



26 July 2023

Our Reference: APLNG - COR - 1040478

Patrick Loughrey
Project Leader
Australian Energy Market Commission
Level 15, 60 Castlereagh Street
Sydney NSW 2000

By electronic lodgement: www.aemc.gov.au

Dear Mr. Loughrey,

Australia Pacific LNG Pty Ltd (**APLNG**) welcomes the opportunity to contribute to the consultation process on the *Gas compensation and dispute resolution frameworks* consultation paper (**the consultation paper**).

APLNG is an incorporated company and one of the largest producers of natural gas in eastern Australia, delivering a reliable energy source to customers in Australia and Asia. We are the largest net contributor of gas to Australia's domestic east coast gas market, having provided over 1,400 PJ of gas into the domestic market since the project was sanctioned.

When the Stage 1 East Coast Gas System (**ECGS**) reforms were first consulted on, APLNG raised concerns about the rushed nature of the consultation and how the limited time given for consultation resulted in the Government \ failing to conduct a thorough assessment of the proposed changes. Less than a year later, Energy Ministers have now submitted a rule change request to refine the compensation framework that was rushed through as part of these reforms. While we appreciate and support the intent of the rule change request, this failure highlights the need for appropriate consultation and substantive impact assessments to be conducted when policy reforms are first being considered. Introduction of a formal process with this approach would increase the likelihood that new frameworks are robust and fit-for-purpose from the outset.

APLNG notes that there have not been any compensation claims submitted under the current ECGS framework, and very few recent instances of compensation claims being made under other parts of the National Gas Rules (**NGR**). Without evidence of current process failings, it makes it challenging to fully appreciate the full extent of improvements that may be required to the compensation framework. Nevertheless, APLNG strongly believes that several improvements are needed, particularly in relation to the funding arrangements.

Most importantly, APLNG has consistently advocated for a gas compensation framework that allows market participants to be compensated for all costs incurred as a result of directions issued by the Australian Energy Market Operator (**AEMO**), including lost opportunity costs. In earlier consultation processes run by the Australian Government and AEMO we have made the following points:

- The definition of 'direct costs' in the ECGS compensation framework should include both direct commercial costs and direct operational costs and include other costs, if justified. Additionally, claims should not be capped.

Confidential information has been omitted for the purposes of section 24 of the Australian Energy Market Commission Establishment Act 2004 (SA) and sections 71 and 319 of the National Gas Law.

- With respect to the recovery of compensation amounts from liable relevant entities, self-produced gas should be excluded from the calculation of 'aggregate gas consumed'. Otherwise, this calls into question the equitability of a system that penalises suppliers for producing sufficient gas to meet their own demand.


We note that some of these concerns do not specifically relate to questions posed by the Australian Energy Market Commission (AEMC). However, we urge the AEMC to consider these matters in more depth in the draft determination. Our submission provides further details.

In terms of the other topics canvassed in the rule change request, APLNG considers the following are key issues for consideration:

- The compensation framework should be separated from the dispute resolution processes contained in Part 15C of the NGR. This will streamline the claims process, remove the unnecessary complexity of identifying the application and interpretation of certain rules, and ensure the entity responsible for determining compensation amounts has the appropriate skills and expertise to do so (as opposed to one versed in dispute resolution processes, as is currently the case).
- A right to appeal process should be included in the ECGS framework. The inclusion of an appeals process will promote fairness and allow industry participants to challenge unfavourable outcomes through a comprehensive review of all relevant factors and evidence (including any third-party information used).
- The full cost of compensation, including the costs of the persons overseeing and determining compensation claims, should be apportioned and recovered from the relevant market customers who directly benefit from AEMO's directions.

APLNG looks forward to meeting with the AEMC on these important issues and continuing to engage with the AEMC as the rule change consultation process progresses. Should you have any queries relating to this submission, please contact Manda Goodwin, General Manager Commercial, at manda.goodwin@aplng.com.au.

Yours sincerely,

DocuSigned by:

213873965DCE49A...

Khoa Dao
Chief Executive Officer
Australia Pacific LNG Pty Ltd

AEMC

GRC0067 - COMPENSATION AND DISPUTE RESOLUTIONS

FRAMEWORK

STAKEHOLDER FEEDBACK TEMPLATE

The template below has been developed to enable stakeholders to provide their feedback on the questions posed in the consultation paper and any other issues that they would like to provide feedback on. The AEMC encourages stakeholders to use this template to assist it to consider the views expressed by stakeholders on each issue. Stakeholders should not feel obliged to answer each question, but rather address those issues of particular interest or concern. Further context for the questions can be found in the consultation paper.

SUBMITTER DETAILS

ORGANISATION: Australia Pacific LNG Pty Ltd

CONTACT NAME: Manda Goodwin, GM Commercial

EMAIL: manda.goodwin@aplng.com.au

PHONE: 07 3021 3320

DATE 26 July 2023

PROJECT DETAILS

NAME OF RULE CHANGE [OR REVIEW]: Compensation and dispute resolutions framework

PROJECT CODE: GRC0067

PROPONENT: The Hon. Chris Bowen M.P on behalf of the Energy Ministers' Sub-Group

SUBMISSION DUE DATE: 20 July 2023

CHAPTER 3 – THE PROBLEM IN THE RULE CHANGE REQUEST

1. WILL THE PROPOSED SOLUTION ADDRESS THE ISSUES RAISED BY ENERGY MINISTERS?

Do you consider that the proposed changes to the Rules will solve the issue(s) raised by Energy Ministers and improve the regulatory framework? Or are there other factors that would have a greater impact?

Australia Pacific LNG sees merit in some of the changes proposed to the gas compensation and dispute resolution frameworks. Refer to our responses to Questions 2 to 6 for more details. We also believe the following issues should be considered as part of this rule change process.

Funding of compensation claims

Australia Pacific LNG believes the full cost of compensation should be apportioned and recovered from the relevant market customer(s) that directly benefit from the directions issued by AEMO (e.g. the end-user(s) that take delivery of gas in the domestic east coast gas market).

Section 4.4 of AEMO's *'East Coast Gas System Procedures'* currently requires *'liable relevant entities who consumed gas or supplied gas for consumption in an affected jurisdiction during the period of the risk or threat'* to pay the compensation amounts. This includes LNG export projects.

The inclusion of self-producing gas suppliers in the definition of 'aggregate gas consumed' calls into question the equitability of a system that penalises suppliers for producing sufficient gas to meet their own demand. For fair assignment of payment obligations, self-produced gas should be excluded from the aggregate consumption calculation. Recovery of compensation costs should be sought from the beneficial recipients of the directed gas instead.

In addition, the compensation funding model more broadly will disincentivise gas customers from proactively purchasing gas at market to support reliability or supply adequacy, as a direction from AEMO would enable those gas customers to obtain gas at a significantly discounted price. This model will create perverse contracting behaviour and incentivise rent-seeking behaviour among gas buyers.

Further, Australia Pacific LNG notes we are subject to reasonable pricing provisions under the Competition and Consumer (Gas Market Emergency Price) Order 2022 (Cth) and Competition and Consumer (Gas Market Code) Regulations 2023 (the Code) that may prevent us from fully recovering compensation amounts we are deemed liable for. Other market participants, such as retailers, are not subject to the same pricing restrictions and can pass on their share of the compensation amounts in full. This results in inequitable outcomes and distorts the market. Consideration needs to be given to how these different frameworks work—for example, changes

might need to be made to the Code to allow covered suppliers who are not exempt from the pricing provisions to recover these costs in addition to the \$12/GJ price cap.

Funding of Adviser and dispute resolution panel (DRP) costs

Australia Pacific LNG believes the costs of the Adviser and DRP (or other persons overseeing or determining claims, as the case may be) should be recovered from the relevant market customer(s) that directly benefit from the directions issued by AEMO.

Under rule 706(5) of the National Gas Rules (NGR), these costs are borne by AEMO unless the DRP decides to re-allocate the costs because a party has unreasonably prolonged the proceedings or there is another good reason. However, there is no explicit guidance provided on how AEMO should recover these costs. Currently, Energy Ministers expect these costs would be recovered from market participants through participant fees under transitional rule 97(2) of the NGR.

Attributing the costs to a subsection of participants, rather than allocating it between all participants, is supported by a recent DRP determination in the Declared Wholesale Gas Market in Victoria. In 2022, Origin Energy (Vic) Pty Ltd entered a claim for compensation following a series of administered pricing periods which occurred throughout June and July 2022. As part of the proceedings,¹ AEMO submitted that the DRP should re-allocate costs to the claimant, so that the costs could be *'included as an element of the "amounts of compensation in respect of the claims"'*. The DRP agreed, noting that it would be an *'inefficient outcome'* for the costs to be borne by all Registered participants *'somewhat indiscriminately'* rather than those participants who contributed to the need for the injections.

Rules 237(9) and 706(5) should be revisited to make it explicit that AEMO can recover the costs of the persons overseeing or determining claims as part of the compensation amount.

Right of appeal

Australia Pacific LNG supports the inclusion of a right to appeal process within the ECGS framework. However, we ask the AEMC to consider the following principles when creating the appeals process:

- Australia Pacific LNG recommends allowing full merits-based appeals, as a right to appeal based on the merits of the original decision promotes fairness

¹ See www.aer.gov.au/system/files/Publication%20Version%202022%2011%2028%20DRP%20determination%20and%20reasons_0.pdf

by ensuring industry participants are provided with an avenue to challenge unfavourable outcomes. A full merits-based appeal allows for a comprehensive review of the decision, considering all relevant factors and evidence (including any third-party information used).

- Appeals should be determined by an independent expert, potentially the Adviser if they are appropriately qualified and not involved in determining the original claim (which is currently the case). Having appeals assessed by the same person would ensure consistency in decisions. If this is not possible, clear guidelines would need to be put in place on how an appeal would be assessed to remove the potential for subjective decision-making.

In terms of the recovery of costs related to appeals, we believe:

- The cost responsibility for unsuccessful appeals should be borne by the claimant—this includes all costs associated with the appeal process. This practice aligns with judicial norms and discourages frivolous or unwarranted appeals, promoting efficiency and cost-effectiveness.
- If an appeal is successful, the compensation amount and the full costs of the appeals process should be recovered from the relevant customers that benefited from the direction (via liable relevant entities).

However, consideration may need to be given to limiting the recovery of legal fees if legal representation is permitted (see below).

If a right of appeal is established, Australia Pacific LNG seeks clarification on the claimant’s ability to be legally represented during the appeals process. The right to legal representation ensures parties are afforded the best opportunity to effectively navigate complex proceedings and provide comprehensive arguments and evidence to support their appeal. If legal representation is permitted, restricting legal fees to those determined by a cost assessor based on a cost scale may be more reasonable than providing full indemnity for legal fees, striking a balance between accessibility and cost containment.

2. SHOULD SIMPLIFICATIONS TO THE PROCESS BE INTRODUCED?

- A. Should a simpler, quicker process for determining claims be available in certain circumstances? If so, what are these circumstances? How could this be achieved?
- B. What considerations are relevant to the proposed process to allow claims to be joined into one process?

Single claimant joining multiple claims

Australia Pacific LNG supports the proposal to allow a single claimant to combine smaller claims related to the same or similar event to meet or exceed the \$5,000 eligibility threshold. However, claims should only be joined if the events precipitating the claims occurred within a specified period (e.g. within two to three years). This will limit the risk of compensation claims being recovered from gas end-users that did not benefit from the past direction.

Multiple claimants joining claims

Australia Pacific LNG does not believe it is appropriate for a person to join another party's claims process. Further, we do not support a fast-track process that would allow multiple claimants to lodge a single application for the same event.

In the rule change request (p.11), Energy Ministers note that '*the dispute resolution panel currently has the discretion to:*

- *Permit or order a person to join, or be joined, as party to the proceedings before the DRP; or*
- *Permit the withdrawal or order the exclusion of a person as party to the proceedings before the DRP.'*

This rule may be appropriate within a dispute resolution framework because another person may have caused or contributed to the problems that are in dispute or the liability has passed to another party. However, in the context of compensation claims, Australia Pacific LNG does not support this approach because of confidentiality and competition concerns:

- Parties would be required to provide commercially sensitive information about themselves, and other entities involved (e.g. for suppliers this could include information about capacity, trading activities and pricing), leading to increased risks of inadvertent disclosure and data mishandling.
- Entities engaging in joint claims may have contractual agreements or non-disclosure arrangements with other uninvolved parties. This will act as a barrier to an effective joint claims process, as this information cannot be shared without proper consent and third parties may not want to expose their strategies/operations.

We suggest that, if Part 15C is retained, this rule should not be applied to the east coast gas system (ECGS) compensation framework. If multiple entity joint claims are permitted to continue, the above risks would need to be adequately addressed in the compensation framework.

Simplification of the claims process

Australia Pacific LNG agrees with the Energy Ministers' objectives of ensuring the procedural and governance arrangements under the ECGS compensation framework are fit-for-purpose, clear, and efficient. This should mean that compensation claims can be resolved in a timely and cost-effective manner. To streamline the process, claimants could give the notice of compensation (the claim) directly to the body overseeing the claims process, who would then notify AEMO and establish the panel responsible for assessing the claim. This would remove the double-handling of the claim by AEMO.

While we support a mechanism that would allow the claimant and AEMO or the body overseeing the claims process to hold formal pre-lodgement discussions on the nature and scope of the claim, we do not believe this mechanism should be mandatory. Some claims may be relatively straight-forward and will not need to be formally discussed before the claim is lodged. If this mechanism is introduced, there will need to be additional time allowances included in the claims process and consideration will need to be given to the cost recovery mechanism for costs incurred by AEMO and/or the body overseeing the claims process, particularly if the party does not lodge a compensation claim.

3. SHOULD FURTHER INCENTIVES BE CONSIDERED IN CERTAIN CIRCUMSTANCES?

Should entities receive only direct costs or should further incentives, such as compensation for other costs, e.g. opportunity costs, be available in certain circumstances?

If so, what should these further incentives be? What circumstances should these further incentives apply?

Australia Pacific LNG considers compensation for gas suppliers that are subject to directions issued by AEMO must cover all losses.

Rule 704(4) of the current framework does not allow:

- loss of profit or opportunity
- indirect or consequential loss.

We strongly believe the limitations in rule 704 of the NGR should be removed, allowing the claimant to be restored to the position they would have been in had it not been for AEMO's direction.

The compensation framework should be required to consider the opportunity costs and direct operational risks caused by the exercise of AEMO's directions powers and related damages that may be incurred by the directed participant. This includes any difference between the price received relative to the next best alternative price the gas supplier would have otherwise received if not for the direction and any direct operational loss.

Confidential information has been omitted for the purposes of section 24 of the Australian Energy Market Commission Establishment Act 2004 (SA) and sections 71 and 319 of the National Gas Law

Allowing market participants to recover more than their direct costs is supported by the compensation claim process in the National Electricity Market (NEM) with respect to any losses incurred during an administered pricing period where the administered price cap or administered floor price is applied. Under clause 3.14.6 of the National Electricity Rules (NER), both direct costs and opportunity costs are claimable. The definition and types of opportunity costs that can be recovered are contained in the compensation guidelines published by the AEMC. Specifically,

| | |
|--|--|
| | <p>opportunity costs are defined as ‘the value of the best alternative opportunity for eligible participants during the application of a price limit event or at a later point in time. The opportunity cost is the foreclosure of this alternative opportunity to use scarce capacity or resources more profitably.’²</p> <p>We acknowledge that non-direct costs such as opportunity and indirect costs may be difficult to determine. In this case, we believe it is appropriate to place the burden of proof on the claimant, including by requiring the claimant to provide clear evidence of the situation that has occurred and modelling and/or analysis of the quantum of associated costs.</p> <p>Direct costs also need to be defined to include both commercial and operational direct costs. For example, Australia Pacific LNG may incur costs when an LNG ship cannot be fully filled because of an AEMO direction to divert gas elsewhere. [REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p><u>Confidential information has been omitted for the purposes of section 24 of the Australian Energy Market Commission Establishment Act 2004 (SA) and sections 71 and 319 of the National Gas Law</u> [REDACTED]</p> <p>If the compensation framework continues to only allow direct costs, there may be scope to introduce a formulaic approach to determining claims based on certain circumstances that would allow claims to be fast-tracked. This would reduce costs associated with the claims process and provide greater certainty to claimants. These scenarios would need to be worked through with industry and should not limit the claimant’s ability to refer the claim to the panel for a determination.</p> |
| <p>4. SHOULD THE GOVERNANCE FRAMEWORK ALLOW FOR INFORMATION REQUESTS?</p> <p>Should we progress Energy Ministers’ proposal to allow the body determining compensation claims to request information from third parties to support this process? Should any other changes be made to allow the body determining compensation claims to obtain the information it needs from the claimant?</p> | <p>Australia Pacific LNG believes that the body determining compensation claims should rely on information provided by the claimant and AEMO only. This includes seeking further information from these parties, as required, to assist the body in determining a compensation claim. If the body is able to request information from third parties to support the process, it is unclear whether or not the ability to request this information is limited to information that is available in the public domain or whether the body (or AEMO as a delegate) would be provided information gathering powers (i.e. the ability to compel third parties to provide information). The latter is likely to impose significant costs on both the information gatherer and the party required to disclose the information and could lengthen the time required to resolve</p> |

² See www.aemc.gov.au/sites/default/files/documents/final_amended_compensation_guidelines.pdf (pp.12-13)

| | |
|---|---|
| | <p>a compensation claim (both of which are contrary to the rule change request objectives).</p> <p>If third party information can be used, it would be beneficial to develop guidelines that cover:</p> <ul style="list-style-type: none"> • in what circumstances third party information can be requested (e.g. if a compensation claim amount is below a certain threshold, the costs of seeking third party information may not outweigh the benefits) • the type of third parties that will be deemed credible • the type or nature of information the third parties can provide • how much weight should be given to third party information, when compared to information provided by the claimant. We believe that the body should primarily rely on information provided by the claimant • what protections would be in place to maintain the privacy and confidentiality of market participants' proprietary and commercially sensitive information • whether the claimant can review and comment on third party information (e.g. in terms of veracity, relevancy or ability to adversely impact the claimant) • whether the third party would be liable for the costs of unsuccessful claims as a result of the information they have provided. <p>We also believe the body determining compensation claims should only be able to request third party information to the extent necessary to assess a claim (i.e. information should be directly relevant to the claimant's situation and claim).</p> |
| <p>5. SHOULD COMPENSATION CLAIMS BE CAPPED? Should there be a cap on compensation claims? If so, what form should these caps take, eg, annual aggregate, individual claims, etc?</p> | <p>Australia Pacific LNG does not support financial limits on an individual claim, or overall claims within a financial year. Introducing a cap will likely prevent market participants from fully recovering losses incurred in relation to complying with a direction from AEMO. We note that, in the NEM, compensation claims as a result of an AEMO intervention event are not subject to a cap either.³</p> |
| <p>6. SHOULD ANOTHER EXISTING OR NEW ENTITY OVERSEE OR DETERMINE CLAIMS? What factors should inform the AEMC's work on the roles of the Adviser and Dispute Resolution Panel (DRP) in overseeing the compensation claims process and making determinations?</p> | <p>Australia Pacific LNG considers that the person(s) involved in coordinating, assessing, and/or determining compensation claims should have expertise in performing these tasks. Given the compensation claim process is not a 'dispute' in the true sense of the word, we do not believe it is necessary for persons in these roles to be versed in dispute resolution. This may mean there is no role for the wholesale energy market dispute resolution adviser (in its current form) in the new compensation framework.</p> |

³ See clause 3.12.2 of the NER.

| | |
|---|--|
| | <p>In addition, as highlighted in the rule change request, the persons overseeing or determining compensation claims:</p> <ul style="list-style-type: none"> • require a good understanding of the natural gas industry • must not have any material direct or indirect interest or association that compromises, or is likely to compromise, the impartiality of the person overseeing or determining the claim • should have sufficient resourcing to coordinate or undertake an assessment of the compensation claims efficiently. <p>With respect to the DRP, we believe it is appropriate to source panel membership from a pool of experts. However, the DRP should be renamed and guidelines covering how the panel should assess compensation claims should be introduced to ensure consistency in decision-making and promote fair outcomes across different claims.</p> <p>In relation to the question of whether the ECGS compensation framework should remain in Part 15C, Australia Pacific LNG believes that it should be a separate section of the NGR. Part 15C was designed with dispute resolution in mind and is not easily transferrable to a compensation claim process, as evidenced by the large number of exclusions contained in Part 27. Having a separate framework will ensure the requirements are drafted in the context of compensation claims and remove the ambiguity that may exist with the current drafting. The framework could also benefit from a clearly defined compensation objective that is focused on ensuring the claimant is restored to the position they would have otherwise been in, if not for the direction.</p> |
| <p>7. WHAT ARE YOUR VIEWS OF THE COSTS AND BENEFITS OF THE PROPOSED SOLUTION?</p> <p>What do you consider will be the costs and benefits of the proposed solution? If there are costs, will these be one off or ongoing? Is there anything the Commission could do in designing the rule that would help to minimise the costs and maximise the benefits?</p> | <p>If the proposed solution introduces a cap on compensation claims or continues to limit compensation claims to direct costs only, market participants will not be able to recover the full costs of complying with an AEMO direction. This will be an ongoing cost to the industry. As highlighted above, Australia Pacific LNG does not support introducing caps and believes claimants should be able to recover all substantiated costs.</p> |
| <p>8. ARE THERE IMPORTANT IMPLEMENTATION CONSIDERATIONS?</p> | <p>While we understand the Energy Ministers' desire to complete and operationalise the revised framework by winter 2024, Australia Pacific LNG considers that any changes to the compensation framework should be subject to a proper assessment</p> |

| | |
|--|--|
| <p>Do you have any suggestions regarding the target commencement timeframes? Are there additional measures that should be considered that would support the effective implementation of the desired solution?</p> | <p>and consultation process. If matters arise that are complex in nature and/or require additional investigations, regulatory bodies and industry may require additional time to consider and develop fit-for-purpose solutions.</p> |
| <p>9. SHOULD THE BROADER FRAMEWORKS BE ALIGNED?</p> <p>A. Should the changes to the ECGS compensation framework be applied to the DWGM compensation framework?</p> <p>B. Should any of these changes be made to the broader compensation and dispute resolution frameworks?</p> <p>C. Are there factors that may limit the application of the changes to the ECGS framework to each of these frameworks?</p> | <p>No feedback.</p> |
| <p>10. ARE THERE ALTERNATIVE SOLUTIONS THAT WOULD BE PREFERABLE?</p> <p>A. Do you think there are any alternative, more preferable rule based solutions, which are more aligned with the long-term interests of consumers?</p> <p>B. Are there alternative solutions that sit outside of the energy rules such as industry or jurisdictional initiatives that would better address the identified issue?</p> | <p>Refer to comments above.</p> |

CHAPTER 4: MAKING OUR DECISION

| | |
|---|---------------------|
| <p>11. ASSESSMENT FRAMEWORK</p> <p>Do you agree with the proposed assessment framework? Are there additional principles that the Commission should take into account or are principles included here that are not relevant?</p> | <p>No feedback.</p> |
|---|---------------------|