

EXPLANATORY STATEMENT

Issued by authority of the Minister for Finance acting for and on behalf of the Treasurer

Competition and Consumer Act 2010

Competition and Consumer (Gas Market Emergency Price) Order 2022

Section 53M of the *Competition and Consumer Act 2010* (the Act) provides that the Minister may make gas market emergency price orders. Section 53X of the Act provides that a gas market emergency price order may include rules about the price at which a person offers to supply or acquire, agrees to supply or acquire or supplies or acquires a gas commodity.

The purpose of the *Competition and Consumer (Gas Market Emergency Price) Order 2022* (the Order) is to prohibit regulated gas producers and affiliates of regulated gas producers from making certain offers on a gas trading exchange, entering into agreements to supply regulated gas, or supplying regulated gas under such agreements, at a price above \$12 per gigajoule (GJ) for a period of 12 months.

Over the course of 2022, the war in Ukraine resulted in significant volatility and record prices for gas on international markets. The current energy crisis was unforeseen and its economic impact on Australia is severe. The Government is committed to reducing the impact of the global energy shock on Australian households and businesses caused by the war in Ukraine, and on 9 December 2022 announced the Energy Price Relief Plan to shield Australians from the worst impacts of energy price increases.

The Order is an emergency measure that underpins Part IVBB of the Act, which was recently inserted by the *Treasury Laws Amendment (Energy Price Relief Plan) Act 2022*. This legislation, together with a proposed mandatory gas market code, forms part of the Government's Energy Price Relief Plan. This will accompany action to limit coal prices, provide targeted energy bill relief for households and businesses, and invest in cleaner, cheaper, more reliable energy for the future to address the current energy crisis.

The price cap is intended to apply to gas producers who transact primarily in wholesale markets. The maximum price of \$12 per GJ has been assessed to be a price which covers costs of production plus a reasonable rate of return on capital for gas sourced from developed fields. The price point is intended to lower domestic wholesale gas prices to levels which are more reasonable for Australian customers.

Part 1 sets out the machinery provisions of the instrument, including the definitions.

Part 2 sets out the geographical application of the Order, and gas commodities to which the Order applies.

Part 3 provides the detail of the price cap and particular exceptions. The prohibition on exceeding the price cap of \$12 per GJ applies to regulated gas producers and their

affiliates that offer, agree to supply, or supply, regulated gas within the price cap period. The price cap also applies to variations relating to price under agreements that were entered into prior to the price cap period. As well as general exceptions to the price cap, regulated gas producers and affiliates may apply to the Minister for an exemption from the price cap. The Minister may delegate any or all of the Minister's functions or powers in relation to exemptions to the Australian Competition and Consumer Commission (ACCC).

In accordance with subsection 53M(4) of the Act, the ACCC was consulted on the terms of the Order. In accordance with subsection 53M(6) of the Act, the Minister has made the Order within 12 months of the commencement of section 53M. The Act does not specify any additional requirements that must be satisfied before the power to make the Order may be exercised.

Public consultation was conducted on an exposure draft Order between 9 December 2022 and 12 December 2022. Submissions were received from around 60 stakeholders over this period, with around half focused on the exposure draft Order and the remainder focused on other aspects of the broader consultation. The limited duration of the consultation period on the exposure draft Order was appropriate as the measure deals with emergency circumstances.

The Order is a legislative instrument for the purposes of the *Legislation Act 2003*.

Details of the Order are set out in [Attachment 1](#).

The Order commences on the day after the day of registration on the Federal Register of Legislation. In accordance with subsections 53M(7) and (8) of the Act, the Order is automatically repealed 12 months after commencement unless it is repealed earlier.

Impact Analysis

The *Options for Energy Price Relief* Impact Analysis was published on 16 December 2022. The Office of Impact Analysis found the Impact Analysis to be adequate. The policy is expected to impose a modest regulatory burden (OBPR2203689).

A statement of Compatibility with Human Rights is at [Attachment 2](#).

Details of the *Competition and Consumer (Gas Market Emergency Price) Order 2022*

Part 1 – Preliminary

Section 1 – Name of the instrument

This section provides that the name of the Order is the *Competition and Consumer (Gas Market Emergency Price) Order 2022* (the Order).

Section 2 – Commencement

This section provides that the Order commences on the day after the instrument is registered on the Federal Register of Legislation.

Section 3 – Authority

This section provides that the Order is made under section 53M of the *Competition and Consumer Act 2010* (the Act).

Section 4 – Definitions

This section provides definitions of key terms used in the Order.

Notably, the term ***price cap*** is defined to mean \$12 per gigajoule (GJ). The ***price cap period*** means the period starting from commencement of the Order and ending 12 months after that day. These terms are relevant to the prohibitions on exceeding the price cap in section 8.

Price cap exemption is defined to mean a price cap exemption granted by the Minister under section 19 of the Order.

Regulated gas is defined as gas which is in a gaseous state at standard temperature and pressure and consists of naturally occurring hydrocarbons, or a naturally occurring mixture of hydrocarbons and non-hydrocarbons, the principal constituent of which is methane. The gas must not be liquefied natural gas and must be suitable for consumption (subject to exceptions in relation to the definition of regulated gas producer in section 5 and the application of Part 3 in section 7). As regulated gas must be ‘naturally occurring’, this definition does not capture renewable gases (for instance, biomethane).

Regulated gas represents the subset of gas commodities regulated under the Order. Section 53B of the Act defines gas commodity to mean gas; or goods or services relating to supplying or acquiring gas. Subsection 53N(1) of the Act allows the Order to apply in relation to a subset of gas commodities. The definition of regulated gas does not include any services, such as pipeline or other transportation services.

A ***gas trading exchange*** means a gas trading exchange established by the Australian Energy Market Operator (AEMO) under subsection 91BRK(1) of the National Gas Law. Certain offers to supply regulated gas, agreements to supply regulated gas, and the supply of regulated gas above the price cap resulting from transactions that occur on a gas trading exchange (also known as AEMO’s Gas Supply Hub) located at

Wallumbilla, Queensland; Moomba, South Australia; Wilton, New South Wales; and Culcairn, New South Wales are captured by the Order.

Section 5 – Definition of regulated gas producer

Section 5 provides that a ***regulated gas producer*** means a person that carries on a business of producing regulated gas.

Regulated gas producers, together with ***affiliates*** of regulated gas producers (as defined in subsection 9(2)), are subject to the prohibitions on exceeding the price cap in section 8.

For the purposes of the definition of a regulated gas producer, the requirement for regulated gas to be suitable for consumption is not applicable. This is intended to ensure that a person that ‘carries on a business of producing regulated gas’ includes persons that carry on the business of producing gas that is not suitable for consumption when it is produced or recovered. However, the prohibitions on exceeding the price cap only apply in relation to regulated gas that is suitable for consumption. This is because gas that is not yet suitable for consumption is not supplied to gas users, and the price cap is intended to apply to the sale of gas from producers to users (such as commercial and industrial customers).

Part 2 – Application

Section 6 – Geographical application

Section 6 limits the geographic application of the Order.

Subsection 53N(2) of the Act allows a gas market instrument (including a gas market emergency price order) to limit its application to parts of Australia where specified requirements are met, or all parts of Australia other than where specified requirements are met.

The Order applies in all parts of Australia, except for parts of Australia in which:

- there is a market (the first market) for regulated gas in the part of Australia, and regulated gas is acquired and supplied in that market by means of a physical network of interconnected gas pipelines; and
- there is another market (the second market) for regulated gas in another part of Australia, in respect of which all of the following conditions are satisfied:
 - regulated gas is acquired and supplied in that market by means of a physical network of interconnected gas pipelines;
 - that physical network crosses a border or borders between States, or between a State and a Territory; and
- there is a physical separation between the network in the first market and second market mentioned above.

In the current circumstances, this provision has the effect of excluding Western Australia from the price cap (that is, the first market described above).

As a consequence of the physical nature of gas and its transportation limitations, consumers in the east coast market are not able, as a practical matter, to buy gas which has been extracted from Western Australia. The physical separation between

the east coast and west coast of Australia (due to the lack of interconnected gas pipelines) results in separate markets.

The different treatment of these markets is appropriate as the purpose of the Order is to reduce the impact of rising energy costs through the imposition of a price cap on regulated gas. This is only necessary in the east coast market, as the east coast market has been severely impacted by the energy crisis and is experiencing prices above the price cap. Conversely, Western Australia is experiencing prices well below the price cap.

The application of the price cap to Western Australia would therefore not have an effect on that market, as prices are already below the cap, and the exclusion of Western Australia from the price cap does not provide Western Australia with a commercial advantage.

Section 7 – Gas to which Part 3 of the instrument applies

Section 7 limits the scope of regulated gas to which the prohibitions on exceeding the price cap and exceptions in Part 3 of the Order apply for the purpose of subsection 53N(1) of the Act. Subsection 53N(1) of the Act allows the Order to apply in relation to the supply or acquisition of a subset of gas commodities.

Part 3 of the Order only applies to regulated gas recovered from an area or block for which a relevant licence or lease was in force immediately before the commencement of the Order authorising the recovery or production of the gas. This is intended to ensure that the price cap applies to gas recovered from developed fields. The relevant Commonwealth and State and Territory licences are:

- federally – a petroleum production licence within the meaning of the *Offshore Petroleum and Greenhouse Gas Storage Act 2006*;
- in New South Wales – a production lease within the meaning of the *Petroleum (Onshore) Act 1991* (NSW), or a licence within the meaning of the *Petroleum (Offshore) Act 1982* (NSW);
- in Victoria – a production licence or an offshore petroleum production licence within the meaning of the *Petroleum Act 1998* (Vic.);
- in Queensland – a petroleum lease within the meaning of the *Petroleum and Gas (Production and Safety) Act 2004* (Qld), or a licence within the meaning of the *Petroleum (Submerged Lands) Act 1982* (Qld);
- in Western Australia – a petroleum production licence within the meaning of the *Petroleum and Geothermal Energy Resources Act 1967* (WA), or a licence within the meaning of the *Petroleum and Geothermal Energy Resources Act 1967* (WA);
- in South Australia – a petroleum production licence within the meaning of the *Petroleum and Geothermal Energy Act 2000* (SA), or a licence within the meaning of the *Petroleum (Submerged Lands) Act 1982* (SA);
- in Tasmania – a petroleum production licence within the meaning of the *Mineral Resources Development Act 1995* (Tas.), or a licence within the meaning of the *Petroleum (Submerged Lands) Act 1982* (Tas.); and

- in the Northern Territory – a production licence within the meaning of the *Petroleum Act 1984* (NT), or a licence within the meaning of the *Petroleum (Submerged Lands) Act 1981* (NT).

There are no relevant licences or leases in the ACT as there is no regulated gas to be recovered in that Territory.

While the definition of regulated gas in section 4 is generally limited to gas that is suitable for consumption, for the purposes of this provision, it is immaterial whether the gas, at the time it is recovered, is suitable for consumption. This clarification is necessary because at the point in time it is recovered under a relevant licence or lease, the regulated gas may not be suitable for consumption, however, it will still be subject to the prohibitions on exceeding the price cap.

The above licences or leases are generally issued when an area or block has been deemed commercially viable or likely to become commercially viable within a certain time period.

Areas and blocks for which a production licence is issued during the price cap period (that is, fields which were undeveloped at the commencement of the Order) will not be subject to the price cap. This is to avoid distorting investment decisions and in recognition of new gas projects potentially having higher costs of production.

Part 3 – Price cap and exceptions

Division 1—Price cap

Division 1 of Part 3 sets out the prohibitions on exceeding the price cap, and the persons who are subject to these prohibitions. It also deals with variations to agreements.

Section 8 – Price cap

Section 8 prohibits a person covered by section 9 (that is, a regulated gas producer or affiliate) from entering into agreements to supply regulated gas, or supplying regulated gas under such agreements, at a price above the price cap during the price cap period. These prohibitions will not apply in relation to pre-existing agreements entered into before the price cap period. Section 8 also prohibits a regulated gas producer or affiliate from offering to supply regulated gas above the price cap on a gas trading exchange. The price cap is \$12 per GJ and the price cap period starts when the Order commences and ends 12 months after that day.

Prohibition on agreements to supply and supply exceeding price cap

Subsection 8(1) prohibits a person covered by section 9 from entering into an agreement to supply regulated gas at a price above the price cap. Specifically, the prohibition applies if:

- the person enters into an agreement for the supply of regulated gas;
- the agreement is entered into in the price cap period;
- under the agreement, the person is to supply regulated gas during the price cap period; and

- the price payable under the agreement, for regulated gas to be supplied by the person in the price cap period, could exceed the price cap.

Subsection 8(2) prohibits a person covered by section 9 from supplying regulated gas under a relevant agreement at a price above the price cap. Specifically, the prohibition applies if:

- the person entered into an agreement for the supply of regulated gas; and
- the agreement is entered into in the price cap period; and
- the person supplies regulated gas under the agreement in the price cap period; and
- the price payable under the agreement, for that gas, exceeds the price cap.

There are general exceptions to the prohibitions in subsection 8(1) and (2) for:

- agreements where the person to whom regulated gas is supplied intends to export the gas in a liquid state (section 11);
- agreements for the storage of regulated gas (section 12);
- subordinate contracts executed during the price cap period that do not include a provision determining price (section 13);
- agreements resulting from a gas exchange transaction that is a declared wholesale gas market or short term trading market (section 14);
- agreements on a gas trading exchange that do not result from a Pre-matched Trade or Broker Pre-matched Trade (within the meaning of AEMO's gas trading exchange agreement as set out in the National Gas Law) (subsection 15(1));
- agreements on a gas trading exchange that result from a Pre-matched Trade or Broker Pre-matched Trade and are for short term supply (subsection 15(2)); and
- regulated gas producers or affiliates that are retailers (section 16).

The prohibitions in subsection 8(1) and (2) also do not apply to regulated gas producers or affiliates specified in a price cap exemption granted under Part 3 of Division 1, or affiliates of exempted producers, in accordance with section 17.

Prohibition on offers on a gas trading exchange exceeding price cap

Subsection 8(3) prohibits a person covered by section 9 from making an offer on a gas trading exchange for the supply of regulated gas at a price above the price cap.

Specifically, the prohibition applies if:

- the person makes an offer on a gas trading exchange for the supply of regulated gas;
- the offer is made in the price cap period; and
- the price under the offer, for that gas, exceeds the price cap.

In accordance with section 4, a gas trading exchange means an exchange established by AEMO under subsection 91BRK(1) of the National Gas Law.

The prohibition on offers exceeding the price cap under subsection 8(3) only applies to transactions that are not Pre-matched Trades or Broker Pre-Matched Trades on a

gas trading exchange due to the exception under subsection 15(4). Pre-matched Trades and Broker Pre-Matched Trades on a gas trading exchange are instead subject to the prohibitions on agreements and supply under agreements exceeding the price cap in subsection 8(1) and (2).

The prohibition in subsection 8(3) also does not apply to offers that are not Pre-matched Trades or Broker Pre-Matched Trades but are for short term supply in accordance with subsection 15(3), or regulated gas producers or affiliates that are retailers in accordance with section 16.

The prohibition does not apply to regulated gas producers or affiliates specified in a price cap exemption, or affiliates of exempted producers, in accordance with section 17.

Penalties

Subsections 8(1), (2) and (3) only apply in relation to gas market conduct within the meaning of subsection 53ZZA(1) of the Act.

These provisions are civil penalty provisions (within the meaning of the *Regulatory Powers (Standard Provisions) Act 2014*). In accordance with section 76 of the Act, they are subject to a civil penalty of up to \$2,500,000 for an individual or, for a body corporate, the greater of:

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

The maximum penalty for breach of one of these civil penalty provisions aligns with the maximum penalty for anti-competitive conduct and breaches of the Australian Consumer Law under the Act. This reflects the seriousness of breaching the price cap and the significant harm to the gas market and to the public associated with breaches of the price cap.

Section 9 – Persons subject to price cap

Section 9 sets out the persons that are subject to the prohibitions on exceeding the price cap.

A person is covered by section 9, and therefore subject to the prohibitions on offering or agreeing to supply, and supplying, regulated gas at a price exceeding the price cap in section 8, if they are a regulated gas producer; that is, if they carry on a business of producing regulated gas.

A person is also covered by section 9 if they are an affiliate of a regulated gas producer and have entered into an agreement for the supply of gas from the regulated gas producer or another affiliate of the producer. A person is an affiliate of a regulated gas producer if they:

- are related to the producer (as determined in accordance with section 4A of the Act);

- are a related entity of the producer (within the meaning of the *Corporations Act 2001*);
- participate in a joint venture with the producer;
- participate in a joint venture with a third person, and the third person also participates in a joint venture with the producer;
- participate in a joint venture with a third person, and a related entity of the third person also participates in a joint venture with the producer;
- participate in a joint venture with a related entity of a third person, and the third person participates in a joint venture with the producer.

These provisions ensure that regulated gas producers cannot enter into agreements with other parties to avoid the price cap.

Section 10 – Price cap—variations to agreements

Section 10 ensures that certain variations to agreements are subject to the prohibitions on exceeding the price cap.

Generally, the Order only applies to agreements that are entered into during the price cap period. However, section 10 provides that a variation to an existing agreement is treated as a new agreement for the purposes of the Order if it determines the price of regulated gas to be supplied under the agreement.

This means that if:

- a person enters an agreement before the start of the price cap period; and
 - the agreement is varied during the price cap period; and
 - the variation includes a provision that determines the price of regulated gas to be supplied under the agreement;
- then, regulated gas supplied under that agreement during the price cap period is subject to the price cap.

Variations that do not determine the price of regulated gas, such as variations dealing with transport costs or other ancillary costs or fees, are not covered by this provision.

Division 2—Exceptions to price cap

Division 2 of Part 3 sets out a number of exceptions to the prohibitions on exceeding the price cap in section 8.

Section 11 – Exception for export

Section 11 provides that the prohibitions in subsection 8(1) and (2) (that is, the prohibitions on agreements and supply under agreements exceeding the price cap) do not apply if, at the time an agreement is entered into, the person to whom the regulated gas is to be supplied intends to export it from Australia in a liquefied state. This is in addition to the exclusion of liquefied natural gas from the definition of regulated gas in section 4. The exception for exports is appropriate as the price cap is intended to target the domestic wholesale market.

Section 12 – Exception for storage

Section 12 provides that the prohibitions in subsection 8(1) and (2) (that is, the prohibitions on agreements and supply under agreements exceeding the price cap) do not apply to agreements for storing regulated gas. The exception is appropriate as the price cap is intended to target regulated gas intended to be used, rather than stored, in the domestic market.

Section 13 – Exception for subordinate contract or transaction notice not determining price

Section 13 provides that the prohibitions in subsection 8(1) and (2) (that is, the prohibitions on agreements and supply under agreements exceeding the price cap) do not apply to subordinate contracts or transaction notices that do not include a provision determining price.

Generally, the prohibition on exceeding the price cap in subsection 8(1) and (2) applies to subordinate contracts and transaction notices. However, an exception applies where the price of the regulated gas to be supplied under such a contract is determined by the master gas supply agreement or another contract entered into before the start of the price cap period, and the subordinate contract or transaction notice does not include a provision determining the price. This includes where the relevant master supply agreement or other contract prescribes a fixed methodology for arriving at a price, such that there is no negotiation as to price when the subordinate contract or transaction notice is executed.

This means that only subordinate contracts or transaction notices that determine the price during the price cap period are subject to the price cap.

A subordinate contract or transaction notice is not subject to the price cap merely because it determines ancillary costs or fees, such as transport costs for gas supplied under the contract. The relevant test is whether the price for the regulated gas to be supplied during the price cap period is determined by the subordinate contract or transaction notice.

Section 14 – Exception for gas exchange transactions

Section 14 provides that the prohibitions in subsection 8(1) and (2) (that is, the prohibitions on agreements and supply under agreements above the price cap) do not apply to agreements that result directly from a transaction on a gas exchange that is a declared wholesale gas market (within the meaning of the National Gas Law) or a short term trading market (within the meaning of the National Gas Law).

Gas exchange is defined in section 53B of the Act. Other agreements that result from a transaction on a gas exchange are subject to the prohibitions on exceeding the price cap under subsection 8(1) and (2), except for certain transactions on a gas trading exchange (as a subset of a gas exchange) under subsection 15(1) and (2).

The purpose of this exception is to exclude transactions on facilitated spot markets for which a price cap is unlikely to be effective. These transactions are generally used for one-off purchases and short term balancing of portfolios.

Section 15 – Exception for gas trading exchange transactions

Section 15 excludes certain offers and agreements resulting from transactions on a gas trading exchange from the prohibitions on exceeding the price cap in section 8.

Section 4 defines a gas trading exchange as a gas trading exchange established by the AEMO under subsection 91BRK(1) of the National Gas Law. As at commencement of the Order, the relevant gas trading exchanges are in Wallumbilla, Queensland; Moomba, South Australia; Wilton, New South Wales; and Culcairn, New South Wales.

Exception to prohibition on agreements and supply – agreements resulting from transactions that are not pre-matched trades

Subsections 8(1) and (2) prohibit a regulated gas producer or affiliate from entering into an agreement to supply, or supplying regulated gas under such an agreement, at a price exceeding the price cap.

Subsection 15(1) provides an exemption from these prohibitions if:

- the agreement results from a transaction on a gas trading exchange; and
- the transaction is not a Pre-matched Trade or a Broker Pre-matched Trade.

In effect, this means that in relation to agreements resulting directly from a transaction on a gas trading exchange, the prohibitions on agreements to supply, and the supply of regulated gas at a price that exceeds the price cap only apply in relation to Pre-matched Trades and Broker Pre-matched Trades.

This is appropriate because Pre-matched Trades and Broker Pre-matched Trades are treated similarly to bilateral contracts in that the buyer and seller pre-agree a price and bring the trade to the gas trading exchange for settlement. AEMO's gas trading exchange agreement treats these in a different way to other trades, as there is no explicit bid or offer, and the trades are not anonymous.

Exception to prohibition on offers – transactions that are pre-matched trades

Subsection 8(3) prohibits a regulated gas producer or affiliate from making an offer on a gas trading exchange for the supply of regulated gas at a price exceeding the price cap.

Subsection 15(4) provides an exemption from this prohibition if:

- the offer is for a transaction for a Pre-matched Trade (within the meaning of the gas trading exchange agreement for the gas trading exchange); or
- the offer is for a Broker Pre-matched Trade (within the meaning of the gas trading exchange agreement for the gas trading exchange).

This means that the prohibition on offers above the price cap only applies to transactions on a gas trading exchange that are not Pre-matched Trades and Broker Pre-matched Trades. This is because it is not necessary to capture Pre-matched Trades and Broker Pre-matched Trades in the offer phase. If an offer above the price cap proceeds to an agreement, then the prohibitions relating to agreement and supply in subsections 8(1) and 8(2) would apply.

The distinction between Pre-matched Trades and Broker Pre-Matched Trades and other transactions on a gas trading exchange is due to the automatic bid matching process and anonymity of bidders on a gas trading exchange for transactions that are not Pre-matched Trades and Broker Pre-Matched Trades.

Different prohibitions are applicable because for transactions that are not Pre-matched Trades and Broker Pre-Matched Trades, buyers and sellers are

automatically matched on the gas trading exchange. While a supplier must not offer to supply regulated gas at a price above the price cap, a buyer may still offer to buy above the price cap. This may result in a supplier being inadvertently matched with a buyer and automatically entering into an agreement above the price cap. Therefore, the prohibitions on agreements and supply under agreements exceeding the price cap are not appropriate for transactions on a gas trading exchange that are not Pre-matched Trades and Broker Pre-Matched Trades.

Short-term supply

Generally, the prohibitions in subsection 8(1) or (2) do not apply to agreements resulting from a transaction on a gas trading exchange, and the prohibition in subsection 8(3) do not apply to offers made on a gas trading exchange, where the gas is to be supplied within 3 days of the agreement or offer being made.

This recognises that short term supply agreements are intended to meet immediate demand and may appropriately be priced above the price cap as the costs of supply at short notice are likely to be higher.

Subsection 15(2) provides that subsection 8(1) and (2) do not apply if:

- the agreement results from a transaction on a gas trading exchange; and
- the transaction is a Pre-matched Trade or a Broker Pre-matched Trade; and
- under the agreement, all of the regulated gas is to be supplied by the end of the third gas day after the agreement is entered into; and
- all of the regulated gas is supplied by that time.

Subsection 15(4) provides that subsection 8(3) does not apply if:

- the offer is made on a gas trading exchange; and
- under the offer, all of the regulated gas is to be supplied by the end of the third gas day after the offer is made; and
- all of the regulated gas is supplied by that time.

This section incorporates definitions from the gas trading exchange agreement for the gas trading exchange. A gas trading exchange agreement has the same meaning as in the National Gas Law. Section 53ZE of the Act allows a gas market instrument (including a gas market emergency price order) to incorporate any matter contained in any other instrument or writing. The relevant gas trading exchanges are covered by the same gas trading exchange agreement (defined in section 4 to have the same meaning as in the National Gas Law), which is publicly available on the AEMO website.

Section 16 – Exception for retailers

Section 16 provides that the price cap prohibitions in section 8 do not apply to a regulated gas producer or affiliate if the person meets two sets of conditions relating to retail operations.

First, if at the time the instrument commenced, the person must have:

- held a retailer authorisation within the meaning of the National Energy Retail Law as it applies in a State or a Territory;

- been a retailer within the meaning of the *Electricity Industry Act 2000* (Vic.); or
- held a licence authorising the person to sell gas by retail under the *Gas Industry Act 2001* (Vic.).

The first condition can only be met if a person is a retailer or holds a relevant licence or authorisation at the time the Order commences. A person will not be able to avoid the application of the price cap by obtaining a retailer authorisation, becoming a retailer, or obtaining a relevant licence during the price cap period.

Second, in addition to the first condition, no more than 50 per cent of the annual turnover of the person during the financial year starting on 1 July 2021, to the extent that it is attributable to business operations related to the production, supply and acquisition of gas, may be attributable to a business of producing regulated gas carried on by the person. Alternatively, this second condition is met if the person did not exist on 1 July 2021 (as in that case, the annual turnover starting on 1 July 2021 could not be calculated).

The turnover test only applies in relation to annual turnover that it is attributable to business operations related to the production, supply and acquisition of gas (not to other business operations). The term annual turnover in this context has the same meaning as in the *Corporations Act 2001* (see section 4). Annual turnover will therefore be considered broadly by reference to the aggregate of supplies made by the person and related bodies corporate during the 2021-22 financial year (subject to the limitation above regarding gas-related business operations).

However, if a person does not think they meet both conditions, for example, due to being a new entrant to the market (and therefore not having a calculable annual turnover for the 2021-22 financial year) that person will be able to apply for an exemption under section 18, and the Minister may grant such an exemption under section 19 due to a material change in circumstances.

The price cap is intended to apply to regulated gas producers, who transact primarily in wholesale markets and not to retailers who may sell gas on occasion at the wholesale level. Retailers face different cost structures such that a \$12 per GJ price cap may not be appropriate. The exemption for persons for whom regulated gas production is not a primary business activity (as a subset of the person's gas-related business activities) recognises these differences. In particular, persons who produce relatively small quantities of gas are intended to be excepted from the price cap.

Example 1.1 Person covered by the retail exception

A Co Pty Ltd (A Co) has held a licence to sell gas by retail under the *Gas Industry Act 2001* (Vic.) since 1 July 2018.

A Co produces a small amount of regulated gas, some of which it sells at the wholesale level to large customers. A Co's annual turnover from 1 July 2021 to 30 June 2022, attributable to business operations related to the production, supply and acquisition of gas, was \$100 million. It earned \$5 million in that time from wholesale sales of regulated gas produced by A Co.

A Co is excepted from the price cap under section 16. A Co may agree to supply gas at a price above the price cap.

Example 1.2 Person not covered by the retail exception

B Co Pty Ltd (B Co) has held a retailer authorisation within the meaning of the National Energy Retail Law since 1 December 2020.

B Co and related entities had an annual turnover of \$100 million in 2021-22. Of this total annual turnover, \$40 million is attributable to its electricity retail operations, and \$60 million is attributable to its gas production and gas retailing operations. Of the \$60 million in gas-related turnover, \$40 million is attributable to its regulated gas production activities and \$20 million to its gas retail activities.

This means that more than 50 per cent of B Co's gas-related turnover is attributable to the business of producing regulated gas. B Co is therefore not excepted from the price cap because although B Co holds a retail licence and meets the first condition of the exemption in section 16, B Co does not meet the second condition of the exemption in section 16.

Section 17 – Exception for person covered by price cap exemption

Section 17 gives effect to a price cap exemption granted to a regulated gas producer or affiliate of a regulated gas producer under Division 3 of the Order.

Subsection 8(1) does not apply if:

- the person entering into the agreement to supply regulated gas is specified in a price cap exemption, or is an affiliate of a regulated gas producer specified in a price cap exemption; and
- the price cap exemption states that it applies in relation to subsection 8(1); and
- the exemption is in force on the day on which the person enters into the agreement for the supply of regulated gas; and
- if the person is an affiliate of a regulated gas producer specified in a price cap exemption – the agreement provides that the person will acquire the regulated gas to be supplied under the agreement from that regulated gas producer.

Subsection 8(2) does not apply if:

- the person supplying regulated gas is specified in a price cap exemption, or is an affiliate of a regulated gas producer specified in a price cap exemption; and
- the price cap exemption states that it applies in relation to subsection 8(2); and
- the exemption is in force on the day on which the person supplies regulated gas under the agreement; and
- if the person is an affiliate of a regulated gas producer specified in a price cap exemption – the person acquired the regulated gas supplied under the agreement from that regulated gas producer.

Subsection 8(3) does not apply if:

- the person making an offer on a gas trading exchange for the supply of regulated gas is specified in a price cap exemption; and
- the price cap exemption states that it applies in relation to subsection 8(3); and
- the exemption is in force on the day on which the person makes the offer on a gas trading exchange.

Division 3—Ministerial price cap exemptions

Division 3 of Part 3 establishes a scheme allowing the Minister to grant a regulated gas producer or affiliate an exemption from one or more of the prohibitions on exceeding the price cap in section 8 in limited circumstances.

Section 18 – Application for price cap exemption

Section 18 provides that a regulated gas producer or an affiliate of a regulated gas producer may apply to the Minister for a price cap exemption. The application must be in writing and in a form approved by the Minister.

Section 19 – Minister may grant price cap exemption

Section 19 provides that the Minister may grant a person (a regulated gas producer or an affiliate) a price cap exemption, in writing, from one or more of the prohibitions in subsection 8(1), (2) or (3) if the Minister receives an application from the person and the Minister is satisfied that it is appropriate to grant the exemption having regard to:

- if the person is a regulated gas producer—the volume of regulated gas produced by the gas producer;
- if the person is a regulated gas producer—the proportion of the business operations of the regulated gas producer represented by the business of producing regulated gas that it carries on;
- any material change in the person’s circumstances since commencement;
- the object of Part IVBB of the Act; and
- any other matter that the Minister considers to be relevant.

Section 17 gives practical effect to a price cap exemption granted to a regulated gas producer or affiliate. The prohibitions on exceeding the price cap in subsections 8(1), (2) and (3) apply to a regulated gas producer and affiliate at all times during the price cap period if the person does not have an exemption in force in relation to the specific prohibition

An exemption under this section is not a legislative instrument because it operates to apply the law in a particular case.

Example 1.3 Material change in circumstances in relation to production

C Co Pty Ltd (C Co) has held a licence to sell gas by retail under the *Gas Industry Act 2001* (Vic.) since 1 July 2018.

C Co used to produce a significant amount of regulated gas alongside its retail business. C Co’s annual turnover from

1 July 2021 to 30 June 2022, attributable to business operations related to the production, supply and acquisition of gas, was \$100 million. Of this, \$75 million was from sales of regulated gas produced by C Co.

However, C Co has now sold off its gas production facilities. It will not produce any regulated gas from 1 July 2022.

C Co does not qualify for the exception provided by section 16, due to its gas production business in 2021-22. Instead, C Co may apply to the Minister for an exemption due to a material change in circumstances.

Section 20 – Contents of price cap exemption

Section 20 provides that a price cap exemption must specify the person to whom the exemption applies, the provisions of the Order to which the exemption applies (that is, subsection 8(1), (2) or (3)) and the period during which the exemption is in force. This period must start on or after the day the exemption is made.

A price cap exemption must also state any conditions to which it is subject. The Minister may make the exemption subject to conditions if the Minister is satisfied that the conditions are appropriate having regard to:

- if the person is a regulated gas producer—the volume of regulated gas produced by the gas producer;
- if the person is a regulated gas producer—the proportion of the business operations of the regulated gas producer represented by the business of producing regulated gas that it carries on;
- the object of Part IVBB of the Act;
- any material change in the person’s circumstances since commencement; and
- any other matter that the Minister considers to be relevant.

A person must not engage in conduct which contravenes a condition of their exemption while the exemption is in force. This may result in revocation or variation of the exemption. This is also subject to a maximum civil penalty of 3,000 penalty units for a body corporate or 600 penalty units for a person other than a body corporate. This maximum penalty is appropriate as breach of conditions of an exemption may undermine the objectives of the price cap. Exemptions will not be granted lightly. The penalties reflect the expectation that persons granted exemptions will comply with any conditions.

Section 21 – Notice of decision

Section 21 requires the Minister to give a person notice of an exemption decision.

If a person (that is, a regulated gas producer or affiliate of a regulated gas producer) makes an application for a price cap exemption, and the Minister decides to grant or not grant the exemption, the Minister must give the person notice of the decision as soon as practicable.

The notice must be in writing and state the reasons for the decision. If the decision is to grant the price cap exemption, the notice must include a copy of the exemption.

A decision not to grant an exemption will not be a reviewable decision. This is appropriate as it is a financial decision with a significant public interest element. The Order is an emergency measure to reduce the impact of the global energy shock. The application of the price cap is expected to have a significant impact on the market for regulated gas in Australia. An exemption decision will therefore involve the evaluation of complex and competing facts and policies.

Additionally, the price cap is only in place for 12 months. By the time a decision on an exemption is made and any merits review is completed, the price cap period is likely to be over. There would therefore be no appropriate remedy that could be conferred by a reviewing body.

Section 22 – Variation or revocation of price cap exemption

Section 22 provides that the Minister may, in writing, vary or revoke a price cap exemption granted to a person (that is, a regulated gas producer or an affiliate of a regulated gas producer) if the Minister is satisfied that it is appropriate to do so.

In deciding whether to vary or revoke a price cap exemption granted under section 19, the Minister must have regard to:

- if the person is a regulated gas producer—the volume of regulated gas produced by the gas producer,
- if the person is a regulated gas producer—the proportion of the business operations of the regulated gas producer represented by the business of producing regulated gas that it carries on;
- any material change in the person’s circumstances since commencement;
- the object of Part IVBB of the Act; and
- any other matter that the Minister considers to be relevant.

The Minister must give a notice of the decision to the person specified in the varied or revoked price cap exemption as soon as practicable.

The notice must be in writing, include a copy of the variation or revocation, and state the reasons for the variation or revocation.

A variation or revocation of an exemption is not a legislative instrument, as the initial exemption is itself not a legislative instrument.

Section 23 – Delegation

Section 23 provides that the Minister may delegate all or any of the Minister’s functions or powers in relation to Ministerial price cap exemptions to the Secretary of the Department or an SES employee (or acting SES employee) in the Department.

The Minister may also delegate those functions or powers to the ACCC, a member of the ACCC or a member of the staff of the ACCC who is an SES employee (or acting SES employee).

A delegate must comply with any written directions of the Minister in exercising a delegated power.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Competition and Consumer (Gas Market Emergency Price) Order 2022

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

Section 53M of the *Competition and Consumer Act 2010* (the Act) provides that the Minister may make gas market emergency gas price orders. Section 53X of the Act provides that a gas market emergency price order may include rules about the price at which a person offers to supply or acquire, agrees to supply or acquire or supplies or acquires a gas commodity.

The *Competition and Consumer (Gas Market Emergency Price) Order 2022* (the Order) prohibits regulated gas producers and affiliates of regulated gas producers from making certain offers on a gas trading exchange, entering into agreements to supply regulated gas, or supplying regulated gas under such agreements, at a price above \$12 per gigajoule for a period of 12 months.

If a regulated gas producer or affiliate breaches the price cap they may be subject to a civil penalty.

The Order only applies to regulated gas producers and affiliates of regulated gas producers (generally, related entities and participants in joint ventures). Regulated gas producers and affiliates are generally not natural persons.

Human rights implications

This Legislative Instrument promotes the right to an adequate standard of living under Article 11 of the International Covenant on Economic, Social and Cultural Rights.

The right to an adequate standard of living requires Australia to take appropriate steps to ensure the availability, adequacy and accessibility of food, clothing, water and housing for all people in Australia. Australia also has an obligation to take reasonable measures within its available resources to progressively secure broader enjoyment of this right.

The right to adequate housing is a component of the right to an adequate standard of living. Factors that go to whether housing is adequate include that people should have access to essential facilities, including energy for cooking, heating and lighting, and that housing-related costs should be affordable.

The current energy crisis, which has contributed to unacceptable increases in gas and electricity prices for Australian households, undermines the right to an adequate standard of living in Australia.

This Legislative Instrument improves the standard of living in Australia by placing a cap on regulated gas prices, which will reduce or mitigate the impact of rising energy prices on Australian households.

Conclusion

This Legislative Instrument is compatible with human rights as it promotes the right to an adequate standard of living.