

## Draft rule determination

# National Gas Amendment (Compensation and dispute resolution frameworks) Rule

### Proponent

Energy Ministers' Sub-Group

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## About the AEMC

The AEMC reports to the energy ministers. We have two functions. We make and amend the national electricity, gas and energy retail rules and conduct independent reviews for the energy ministers.

## Acknowledgement of Country

The AEMC acknowledges and shows respect for the traditional custodians of the many different lands across Australia on which we all live and work. We pay respect to all Elders past and present and the continuing connection of Aboriginal and Torres Strait Islander peoples to Country. The AEMC office is located on the land traditionally owned by the Gadigal people of the Eora nation.

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## Summary

- 1 The Commission's draft determination is to make a draft rule that is a more preferable rule in response to a rule change request submitted by the Energy Ministers Sub-Group (Energy Ministers).
- 2 Our draft rule would create a new framework for the assessment of compensation claims by separating the current dispute resolution arrangements from the arrangements for determining compensation claims. This would create a 'fit for purpose' compensation framework that better supports the new East Coast Gas System (ECGS) framework under Part 27 of the National Gas Rules (NGR).
- 3 The Commission's draft determination is that the proposed compensation framework and consequential changes would come into effect on 27 June 2024.
- 4 We are seeking feedback on our draft determination and rule by **25 January 2024**.

## Our draft rule would support security, reliability and supply adequacy in the ECGS

- 5 Over the last year, there have been a number of changes to the ECGS to address security and reliability threats and better manage volatility in the system. The draft rule is part of a wider body of ongoing reform work.
- 6 On 12 August 2022 Energy Ministers decided on additional reforms to manage supply adequacy risks in the ECGS. These reforms included widening the functions and powers of AEMO to manage threats to security of gas supply. 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 ECGS. The ECGS framework contains a mechanism to compensate those parties impacted by an AEMO direction.
- 7 Energy Ministers have identified a number of issues with the existing framework for compensation for AEMO directions in terms of clarity, consistency, efficiency and effectiveness. More specifically, Energy Ministers asked the AEMC to consider improvements in relation to the *governance and procedural arrangements, scope of the framework and funding arrangements*.
- 8 Our more preferable draft rule would provide for a well-functioning compensation framework that supports security, reliability and supply adequacy in the ECGS.
- 9 Although the rule change request did not include drafting of the proposed rule, it contained a description of the proposed rule and potential options for the AEMC to consider and explore.

## Stakeholder feedback has shaped our draft rule

- 10 Stakeholders supported improving the *governance and procedural arrangements* so that they are clear, transparent and fit-for purpose in terms of providing directed parties with the opportunity to receive compensation. The Commission's draft rule aligns with stakeholder views by separating the compensation arrangements from the dispute resolution arrangements and streamlining the process for the assessment of compensation claims.
- 11 With regard to the *scope of the framework and funding arrangements* that set out what costs can be claimed, when a claim can be made and who funds compensation, stakeholders expressed mixed views.

- *What costs can be claimed:* Some stakeholders expressed support for broadening the categories of costs that are eligible for compensation to include opportunity costs. However, the Commission's draft determination is to maintain the existing arrangements by limiting the costs that are eligible for compensation to direct costs.
- *When a claim can be made:* Stakeholders supported reviewing the minimum claim threshold given the costs of the process for assessing compensation claims. The Commission's draft determination to increase the claim threshold to \$50,000 responds to stakeholder comments, by balancing the minimum amount of compensation that can be claimed with the indicative costs of the expert determination process.
- *Who funds a compensation claim:* Most stakeholders expressed support for reviewing the current compensation funding arrangements. The Commission's draft rule would enhance clarity through principles in the NGR to guide AEMO's cost recovery methodology for compensation claims under Part 27. The proposed NGR principles largely align with the current demand-driven approach adopted by AEMO, with some amendments. The draft rule also provides for compensation claimants to share the burden of compensation funding in the same way as other market participants and for the costs of the independent expert to be recovered as part of the compensation funding arrangements.

## The Commission's draft rule is in the long term interest of consumers

12 The Commission considers the more preferable draft rule would contribute to the achievement of the NGO<sup>1</sup> by aligning with the following assessment criteria underlying this rule change:

- **Safety, security and reliability:** The draft rule would refine the compensation framework for AEMO directions to better support reliability and supply adequacy compared to the existing arrangements. It would retain the incentives for behaviour that supports system reliability and supply adequacy by limiting the costs that are eligible for compensation to direct costs only.
- **Principles of market efficiency:** The Commission's draft determination to allow for compensation of direct costs only aims to provide for the right balance of incentives to support the normal operation of the market, as compared to a directed market state. The Commission considers that broadening the categories of costs that are eligible for compensation would pose the risk of creating undesirable incentives in favour of a directed state. Further, the Commission's view is that participants must consider the risk of a direction alongside other risks associated with market participation. Allowing only for compensation of direct costs allocates risk to those best placed to manage the risk of a direction.
- **Implementation considerations:** The Commission's determination to maintain the current definition of costs that are eligible for compensation as direct costs only was also guided by implementation considerations. Determining direct costs is simpler and more transparent, whereas allowing for compensation of indirect and opportunity costs would require complex and costly counterfactual analysis. Implementation considerations also shaped our draft determination to increase the minimum claim threshold to \$50,000 and not to allow different entities to join claims to meet the minimum threshold to claim. Lastly, the Commission's draft determination is to make consequential changes to the Declared Wholesale Gas Market (DWGM) and Short Term Trading Market (STTM) provisions to support the application of the proposed compensation framework to relevant claims.
- **Principles of good regulatory practice:** The Commission's draft rule aligns the proposed new NGR compensation framework with the NER expert determination process used for

<sup>1</sup> Section 23 of the NGL.

compensation for AEMO directions, with some modifications. Alignment of the frameworks promotes consistency and simplicity through a streamlined process and transparency for stakeholders.

## The draft rule would create a ‘fit for purpose’ compensation framework

### The draft rule would establish a new compensation framework in the NGR

- 13 Our draft determination is to establish a separate framework for the assessment of compensation claims (by establishing two new divisions in Part 15C of the NGR). This would mean separating the current dispute resolution arrangements from the arrangements for determining compensation claims. We have modelled the proposed arrangements on the expert determination framework for the assessment of electricity compensation claims under chapter 3 of the NER.

### The draft rule would refine the framework for compensation for AEMO directions in the ECGS

- 14 The arrangements for AEMO directions in the ECGS in Part 27 of the NGR set out the circumstances in which a compensation claim may be made, what costs can be claimed and who funds the compensation. The Commission’s draft rule would:
- limit the costs that are eligible for compensation to direct costs only to incentivise market supporting behaviour before an AEMO direction
  - insert principles into the NGR to guide AEMO’s cost recovery methodology for compensation claims under Part 27 (these largely align with the current demand-driven approach adopted by AEMO, with some amendments)
  - introduce a new civil penalty provision to support appropriate behaviour in response to an AEMO direction
  - increase the minimum threshold for a compensation claim to \$50,000 and not allow for different entities to join claims.

### The draft rule includes consequential changes to the DWGM and STTM

- 15 The Commission’s draft determination is to make consequential changes to Parts 19 and 20 of the NGR to apply the proposed compensation framework under Part 15C to compensation claims under those Parts arising from AEMO directions and intervention, market suspension and administered pricing. Claims relating to unintended scheduling results under Part 19 or scheduling errors under Part 20 would continue to be assessed under the existing dispute resolution framework.

### The draft rule would not change the existing dispute resolution provisions

- 16 The Commission’s draft determination is to not make any changes to the existing dispute resolution provisions. We have identified some issues in relation to the dispute resolution provisions in Part 15C of the NGR and the corresponding provisions in the NER, including powers of the Dispute Resolution Panel (DRP) and procedural matters. However, these issues are not exclusive to the NGR which is the focus of this rule change. In any event, this rule cannot address the issues specific to the NER.

## Implementation of the new compensation framework in June 2024

- 17 The Commission’s draft determination is that the proposed compensation framework (as well as the proposed consequential changes to the DWGM and the STTM) would come into effect on 27 June 2024.
- 18 By that date, AEMO would be required to review, and where necessary update, the following

Procedures to ensure alignment with the draft rule: the STTM Procedures; the Wholesale Market Procedures; and the East Coast Gas System Procedures.

- 19 Further, by the commencement date, AEMO would be required to make and publish guidance on the expert determination process and prepare, consult and publish a form of confidentiality deed to allow the independent expert to engage with a claimant.
- 20 Any existing claims that are not finally dealt with or decided immediately before the commencement date would be dealt with by the existing (old) rules.

## Related AEMC work on electricity compensation arrangements

- 21 The Commission is currently considering changes to some of the electricity compensation frameworks in the *Review into electricity compensation arrangements*.
- 22 The Review has linkages to this rule change in terms of considering the purpose and scope of compensation frameworks. While the Commission notes a consistent approach may be desirable, there may be a need for bespoke arrangements given the differences between the electricity and gas markets and frameworks.

## How to make a submission

### How to make a written submission

**Due date:** Written submissions responding to this draft determination and rule must be lodged with Commission by 25 January 2024.

**How to make a submission:** Go to the Commission's website, [www.aemc.gov.au](http://www.aemc.gov.au), find the "lodge a submission" function under the "Contact Us" tab, and select the project reference code GRC0067.<sup>2</sup>

Tips for making submissions on rule change requests are available on our website.<sup>3</sup>

**Publication:** The Commission publishes submissions on its website. However, we will not publish parts of a submission that we agree are confidential, or that we consider inappropriate (for example offensive or defamatory content, or content that is likely to infringe intellectual property rights).<sup>4</sup>

### Next steps and opportunities for engagement

There are other opportunities for you to engage with us. We will be holding a public forum on **11 December** and encourage you to reach out to us if you would like a one-on-one discussion with the project team.

You can also request the Commission to hold a public hearing in relation to this draft rule determination.<sup>5</sup>

**Due date:** Requests for a hearing must be lodged with the Commission by 7 December 2024.

**How to request a hearing:** Go to the Commission's website, [www.aemc.gov.au](http://www.aemc.gov.au), find the "lodge a submission" function under the "Contact Us" tab, and select the project reference code GRC0067. Specify in the comment field that you are requesting a hearing rather than making a submission.<sup>6</sup>

### For more information, you can contact us

Please contact the project leader with questions or feedback at any stage.

Project leader: Patrick Loughrey

Email: [patrick.loughrey@aemc.gov.au](mailto:patrick.loughrey@aemc.gov.au)

<sup>2</sup> If you are not able to lodge a submission online, please contact us and we will provide instructions for alternative methods to lodge the submission

<sup>3</sup> See: <https://www.aemc.gov.au/our-work/changing-energy-rules-unique-process/making-rule-change-request/our-work-3>

<sup>4</sup> Further information about publication of submissions and our privacy policy can be found here: <https://www.aemc.gov.au/contact-us/lodge-submission>

<sup>5</sup> NGL s 310(2).

<sup>6</sup> If you are not able to lodge a request online, please contact us and we will provide instructions for alternative methods to lodge the request.

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# 1 The Commission has made a draft determination

The Commission's draft determination is to make a draft rule that is a more preferable rule in response to a rule change request submitted by the Energy Ministers' Sub-Group (Energy Ministers). The rule change request seeks to address issues with the existing compensation framework following the introduction of the East Coast Gas System (ECGS) reform package under the National Gas Rules (NGR).<sup>7</sup>

Energy Ministers have identified a number of issues with the existing framework for compensation in terms of clarity, consistency, efficiency and effectiveness. More specifically, Energy Ministers asked the AEMC to consider the following improvements:

- refining the compensation and dispute resolution frameworks to provide clear and consistent arrangements so that the gas sector operates efficiently and effectively in the long-term interests of consumers
- making any necessary changes to the Part 15C dispute resolution framework so it can be more effectively applied to any assessment of compensation claims across various parts of the NGR where compensation claims may arise
- considering any bespoke amendments to the ECGS framework compensation arrangements so it is fit for purpose, and
- considering whether and to what extent consequential changes may be required.

We are seeking feedback on this draft rule. For more detailed information on:

- why we made the draft rule, refer to Chapter 2
- how the rule works, refer to Chapter 3
- the draft amendments to the NGR, refer to Appendix C.

## 1.1 Our draft rule would create a new compensation framework for directions in the ECGS

Our draft rule would create a new framework for the assessment of compensation claims by separating the current dispute resolution arrangements from the arrangements for determining compensation claims. This would create a 'fit for purpose' framework that better supports the new ECGS framework under Part 27 of the NGR, i.e. a well-functioning compensation framework that supports reliability and supply adequacy. The draft rule would make amendments to Parts 19, 20 and 27 of the NGR in order to:

- establish a new framework for the assessment of compensation claims
- refine the framework for compensation for AEMO directions in the ECGS to support reliability and supply adequacy
- make consequential changes to rules governing the Declared Wholesale Gas Market (DWGM) and Short-Term Trading Market (STTM) to ensure the application of the proposed compensation framework to relevant claims.

Our draft rule does not make any substantial changes to the existing dispute resolution provisions.

<sup>7</sup> <https://www.energy.gov.au/government-priorities/energy-and-climate-change-ministerial-council/working-groups/gas-working-group/gas/proposed-regulatory-amendments-extend-aemos-functions-and-powers-manage-east-coast-gas-supply-adequacy>.

## 1.2 Stakeholder support for clarity, consistency and efficiency shaped our draft rule

Stakeholders supported improving the *governance and procedural arrangements* so that they are clear, transparent and fit-for purpose in terms of providing directed parties with the opportunity to get compensation.<sup>8</sup> The Commission's draft rule aligns with stakeholder views by separating the compensation arrangements from the dispute resolution arrangements and streamlining the process for the assessment of compensation claims (see section 3.1).

With regard to the *scope of the framework and funding arrangements*, i.e. what costs can be claimed, when a claim can be made and who funds compensation, stakeholders expressed mixed views:

- *What costs can be claimed:* Some stakeholders expressed support for broadening the categories of costs that are eligible for compensation to include opportunity costs.<sup>9</sup> However, the Commission's draft determination is to maintain the existing arrangements by limiting the costs that are eligible for compensation to direct costs. The Commission's draft determination aims to provide for the right balance of incentives to support the normal operation of the market, as compared to a directed market state. The Commission is of the view that broadening the categories of costs that are eligible for compensation would pose the risk of creating undesirable incentives in favour of a directed state (see section 3.2.1).
- *When a claim can be made:* Stakeholders supported reviewing the minimum claim threshold given the costs of the process for assessing compensation claims. The Commission's draft determination to increase the threshold to \$50,000 responds to stakeholder comments, in terms of balancing the minimum amount of compensation that can be claimed with the indicative costs of the expert determination process (see section 3.2.4).
- *Who funds a compensation claim:* Most stakeholders expressed support for reviewing the current compensation funding methodology in terms of providing further clarity and reviewing the current cost allocation model.<sup>10</sup> The Commission's draft rule would enhance clarity by inserting principles into the NGR to guide AEMO's cost recovery methodology for compensation claims under Part 27. The proposed NGR principles largely align with the current demand-driven approach adopted by AEMO, with some clarification and amendments (see section 3.2.2).

The Commission further seeks feedback from stakeholders in relation to two recommended new civil penalty provisions proposed in the draft rule (see section 3.2.3). The first recommendation relates to subrule 135JJ(4) which requires a claimant to pay AEMO any costs of the compensation determination process allocated to the claimant. We recommend that this is classified as a tier two civil penalty provision. The second recommendation relates to rule 706 which seeks to deter opportunistic behaviour that exacerbates the direct costs arising from an ECGS direction. We recommend that this is classified as a tier one civil penalty provision.

Appendix C outlines the amendments to the NGR made under the more preferable draft rule in further detail.

<sup>8</sup> Submissions to the consultation paper: AEMO, p. 1; AER, p. 1; APA, p. 1; APLNG, p. 2; Origin, p. 1; Shell, p. 1.

<sup>9</sup> Submissions to the consultation paper: APLNG, p. 1; Origin, p. 1; Alinta, p.1; Jemena, p. 2; APA, p. 5; Shell, p. 1.

<sup>10</sup> Submissions to the consultation paper: Shell, p. 3; Alinta, p. 2; APGA, p. 3; APA, p. 4; only Origin expressed support for the current consumption-based approach, p. 2.

## 1.3 Our draft rule would support security, reliability and supply adequacy in the ECGS

The Commission's draft rule would provide for a well-functioning compensation framework that supports reliability and supply adequacy. Over the last year, there have been a number of changes to the ECGS to address security and reliability threats and better manage volatility in the system. The draft rule is part of a wider body of ongoing reform work.

On 12 August 2022 Energy Ministers decided on additional reforms to manage supply adequacy risks in the ECGS. These reforms ranged from introducing new information obligations to improve transparency and efficiency to widening the functions and powers of AEMO to manage threats to security of gas supply. The reforms did not make the ECGS a single market like the national electricity market (NEM), but created an overarching framework to manage security and reliability across the facilitated markets and contract based commercial facilities. The facilitated gas markets include the STTM with hubs in Adelaide, Brisbane and Sydney, the Victorian DWGM, and the gas supply hub (GSH) which facilitates trades in gas and secondary transportation capacity for the Wallumbilla and Moomba trading hubs.<sup>11</sup>

These gas market reforms were progressed in two stages to ensure AEMO had the tools it required in time to address potential risks to supply in winter 2023. As the Energy Ministers' rule change request notes:

*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.*

This rule change request is intended to build on some of the elements of the Stage 1 reforms. Stage 2 reforms are expected to be progressed in 2024.

<sup>11</sup> Section 5 and Appendices A -D of the consultation paper for the AEMC's 2021 Hydrogen Review provide more information on the facilitated markets, available at: <https://www.aemc.gov.au/market-reviews-advice/review-extending-regulatory-frameworkshydrogen-and-renewable-gases>.

## 2 The rule would contribute to the national gas objective

The Commission can only make a rule if it is satisfied it will or is likely to contribute to the achievement of the relevant energy objectives.<sup>12</sup> For this rule change, the relevant energy objective is the national gas objective:<sup>13</sup>

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—

- (a) price, safety, reliability and security of supply of natural gas; and
- (b) the achievement of targets set by a participating jurisdiction—
  - (i) for reducing Australia’s greenhouse gas emissions; or
  - (ii) that are likely to contribute to reducing Australia’s greenhouse gas emissions.

The targets statement, available on the AEMC website, lists the emissions reduction targets to be considered, as a minimum, in having regard to the NGO.<sup>14</sup>

In developing the draft rule, the Commission has considered the application to Western Australia according to the following questions:

- Does the AEMC have a relevant rule-making power? The draft rule does not fall within the subject matters about which the Commission may make rules under the WA Gas Act.
- Is the AEMC amending parts of the NGR that apply in Western Australia? The draft rule amends Parts 15C, 19, 20 and 27 of the NGR, none of which apply in the Western Australian version of the NGR.

Accordingly, the draft rule would not apply in Western Australia.

See Appendix D for more detail on the legal requirements for a determination.

### 2.1 How we have applied the legal framework to our decision

The Commission must consider how to address issues with the existing framework for compensation following AEMO directions against the legal framework.

We identified the following criteria to assess whether the proposed rule change, no change to the rules (business-as-usual), or other viable, rule-based options are likely to better contribute to achieving the NGO:

- **Safety, security and reliability:** do the proposed improvements to the compensation framework align with the broader reforms to manage threats to security and reliability?
- **Principles of market efficiency:** do the proposed improvements to the compensation framework, including the allocation of costs, provide sufficient transparency and incentives to encourage efficient and effective actions from relevant entities?
- **Implementation considerations:** do the proposed improvements to the compensation framework support market wide success by reducing complexity and uncertainty? Would

<sup>12</sup> NGL subrule 291(1).

<sup>13</sup> The NGO was updated on 21 September 2023 with the commencement of the *Statutes Amendment (National Energy Laws) (Emissions Reduction Objectives) Act 2023 (SA)*. We have applied the updated NGO in this draft determination in line with that Act. This is a change from the consultation paper which referenced the old NGO.

<sup>14</sup> Section 32A(5) of the NEL.

consequential changes to the DWGM and broader compensation and dispute resolution framework support successful implementation?

- **Principles of good regulatory practice:** do the proposed improvements to the compensation framework promote predictability and efficiency?

These assessment criteria reflect the key potential impacts – costs and benefits – of the rule change request, for impacts within the scope of the NGO.

Since the consultation paper was published, the NGO has been updated. The Commission has considered whether there is a need to change the assessment criteria to take into account the amendments to the NGO and is satisfied that the criteria proposed in the consultation paper remain appropriate.

The Commission has undertaken regulatory impact analysis to evaluate the impacts of the various policy options against the assessment criteria. Appendix B outlines the methodology of the regulatory impact analysis.

The rest of this section explains why the draft rule best promotes the long-term interest of consumers when compared to other options and assessed against the criteria.

### 2.1.1 A well-functioning compensation framework supports reliability and supply adequacy

The draft rule would refine the compensation framework for AEMO directions to better support reliability and supply adequacy compared to the existing arrangements. The draft rule responds to the issues raised in the change request, seeking to achieve the following objectives:<sup>15</sup>

- Sufficiently incentivise behaviour that supports system reliability and supply adequacy: The draft rule would limit the costs that are eligible for compensation to direct costs only to incentivise market supporting behaviour (section 3.2.1) and we further recommend introducing a new civil penalty provision to support appropriate behaviour in response to an AEMO direction (section 3.2.3).
- Ensure the compensation framework is sustainable, i.e. access to compensation and the quantum of payments is subject to appropriate limits, in order to support AEMO directions: increasing the minimum threshold for a compensation claim to \$50,000 and not allow for different entities to join claims in order to meet the minimum threshold (section 3.2.4).
- Provide funding arrangements for compensation payments that are fair and equitable. The draft rule would insert principles into the NGR to guide AEMO's cost recovery methodology for compensation claims under Part 27 (section 3.2.2). The proposed principles largely align with the current demand-driven approach adopted by AEMO, with some clarification in terms of AEMO allocation of costs to entities based on gas consumption at the time and in the location of the risk or threat.

### 2.1.2 Compensating only for direct costs incentivises market efficiency through behaviour that supports normal market operation

Consistent with the existing arrangements, the Commission's draft determination is to limit costs that are eligible for compensation to direct costs. The Commission's draft determination aims to provide for the right balance of incentives to support the normal operation of the market, as compared to a directed market state. We note that stakeholders broadly supported clarifying the types of costs that are eligible for compensation.<sup>16</sup> Stakeholders submitted a range of costs that

<sup>15</sup> AEMC consultation paper, p. 4

<sup>16</sup> Submissions to the consultation paper: APLNG, p. 1; Origin, p. 1; Alinta, p.1; Jemena, p. 2; APA, p. 5; Shell, p. 1.

the compensation framework should contemplate: direct, opportunity, consequential and indirect costs.<sup>17</sup> The Commission considers that broadening the categories of costs that are eligible for compensation would pose the risk of creating undesirable incentives in favour of a directed state. Further, the Commission is of the view that participants must consider the risk of a direction alongside other risks associated with market participation and that allowing only for compensation of direct costs allocates risk to those best placed to manage the risk of a direction.

Given the draft determination to limit costs that are eligible for compensation to direct costs in order to maintain the incentives for normal market operation and market efficiency, the Commission does not recommend introducing a cap on compensation claims under Part 27. As claims are limited to direct costs and they have a natural limit in relation to the cost of supply in the market, the Commission considers there is no basis for a further cap. This determination is consistent with stakeholders' views on this issue.<sup>18</sup>

### 2.1.3 The draft arrangements would reduce costs and complexity

There was stakeholder support for including opportunity costs within the compensation framework. APLNG noted that determining opportunity costs may be difficult, however, it should be considered if the burden of proof is on the claimant.<sup>19</sup> The Commission's draft determination however, is to maintain the current definition of costs that are eligible for compensation as direct costs only based on implementation considerations. Determining direct costs is simpler and more transparent, whereas allowing for compensation of indirect and opportunity costs would require complex and costly counterfactual analysis.

The Commission also had regard to the costs and complexity of implementation and cost to participants when making its draft determination on increasing the minimum claim threshold (section 3.2.4). Setting the threshold too low would be costly for participants that would be required to fund the expert determination process. Stakeholders supported reviewing the threshold on the basis of efficiency considerations, given the costs of the process for assessing compensation claims.<sup>20</sup> Likewise, the Commission does not support allowing different entities to join claims to meet the minimum threshold to claim (section 3.2.4). The independent expert will need to assess each claim individually and allowing different entities to join smaller claims is likely to lead to the costs of the process exceeding the value of claims. We acknowledge stakeholder submissions,<sup>21</sup> but note the implementation costs to all participants.

With regard to the need for consequential changes to the DWGM and STTM provisions and the dispute resolution framework to support successful implementation, the draft rule would:

- make consequential changes to the DWGM and STTM to ensure the application of the proposed compensation framework to relevant claims (section 3.3).
- not make any consequential changes to the dispute resolution framework. The Commission has identified some issues with the dispute resolution provisions through engagement with stakeholders, and its own analysis, but determined that these issues are not exclusive to the NGR which is the focus of this rule change. In any event, this rule cannot address the issues raised that are specific to the NER (section 3.4).

17 Only EUAA did not support the broadening of cost categories eligible for compensation. EUAA submission to the consultation paper, p. 2.

18 Submissions to the consultation paper: Origin, p. 2; Alinta, p. 2; APA, p. 6; EUAA, p. 2/3, APLNG, p. 1.

19 APLNG submission to the consultation paper, p. 1.

20 Submissions to the consultation paper: AEMO, p. 2; Alinta, p. 2; Shell, p. 2.

21 Submissions to the consultation paper: AER, p. 2; APA, p. 6; Shell, p. 2.

#### 2.1.4 A streamlined compensation process would ensure consistency with the NER compensation arrangements, promoting good regulatory practice

The Commission's draft rule aligns the proposed new NGR compensation framework with the NER expert determination process used for compensation for AEMO directions, but with some modifications (see section 3.1).<sup>22</sup> These amendments reflect the different nature of gas and electricity markets and also aim to provide greater certainty to those using the framework. Aligning the framework for determining compensation under the NGR with the comparable NER arrangements promotes consistency and simplicity through a streamlined process and transparency to stakeholders through:

- a clear allocation of roles and responsibilities in the proposed new framework in Part 15C (section 3.1.2),
- requiring AEMO to provide guidance about the operation of the expert determination process for compensation claims (section 3.1.2).

Further, the Commission's draft rule would promote transparency, clarity and consistency by:

- introducing NGR principles to govern the recovery of compensation costs based on gas consumption, time and location - to improve clarity to participants and provide guidance to AEMO (section 3.2.2)
- allowing AEMO to recover the costs of the expert in addition to the compensation amount from funding parties - thereby providing a simple and transparent solution to the question of how to recover the costs of the expert determining a compensation claim made under Part 27 (section 3.2.2)
- providing claimants, as well as market bodies and parties required to fund a compensation claim, with a (limited) right to seek review of an expert's decision<sup>23</sup> - thereby aligning the right of appeal under the draft compensation framework with the principles governing review of rule disputes (section 3.1.2).

<sup>22</sup> Such as the arrangements for resolving conflicts of interest, the proposal for AEMO to publish guidance and the explicit right of appeal

<sup>23</sup> This is consistent with the NGL that allows for appeal on a question of law for rule disputes and applies the review provisions of the Commercial Arbitration Acts of each jurisdiction to the appeal. NGL section 270C



## 3 How our rule would operate

### 3.1 The establishment of a new compensation framework in the NGR

#### **Box 1: Draft determination - Establishment of a new framework to assess compensation claims under the NGR**

Our draft determination is to establish a separate framework for the assessment of compensation claims (by establishing two new divisions in Part 15C of the NGR). This would mean separating the current dispute resolution arrangements from the arrangements for determining compensation claims. This would create a 'fit for purpose' process for the assessment of compensation claims.

We have modelled the proposed arrangements based on the expert determination framework for the assessment of electricity compensation claims under chapter 3 of the NER.

The rule change request asked the Commission to ensure the procedural and governance arrangements under the ECGS compensation framework are fit for purpose. Energy Ministers suggested that this could include amending the Part 15C framework or developing a new framework separate to Part 15C.<sup>24</sup> In response to the consultation paper stakeholders likewise indicated that current arrangements are unclear and more certainty in the framework for assessing compensation claims would be beneficial.<sup>25</sup> ALPNG suggested it may be more appropriate to create a new framework specifically for the assessment of compensation claims.<sup>26</sup> Shell likewise submitted that the Commission should consider alignment with the NER expert determination process.<sup>27</sup>

Our analysis indicated that a compensation claim does not have the same characteristics as a rule dispute – there is no other 'party' to the claim. Therefore, we consider a standalone compensation framework is more appropriate to assess compensation claims, instead of utilising the existing dispute resolution provisions for this purpose. In our view, the proposed framework better supports AEMO's new intervention powers under Part 27 of the NGR, i.e. a well-functioning compensation framework supports reliability and supply adequacy. The proposed framework is clear, transparent and fit-for purpose in terms of providing directed parties with the opportunity to get compensation.

The following sections outline the constituent parts of the Commission's proposed compensation framework, including the:

- scope of the new framework in terms of its application to compensation claims but not unintended scheduling results or scheduling errors (section 3.1.1), and
- roles and responsibilities of AEMO, the independent expert and claimants (section 3.1.2).

#### **3.1.1 Application of the proposed new framework to compensation claims (without option to fast-track any claims)**

<sup>24</sup> See p. 7 of the rule change request.

<sup>25</sup> Submissions to the consultation paper: AEMO, p. 1; AER, p. 1; APA, p. 1; APLNG, p. 2; Origin, p. 1; Shell, p. 1.

<sup>26</sup> APLNG submission to the consultation paper, p. 2.

<sup>27</sup> Shell submission to the consultation paper, p. 2.



**Box 2: Draft determination - The proposed framework would apply to compensation claims (but not unintended scheduling results or scheduling errors), with no option for a fast-tracked process**

The proposed new compensation claims framework in Part 15C would apply to compensation claims made under Part 19, 20 and 27 of the NGR in relation to AEMO directions and intervention, market suspension and administered pricing.

The proposed compensation framework would not apply to claims arising from unintended scheduling results under Part 19 or scheduling errors under Part 20 (given these are more akin to disputes as AEMO may dispute the nature of the claim).

The Commission has also considered whether there would be any benefit in allowing for a fast-track process to apply to specific compensation claims, under which AEMO could determine straightforward claims below a monetary threshold. Our draft determination is to retain the process for AEMO in Part 20, taking into account the nature of the claims under that Part. However, our draft determination is to not design such a process for compensation claims under Parts 19 and 27 as:

- this would require a determination on a threshold for small claims and the Commission does not consider a natural threshold exists, and
- AEMO would not have the relevant information to determine such 'simple' claims.

**The proposed framework would apply to compensation claims but not unintended scheduling results or scheduling errors**

The Commission has considered which types of compensation claims should be assessed under the proposed new framework and which ones would more appropriately be dealt with through the existing dispute resolution provisions. The Commission considers that unintended scheduling results under Part 19 and scheduling errors under Part 20 are different in nature to the other types of compensation claims allowed for under the NGR. This is because there may be a dispute about whether there was either an unintended scheduling result or a scheduling error - in either case AEMO may dispute the basis for the claim. Consequently, the Commission considers that the existing dispute resolution framework is more suitable in terms of treating these as a dispute. On this basis the Commission is satisfied that the following compensation claims should be assessed under the proposed new compensation framework in Part 15C:<sup>28</sup>

- Part 19, rules 344 and 237: a Registered Participant claims for compensation where AEMO has intervened in the market and required the Registered Participant to inject gas into the declared transmission system (DTS);
- Part 19, rules 350 and 237: a Registered Participant claims for compensation where the market has been suspended, in respect of gas injected into the DTS;
- Part 20, rules 433 and 465: a Trading Participant claims in respect of gas injected into the hub where the price is less than its offer due to rule 428 (relating to administered price cap states), rule 430 (relating to market administered scheduling states) or rule 431 (relating to market administered settlement states);
- Part 27, rules 704 -707: a relevant entity claims compensation in relation to an ECGS direction.

<sup>28</sup> See definition of compensation claim under rule 135F of the draft rule.

### **We do not consider there would be any benefit in designing a fast-tracked compensation claims assessment process for claims under Parts 19 or 27**

As part of our analysis on the application and scope of the proposed new framework, we have also considered whether a fast-track process should apply to specific types of compensation claims. Under the current arrangements WEMDRA has created a fast-track process for scheduling errors that allows an agreed outcome to be put to the DRP for final determination. Under the current Part 20, AEMO can agree certain compensation claims through the Stage 1 dispute resolution process, without a DRP needing to be appointed.<sup>29</sup> Another fast-track approach applies under the NER compensation frameworks and allows some decisions on compensation claims below a predetermined threshold to be assessed by AEMO with no reference to the independent expert.<sup>30</sup> On this basis, some stakeholders raised in their submissions to the consultation paper whether the process for assessing compensation claims could be streamlined by establishing a fast-track process for small claims.<sup>31</sup>

The Commission has determined to retain the ability for AEMO to reach agreement with a claimant under Part 20 where AEMO is satisfied that the claim is uncontroversial, on the basis that the calculation of the compensation amount may be relatively straightforward in many cases and appointing an independent expert to determine the claim would be an unnecessary cost.<sup>32</sup>

The Commission considered what a fast track or small claims process might look like under the new framework for other compensation claims. The Commission considered whether by reference to either the dollar value of the claim, or a set of other criteria, certain claims could proceed under a 'fast track' process. However, the Commission has decided not to design a fast-track process based on the following implementation considerations:

1. There is no 'natural' threshold or set of criteria that could be used. The Commission could not identify a class of claims suited to a streamlined process.
2. There is no meaningful way to streamline the process. Under the NER, AEMO has the responsibility to assess these small claims to avoid them going to an expert for determination. However, in contrast to NER arrangements, AEMO would have an information deficit within the gas context because of differences between the operation of electricity and gas markets.

### **3.1.2 We propose a streamlined compensation framework that clarifies the roles and responsibilities of AEMO, the independent expert and claimants**

#### **Box 3: Draft determination - Roles and responsibilities of AEMO, the independent expert, and claimants**

The proposed new compensation claims framework in Part 15C of the NGR clarifies the roles and responsibilities of AEMO, the independent expert, and claimants as follows:

- AEMO would have no role in assessing compensation claims referred to an independent expert but rather would fulfil a coordinating role by appointing the independent expert and providing guidance to claimants
- the independent expert would be responsible for assessing compensation claims referred to it

<sup>29</sup> Rules 465 and 466 of the NGR.

<sup>30</sup> NER clause 3.12.2(l).

<sup>31</sup> Submissions to the consultation paper: EUAA, p. 2; Alinta, p. 2; APLNG, p. 2; WEMDRA, p. 1.

<sup>32</sup> Subrule 465(2) of the draft rule.

- a claimant would have certain rights, including a right of appeal on questions of law, but also increased responsibilities, including liability for some or all of the costs of the independent expert (for example where an applicant has unreasonably prolonged proceedings).

The proposed new framework in Part 15C of the NGR clarifies the roles and responsibilities of AEMO, the independent expert, and claimants. The Commission's consultation paper explored whether the role of the Adviser and the DRP could be re-allocated to another body or whether it is appropriate to retain their coordinating and decision-making functions. Submissions to the consultation paper indicated that stakeholders support transparency and clarity with regard to roles and responsibilities (apart from the AER, supporting the existing arrangements with the Adviser overseeing compensation claims).<sup>33</sup>

The Commission's draft rule aligns the proposed new NGR compensation framework with the NER expert determination process used for compensation arrangements for AEMO directions, but with some modifications (such as the arrangements for resolving conflicts of interest, the proposal for AEMO to publish guidance and the explicit right of appeal). These amendments reflect the different nature of gas and electricity markets and also aim to provide greater certainty to those using the framework.

As a result of aligning the framework for determining compensation under the NGR with the comparable NER arrangements, the process is more streamlined compared to the current arrangements. Our draft rule further aligns with the following assessment criteria of this rule change:

- *Principles of good regulatory practice:* By promoting simplicity through a streamlined process and transparency to stakeholders through a clear allocation of roles and responsibilities in the proposed new framework in Part 15C and requiring AEMO to provide guidance about the operation of the expert determination process for compensation claims.
- *Implementation considerations:* Aligning the NGR with the NER compensation arrangements supports consistency across regulatory frameworks (to the extent possible) and reduces complexity.

#### **AEMO would fulfil a coordinating and guiding function (but have no role in assessing compensation claims)**

Under the proposed new framework AEMO must:

- nominate and (if there is no valid objection on conflict of interest grounds) appoint the independent expert<sup>34</sup>
  - the draft rule prescribes specific timeframes for the determination process, including the time for AEMO to nominate and then appoint the independent expert and the time for the expert to make a final determination.
- prepare, consult and publish a form of confidentiality deed to allow the independent expert to engage with a claimant<sup>35</sup>

<sup>33</sup> Submissions to the consultation paper: AER, p. 3; APA, p. 7; EUAA, p. 3; Shell, p. 2.

<sup>34</sup> Rule 135JE of the draft rule.

<sup>35</sup> Subrule 135JD(2) of the draft rule.

- publish guidance about the operation of the expert determination process for compensation claims, including guidance about (noting that the draft rule does not specify the form in which AEMO should provide this guidance):<sup>36</sup>
  - the selection of independent experts and if applicable, the maintenance by AEMO of a pool of potential independent experts;
  - how potential conflicts of interest will be managed; and
  - giving notice of the claim, the claims process and indicative timetables.

### **The independent expert would be responsible for the assessment of compensation claims**

Under the proposed new framework the independent expert:

- must independently investigate, analyse and determine a compensation claim in accordance with the rules<sup>37</sup>
- determines the process and timetable it will adopt in performing its role, subject to the timeframes for certain steps specified in the rules, and must notify the claimant and AEMO on the process and timetable (including if the independent expert amends the process and timetable)<sup>38</sup>
  - although the timetable for making determinations would be defined in the rules, the draft rule gives the independent expert some discretion to extend the timeframes, for example if the expert is waiting for information from a claimant or due to the complexity of a specific claim.<sup>39</sup>
- may appoint a person with appropriate expertise to provide advice on a matter outside its expertise<sup>40</sup>
- may request the claimant and AEMO to provide information relating to the claim or events leading to the claim:
  - the independent expert can make assumptions if the claimant does not provide the relevant information,<sup>41</sup> and
  - AEMO only needs to provide the requested information to the extent it is within AEMO's possession or control (AEMO would, for example, not be required to provide an assessment of information)<sup>42</sup>
- must prepare:
  - a draft and final report for publication by AEMO<sup>43</sup>
  - a draft and final determination for each claim referred to it and provide it to the claimant and AEMO (including details of the calculation used to determine the amount of compensation)<sup>44</sup>
- has no power to compel third party information for its assessment of a compensation claim
  - the Commission considers there would need to be a compelling reason to include a power to call on third party information. It is not satisfied that such a reason exists in the context

36 Subrule 135JD(3) of the draft rule.

37 Subrule 135JG(1) of the draft rule.

38 Subrules 135JG(2)-(5).

39 Rule 135JG(5) of the draft rule.

40 Subrule 135JG(8) of the draft rule.

41 Subrules 135JG(6) and (7) of the draft rule.

42 Rule 135JF of the draft rule.

43 Subrules 135JH(1)(a) and (3)(a).

44 Subrules 135JH1(b) and (3)(b).

of a compensation claim, where the claimant could be expected to have the information it needs to support its claim for direct costs. The Commission also notes that it proposes that the independent expert would be empowered to appoint a person with appropriate expertise to provide advice on a matter outside its expertise, and AEMO will be required to provide market information within its possession. On this basis the Commission does not consider a power for the independent expert to compel third party information is required.

- although stakeholders broadly supported allowing for the body assessing compensation claims to call on third party information,<sup>45</sup> the Commission considers that allowing an independent expert to require a third party to provide information for the purpose of assessing a compensation claim is beyond its rule-making powers.<sup>46</sup>

### **Claimants would have appropriate rights and responsibilities as part of the process**

Under the proposed new framework a claimant:

- may notify the AER (consistent with the AER's role under the NGR dispute resolution process) that it objects to the proposed independent expert appointed by AEMO, on the ground that the independent expert has an interest that would compromise its impartiality in relation to the relevant compensation claim<sup>47</sup>
  - if the AER receives objections from more than 25% of the claimants in relation to the relevant compensation claim and the AER has concerns regarding the independent expert's impartiality, then AEMO must nominate another person to be the independent expert.<sup>48</sup>
- must notify its claim within the time specified in the Part applicable to the claim, and will then have an opportunity to provide written submissions and evidentiary material once the expert is appointed<sup>49</sup>
- must do all things reasonably necessary for the proper, expeditious and cost-effective assessment and determination of its claim<sup>50</sup>
- may request a meeting with the independent expert to discuss matters in relation to an independent expert's draft report or draft determination applicable to the claimant<sup>51</sup>
- may seek appeal on questions of law as the draft rule provides for claimants, as well as market bodies and parties required to fund a compensation claim, to have a (limited) right to seek review of an expert's decision.<sup>52</sup>
  - the NGL allows for appeal on a question of law for rule disputes and applies the review provisions of the Commercial Arbitration Acts of each jurisdiction to the appeal.<sup>53</sup> Under existing arrangements this would apply to a compensation claim. The Commission therefore has decided to align the right of appeal under the draft compensation framework with the principles governing review of rule disputes. We consider this would promote good decision-making and is consistent with good regulatory practice.

45 Submissions to the consultation paper: AER, p.3; APA, p. 6; WEMDRA, p. 1; EUAA, p. 2.

46 Powers to require third parties to provide information are dealt with at the NGL level or, in the case of rule disputes, are subject to supervision by a court through the commercial arbitration framework.

47 Subrule 135JE(2) of the draft rule.

48 Subrule 135JE(3) of the draft rule.

49 Subrule 135JG(3)(b) of the draft rule.

50 Subrule 135JG(9) of the draft rule.

51 Subrule 135JH(2) of the draft rule.

52 Subrule 135JK(1) of the draft rule.

53 NGL section 270C.

- the Commission notes that some stakeholders supported this right of appeal including a merits review.<sup>54</sup> The Commission notes that public policy considerations, such as the public interest in finality of arbitration decisions, lie behind the limited rights of appeal that apply to arbitration decisions and by extension, decisions on rule disputes. The Commission is satisfied that similar considerations apply in relation to the expert determination process.
- must bear its own costs of making a compensation claim<sup>55</sup>
- may be liable for some or all of the costs of the independent expert, for example where an applicant has unreasonably prolonged proceedings.<sup>56</sup>
- must pay to AEMO the allocated compensation process costs within 10 business days of an invoice from AEMO for the amount<sup>57</sup>
  - the Commission proposes to recommend that subrule 135JJ(4) of the draft rule be classified as a tier two civil penalty provision.

### 3.2 We have refined the framework for AEMO directions in the ECGS

The following sections address issues relating to the compensation arrangements in Part 27 of the NGR. Part 27 sets out the circumstances in which a claim may be made, overlaid by a general test of whether compensation is appropriate in all circumstance, and what costs can be claimed.

The rule change request tasked the Commission to improve the regulatory framework in order to achieve the following objectives:<sup>58</sup>

- sufficiently incentivise behaviour that supports system reliability and supply adequacy
- ensure the compensation framework is sustainable, i.e. access to compensation and the quantum of payments is subject to appropriate limits
- provide funding arrangements for compensation payments that are fair and equitable
- provide reasonable and proportionate access to compensation.

Against this background, the following sections provide further detail on our draft determination to:

- limit the costs that are eligible for compensation to direct costs only to incentivise market supporting behaviour before an AEMO direction (section 3.2.1)
- insert principles into the NGR to guide AEMO's cost recovery methodology for compensation claims under Part 27. The proposed NGR principles largely align with the current demand-driven approach adopted by AEMO, with some amendments (section 3.2.2)
- introduce a new civil penalty provision to support appropriate behaviour in response to an AEMO direction (section 3.2.3)
- increase the minimum threshold for a compensation claim to \$50,000 and not allow for different entities to join claims in order to meet the minimum threshold (section 3.2.4).

54 Submissions to the consultation paper: Origin, p. 1; APA, p. 6; APLNG, p. 2; EUAA, p. 1.

55 Subrule 135JJ(2) of the draft rule.

56 Subrule 135JJ(3) of the draft rule.

57 Subrule 135JJ(4) of the draft rule.

58 AEMC consultation paper, p. 4.

### 3.2.1 Only direct costs are eligible for compensation to incentivise market supporting behaviour

#### **Box 4: Draft determination - Only direct costs are eligible for compensation to incentivise market supporting behaviour**

The Commission's draft determination is to limit costs that are eligible for compensation to direct costs (consistent with current arrangements). The Commission's draft determination aims to provide for the right balance of incentives to support the normal operation of the market, as compared to a directed market state. The Commission is of the view that broadening the categories of costs that are eligible for compensation would pose the risk of creating undesirable incentives in favour of a directed state.

Given the draft determination to limit costs that are eligible for compensation to direct costs, we do not recommend introducing a cap on compensation claims under Part 27. As there would be a natural limit on claims, the Commission considers there is no basis for a further cap.

#### **Categories of costs and rationale for the Commission's draft determination to only allow for compensation of direct costs**

Under the current arrangements, compensation for AEMO gas directions is narrowly defined as covering:<sup>59</sup>

- direct costs of supplying a natural gas service as directed (e.g. replacing and shipping gas)
- direct cost for a party deprived of a natural gas service (that it has paid for under contract), even if the party is not the subject of the direction.

The rule change request raised the issue of whether the compensation framework incentivises market behaviour that supports system reliability or adequacy, i.e. whether eligible categories of costs for compensation are appropriate.<sup>60</sup>

Stakeholders broadly supported clarifying the types of costs that are eligible for compensation.<sup>61</sup> Stakeholders submitted a range of costs that the framework should contemplate: direct, opportunity, consequential and indirect costs. EUAA did not support the broadening of costs eligible for compensation.<sup>62</sup>

The Commission notes that the categories of costs raised by stakeholders are not clearly defined, and in some cases do not seem to be mutually exclusive. For example, the definition of what constitutes a direct cost as employed by EUAA does not align with the current definition of direct costs under Part 27, and in the case of cleaning and/or repairs for equipment more closely aligns with other stakeholders use of the term consequential costs. In table 3.1, the Commission has therefore sought to first:

- identify the different categories of costs under consideration
- define the scope of the different cost categories, and
- illustrate the scope of the identified cost categories based on examples provided in stakeholder submissions.

<sup>59</sup> NGR rule 704.

<sup>60</sup> Rule change request, p. 13.

<sup>61</sup> Submissions to the consultation paper: Origin, p. 2; Alinta, p. 1; Jemena, p. 1; APA, p. 5; Shell, p. 2; APLNG, p. 1.

<sup>62</sup> EUAA submission to the consultation paper, p. 2.



Table 3.1: Categories of costs

Cost category	Definition	Examples raised in stakeholder submissions/possible scenarios
Direct costs	The cost that are directly involved in the production of a particular product or provision of a particular service.	<p>The costs associated with the supply of gas including:</p> <ul style="list-style-type: none"> <li>• direct costs of supplying a natural gas service as directed (eg buying replacement gas and shipping gas).</li> <li>• direct costs for a party deprived of a natural gas service (that it has paid for under contract), even if the party is not the subject of the direction.</li> </ul>
Indirect costs	The expenses of doing business that are not readily identified with a direction, but are necessary for the general operation of the organisation and the conduct of activities it performs. I.e. the broader costs of operating the business.	Labour and operating costs incurred in the course of a direction, e.g. the costs of staffing during a direction.
Consequential costs	<p>A consequential adverse impact caused by a direction to contracts or damage to business property or equipment.</p> <p>Within current NER provisions, consequential costs are “costs not directly attributable to the event, nor opportunity costs, but costs borne as a consequence of the event.”</p>	<p>Consequential contract cost as a result of an AEMO direction:</p> <ul style="list-style-type: none"> <li>• A gas powered generator is not able to generate electricity in support of contracts for the supply of electricity at fixed prices</li> <li>• LNG cargo cannot leave for the spot market or supply of a LNG contract. Alternative gas has to be sourced to meet LNG contract commitment.</li> </ul> <p>Consequential damage costs as a result of an AEMO direction:</p> <ul style="list-style-type: none"> <li>• Delayed maintenance - which may lead to equipment failure during or after the direction.</li> <li>• Off-specification (offspec) gas supply - where AEMO directs gas to be supplied between different networks and the offspec gas supply causes damage. (This example was raised in submissions. However, we consider the pipeliner may be able to refuse due to jurisdictional requirements, i.e. safety</li> </ul>



Cost category	Definition	Examples raised in stakeholder submissions/possible scenarios
		preventing transport of off-spec gas).
Opportunity costs	The cost of a lost opportunity due to a direction.	Lost revenue opportunity in LNG or gas spot markets or in the NEM.

Source: AEMC.

On the basis of identifying and defining the different cost categories, the Commission has considered the inclusion or exclusion of different cost categories under the draft framework. The Commission's draft determination is to leave the categories of costs that are eligible for compensation unchanged, that is, to maintain the current definition of costs that are eligible for compensation as direct costs only.

In making its determination the Commission has been guided by the following assessment criteria (see table below for further detail):

- *Maintain the incentives for normal, and not directed, market operation and efficient risk allocation:* The Commission is of the view that broadening the cost categories that are eligible for compensation could create an undesirable incentive to prefer a directed state. Further, the Commission is of the view that participants must consider the risk of a direction and allowing only for compensation of direct costs allocates risk to those most suitable to manage the risk of a direction.
- *Good regulatory practice and implementation considerations that allow for the complexity of assessing a wider set of compensation claims:* Determining direct costs is simpler and more transparent. Allowing for compensation of indirect and opportunity costs would require complex and costly counterfactual analysis.

Table 3.2 outlines the Commission's rationale for the inclusion of direct costs and exclusion of other cost categories.

**Table 3.2: Reasons for inclusion of direct costs and exclusion of other cost categories**

Cost category	Reasons for inclusion/exclusion
Direct costs	<p>The Commission's draft determination is to include direct costs in the framework based on the need for participants to be able to recover their direct costs if subject to an AEMO direction.</p> <p>The payment of direct costs maintains the incentive for market participants to have gas supply and gas supply services available to supply the market during normal market operation and during periods of direction.</p>
Consequential contract costs	<p>The Commission's draft determination is to exclude consequential contract costs. The Commission considers that their inclusion would create undesirable incentives and would not encourage prudent risk management by participants. For example:</p> <ul style="list-style-type: none"> <li>• Participants should be incentivised to ensure a functioning market. Allowing for compensation of consequential contract costs would lower risk for participants in a market with gas supply issues and</li> </ul>

Cost category	Reasons for inclusion/exclusion
	<p>NEM prices in excess of \$300/MWh. Participants would no longer face the same risk of gas contract non-delivery that they face under normal market operation. Allowing for compensation of consequential contract costs might therefore provide incentives to prefer a directed market state, with a bearing on the security and reliability of the system.</p> <ul style="list-style-type: none"> <li>Participants should have an incentive to manage their market risk and the risk of direction where this occurs. For example, in the process of managing portfolio risk, a participant should sell marginally less LNG cargoes where the market is in distress to mitigate that risk and the increased risk of direction. Similarly, GPG plants need to allow for gas supply risk and plant outages in the process of participating in the electricity contract market. Gas directions are a subset of the contracting risk that should be allowed for by participants in the process of selling electricity forward contracts.</li> </ul>
Consequential damage costs	<p>The Commission's draft determination is to exclude consequential damage costs given the risks of such damage occurring should be managed through prudent market practice and communication, consistent with the rules. The Commission considers that the following mechanisms provide sufficient processes to manage these risks:</p> <ul style="list-style-type: none"> <li>In Victoria AEMO has a maintenance coordinator function</li> <li>In other regions, Gas Bulletin Board (GBB) procedures and AEMO's ability to call industry conferences provide sufficient process and communication channels to avoid the possibility that an AEMO direction might lead to equipment failure.</li> </ul> <p>Participants are incentivised to transparently communicate gas specification issues to AEMO in the course of normal market operation (GBB/industry conferences).</p>
Indirect costs	<p>The Commission's draft determination is to exclude indirect costs. The Commission considers that their inclusion would create undesirable incentives and implementation issues.</p> <p>Inclusion may provide incentives to attribute normal business costs to the direction event, and to include these costs in a compensation claim in order to recover additional funds from the market during a direction event.</p> <p>Inclusion would also require complex and costly counterfactual analysis. It would be challenging and subject to interpretation to attribute these costs to the direction alone, and not the supply of gas in general.</p>
Opportunity costs	<p>The Commission's draft determination is to exclude opportunity costs as it considers their inclusion would create undesirable incentives and implementation issues.</p> <p>The Commission considers that allowing for compensation of opportunity costs could provide an incentive towards a directed state</p>

Cost category	Reasons for inclusion/exclusion
	that does not support the future security and reliability of the system.  The Commission also considers that these claims would require complex and costly counterfactual analysis.

Source: AEMC.

### 3.2.2 The draft rule elevates principles into the NGR to govern the cost recovery methodology used to fund compensation claims

#### Box 5: Draft determination - Provide clarity on the cost recovery methodology used to fund compensation claims under Part 27

The Commission's draft determination is to insert principles into the NGR to guide AEMO's cost recovery methodology for compensation claims under Part 27. The proposed NGR principles largely align with the current demand-driven approach adopted by AEMO, with some clarification and amendment in terms of the draft rule:

- defining gas demand as taking gas from a pipeline for consumption purposes, an LNG export, or any other purposes, including for storage
- allocating costs based on time and location
- requiring the claimant to also fund compensation
- specifying that AEMO recovers the costs of the expert in addition to the compensation amount from the relevant entities (based on demand during the relevant period of time in the affected location).

Under current arrangements AEMO is required to include in its East Coast Gas System Procedures (referred to as the Procedures in the following)<sup>63</sup> the manner, form and methodology for payments made by relevant entities to fund compensation claims.<sup>64</sup> AEMO's current compensation funding methodology allocates costs amongst participants based on:

- the consumption, i.e. demand of gas
- during the relevant period.

AEMO relied on a report from CEPA to develop the current methodology<sup>65</sup> given the existing Part 27 arrangements provide limited guidance for AEMO.

The rule change request asked the Commission to consider whether these arrangements should be revised. The rule change request suggested the Commission consider alternatives to the current arrangements, including:<sup>66</sup>

- **Alternatives to the existing cost allocation approach:** Would moving to a beneficiary or causer pays model or more equitable cost allocation approach be more appropriate than maintaining the current consumption-driven approach?

63 [https://aemo.com.au/-/media/files/stakeholder\\_consultation/consultations/gas\\_consultations/2023/implementation-of-east-coast-gas-system-procedures/notice-of-decision/east-coast-gas-system-procedures.pdf?la=en](https://aemo.com.au/-/media/files/stakeholder_consultation/consultations/gas_consultations/2023/implementation-of-east-coast-gas-system-procedures/notice-of-decision/east-coast-gas-system-procedures.pdf?la=en).

64 Rule 707(8)(a) of the NGR.

65 [https://aemo.com.au/-/media/files/stakeholder\\_consultation/consultations/gas\\_consultations/2023/implementation-of-east-coast-gas-system-procedures/cepa-report-recovering-the-costs-of-gas-directions-and-the-trading-fund.pdf?la=en](https://aemo.com.au/-/media/files/stakeholder_consultation/consultations/gas_consultations/2023/implementation-of-east-coast-gas-system-procedures/cepa-report-recovering-the-costs-of-gas-directions-and-the-trading-fund.pdf?la=en).

66 Rule change request, p. 14.

- **Increased clarity and guidance through the NGR:** Should the NGR provide more detail or is it appropriate for AEMO to determine the cost allocation mechanism within its Procedures?

#### Maintaining the consumption-based approach with minor amendments

Stakeholders expressed support for reviewing the current compensation funding methodology in terms of providing further clarity and reviewing the current cost allocation model.<sup>67</sup> Only Origin expressed support for the current consumption-based approach.<sup>68</sup>

The Commission considers that determining a causer pays model is a complex task. Ascribing fault to a particular entity presents a difficult, time consuming task within the context of complex market dynamics. This is particularly the case where an entity may be responding to a normal commercial incentive, for example, a gas powered generator responding to a high price period in the NEM. The Commission's analysis has further indicated that the main beneficiary of any direction would be demand, however, demand may also be a cause of directions.

As such the Commission is of the view that this leaves gas consumption, i.e. demand as the preferable means of allocating costs. However, the Commission's draft determination is to provide further clarity around the definition of 'gas demand' in the NGR, which the draft rule further specifies as *natural gas taken from a pipeline forming part of the ECGS for:*<sup>69</sup>

- *consumption purposes*
- *an LNG export project, or*
- *any other purposes, including storage, specified in the Procedures, in circumstances where the withdrawal of that natural gas has the potential to impact the supply demand balance in the ECGS during an identified risk or threat.*

The Commission further considers that the allocation of costs should be kept as narrow as possible to time and location, for reasons of fairness and to maintain incentives to manage demand where this is feasible during challenging periods in the market. The Commission largely agrees with the current approach to recovering the costs adopted by AEMO, but considers there is benefit in the draft rule providing further clarification in terms of AEMO allocating costs to entities based on time and location.<sup>70</sup>

AEMO's current approach to recovering costs is set out in sections 4.4(c) and (d) of its Procedures. AEMO's Procedures distinguish between a period in which the risk or threat was under 28 days in duration and longer than 28 days. The allocation of costs is slightly different in each case.

- Where the compensation claim relates to a direction given in respect of an identified risk or threat for which the **period of the risk or threat was 28 days or less**, compensation costs are to be allocated as determined by AEMO "in the affected jurisdiction or jurisdictions **during the 7-day period ending on the day the relevant risk or threat notice or direction notice was revoked**".<sup>71</sup>
- Where the compensation claim relates to a direction in respect of an **identified risk or threat of 29 days or more**, then each liable relevant entity who is liable to contribute to the compensation amount, other than the claimant, is to be allocated a share of the compensation amount in proportion to its share of gas consumed in the "affected jurisdiction or jurisdictions

67 Submissions to the consultation paper: Shell, p. 2; Alinta, p. 2; Jemena, p. 1; APGA, p. 1; APA, p. 3/4

68 Origin submission to the consultation paper: p. 2.

69 See definition of gas demand under rule 703 of the draft rule.

70 Subclause 707(11) of the draft rule.

71 AEMO ECGS Procedures, p. 22.

**during the 6-month period ending on the day the relevant risk or threat notice or direction notice was revoked".<sup>72</sup>**

The Commission notes that the existing Procedures in respect of a period under 28 days are consistent with the principle of keeping cost allocation as narrow as possible in terms of time and location in order to preserve the incentive for gas consumption to be managed as much as possible during threat or risk periods. However, for longer periods of time in excess of 29 days, the existing Procedures will require revision to accommodate the changes such that cost allocation is as narrow as possible even where the period of threat or risk notice extends over a long time frame.

#### **Inclusion of principles in the NGR to improve clarity to participants and provide guidance to AEMO**

The Commission's draft determination is to insert principles into the NGR to govern the recovery of compensation costs based on gas consumption, time and location. In line with this rule change's assessment criterion of *good regulatory practice*, the Commission's draft determination would provide greater clarity to stakeholders and guidance to AEMO, while allowing for some flexibility within AEMO's application of the principles-based approach.<sup>73</sup>

AEMO supported providing further clarity and guidance in the NER on the compensation funding methodology rather than leaving it completely to AEMO to determine the methodology.<sup>74</sup> Other stakeholders likewise expressed support for the NGR providing greater guidance and clarity on this aspect.<sup>75</sup>

#### **A claimant may be a relevant liable entity that is required to fund compensation**

Compensation claimants would no longer be exempt from funding compensation claims. Based on consumption-based approach, a claimant may be a relevant liable entity that is required to fund compensation.<sup>76</sup> Consequently, the draft rule would allow AEMO to set off against amounts payable to a claimant any amount the claimant is required to pay AEMO by way of compensation funding or as a contribution to the costs of the claims determination process.<sup>77</sup>

#### **AEMO can recover the costs of the expert in addition to the compensation amount from funding parties**

The Commission's draft determination is to amend the NGR to allow for the recovery of the costs of the expert determining a claim under Part 27 in the same way that the compensation is recovered, i.e. AEMO would recover the costs of the independent expert in addition to the amount of compensation that is awarded.

This draft determination aligns with the *good regulatory practice* assessment criterion of this rule change, as the proposed approach is a simple and transparent solution to the question of how to recover the costs of the expert determining compensation claims made under Part 27.

Under the current arrangements in Part 27, AEMO does not explicitly recover the costs with the DRP and the Adviser.<sup>78</sup> As a result, AEMO passes the costs on through participant fees. The rule change request asked the Commission to consider whether the costs of the body making the decision on the amount of compensation awarded should be covered by the same participants

<sup>72</sup> AEMO, ECGS Procedures, p. 22-23.

<sup>73</sup> Subclause 707(11) of the draft rule.

<sup>74</sup> AEMO submission to the consultation paper, p. 1/2.

<sup>75</sup> Stakeholder submissions to the consultation paper: Shell, p. 3; APA, p. 4.

<sup>76</sup> Subclause 707(7) of the draft rule.

<sup>77</sup> Subclause 707(8) of the draft rule.

<sup>78</sup> Subrule 707(6) of the NGR.

who fund compensation claims. The AER and AEMO supported allowing AEMO to recover the costs of the body making the decision on the amount of compensation awarded.<sup>79</sup> Conversely, Alinta supported these costs being borne by AEMO.<sup>80</sup>

The Commission proposes that for claims made under Parts 19 or 20, the approach in Part 19 would continue to apply, and these costs would be passed through participant fees, so that costs are recovered from the market where the event leading to compensation occurs.<sup>81</sup>

### 3.2.3 We recommend introducing a new civil penalty provision to support appropriate behaviour in response to an AEMO direction

#### **Box 6: Draft determination - Introducing a new civil penalty provision to support appropriate behaviour in response to an AEMO direction**

The Commission's draft determination is to recommend a new rule that prohibits certain behaviour by an entity in response to a direction or where the market anticipates a direction may be given. The intent of this provision is to deter opportunistic behaviour that exacerbates the direct costs arising from an AEMO direction.

Subject to consultation with the AER, the Commission intends to recommend to Energy Ministers that this rule be classified as a tier one civil penalty provision.

Under current arrangements, a DRP is required to first assess whether the payment of compensation is 'appropriate in all the circumstances'.<sup>82</sup> The DRP is then required to determine the amount of compensation and may determine not to fully compensate the claimant where the claimant fails to mitigate its loss or where the actions of the claimant (both before and after the direction was issued) contributed to or exacerbated the amount of compensation being claimed.<sup>83</sup> The current rules do not give the DRP guidance about what matters it should take into account in the first stage, when determining whether compensation is 'appropriate in all the circumstances'. Somewhat more guidance is provided for the second stage question of whether the actions of the claimant contributed to or exacerbated the amount of compensation being claimed.

The Commission considers that these provisions require a DRP to assess the claimant's conduct before, during, and after a direction in deciding whether any compensation is payable and if so, the amount. The Commission considers that, to the extent that conduct relating to a direction should be reviewed as part of the compensation framework and an assessment of that conduct made, there should be a clear prohibition on engaging in the relevant behaviour, rather than the indirect application of a behavioural standard through the compensation determination process. The Commission also considers that the AER, rather than the person determining the compensation, should assess whether the regulatory requirement has been breached.

The Commission's draft rule would remove both the requirement for the DRP (now the independent expert) to assess whether compensation is appropriate in all the circumstances and the requirement to consider whether the actions of the claimant (both before and after the direction was issued) contributed to or exacerbated the amount of compensation being claimed.

79 Submissions to the consultation paper: AER, p. 3; AEMO, p. 3.

80 Alinta submission to the consultation paper, p. 2.

81 Subrules 237(4) and 465(6) of the draft rule.

82 Subrule 707(1)(a) of the NGR.

83 Subrule 707(2) of the NGR.

The Commission has considered whether a behavioural standard is needed to deter unwanted behaviour or whether it is sufficient to rely on the economic incentives offered through the types of costs that are eligible for compensation (see section 3.2.1) and the incentive to mitigate direct costs to avoid the risk of an adjustment by the independent expert. However, the Commission is of the view that relying on the economic incentives is insufficient since they do not extend to the behaviour of those supplying the natural gas services that relevant entities may require to comply with a direction. Therefore, the Commission's draft determination is to include a rule to prohibit the unwanted behaviour and that is subject to enforcement by the AER.

The Commission has considered what behaviour should be prohibited. Its draft determination is to extend the new provision to behaviour that exacerbates direct costs; that is, opportunistic behaviour that has the effect of increasing the direct costs to be compensated, compared to the counterfactual where the relevant entity did not engage in that behaviour. Such behaviour might include the withdrawals of bids or offers or changes in prices of bids or offers in the market or in availability with the intention of increasing the price of a natural gas service a relevant entity requires to comply with a direction during a threat or risk period. The additional cost would ultimately be borne by consumers through the compensation framework.

The Commission has considered who the prohibition should apply to and its draft determination is that the prohibition should extend to conduct by all relevant entities, not just relevant entities given a direction.

The Commission has considered how the provision should be framed. One approach would be to define behavioural standards that must be met by parties in response to an AEMO direction, akin to a 'code of conduct'. The Commission considers it would be difficult to define behavioural standards meaningfully and without a loss of flexibility for market participants engaging in normal commercial activity, and in a way that is consistent with the AER's approach to enforcement in the sector.

The draft rule instead includes a specific prohibition.<sup>84</sup> The proposed provision:

- applies to all relevant entities, not just those subject to an AEMO direction
- retains the concept of 'exacerbation' of direct costs from the current rules
- applies to acts or omissions that exacerbate costs either intentionally or recklessly
- excludes behaviour that has a reasonable cause.

Subject to consultation with the AER, the Commission proposes to recommend to Energy Ministers that this rule be classified as a tier one civil penalty provision.

**Question 1: We are interested in stakeholder views on the proposed new civil penalty provision to support appropriate behaviour in response to an AEMO direction**

In particular, the Commission seeks feedback on:

- the types of behaviour that should be targeted under the new provision and the extent to which such behaviour might increase, or be intended to increase, the costs of compensation
- whether the draft rule would address this behaviour as intended, or alternative approaches

<sup>84</sup> Rule 706 of the draft rule.



- whether the concepts of ‘exacerbation’ of direct costs and ‘reasonable cause’ provide sufficient guidance on the behaviour prohibited by the rule, while allowing normal trading to occur during periods of market risk or threats.

### 3.2.4 The draft rule increases the minimum threshold for a compensation claim to \$50,000 (and allow for indexation) and no joining of claims to meet the minimum threshold

#### **Box 7: Draft determination - The draft rule increases the minimum claim threshold (and allow for indexation) and no option for different entities to join claims**

The Commission’s draft determination is to:

- increase the minimum threshold to make a claim to \$50,000. This increase is based on the indicative costs of the independent expert
- allow for indexation of the minimum claim threshold
- maintain the existing arrangements in terms of allowing for different claims from the same event to be assessed by the same independent expert, however, different entities could not join claims in order to meet the minimum threshold.

#### **Increase of the minimum claim threshold to \$50,000 and allowing for indexation**

The Commission’s draft determination is to increase the threshold to \$50,000 in order to balance the minimum amount of compensation that can be claimed with the indicative costs of the expert determination process. In making its draft determination, the Commission engaged with AEMO on this matter and decided to increase the threshold based on the following considerations:

- The costs of an independent expert are likely to be high due to the complexity of claims, given the interaction of claims with multiple gas markets, contractual arrangements, title of gas, and nature of the directions (i.e., it is likely that directions will relate to larger volumes of gas).
- Setting the threshold too low would be costly and not align with our assessment criteria of *market efficiency* and *implementation considerations*, by balancing the costs and complexity of implementation and costs to participants (which will be required to fund the expert determination process).

Further, the Commission’s draft determination is to allow for indexation of the \$50,000 minimum claim threshold.<sup>85</sup>

Under current arrangements there is a \$5000 minimum threshold in order for a claimant to make a compensation claim.<sup>86</sup> The rule change request suggested that the Commission review this threshold, having regard to efficiency of the process.<sup>87</sup> Stakeholders likewise supported reviewing the threshold given the costs of the process for assessing compensation claims.<sup>88</sup>

**Consistent with existing arrangements, different entities would not be able to join compensation claims**

<sup>85</sup> Subrule 704(4) and (5) of the draft rule.

<sup>86</sup> NGR subrule 704(1).

<sup>87</sup> Rule change request, p. 13.

<sup>88</sup> Submissions to the consultation paper: AEMO, p. 2; Alinta, p. 2; Shell, p. 2.



### to meet the minimum threshold

Under current arrangements a DRP can permit or order a person to join or be joined in as a party to proceedings.<sup>89</sup> The rule change request raised the issue of whether different entities should be able to join claims.<sup>90</sup> This could be in the form of:

- multiple claims from the same event, or
- multiple claims to meet the \$5,000 threshold (noting that the Commission's draft determination is to increase the minimum claim threshold to \$50,000).

Most stakeholders supported allowing for a mechanism to join claims.<sup>91</sup> Only EUAA and Origin raised concerns on the basis that claims may contain commercially sensitive or confidential information.<sup>92</sup>

The Commission is of the view that allowing for the independent expert to determine multiple claims relating to the same event would be an efficient use of resources. The new Part 15C compensation framework outlined in section 3.1 allows for this to occur.<sup>93</sup> However, the Commission does not support allowing different entities to join claims to meet the minimum threshold to claim. This draft determination aligns with the assessment criterion of *implementation considerations*. The independent expert will need to assess each claim individually and allowing different entities to join smaller claims is likely to lead to costs of the process exceeding the value of claims.

## 3.3 The draft rule makes consequential changes to the DWGM and STTM

### **Box 8: Draft determination- The draft rule makes consequential changes to the DWGM and STTM to ensure the application of the proposed compensation framework to relevant claims**

The Commission's draft determination is to make consequential changes to Parts 19 and 20 to ensure the application of the proposed compensation framework under Part 15C to relevant compensation claims in relation to AEMO directions and intervention, market suspension and administered pricing.

Claims relating to unintended scheduling results under Part 19 or scheduling errors under Part 20 would continue to be assessed under the existing dispute resolution framework.

Energy Ministers requested that the Commission consider the alignment between the existing compensation regimes in Parts 19, 20 and 27 of the NGR.<sup>94</sup> Submissions to the consultation paper were mixed on this issue. Shell supported having the same compensation framework apply to both the DWGM and ECGS.<sup>95</sup> EUAA supported greater consistency between the two systems,<sup>96</sup> whereas APA submitted that given the differences between these markets, the frameworks should recognise the differences between them and be fit for purpose.<sup>97</sup>

89 NGR rule 135HE

90 Rule change request, p. 13.

91 Submissions to the consultation paper: AER, p. 2; APA, p. 6; Shell, p. 2.

92 Submissions to the consultation paper: EUAA, p. 1/2; Origin, p. 2.

93 Subrule 135JE(4) of the draft rule.

94 Rule change request, p. 12.

95 Shell submission to the consultation paper, p. 2.

96 EUAA submission to the consultation paper, p.3/4.

97 APA submission to the consultation paper, p. 8.

Under the proposed compensation framework outlined in section 3.1, the new compensation framework would apply to Part 27 (ECGS Directions), Part 19 (DWGM) and Part 20 (STTM) of the NGR in relation to AEMO directions and intervention, market suspension and administered pricing.

The proposed Part 15C compensation framework would not apply to claims arising from unintended scheduling results under Part 19 or scheduling errors under Part 20. These would continue to be determined using the Part 15C rule dispute process (see for more detail section 3.1.1).

The Commission's determination is that the proposed compensation framework in Part 15C would govern the process for assessing a compensation claim, whereas the existing rules in Parts 19, 20 and 27 (as applicable to the claim) would continue to govern the following aspects:

1. eligibility to make a claim
2. how a claim is initiated and the requirement to refer claims for determination by an independent expert under the new provisions
3. what must be determined and the principles to be applied in determining compensation
4. AEMO's obligation to pay the compensation awarded and the compensation funding arrangements.

As a result, the Commission's draft determination is to make consequential changes to Parts 19 and 20 to ensure that relevant compensation claim would be assessed under the proposed compensation framework in Part 15C.

In addition, in relation to Part 20, the Commission's draft determination is to include a new provision dealing with payment of the costs of the independent expert, to replace the arrangements that would currently apply under Part 15C.<sup>98</sup> Under the new provision, the costs will be borne by AEMO rather than the claimant, and passed through participant fees.<sup>99</sup> This is consistent with the approach in Part 19.<sup>100</sup>

The Commission is of the view that this aligns with *good regulatory practice*, by achieving consistency between the frameworks whilst maintaining the need for bespoke arrangements that reflect the different nature of these markets.

### 3.4 We do not make any changes to the existing dispute resolution provisions

#### **Box 9: Draft determination - No changes to the existing dispute resolution provisions, other than consequential drafting changes**

The Commission's draft determination is to not make any material changes to the existing dispute resolution provisions. Although we have identified some issues, these are not exclusive to the NGR.

Based on the Commission's determination to separate compensation claims out from the existing dispute resolution provisions, with some exceptions for scheduling errors and unintended

<sup>98</sup> Under the current arrangements, rule 135JA would apply to the Part 20 compensation claims.

<sup>99</sup> Subrule 465(6) of the draft rule.

<sup>100</sup> Subrule 237(4) of the draft rule.

scheduling results, the Commission has considered whether any changes to the existing dispute resolution provisions would be required.

Most stakeholders did not comment explicitly on the dispute resolution provisions. However through engagement with stakeholders, and the Commission's own analysis, we have identified some issues in relation to the dispute resolution provisions in Part 15C and the corresponding provisions in the NER, including:

- **Powers of the DRP:** there is uncertainty about the interaction between the NGR/NER provisions and the provisions in the *Commercial Arbitration Acts* that the NGL/NEL apply to rule disputes.
- **Procedural matters:** The AER considers there should be more flexibility in the timetable for appointing a DRP and WEMDRA identifies differences between NER and NGR requirements for market participant dispute management systems.

The Commission is of the view that the NGR and NER frameworks for rule disputes have not kept up with changes to other legislation, such as the *Commercial Arbitration Acts*. However, these issues are not exclusive to the NGR which is the focus of this rule change. In any event, this rule cannot address the issues raised that are specific to the NER.

### 3.5 Commencement date, implementation and transitional arrangements

**Box 10: Draft determination - The proposed compensation framework (and consequential changes) would come into effect in June 2024 to allow for a sufficient implementation time frame**

The Commission's draft determination is that the proposed compensation framework and consequential changes would come into effect on 27 June 2024. This would provide AEMO with sufficient time to update and consult on aligned Procedures, as well as allow AEMO to publish guidance and a confidentiality deed by the proposed rule commencement date.

Any existing claims would be dealt with under the existing arrangements.

The Commission's draft determination is that the proposed compensation framework (as well as the proposed consequential changes to the DWGM and the STTM) would come into effect on 27 June 2024.<sup>101</sup>

By that date, AEMO would be required to review, and where necessary update, the following Procedures to ensure alignment with the draft rule:<sup>102</sup>

- the STTM Procedures;
- the Wholesale Market Procedures; and
- the East Coast Gas System Procedures.

Further, by the commencement date, AEMO would be required to (see section 3.1.2 for more detail):

- make and publish guidance on the expert determination process<sup>103</sup>

<sup>101</sup> Rule 100 of the draft rule.

<sup>102</sup> Rule 102 of the draft rule.

<sup>103</sup> Subclause 135JD(3) of the draft rule.

- prepare, consult and publish a form of confidentiality deed to allow the independent expert to engage with a claimant.<sup>104</sup>

Any existing claims that are not finally dealt with or decided immediately before the commencement date would be dealt with by the existing (old) rules.<sup>105</sup> If an award of compensation is made with respect to an existing claim, AEMO must pay and may recover the compensation and any costs of the dispute resolution process that are required to be borne by AEMO in the manner provided for in the existing rules despite the Amending Rule.<sup>106</sup>

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104 Subclause 135JD(2) of the draft rule

105 Rule 101 of the draft rule.

106 Rule 101 of the draft rule.

## A Rule making process

A standard rule change process includes the following stages:

- a proponent submits a rule change request
- the Commission initiates the rule change process by publishing a consultation paper and seeking stakeholder feedback
- stakeholders lodge submissions on the consultation paper and engage through other channels to make their views known to the AEMC project team
- the Commission publishes a draft determination and draft rule (if relevant)
- stakeholders lodge submissions on the draft determination and engage through other channels to make their views known to the AEMC project team
- the Commission publishes a final determination and final rule (if relevant).

You can find more information on the rule change process in *The Rule change process – a guide for stakeholders*.<sup>107</sup>

### A.1 Energy Ministers asked the Commission to address issues with the existing framework

The rules setting out the arrangements for determination of compensation claims under Part 27 of the NGR are drawn from Part 15C of the NGR (which is also deployed in relation to compensation claims under the DWGM and STTM 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 or 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.

Against this background, Energy Ministers identified a number of issues with the existing framework for compensation in terms of clarity, consistency, efficiency and effectiveness. More specifically, Energy Ministers asked the AEMC to consider the following improvements:

- refining the compensation and dispute resolution frameworks to provide clear and consistent arrangements so that the gas sector operates efficiently and effectively in the long-term interests of consumers
- making any necessary changes to the Part 15C dispute resolution framework so it can be more effectively applied to any assessment of compensation claims across various parts of the NGR where compensation claims may arise
- considering any bespoke amendments to the ECGS framework compensation arrangements so it is fit for purpose, and
- considering whether and to what extent consequential changes to other parts of the NGR may be required.

<sup>107</sup> AEMC, *The rule change process: a guide for stakeholders*, June 2017, available here: <https://www.aemc.gov.au/sites/default/files/2018-09/A-guide-to-the-rule-change-process-200617.PDF>.

## A.2 The proposed rule seeks to improve clarity, consistency, efficiency and effectiveness

The Energy Ministers' rule change request proposed a number of potential changes to the framework, to improve clarity, efficiency and consistency, including in the following areas:<sup>108</sup>

### **Governance and procedural arrangements:**

- the role of the Adviser and time frames to establish a DRP
- the ability for the DRP to call on, or rely on, third-party information
- rights to appeal
- ability to join compensation claims
- the interactions between Part 15C and other parts of the NGR that refer to Part 15C.

### **The scope of the framework:**

- clarifying legal rights and obligations in advance
- clarifying eligibility for compensation and the interaction with incentives.

### **Funding arrangements:**

- funding of compensation claims, and
- allocation of costs.

## A.3 It proposed to focus on governance arrangements, scope of the framework and funding arrangements

This section summarises and outlines in more detail some proposed solutions in line with the above identified areas to address issues with the existing framework.<sup>109</sup>

### **Governance and procedural arrangements**

Energy Ministers proposed a number of potential refinements to the process which would support greater efficiency, for example, the creation of a mechanism for the relevant entity(s) to agree the scope of the claim with the Adviser or DRP at the commencement of the process. Energy Ministers also proposed allowing claims from multiple entities related to the same or similar events to be joined.

Energy Ministers suggested that greater efficiency in the process could also be achieved by allowing the DRP to require third parties to provide information to support its consideration of compensation claims. Additionally, Energy Ministers suggested the AEMC review AEMO's ECGS Procedures to consider whether they could more effectively achieve the ECGS policy objectives.

### **The scope of the framework**

To ensure any changes continue to support the broader reforms to manage threats to security and reliability in the ECGS, Ministers raised the potential for further incentives beyond direct costs to be compensated in certain circumstances. This could include compensation for opportunity cost when there may be additional need or urgency to encourage participants to help respond to threats to the ECGS.

### **Funding arrangements**

<sup>108</sup> While the rule change request did not include drafting of the proposed rule, it contained a description of the proposed rule and potential options for the AEMC to consider and explore.

<sup>109</sup> See AEMC consultation paper p. 8 and rule change request p. 7.

Energy Ministers also stated that the compensation framework should be sustainable, that is, access to compensation and the quantum of payments should be subject to appropriate limits. This could be addressed by allowing compensation processes to be combined for efficiency and consistency improvements, but also through the potential introduction of caps on compensation claims. Energy Ministers also suggested the Commission consider the allocation of costs, including whether cost allocation mechanisms might sit more appropriately in the Rules than in AEMO's Procedures. Energy Ministers also asked the AEMC to consider the roles of entities like the Adviser and the DRP to determine whether and to what extent their roles appropriate to compensation frameworks. Energy Ministers also noted that it may be appropriate to consider whether the Adviser or a different or new entity should oversee compensation claims for AEMO directions. Changes to these arrangements could help ensure the compensation process is fit for purpose.

## A.4 The process to date

On 22 June 2023, the Commission published a notice advising of the initiation of the rule making process and consultation in respect of the rule change request.<sup>110</sup> A consultation paper identifying specific issues for consultation was also published. Submissions closed on 20 July 2023. The Commission received 11 submissions as part of the first round of consultation. The Commission further met with individual stakeholders and industry groups.

The Commission considered all issues raised by stakeholders in submissions and through discussions. Issues raised in submissions and through discussions are discussed and responded to throughout this draft rule determination. The Commission extended the time frame for making the draft rule as the rule change request raised issues of sufficient complexity.<sup>111</sup>

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<sup>110</sup> This notice was published under s. 303 of the NGL.

<sup>111</sup> The notice was published under s. 317 of the NGL.

## B Regulatory impact analysis

The Commission has undertaken regulatory impact analysis to make its draft determination.

### B.1 Our regulatory impact analysis methodology

#### **We considered a range of policy options**

The Commission compared a range of viable policy options that are within our statutory powers. The Commission analysed these options: the rule proposed in the rule change request, a more preferable rule and a business-as-usual scenario where we do not make a rule.

#### **We identified who would be affected and assessed the benefits and costs of each policy option**

The Commission's regulatory impact analysis for this rule change used qualitative methodologies. It involved identifying the stakeholders impacted and assessing the benefits and costs of policy options. The depth of analysis was commensurate with the potential impacts. Where commensurate and feasible, the Commission has quantified the impacts. The Commission focused on the types of impacts within the scope of the NGO.

Table B.1 summarises the regulatory impact analysis the Commission undertook for this rule change. Based on this regulatory impact analysis, the Commission evaluated the primary potential costs and benefits of policy options against the assessment criteria. The Commission's determination considered the benefits of the options minus the costs.



**Table B.1: Regulatory impact analysis methodology**

Assessment criteria	Primary costs Low, medium or high –	Primary benefits Low, medium or high –	Stakeholders affected	Methodology QT = quantitative, QL = qualitative
Principles of market efficiency	Nil No change to the cost categories eligible for compensation (direct costs only)	Low	<ul style="list-style-type: none"> <li>AEMO</li> <li>Market participants</li> <li>Other relevant entities</li> </ul>	<ul style="list-style-type: none"> <li>QL: No additional costs as there is no expansion in costs eligible for compensation.</li> <li>QL: Administrative simplicity is maintained.</li> <li>QL: Benefits are maintained as direct costs only being eligible for compensation means incentives for normal market operation are maintained.</li> </ul>
Principles of market efficiency	Low Civil penalty provision to support appropriate behaviour in response to an AEMO direction	Medium	<ul style="list-style-type: none"> <li>AER</li> <li>Market participants</li> <li>Other relevant entities</li> </ul>	<ul style="list-style-type: none"> <li>QL: Some AER costs associated with monitoring behaviour in response to an AEMO direction. Some benefits through the incentive for appropriate behaviour in response to an AEMO direction, seeking to prevent parties from increasing the costs of compensation.</li> </ul>
Implementation considerations	Low AEMO changes to procedures to take account of principles introduced into the rules to guide AEMO's cost recovery methodology	Low	<ul style="list-style-type: none"> <li>AEMO</li> <li>Market participants</li> <li>Other relevant entities</li> </ul>	<ul style="list-style-type: none"> <li>QL: Administrative costs of initial changes required to AEMO Procedures. Incentives for normal market operation are made clearer through AEMO update to Procedures</li> <li>QL: Market participants and other relevant entities will face some initial transaction costs as they seek to understand and engage with the amended framework.</li> </ul>
Implementation considerations	Low Governance - AEMO role in appointing independent	Medium	<ul style="list-style-type: none"> <li>AEMO</li> <li>AER</li> </ul>	<ul style="list-style-type: none"> <li>QL: Administrative tasks required are not a substantial change on what is already required under the rules. AER role is a new role required but</li> </ul>

Assessment criteria	Primary costs Low, medium or high –	Primary benefits Low, medium or high –	Stakeholders affected	Methodology QT = quantitative, QL = qualitative
	expert and publishing guidance on operation of expert determination process and in providing information to independent expert. AER role in reviewing the appointment of the independent expert			not anticipated to be onerous.
Principles of good regulatory practice	Low AEMO can recover the costs of the expert in addition to the compensation amounts	Low	<ul style="list-style-type: none"> <li>AEMO</li> <li>Market participants</li> <li>Other relevant entities</li> </ul>	<ul style="list-style-type: none"> <li>QL: No addition in costs, allows AEMO to recover the costs of the independent expert in the same way that compensation is recovered.</li> </ul>
Principles of good regulatory practice	Nil Change in threshold for claims from \$5000 to \$50,000	Low	<ul style="list-style-type: none"> <li>AEMO</li> <li>Market participants</li> <li>Other relevant entities</li> </ul>	<ul style="list-style-type: none"> <li>QL: No real transaction costs for relevant entities to adjust to the new framework. Benefit provided in that only claims above \$50,000 are eligible for consideration by the independent expert (of which the process costs are estimated to be approx. \$50,000). Therefore, low value claims where the costs outweigh the benefits would be avoided.</li> </ul>
Principles of good regulatory practice	Low Consequential changes to Parts 19 and 20 to link them to the new framework in Part 15C to	Low	<ul style="list-style-type: none"> <li>AEMO</li> <li>Market participants</li> </ul>	<ul style="list-style-type: none"> <li>QL: More consistent application of the framework across different parts of the rules. Provides consistency and predictability to market participants.</li> </ul>

Assessment criteria	Primary costs Low, medium or high –	Primary benefits Low, medium or high –	Stakeholders affected	Methodology QT = quantitative, QL = qualitative
	achieve consistency between Parts 19, 20 and 27			
Safety, security and reliability	Nil	Low	<ul style="list-style-type: none"> <li>• AEMO</li> <li>• Market participants</li> <li>• Consumers</li> </ul>	<ul style="list-style-type: none"> <li>• QL: The proposed changes to the compensation framework align with broader reforms to manage system security and reliability given their support for incentives for normal market operation.</li> </ul>

## C Summary of amendments to the National Gas Rules

This appendix outlines the amendments to the National Gas Rules (NGR) made under the more preferable draft rule.

### C.1 Proposed changes to Part 15C

#### C.1.1 Introduction

Under the proposed rule, a new framework for expert determination of compensation claims (**compensation determination process**) would be inserted as Divisions 5 and 6 of Part 15C and the Part would be renamed 'Dispute resolution and compensation claims'. The compensation determination process would apply to the determination of these compensation claims instead of the dispute resolution process under Part 15C.

#### C.1.2 Claims subject to the compensation determination process

The definitions in proposed rule 135F would be amended to define which claims the compensation determination process would apply to, that is, claims for compensation under:

- rule 344 (AEMO interventions) or 350 (administered price cap) of Part 19 - Declared Wholesale Gas Market
- rule 433 (administered market states) of Part 20 - Short Term Trading Market, and
- Division 6 (Claims in respect of east coast gas system directions) of Part 27 - East coast gas system reliability and supply adequacy.

Other new defined terms to be added for the new compensation claims process would be 'claimant', 'compensation claim event' and 'independent expert'.

Consequential change would be made to the term 'relevant dispute' in rule 135F, to the general principles in rules 135FA and 135FB and to the heading of Division 4 of Part 15C.

#### C.1.3 Administration and guidance by AEMO

Under proposed rule 135JD, AEMO would be required to:

- determine the terms of appointment of an independent expert (subrule (1)),
- prepare and consult on a confidentiality deed between the independent expert and a claimant (subrule (2)), and
- publish guidance about the process for determination of compensation claims (subrule (3)).

#### C.1.4 Nomination and appointment of independent expert

Proposed rule 135JE would deal with the nomination and appointment of the independent expert as follows:

- Where AEMO is required to appoint an independent expert to determine a compensation claim, AEMO would be required to
  - publish and provide to the AER, notice of its proposed nominee within 15 business days of being notified of the claim (subrule (1)(a)), and
  - take into account the principle that to the extent reasonably practicable, related claims should be determined by the same independent expert as part of the same process (subrule (2)).

- A claimant would be permitted to notify the AER that it objects to a proposed nomination of an independent expert on the grounds that the independent expert has a potential conflict of interest (subrule (3)).
- If the AER receives an objection:
  - the AER would be required to give AEMO a copy of the notice and any supporting information, and
  - AEMO may nominate a different person to act as the independent expert (subrule (4)).
- If the AER receives objections from more than 25% of claimants in relation to a compensation claim and is satisfied that the nominated expert has a potential conflict of interest, the person is not eligible to act as the independent expert and AEMO and AEMO must nominate another person as the independent expert (subrule (5)) as soon as reasonably practicable (subrule (1)(b)).
- AEMO would be required to appoint the independent expert within 5 business days if there is no objection, or once any objection has been resolved (subrule (5)).

#### **C.1.5 Information to be provided by AEMO**

Under proposed rule 135JF, AEMO would be required to:

- provide the claim to the independent expert as soon as practicable after the expert is appointed, and
- provide market data requested by the independent expert to the expert and the claimant.

#### **C.1.6 Procedures for assessment of compensation claims**

Proposed rule 135JG would deal with the procedures for assessment of compensation claims as follows:

- The independent expert would be responsible for independently investigating, analysing and determining a compensation claim in accordance with the rules including:
  - determining (and amending) the process and timetable it will adopt in processing a claim, subject to timeframes specified under the rules,
  - notifying the claimant and AEMO of the process and timetable for a claim,
  - requesting written submissions and information supporting the claim from the claimant
  - requesting additional information it requires from the claimant (subrules (1) to (4) and (6)).
- The process and timetable developed by the independent expert must be consistent with timeframes specified under the rules and may allow for timeframes to be extended:
  - for periods in which it is waiting for the claimant to provide requested information,
  - where it reasonably considers that the issues relevant to the claim are of sufficient complexity or difficulty or there is a material change in circumstances (subrules (5)(b)).
- The independent expert would be permitted to appoint persons to provide advice on matters outside the expert's expertise and provide information to that person (subrule (8)).
- A claimant would be required to do all things reasonably necessary for the proper, expeditious and cost-effective assessment and determination of its claim (subrule (9)).

#### **C.1.7 Draft and final report and determination**

Proposed rule 135JH would set out the following process for determinations to be made:

- The independent expert would be required within 30 business days of its appointment to:

- prepare and provide to AEMO a draft report setting out the amount of compensation payable, any other matters required to be determined in accordance with the Part under which the compensation claims are made and any methodologies and assumptions used by the expert in making its determination,
- prepare and notify to each claimant and AEMO, its draft determination of the claimant's claim, and
- invite public submissions on its draft report and submissions from each claimant on the draft determination of its claim for a period of not less than 10 business days (subrule (1)).
- The independent expert would, if requested to do so by a claimant, be required to meet with the claimant's representatives within 15 business days of the notice of the draft determination (subrule (2)).
- The independent expert would be required within 20 business days after the end of the consultation period on the draft report and determinations (subrules (3) and (5)):
  - prepare and provide to AEMO its final report on the compensation claim (including a version from which confidential information has been omitted),
  - prepare and notify to each claimant and AEMO, its final determination of the claimant's claim, and
  - give AEMO its final tax invoice for the services rendered by the independent expert.
- AEMO would be required to publish a final determination from which confidential information has been excluded (subrules (6) and (7)).

The final determination of an independent expert would take effect in accordance with the provisions of the Part under which the claim is made (subrule (5)).

### C.1.8 Nature of the expert process, costs of claims and review of claim determinations

Proposed new Division 6 in Part 15C would deal with miscellaneous matters relating to the expert determination process.

- New rule 135JI would explain the nature of the expert determination process. An independent expert appointed to determine compensation claims would:
  - act as an expert and not an arbitrator
  - not be bound by the claimant's formulation of the matters to be addressed or the rules of evidence, and
  - incur no civil monetary liability for an act or omission in the exercise of powers or functions related to the determination of compensation claims under the rules unless the act or omission was done or made in bad faith (rule 135JI)
- New rule 135JJ would deal with costs. A claimant would be required to bear its own costs of a compensation claim (subrule (1)). The costs of the independent expert and AEMO in relation to a compensation claim (compensation process costs) would be borne as provided for in the Part under which the compensation claim is made unless the independent expert allocates some or all of the compensation process costs to the claimant because the claimant unreasonably prolonged the compensation determination process or there is some other good reason to alter the allocation of compensation process costs (subrules (2) and (3)). Payment would be made to AEMO within 10 business days of invoice (subrule (4)).
- A claimant would be required to pay AEMO the compensation process costs allocated to it within 10 business days of invoice (subrule (4)). The AEMC proposes to recommend that

subrule (4) be classified as a tier two civil penalty provision under the National Gas (South Australia) Regulations.

- New rule 135K would provide for a right of review. A claimant, the AER, AEMO or a person required, or who may be required, to pay money to AEMO in relation to a compensation claim would be entitled to apply to a Court for review of a determination of an independent expert on a question of law if the Court grants leave (subrule (1)). A Court would be empowered to grant leave to appeal in the circumstances specified in subrule (2). Subrules (3) to (9) would provide for the process that will apply if an application for appeal is made.

## C.2 Proposed changes to Part 19

- A new defined term 'compensation determination process' would be included in rule 200 to refer to the compensation determination process under new Division 5 of Part 15C.
- Rule 237 would be amended to:
  - provide for claims under rule 344 (AEMO interventions) or 350 (administered price cap) to be referred for determination under the compensation determination process, rather than referring the claim for resolution as a rule dispute by a dispute resolution panel (subrule (2)),
  - allow a registered participant to withdraw a claim at any time before the date for provision of written submissions by the claimant under Part 15C (subrule (3)). Under current subrule (5), a claim may only be withdrawn before a dispute resolution panel is appointed to resolve it, and
  - replace references to the dispute resolution panel with the independent expert.
- Rule 238 would be amended to reflect that an independent expert (rather than a dispute resolution panel) will be appointed to determine claims under rule 237.

## C.3 Proposed changes to Part 20

- A new defined term 'compensation determination process' would be included in rule 364 to refer to the compensation determination process under new Division 5 of Part 15C.
- Rule 465 would be amended to so that claims under rule 433 (Administered market states), rather than being settled by agreement or resolved by a dispute resolution panel would be:
  - where AEMO is satisfied that the claim is not controversial and has the agreement of the claimant, determined by AEMO, or
  - otherwise, be determined by an independent expert appointed by AEMO (subrule (2)).
- Rule 465 would also be amended to:
  - allow a registered participant to withdraw a claim at any time before the date for provision of written submissions by the claimant under Part 15C (subrule (3)). Under the current subrule (5), a claim may only be withdrawn before a dispute resolution panel is appointed to resolve it
  - provide that the cost of the independent expert on a compensation claim would be borne by AEMO unless the independent expert re-allocates those costs, or a proportion of those costs, to the claimant on the ground that the claimant has unreasonably prolonged the proceedings or there is some other good reason to alter the allocation of those costs (subrule (6)). Under the current rules, the dispute resolution panel may allocate costs relating to the resolution of rule 433 claims under subrule 135JA(3). The proposed approach under subrule 465(6) mirrors the approach under subrule 237(4) in Part 19,

- make consequential changes to the remainder of the rule to reflect the new process (subrules (4) and (5), replacing what are now subrules (6) and (7)).
- Consequential amendments would be made to subrule 466 to remove references to claims under rule 433 being ‘agreed’ (as compensation claims under new Division 5 of Part 15C are not able to be settled by agreement) and replace references to the dispute resolution panel with references to the independent expert.
- Subrule 466(2) would be amended to make the description of losses that are not to be compensated under rule 466 consistent with losses excluded from compensation under Division 6 of Part 27 (refer to proposed new rule 704).
- A consequential amendment would be made to subrule 500(2).

## C.4 Proposed changes to Part 27

### C.4.1 Introduction

- Under the proposed rule, Division 6 of Part 27 (Compensation claims relating to east coast gas system directions) would be substantially amended by:
  - providing for compensation claims under Division 6 of Part 27 to be referred for determination under the new compensation determination process under Part 15C rather than being treated as relevant disputes under Part 15C,
  - defining terms used in amended Division 6 (rule 703),
  - clarifying the provisions relating to entitlement to compensation (rule 704),
  - specifying how notices of claim are made and withdrawn (rule 705),
  - prohibiting a relevant entity from exacerbating direct costs relating to an east coast gas system direction (rule 706),
  - providing further detail in the NGR on how compensation claims relating to east coast gas system directions are determined and paid (subrules 707(1) to (8)),
  - expanding and clarifying the principles governing the funding of compensation and the costs of determining those claims (subrules 707(9) to (11)).
- Further detail on these amendments is set out below.

### C.4.2 Defined terms

- The following definitions would be included in rule 703, to apply in amended Division 6:
  - claims threshold
  - claim resolution costs
  - compensation determination process
  - compensation funding amount
  - gas demand
  - independent expert
  - liable relevant entities
  - market transaction, and
  - related claims.
- The defined term ‘Adviser’ would be omitted as it is not relevant to the compensation determination process.



### C.4.3 Entitlement to compensation

- Subrule 704(1) would be amended to provide that a claim may be made for direct costs incurred by a claimant, in place of the current reference to financial detriment.
- The proposed rule would specify a claims threshold of \$50,000 for claims notified in the period ending 31 December 2024 and a claims threshold for calendar years that begin after that date equal to \$50,000 adjusted by CPI (subrules 704(4) and (5)). Under the current rules, the cost threshold for claims is \$5,000 and it is not subject to adjustment.
- The basis on which direct costs claimed by a relevant entity are to be determined would be clarified in new subrule 704(2). This subrule is a modified form of subrule 704(5) of the current rules.
- The types of losses and costs for which a relevant entity is not entitled to compensation would be amended to clearly exclude loss of profit, indirect or consequential costs or losses and opportunity costs or losses (subrule 704(3)).

### C.4.4 Notice of claims and referral to an independent expert

Rule 705 would be amended to provide for claims under rule 704 to be referred for determination under the compensation determination process, rather than referring the claim for resolution as a rule dispute by a dispute resolution panel. Current rule 706, which deals with the appointment of the dispute resolution panel, would also be removed.

A new mechanism would be included to set the time by which a claim must be submitted as follows:

- AEMO would be required to publish a notice requesting relevant entities that may be entitled to compensation to submit notice of their claim. AEMO would publish the notice as soon as practicable after the completion (as determined by AEMO, acting reasonably) of any actions required to be taken as a direct result of an east coast gas system direction (new subrule (1)).
- A claimant would have 20 business days after the end of month in which the notice is issued to submit its notice of claim (new subrule (2)).
- A claimant would be permitted to withdraw a claim at any time before the date for provision of written submissions by the claimant under Part 15C. Under the current rules, a claim may be withdrawn at any time.

### C.4.5 No exacerbation of direct costs

A new prohibition on conduct of a relevant entity that exacerbate the direct costs incurred or likely to be incurred by the relevant entity or another person as a direct result of AEMO issuing an east coast gas system direction would be inserted (new rule 706).

The new rule replaces and extends the current requirement in subrule 707(1)(a) for the dispute resolution panel to consider whether it is appropriate in all the circumstances for compensation to be paid, and in subrules 707(2)(b) and (3) for any compensation to be reduced where the actions of the claimant (both before and after the direction was issued) contributed to or exacerbated the amount of compensation being claimed.

The AEMC proposes to recommend that new rule 706 would be classified as a tier one civil penalty provision.

#### C.4.6 Determination and payment of compensation claims

Rule 707 would be amended to reflect the change from the dispute resolution panel to the independent expert. In addition the following changes would be made:

- Subrule (1) would be amended to remove the requirement for the person determining the compensation to determine whether it is appropriate in all the circumstances for compensation to be paid.
- The circumstances in which the independent expert can determine not to fully compensate a claimant for its direct costs would be amended by:
  - referring to the mitigation of 'costs' not ('losses') in subrule (2)(a),
  - omitting subrule (2)(b) of the current rule under which a determination can be made not to fully compensate the claimant where the actions of the claimant contributed to or exacerbated the amount of compensation being claimed, and
  - amending current subrule (2)(c) (proposed to be renumbered as subrule (2)(b)) to allow for a determination that does not to fully compensate the claimant where the claimant received funds, payments, compensation or other financial benefit from being deprived of the relevant service. Under the current rule this applies only where the claimant receives such benefits for undertaking the activity required by the direction.

#### C.4.7 Funding the cost of compensation claims

The provisions in rule 707 that deal with the funding of compensation claims would be extended to the costs of the independent expert process to make related changes as follows:

- A new concept 'compensation funding amount' would be included in subrule (6) to cover both the compensation awarded to claimants and the costs of the independent expert process (unless the independent expert required the claimant to bear those costs).
- Subrule (5) would be amended to:
  - require AEMO to calculate the compensation funding amount,
  - determine which relevant entities must fund the compensation funding amount and their respective shares, and
  - require AEMO to pay the amount to the claimant in accordance with the Procedures after receiving payments from relevant entities that fund the compensation. The provision would expressly enable AEMO to make Procedures that allow for part payments to claimants, ie pay claimants as amounts are received by AEMO from relevant entities.

#### C.4.8 Funding compensation claims and the related costs

The provisions in rule 707 that govern compensation claim funding would be amended to set out the guiding principles in the rules. Compensation claimants would no longer be exempt from funding compensation claims. The changes include the following:

- Subrule (7) would be amended to provide that a claimant may be a relevant liable entity that is required to fund compensation. New subrule (8) would allow AEMO to set off against amounts payable to a claimant any amount the claimant is required to pay AEMO by way of compensation funding or as a contribution to the costs of the claims determination process.
- Subrule (9) (currently subrule (8)) and new subrule (10) would require AEMO to make Procedures:
  - about the provision of information to AEMO to enable AEMO to calculate the payment to be requested from each liable relevant entity,

- explaining how liable relevant entities are determined,
- explaining how AEMO will calculate aggregate gas demand in a location and a liable relevant entity's share of gas demand in that location, and
- providing for the share of gas demand of a retailer, or other person that sells gas, to include gas consumed by the person's customers to the extent that the quantity would not otherwise be included in the calculation of gas demand.
- Subrule (11) (currently subrule (9)) would require AEMO, when making Procedures about who funds compensation and related costs, to have regard to the principle that a liable relevant entity's share of a compensation funding amount should be in proportion to its share of the aggregate gas demand of all liable relevant entities (i) in the location of the identified risk or threat and (ii) in the relevant risk or threat period, both having regard to any relevant risk or threat notice and any relevant east coast gas direction.

## C.5 Transitional provisions

### C.5.1 Saving of existing claims

If immediately before the commencement of the final rule a claim made under the old rules was not finally dealt with then:

- an existing claim would be dealt with and decided under the old rules as if the old rules were still in force, and
- if an award of compensation is made with respect to an existing claim, AEMO would be required to pay and recover the compensation and any costs of the dispute resolution process that are required to be borne by AEMO as provided for in the old rules as if the old rules were still in force.

### C.5.2 Instruments made by AEMO

By the commencement date, AEMO would be required to:

- review (and update where necessary) the STTM Procedures, Wholesale Gas Market Procedures and the East Coast Gas System Procedures. Any changes to these Procedures would be required to take effect on the commencement date,
- prepare, consult on and publish a form of confidentiality deed to be made by an independent expert in favour of claimants, and
- make and publish guidance about the process for determining compensation claims under subrule 135JD(3).

## D Legal requirements to make a rule

This appendix sets out the relevant legal requirements under the NGL for the Commission to make a draft rule determination.

### D.1 Draft rule determination and draft rule

In accordance with section 308 of the NGL, the Commission has made this draft rule determination for a more preferable draft rule in relation to the rule proposed by the Energy Ministers Sub-Group.

The Commission's reasons for making this draft rule determination are set out in chapter 2.

A copy of the more preferable draft rule is attached to and published with this draft determination. Its key features are described in chapter 3 and appendix C.

### D.2 Power to make the rule

The Commission is satisfied that the more preferable draft rule falls within the subject matter about which the Commission may make rules.

The more preferable draft rule falls within the matters set out in Schedule 1 to the NGL as it relates to the following clauses:

**55ZF** Arrangements to pay compensation to relevant entities adversely affected by AEMO's exercise or performance of its east coast gas system reliability and supply adequacy functions, and to recover the compensation paid from relevant entities.

**126** Dispute resolution, including—

- (a) definition of the class of disputes subject to the dispute resolution provisions of the Rules; and
- (b) the appointment of persons to arbitrate, mediate or assist in some other way in the resolution of such disputes; and
- (c) the appointment of a person to manage and facilitate the dispute resolution process (without however derogating from that person's power to act personally as an arbitrator or mediator in a particular dispute); and
- (d) the dispute resolution process; and
- (e) rights of appeal on questions of law against decisions made in the course of the dispute resolution process.

### D.3 Commission's considerations

In assessing the rule change request the Commission considered:

- its powers under the NGL to make the draft rule
- the rule change request
- submissions received during first round of consultation
- the Commission's analysis as to the ways in which the draft rule will or is likely to contribute to the achievement of the NGL.

There is no relevant Ministerial Council on Energy (MCE) statement of policy principles for this rule change request.<sup>112</sup>

The Commission may only make a rule that has effect with respect to an adoptive jurisdiction if satisfied that the proposed rule is compatible with the proper performance of AEMO's declared system functions.<sup>113</sup> The Commission is satisfied that the more preferable draft gas rule is compatible with AEMO's declared system functions. The draft rule provides for an independent expert to determine certain compensation claims under the rules applicable to the DWGM, in place of the DRP. Under the new arrangements, AEMO ceases to be a party to the claim, but it continues to provide information in relation to those claims that is available to it as a result of performing its declared system functions and continues to give effect to the determination in its role as administrator of the DWGM.

## D.4 Making gas rules in Western Australia

Under the *National Gas Access (WA) Act 2009* (WA Gas Act), a modified version of the NGL was adopted, known as the National Gas Access (Western Australia) Law (WA Gas Law). Under the WA Gas Law, the NGR applying in Western Australia is version 1 of the NGR, as amended by rules made by the South Australian Minister for Energy<sup>114</sup> and rules made by the AEMC in accordance with its rule making powers under section 74 and 313 of the WA Gas Law.<sup>115</sup>

The draft rule does not fall within the subject matters about which the Commission may make rules under the WA Gas Act.

The draft rule amends Parts 15C, 19, 20 and 27 of the NGR that do not apply in the Western Australian version of the NGR.

Accordingly, the draft rule will not apply in Western Australia.

## D.5 Civil penalty provisions and conduct provisions

The Commission cannot create new civil penalty provisions or conduct provisions. However, it may recommend to the Energy Ministers' Meeting that new or existing provisions of the NGR be classified as civil penalty provisions or conduct provisions.

The NGL sets out a three-tier penalty structure for civil penalty provisions in the NGL and the NGR.<sup>116</sup> A Decision Matrix and Concepts Table,<sup>117</sup> approved by Energy Ministers, provide a decision-making framework that the Commission applies, in consultation with the AER, when assessing whether to recommend that provisions of the NGR should be classified as civil penalty provisions, and if so, under which tier.

Subject to consulting with the AER, the Commission proposes to make the following civil penalty recommendations to the Energy Ministers in relation to the final rule.

<sup>112</sup> Under s. 33 of the NEL and s. 73 of the NGL the AEMC must have regard to any relevant MCE statement of policy principles in making a rule. The MCE is referenced in the AEMC's governing legislation and is a legally enduring body comprising the Federal, State and Territory Ministers responsible for energy. On 1 July 2011, the MCE was amalgamated with the Ministerial Council on Mineral and Petroleum Resources. In December 2013, it became known as the Council of Australian Government (COAG) Energy Council. In May 2020, the Energy National Cabinet Reform Committee and the Energy Ministers' Meeting were established to replace the former COAG Energy Council.

<sup>113</sup> Section 295(4) of the NGL.

<sup>114</sup> The Statutes Amendment (National Energy Laws) (Binding Rate of Return Instrument) Act 2018 and the National Gas (South Australia) (Pipelines Access—Arbitration) Amendment Act 2017.

<sup>115</sup> See the AEMC website for further information at <https://www.aemc.gov.au/regulation/energy-rules/national-gas-rules/western-australia>.

<sup>116</sup> Further information is available at <https://www.aemc.gov.au/regulation/energy-rules/civil-penalty-tools>

<sup>117</sup> The Decision Matrix and Concepts Table is available at: [https://web.archive.org/awa/20210603104757mp\\_/https://energyministers.gov.au/sites/prod.energycouncil/files/publications/documents/Final%20-%20Civil%20Penalties%20Decision%20Matrix%20and%20Concepts%20Table\\_Jan%202021.pdf](https://web.archive.org/awa/20210603104757mp_/https://energyministers.gov.au/sites/prod.energycouncil/files/publications/documents/Final%20-%20Civil%20Penalties%20Decision%20Matrix%20and%20Concepts%20Table_Jan%202021.pdf)

**Table D.1: Civil penalty provision recommendations**

Rule	Description of rule	Proposed classification	Reason
135JJ(4)	If the independent expert determines that a claimant must bear some or all of the costs of the independent expert and AEMO, the claimant must pay that amount to AEMO within 10 business days of an invoice from AEMO for that amount.	Tier two	Tier two is proposed because failure may impact market administration.
706	A relevant entity must not by any act or omission, either intentionally or recklessly, exacerbate the direct costs incurred or likely to be incurred by the relevant entity or another person as a direct result of AEMO issuing an east coast gas system direction, without reasonable cause.	Tier one	Tier one is proposed because failure to comply risks distortion of market outcomes.

The more preferable draft rule also amends subrule 707(7) which is currently classified as a tier two civil penalty provision. The subrule requires a liable relevant entity to pay AEMO in accordance with the East Coast Gas System Procedures. The Commission considers that it should continue to be classified as a tier two civil penalty provision.

## Abbreviations and defined terms

AEMC	Australian Energy Market Commission
AEMO	Australian Energy Market Operator
AER	Australian Energy Regulator
Commission	See AEMC
DRP	Dispute Resolution Panel
DWGM	Declared Wholesale Gas Market
ECGS	East Coast Gas System
LNG	Liquefied natural gas
NER	National Electricity Rules
NGL	National Gas Law
NGO	National Gas Objective
NGR	National Gas Rules
STTM	Short Term Trading Market
WA Gas Act	National Gas Access (WA) Act 2009
Proponent	The individual / organisation who submitted the rule change request to the Commission