rules (NER). Therefore, the AER suggested the rule could be drafted such that the Adviser is to establish a DRP within 5 business days of the relevant entities and AEMO agreeing on the parameters of compensation or notifying the Adviser such agreement cannot be reached. Alternatively, if it was preferred not to make the timeframe dependent on discussion of these parameters, the AER considered it would be appropriate to provide at least 15 business days for the Adviser to establish a DRP after being notified by AEMO.

In light of the above suggestion, and acknowledging that the ECGS framework does not contemplate a negotiation between AEMO and the claimant on the nature and scope of the claim, Energy Ministers request that the AEMC consider whether rule changes may be needed to:

- Establish a mechanism for a claimant to agree on the scope of the claim with the Adviser or the DRP. Note the current ECGS framework does not contain any provisions that require the claimant to discuss or agree on the nature and scope of a compensation claim with the Adviser or DRP before the claim is provided to the DRP.
  - If this approach is deemed appropriate, additional time may need to be reflected in the current timeframes, by allowing the Adviser extra time (beyond the 5 business days provided in the ECGS framework) to discuss the nature and scope of the compensation claim with the claimant and AEMO.

Additionally, Energy Ministers request that the AEMC consider whether WEMDRA is the most appropriate entity to oversee compensation claims under the NGR, or if another existing or new entity may be better placed to oversee compensation claims.

Matters for consideration include, but are not limited to:

- Detailed knowledge and experience in overseeing compensation claims processes;
- Good understanding of the natural gas industry or the capacity to acquire a good understanding of the natural gas industry quickly.
- Must not have any material direct or indirect interest or association that compromises, or is likely to compromise, the impartiality of the Adviser in relation to assessing compensation claims.
- Sufficient resourcing to undertake assessment of compensation claims efficiently.

### *Issue 1.2 – Ability for DRP to call on or rely on third party information*

In assessing compensation claims, the DRP (or claims assessor) is not bound by the rules of evidence and may inform itself in any way it thinks fit.<sup>10</sup> The DRP may also issue a direction to require a party

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<sup>9</sup> [https://www.energy.gov.au/sites/default/files/2022-12/Draft%20Regulations%20and%20Rules%20Submission\\_AER.pdf](https://www.energy.gov.au/sites/default/files/2022-12/Draft%20Regulations%20and%20Rules%20Submission_AER.pdf)

<sup>10</sup> R135HF(2) of the NGR applies.

to the compensation claim to provide the DRP with all information in its possession that is relevant to the claim.<sup>11</sup>

Energy Ministers note these high level provisions and request that the AEMC consider whether there is merit for the rules to more explicitly provide the DRP the ability to call on third parties to provide information or rely on any other source of information as the DRP thinks fit to enable a better operation of the framework that is more consistent with the NGO.

### *Issue 1.3 – Rights of appeal*

The ECGS framework currently does not provide for the claimant or a relevant entity who may be required to fund the compensation fund the right of appeal following a determination by the DRP. The AEMC may wish to consider if rights of appeal should be provided in the rules. For example:

- What rights of appeal should parties to a compensation claim have?
  - Should the claimant have a right of appeal to a determination made by the DRP? If so, what process or conditions may be attached to the right of appeal?
  - Does a relevant entity requested by AEMO to fund compensation paid under the ECGS compensation framework have a right of appeal to a determination made by the DRP regarding the quantum of compensation to be paid? If so, what process or conditions may be attached to the right of appeal?

Should rule amendments be made to allow for rights of appeal for compensation arrangements under the ECGS framework, the AEMC may also wish to consider if any consequential changes to other parts of the east coast gas market (such as the DWGM framework) may be required, reflecting the differences in the operation of the different markets in the east coast gas system.

### *Issue 1.4 – Ability to join compensation claims*

Under Part 15C, the DRP currently has the discretion to:

- Permit or order a person to join, or be joined, as party to the proceedings before the DRP; or
- Permit the withdrawal or order the exclusion of a person as party to the proceedings before the DRP.

While the above provisions also apply in the ECGS framework, Part 15C and the ECGS framework do not provide for the joining of claims lodged by the same applicant in relation to the same or similar event impacting on that entity.

The ECGS framework envisages that a party to a compensation claim would need to be able to substantiate a financial detriment in excess of \$5,000 as a direct result of an AEMO direction issued under s91AF of the NGL. Energy Ministers understand there may be circumstances where allowing a single claimant to join multiple claims relating to the same or similar event (where each standalone claim is below the \$5,000 threshold) could be consistent with the long term interest of consumers, as claims below the \$5,000 threshold lodged by small businesses may have relative substantial business impact on the claimant who would otherwise be ineligible if joining of claims is not permitted.

For this reason, Energy Ministers request that the AEMC consider if rule changes should be made to permit the joining of smaller claims (that are individually below the threshold) in relation to the same or similar event by the same claimant in order to exceed the \$5,000 eligibility threshold, if the

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<sup>11</sup> R135HG(e) of the NGR applies.

DRP is of the view that there is no detriment to the process or material increase in cost of hearing the claims. This combined claim by the claimant may then be joined with other similar claims by other participants if appropriate.

#### *Issue 1.5 – Interactions between Parts 15C other Parts of the NGR that refers to Part 15C*

In making any changes to the NGR to address the issues outlined in this rule change request, the AEMC should also make any other amendments necessary such that the NGR is internally consistent and interactions between functions, roles and processes are clear and work effectively. For example, in relation to the application of Part 15C in Part 19:

- whether a rule change may be required to clarify if r237(3) under Part 19 means the Adviser does not have a role in resolving a relevant dispute under the DWGM beyond setting up a DRP and referring a claim to the DRP? If this is the policy intent, clarify if this means Parts of 15C such as r135H, r135HA, r135HB and r135HD(1) are effectively switched off?
- Besides Part 19, other parts of the NGR which cross references Part 15C of the NGR have not been checked. The AEMC may wish to check these cross references to determine if any clarifications may be required.

## 2. Scope of application of the compensation framework and claims eligibility

### *Issue 2.1 Clarifying legal rights and obligations in advance*

The ECGS framework includes provisions that require the DRP to have regard, when determining the eligibility and the amount of compensation to be paid, to the following (see r707(2)):

- whether the claimant failed to take reasonable action to mitigate the loss for which compensation is being claimed; or
- whether the actions of the claimant (both before and after the direction was issued) contributed to or exacerbated the amount of compensation being claimed; or
- whether the claimant received funds, payments, compensation or another financial benefit for undertaking the activity required by the direction.

These rules seek to incentivise market participants to support gas system reliability and adequacy and seeks to ensure consumers do not compensate for directions in response to inefficient industry behaviour, but may not provide clarity to allow gas market participants to:

- understand in advance how rules apply in different AEMO directions;
- work out what and how much they will be paid for responding to support gas system reliability and adequacy, or what it will cost not to respond;
- understand how AEMO determines which relevant entities will be required to fund a relevant compensation claim.

These omissions at the time of developing the ECGS framework, are in part due to the range of scenarios necessary to be considered. Such a broad range of issues are less suited to consideration under Rules but consideration of procedures under development by AEMO.

AEMO is developing guidelines to provide context on the exercise or performance of its directions functions. AEMO is also developing procedures to set out the information required to be included in compensation claims, and how AEMO will determine the relevant entities who will be required to fund a relevant compensation claim. As these procedures and guidelines are expected to be in place

by June 2023, Energy Ministers request the AEMC to consider these procedures and guidelines when determining whether rule changes may be required to ensure the ECGS policy objectives are effectively achieved while complying with the general rule of law principles about legal rights and obligations being known in advance.

#### *Issue 2.2 Matters of consideration in considering compensation and eligibility*

A broader aim of the ECGS framework is to ensure the cost of resolving system-wide supply adequacy and reliability issues, including through the compensation framework, is minimised and costs are shared fairly and equitably across the system and its participants. This aim aligns with the following objectives:

- parties detrimentally affected by AEMO's exercise of directions powers under the ECGS framework have reasonable and proportionate access to compensation;
- the compensation framework incentivises market behaviour that supports system reliability or adequacy, hence reduce the need for AEMO interventions;
- the compensation framework is sustainable – access to compensation and the quantum of payments is subject to appropriate limits;
- the funding arrangements for compensation payments are fair and equitable given the nature of claims made and the role and circumstances of the relevant market participants required to fund the compensation claims; and
- ensure that costs are allocated in an efficient manner.

While the rules set out in r707(2) are consistent with the above objectives, the AEMC should consider whether further rule changes may be required to:

- provide gas market participants more clarity on the operation of the rules under different circumstances in which AEMO may issue directions, and the different types of entities subject to direction;
- provide further incentives in certain circumstances (and if so, in what circumstances) to ensure claimants do not contribute to or exacerbate the compensation being claimed;
- strengthen the sustainability of the compensation framework; and
- take into account other matters that are not otherwise covered in the existing framework that should dictate the eligibility of compensation claims, having regard to the overall objectives identified above.

Matters that the AEMC should consider include, but are not limited to:

- Whether the rules should provide further clarity on:
  - The circumstances of direction, such as the nature of the issue with which AEMO was contending, and the application of the direction to, e.g. gas swaps, gas supply contracts, gas transportation agreements, and gas derivative products etc);
  - The type or characteristics of the entity to whom the direction is issued (including the size, nature or financial circumstances of the entity);
  - The actions of the claimant (either before or after a direction is issued);
  - The geographical impact or scope of application of a direction.
- Whether limiting compensation claims to direct costs is appropriate under all scenarios.

- For each scenario considered, is the strengthening of incentives from direct costs alone sufficient to ensure the claimant does not contribute to or exacerbate the amount of compensation being claimed?
- Should other compensation claims be eligible, the time allowed from submitting an eligible claim may need to be further reviewed.
- Whether compensation claims should be subject to different types of caps or thresholds in different circumstances (e.g. an aggregate annual cap, individual caps, minimum financial detriment limits etc).

### 3. Funding of compensation claims and allocation of costs of adviser and DRP

#### *Issue 3.1 – Funding of compensation claims*

NGR r 707(8) requires AEMO to make Procedures that set out the manner, form and methodology for payments made by relevant entities to fund compensation claims. It requires the Procedures to have regard to minimising inequitable distributional cost impacts to the extent reasonably possible.

As with the current criteria for the assessment of compensation claims, the AEMC should consider the merits of this approach. In considering whether changes to the rules would better contribute to the National Gas Objective, the AEMC should consider whether additional rules should be developed to provide greater clarity for market participants on their exposure to compensation funding.

Matters for consideration in the development of compensation funding rules include, for example:

- How should compensation costs be allocated to market participants so that those paying for the cost of the AEMO directions are those that value reliability the most?
- Is equitable allocation of costs across market participants more appropriate than a causer or beneficiary pays approach under certain (and what) circumstances?
- What factors should be considered when determining when a causer or beneficiary pays approach should be prioritised over an equitable allocation approach?
- What will be the most appropriate approach to maintain investment incentives?
- How to reduce distributional impacts across market consumers of a different scale?
- How should cost allocation work where AEMO directions impact multiple markets in different jurisdictions?

As Procedures set out the manner, form and methodology of payments to fund compensation, Energy Ministers request the AEMC consider these Procedures of compensation funding rules. Additionally, Energy Ministers request consideration of whether cost allocation mechanisms most appropriately sits in the Rules or should continue to be determined by AEMO in the Procedures.

#### *Issue 3.2 – Allocation of costs of adviser and DRP*

NGR r 706(5) provides that the costs of the Adviser and the DRP must be borne by AEMO unless the DRP re-allocates the costs or part of the costs to a party where:

- The party has unreasonably prolonged the proceedings; or
- There is another good reason to alter the allocation of the costs.

This provision is consistent with the DWGM compensation rule r237(9).

The ECGS framework transitional rule clarifies that *“AEMO is entitled to fund and recover, through participant fees, the costs incurred, or expected to be incurred, by AEMO in the exercise or performance of its east coast gas system reliability and supply adequacy functions in connection with the project.”* This means that AEMO has the discretion to recover any costs (incurred and expected) of the Adviser and the DRP through participant fees.

The above provisions acknowledges that AEMO must be able to recover all costs for making decisions that are in accordance with its functions and powers to support energy security and reliability.

However, the above provisions as applied in the ECGS and DWGM are inconsistent with the NER provisions r8.2.8 which provides for the costs of the Adviser and the DRP must be borne equally by the parties to the dispute unless re-allocated by the DRP or otherwise agreed between the parties to the dispute.

The AEMC should clarify the optimal long-term approach to allocating costs of the Adviser and the DRP. This may include the AEMC drawing lessons in compensation arrangements from the NER or the continuation of the current approach. As part of this consideration, the AEMC may also wish to consider whether costs should be recovered from the same participants who fund the compensation amount.

## Contribution to the National Gas Objective

The National Gas Objective, as stated in the NGL, is:

*“...to promote efficient investment in, and efficient operation and use of, natural gas services for the long term interests of consumers of natural gas with respect to price, quality, safety, reliability and security of supply of natural gas.”*

The proposal aims to resolve issues and make other improvements to the operation of compensation arrangements in relation to AEMO powers and functions. Energy Ministers view this proposed rule change as promoting the efficient operation of natural gas services for the long-term interests of consumers of natural gas. In particular, the proposed rule change will enhance reliability in the east coast gas market, allowing AEMO to better manage periods of volatility and responding to supply adequacy threats as set out in the background section.

The proposed rule change will promote the long-term interests of consumers (including commercial and industrial users) with respect to price through imposing limitations on compensation which incentivises market behaviour to support gas system reliability and adequacy, which in turn put downward pressure on gas prices.

The proposed rule change seeks to ensure that parties detrimentally affected by AEMO’s directions have access to reasonable and proportionate compensation subject to appropriate limits. This will promote a fairer and more equitable gas market, and promote confidence and investment certainty in the gas market while ensuring the compensation framework is sustainable.

Consistent with the objectives of the NGO, the proposed rule change improves the use of market efficiencies to incentivise investment through clarifying obligations in advance of the issuance of directions. This includes, for example, an improved understanding of how and when affected parties

will be paid for responding to support gas system reliability and adequacy, or potential costs where parties do not respond.

The ECGS Framework seeks to ensure costs for consumers are limited to the greatest extent possible through driving appropriate market responses to potential gas shortfalls. The proposed rule changes to the compensation framework will better inform parties of compensation arrangements under different scenarios. Consistent with policy aims, this will encourage more equitable distribution of compensation costs across gas market participants, including cross jurisdictional compensation arrangements.

Additionally, improved clarity in the allocation of payments through the proposed rule change will promote improved efficiency of administration and payments of outstanding compensation claims.

Potential improvements to the ability of the DRP (or another body appointed to oversee compensation arrangements) to obtain further information to assess compensation claims will improve the efficiency and effectiveness in determining eligibility and calculating the quantum of eligible compensation claims.

While the final scope of the proposed Rule change request is intentionally flexible to allow for sufficient AEMC discretion, it is expected to encourage more efficient and effective assessment of compensation claims and allocation of payments to fund the framework.

## Expected Benefits and Costs of the proposed rule change request

Energy Ministers consider that the benefits of the proposed rule change to strongly outweigh the costs.

The direction framework is necessarily broad given the range of actions for reliability and a supply adequacy that must be considered. However, on balance, the proposal benefits consumers and the efficient operation of the gas market by exploring opportunities to provide:

- a more robust, enduring compensation framework that provides greater clarity on the merit of claims and payments toward potential compensation claims, including encouraging market driven responses in the first instance. Improvements of this nature will drive better market preparedness to potential shortfalls, improve compliance risks and provide greater confidence in the regulatory framework; and
- improvement to the claim assessment process leading to improved efficiency and effectiveness in the handling of compensation claims and reducing potential costs

On balance, the proposal is expected to provide benefits across market participants through providing a single, refined framework for all AEMO interventions. This will reduce market participant costs for all through reduced complexity and a more efficient resolution of compensation matters.

More specifically, the proposed rule change is expected to benefit commercial and industrial gas users through providing greater clarity on how much they will be paid in responding to directions or the potential impacts in not responding. This includes more guidance to incentivise desired behaviour in responding to directions and undertaking investment to avoid liabilities leading to improvements in reliability, and more guidance on how directions may apply to different contract types including gas swaps, gas supply contracts, or gas derivative products.

Additionally, the proposed rule change is expected to benefit commercial and industrial gas users through further opportunity to consider equity matters and thresholds, which may benefit smaller

users. The proposed rule change is expected to improve management of periods of volatility leading to more consistent pricing.

Gas retailers will be benefited in similar ways to commercial and industrial gas users. Specific benefits are expected to arise from improved investment signals and the clarification in compensation arrangements for different contract types.

Pipeline operators will also benefit from a clarified understanding of the impacts of direction on different types of agreements, particularly gas transport agreements. The proposed rule change is expected to clarify compensation arrangements across multiple markets in different jurisdictions.

Gas powered generators, storage service providers and gas supplier will benefit from an improved understanding of how directions apply to different contract types, improved investment signals, and further clarity of payments following a direction.

It is anticipated that the costs and risks arising from this rule change proposal to be minimal and include:

- transitional costs arising from uncertainty in the regulatory process during the interim period as the rule change requirements are developed and consulted;
- challenges in managing multiple changes to rule amendments affecting several markets; and stakeholder fatigue arising from the range of ongoing industry consultation currently underway, and the potential for this to limit the timeliness of industry input into the rule change consultation process.

Broadly, it is anticipated these costs will be significantly outweighed by the benefits that are expected to arise from this rule change proposal – a potentially fairer, more efficient and lower cost compensation framework which promotes the efficient operation and use of natural gas services for the long-term interests of natural gas consumers with respect to the reliability and supply of natural gas.

## **Background on WEMDRA and Part 15C dispute resolution process**

### **Wholesale energy market dispute resolution adviser (WEMDRA)**

WEMDRA is the dispute resolution adviser required under the National Electricity Rules (see Chapter 8 of the NER) and National Gas Rules (Part 15C of the NGR).

In the context of the gas market, WEMDRA is responsible for assisting in resolving disputes by eligible parties covered by Part 15C of the NGR and applications for compensation as a result of an Unintended Scheduling Result (USR) under Part 19.

In the context of the electricity market, WEMDRA is responsible for assisting electricity market participants to resolve or select a process in the event of a dispute or scheduling error.

WEMDRA is appointed on terms and conditions determined by the AER. Each term of appointment lasts three years. WEMDRA must report to the AER at least once each quarter about dispute resolution under Part 15C of the NGR.

### **Role of WEMDRA in the context of the gas market**

- Maintains and publishes a dispute management contact (DMC) list which contains the names and contact details of all current dispute management contacts as notified to WEMDRA.
- Ensure the effective operation of the provisions of Part 15C of the NGR. This includes, for example:
  - Establishing and maintaining a pool of persons from which members of a dispute resolution panel (DRP) may be selected under 135HD.
  - Facilitating dispute resolution under stages 1 and 2 of the dispute resolution process, including attempting to resolve the dispute, and/or referring the dispute to the DRP for determination (see r135HB(3));
  - Appointment of a member of the DRP pool to give directions about disclosure of information under r135HC.
  - Establish a DRP under the DRP pool to determine a relevant dispute (see r135HD).
- May issue guidance notes relating to the conduct of any part of the Stage 1 and 2 dispute resolution processes. Guidance notes are intended to promote the efficient use of resources and processes but are not binding.

### **Outline of Part 15C dispute resolution process**

Part 15C of the NGR sets out a framework for dispute resolution in the east coast gas market.

There are 2 stages within the Part 15C framework as follows:

#### **Stage 1 dispute resolution process<sup>12</sup>**

- Designed to enable participants to resolve issues commercially, and provide a framework for ensuring that time is measured and allow for escalation to stage 2 if required.

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<sup>12</sup> For more information, see r135H of the NGR

- The wholesale energy market dispute resolution adviser (WEMDRA) is available to assist this process by facilitating meetings or provide a non-binding expert view on the issues under dispute.

### **Stage 1 notice**

- A party to a relevant dispute may initiate the dispute resolution process by serving a Stage 1 notice on one or more parties to the relevant dispute and give a copy of the notice to WEMDRA.
  - A Stage 1 notice must be served within a period fixed by the rules from the relevant dispute; or if no such period is fixed by these rules, within 90 business days after the relevant dispute arises.
- Within 15 business days after service of a Stage 1 notice, representatives of the parties to the dispute must meet to determine, by agreement, the course of the dispute resolution process.
- The meeting must be held on a without prejudice basis, and
  - May, if the parties agree, be arranged and chaired by WEMDRA; and
  - May agree that process should proceed by direct discussions between parties, by mediation or in any other way;
  - Must consider whether there are other parties to the relevant dispute who should be served with the Stage 1 notice; and
  - May agree to keep confidential the fact that the relevant dispute exists and any information exchanged between the parties to the dispute for the purposes of attempting to resolve the relevant dispute.
- R135HA(8) sets out timeframes and conditions under which a party may escalate the matter to WEMDRA by serving a Stage 2 notice.

### **Stage 2 dispute resolution process<sup>13</sup>**

- Designed to provide for escalation from Stage 1.
- Provides the opportunity for issues to be decided by an expert or panel of experts known as a dispute resolution panel (DRP). Determinations made by the DRP are binding on both parties to the dispute.
- These experts are drawn from a pool maintained by WEMDRA. WEMDRA provides case management assistance in Stage 2, with the level of assistance dependant on the nature of the dispute.

### **Stage 2 notice**

- On receipt of a Stage 2 notice, WEMDRA must immediately notify each party to the dispute of that fact. Each party must within 15 business days of notification provide WEMDRA a statement setting out:
  - a brief history of the relevant dispute and the circumstances giving rise to it; and
  - a statement of the issues involved in the relevant dispute.
- WEMDRA must, within 30 business days of being served a Stage 2 notice:

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<sup>13</sup> For more information, see r135HB to 135HI of the NGR.

- If the parties agree – attempt to resolve the relevant dispute by any means WEMDRA considers appropriate, having regard to the principles set out in r135FA(2) and (3); or
  - Refer the relevant dispute to a DRP for determination.
- If WEMDRA attempts to resolve the relevant dispute, WEMDRA may, if of the opinion that the attempt is unlikely to prove successful, abandon the attempt and refer the relevant dispute to a DRP for determination.
- If WEMDRA refers a relevant dispute to a DRP, WEMDRA must promptly publish notice of the referral to all Registered participants<sup>14</sup> and give notice of the referral to AEMO, the AER and the AEMC.

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<sup>14</sup> Has the meaning given in s2(1), Part 1, Chapter 1 of the NGL.