

ASIC CLASS ORDER [CO 10/407]

EXPLANATORY STATEMENT

Prepared by the Australian Securities and Investments Commission

Corporations Act 2001

The Australian Securities and Investments Commission (**ASIC**) makes ASIC Class Order [CO 10/407] under s911A(2)(1) of the *Corporations Act 2001* (**Act**).

Paragraph 911A(2)(1) provides that a person is exempt from the requirement to hold an Australian financial services (**AFS**) licence for a financial service they provide if the provision of the service is covered by an exemption specified by ASIC in writing and published in the Gazette.

1. Background

On 1 July 2009, the Australian Energy Market Operator (**AEMO**) assumed a range of functions in the gas and electricity markets that were previously undertaken by other market operators including statutory bodies such as the National Electricity Market Management Company Limited. AEMO currently operates and administers national electricity markets, the Victorian gas market, and retail gas markets in South Australia, New South Wales, Victoria and Queensland.

AEMO was tasked with establishing, operating and administering a Short Term Trading Market for gas (**STTM**) in South Australia and New South Wales by June 2010, with a view to expanding this market to other states in the future.

The STTM has been established by way of amendments to the National Gas Law (**NGL**) and National Gas Rules (**NGR**). Compliance with the STTM rules will be monitored and enforced by the Australian Energy Regulator (**AER**). The STTM caters for shippers and users of gas. Shippers have contractual arrangements to deliver gas to the distribution system using pipelines and other facilities, and offer that gas into the STTM. Users bid in the STTM to buy the gas they intend to withdraw from the distribution system. Both shippers and users are required to register as trading participants in the STTM (**Trading Participants**) and are subject to the NGR.

An 'ex ante market' forms part of the STTM process. The ex ante market is where gas is traded a day ahead of the day the gas is actually supplied, that is, a day ahead of a 'gas day'. The ex ante market sets the price for all gas supplied on a gas day. AEMO must prepare a market schedule for the gas day based on the bids and offers provided by Trading Participants. This schedule will specify the ex ante market price and the

quantity of gas that Trading Participants are expected to deliver or withdraw. This scheduling creates what we have termed ‘ex ante rights’. That is, the rights and obligations created when AEMO schedules trading participants in the ex-ante market of the STTM. These rights may satisfy the definition of a derivative under s761D of the Act upon consideration of the following features:

- (i) Trading Participants who are scheduled in the ex ante market are given the right but not the obligation to deliver or withdraw a specified quantity of gas on the following ‘gas day’;
- (ii) Trading Participants undertake these obligations the day following their scheduling in the ex ante market; and
- (iii) the amount of consideration is ultimately determined by reference to the volume of gas actually delivered (or withdrawn) on the gas day, multiplied by the ex ante market price, and subject to variations.

As such without relief AEMO and Trading Participants may be required to hold an AFS licence to deal in ex ante rights.

2. Purpose of the class order

The purpose of Class Order [CO 10/407] is to exempt AEMO and Trading Participants from the requirement to hold an AFS licence covering the provision of specified financial services related to the operation of the ex ante market of the STTM.

3. Operation of the class order

Under paragraph 4 of Class Order [CO 10/407], AEMO is exempt from the requirement to hold an AFS licence covering the provision of the following financial services to a Trading Participant that is a wholesale client:

- (i) providing general advice in relation to ex ante rights;
- (ii) dealing in ex ante rights by issuing them; and
- (iii) making a market in ex ante rights.

Under paragraph 5 of the class order a Trading Participant is exempt from the requirement to hold an AFS licence for dealing in ex ante rights on its own behalf by issuing the ex ante rights where the ex ante rights are also issued by AEMO to the Trading Participant as a wholesale client of AEMO. This means that Trading Participants must fit the definition of a wholesale client as set out under s761G(4) of the Act.

4. Consultation

Before making this class order we consulted with AEMO (as the market operator) regarding the required terms of relief, and the AER (as the regulator responsible for monitoring and enforcing the NGL and NGR) regarding the regulatory arrangements and structure of the STTM.