Law Council OF AUSTRALIA

Business Law Section

16 May 2023

Department of Climate Change, Energy, the Environment and Water
John Gorton Building
King Edward Terrace
Parkes ACT 2600

By email: gasmandatorycode@dcceew.gov.au

Dear Sir/Madam,

Competition and Consumer (Gas Market Code) Regulations 2023

The Competition and Consumer Committee of the Business Law Section of the Law Council of Australia (the **Committee**) is pleased to make the following submission to the Competition and Consumer (Gas Market Code) Regulations 2023 consultation.

1. The Committee observes that the framework contained in the current exposure draft does not represent best practice economic regulatory design and creates significant regulatory uncertainty in a sector of the economy that is underpinned by long term investment decisions by both sellers and buyers. The Committee is concerned that a combination of exemptions determined by substantively unfettered Ministerial discretion, a price cap that may periodically be amended by reference to opaque criteria, in each case without merits review or any realistic possibility of review for error, and very substantial penalties for non-compliance create significant risk and uncertainty.

2. The first design issue arises in relation to the extent of ministerial discretion. For large gas producers supplying at least 100PJ of gas in the preceding financial year, or any producer selling any quantity for export, the Code regulates the price of their domestic gas sales unless a Ministerial exemption is granted on the basis of voluntary enforceable supply commitments which are satisfactory to the Minister.

3. In the Committee's view, the effectively unfettered discretion in the grant of Ministerial exemptions is an undesirable attribute of a framework that, in effect, involves price and quantity regulation of wholesale gas markets. In other regulated contexts, decisions on appropriate prices are made by specialist regulatory authorities or the Australian Competition Tribunal, with at least limited merits review, informed by transparent economic analysis, rather than left to Executive discretion. That Ministerial discretion applies simultaneously in relation to both maximum prices and volumes supplied.

4. There is no process by which an aggrieved gas producer can seek review of a decision not to grant a conditional Ministerial exemption, and no certainty as to the continuation of any exemption, as there are no limitations on the Minister’s ability to vary or revoke a conditional Ministerial exemption. There are certain matters referred to in subsection 52(2) to which a Minister 'may' have regard, but ultimately

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there are no effective fetters on the Ministerial discretion. The potential for detrimental effects arising from the regulatory uncertainty created by this arrangement is amplified given the long-term nature of investments and associated commitments for gas supply in Australia and internationally.

5. The second regulatory design issue arises in relation to the ability of the Australian Competition and Consumer Commission (**ACCC**) periodically to amend the 'reasonable price'. Under the Code, it is proposed that the ongoing responsibility for determining the price resides with the ACCC. The Code sets out matters that the ACCC 'may' take into account (but necessarily it is not bound to do so). While the ACCC must consult on why it considers a price specified to be reasonable, and must consider any comments made in consultations, the provisions do not provide for the kind of rigour that usually would be expected where an administrative body is making very significant decisions in relation to prices to apply in a market.

6. If the decision is made to proceed with the basic framework of the Code as proposed in the Exposure Draft, the Committee suggests that consideration be given to:

    (a) gas producers and customers being permitted to opt out of specified provisions of the Code by agreement. This would maintain the autonomy of parties, acting in their own interest, to negotiate on a free market basis but with the Code (and in particular its price cap) as a fall back for (in particular) the buyer, should the price for the bundle of product and services represented by a long term gas contract be excessive. This was permitted under the voluntary code and could be considered as an option for the mandatory code.

    (b) the introduction of penalties after a grace period to allow parties to understand any guidance notes issued, to comply appropriately, and to revise the Code for any issues that arise in practice before penalties apply. As an example, the potential imposition of substantial penalties for breaching an exemption condition may not be appropriate, particularly if there are circumstances outside of a party's control affecting the ability of a party to comply with that condition (i.e. not meet the volume of supply committed due to breakdown, weather issues, low demand, financial issues, etc).

Conclusion and further contact

7. The Committee would be pleased to discuss any aspect of this submission. Please contact the chair of the Committee, Lisa Huett, at lisa.huett@au.kwm.com, if you would like to do so.

Yours faithfully

Philip Argy
Chairman
Business Law Section