

Gas Market Consultation
Labour Market, Environment, Industry and Infrastructure Division
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Submitted via email: GasMarketConsultation@treasury.gov.au

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Options to ensure the domestic wholesale gas market delivers for Australians

The Australian Energy Council ('AEC') welcomes the opportunity to make a submission in relation to the draft price cap instrument contained in the Government's legislation package 'Options to ensure the domestic wholesale gas market delivers for Australians' (the 'Legislation Package').

The AEC is the peak industry body for electricity and downstream natural gas businesses operating in the competitive wholesale and retail energy markets. AEC members generate and sell energy to over 10 million homes and businesses and are major investors in renewable energy generation. The AEC supports reaching net-zero by 2050 as well as a 55 per cent emissions reduction target by 2035 and is committed to delivering the energy transition for the benefit of consumers.

In respect of the Legislation Package, broadly, the AEC regards direct government assistance to vulnerable households and small businesses as a positive step in the short term but believes that caps on upstream fuel costs may not deliver the desired lower prices and should be approached with caution.¹ These views are not repeated in this submission, which focuses instead on two specific issues raised by the Consultation Paper.

In summary, if a short-term price cap on *wholesale* gas is to be introduced, it is important that the regulatory framework accurately reflects this policy intent and does not inadvertently capture the retail arm of vertically integrated gas producers. The AEC agrees with the view expressed in the Consultation Paper that neither the price cap nor the reasonable pricing framework in any mandatory code should apply to retailers on account of their different cost structures.

Does the draft instrument (at Appendix B) clearly and appropriately define the wholesale contracts which are subject to the price cap?

No, the AEC submits that the draft price cap instrument requires some refinement to ensure that it only captures the first sale of gas at the wholesale level and does not inadvertently capture sales of gas made by the retail arm of vertically integrated gas producers.

There is clear policy intent that the draft price cap instrument setting the price cap is intended to only apply to the wholesale market and, more specifically, to the first sale of gas by a gas producer in the wholesale market. It is not intended to apply to gas sold by retailers in retail markets, nor to gas sold by retailers at the wholesale level. In particular, we note the following commentary in the explanatory materials to the exposure draft *Competition and Consumer (Gas Market Emergency Price) Order 2022* and the Consultation Paper:

¹ See [Statement on Energy Price Relief Plan: Good news for customers in the short term but price cap impact uncertain \(energycouncil.com.au\)](https://www.energycouncil.com.au).

*[Consultation paper] The **price cap** applies to producers in order to capture the first sale of gas, so **would not apply to gas sold at the wholesale level by other market participants like retailers**, which have different cost structures. The ACCC and AER will be closely monitoring the behaviour of all participants in the wholesale contract market and, if other wholesale gas sellers' prices are identified as being excessive relative to their costs, the scope of the price cap could be expanded.²*

*[Explanatory materials]... the Government intends to implement a temporary price cap through a gas market emergency price order as provided in the Bill. The order would **apply to uncontracted gas offered on the wholesale market** from currently operational fields capable of supply during the period in which the emergency price order is in force.³*

The AEC understands that this policy was intended to be reflected in the draft price cap instrument by limiting the application of the price cap to sales made by 'gas producers' (and also to sales made on their behalf by affiliates and related persons) (see section 8). As currently drafted, however, the AEC believes that the price cap could technically extend to the following sales:

- **Retail sales of gas made by a gas producer who is vertically integrated** - this is because a gas producer is subject to the price cap by virtue of section 8, but the price cap defined in section 7 is not limited to sales of regulated gas on the wholesale market;
- **Retail sales of gas made by a related entity of a gas producer** - this is because a related entity of a gas producer is subject to the price cap if they acquire gas from the gas producer by virtue of section 8, but the price cap defined in section 7 is not limited to sales of regulated gas on the wholesale market;
- **Retail sales by an entity who is in a joint venture with a gas producer or an affiliate of a gas producer** - this is because a joint venture partner of a gas producer is subject to the price cap if they acquire gas from the gas producer by virtue of section 8, but the price cap defined in section 7 is not limited to sales of regulated gas on the wholesale market.

The AEC notes that there are a number of exceptions to the price cap in section 10 of the draft price cap instrument, but sales of regulated gas on the retail market is not currently one of the exceptions. This appears to be a confined drafting issue that could readily be addressed, for example, through amendments to the definition of price cap in section 7 of the price cap instrument, through an express exception in section 10 of the price cap instrument or other minor changes to the price cap instrument and/or the *Competition and Consumer Amendment (Gas Market) Bill 2022*.

Should the Code of Conduct be limited to wholesale contracts where the supplier is a gas producer, or be expanded to include contracts offered by other market participants, such as retailers?

Yes, the AEC submits that the Code of Conduct should be limited to wholesale contracts where the supplier is a gas producer.

² Consultation paper on 'Options to ensure the domestic wholesale gas market delivers for Australians' dated December 2022, p. 7.

³ Competition and Consumer Amendment (Gas Market) Bill 202 – Exposure draft explanatory materials, p. 4.

The AEC understands the Government's intent is to introduce a Mandatory Gas Code to address bargaining power imbalances and other concerns which may potentially limit buyers' ability to negotiate gas supply contracts on reasonable terms. This Mandatory Gas Code would build on the current Voluntary Code of Conduct and is intended to place obligations on both suppliers and purchasers in the *wholesale* gas market to increase transparency, ensure a robust pricing framework and provide a pathway for dispute resolution.⁴

The AEC understands the intended benefits of the Code are to (i) ensure that commercial and industrial customers receive reasonable wholesale prices and (ii) to limit energy price rises for households and businesses which can flow from higher wholesale prices. On point (ii), the policy intent is therefore to regulate an input cost to retail energy (being wholesale gas prices) and not to regulate retail pricing directly.

If wholesale gas prices are to be subject to a Mandatory Code of Conduct, including a reasonable pricing provision, then the AEC agrees that the application of the Code of Conduct should be limited to *wholesale contracts*, consistent with this current policy intent.

Fundamentally, the proposed Mandatory Code of Conduct is intended to address concerns particular to the *wholesale* gas market, where gas sales are subject to detailed negotiation between suppliers and commercial / industrial customers on a bilateral basis and contracts are often long term. The AEC notes that this is a fundamentally different market to the *retail* gas market, where retail prices are publicly available and customers can readily compare offers and switch retailers. The AEC agrees with the consultation paper that the Mandatory Code of Conduct should not be extended to retailers on account of the different cost structures which apply to retailers as compared with wholesalers.

The AEC also considers that limiting the Mandatory Code of Conduct to wholesale contracts is consistent with the criteria for intervention set out in the Consultation Paper, which notes that any intervention must be 'targeted' and 'minimise any distortionary impacts in energy markets and related markets'.⁵

The AEC also notes that retail energy markets are closely monitored by both energy specific regulators, such as the Australian Energy Regulator and the Essential Services Commission, as well as the Australian Competition and Consumer Commission. Retail energy markets are also underpinned by a detailed regulatory regime, being the National Energy Customer Framework in the ACT, Tasmania, SA, NSW and Queensland and the Energy Retail Code of Practice in Victoria. Imposing additional obligations in the form of a Mandatory Code of Conduct would create duplication and regulatory complexity.

Finally, the AEC notes that, notwithstanding the policy intent to limit regulatory intervention to the *wholesale* gas market, the *Competition and Consumer Amendment (Gas Market) Bill 2022* goes considerably further than this and introduces broad-ranging powers to introduce codes to regulate sales of gas more generally. Given the limited time available, the AEC does not comment on the draft legislation, other than to note that the breadth of these powers is concerning, particularly given the limited time available to industry to consider and respond to the exposure draft. The AEC is strongly of the view that regulatory intervention in energy markets should be approached with caution to ensure that the potential for unintended or distortionary impacts is minimized.

⁴ Competition and Consumer Amendment (Gas Market) Bill 202 – Exposure draft explanatory materials, sections 1.6 and 1.7.

⁵ Consultation paper on 'Options to ensure the domestic wholesale gas market delivers for Australians' dated December 2022, p.5.

Please do not hesitate to contact Ben Barnes, General Manager Corporate Affairs & Retail by email on ben.barnes@energycouncil.com.au or by telephone on 0421 497 491 should you wish to discuss this submission further.

Yours sincerely,



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