

SUPPLEMENTARY EXPLANATORY STATEMENT

Issued by the authority of the Minister for Climate Change and Energy

Competition and Consumer Act 2010

Competition and Consumer (Gas Market Code) Regulations 2023

Purpose

The *Competition and Consumer (Gas Market Code) Regulations 2023* (the Regulations) commenced on 11 July 2023. The purpose of 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.

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 places 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.

This supplementary explanatory statement addresses the Senate Scrutiny of Delegated Legislation Committee's request for further information on: the justification for exclusion of merits review in relation to decisions that are preliminary or procedural in nature, including decisions under section 75; the justification for exclusion of merits review in relation to policy decisions of a high political content; why the no-invalidity clauses in subsections 61(7) and 76(3) are necessary and appropriate; and the factors to be considered when determining what is 'contrary to the public interest' for the purposes of section 43.

This supplementary explanatory statement should be read in conjunction with the initial explanatory statement for the Regulations.

Amendments to the explanatory statement

Amendment 1

After the second paragraph under the heading "Section 43 – Commission may publish information relating to small supplier deemed exemption or conditional Ministerial exemption" in *Part 6 – Record keeping, information and publication*, add:

Whether something is in the 'public interest' relates to matters of common concern or relevance to the general public or an identifiable section of the public, in contrast to matters of individual interest. The Australian Competition and Consumer Commission (ACCC) must analyse, in each case, where the balance of the public interest lies based on the specific information to be published relating to an exempt supplier. Factors that may be considered by the ACCC include:

- whether publication of the information about the exempt supplier would promote or hinder a workably competitive market for regulated gas or the affordability and availability of regulated gas or otherwise impact the economy
- whether publication would promote or hinder the sufficiency or adequacy of investment in and supply and production of regulated gas
- the impact of publication on trade and exports, and on international relations
- the object of Part IVBB of the Act
- whether disclosure would be contrary to protections in privacy or other laws.

Amendment 2

After the fourth paragraph under the subheading “Considering whether it is appropriate to grant the conditional Ministerial exemption” under the heading “Section 61 – Energy Minister, with agreement of Resources Minister, may grant conditional Ministerial exemption” in *Part 8 – Conditional Ministerial exemptions*, add:

The Energy Minister’s decision to grant a conditional Ministerial exemption under subsection 61(1), and other related decisions under subsections 63(1) and 68(1) (collectively, the exemption framework), are not appropriate for independent merits review as they are decisions of high political content, in accordance with the Administrative Review Council’s guide, *‘What decisions should be subject to merits review?’* (the Council’s guide). Decisions made in relation to the exemption framework are economically consequential for the Australian east coast gas market and the cost of energy for consumers in that market, which ranges from domestic households to industrial gas users. A key objective of the exemptions framework is to incentivise suppliers to commit more gas supply to the east coast to address gas supply shortfalls that have been forecast by the Australian Energy Market Operator (AMEO) and the ACCC.

The matters that the Energy Minister must consider under subsection 61(4) when making a decision to grant an exemption under subsection 61(1) are matters of sufficiently high political content. These considerations contribute to the Regulations’ objective to incentivise the adequate supply and long-term investment of reasonably priced gas in the domestic market. The approach aims to ensure that gas prices are driven by Australian market fundamentals and costs, rather than international factors. The exemptions framework will allow Australia to deliver on energy supply commitments to trading partners and reduce the risk of triggering the Australian Domestic Gas Security Mechanism. By reducing this risk, Australia will maintain its investments and reputation as a trusted trading partner.

Suppliers seeking an exemption from the price rules will be expected to offer commitments to meet the policy intent and justify the exemption from the Regulations’ pricing rules. While the types of conditions are not defined in the Regulations, it is expected they will relate to additional domestic volumes, price commitments, investment in new production, how gas is offered to the domestic market and other related matters. Decisions made in relation to these exemptions, and such commitments, are expected to be important to address gas supply shortfalls.

The exemptions framework also reflects the importance of providing producers with policy and regulatory certainty to engage in long term investments. The Regulations allow producers to enter multi-year enforceable commitments with the Government, thus

providing certainty around price regulation. That certainty, and the economic impact of the Regulations, may be diminished if relevant decisions are subject to merits review.

The decision to take into account any matter under subsection 61(4) is preliminary or procedural in nature as it facilitates, or leads to, the making of a substantive decision, being the granting of a conditional Ministerial exemption under subsection 61(1). Including review rights in relation to a decision under subsection 61(4) would frustrate or delay the administrative decision-making processes under section 61. As such, and in accordance with the Council's guide, the decision under subsection 61(4) is not suitable for merits review.

Amendment 3

After the second paragraph under the subheading "Consultation with other Ministers" under the heading "Section 61 – Energy Minister, with agreement of Resources Minister, may grant conditional Ministerial exemption" in *Part 8 – Conditional Ministerial exemptions*, add:

Subsection 61(7) provides that a failure to comply with the consultation requirement under subsection 61(6) prior to granting a conditional Ministerial exemption does not affect the validity of the exemption. As subsection 61(5) already requires two Government Ministers – the Energy Minister and the Resources Minister – to be satisfied that the exemption would not have a significant impact on the matters specified in subsection 61(4) before the exemption can be granted, it is appropriate in the circumstances that failing to consult with two additional Government Ministers – the Minister administering Part IVBB of the Act and the Industry Minister – does not invalidate the granting of an exemption.

In the case of an exemption, the importance of thorough consultation is to be balanced against the need for certainty, as parties may enter contracts based on a supplier exemption, and failure to consult with other Government Ministers should not affect the certainty of that decision. Nevertheless, it is the intention that the consultation process in subsection 61(6) occurs in all but the most urgent circumstances.

Further, the no-invalidity clause only applies in relation to a failure by the Energy Minister to comply with the consultation process in subsection 61(6) and does not affect a person's right to seek judicial review in relation to other matters.

Amendment 4

After the second paragraph under the heading "Section 62 – Conditions notices" in *Part 8 – Conditional Ministerial exemptions*, add:

The Energy Minister's decision to give each person a notice in writing under subsection 62(2) is preliminary or procedural in nature as it facilitates, or leads to, the making of a substantive decision, being the granting of a conditional Ministerial exemption under subsection 61(1). Including review rights in relation to a decision under subsection 62(2) would frustrate or delay the administrative decision-making processes under section 61. As such, and in accordance with the Council's guide, a decision under subsection 62(2) is not suitable for merits review.

Amendment 5

After the first paragraph under the heading “Section 63 – Energy Minister may grant conditional Ministerial exemption that Energy Minister and Resources Minister consider appropriate” in *Part 8 – Conditional Ministerial exemptions*, add:

A decision under subsection 63(2) to have regard to matters under subsection 61(4) is preliminary or procedural in nature as it facilitates, or leads to, the making of a substantive decision, being the granting of a conditional Ministerial exemption under subsection 61(1). Including review rights in relation to a decision under subsection 63(2) would frustrate or delay the administrative decision-making processes under section 61. As such, and in accordance with the Council’s guide, a decision under subsection 63(2) is not suitable for merits review.

Amendment 6

After the sixth paragraph under the heading “Section 74 – Additional or corrected information in relation to application” in *Part 8 – Conditional Ministerial exemptions*, add:

Section 75 – Minister may request additional information and documents

Section 75 provides that the Energy Minister may request additional information and documents from certain persons in connection with an application for a conditional Ministerial exemption, or to vary or revoke such an exemption, under section 58 or 66 respectively. The purpose of this provision is to permit the Energy Minister to collect and consider relevant information from persons – who may not necessarily be the applicants for the Ministerial exemptions – in deciding whether to grant the exemption.

There are no legal consequences if a person fails to comply with section 75 – that is, persons who are issued with a request under section 75 are not required to respond to the notice. However, where the Energy Minister considers it necessary to seek information or documents from specific persons before making an exemption decision, a failure to provide such information may practically delay the decision-making process. If insufficient information is provided, a person’s application may be rejected because the Energy Minister cannot be satisfied of a certain matter.

A decision under subsection 75(1) is preliminary or procedural in nature as it facilitates, or leads to, the making of a substantive decision, being the granting of a conditional Ministerial exemption under subsection 61(1), or the variation or revocation of an exemption under subsection 68(1). Including review rights in relation to a decision under subsection 75(1) would frustrate or delay the administrative decision-making processes under sections 61 and 68. As such, and in accordance with the Council’s guide, a decision under subsection 75(1) is not suitable for merits review.

Amendment 7

After the second paragraph under the heading “Section 76 – Review of this instrument” in *Part 9 – Miscellaneous*, add:

The no-invalidity clause in subsection 76(3) is appropriate in the circumstances as subsection 76(1) already requires two Government Ministers – the Energy Minister and the Resources Minister – to jointly agree to the review before it is undertaken. It is also the

case that if an amendment to the Regulations is required and that amendment impacts the portfolio area of the Minister administering Part IVBB of the Act and the Industry Minister, the Energy Minister must consult with those Ministers.

Further, the no-invalidity clause in subsection 76(3) only applies in relation to a failure by the Energy Minister and Resources Minister to comply with the consultation process in subsection 76(2) and does not affect a person's right to seek judicial review in relation to other matters.

Amendment 8

After the third paragraph under the heading “Section 77 – Delegation” in *Part 9 – Miscellaneous*, add:

In accordance with the Council’s guide, the Energy Minister’s decision to delegate under section 77 is not subject to merits review. The Council’s guide states that decisions involving the delegation of a function or power to a person should not be subject to merits review.