

EXPLANATORY STATEMENT

Issued by Authority of Minister for Climate Change and Energy

Competition and Consumer Act 2010

Competition and Consumer (Gas Market Code) Regulations 2023

Section 172 of the *Competition and Consumer Act 2010* (the Act) provides that the Governor General may make regulations, not inconsistent with the Act, prescribing all matters that are required or permitted by the Act to be prescribed or are necessary or convenient to be prescribed for carrying out or giving effect to the Act.

Section 53L of the Act provides the regulations may prescribe matters required or permitted by this Act to be prescribed by a gas market code.

The purpose of the *Competition and Consumer (Gas Market Code) Regulations 2023* (the Regulations) is to facilitate a well-functioning domestic wholesale gas market with adequate gas supply at reasonable prices and on reasonable terms for both suppliers and buyers.

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 has been 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.

Consistent with the Energy Price Relief Plan, on 16 December 2022 the Act was amended by the *Treasury Laws Amendment (Energy Price Relief Plan) Act 2022* to create an overarching framework to enhance the welfare of Australians through the regulation of the Australian gas market, and in particular, limit increases in gas prices caused by disruptions in global energy markets. This included powers for the Government to impose a price cap and to implement an ‘ongoing mandatory code of conduct’ for the gas market. A 12-month price cap was implemented on 23 December 2022 through the *Competition and Consumer (Gas Market Emergency Price) Order 2022*. The Regulations implement the ongoing mandatory code of conduct for the wholesale gas market.

The Regulations address long-term issues in the wholesale gas market to ensure that there is a reliable and affordable supply of gas. This includes improving upon the *Voluntary Code of Conduct for the Negotiation and Development of Gas Supply Agreements between Gas Suppliers and Gas Customers in Australia* by strengthening requirements related to transparency, reporting, pricing, and timeframes for negotiation. While the gas market code will place obligations on both suppliers and buyers, such as obligations to deal with each other in good faith, greater obligations are placed on suppliers to help address imbalances in bargaining power in the domestic wholesale market.

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

Part 2 sets out the application of the Regulations, including geographical application.

Part 3 sets out requirements relating to negotiations to supply regulated gas, including requirements for gas EOIs, gas initial offers and gas final offers.

Part 4 sets out requirements for agreements to supply regulated gas, including prohibitions on exceeding a reasonable price for making certain offers to supply regulated gas on a gas trading exchange, entering into agreements to supply regulated gas, or supplying regulated gas under such agreements.

Part 5 sets out good faith obligations in relation to negotiations and agreements to supply regulated gas.

Part 6 sets out record keeping, reporting and publication obligations.

Part 7 deals with deemed exemptions and Part 8 deals with conditional Ministerial exemptions.

Part 9 provides for delegations and sets out requirements to review the Regulations.

Public consultation was conducted on an exposure draft of the Regulations between 26 April 2023 and 12 May 2023. Submissions were received from around 50 stakeholders over this period. In response to stakeholder feedback, some features of the Regulations were updated to better achieve the objective of ensuring adequate supply of reasonably priced regulated gas. These changes will provide additional flexibility in commercial negotiations, increase certainty for investors and reduce compliance costs.

The Act does not specify any conditions that need to be satisfied before the power to make the Regulations may be exercised.

The Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*.

The Regulations commenced on the day after the instrument was registered on the Federal Register of Legislation. Most provisions do not apply until two months after commencement of the Regulations to ensure a smooth transition to the new framework.

Details of the Regulations are set out in [Attachment A](#).

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

The *Options to Provide Energy Price Relief Impact Analysis* was published on 16 December 2022 (available here: <https://oia.pmc.gov.au/published-impact-analyses-and-reports/options-energy-price-relief>). The Office of Impact Analysis found the Impact Analysis to be adequate. The *Options to Provide Energy Price Relief Impact Analysis – Addendum in Relation to Policy Design Changes for a Mandatory Code of Conduct for the East Coast Wholesale Gas Market* was prepared by the Department of Climate Change, Energy, the Environment and Water to update the impact information for decision-makers.

The addendum provides an update on the impact of the policy changes compared to the original policy proposal and estimates a saving of \$4.32 million over ten years compared to the original policy proposal. OIA advised that the addendum did not need to be certified but intend to publish it on their website alongside the *Options to Provide Energy Price Relief Impact Analysis*. The policy is expected to impose a regulatory burden of around \$0.37 million per year (OBPR2203689).

All references in this document are to provisions in the Regulations unless otherwise stated.

Details of the *Competition and Consumer (Gas Market Code) Regulations 2023*

Part 1 – Preliminary

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

Section 1 – Name

Section 1 provides that the name of the instrument is the *Competition and Consumer (Gas Market Code) Regulations 2023* (the Regulations).

Section 2 – Commencement

Section 2 provides that the Regulations commence on the day after the instrument is registered on the Federal Register of Legislation.

Section 3 – Authority

Section 3 provides that the Regulations are made under the *Competition and Consumer Act 2010* (the Act).

Section 4 – Definitions

Section 4 provides definitions of key terms used in the Regulations.

Section 5 – Definition of regulated gas producer

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

Regulated gas is defined in section 4 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. It must be suitable for consumption. Regulated gas is not liquefied natural gas, or re-gasified natural gas that was imported as liquefied natural gas.

Subsection 5(2) excludes the requirement for regulated gas to be suitable for consumption for the purposes of the definition of regulated gas producer. This ensures that a person that ‘carries on a business of producing regulated gas’ includes persons that carry on a business of producing regulated gas that is not suitable for consumption when it is produced or recovered. However, prohibitions on exceeding a reasonable price only applies 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 reasonable price is not intended to apply to the sale of regulated gas that is not suitable for consumption to commercial and industrial users.

The definition of regulated gas producer is relevant to the meaning of covered supplier in section 6.

Section 6 – Definition of covered supplier and affiliate

Subsection 6(1) provides that a person is a *covered supplier* if:

- the person is a regulated gas producer (as defined in section 5), or:
- the person is an *affiliate* of a regulated gas producer; and the person has entered into an agreement (the *affiliate supply agreement*) for the supply of gas to the person by the regulated gas producer or another affiliate of the regulated gas producer, and subsection 6(2) applies, and
- the agreement is not a *mandatory government agreement*, defined in section 4 as an agreement for the supply of regulated gas that a person has entered into because of a direction issued under the National Gas Law.

Subsection 6(2) clarifies that an affiliate is only taken to be a covered supplier if:

- an affiliate supply agreement is in force; or
- the person has entered into another agreement to supply the gas acquired under the affiliate supply agreement to another person, and that other agreement is in force; or
- the person intends to enter into another agreement to supply the gas acquired under the affiliate supply agreement to another person.

This limits the time period in which an affiliate supply agreement results in a person being an affiliate, and therefore a covered supplier.

Subsection 6(3) sets out the circumstances in which a person is an affiliate of a regulated gas producer, including when there is a joint venture in which the person and the regulated gas producer are participants.

Covered suppliers (regulated gas producers and affiliates) are subject to the various prohibitions and requirements in the Regulations, including the prohibition on exceeding a reasonable price in Division 2 of Part 4.

Part 2 – Application

Part 2 sets out the application of the Regulations, including a 2-month transition period between commencement and application of the Regulations and the geographical application of the Regulations.

Section 7 – General application

Application to gas EOIs, gas initial offers and gas final offers issued, and agreements made, after commencement

Section 7 prevents the application of the Regulations to gas EOIs, gas initial offers, gas final offers and agreements issued or made during the *transition period*. This is defined in section 4 as the period beginning on the commencement of the Regulations and ending 2 months after commencement. This is intended to ensure a smooth transition to the new framework.

In addition, the Regulations do not apply:

- in relation to a gas initial offer made after the transition period if the gas initial offer relates to a gas EOI issued before or during the transition period;
- in relation to a gas final offer made after the transition period if any of the following conditions are satisfied:
 - the gas final offer relates to a gas EOI issued before or during the transition period;
 - the gas final offer relates to a gas initial offer issued before or during the transition period;
- in relation to an agreement made after the transition period to supply regulated gas (except Division 2 of Part 4 (the Price rules), section 31 (good faith obligations in relation to agreements for supply of regulated gas) and paragraph 33(2)(k) (certain record keeping requirements) and any other provisions in the Regulations to the extent that they relate to the aforementioned provisions, if any of the following conditions are satisfied:
 - the agreement relates to a gas EOI issued before or during the transition period;
 - the agreement relates to a gas initial offer issued before or during the transition period;
 - the agreement relates to a gas final offer issued before or during the transition period.

Application of good faith provisions

Subsections 7(6) and 7(7) provide that good faith obligations under section 30 apply in relation to negotiations entered into after the transition period, but do not apply to negotiations entered into after the transition period if the negotiations:

- relate to a gas EOI issued before or during the transition period;
- relate to a gas initial offer issued before or during the transition period;
- relate to a gas final offer issued before or during the transition period.

Application in relation to agreements to which the price cap Order applies

There is no transition from the requirements of the *Competition and Consumer (Gas Market Emergency Price) Order 2022* (the price cap Order). Subsection 7(8) provides that the Regulations do not apply to agreements to supply regulated gas to which Part 3 of the price cap Order applies (or, if the price cap Order has been repealed, to which that Part applied immediately before that repeal), that were entered into during the price cap period (that is, the 12 months starting from commencement of the price cap Order). Industry participants should refer to the price cap Order to determine whether Part 3 of the Order applies to a particular agreement.

The Regulations also do not apply to:

- a gas EOI that relates to an agreement to supply regulated gas to which Part 3 of the price cap Order applies or applied, and that was entered into in the price cap period mentioned in the price cap Order;
- a gas initial offer that relates to such an agreement;
- a gas final offer that relates to such an agreement; or
- negotiations mentioned that relate to such an agreement for the purposes of section 30 (good faith obligations in relation to negotiations).

Section 8 – General application–variation to agreements

Section 8 ensures that certain variations to agreements are subject to certain requirements in the Regulations.

Generally, the Regulations only apply to agreements that are entered into after commencement (subject to the 2-month transition period in section 7). However, section 8 provides that a variation to an existing agreement, where the variation is entered into after the transition period, is treated as a new agreement for the purposes of the Regulations if it determines the price of regulated gas to be supplied under the agreement.

The application of the Regulations to a variation of an existing agreement in this circumstance is limited to Division 2 of Part 4 (the Price Rules), section 31 (good faith obligations in relation to an agreement for supply of regulated gas), paragraph 33(2)(k) (certain record keeping requirements), and any other provisions in the Regulations to the extent that they relate to the aforementioned provisions.

This means that if:

- a person is a covered supplier; and
- a person enters an agreement for the supply of regulated gas before commencement (subject to the transition period in section 7); and
- the agreement is varied after the transition 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 is subject to the requirements in Division 2 of Part 4, section 31, paragraph 33(2)(k) of the Regulations and any other provisions in the Regulations to the extent that they relate to the aforementioned provisions.

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

Section 9 – Geographic application

Section 9 limits the geographic application of Parts 3, 4, 5, 6, 7, 8 and 9 of the Regulations.

Subsection 53N(2) of the Act allows a gas market instrument (including a gas market code) 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.

Parts 3, 4, 5, 6, 7, 8 and 9 of the Regulations apply in all parts of Australia, except for parts of Australia in which:

- there is a 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 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 networks mentioned above.

In the current circumstances, this provision has the effect of applying the Regulations to the east coast market, which consists of an interconnected network of pipelines spanning New South Wales, Victoria, Queensland, South Australia, Tasmania, the Northern Territory and the Australian Capital Territory, and which is linked to the international market through LNG export facilities in Queensland and the Northern Territory. It also has the effect of excluding Western Australia from the Regulations.

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 a key purpose of the Regulations is to reduce the impact of rising energy costs caused by the international energy crisis. This is only necessary in the east coast market, as the east coast market has been severely impacted by the crisis and is experiencing prices above the reasonable price. Conversely, Western Australia (which is also linked to the international market but has a domestic gas reservation policy) has been experiencing prices well below the reasonable price.

Part 3 – Negotiations

Part 3 sets out requirements for gas EOIs, gas initial offers and gas final offers.

Section 10 – Gas EOI must comply with certain requirements

Section 10 requires a covered supplier that chooses to issue a gas EOI (as defined in section 4) to specify certain matters in the EOI.

Subsection 10(2) sets out the specific matters that must be included in a gas EOI. This includes the last day of the gas EOI open period. The gas EOI open period is the period

during which a potential buyer can give a covered supplier a notice in writing expressing interest in a gas EOI (see sections 4 and 13).

A note to subsection 10(2) clarifies that the gas EOI must specify the matters set out in subsection 10(2) but may also specify other matters.

Section 4 provides that if a person issues a gas EOI, the gas EOI open period is the period that:

- starts on the day the person issues the gas EOI; and
- ends on the day specified in the gas EOI.

Subsection 10(3) provides that the last day of the gas EOI open period (as specified in the gas EOI) must be at least 20 business days after the day on which the supplier issues the gas EOI. This means that a gas EOI must remain open for at least 20 days after issue for buyers to express interest.

Section 53ZJ of the Act provides that a gas market instrument may provide that a provision is a civil penalty provision or that a person may be subject to a civil penalty if they contravene a provision.

Pursuant to section 53ZJ of the Act and subsection 10(1), failure to specify the prescribed matters in a gas EOI is subject to a civil penalty. The maximum civil penalty that may be imposed by the Court, in accordance with table item 7D in subsection 76(1A) of the Act, is 6,000 penalty units for a body corporate or 1,200 penalty units for a person other than a body corporate, as set out at the foot of subsection 10(1).

The maximum penalties are designed to provide an effective deterrent to breaches of the law and reflect the need to address imbalances in bargaining power in the domestic wholesale market.

Section 11 – Gas EOI must be published

Section 11 requires covered suppliers to publish gas EOIs in a legible, prominent and unambiguous way on their websites at the same time that they issue a gas EOI.

Section 53ZJ of the Act allows a gas market instrument to provide that a provision is a civil penalty provision or that a person may be subject to a civil penalty if they contravene a provision. Pursuant to section 53ZJ of the Act and section 11, failure to comply with the requirement to publish a gas EOI is subject to a civil penalty. The maximum civil penalty that may be imposed by the Court, in accordance with table item 7D in subsection 76(1A) of the Act, is 6,000 penalty units for a body corporate or 1,200 penalty units for a person other than a body corporate, as set out at the foot of section 11.

The maximum penalties are designed to provide an effective deterrent to breaches of the law and reflect the need to address imbalances in bargaining power in the domestic wholesale market.

Section 12 – Gas EOI must remain open throughout gas EOI open period

Section 12 requires gas EOIs to remain open (as published pursuant to section 11) throughout the gas EOI open period (as defined in section 4, also see section 10).

Section 53ZJ of the Act allows a gas market instrument to provide that a provision is a civil penalty provision or that a person may be subject to a civil penalty if they contravene a provision. Pursuant to section 53ZJ of the Act and section 12, failure to comply with the requirement for a gas EOI to remain open during the gas EOI open period is subject to a civil penalty. The maximum civil penalty that may be imposed by the Court, in accordance with table item 7D in subsection 76(1A) of the Act, is 6,000 penalty units for a body corporate or 1,200 penalty units for a person other than a body corporate, as set out at the foot of section 12.

The maximum penalties are designed to provide an effective deterrent to breaches of the law and reflect the need to address imbalances in bargaining power in the domestic wholesale market. If a covered supplier issues a gas EOI that does not remain open throughout the gas EOI open period, they may be liable for a civil penalty.

Section 13 – Gas EOI—supplier must notify potential buyer whether or not successful

Section 13 provides that, if a covered supplier issues a gas EOI, and another person (the *potential buyer*) gives the supplier notice in writing during the gas EOI open period that they are interested in negotiating further in relation to the gas EOI, the supplier must notify the potential buyer stating that they have been “successful” or “not successful” in relation to the gas EOI within the gas EOI response period. Section 4 provides that if a covered supplier issues a gas EOI, the gas EOI response period is the period that:

- starts on the day after the end of the gas EOI open period; and
- ends:
 - 25 business days later; or
 - if there are more than 24 other persons, each of which gives the supplier, in the gas EOI open period, a notice in writing stating that the other person has an interest in further negotiations in relation to the gas EOI—35 business days later.

If no potential buyers provide notice that they are interested in negotiating further in relation to a gas EOI during the gas EOI open period, then the covered supplier has no further obligations in relation to the gas EOI.

Section 53ZJ of the Act allows a gas market instrument to provide that a provision is a civil penalty provision or that a person may be subject to a civil penalty if they contravene a provision. Pursuant to section 53ZJ of the Act and section 13, failure to comply with the requirement to notify a buyer of whether or not they are successful in relation to a gas EOI during the gas EOI response period is subject to a civil penalty. The maximum civil penalty that may be imposed by the Court, in accordance with table item 7D in subsection 76(1A) of the Act, is 6,000 penalty units for a body corporate or 1,200 penalty units for a person other than a body corporate, as set out at the foot of section 13.

The maximum penalties are designed to provide an effective deterrent to breaches of the law and reflect the need to address imbalances in bargaining power in the domestic wholesale market.

Section 14 – Gas EOI—if notice of interest, supplier must issue offer

Section 14 provides that, if a covered supplier issues a gas EOI, and notifies another person (the *potential buyer*) within the gas EOI response period (as defined in section 4) that they are “successful” in relation to a gas EOI, the supplier must provide the potential buyer with a gas initial offer. Alternatively, if the potential buyer provides the supplier with notice that the buyer will accept a gas final offer instead, the supplier must provide the potential buyer with a gas final offer.

Section 4 defines gas initial offer as an offer of basic terms forming the basis of negotiations for the purposes of entering into a binding agreement for the person making the offer to supply regulated gas is a gas initial offer if acceptance of the offer does not result in the entering into of such an agreement (but may lead to negotiations for the purposes of entering into such an agreement). Section 4 defines gas final offer as a gas an offer to supply regulated gas that:

- is in a form that is capable of being accepted; and
- if accepted, gives rise to a binding agreement to supply regulated gas.

The main difference between a gas initial offer and gas final offer is that a gas final offer must be in a form capable of being accepted and if accepted, is an agreement to supply regulated gas.

Section 53ZJ of the Act allows a gas market instrument to provide that a provision is a civil penalty provision or that a person may be subject to a civil penalty if they contravene a provision. Pursuant to section 53ZJ of the Act and subsection 14(1), failure to issue a gas initial offer or gas final offer as described above is subject to a civil penalty. The maximum civil penalty that may be imposed by the Court, in accordance with table item 7D in subsection 76(1A) of the Act, is 6,000 penalty units for a body corporate or 1,200 penalty units for a person other than a body corporate, as set out at the foot of subsection 14(1).

The maximum penalties are designed to provide an effective deterrent to breaches of the law and reflect the need to address imbalances in bargaining power in the domestic wholesale market.

If no potential buyers provide notice that they are interested in negotiating further in relation to a gas EOI during the gas EOI open period, then the covered supplier does not need to issue a gas initial offer or a final gas offer.

Section 15 – Gas EOI—exception for material change of supplier’s circumstances, etc.

Section 15 excepts covered suppliers from the requirements in section 12 (requirement for gas EOI to remain open during gas EOI open period), section 13 (requirement for supplier to notify potential buyer whether or not successful) and section 14 (requirement to provide a gas initial offer or gas final offer) if:

- there has been a material change in the supplier’s circumstances resulting in the inability of the supplier to supply regulated gas in accordance with the gas EOI (also see section 22);
- there has been a material change in the supplier’s financial circumstances or business structure, and the change will affect the ability of the supplier to supply regulated gas in accordance with the gas EOI; or
- a circumstance specified in a determination under subsection 23(1) exists.

To benefit from one of these exceptions, the supplier must publish a notice on their website before the end of the gas EOI response period stating that one or more of the aforementioned conditions are satisfied and that they are withdrawing the gas EOI.

In the case of the section 13 requirement (to notify potential buyer whether or not successful) and section 14 requirement (to provide a gas initial offer or gas final offer) if a potential buyer had expressed interest in further negotiations in relation to the gas EOI during the gas EOI open period, the supplier must also give the potential buyer notice that one or more of the aforementioned conditions are satisfied and that the EOI is withdrawn before the end of the gas EOI response period.

Section 16 – Gas initial offer must comply with certain requirements

Section 16 requires a covered supplier that issues a gas initial offer (as defined in section 4) to another person (the *potential buyer*) to specify certain matters in the offer. This may be required because a covered supplier has issued a gas EOI and a potential buyer is “successful” (see section 14), or because a covered supplier has chosen to issue a gas initial offer to a potential buyer independently of a gas EOI.

Subsection 16(2) sets out the specific matters that must be included in a gas initial offer. This includes the last day of the gas initial offer open period (as defined in section 4). The gas initial offer open period is the period during which a potential buyer can confirm interest in receiving a gas final offer (see section 18).

A note to subsection 16(2) clarifies that the gas initial offer must specify the matters set out in subsection 16(2) but may also specify other matters.

Subsection 16(3) provides that the last day of the gas initial offer open period must be at least 15 business days after the day on which the covered supplier issues the gas initial offer, or if the supplier and the potential buyer, in writing before the supplier issues the gas initial offer to the potential buyer, fix a specified day—that day. This means that a covered supplier and potential buyer may agree in writing to the gas initial offer open period being less than 15 business days.

Section 53ZJ of the Act allows a gas market instrument to provide that a provision is a civil penalty provision or that a person may be subject to a civil penalty if they contravene a provision. Pursuant to section 53ZJ of the Act and subsection 16(1), failure to comply with the requirement to include certain matters in a gas initial offer as described above is subject to a civil penalty. The maximum civil penalty that may be imposed by the Court, in accordance with table item 7D in subsection 76(1A) of the Act, is 6,000 penalty units for a

body corporate or 1,200 penalty units for a person other than a body corporate, as set out at the foot of subsection 16(1).

The maximum penalties are designed to provide an effective deterrent to breaches of the law and reflect the need to address imbalances in bargaining power in the domestic wholesale market.

Section 17 – Gas initial offer must not be withdrawn or terminated before end of gas initial offer open period or gas initial offer response period

Section 17 requires gas initial offers to remain open during the gas initial offer open period and gas initial offer response period (as defined in section 4). This is subject to the exceptions in section 19.

Section 53ZJ of the Act allows a gas market instrument to provide that a provision is a civil penalty provision or that a person may be subject to a civil penalty if they contravene a provision. Pursuant to section 52ZJ of the Act and section 17, if a covered supplier issues a gas initial offer to another person (the *potential buyer*) (whether or not in relation to a gas EOI) and the supplier withdraws or terminates the gas initial offer before the end of the gas initial offer open period or gas initial offer response period, the supplier may be subject to a civil penalty.

The maximum civil penalty that may be imposed by the Court, in accordance with table item 7D in subsection 76(1A) of the Act, is 6,000 penalty units for a body corporate or 1,200 penalty units for a person other than a body corporate, as set out at the foot of section 17.

The maximum penalties are designed to provide an effective deterrent to breaches of the law and reflect the need to address imbalances in bargaining power in the domestic wholesale market.

Section 18 – Gas initial offer—if notice of interest, supplier must issue gas final offer

Section 18 provides that, if a covered supplier issues a gas initial offer to another person (the *potential buyer*) (whether or not it is in relation to a gas EOI), and the potential buyer gives the supplier notice in writing during the gas initial offer open period (as defined in section 4) that they are interested receiving a gas final offer in relation to the gas initial offer, the supplier must issue the potential buyer a gas final offer during the gas initial offer response period (as defined in section 4).

Section 53ZJ of the Act allows a gas market instrument to provide that a provision is a civil penalty provision or that a person may be subject to a civil penalty if they contravene a provision. Pursuant to section 52ZJ of the Act and subsection 18(1), a covered supplier that fails to issue a gas final offer in the circumstances described above is subject to a civil penalty. The maximum civil penalty that may be imposed by the Court, in accordance with table item 7D in subsection 76(1A) of the Act, is 6,000 penalty units for a body corporate or 1,200 penalty units for a person other than a body corporate, as set out at the foot of subsection 18(1).

The maximum penalties are designed to provide an effective deterrent to breaches of the law and reflect the need to address imbalances in bargaining power in the domestic wholesale market.

A covered supplier does not need to issue gas final offer if the potential buyer gives the supplier a buyer gas final offer during the gas initial offer open period (see section 14).

Section 19 – Gas initial offer—exceptions for material change of supplier’s circumstances, agreement to terminate or withdraw, etc.

Section 19 provides that section 17 (prohibition on withdrawing or terminating a gas initial offer during gas initial offer open period or gas initial offer response period) and section 18 (requirement to issue a gas final offer) do not apply if:

- there has been a material change in the supplier’s circumstances resulting in the inability of the supplier to supply regulated gas in accordance with the gas initial offer (also see section 22); or
- there has been a material change in the supplier’s financial circumstances or business structure, and the change will affect the ability of the supplier to supply regulated gas in accordance with the gas initial offer; or
- a circumstance specified in a determination under subsection 23(1) exists; or
- the supplier and the potential buyer agreed to the withdrawal or termination; or
- the potential buyer gives the supplier written notice, before the end of the gas initial offer open period, that the potential buyer withdraws from the negotiation process.

Section 20 – Gas final offer must comply with certain requirements

Section 20 requires a covered supplier that issues a gas final offer (as defined in section 4) to another person (the *potential buyer*) to specify certain matters in the gas final offer and include a notice in writing that sets out the last day of the gas final offer open period (this is the period in which the potential buyer may accept a final offer as defined in section 4).

The last day of the gas final offer open period must be no earlier than 15 business days after the supplier issues the gas final offer unless parties agree to a different timeframe in writing prior to the gas final offer being issued.

Subsection 20(2) sets out the specific matters that must be included in a gas final offer, such as the quantity of regulated gas intended to be supplied in accordance with the gas final offer. A note to subsection 20(2) clarifies that the gas final offer must specify the matters set out in subsection 20(2) but may also specify other matters. For example, if the gas final offer contemplates that there will be conditions precedent to an agreement under which regulated gas will be supplied in accordance with the gas final offer, it may specify those conditions precedent.

Section 53ZJ of the Act allows a gas market instrument to provide that a provision is a civil penalty provision or that a person may be subject to a civil penalty if they contravene a provision. Pursuant to section 52ZJ of the Act and subsection 20(1), failure to include

certain matters in a gas final offer and include a notice setting out the last day of the gas final offer open period as described above is subject to a civil penalty.

The maximum civil penalty that may be imposed by the Court, in accordance with table item 7D in subsection 76(1A) of the Act, is 6,000 penalty units for a body corporate or 1,200 penalty units for a person other than a body corporate, as set out at the foot of subsection 20(1).

The maximum penalties are designed to provide an effective deterrent to breaches of the law and reflect the need to address imbalances in bargaining power in the domestic wholesale market.

Section 21 – Gas final offer must not be withdrawn or terminated before end of gas final offer open period

Section 21 requires a gas final offer to remain open during the gas final offer open period, subject to a number of exceptions.

The gas final offer open period is defined in section 4. It represents the period in which a potential buyer may accept a gas final offer in order for the offer to remain subject to the Regulations.

A covered supplier contravenes subsection 21(1) if:

- the supplier issues a gas final offer to another person (the potential buyer) (whether or not in relation to a gas EOI or gas initial offer); and
- the supplier withdraws or terminates the gas final offer before the end of the gas final offer open period.

Section 53ZJ of the Act allows a gas market instrument to provide that a provision is a civil penalty provision or that a person may be subject to a civil penalty if they contravene a provision. Pursuant to section 53ZJ of the Act and subsection 21(1), if a covered supplier withdraws or terminates a gas final offer during the gas final offer open period as described above, the supplier may be subject to a civil penalty.

The maximum civil penalty that may be imposed by the Court, in accordance with table item 7D in subsection 76(1A) of the Act, is 6,000 penalty units for a body corporate or 1,200 penalty units for a person other than a body corporate, as set out at the foot of subsection 21(1).

The maximum penalties are designed to provide an effective deterrent to breaches of the law and reflect the need to address imbalances in bargaining power in the domestic wholesale market.

Subsection 21(2) provides that subsection 21(1) does not apply where:

- there has been a material change in the supplier's circumstances resulting in the inability of the supplier to supply regulated gas in accordance with the gas final offer (also see section 22); or

- there has been a material change in the supplier’s financial circumstances or business structure, and the change will affect the ability of the supplier to supply regulated gas in accordance with the gas final offer; or
- a circumstance specified in a determination under subsection 23(1) exists; or
- the supplier and the potential buyer agreed to the withdrawal or termination; or
- the potential buyer gives the supplier written notice, before the end of the gas final offer open period, that the potential buyer withdraws from the negotiation process.

Section 22 – Definition of material change in the supplier’s circumstances

Section 22 defines a ***material change in the supplier’s circumstances*** in relation to a circumstance in which a covered supplier can withdraw or terminate a gas EOI, gas initial offer or gas final offer pursuant to sections 15, 19 and 21 respectively. This is intended to provide flexibility for parties to terminate or withdraw from negotiations for a proposed agreement to supply regulated gas, ensure gas supply is not unintentionally quarantined during negotiations and clarify that covered suppliers are able to negotiate with multiple parties in relation to a given volume of regulated gas.

All of the following are taken to be a material change in the supplier’s circumstances:

- a change to, or a new requirement for, an approval under a law of the Commonwealth, a State or a Territory that affects the supplier’s ability to supply the regulated gas in accordance with the gas EOI, gas initial offer or gas final offer;
- a change to an existing legal obligation of, or the imposition of a new legal obligation on, the supplier that affects the supplier’s ability to supply the regulated gas in accordance with the gas EOI, gas initial offer or gas final offer;
- in the case where a gas initial offer or gas final offer was issued—the person to whom it has been issued becomes insolvent;
- equipment needed to produce the regulated gas becomes unavailable due to circumstances that could not have been reasonably foreseen by the supplier;
- a service needed to deliver the regulated gas becomes unavailable due to circumstances that could not have been reasonably foreseen by the provider of the service;
- a technical or operational issue that could not have been reasonably foreseen by the supplier has had a substantial effect on the supplier’s ability to supply the regulated gas in accordance with the gas EOI, gas initial offer or gas final offer;
- the regulated gas (that was the subject of the gas EOI or gas initial offer or gas final offer) has been sold to another person.

Section 23 – Determination—withdrawal or termination circumstances

Section 23 provides that the Australian Competition and Consumer Commission (ACCC) may, by legislative instrument, make a determination specifying circumstances in which a covered supplier who has issued a gas EOI, gas initial offer or gas final offer may withdraw or terminate it. This is relevant to section 15 (for a gas EOI), section 19 (for gas initial offer) and section 21 (for withdrawal or termination of gas final offers).

Subsection 53ZB(4) of the Act provides that, if a gas market code confers a power on a person or body, that power may be exercised by legislative instrument. It is appropriate that circumstances for withdrawal or termination be prescribed by legislative instrument because:

- inserting this into primary legislation would add a set of specific provisions that would apply only to a small group of suppliers in particular circumstances, leading to unnecessary complexity for other users of the primary legislation; and
- new circumstances may need to be added urgently to deal with changed market conditions or unexpected circumstances.

Additionally, before making a determination, the ACCC must consult with the public about the proposed determination and take into account comments made during consultation. A determination as to withdrawal and termination circumstances is a legislative instrument subject to disallowance and sunseting.

Part 4 – Agreements for supply of regulated gas

Part 4 sets out requirements for agreements to supply regulated gas, including prohibitions on exceeding a reasonable price when making certain offers to supply regulated gas on a gas trading exchange, entering into agreements to supply regulated gas at a price that could exceed a reasonable price, or supplying regulated gas under such agreements at a price that exceeds a reasonable price.

Section 24 – Agreement for supply of regulated gas—failure to issue gas final offer

Section 24 requires a covered supplier to issue a gas final offer to a potential buyer prior to entering into an agreement for the supply of regulated gas. Unlike gas EOIs and gas initial offers, a covered supplier must issue a gas final offer prior to entering an agreement unless the buyer issues a buyer gas final offer. If the buyer provides the covered supplier with a buyer gas final offer (as defined under section 4) prior to entering into an agreement during the gas initial offer period, the obligation on the supplier to provide a gas final offer does not apply (see subsection 18(2)).

Section 53ZJ of the Act allows a gas market instrument to provide that a provision is a civil penalty provision or that a person may be subject to a civil penalty if they contravene a provision. Pursuant to section 52ZJ of the Act and subsection 24(1), a covered supplier that fails to issue a gas final offer in the circumstances described above may be subject to a civil penalty.

The maximum civil penalty that may be imposed by the Court, in accordance with table item 7D in subsection 76(1A) of the Act, is 6,000 penalty units for a body corporate or 1,200 penalty units for a person other than a body corporate, as set out at the foot of subsection 24(1).

The maximum penalties are designed to provide an effective deterrent to breaches of the law and reflect the need to address imbalances in bargaining power in the domestic wholesale market.

Section 25 – Agreement for supply of regulated gas must comply with certain requirements

Section 25 requires a covered supplier that enters into an agreement for the supply of regulated gas to specify certain matters in that agreement.

Subsection 25(2) sets out the specific matters that must be included in the agreement, such as the quantity of regulated gas intended to be supplied in accordance with the agreement. These requirements broadly align with those for a gas final offer, as a gas final offer (as defined in section 4) must be in a form capable of being accepted, and if accepted give rise to a binding agreement to supply regulated gas.

A note to subsection 25(2) clarifies that the agreement must specify the matters set out in subsection 25(2) but may also specify other matters. For example, if there will be conditions precedent to an agreement under which regulated gas will be supplied, it may specify those conditions precedent.

Section 53ZJ of the Act allows a gas market instrument to provide that a provision is a civil penalty provision or that a person may be subject to a civil penalty if they contravene a provision. Pursuant to section 52ZJ of the Act and subsection 25(1), a covered supplier that does not include specified matters in an agreement may be subject to a civil penalty.

The maximum civil penalty that may be imposed by the Court, in accordance with table item 7D in subsection 76(1A) of the Act, is 6,000 penalty units for a body corporate or 1,200 penalty units for a person other than a body corporate, as set out at the foot of subsection 25(1).

The maximum penalties are designed to provide an effective deterrent to breaches of the law and reflect the need to address imbalances in bargaining power in the domestic wholesale market.

Section 26 – Agreement for supply of regulated gas—entering into agreement where price could exceed reasonable price

Section 26 prohibits a covered supplier from entering an agreement to supply regulated gas at a price that could exceed a reasonable price. This does not apply in relation to pre-existing agreements entered into before the Regulations commenced (or during the 2-month transition period pursuant to section 7). The reasonable price is set out in section 29 (\$12 per GJ at commencement of the Regulations).

Specifically, the prohibition applies if:

- the supplier is a covered supplier; and
- the supplier enters into an agreement for the supply of regulated gas; and
- under the agreement, the supplier is to supply regulated gas to another person; and
- the price payable under the agreement, for regulated gas to be supplied by the supplier, could exceed the reasonable price set out in section 29.

Subsections 26(1) only applies in relation to gas market conduct within the meaning of subsection 53ZZA(1) of the Act.

The prohibition does not apply to covered suppliers with certain deemed exemptions, such as small suppliers supplying in the domestic market (see section 55) or covered suppliers specified in a conditional Ministerial exemption (see section 56 and Part 8).

Section 53ZJ of the Act allows a gas market instrument to provide that a provision is a civil penalty provision or that a person may be subject to a civil penalty if they contravene a provision. Pursuant to section 52ZJ of the Act and subsection 26(1), entering into an agreement to supply regulated gas where the price of regulated gas to be supplied could exceed the reasonable price as described above, is subject to a civil penalty.

In accordance with item 7C of the table to subsection 76(1A) of the Act, the maximum civil penalty that may be imposed by the Court for breach by an individual is \$2,500,000, whilst the maximum civil penalty for breach by a body corporate is 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 act or omission.

The maximum penalty for breach of subsection 26(1) aligns with the maximum penalty for anti-competitive conduct and breaches of the Australian Consumer Law under the Act. This reflects the seriousness of exceeding the reasonable price and the significant harm to the gas market and to the public associated with exceeding the reasonable price.

Section 27 – Agreement for supply of regulated gas—price for supplied gas exceeds reasonable price

Section 27 prohibits a covered supplier from entering an agreement to supply regulated gas, and supplying gas under that agreement at a price that exceeds a reasonable price. This does not apply in relation to pre-existing agreements entered into before the Regulations commenced (or during the 2-month transition period pursuant to section 7). The reasonable price is set out in section 29 (\$12 per gigajoule (GJ) at commencement of the Regulations).

Specifically, the prohibition applies if:

- the supplier is a covered supplier; and
- the supplier enters into an agreement for the supply of regulated gas; and
- the supplier supplies regulated gas under the agreement; and
- the price payable under the agreement, for that regulated gas, exceeds the reasonable price set out in section 29.

Subsections 27(1) only applies in relation to gas market conduct within the meaning of subsection 53ZZA(1) of the Act.

The prohibition does not apply to covered suppliers with certain deemed exemptions, such as small suppliers supplying in the domestic market (see section 55) or covered suppliers specified in a conditional Ministerial exemption (see section 56 and Part 8).

Section 53ZJ of the Act allows a gas market instrument to provide that a provision is a civil penalty provision or that a person may be subject to a civil penalty if they contravene a provision. Pursuant to section 52ZJ of the Act and subsection 27(1), supplying regulated gas under an agreement at a price that exceeds the reasonable price as described above is subject to a civil penalty.

In accordance with item 7C of the table to subsection 76(1A) of the Act, the maximum civil penalty that may be imposed by the Court for breach by an individual is \$2,500,000, whilst the maximum civil penalty for breach by a body corporate is 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 act or omission.

The maximum penalty for breach of subsection 27(1) aligns with the maximum penalty for anti-competitive conduct and breaches of the Australian Consumer Law under the Act. This reflects the seriousness of exceeding the reasonable price and the significant harm to the gas market and to the public associated with exceeding the reasonable price.

Section 28 – Offer on gas trading exchange for supply of regulated gas—price under offer exceeds reasonable price

Section 28 prohibits a covered supplier from making an offer on a gas trading exchange for the supply of regulated gas at a price that exceeds the reasonable price. The reasonable price is set out in section 29 (\$12 per GJ at commencement of the Regulations).

Specifically, the prohibition applies if:

- the supplier is a covered supplier; and
- the supplier makes an offer on a gas trading exchange for the supply of regulated gas; and
- the price under the offer, for that gas, exceeds the reasonable price set out in section 29.

Subsection 28(1) only applies in relation to gas market conduct within the meaning of subsection 53ZZA(1) of the Act.

The prohibition on offers exceeding the reasonable price under subsection 28(1) 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 52(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 reasonable price in section 26 and 27.

The prohibition in subsection 28(1) also does not apply to offers that are not Pre-matched Trades or Broker Pre-Matched Trades but are for short term supply of three days or less in accordance with subsection 52(3).

The prohibition does not apply to covered suppliers with certain deemed exemptions, such as small suppliers supplying in the domestic market (see section 55) or covered suppliers specified in a conditional Ministerial exemption (see section 56 and Part 8).

Section 53ZJ of the Act allows a gas market instrument to provide that a provision is a civil penalty provision or that a person may be subject to a civil penalty if they contravene a provision. Pursuant to section 52ZJ of the Act and subsection 28(1), offering regulated gas at a price that exceeds the reasonable price on a gas trading exchange as described above is subject to a civil penalty.

In accordance with item 7C of the table to subsection 76(1A) of the Act, the maximum civil penalty that may be imposed by the Court for breach by an individual is \$2,500,000, whilst the maximum civil penalty for breach by a body corporate is 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 act or omission.

The maximum penalty for breach of subsection 28(1) aligns with the maximum penalty for anti-competitive conduct and breaches of the Australian Consumer Law under the Act. This reflects the seriousness of exceeding the reasonable price and the significant harm to the gas market and to the public associated with exceeding the reasonable price.

Section 29 – Reasonable price

Section 29 sets out the reasonable price for regulated gas. This is central to the prohibitions on exceeding a reasonable price in sections 26, 27 and 28.

Subsection 29(2) provides that the reasonable price for regulated gas is \$12 per gigajoule at commencement of the Regulations; or if the ACCC makes a later determination—the price for regulated gas specified in the determination.

The ACCC may, by legislative instrument, make a determination specifying a price for regulated gas that the ACCC considers is a reasonable price for regulated gas.

Subsection 53ZB(4) of the Act provides that, if a gas market code confers a power on a person or body, that power may be exercised by legislative instrument. It is appropriate a reasonable price for regulated gas be prescribed by legislative instrument because:

- setting a reasonable price is a technical matter involving consideration of production costs, supply, demand, and other factors, such that the ACCC is uniquely well-placed to set a reasonable price; and
- the reasonable price may need to be changed urgently to deal with changed market conditions or unexpected circumstances.

Additionally, there are a number of safeguards on the ACCC making a determination. Notably:

- the ACCC must consult with the public prior to making such a determination and must take into account comments made in consultation.
- the ACCC can only make a determination within a period of 2 years starting from commencement of the instrument if:
 - the ACCC consider that there has been a substantial change in market conditions for regulated gas; or
 - the Energy Minister and the Resources Minister jointly notify the ACCC in writing that it may do so.
- the ACCC can only make a further determination within a period of 2 years of a previous determination coming into force if:
 - the ACCC consider that there has been a substantial change in market conditions for regulated gas; or
 - the Energy Minister and the Resources Minister jointly notify the ACCC in writing that it may do so.
- in making a determination the ACCC may consider the extent to which the determination would promote the following:
 - a workably competitive market for regulated gas in the parts of Australia to which this Part applies (see section 9);
 - the affordability and availability of regulated gas in those parts of Australia;
 - the sufficiency or adequacy of investment in, and production of, regulated gas to meet demand in those parts of Australia;
 - the effect or expected effect of other related decisions or government policies;
 - any other matter the ACCC considers relevant.

Part 5 – Good faith

Part 5 enshrines the principle that covered suppliers and buyers should act in good faith in relation to an agreement for the supply of regulated gas by a covered supplier and the negotiation of such an agreement, including negotiations relating to gas EOIs, gas initial offers and gas final offers.

Section 30 – Good faith–dealing in relation to negotiations

Subsection 30(1) requires a covered supplier and any other person (the *other party*, typically the buyer) that participates in negotiations with the supplier about a proposed supply of regulated gas by the supplier, to deal with each other in good faith within the meaning of the unwritten law in relation to the negotiations. This does not prevent a covered supplier or the other party from acting in the person’s legitimate commercial interests.

Section 53ZJ of the Act allows a gas market instrument to provide that a provision is a civil penalty provision or that a person may be subject to a civil penalty if they contravene a provision. Pursuant to section 52ZJ of the Act and subsection 30(1), failing to deal in good faith in relation to negotiations as described above is subject to a civil penalty.

In accordance with item 7C of the table to subsection 76(1A) of the Act, the maximum civil penalty that may be imposed by the Court for breach by an individual is \$2,500,000, whilst the maximum civil penalty for breach by a body corporate is 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 act or omission.

The maximum civil penalty aligns with the maximum penalty for anti-competitive conduct and breaches of the Australian Consumer Law under the Act. This is intended to deter parties from not dealing with each other in good faith in relation to negotiations, including through conduct that is arbitrary, unreasonable or reckless, and reflects the importance of addressing imbalances in bargaining power and promoting honest and fair dealings between sellers and buyers of gas.

Section 31 – Good faith–dealing in relation to agreement

Subsection 31(1) requires a covered supplier and another person (the *other party*, typically the buyer) that enters an agreement with the supplier for the supply of regulated gas by the supplier, to deal with each other in good faith within the meaning of the unwritten law in relation to the agreement. This does not prevent a covered supplier or the other party from acting in the person’s legitimate commercial interests.

The requirement to deal in good faith in relation to an agreement is intended to apply whilst an agreement is in force. Subsection 31(2) provides that to avoid doubt, “dealing” is intended to include:

- exercising rights or performing obligations under the agreement;
- dealing with or resolving complaints or disputes arising under or in connection with the agreement, and

- varying or terminating the agreement.

Section 53ZJ of the Act allows a gas market instrument to provide that a provision is a civil penalty provision or that a person may be subject to a civil penalty if they contravene a provision. Pursuant to section 52ZJ of the Act and subsection 31(1), failing to deal in good faith in relation to an agreement as described above is subject to a civil penalty.

In accordance with item 7C of the table to subsection 76(1A) of the Act, the maximum civil penalty that may be imposed by the Court for breach by an individual is \$2,500,000, whilst the maximum civil penalty for breach by a body corporate is 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 act or omission.

The maximum civil penalty aligns with the maximum penalty for anti-competitive conduct and breaches of the Australian Consumer Law under the Act. This is intended to deter parties from not dealing with each other in good faith in relation to an agreement, including through conduct that is arbitrary, unreasonable or reckless, and reflects the importance of addressing imbalances in bargaining power and promoting honest and fair dealings between sellers and buyers of gas.

Section 32 – Good faith—matters to take into account

Section 32 contains a non-exhaustive list of matters that the courts may have regard to when determining whether a person deals in good faith with another person in relation to negotiations or an agreement. It is not intended to limit the matters that the court can have regard to as the meaning of good faith is intended to be drawn from the unwritten law as it evolves over time. The listed matters are intended to assist the court in determining when a person has breached the obligation to deal in good faith within the meaning of the unwritten law, and to assist covered suppliers and buyers to understand the nature of their obligation to act in good faith towards the other party.

Part 6 – Record keeping, information and publication

Part 6 requires suppliers to record and retain certain information, give certain information to the ACCC, and publish certain information on their websites. The ACCC may also publish certain information,

Section 33 – Record keeping by supplier

Section 33 requires covered suppliers to make written records of particular details in a form approved by the ACCC and keep those records for certain periods of time in a manner approved in writing by the ACCC Commissioner.

Section 53ZJ of the Act allows a gas market instrument to provide that a provision is a civil penalty provision or that a person may be subject to a civil penalty if they contravene

a provision. Pursuant to section 53ZJ of the Act and subsection 33(1) failure to keep the required records may attract a civil penalty.

The maximum civil penalty that may be imposed by the Court, in accordance with table item 7D in subsection 76(1A) of the Act, is 3,000 penalty units for a body corporate or 600 penalty units for a person other than a body corporate, as set out at the foot of subsection 33(1).

These maximum penalties reflect the potential consequences that contravening conduct could have for the operation of gas markets and the need for a strong deterrence to ensure compliance with the reporting requirements. The maximum penalties have been designed to provide an effective deterrent to breaches of the law while ensuring a penalty cannot be considered an acceptable cost of doing business.

The details that must be recorded, and the period of time they must be kept, are:

- each gas EOI issued by the supplier that proceeded to an agreement to supply regulated gas, for 6 years after the agreement was entered into;
- each gas EOI issued by the supplier that has not proceeded to an agreement to supply regulated gas, for 6 years after the record was made;
- each gas initial offer issued by the supplier that proceeded to an agreement to supply regulated gas, for 6 years after the agreement was entered into;
- each gas initial offer issued by the supplier that has not proceeded to an agreement to supply regulated gas, for 6 years after the record was made;
- each buyer gas final offer given to the supplier that proceeded to an agreement to supply regulated gas, for 6 years after the agreement was entered into;
- each buyer gas final offer given to the supplier that has not proceeded to an agreement to supply regulated gas, for 6 years after the record was made;
- each gas final offer issued by the supplier that proceeded to an agreement to supply regulated gas, for 6 years after the agreement was entered into;
- each gas final offer issued by the supplier that has not proceeded to an agreement to supply regulated gas, for 6 years after the record was made;
- all documents and information exchanged between the supplier and a person with whom the supplier has negotiated in respect of a gas EOI, gas initial offer, buyer gas final offer or gas final offer, for 6 years after the supplier started to hold the document or information as set out above including,
 - Each version of such a gas initial offer, buyer gas final offer or gas final offer; and
 - If a gas EOI, gas initial offer, buyer gas final offer or gas final offer did not proceed to an agreement to supply regulated gas – documents and information containing reasons why it did not proceed to an agreement;

- any other documents or information that the supplier creates, obtains or holds and that relates to the supply, price or marketing of regulated gas, for 6 years after the supplier created or first started to hold the document or information;
- each agreement to supply regulated gas entered into by the supplier, for 6 years after the agreement was entered into;
- the name of each person who gave the supplier a notice in writing, in each calendar year ending after the commencement of this instrument, stating an interest in further negotiations in relation to a gas EOI issued by the supplier, for 6 years starting after the end of the calendar year; and
- details specified by the ACCC in a determination, for the period specified in the determination.

Subsection 33(3) provides that ACCC may, by legislative instrument, determine kinds of details that must be recorded, and the period which those records must be kept. Subsection 53ZB(4) of the Act provides that, if a gas market code confers a power on a person or body, that power may be exercised by legislative instrument. It is appropriate that additional information be prescribed by legislative instrument because:

- prescribing this in the primary law would insert, into an already complex statutory framework, a set of specific provisions that would apply only to a relatively small group of entities (suppliers of regulated gas), leading to unnecessary complexity for other users of the primary legislation; and
- new information may need to be added urgently to deal with changed market conditions or unexpected circumstances.

Additionally, before making a determination, the ACCC must consult with the public about the proposed determination, and take into account any comments. A determination as to additional information that must be recorded is a legislative instrument subject to disallowance and sunseting.

Section 34 – Supplier to publish information relating to available gas, etc.

Section 34 requires a covered supplier to maintain on its website a statement that sets out particular information and states that it is published for the purposes of section 34 of the Regulations. This statement must be maintained on the supplier’s website as soon as practicable from the day after the end of the transition period, being 2 months after the commencement of the Regulations; or a date determined by the ACCC.

Section 53ZJ of the Act allows a gas market instrument to provide that a provision is a civil penalty provision or that a person may be subject to a civil penalty if they contravene a provision. Pursuant to section 53ZJ of the Act and subsection 34(1), failure to publish the required information may attract a civil penalty.

The maximum civil penalty that may be imposed by the Court, in accordance with table item 7D in subsection 76(1A) of the Act, is 3,000 penalty units for a body corporate or 600 penalty units for a person other than a body corporate, as set out at the foot of subsection 34(1).

These maximum penalties reflect the potential consequences that contravening conduct could have for the operation of gas markets and the need for a strong deterrence to ensure compliance with the information publication requirements. The maximum penalties have been designed to provide an effective deterrent to breaches of the law while ensuring a penalty cannot be considered an acceptable cost of doing business.

The website statement must include:

- details of each gas EOI that the supplier intends to issue in the 24 month period, including
 - the volume of regulated gas proposed to be supplied in accordance with the gas EOI, and
 - The period over which that regulated gas is proposed to be supplied in accordance with the gas EOI;
- the volume of uncontracted regulated gas that is likely to be available to the supplier in that 24 month period; and
- the volume of that uncontracted regulated gas:
 - that the supplier intends to be the subject of a gas EOI, a gas initial offer or a gas final offer in that 24 month period; or
 - that the supplier intends to supply in that 24 month period.

The ACCC may, by legislative instrument, determine a date on which the publication obligations will commence and determine additional information to be published in the website statement. Subsection 53ZB(4) of the Act provides that, if a gas market code confers a power on a person or body, that power may be exercised by legislative instrument. It is appropriate that additional information be prescribed by legislative instrument because:

- prescribing this in the primary law would insert, into an already complex statutory framework, a set of specific provisions that would apply only to a relatively small group of entities (suppliers of regulated gas), leading to unnecessary complexity for other users of the primary legislation; and
- new information may need to be added urgently to deal with changed market conditions or unexpected circumstances.

Additionally, before making a determination, the ACCC must consult with the public about the proposed determination and take into account any comments. A determination as to additional information that must be recorded is a legislative instrument subject to disallowance and sunseting.

The information in the website statement must be set out in a legible and prominent way, and in a form approved by the ACCC in writing, if such a form exists.

Section 35 – Supplier to report information to Commission—information relating to available gas, etc.

Section 35 requires covered suppliers to report certain information to the ACCC in a notice that specifies it is for the purposes of section 35 of the Regulations. This notice must be given as soon as practicable, from the day after the end of the transition period, being 2 months after the commencement of the Regulations; or a date determined by the ACCC.

The notice must contain, in relation to a 24 month period:

- the information set out in subsection 34(5) of the Regulations; and
- whether the supplier intends, in that 24 month period, to do either or both of the following:
 - issue a gas EOI, gas initial offer or gas final offer in respect of regulated gas that is uncontracted regulated gas on any day from the date that the notification obligations commence; or
 - supply regulated gas that is uncontracted regulated gas on any day from the date that the notification obligations commence.

The ACCC may, by legislative instrument, determine a date on which information must be reported and additional information to be published in such a notice. The ACCC may, by legislative instrument, determine additional information to be published in the website statement. Subsection 53ZB(4) of the Act provides that, if a gas market code confers a power on a person or body, that power may be exercised by legislative instrument. It is appropriate that additional information be prescribed by legislative instrument because:

- prescribing this in the primary law would insert, into an already complex statutory framework, a set of specific provisions that would apply only to a relatively small group of entities (suppliers of regulated gas), leading to unnecessary complexity for other users of the primary legislation; and
- new information may need to be added urgently to deal with changed market conditions or unexpected circumstances.

Additionally, before making a determination, the ACCC must consult with the public about the proposed determination and take into account any comments. A determination as to additional information that must be recorded is a legislative instrument subject to disallowance and sunseting.

The notice must be in writing and in a form approved by the ACCC in writing, if such a form exists.

Section 53ZJ of the Act allows a gas market instrument to provide that a provision is a civil penalty provision or that a person may be subject to a civil penalty if they contravene a provision. Pursuant to section 53ZJ of the Act and subsection 35(1) failure to report information to the ACCC as described above may attract a civil penalty.

The maximum civil penalty that may be imposed by the Court, in accordance with table item 7D in subsection 76(1A) of the Act, is 3,000 penalty units for a body corporate or 600 penalty units for a person other than a body corporate, as set out at the foot of subsection 35(1).

These maximum penalties reflect the potential consequences that contravening conduct could have for the operation of gas markets and the need for a strong deterrence to ensure compliance with the reporting requirements. The maximum penalties have been designed to provide an effective deterrent to breaches of the law while ensuring a penalty cannot be considered an acceptable cost of doing business.

Section 36 – Supplier to report information to Commission—gas EOIs

Section 36 requires a covered supplier to give the ACCC a notice in writing in respect of the issue of a gas EOI. The notice must state that it is for the purpose of section 36 of the Regulations and set out the date on which the supplier issued the gas EOI. The covered supplier must provide this notice to the ACCC within 3 business days of issuing the gas EOI.

A covered supplier must also give ACCC a copy of the gas EOI on or before the deadline for giving a notice under this section determined by the ACCC.

The ACCC may, by legislative instrument, determine a deadline for providing such a notice. Subsection 53ZB(4) of the Act provides that, if a gas market code confers a power on a person or body, that power may be exercised by legislative instrument. It is appropriate that this deadline be prescribed by legislative instrument because:

- prescribing this in the primary law would insert, into an already complex statutory framework, a set of specific provisions that would apply only to a relatively small group of entities (suppliers of regulated gas), leading to unnecessary complexity for other users of the primary legislation; and
- the appropriate deadline may change due to market conditions, the ACCC's systems, and other factors, and so it is desirable for the ACCC to be able to set and change the deadline to account for these changes.

Additionally, before making a determination, the ACCC must consult with the public about the proposed determination and take into account any comments. A determination specifying the deadline for giving notice under this section is a legislative instrument subject to disallowance and sunseting.

Section 53ZJ of the Act allows a gas market instrument to provide that a provision is a civil penalty provision or that a person may be subject to a civil penalty if they contravene a provision. Pursuant to section 53ZJ of the Act and subsection 36(1) failure to report information to the ACCC as described above may attract a civil penalty.

The maximum civil penalty that may be imposed by the Court, in accordance with table item 7D in subsection 76(1A) of the Act, is 3,000 penalty units for a body corporate or 600 penalty units for a person other than a body corporate, as set out at the foot of subsection 35(1).

These maximum penalties reflect the potential consequences that contravening conduct could have for the operation of gas markets and the need for a strong deterrence to ensure compliance with the reporting requirements. The maximum penalties have been designed to provide an effective deterrent to breaches of the law while ensuring a penalty cannot be considered an acceptable cost of doing business.

Section 37 – Supplier to report information to Commission—gas initial offers, buyer gas final offers and gas final offers

Section 37 provides that, where a covered supplier:

- issues a gas initial offer or a gas final offer; or
- is given a buyer gas final offer,

the supplier must give the ACCC a notice in writing that:

- states that it is given for the purposes of section 37 of the Regulations;
- sets out the date on which the supplier issued the gas initial offer or gas final offer, or received the buyer gas final offer; and
- includes a copy of the gas initial offer, gas final offer, or buyer gas final offer.

This notice must be given to ACCC on or before the deadline for giving notice under this section determined by ACCC.

The ACCC may, by legislative instrument, determine a deadline for providing such a notice. Subsection 53ZB(4) of the Act provides that, if a gas market code confers a power on a person or body, that power may be exercised by legislative instrument. It is appropriate that this deadline be prescribed by legislative instrument because:

- prescribing this in the primary law would insert, into an already complex statutory framework, a set of specific provisions that would apply only to a relatively small group of entities (suppliers of regulated gas), leading to unnecessary complexity for other users of the primary legislation; and
- the appropriate deadline may change due to market conditions, the ACCC's systems, and other factors, and so it is desirable for the ACCC to be able to set and change the deadline to account for these changes.

Additionally, before making a determination, the ACCC must consult with the public about the proposed determination and take into account any comments. A determination specifying the deadline to give notice under this section is a legislative instrument subject to disallowance and sunseting.

Section 53ZJ of the Act allows a gas market instrument to provide that a provision is a civil penalty provision or that a person may be subject to a civil penalty if they contravene a provision. Pursuant to section 53ZJ of the Act and subsection 37(1) failure to report information to the ACCC as described above may attract a civil penalty.

The maximum civil penalty that may be imposed by the Court, in accordance with table item 7D in subsection 76(1A) of the Act, is 3,000 penalty units for a body corporate or 600 penalty units for a person other than a body corporate, as set out at the foot of subsection 37(1).

These maximum penalties reflect the potential consequences that contravening conduct could have for the operation of gas markets and the need for a strong deterrence to ensure

compliance with the reporting requirements. The maximum penalties have been designed to provide an effective deterrent to breaches of the law while ensuring a penalty cannot be considered an acceptable cost of doing business.

Section 38 – Supplier to report information to Commission—agreements to supply regulated gas

Section 38 requires a covered supplier that enters into an agreement to supply regulated gas to give the ACCC a notice in writing. This notice must state that it is for the purposes of section 38 of the Regulations, set out the date on which the supplier entered into the agreement, and include a copy of the agreement.

The ACCC may, by legislative instrument, determine a deadline for providing such a notice. Subsection 53ZB(4) of the Act provides that, if a gas market code confers a power on a person or body, that power may be exercised by legislative instrument. It is appropriate that this deadline be prescribed by legislative instrument because:

- prescribing this in the primary law would insert, into an already complex statutory framework, a set of specific provisions that would apply only to a relatively small group of entities (suppliers of regulated gas), leading to unnecessary complexity for other users of the primary legislation; and
- the appropriate deadline may change due to market conditions, the ACCC's systems, and other factors, and so it is desirable for the ACCC to be able to set and change the deadline to account for these changes.

Additionally, before making a determination, the ACCC must consult with the public about the proposed determination and take into account any comments. A determination specifying the deadline to give notice under this section is a legislative instrument subject to disallowance and sunseting.

Section 53ZJ of the Act allows a gas market instrument to provide that a provision is a civil penalty provision or that a person may be subject to a civil penalty if they contravene a provision. Pursuant to section 53ZJ of the Act and subsection 38(1), failure to report information to the ACCC as described above may attract a civil penalty.

The maximum civil penalty that may be imposed by the Court, in accordance with table item 7D in subsection 76(1A) of the Act, is 3,000 penalty units for a body corporate or 600 penalty units for a person other than a body corporate, as set out at the foot of subsection 38(1).

These maximum penalties reflect the potential consequences that contravening conduct could have for the operation of gas markets and the need for a strong deterrence to ensure compliance with the reporting requirements. The maximum penalties have been designed to provide an effective deterrent to breaches of the law while ensuring a penalty cannot be considered an acceptable cost of doing business.

Section 39 – Supplier to report information to Commission—conditional Ministerial exemptions

Section 39 requires a covered supplier that has been granted a conditional Ministerial exemption that is subject to conditions, to report certain information to the ACCC.

Specifically, subsection 39(1) requires a covered supplier that is specified in a conditional Ministerial exemption that states it is subject to conditions, to give the ACCC a notice in writing as soon as practicable after the end of the period covered by subsection 39(3) that:

- states that the notice is given for the purposes of section 39 of the Regulations; and
- sets out information in relation to a period that demonstrates the supplier complied with the conditions in a conditional Ministerial exemption throughout the period.

Subsection 39(3) covers the following periods:

- the period of 3 months beginning on the day the conditional Ministerial exemption was granted;
- if the conditional Ministerial exemption was in force at a time in a subsequent period of 3 months that:
 - started immediately after the end of the period mentioned in paragraph 39(3)(a) (the period of 3 months beginning on the day the conditional Ministerial exemption was granted); or
 - started immediately after the end of the period mentioned in subparagraph 39(3)(b)(i), or the end of a period covered by a previous operation of this subparagraph;

that subsequent period of 3 months.

Section 53ZJ of the Act allows a gas market instrument to provide that a provision is a civil penalty provision or that a person may be subject to a civil penalty if they contravene a provision. Pursuant to section 53ZJ of the Act and subsection 39(1) failure to report information to the ACCC as described above may attract a civil penalty.

The maximum civil penalty that may be imposed by the Court, in accordance with table item 7D in subsection 76(1A) of the Act, is 3,000 penalty units for a body corporate or 600 penalty units for a person other than a body corporate, as set out at the foot of subsection 39(1).

These maximum penalties reflect the potential consequences that contravening conduct could have for the operation of gas markets and the need for a strong deterrence to ensure compliance with the reporting requirements. The maximum penalties have been designed to provide an effective deterrent to breaches of the law while ensuring a penalty cannot be considered an acceptable cost of doing business.

Section 40 – Supplier to report information to Commission—retailers

Section 40 requires a covered supplier that is a retailer to report certain information to the ACCC.

If, at the time immediately following the end of the transition period, a covered supplier:

- held a retailer authorisation (within the meaning of the National Energy Retail Law as it applies in a State or a Territory); or
- is a retailer (within the meaning of the *Electricity Industry Act 2000* (Vic.)); or
- holds a licence authorising the person to sell gas by retail under the *Gas Industry Act 2001* (Vic.);

the supplier must give the Commission a notice in writing within 3 business days after the end of the transition period.

The notice is intended to demonstrate to the Commission that the deemed exemption under section 53 applies at a point at which the Code applies. Specifically, the notice must state that it is given for the purposes of section 40 and:

- if the covered supplier holds a retailer authorisation (within the meaning of the National Energy Retail Law as it applies in a State or a Territory) or holds a licence authorising the person to sell gas by retail under the *Gas Industry Act 2001* (Vic.)—include a copy of the retailer authorisation or licence; and
- if the supplier is a retailer (within the meaning of the *Electricity Industry Act 2000* (Vic.)—include a link to a publicly available website that allows access to the text of the supplier's retailer's licence; and
- set out information demonstrating that no more than 50 per cent of the annual turnover of the supplier during the financial year, to the extent that it is attributable to business operations related to the production, supply, and acquisition of gas, is attributable to a business of producing regulated gas carried on by the supplier; and
- set out information of a kind that is specified in a determination made by the Commission.

The requirement to report applies on an ongoing basis if a covered supplier becomes or ceases to be a retailer. Subsection 40(2) requires a covered supplier that becomes a retailer after the end of the transition period to give the ACCC notice within 3 business days. Section 40(3) requires a covered supplier to give the ACCC notice within 3 business days if it ceases to be a retailer.

The ACCC may, by legislative Instrument, determine kinds of information that is required to be set out in a notice. Before making a determination, the ACCC must consult with the public about the proposed determination and take into account any comments.

The notice must be in writing and in a form approved by the ACCC, if such a form exists.

Section 53ZJ of the Act allows a gas market instrument to provide that a provision is a civil penalty provision or that a person may be subject to a civil penalty if they contravene a provision. Pursuant to section 53ZJ of the Act and subsection 40(5), failure to report information to the ACCC as described above may attract a civil penalty.

The maximum civil penalty that may be imposed by the Court, in accordance with table item 7D in subsection 76(1A) of the Act, is 3,000 penalty units for a body corporate or 600 penalty units for a person other than a body corporate, as set out at the foot of subsection 40(5).

These maximum penalties reflect the potential consequences that contravening conduct could have for the operation of gas markets and the need for a strong deterrence to ensure compliance with the reporting requirements. The maximum penalties have been designed to provide an effective deterrent to breaches of the law while ensuring a penalty cannot be considered an acceptable cost of doing business.

Section 41— Supplier to report information to Commission—small suppliers

Section 41 requires suppliers who produce less than 100 petajoules of gas in a year (small suppliers) to provide certain information to the ACCC in writing and in a form approved by the ACCC. This is intended to demonstrate to the ACCC that the deemed exemption under section 55 applies.

Suppliers are captured by this requirement if they produce less than 100 petajoules of regulated gas in the most recent calendar year.

Notice as to status

Small suppliers must provide the ACCC with a notice containing:

- a statement that the notice is for the purposes of section 41 of the Regulations;
- information demonstrating that the supplier produced less than 100 petajoules of regulated gas in the threshold year; and
- any information specified in a determination.

This notice must be provided before 23 December 2023 for suppliers who began producing regulated gas before commencement of the Regulations, or for other suppliers, the third business day after the first calendar year in which they began producing regulated gas.

Section 53ZJ of the Act allows a gas market instrument to provide that a provision is a civil penalty provision or that a person may be subject to a civil penalty if they contravene a provision. Pursuant to section 53ZJ of the Act and subsection 41(1) failure to report information to the ACCC as described above may attract a civil penalty.

The maximum civil penalty that may be imposed by the Court, in accordance with table item 7D in subsection 76(1A) of the Act, is 3,000 penalty units for a body corporate or 600 penalty units for a person other than a body corporate, as set out at the foot of subsection 41(1).

These maximum penalties reflect the potential consequences that contravening conduct could have for the operation of gas markets and the need for a strong deterrence to ensure compliance with the reporting requirements. The maximum penalties have been designed to provide an effective deterrent to breaches of the law while ensuring a penalty cannot be considered an acceptable cost of doing business.

Notice about potential export sale

Small suppliers must also provide the ACCC with a notice if they form an intention to enter into an agreement to supply regulated gas to another person, and that person intends to export that regulated gas from Australia.

The notice must state that the supplier has formed an intention to enter into an agreement to supply regulated gas to another person, and that person intends to export that regulated gas from Australia. It must contain any other information prescribed in a determination.

Section 53ZJ of the Act allows a gas market instrument to provide that a provision is a civil penalty provision or that a person may be subject to a civil penalty if they contravene a provision. Pursuant to section 53ZJ of the Act and subsection 41(6) failure to report information to the ACCC as described above may attract a civil penalty.

The maximum civil penalty that may be imposed by the Court, in accordance with table item 7D in subsection 76(1A) of the Act, is 3,000 penalty units for a body corporate or 600 penalty units for a person other than a body corporate, as set out at the foot of subsection 41(6).

These maximum penalties reflect the potential consequences that contravening conduct could have for the operation of gas markets and the need for a strong deterrence to ensure compliance with the reporting requirements. The maximum penalties have been designed to provide an effective deterrent to breaches of the law while ensuring a penalty cannot be considered an acceptable cost of doing business.

Notice about export sale agreement

Small suppliers must also provide the ACCC with a notice if they enter into an agreement to supply regulated gas to another person, and that person intends to export that regulated gas from Australia.

The notice must state that the supplier has entered into an agreement to supply regulated gas to another person, and that person intends to export that regulated gas from Australia. It must contain any other information prescribed in a determination.

Section 53ZJ of the Act allows a gas market instrument to provide that a provision is a civil penalty provision or that a person may be subject to a civil penalty if they contravene a provision. Pursuant to section 53ZJ of the Act and subsection 41(7) failure to report information to the ACCC as described above may attract a civil penalty.

The maximum civil penalty that may be imposed by the Court, in accordance with table item 7D in subsection 76(1A) of the Act, is 3,000 penalty units for a body corporate or 600 penalty units for a person other than a body corporate, as set out at the foot of subsection 41(7).

These maximum penalties reflect the potential consequences that contravening conduct could have for the operation of gas markets and the need for a strong deterrence to ensure compliance with the reporting requirements. The maximum penalties have been designed to provide an effective deterrent to breaches of the law while ensuring a penalty cannot be considered an acceptable cost of doing business.

Additional information prescribed by determination

The ACCC may make determinations, by legislative instrument, with respect to information required in notices under this section. Subsection 53ZB(4) of the Act provides that, if a gas market code confers a power on a person or body, that power may be exercised by legislative instrument. It is appropriate that additional information be prescribed by legislative instrument because:

- inserting this into primary legislation would add a set of specific provisions that would apply only to a small group of suppliers in particular circumstances, leading to unnecessary complexity for other users of the primary legislation; and
- new circumstances may need to be added urgently to deal with changed market conditions or unexpected circumstances.

Additionally, before making a determination, the ACCC must consult with the public about the proposed determination, and take into account any comments. A determination as additional information is a legislative instrument subject to disallowance and sunseting.

Section 42 – Commission may disclose information

Section 42 allows the ACCC to disclose information collected under Part 6 to the Minister administering Part IVBB of the Act (currently the Treasurer); the Energy Minister; the Resources Minister; the Industry Minister; and the Departments that they administer, for the purposes of:

- administering Part IVBB of the Act (which includes the Regulations);
- administering Division 6 of Part 3 of the *Customs (Prohibited Exports) Regulations 1958* – that is, the Australian Domestic Gas Security Mechanism (ADGSM); and
- developing government policy in relation to regulated gas.

The intent of the section is to ensure information collected under the Regulations can be shared for use in administration and development of relevant policy without the need to re- collect the information and impose additional regulatory burden. The section does not limit other provisions of the Act or Regulations that provide for disclosure of information, such as section 155AAA of the Act. For example, the ACCC can publish information when an official is performing duties or functions as an ACCC official which would allow it to disclose information as part of its Gas Inquiry reporting.

Section 43 – Commission may publish information relating to small supplier deemed exemption or conditional Ministerial exemption

Section 43 requires the ACCC to publish the following information in a manner that the ACCC considers appropriate, as soon as practicable after obtaining the information:

- the name of any suppliers exempted from the reasonable pricing provisions because they are small suppliers exclusively supplying to the domestic market; and
- for a supplier specified in a conditional Ministerial exemption:
 - the name of the supplier;

- the period during which the exemption is in force;
- any conditions specified in the exemption; and
- details regarding any variation or revocation of the exemption.

The ACCC must not publish the information if doing so would prejudice the commercial interests of the supplier in a substantial way or is contrary to the public interest.

Section 44 – Specified person to publish or report information for a joint venture

Section 44 allows suppliers carrying on a joint venture involving gas market conduct to notify the ACCC that a specified person who carries on the joint venture will publish or report information on behalf of the joint venture. The notice must have effect for a specified period and specify the covered suppliers on whose behalf information will be published or reported.

If the ACCC receives such a notice, then any statement published by the specified person or notice given by the specified person to the ACCC is treated as though it was published or given by each of the covered suppliers, to the extent that it relates to the joint venture.

Part 7 – Exemptions, etc.

Part 7 provides for deemed exemptions from specified provisions of the Regulations in certain circumstances.

Section 45 – Deemed exemption for supply of regulated gas for less than 12 months

Section 45 provides that, if it relates to the supply, or proposed supply of regulated gas for less than 12 months, then:

- for a gas EOI – the civil penalty provisions in Division 1 of Part 3 do not apply;
- for a gas initial offer – the civil penalty provisions in Division 2 of Part 3 do not apply;
- for a gas final offer – the civil penalty provisions in Division 3 of Part 3 do not apply; and
- for a gas agreement – the civil penalty provisions Division 1 of Part 4 do not apply.

The deemed exemption for the supply, or proposed supply of regulated gas for less than 12 months is intended to ensure that obligations under the Regulations are proportional and aligned to the duration of supply. The deemed exemption only applies for the specified provisions in the Regulations – for example, the requirement to deal in good faith still applies to arrangements for periods of less than 12 months.

Section 46 – Deemed exemption for gas EOI issued in respect of 2 or fewer persons

Section 46 provides that the civil penalty provisions in relation to gas EOIs and publication and reporting of information do not apply if:

- the supplier has issued the gas EOI for the purpose of ascertaining whether one or more particular persons (each of which is a *gas EOI target*) is interested in acquiring regulated gas;
- the total number of gas EOI targets is 2 or fewer;
- the supplier has not issued another gas EOI that is substantially similar to the gas EOI—the supplier has issued the other gas EOI for the purpose of ascertaining whether one or more particular persons (each also to a person who is not a gas EOI target).

This is intended to confirm that it is not necessary to publish a formal EOI and comply with associated provisions of the Regulations in order to make targeted approaches to up to two persons if this is to understand whether those particular persons are interested in acquiring regulated gas.

Section 47 – Deemed exemption for export

Section 47 provides that if, at the time an offer is issued or the agreement is entered into to supply regulated gas, the person to whom the offer is issued or the gas is to be supplied under the agreement (as relevant) intends to export the regulated gas from Australia in a liquid state, then:

- for a gas initial offer—
 - the civil penalty provisions in relation to gas initial offers in Division 2 of Part 3 do not apply; and
 - to the extent that they relate to gas initial offers – the civil penalty provisions in relation to dealing in good faith and publication and reporting of information in Parts 5 and 6 do not apply; and
- for a gas final offer—
 - the civil penalty provisions in relation to gas final offers in Division 3 of Part 3 do not apply; and
 - to the extent that they relate to gas final offers – the civil penalty provisions in relation to dealing in good faith and publication and reporting of information in Parts 5 and 6 do not apply; and
- for an agreement to supply regulated gas—
 - the civil penalty provisions in relation to agreements in Part 4 do not apply; and
 - to the extent that they relate to an agreement to supply regulated gas, the civil penalty provisions in relation to dealing in good faith and publication and reporting of information (other than section 41) in Parts 5 and 6 do not apply.

This deemed exemption in relation to sales to a person who intends to export is appropriate as the Regulations are intended to apply to gas offers and agreements in relation to regulated gas for domestic use and to help address bargaining power imbalances between

producers and users in the domestic wholesale market. It is expected that suppliers who are seeking to rely on this exemption would seek to ascertain the intention of the buyer at the time of making offers or entering into agreements. Such intention could be evidenced in an agreement or other documentation that affirms or warrants the intention of the counterparty.

Section 48 – Deemed exemption for gas swap agreements

Section 48 provides for a deemed exemption for gas swap agreements, which are defined under section 4 to mean an agreement to:

- swap a quantity of regulated gas at one location for the same quantity of regulated gas at a different location; or
- swap a quantity of regulated gas at a location at one time for the same quantity of regulated gas at the same location at a different time.

Section 48 provides that if it relates to a proposed supply of regulated gas under a gas swap agreement, then:

- for a gas EOI—
 - the civil penalty provisions in relation to gas EOIs in Division 1 of Part 3 do not apply; and
 - to the extent that they relate to gas EOIs – the civil penalty provisions in relation to dealing in good faith and publication and reporting of information in Parts 5 and 6 do not apply; and
- for a gas initial offer—
 - the civil penalty provisions in relation to gas initial offers in Division 2 of Part 3 do not apply; and
 - to the extent that they relate to gas initial offers – the civil penalty provisions in relation to dealing in good faith and publication and reporting of information in Parts 5 and 6 do not apply; and
- for a gas final offer—
 - the civil penalty provisions in relation to gas final offers in Division 3 of Part 3 do not apply; and
 - to the extent that they relate to gas final offers – the civil penalty provisions in relation to dealing in good faith and publication and reporting of information in Parts 5 and 6 do not apply; and
- for an agreement to supply regulated gas—
 - the civil penalty provisions in relation to agreements in Part 4 do not apply; and

- to the extent that they relate to an agreement to supply regulated gas, the civil penalty provisions in relation to dealing in good faith and publication and reporting of information (other than section 41) in Parts 5 and 6 do not apply.

This deemed exemption in relation to volume neutral gas swap agreements is appropriate as these arrangements facilitate efficient market operation and play an important role in balancing and hedging gas supply and delivering additional gas at peak times.

Section 49 – Deemed exemption for foundational agreements and gas master supply agreements

Section 49 provides that, if it relates to a proposed supply, or supply, of regulated gas under a foundational agreement or gas master supply agreement, then:

- for a gas EOI – the civil penalty provisions in Division 1 of Part 3 do not apply;
- for a gas initial offer – the civil penalty provisions in Division 2 of Part 3 do not apply;
- for a gas final offer – the civil penalty provisions in Division 3 of Part 3 do not apply; and
- for a gas agreement – the civil penalty provisions in Division 1 of Part 4 do not apply.

Section 4 of the Regulations provides that a foundational agreement means an agreement for the supply of regulated gas where all the regulated gas will be sourced from undeveloped reserves, future development of contingent resources or prospective resources.

A gas master supply agreement is not defined as it is a well-known industry term.

The purpose of this section is to exempt foundational agreements and master supply agreements, and EOIs, initial offers and final offers in relation to such agreements, from certain civil penalty provisions because they are inherently different to agreements to supply regulated gas generally. For example, foundational agreements have different terms and negotiation timeframes to agreements to supply regulated gas from established fields.

This provision does not exempt foundational agreements or gas master supply agreements from the prohibitions on exceeding the reasonable price under Division 2 of Part 4.

Section 50 – Deemed exemption for subordinate contract or transaction notice not determining price

Section 50 provides that the civil penalty provisions in Part 4 (dealing with agreements, and not including section 28 dealing with offers on a gas trading exchange) do not apply to subordinate contracts or transaction notices that do not include a provision determining price.

Generally, the rules relating to procedure and price in the Regulations apply 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 a master gas supply

agreement, and the subordinate contract or transaction notice does not include a provision determining the price. This includes where the relevant gas master supply agreement 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 are subject to the rules relating to procedure and price.

A subordinate contract or transaction notice is not subject to the procedure and price rules 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 is determined by the subordinate contract or transaction notice.

Section 51 – Deemed exemption gas exchange transactions

Section 51 provides that, if an agreement to supply regulated gas results directly from a transaction on a gas exchange that is a declared wholesale gas market or a short-term trading market (within the meaning of the National Gas Law), then

- the civil penalty provisions in relation to agreements do not apply; and
- to the extent that they relate to agreements – the civil penalty provisions in relation to dealing in good faith and publication and reporting of information do not apply.

The exemption for transactions on these markets is designed to ensure that they can continue to respond flexibly to short term fluctuations in supply and demand for gas in the east coast gas market.

Section 52 – Deemed exemption for gas trading exchange transactions

Section 52 excludes certain offers and agreements resulting from transactions on a gas trading exchange from the prohibitions on exceeding a reasonable price in Division 2 of Part 4.

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

Subsections 26(1) and 27(1) prohibit a covered supplier from entering into an agreement to supply, or supplying regulated gas under such an agreement, at a price exceeding the reasonable price as determined by section 29.

Subsection 52(1) provides for a deemed 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 a reasonable price 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. Australian Energy Market Operator's (AEMO) 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.

Short-term supply

Generally, the prohibitions in subsections 26(1) or 27(1) do not apply to agreements resulting from a transaction on a gas trading exchange, and the prohibition in subsection 28(1) does 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 ensure that the market can continue to respond flexibly to short term fluctuations in supply and demand for gas.

Subsection 52(2) provides that subsections 26(1) and 27(1) 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 52(3) provides that subsection 28(1) 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.

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

Subsection 28(1) prohibits a covered supplier from making an offer on a gas trading exchange for the supply of regulated gas at a price exceeding a reasonable price.

Subsection 52(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 a reasonable price 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 reasonable price proceeds to an agreement, then the prohibitions relating to agreement and supply in subsections 26(1) and 27(1) 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 exceeding a reasonable price, a buyer may still offer to buy above the reasonable price. This may result in a supplier being inadvertently matched with a buyer and automatically entering into an agreement exceeding a reasonable price. Therefore, the prohibitions on agreements and supply under agreements exceeding a reasonable price are not appropriate for transactions on a gas trading exchange that are not Pre-matched Trades and Broker Pre-Matched Trades.

Section 53 – Deemed exemption for retailers

Section 53 provides that the civil penalty provisions in Parts 3, 4, 5 and 6 do not apply if the person mentioned in those provisions, is a retailer. Such persons are not subject to the requirements relating to gas EOIs, gas initial offers, gas final offers, agreements, good faith dealing, and publication and reporting of information.

To qualify for the retailer exemption at a time, the person must have, at that time:

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

In addition to the above, no more than 50 per cent of the annual turnover of the person during the most recent financial year ending before the time, 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.

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 of the Regulations). Annual turnover will therefore be considered broadly by reference to the aggregate of supplies made by the person and related bodies corporate during the most recent financial year (subject to the limitation above regarding gas-related business operations).

The Regulations are 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 price which is reasonable for regulated gas producers may not be appropriate for gas retailers. Retailers may also conduct their business in a different way, using different timeframes and processes, to producers. The exemption for persons who are licenced retailers 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.

Section 54 – Deemed exemption for mandatory government agreements

Section 54 provides that if it relates to a proposed supply, or supply, of regulated gas under a gas mandatory government agreement, then:

- for a gas EOI—
 - the civil penalty provisions in relation to gas EOIs in Division 1 of Part 3 do not apply; and
 - to the extent that they relate to gas EOIs – the civil penalty provisions in relation to dealing in good faith and publication and reporting of information in Parts 5 and 6 do not apply; and
- for a gas initial offer—
 - the civil penalty provisions in relation to gas initial offers in Division 2 of Part 3 do not apply; and
 - to the extent that they relate to gas initial offers – the civil penalty provisions in relation to dealing in good faith and publication and reporting of information in Parts 5 and 6 do not apply; and
- for a gas final offer—
 - the civil penalty provisions in relation to gas final offers in Division 3 of Part 3 do not apply; and
 - to the extent that they relate to gas final offers – the civil penalty provisions in relation to dealing in good faith and publication and reporting of information in Parts 5 and 6 do not apply; and
- for an agreement to supply regulated gas—
 - the civil penalty provisions in relation to agreements in Part 4 do not apply; and

- to the extent that they relate to an agreement to supply regulated gas, the civil penalty provisions in relation to dealing in good faith and publication and reporting of information (other than section 41) in Parts 5 and 6 do not apply.

Section 4 provides that a mandatory government agreement means an agreement for the supply of regulated gas that a person has entered into because of a direction issued under the National Gas Law. A deemed exemption is therefore warranted as entering into such agreements is not at the discretion of the entities involved.

Section 55 – Deemed exemption for small suppliers supplying the domestic market

Section 55 exempts small suppliers (producing less than 100 petajoules of regulated gas in a calendar year) from reasonable price requirements under subsections 26(1), 27(1) and 28(1) if they only supply the domestic market. This exemption is lost, however, if a small supplier enters into an agreement to supply gas with a buyer who, at the time of that agreement, intends to export that gas. Suppliers are subject to an ongoing obligation to inform the ACCC of such circumstances (see section 41).

It is expected that a covered supplier would seek to ascertain the intention of the buyer prior to, or at the time of, entering the agreement – the intention of the buyer could be evidenced in the agreement itself or other documentation that affirms whether the buyer intends to export the regulated gas.

Broadly, section 55 operates to attribute a given quantity of production to a covered supplier based on the amount that the supplier produces, and also the amount that is produced by entities with whom the supplier has certain relationships. In this way, the production of a given covered supplier is, in part, determined or counted by reference to whether the supplier exercises market power as part of a group of covered suppliers.

Subsection 55(1) provides that the prohibitions on exceeding a reasonable price in subsections 26(1), 27(1) and 28(1) do not apply at a time to a covered supplier mentioned in those subsections if the amount of **counted gas** that has been produced in the most recent calendar year ending before the time:

- is nil, or less than 100 petajoules; and
- subsection 55(2) does not apply; and
- the supplier has not entered into an agreement, at a time on or after the commencement of this instrument, to supply regulated gas with a person who (at that time) intended to export the regulated gas from Australia.

Subsection 55(2) (as referred to in subsection 55(1)) applies if:

- the supplier entered into an agreement, before the commencement of the Regulations, to supply regulated gas with a person; and
- the supplier has varied the agreement, on or after that commencement, to increase the amount of regulated gas to be supplied under the agreement; and

- at the time of the variation, the person intended to export regulated gas supplied under the agreement (as varied) from Australia.

However, for the purposes of paragraph 55(1)(c) and subsection 55(2), agreements that are gas swap agreement, mandatory government agreements or agreements mentioned in section 51 or subsections 52(1) or (2) do not apply.

Section 55(3) therefore ensures that agreements related to declared wholesale gas markets, short term trading markets if it is an agreement mentioned in (section 51), or certain agreements on gas trading exchanges (subsections 52(1) or (2), gas swap agreements and mandatory government agreements can be disregarded.

This will provide clarity that a small supplier will does not lose their deemed exemption if they unintentionally enter an agreement with a buyer who intends to export or is directed to enter such an agreement by the Australian Energy Market Operator in accordance with its National Gas Law directions powers. The provisions also allow small suppliers to enter volume neutral gas swap agreements with a liquefied natural gas exporter and not lose their deemed exemption, thus enabling additional regulated gas to be made available to the domestic market during periods of high demand, or with the effect of avoiding transportation costs and constraints.

Subsection 55(4) provides that counted gas (as referred to in subsection 55(1)) is:

- any regulated gas produced by the supplier or a related body corporate in the parts of Australia to which this Part applies (see section 9);
- if there is an agreement under which the supplier or a related body corporate has a right to ownership, or the value of sale, of a particular amount of regulated gas produced by the parties to that agreement (other than by the supplier or a related body corporate) in those parts of Australia, in accordance with that agreement—that particular amount of regulated gas;
- if there is an agreement under which the supplier or a related body corporate has a right to ownership, or the value of sale, of the regulated gas produced by the parties to that agreement (other than by the supplier or a related body corporate) in those parts of Australia, in accordance with that agreement—so much of that regulated gas as is covered by subsection 55(5).

Subsection 55(5) provides that for the purposes of paragraph 55(4)(c), subsection 55(5) covers regulated gas if:

- the supplier, or a related body corporate, is a party to an agreement (the second agreement) with the parties to the agreement mentioned in paragraph 55(4)(c); and
- under the second agreement, the regulated gas is to be sold or marketed.

Subsection 55(6) provides that for the purposes of paragraphs 55(4)(b) and (c), disregard an agreement if it is a gas swap agreement or a mandatory government agreement.

Collectively, the ‘counted gas’ provisions in subsections 55(4) to (6) provide that the production of a small supplier is determined or counted for the purposes of paragraph

55(1)(a) by reference to the amount the supplier itself produces, and also the production of its related corporate entities and the entities with whom the supplier has an agreement under which the supplier acquires a right to regulated gas production (or its sale value).

The provisions also ensure that, should a covered supplier be a party to such an agreement, and also a party to a joint sale or marketing agreement, then the production of the collective parties is attributed to the supplier. For example, depending on the corporate structure of a given covered supplier and the nature of its ‘joint venture’ and ‘joint marketing’ agreements, production of a small supplier for the purposes of this section could be counted as the total of:

- per paragraph 55(4)(a), the amount produced by the supplier and its related entities; and
- per paragraph 55(4)(b), the amount of gas to which the supplier has a right of ownership, of the total produced by all parties to a joint venture agreement to which the supplier is also a party; and
- per paragraph 55(4)(c) and subsection 55(5), if the supplier has a joint marketing or sale agreement with its joint venture partners in relation to the gas collectively produced by parties to the joint venture agreement (under which the supplier has a right to the collectively produced gas or part thereof), then all of the gas produced and marketed by the joint venture parties under the joint venture and joint marketing agreements.

In practice, either paragraph 55(4)(b) or (c) could apply in relation to the same volume of gas – this will depend on how marketing and joint venture agreements of a given supplier are structured. It is, however, not intended that the same volume of production be counted twice.

It should also be noted that while these provisions are drafted to refer separately to joint venture and joint marketing agreements, such agreements are not required to exist as separately executed arrangements and may exist together in a single agreement between the relevant parties. That is, the *second agreement* in paragraph 55(5)(a) could also be part of the agreement referenced in paragraph 55(4)(c).

Section 56 – Deemed exemption for a person covered by a conditional Ministerial exemption—gas pricing penalty provisions

Section 56 gives effect to a conditional Ministerial exemption granted to a covered supplier under Part 8 in relation to a gas pricing penalty provision (as defined in subsection 60(2)).

Subsection 56(1) provides that the prohibition on a covered supplier entering an agreement for the supply of regulated gas where the price payable for regulated gas to be supplied exceeds the reasonable price under subsection 26(1) does not apply if:

- the supplier mentioned in subsection 26(1) is specified in a conditional Ministerial exemption; and

- the conditional Ministerial exemption states that it applies in relation to the prohibition under subsection 26(1); and
- on the day on which the supplier enters into the agreement for the supply of regulated gas, the conditional Ministerial exemption is in force.

Subsection 56(2) provides that the prohibition on a covered supplier supplying regulated gas where the price payable for regulated gas supplied exceeds the reasonable price under subsection 27(1) does not apply if:

- the supplier mentioned in subsection 27(1) is specified in a conditional Ministerial exemption; and
- the conditional Ministerial exemption states that it applies in relation to the prohibition under subsection 27(1); and
- on the day on which the supplier supplies regulated gas under the agreement, the conditional Ministerial exemption is in force.

Subsection 56(3) provides that the prohibition on a covered supplier offering to supply regulated gas on a gas trading exchange at a price that exceeds the reasonable price under subsection 28(1) does not apply if:

- the supplier mentioned in subsection 28(1) is specified in a conditional Ministerial exemption; and
- the conditional Ministerial exemption states that it applies in relation to subsection 28(1); and
- on the day on which the supplier makes the offer on a gas trading exchange for the supply of regulated gas, the conditional Ministerial exemption is in force.

Section 57 – Deemed exemption for person covered by conditional Ministerial exemption—other gas penalty provisions

Section 57 gives effect to a conditional Ministerial exemption granted to a covered supplier under Part 8 in relation to a gas penalty provision (see subsection 60(1)).

Subsection 57(1) gives effect to conditional Ministerial exemptions from the requirements relating to gas EOIs, gas initial offers, gas final offers, and gas agreements. If a conditional Ministerial exemption from a specified provision is in force on the day that a supplier covered by the exemption issues a gas EOI, issues a gas initial offer, issues a gas final offer, or enters into an agreement (as relevant), then that specified provision does not apply to the supplier.

Subsection 57(2) gives effect to conditional Ministerial exemptions from the requirements relating to dealing in good faith. If a conditional Ministerial exemption from a specified provision is in force on the day that a party covered by the exemption fails to deal in good faith as required by the specified provision, then that specified provision does not apply to the party.

Subsection 57(3) gives effect to conditional Ministerial exemptions from the requirements relating to record keeping, reporting and publication. If a conditional Ministerial exemption from a specified provision is in force on the day that a supplier covered by the exemption fails to meet the record keeping, reporting or publication requirement in the specified provision, then that specified provision does not apply to the supplier.

Part 8 – Conditional Ministerial exemptions

Part 8 establishes a scheme allowing the Energy Minister to grant a person or persons a conditional Ministerial exemption from a gas penalty provision or gas pricing penalty provision.

Section 58 – Application for conditional Ministerial exemption

Section 58 provides that a person may apply to the Energy Minister for a conditional Ministerial exemption. The application must be in writing and in a form approved by the Energy Minister.

A note to subsection 58(1) refers the reader to sections 56 and 57 for the effect of a conditional Ministerial exemption.

Section 59 – Withdrawal of application

A person may withdraw their application for a conditional Ministerial exemption at any time, unless the Energy Minister has decided to grant or not grant the exemption. If a person withdraws their application, Divisions 2 (Grant of conditional Ministerial exemptions) and Division 5 (Miscellaneous) apply on and after that time, as if the person had not made the application. The withdrawal must be in writing and in a form approved by the Energy Minister.

Section 60 – Meaning of gas penalty provision and gas pricing penalty provision

Subsection 60(1) provides that all civil penalty provisions in the Regulations are ***gas penalty provisions***, including ***gas pricing penalty provisions***.

Subsection 60(2) provides that subsections 26(1), 27(1) and 28(1) are ***gas pricing penalty provisions***.

Section 61 – Energy Minister, with agreement of Resources Minister, may grant conditional Ministerial exemption

Section 61 provides that the Energy Minister, with agreement of the Resources Minister, may grant a person or more than one person a conditional Ministerial exemption, in writing, from any or all of the gas penalty provisions (as defined under subsection 60(1)) if:

- the Energy Minister receives an application from that person, or each of those persons; and
- the Energy Minister is satisfied that it is appropriate to grant the conditional Ministerial exemption; and

- the Resources Minister is satisfied that it is appropriate to grant the conditional Ministerial exemption.

Additionally, if the conditional Ministerial exemption is to be subject to conditions other than the proposed conditions set out in the person's application, the Energy Minister must give notice of the proposed conditions to the person at least 14 days before making a decision. However, if the Energy Minister reasonably considers that proposed conditions are necessary to address exceptional circumstances, then the Energy Minister need not give the notice of proposed decision 14 days' notice before making a decision.

Considering whether it is appropriate to grant the conditional Ministerial exemption

In order to be satisfied that it is appropriate to grant the conditional Ministerial exemption, a Minister may take into account any of the following matters:

- the extent to which the conditional Ministerial exemption would promote a workably competitive market for regulated gas in the geographic area to which the Regulations apply;
- the extent to which the conditional Ministerial exemption would promote the affordability and availability of regulated gas on reasonable terms in the geographic area to which the Regulations apply;
- the extent to which the conditional Ministerial exemption would promote the sufficiency or adequacy of investment in, and supply and production of, regulated gas to meet demand the geographic area to which the Regulations apply;
- the effect or expected effect of other related decisions or government policies;
- the impact of the exemption on trade and exports, and on international relations;
- the impact of the exemption on the economy;
- the object of Part IVBB of the Act; and
- any other matter the Minister considers relevant.

For an exemption from any or all penalty provisions other than the gas pricing penalty provisions, the Energy Minister must not grant a conditional Ministerial exemption unless the Energy Minister and the Resources Minister are satisfied that the grant of the exemption (inclusive of the conditions on which would be granted) would not have a significant impact on the above matters.

The intent of additional requirements for exemptions from non-pricing penalty provisions is to ensure that such exemptions, should they be granted, are only available to an applicant in limited circumstances including where the Code unintentionally captures the applicant due to its bespoke business arrangements. In practice, it is expected that Ministers would have to be satisfied, for example, that the granting of such exemptions on the conditions proposed (if any) would have little substantive impact on matters such as competition in

the wholesale gas market, the affordability and availability of regulated gas, or the objects of Part IVBB of the Act.

In determining whether a Minister is satisfied of such matters, relevant considerations might include, for example, the overall volume of regulated gas produced or sold by the supplier, the proportion of the business operations represented by the business of producing or selling regulated gas that it carries on, and other such relevant matters.

Consultation with other Ministers

The Energy Minister cannot grant a conditional Ministerial exemption unless the Resources Minister is satisfied that it is appropriate to grant the exemption pursuant to paragraph 61(1)(d).

The Energy Minister must also consult with the Minister administering Part IVBB of the Act (the Treasurer at the time of writing) and the Industry Minister before granting a conditional Ministerial exemption, but failure to do this does not affect the validity of a conditional Ministerial exemption.

Section 62 – Conditions notices

Section 62 provides that if the Energy Minister is considering granting a person a conditional Ministerial exemption which is subject to conditions, the Energy Minister must give that person a notice in writing setting out those proposed conditions. The Energy Minister must also give a copy of the notice to the ACCC as soon as practicable.

A note to subsection 62(2) clarifies that the Energy Minister cannot grant a conditional Ministerial exemption unless the Resources Minister is satisfied of the matter mentioned in paragraph 61(1)(d).

Section 63 – Energy Minister may grant conditional Ministerial exemption that Energy Minister and Resources Minister consider appropriate

Section 63 provides that a conditional Ministerial exemption may be subject to conditions if both the Energy and Resources Ministers are satisfied the conditions are appropriate. In deciding whether the conditions are appropriate, the Ministers may have regard to the same matters that they may have regard to when deciding whether granting the exemption is appropriate (as set out in subsection 61(4)).

This section makes clear that conditions may apply in respect of particular gas production areas and may also include conditions that, in specified circumstances, are contravened if a person specified in the conditional Ministerial exemption engages in conduct that, apart from the conditional Ministerial exemption, would contravene a gas penalty provision (as defined in section 60(1)).

The Regulations are intended to allow a broad range of conditions in a conditional Ministerial exemption. This is because different types of covered suppliers (given the varied characteristics of their organisation and nature of their business) will necessarily warrant the consideration of different and potentially bespoke conditions.

Such conditions could therefore extend to, for example, a range of pricing, supply, conduct, investment, reporting and information disclosure obligations. Such conditions

could additionally involve mechanisms that require actions in certain circumstances, or at certain times, and could also include obligations that, should compliance with a primary condition not be possible at a given time or in given circumstances, then compliance could occur at a later time or in other circumstances.

Section 64 – Contents of conditional Ministerial exemption

Section 64 provides that a conditional Ministerial exemption must specify the person or persons to whom the exemption applies, the gas penalty provisions to which the exemption applies, the day on which the decision to make the exemption was made, and the period during which the exemption is in force. This period must start on or after the day the exemption is made and last for at least 12 months.

A conditional Ministerial exemption must also state any conditions to which it is subject. These conditions are not specified in the Regulations but could relate to gas supply commitments related to volume, price, new production, conditions on how gas is offered to the market or other similar matters.

Section 65 – Notice of decision

Section 65 requires the Energy Minister to give a person notice of a conditional Ministerial exemption decision if the Minister receives an application for an exemption under section 58.

If a person makes an application for a conditional Ministerial exemption, and the Energy Minister decides to grant or not grant the exemption, the Energy Minister must give the person notice of the decision as soon as practicable. The Energy Minister cannot grant a conditional Ministerial exemption unless the Resources Minister is satisfied that it is appropriate to grant the exemption pursuant to paragraph 61(1)(d).

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

If the Energy Minister grants a conditional Ministerial exemption, the Energy Minister must give a copy of the decision notice to the ACCC as soon as practicable.

Section 66 – Application for variation or revocation of conditional Ministerial exemption

Section 66 allows the person who applied for a conditional Ministerial exemption to apply to the Energy Minister for a variation or revocation of the exemption. The application must be in writing and in a form approved by the Energy Minister.

A note to subsection 66(1) refers the reader to sections 56 and 57 for the effect of a conditional Ministerial exemption.

Section 67 – Withdrawal of application

Section 67 provides that a person may withdraw their application to vary or revoke the conditional Ministerial exemption at any time unless the Energy Minister has decided to grant or not grant the conditional Ministerial exemption. If a person withdraws their

application, the person has not made an application for the purposes of Part 8. The withdrawal must be in writing and in a form approved by the Energy Minister.

Section 68 – Variation or revocation of conditional Ministerial exemption

Subsection 68(1) provides that the Energy Minister may, in writing, vary (including by varying conditions) or revoke a conditional Ministerial exemption granted in relation to a person or more than one person if:

- the Energy Minister receives an application from that person, or one of those persons to vary or revoke the exemption (subject to subsection 68(2));
- the Energy Minister has given all of the persons a notice of the proposed variation or revocation (as set out under section 69), and 14 days have passed since that notice was given;
- the Energy Minister is satisfied that it is appropriate to make the variation or revocation; and
- the Resources Minister is satisfied that it is appropriate to make the variation or revocation.

A note to subsection 68(1) reiterates that the Energy Minister cannot exercise a power under subsection 68(1) unless the Resources Minister is satisfied that it is appropriate to make the variation or revocation.

Subsection 68(2) provides that the Energy Minister may vary or revoke a person's exemption without having received an application from the person if the Energy Minister reasonably considers that a person specified in the exemption has contravened, or is contravening, a provision of the Act or the Regulations or a condition to which the exemption is subject.

Subsection 68(3) provides that the Energy Minister may also vary a person's conditional Ministerial exemption without having received an application from the person if the variation is of a minor or technical nature. This may be required to correct minor matters such as the spelling of a person's name.

Subsection 68(4) allows the Energy Minister to vary or revoke a person's exemption without providing notice of a proposed variation or revocation to the person and waiting 14 days if the Energy Minister reasonably considers that the variation or revocation is necessary to address exceptional circumstances.

Subsection 68(5) provides that subsections 61(4), (5) and (6) and (7) apply in relation to the variation or revocation of a conditional Ministerial exemption under subsection 68(1) in the same way that they apply in relation to the grant of a conditional Ministerial exemption.

Section 69 – Notices of proposed variation or revocation

Section 69 provides that, if the Energy Minister is proposing to vary or revoke a conditional Ministerial exemption which specifies a person, the Energy Minister may give the person a notice in writing. The notice must set out the proposed variation or revocation, the reasons for the proposed variation or revocation, and the day on which the proposal is to take effect.

Section 70 – Contents of variation or revocation

Section 70 provides that a variation or revocation of a conditional Ministerial exemption must specify the day on which the decision to vary or revoke the exemption was made and the day on which it takes effect. If the variation changes the period during which the exemption is in force, the variation must state the new period during which the exemption is in force. If the variation changes or removes conditions to which the exemption is subject, the variation must state that change or removal.

Section 71 – Notice of decision to vary or revoke conditional Ministerial exemption

Section 71 requires the Energy Minister to give a person notice of a variation or revocation decision made under section 68.

If the Energy Minister decides to vary (including by varying conditions) or revoke a conditional Ministerial exemption, or not to vary or revoke a person's exemption (where a person has applied for the variation or revocation), the Energy Minister must give the person notice of the decision as soon as practicable. The Energy Minister cannot vary or revoke conditions in a conditional Ministerial exemption unless the Resources Minister is satisfied that it is appropriate pursuant to paragraph 68(1)(d).

The notice must be in writing and state the reasons for the decision. If the decision is to vary the conditional Ministerial exemption, the notice must also include a copy of the exemption as varied. If the decision is to revoke an exemption, the notice must include a statement that the conditional Ministerial exemption is revoked.

If the Energy Minister varies or revokes a conditional Ministerial exemption, the Energy Minister must give a copy of the decision notice to the ACCC as soon as practicable.

Section 72 – Renewals

Section 72 provides that, if a person applies to renew a conditional Ministerial exemption, by virtue of an application made pursuant to section 66 to vary the exemption to extend the period in which the exemption is in force, that exemption applies until the Energy Minister gives the person a notice that the Energy Minister has decided to make or not make the variation.

This means that if a person makes an application to renew a conditional Ministerial exemption, and it notionally expires while the Energy Minister is deciding whether to renew the exemption (by varying it), the exemption stays in force until the Energy Minister makes that decision.

The Energy Minister cannot renew a conditional Ministerial exemption (by varying that exemption) unless the Resources Minister is satisfied that it is appropriate pursuant to paragraph 68(1)(d).

Section 73 – Obligation to comply with conditions in conditional Ministerial exemption

Section 73 requires a person specified in a conditional Ministerial exemption to comply with conditions in a conditional Ministerial exemption.

Subsection 73(1) provides that a person contravenes subsection 73(1) if the person engages in conduct at a time when the conditional Ministerial exemption is in force; and the conduct contravenes a condition specified in the conditional Ministerial exemption.

Section 53ZJ of the Act allows a gas market instrument to provide that a provision is a civil penalty provision or that a person may be subject to a civil penalty if they contravene a provision.

Pursuant to section 53ZJ of the Act and subsection 73(2), failure to comply with conditions in a conditional Ministerial exemption may attract a civil penalty. The maximum civil penalty that may be imposed by the Court for breach by an individual is \$2,500,000, whilst the maximum civil penalty for breach by a body corporate is 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 act or omission.

The maximum penalty for breach of the 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 a condition of a conditional Ministerial exemption and key role of the conditional Minister exemption framework in ensuring that the east coast gas market is well-supplied with reasonably priced gas.

Section 74 – Additional or corrected information in relation to application

Section 74 requires a person that makes an application under section 58 (an application for a conditional Ministerial exemption) or section 66 (an application to vary or revoke a conditional Ministerial exemption) to provide additional or corrected information if they become aware that information in the application, or information or a document given to the Energy Minister in relation to the application, is incomplete or incorrect. The additional or corrected information must be provided as soon as practicable.

The purpose of this provision is to ensure the Energy Minister has all the relevant, correct information before them to assess any relevant applications made under the Regulations, and to facilitate compliance with requirements of the Regulations.

Subsection 74(2) provides that subsection 74(1) does not apply if the relevant complete and corrected information and documents have already been given by any person to the Energy Minister in connection with any application to grant, vary or revoke a conditional Ministerial exemption.

Section 53ZJ of the Act allows a gas market instrument to provide that a provision is a civil penalty provision or that a person may be subject to a civil penalty if they contravene a provision. A person that fails to comply with the obligation in subsection 74(1) to provide additional or corrected information in relation to an application may be liable for a civil penalty. The maximum civil penalty that may be imposed by the Court, in accordance with table item 7D in subsection 76(1A) of the Act, is 3,000 penalty units for a body corporate or 600 penalty units for a person other than a body corporate, as set out at the foot of subsection 74(1).

These maximum penalties reflect the potential consequences that contravening conduct could have for the operation of gas markets and the need for a strong deterrence to ensure full and correct information is supplied in relation to exemption applications. The maximum penalties have been designed to provide an effective deterrent to breaches of the law while ensuring a penalty cannot be considered an acceptable cost of doing business.

A person may also commit an offence if they provide false or misleading information or documents in relation to this provision (pursuant to sections 136.1, 137.1 and 137.2 of Schedule 1 to the *Criminal Code Act 1995*).

Part 9 – Miscellaneous

Part 9 allows the Energy Minister and Resources Minister to delegate certain powers and functions under the Regulations, and to jointly cause a review of the Regulations.

Section 76 – Review of this instrument

Section 76 allows the Energy Minister and Resources Minister to jointly cause a review of the operation of the Regulations. A review may occur at any time; however, the first review must occur no later than 1 July 2025. This is intended to ensure the operation of the Regulations and its impacts on conduct in the gas market are considered contemporaneously to the review of the Australian Domestic Gas Security Mechanism.

The Energy Minister and Resources Minister, acting jointly, must consult with the Minister administering Part IVBB of the Act (the Treasurer at the time of writing) and the Industry Minister prior to causing a review. However, failure to do so does not affect the validity of the review.

The review may be carried out by the ACCC or any other person whom the Energy Minister and the Resources Minister consider qualified to undertake the review. The person or persons undertaking the review must provide an opportunity for interested parties to make written submissions and take those written submissions into account in undertaking the review. This is intended to ensure that interested parties' views are able to be submitted and taken into account in any review. The person or persons undertaking the review must give the Energy Minister and the Resources Minister a written report of the review.

Reviews are intended to provide insight into the role, impacts and operation of the Regulations and determine whether any amendments need to be made, including whether it is appropriate to change the pricing or conduct provisions of the Regulations based on market conditions or other market or regulatory developments.

Section 77 – Delegation

Subsection 77(1) allows the Energy Minister to delegate functions or powers under Part 8 of the Regulations to the Secretary of the Energy Department or a Senior Executive employee, or acting Senior Executive employee, in the Energy Department.

Subsection 77(2) allows the Resources Minister to delegate functions or powers under Part 8 of the Regulations to the Secretary of the Resources Department or a Senior Executive employee, or acting Senior Executive employee, in the Resources Department.

In exercising powers or performing functions, delegates must comply with any written directions of the Energy Minister or Resources Minister, as the case may be, to ensure that powers and functions exercised by delegates are exercised appropriately and consistently.

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 Code) Regulations 2023

These Regulations are 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 Regulations

Section 172 of the *Competition and Consumer Act 2010* (the Act) provides that the Governor General may make regulations, not inconsistent with the Act, prescribing all matters that are required or permitted by the Act to be prescribed or are necessary or convenient to be prescribed for carrying out or giving effect to the Act

Section 53L of the Act provides the regulations may prescribe matters required or permitted by the Act to be prescribed by a gas market code.

The *Competition and Consumer (Gas Market Code) Regulations 2023* (the Regulations) address long-term issues in the wholesale gas market to ensure a reliable and affordable supply of gas. This includes improving the *Voluntary Code of Conduct for the Negotiation and Development of Gas Supply Agreements between Gas Suppliers and Gas Customers in Australia* by strengthening requirements related to transparency, reporting, pricing, and timeframes for negotiation. While the Regulations place obligations on both covered suppliers and buyers, such as obligations to deal with each other in good faith, greater obligations are placed on suppliers to help address imbalances in bargaining power in the domestic wholesale market.

The Regulations impose requirements on agreements to supply regulated gas, including prohibitions on exceeding a reasonable price for making certain offers to supply regulated gas on a gas trading exchange, entering into agreements to supply regulated gas, or supplying regulated gas under such agreements. The Regulations also specify requirements on the processes leading up to agreements, including requiring particular content and timing for gas EOIs, gas initial offers, and gas final offers. There are also record keeping, reporting and publication obligations. Failure to comply with the requirements may result in a civil penalty being applied.

Certain covered suppliers (regulated gas producers and affiliates) may be exempt from the requirements if they meet the requirements for a deemed exemption – such as being a small producer of gas for the domestic market – or successfully apply to the Minister for a conditional Ministerial exemption.

Human rights implications

The Regulations promote the right to an adequate standard of living.

The gas market participants that are subject to the Regulations are mainly expected to be bodies corporate, which do not have human rights. To the extent that it is possible that an individual may be captured by the Regulations, the Regulations engage the right to a fair trial and presumption of innocence.

Right to an adequate standard of living

The Regulations promote the right to an adequate standard of living, including food, water and housing under Article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

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 access to essential facilities, such as energy for cooking, heating and lighting.

The Regulations improve the standard of living in Australia by facilitating the regulation of gas markets to enhance the welfare of Australians, including by reducing or mitigating the impact of rising energy prices.

Right to a fair trial and presumption of innocence

The Regulations may engage criminal process rights under Articles 14 and 15 of the ICCPR.

Civil penalty provisions may engage criminal process rights under Articles 14 and 15 of the ICCPR regardless of the distinction between criminal and civil penalties in domestic law. When a provision imposes a civil penalty, an assessment is therefore required as to whether it amounts to a ‘criminal’ penalty for the purposes of Articles 14 and 15 of the ICCPR.

The civil penalty provisions contained in the Regulations are not ‘criminal’ for the purposes of human rights law. While a criminal penalty is deterrent or punitive, these provisions are regulatory and disciplinary, and aim to encourage compliance with the Regulations. Further, the provisions do not apply to the general public, but to a sector or class of people who should reasonably be aware of their obligations under the Regulations – suppliers and buyers of regulated gas. Therefore, imposing these civil penalties will enable an effective disciplinary response to non-compliance.

The judiciary continues to have discretion to consider the seriousness of the contravention and impose a penalty that is appropriate in the circumstances. The civil courts are experienced in making civil penalty orders at appropriate levels having regard to the maximum penalty amount, considering a range of factors including the nature of the contravening conduct and the size of the organisation involved.

The nature and severity of the potential civil penalties for breaches of the agreement process, pricing, information, and good faith requirements are therefore not ‘criminal’ for

the purposes of human rights law and so these provisions do not engage the criminal process rights under Articles 14 and 15 of the ICCPR.

Conclusion

The Legislative Instrument is compatible with human rights because it promotes the right to an adequate standard of living. To the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate.