



DRAFT DECISION AND STATEMENT OF REASONS UNDER PARAGRAPH 55(1)(b) OF THE NATIONAL GREENHOUSE AND ENERGY REPORTING ACT 2007

A. Decision

1. I, ROSS CARTER, Executive General Manager, Regulatory Division, Clean Energy Regulator, under paragraph 55(1)(b) of the *National Greenhouse and Energy Reporting Act 2007*, hereby declare that the Australian Energy Market Operator Limited (ABN 94 072 010 327), has operational control over the Victorian Gas Transmission System operating facility. This facility does not include the maintenance activities at the Victorian Gas Transmission System maintenance facility.
2. As agreed upon by the Australian Energy Market Operator Limited and APA Group, the declaration will take effect from 1 July 2008, which is the time at which reporting obligations under the *National Greenhouse and Energy Reporting Act 2007* commenced.
3. My reasons for this decision are set out in this statement.

A.1 Authority to make the decision

4. On 2 April 2012, the Clean Energy Regulator (the Regulator) replaced the Greenhouse and Energy Data Officer (GEDO) under the *National Greenhouse and Energy Reporting Act 2007* (NGER Act) and assumed authority to declare a that a corporation has operational control over a facility under paragraph 55(1)(b) of the NGER Act.
5. The Regulator, acting under section 35 of the *Clean Energy Regulator Act 2011*, has delegated its authority to declare that a corporation has operational control over a facility under paragraph 55(1)(b) of the NGER Act to an SES Band 2 position in the Regulatory Division.
6. I, Ross Carter, currently hold the position of Executive General Manager, Regulatory Division at the SES Band 2 level and therefore I have the authority to declare that a corporation has operational control over a facility under paragraph 55(1)(b) of the NGER Act.

A.2 Background to the decision

7. The Victorian Gas Transmission System (the GTS) comprises a network of high pressure gas transmission pipelines in Victoria. Almost all the natural gas consumed in Victoria is transported through the GTS.
8. The GTS transports gas from Esso's Longford gas treatment plant in south east Victoria, the Otway basin gas fields and underground storage in south western Victorian. The GTS supplies gas to Gippsland, Melbourne, Central and Northern Victoria, Albury, the Murray Valley region, Geelong and South Western Victoria.
9. APA Group (APA) is an ASX-listed business with interests in gas infrastructure across Australia. APA owns the GTS, but is required to make the system available to the Australian Energy Market Operator (AEMO) so as to enable AEMO to operate the system in accordance with the *National Gas Law* and *National Gas Rules*.
10. AEMO is an independent organisation that operates electricity and gas markets and systems in eastern and south-eastern Australia. Ownership of AEMO is split between government and

industry, with membership comprising 60% government members and 40% industry members.

11. AEMO's functions are largely prescribed by the *National Gas Law* and the *National Electricity Law*. These functions include controlling the operation and security of the GTS, and operating and administering the Victorian wholesale gas market.
12. By letter dated 24 September 2009, AEMO and APA Group submitted a joint application to the GEDO requesting that the GEDO make a declaration on the GEDO's own initiative under section 55(1)(b) of the NGER Act, as to which corporation has operational control over the GTS operating facility.
13. The submission states that AEMO and APA:
 - consider that the GTS comprises two facilities: the GTS operating facility and the GTS maintenance facility
 - are in dispute as to which party has operational control over the GTS operating facility,
 - agree that the GTS maintenance facility is under the operational control of APA.
14. The request was for a declaration on the GEDO's own initiative under paragraph 55(1)(b) of the NGER Act because paragraph 55(1)(a) provides that an application under that section can only be for a declaration that the applicant has operational control over the relevant facility. In this case, each of the parties submits that it is the other which has operational control.
15. As a result of the inability of the parties to agree on which has operational control over the GTS operating facility, the emissions, energy production and energy consumption of the facility are not currently being reported. I consider that the objects of the NGER Act would be best served by resolving this impasse with a declaration of operational control, allowing the data from the facility to be appropriately reported under the NGER Act.
16. For the reasons set out above in paragraphs 12-15 I have decided to make a declaration on my own initiative under paragraph 55(1)(b) of the NGER Act in relation to which of AEMO or APA has operational control over the GTS operating facility.

B. Findings on material questions of fact

17. Based on the matters I am required to consider under the legislation and the other information identified above, I make the following findings of fact in relation to operational control of the GTS operating facility:
 - a. The GTS comprises two facilities for the purposes of the NGER Act: the GTS operating facility and the GTS maintenance facility.
 - b. The primary activity of the GTS operating facility is to transport natural gas through transmission pipelines from producers of natural gas to end-users.
 - c. The GTS maintenance facility comprises of maintenance related activities.
 - d. APA has operational control over the GTS maintenance facility.
 - e. APA is the owner of the natural gas transmission pipeline network that comprises the GTS operating facility.
 - f. APA is required under section 91BE of the *National Gas Law* to make the transmission pipeline network that comprises the GTS operating facility available to AEMO.
 - g. Under section 91BA of the *National Gas Law* AEMO is the 'operator' of the GTS operating facility.
 - h. AEMO has substantial authority to introduce and implement operating policies and health and safety policies for the GTS operating facility.
 - i. AEMO has limited authority to introduce and implement environmental policies for the GTS operating facility.

- j. APA has some authority to introduce and implement operating policies and health and safety policies for the GTS operating facility.
- k. APA has substantial authority to introduce and implement environmental policies for the GTS operating facility.
- l. AEMO has greater authority than APA to introduce and implement operating policies and health and safety policies for the GTS operating facility.
- m. APA has greater authority than AEMO to introduce and implement environmental policies for the GTS operating facility.
- n. On balance, AEMO has operational control of the GTS operating facility.

C. Material relied upon in making the decision

18. The evidence and other material on which my factual findings are based in the present case is:
- a. AEMO and APA's *Agreed Statement of Facts*, which sets out agreed facts in regards to the GTS including: details of the activities conducted at the two GTS facilities; details of the division of powers and responsibilities between AEMO and APA; and the legislation and contractual arrangements in place.
 - b. The *APA Submission*, which contends that it is AEMO that has operational control over the GTS operating facility, not APA.
 - c. The *AEMO Submission*, which contends that it is APA that has operational control over the GTS operating facility, not AEMO.
 - d. *AEMO's Additional Information Submission*, dated 12 November 2011, which provides additional information regarding health and safety policies and environmental policies as requested by the GEDO.
 - e. The *National Gas Law*, as set out in the Schedule to the *National Gas (South Australia) Act 2008* (version 1.1.2010), is applied as a law of South Australia and a law of other jurisdictions by their Application acts. The law sets out AEMO's responsibilities in regards to operating a declared transmission systems (i.e. the GTS).
 - f. The *National Gas Rules* (version 12) are made under the *National Gas Law*. The *National Gas Rules* provide AEMO with a range of rules in regards to the operation and security of the GTS.
 - g. The *National Gas (Victoria) Act 2008* (version 004) applies the *National Gas Law* as a law of Victoria.
 - h. The *Service Envelope Agreement* (SEA) is the agreement that the service provider (APA) and AEMO are required to enter into under section 91BE of the *National Gas Law* for the control, operation, safety, security and reliability of the declared transmission system (i.e. GTS).
 - i. The *Wholesale Market System Security Procedures (Victoria)* 9 June 2010 are prepared by AEMO and provide for the operation of the GTS in a way that averts or minimises threats to system security.
 - j. The *Wholesale Market Gas Scheduling Procedures (Victoria)* v1.2 17 April 2012, are prepared by AEMO to govern the operation of the GTS.
 - k. The *Emergency Procedures (Gas)* are prepared by AEMO in accordance with subsection 53(1) of the *National Gas (Victoria) Act 2008*, which requires AEMO to make and keep up-to-date a Gas Emergency Protocol. The *Emergency Procedures (Gas)* form a part of the Gas Emergency Protocol.
 - l. *Gas Safety Act 1997 (Vic)* (version 035) makes provision for the safe conveyance, sale, supply, measurement, control and use of gas and generally regulates gas safety.
 - m. *Gas Safety (Safety Case) Regulations 2008 (Vic)* are made under section 118 of the *Gas Safety Act 1997*. They make provisions for safety cases in relation to facilities, gas installations and appliances and provide for the reporting of gas incidents.

- n. The *Pipelines Act 2005 (Vic)* (version 008), regulates the construction and operation of pipelines in Victoria and establishes legislation regarding environmental and health and safety matters in relation to the construction and operation of pipelines in Victoria.
- o. The *Pipelines Regulations 2007 (Vic)*, made under section 190 of the *Pipelines Act 2005 (Vic)*, provide regulations relating to the reporting of safety and environmental incidents in relation to pipeline operations; the standards for the construction and operation of pipelines; requirements of Safety Management Plans; and requirements of Environmental Management Plans.
- p. The *Revised Explanatory Statement to the National Greenhouse and Energy Reporting Bill 2007*, which provides background to the Bill.
- q. The legislative provisions referred to below in paragraphs 19 to 22.

National Greenhouse and Energy Reporting Act 2007

19. Section 9 of the NGER Act provides a definition of ‘facility’, which is used in the reporting provisions of the Act. Section 9 is as follows:

Section 9: Facilities

- (1) For the purposes of this Act and the *Clean Energy Act 2011*, a **facility** is an activity, or a series of activities (including ancillary activities), that involve greenhouse gas emissions, the production of energy or the consumption of energy and that:
 - (a) form a single undertaking or enterprise and meet the requirements of the regulations; or
 - (b) are declared by the Regulator to be a facility under section 54 or 54A;
- (2) Paragraph (1)(a) does not apply if a declaration of a kind referred to in paragraph (1)(b) is in force.
- (3) Regulations made for the purposes of paragraph (1)(a) may specify:
 - (a) the circumstances in which an activity or activities (including the ancillary activities) will form part of a single undertaking or enterprise; and
 - (b) what activities are attributable to particular industry sectors.

20. Section 11 and 11A of the NGER Act provides a definition of ‘operational control’, which is used in the reporting provisions of the Act. Section 11 is as follows:

Section 11: Operational Control – basic rule

- (1) For the purposes of this Act and the *Clean Energy Act 2011*, a person has **operational control** over a facility if:
 - (a) the person has the authority to introduce and implement any or all of the following for the facility:
 - (i) operating policies;
 - (ii) health and safety policies;
 - (iii) environmental policies;
 and meets the requirements of the regulations; or
 - (b) the Regulator declares the person to have operational control over the facility under section 55 or 55A.
- (2) Paragraph (1)(a) does not apply in relation to a facility if a declaration of a kind referred to in paragraph (1)(b) is in force in relation to the facility.
- (3) For the purposes of this Act and the *Clean Energy Act 2011*, only one person can have operational control over a facility at any one time.
- (4) This section has effect subject to sections 11A, 11B and 11C.

21. Section 55 of the NGER Act provides details on declarations of operational control. Section 55 is as follows:

Section 55: Regulator may declare corporation etc. has operational control

- (1) The Regulator may declare that a controlling corporation or another member of the corporation’s group has operational control over a facility:

- (a) on application by the corporation or member; or
 - (b) on the Regulator's own initiative.
- (2) An application must:
- (a) identify the corporation or member; and
 - (b) identify the facility for which a declaration of operational control is sought; and
 - (c) include any other information required by the regulations; and
 - (d) be given in a manner and form approved by the Regulator.
- (3) In considering making a declaration that a controlling corporation or another member of the corporation's group has operational control over a facility, the Regulator must have regard to the matters dealt with in paragraph 11(1)(a) and regulations made for the purposes of that paragraph.
- (3A) The Regulator must not declare that a controlling corporation or another member of the corporation's group has operational control over a facility unless the Regulator is satisfied that the corporation or member has substantial authority to introduce and implement either or both of the following for the facility:
- (a) operating policies;
 - (b) environmental policies.
- (3B) The Regulator must not declare that a member of a controlling corporation's group (other than the controlling corporation) has operational control over a facility on application made by the member unless the controlling corporation has given written consent to the making of the declaration.
- (4) The Regulator must notify an applicant under paragraph (1)(a), in writing, of a decision under subsection (1) to declare the corporation or member to have operational control over the facility or to refuse the application.
- (5) If the Regulator makes a declaration under paragraph (1)(b), the Regulator must notify, in writing, the corporation or member which the Regulator has declared to have operational control over the facility to which the declaration relates.

National Greenhouse and Energy Reporting Regulations 2008

22. Regulation 2.20 of the National Greenhouse and Energy Reporting Regulations 2008 (NGER Regulations) is made for the purpose of paragraph 9(1)(a) of the NGER Act. Regulation 2.20 provides that:

Regulation 2.20: Forming part of a single undertaking or enterprise - electricity, gas etc. activities

- (1) If:
- (a) an activity in a series of activities is in 1 of the industry sectors mentioned in subregulation (2); and
 - (b) the activity and any ancillary activities to it are under the overall control of the same corporation;
- then all of the activities will form part of the same single undertaking or enterprise.
- (2) For subregulation (1), the industry sectors are as follows:
- (a) Electricity transmission (262);
 - (b) Electricity distribution (263);
 - (c) Gas supply (270);
 - (d) Pipeline and other transport (502);
 - (f) Telecommunications services (580);
 - (e) Water supply, sewerage and drainage services (281).

D. Reasons for the decision

D.1 What should I consider in reaching my decision?

23. The relevant legislation that I base my decision on is as follows.
24. Under subsection 55(3) of the NGER Act, in making a declaration as to which corporation has operational control over the GTS operating facility, I am required to have regard to the

matters dealt with in paragraph 11(1)(a) of the NGER Act and regulations made for the purpose of paragraph 11(1)(a). I note that there have not been any regulations made for paragraph 11(1)(a).

25. However, whilst I am compelled to consider these matters, subsection 55(3) does not expressly identify all the matters that I can take into account when making a decision regarding a declaration under paragraph 55(1)(b).
26. In this case, I consider that section 11A of the NGER Act (i.e. Operational Control – person with greatest authority ‘test’) is a relevant matter that I may consider if it is able to assist me in making a declaration under paragraph 55(1)(b). I consider section 11A relevant as it provides an objective means of deciding which party should be declared to have operational control over a facility where more than one person could satisfy paragraph 11(1)(a) in relation to a facility.
27. Additionally, subsection 55(3A) prevents the making of a declaration that a controlling corporation or another member of a controlling corporation’s group has operational control over a facility unless I am satisfied that the corporation or member has substantial authority to introduce and implement either or both operating policies and environmental policies for the facility.
28. Based on the legislative requirements outlined above there are a number of matters that I must consider in order for me to decide whether AEMO or APA has operational control over the GTS operating facility. Those matters are:
 - As a preliminary matter, I must consider whether the GTS operating facility constitutes a facility for the purposes of the NGER Act (section 9 of the NGER Act);
 - Assuming that the GTS operating facility is a facility for the purposes of the NGER Act, then:
 - Does AEMO or APA have the authority to introduce and implement any or all of the following policies for the GTS operating facility: operating policies; health and safety policies; and environmental policies (section 11 of the NGER Act)?
 - Does AEMO and APA have substantial authority to introduce and implement either or both operating policies and environmental policies for the GTS operating facility (subsection 55(3A))?

D.2. Does the GTS operating facility constitute a facility for the purposes of section 9 of the NGER Act?

29. Before proceeding with consideration of the issue of operational control over the GTS, I must consider whether the facility definition agreed upon by AEMO and APA is consistent with the definition of a facility under the NGER legislation.
30. Subsection 9(1) of the NGER Act provides that a facility is an activity or series of activities that involve greenhouse gas emissions, production of energy or consumption of energy and that form a single undertaking or enterprise.
31. AEMO and APA’s Agreed Statement of Facts indicates that there are two sets of activities in relation to the GTS, each of which AEMO and APA agree form a facility for the purposes of the NGER Act. These are:
 - The activities that comprise the operation of the GTS so as to transport gas, which form the GTS *operating* facility; and
 - The activities that comprise the maintenance of the GTS, which form the GTS *maintenance* facility.
32. The Agreed Statement of Facts indicates that:
 - AEMO and APA are in dispute as to which party has operational control over the GTS *operating* facility; and

- AEMO and APA agree that the GTS *maintenance* facility is under the operational control of APA.
33. Furthermore, the Agreed Statement of Facts states that:
- AEMO and APA believe that the transportation of gas through the GTS operating facility is intended to be able to constitute a single facility despite the system spanning multiple sites (i.e. that regulation 2.20 of the NGER Regulations is intended to deem gas transmission activities to form part of the same single undertaking or enterprise).
 - Regulation 2.20 covers 'Gas Supply' as defined in ANZSIC 270. However, ANZSIC 270 only refers to the distribution of natural gas through mains systems, and expressly excludes the transportation of natural gas through gas transmission pipelines, which is classified under ANZSIC 5021- Pipeline Transport.
 - AEMO and APA presume that regulation 2.20 was, in fact, intended to extend to the transmission of gas through pipeline transmission systems such as the GTS operating facility.
34. Amendments were made to regulation 2.20 on 1 July 2012 to include the 'Pipeline and Other Transport' industry sector (ANZSIC code 502), which includes the transportation of natural gas through gas transmission pipelines classified under ANZSIC code 5021.
35. As the GTS operating facility principally involves the transmission of natural gas through gas transmission pipelines, regulation 2.20 now applies to the activities that comprise the operation of the GTS.
36. Regulation 2.20 states that:
- if an activity in a series of activities is in one of the industry sectors listed in regulation 2.20; and
 - that activity and any ancillary activities to it are under the overall control of the same corporation;
- then all of the activities will form a part of the same single undertaking or enterprise and, provided that the other requirements of section 9 of the NGER Act relating to the definition of a facility are met, all of the activities will form a single facility for the purposes of the NGER Act.
37. Ancillary is not defined in the NGER legislation. The ordinary meaning of ancillary is¹: 'an accessory, subsidiary or helping thing or person'.
38. I consider that the maintenance activities of the GTS would be ancillary activities to the gas transmission activities of the GTS.
39. Depending on whether the gas transmission activities and the maintenance activities are under the overall control of the same corporation or different corporations dictates if one or two facilities exist in regards the GTS.
40. As APA and AEMO agree that the maintenance activities are under the overall control of APA, I will proceed on the basis that the gas transmission activities form a single facility – the GTS operating facility.
41. In the event that AEMO is declared to have operational control over the GTS operating facility then two facilities will exist – the GTS operating facility under the operational control of AEMO and the GTS maintenance facility under the operational control of APA.
42. However, in the event that APA is declared to have operational control over the GTS operating facility then by virtue of regulation 2.20(1)(b) I would consider that the gas transmission activities and the maintenance activities would form a single facility under the operational control of APA.

¹ The Macquarie Dictionary Online.

Meaning of ‘operating policies’, ‘health and safety policies’, ‘environmental policies’, ‘introduce’ and ‘implement’.

43. As a preliminary matter, I have considered what is meant by the terms ‘operating policy’, ‘health and safety policy’, ‘environmental policy’, ‘introduce’ and ‘implement’ in the context of paragraph 11(1)(a) and section 55 of the NGER Act. These terms are not defined in the NGER legislation.
44. A ‘policy’ is defined as²: ‘a definite course of action adopted as expedient or from other considerations: *a business policy*’.
45. ‘Operate’ is defined as³:
 - ‘to work or use a machine, apparatus, or the like’;
 - ‘to perform some process of work or treatment’;
 - ‘to manage or use (a machine, etc.) at work’; or
 - ‘to keep (a machine, apparatus, factory, industrial system, etc.) working or in operation’.
46. Having regard to ordinary meaning of these terms, I consider that the phrase ‘operating policy’ should be interpreted broadly, to include any articulated course of action concerning the running of a facility (including directions for the operation of the facility or machinery at the facility or plans for the facility such as budgets and operational plans).
47. ‘Introduce’ is defined as⁴: ‘to lead, bring, or put into a place, position, surrounding, relations, etc.’.
48. ‘Implement’ is defined as⁵: ‘to put (a plan, proposal, etc.) into effect’.
49. Having regard to the ordinary meaning of the words ‘introduce’ and ‘implement’, I consider that the authority to *introduce and implement* operating policies would include writing and approving such policies, as well as putting those policies into effect (including by directing staff to comply with the policies and enforcing compliance with the policies, if necessary).
50. Similarly, I consider that the authority to *introduce and implement* health and safety and/or environmental policies would include writing policies which relate to health and safety in the workplace (for example, in relation to staffing issues, the handling of hazardous materials, emergency procedures and security issues), or the environment (in particular, the protection of the environment, including managing the facility’s energy consumption and greenhouse gas emissions), as well as putting those policies into effect.

D.3 AEMO’s authority to introduce and implement operating policies

51. AEMO’s authority to introduce and implement operating policies in relation to the GTS operating facility derive from the *National Gas Law*, the *National Gas Rules* and a contractual agreement between AEMO and APA called the Service Envelope Agreement.

National Gas Law

52. The National Gas Law is set out in the Schedule to the National Gas (South Australia) Act 2008.
53. Section 7 of the *National Gas (Victoria) Law 2008* provides that the *National Gas Law* as set out in the Schedule to the *National Gas (South Australia) Act 2008* applies as a law of Victoria.
54. Subsection 39(b) of the *National Gas (Victoria) Law 2008* provides that the Minister for Energy and Resources, by Order published in the Victorian Government Gazette, may declare a transmission pipeline, or a part of a transmission pipeline, situated wholly or partly in Victoria to be a declared transmission system.

² The Macquarie Dictionary Online.

³ The Macquarie Dictionary Online.

⁴ The Macquarie Dictionary Online.

⁵ The Macquarie Dictionary Online.

55. On 26 June 2009, the Minister for Energy and Resources, by order published in the Victorian Government Gazette⁶, declared pursuant to subsection 39(b) of the *National Gas (Victoria) Law 2008* that the GTS is a declared transmission system.
56. Section 91BA of the *National Gas Law*, sets out the functions ('declared system functions') of AEMO in relation to the GTS (a declared transmission system). I consider the following functions provide AEMO with the authority to introduce and implement operating policies for the GTS operating facility:
- determine security standards for the declared transmission system
 - control the operation and security of the declared transmission system
 - coordinate the interactions of producers, storage providers and service providers for ensuring a safe, secure, reliable and efficient declared transmission system.
57. The *National Gas Law* confers on AEMO the function of controlling the operation and security of the GTS. Therefore, in order to perform its functions AEMO would need to prepare relevant operating policies (i.e. introduce) and then put those policies into effect (i.e. implement).

National Gas Rules

58. Section 74 and 290-320 of the *National Gas Law* provides for the making of the *National Gas Rules*. Matters for which *National Gas Rules* can be made include AEMO's declared system functions and the operation of a declared wholesale gas market⁷.
59. The *National Gas Rules* provide more detailed information on the functions of AEMO under section 91BA of the *National Gas Law* in relation to its operation of the GTS operating facility and the wholesale gas market. I consider Rules 205, 206 and 215 provide AEMO with the authority to introduce and implement operating policies for the GTS operating facility.
60. Rule 205 requires AEMO to make *system security procedures* governing the operation of the GTS operating facility. The system security procedures provide for the operation of the GTS in a way that averts or minimises threats to system security.
61. In accordance with Rule 205, AEMO has produced the Wholesale Market System Security Procedures (Victoria). While the procedures are titled Wholesale Market System Security Procedures, the procedures indicate that they are intended to provide for the operation of the declared transmission system in a way that averts or minimises threats to system security as indicated by the following:
- AEMO will seek to exercise operational control over the declared transmission system in a way that ensures a secure state for each major pipeline, and therefore results in security of the system as a whole. (page 3)*
62. Among the matters included in the procedures are:
- the conditions which must be met for the GTS to be in a normal operating state
 - operational factors to be monitored by AEMO, i.e. weather forecast change leading to changes in supply demand
 - details of the demand, flows, linepack and pressures applicable to each major pipeline.
63. Rule 206 (Gas Scheduling) requires that AEMO must schedule injections of gas into and withdrawals of gas from the GTS in accordance with bids. Additionally, AEMO must make and comply with the gas scheduling procedures.
64. In accordance with rule 206, AEMO has produced the Wholesale Market Gas Scheduling Procedures (Victoria). Among the matters included in the procedures are:

⁶ Victorian Government Gazette, No. S 222 Tuesday 30 June 2009.

⁷ National Gas Law section 74(1)(a)(v)

- an outline of inputs and assumptions used by AEMO for the purposes of producing operating schedules and pricing schedules under normal operating conditions
 - inputs to operating schedules, for example demand forecasts, injection and withdrawal bids
65. Rule 215 requires AEMO to produce and publish each day operating schedules using a range of operational inputs and assumptions, which specify injections into and withdrawals from the GTS for each hour of the gas day in a way that minimises the cost of satisfying expected demand of gas over that gas day.

Service Envelope Agreement

66. Under section 91BE of the *National Gas Law*, APA as the service provider for the GTS must have an agreement (a Service Envelope Agreement) with AEMO for the control, operation, safety, security and reliability of the GTS.
67. Under the Service Envelope Agreement, APA makes the GTS available to AEMO.
68. The Service Envelope Agreement (SEA) stipulates the manner in which AEMO must use the GTS in performing its obligations under the *National Gas Law* and *National Gas Rules*. Specifically, I consider that the following provisions of the SEA provide AEMO with the authority to introduce and implement operating policies for the GTS operating facility:
- AEMO must operate the GTS in a manner that does not preclude or materially adversely affect APA's ability to make the GTS available to AEMO (SEA 8.1(a)(iii))
 - AEMO must provide all personnel, facilities, materials, equipment, spare parts and other things reasonably required to enable AEMO to provide the VENCORP services (as defined in the SEA) (SEA 8.1(a)(vii))
 - AEMO must have reasonable regard to the operating cost, maintenance and service life of the assets comprising the GTS (SEA 8.1(a)(viii))
 - AEMO must operate the compressors and pipelines correctly and safely in accordance with technical operating constraints (SEA Schedule 1, section 4) and in a manner which results in their efficient operation (SEA 9).

Summary

69. The *National Gas Law*, *National Gas Rules* and the Service Envelope Agreement establish AEMO's functions and responsibilities in regards to its operation of the GTS operating facility.
70. The *National Gas Law* and *National Gas Rules* provide AEMO with authority to operate the GTS and to make procedures in regards to the operation of the GTS. AEMO as the body authorised to operate the GTS would be required to put the procedures into effect in order to operate the GTS operating facility.
71. In my opinion, the *National Gas Law*, *National Gas Rules* and the Service Envelope Agreement provide AEMO with the authority to introduce and implement operating policies in relation to the GTS operating facility.

D.4 AEMO's authority to introduce and implement health and safety policies

72. AEMO's authority to introduce and implement health and safety policies in relation to the GTS operating facility derive from the *National Gas Law*, *National Gas Rules*, *National Gas (Victoria) Act 2008*, *Gas Safety Act 1997*, *Gas Safety (Safety Case) Regulations 2008* and the Service Envelope agreement.

National Gas Law and National Gas Rules

73. Rule 205 of the *National Gas Rules* requires AEMO to make system security procedures governing its operation of the declared transmission system. These procedures state that AEMO must monitor a range of operational factors for the purpose of ensuring that the GTS operating facility is operating in a normal state and so that, amongst other reasons, there is no threat to public safety.

74. As one of the reasons for producing the procedures is to ensure there is no threat to public safety, I consider that these procedures are a health and safety policy.
75. As a requirement of the procedures is for AEMO to monitor a range of operational factors in order to ensure that the GTS operating facility is operating in a normal state this suggests that AEMO implements the procedures.
76. Under Rule 333 of the *National Gas Rules* AEMO has the power to declare an emergency where AEMO reasonably believes there is a situation which may threaten:
 - reliability of gas supply
 - system security or the security of a declared distribution system
 - public safety.
77. Additionally, under Rule 333:
 - AEMO may specify a process for communicating to Registered Participants the existence of an emergency, and all relevant information relating to the emergency;
 - The existence of an emergency will be determined by AEMO in its absolute discretion except where a government authority authorised to declare an emergency directs AEMO to do so; and
 - An emergency will continue until such a time as AEMO determines that the emergency has ended.
78. Under Rule 339 of the *National Gas Rules* AEMO must:
 - liaise with any safety body as required
 - inform Registered Participants of the commencement, nature, extend and expected duration of an emergency
 - inform the way in which AEMO anticipates it will act in response to the emergency
 - keep Registered Participants informed of any changes to the nature, extend and expected duration of the emergency.

National Gas (Victoria) Act 2008

79. Section 53 of the *National Gas (Victoria) Act 2008* requires AEMO to make and keep up-to-date a Gas Emergency Protocol. The definition of an emergency is contained in Rule 333 of the *National Gas Rules* as discussed above.
80. The Gas Emergency Protocol could be viewed as encompassing operating policies and/or health and safety policies. However, because the purpose of the emergency gas protocol is to minimise and/or avert an emergency which would threaten among other things, AEMO employees and the broader public's health and safety, I consider that the Emergency Gas Protocol is more appropriately classified as a health and safety policy.
81. The *National Gas (Victoria) Act 2008* prescribes a number of matters which the protocol must contain. However, while the legislation is prescriptive in the matters to be covered in the emergency protocol, AEMO has the authority to determine the details of the protocol.
82. The Emergency Procedures (Gas) produced by AEMO form a component of the Gas Emergency Protocol. Among the matters included in the Emergency Procedures are:
 - detailed descriptions of the levels of gas emergency (Levels 1 to 5)
 - procedures for responding to each level of gas emergency
 - additional guidelines for AEMO to consider when declaring a Level 5 gas emergency
 - actions to be undertaken by AEMO in regards to restoring gas supply after an emergency.
83. Only AEMO can declare a Level 5 gas emergency and under section 91BC of the *National Gas Law* AEMO can issue compulsory directions to a Registered Participant in the GTS in relation to the emergency.

Gas Safety Act 1997 (Vic)

84. Under section 37 of the *Gas Safety Act 1997 (Vic)*, AEMO is required to submit a safety case to Energy Safe Victoria for the GTS.
85. The *Gas Safety (Safety Case) Regulations 2008 (Vic)* set out the content of a safety case made under section 37 of the *Gas Safety Act 1997*.
86. The information to be included in AEMO's safety case for the GTS operating facility is set out in Division 4 and 5 of the Regulations and includes a formal safety assessment and a safety management system.
87. The formal safety assessment (regulation 25) must provide a systematic assessment of risk and a description of technical and other matters to be undertaken to reduce, as far as possible that risk.
88. AEMO's safety management system for the GTS operating facility must contain the following:
 - AEMO's safety policy (regulation 27)
 - the procedures and asset management plan that are used to ensure that the operation of the GTS is adequate for the safety and safe operation of the GTS (regulation 30)
 - a response plan designed to address all reasonably foreseeable emergencies, setting out how the AEMO will ensure the safety of the public and specify the means to ensure the continued safe operation of the GTS operating facility (regulation 32)
 - details by which AEMO ensures that it meets its duties under the Act in relation to reporting of gas incidents (regulation 34)
 - details of the processes and the performance indicators to be used by the AEMO for monitoring, auditing and reviewing the adequacy and implementation of the safety policies and procedures specified in the safety management system (regulation 34)
 - details of the means to be used for recording and investigating gas incidents (regulation 35)
 - the work and staffing systems necessary to ensure a minimum level of qualifications, skill and competence required for carrying out the work (regulation 36)

Service Envelope Agreement

89. Clause 15.2 of the SEA provides that parties agree to cooperate in good faith, to the extent to which each party is able to reasonably do so, to enable the other party to comply with occupational health and safety requirements.
90. While it is correct that clause 15.2 does not allocate specific health and safety obligations to either company, the clause does indicate that both companies may have respective health and safety obligations, as evidenced by the wording 'to enable the other party to comply'.
91. It may be assumed that a component of these obligations will be the implementation of health and safety policies in order to comply with statutory obligations. In my opinion, the wording of clause 15.2 indicates that compliance with health and safety requirements is the obligation of both companies.
92. Additionally, under clause 8.1(a)(vii) of the SEA, AEMO must provide all personnel, facilities, material, equipment etc. to enable AEMO to provide the VENCORP Services (these are specified in the MSO Rules - now the Wholesale Market Procedures). As AEMO staff are involved in performing those services relating to the operation of the GTS operating facility, AEMO will in that regard have authority to introduce and implement health and safety policies in regard to the facility.

Summary

93. AEMO has a range of legislated and contractual health and safety responsibilities as outlined above, which would require AEMO to prepare health and safety policies and to put those policies into effect.

94. In my opinion, AEMO has the authority to introduce and implement health and safety policies for the GTS operating facility.

D.5 AEMO's authority to introduce and implement environmental policies

95. Clause 15.1 of the SEA refers to environmental policies. Worded in the same way as clause 15.2 (i.e. health and safety laws), clause 15.1 requires the parties to cooperate in good faith to the extent that they are reasonably able to do so, to enable the other party to achieve compliance with all relevant environmental laws, policies, schemes etc.
96. I consider that the drafting of clause 15.2 does provide AEMO with the authority to introduce and implement environmental policies in order to achieve compliance with any environmental obligation that AEMO may have..

D.6 APA's authority to introduce and implement operating policies

97. APA's authority to introduce and implement operating policies derives from the *National Gas Rules* and Service Envelope Agreement.

National Gas Rules

98. Functions are conferred on the declared transmission service provider, in this case APA under Rules 288 and 293 of the *National Gas Rules*.
99. Rule 288 requires APA to provide a gas quality monitoring at each system injection point on the GTS. Also under Rule 288, APA must submit to AEMO for approval a plan to ensure the accuracy and reliability of the gas quality monitoring system.
100. Rule 293 requires APA to ensure that metering installations are installed, maintained and are accurate.
101. In my opinion, *National Gas Rules* 288 and 293 provides APA with the authority to introduce and implement operating policies in relation to the GTS operating facility.

Service Envelope Agreement

102. Under section 91BE of the *National Gas Law*, APA is required to make the transmission pipeline network comprising the GTS operating facility available to AEMO.
103. Clause 8.1(a)(vi) of the Service Envelope Agreement requires AEMO to comply with the policies of APA that are relevant to the operation of GTS as advised by APA from time-to-time, except where such policies would result in an increase in AEMO's costs of providing its services and a revised charge to cover the increased costs has not been agreed.
104. In the APA Submission, APA indicates that in practice, it does not provide formal policies or operating instructions to AEMO under this clause. However, the clause does provide APA with the authority to make policies that AEMO is required to comply with subject to the restrictions specified in clause 8.1(a)(vi) above.
105. I consider that clause 8.1(a)(vi) of the Service Envelope Agreement does provide APA with authority to introduce operating policies in relation to the GTS operating facility and the requirement that AEMO comply with those policies likely gives APA some authority to implement those policies. The phrase from time-to-time, however, suggests that the issuing of policies is intended to be made as a particular matter which needs to be addressed arises rather than on a regular basis.

Summary

106. In my opinion, the *National Gas Rules* and the Service Envelope Agreement provide APA with the authority to introduce and implement operating policies in relation to the GTS operating facility.

D.7 APA's authority to introduce and implement health and safety policies

Gas Safety Act 1997 (Vic)

107. Similar to AEMO's obligations under section 37 of the *Gas Safety Act 1997 (Vic)* outlined in paragraphs 84 to 88, APA is required to submit a safety case to Safe Energy Victoria for the GTS.
108. APA's obligations under the *Gas Safety Act 1997 (Vic)* are the same as AEMO's as outlined in paragraphs 84 to 88.

Service Envelope Agreement

109. Clause 15.2 of the Service Envelope Agreement provides that parties agree to cooperate in good faith, to the extent to which each party is able to reasonably do so, to enable the other party to comply with occupational health and safety requirements. In my opinion the wording of clause 15.2 indicates that compliance with health and safety requirements is the obligation of both companies.
110. I note also that APA is required under clause 4 of the Service Envelope agreement to make the GTS available to AEMO in accordance with the requirements of good practice and to provide the personnel, facilities, material equipment, spare parts and other things reasonably necessary for this purpose. AEMO is also required to comply with APA's policies in relation to the operation of the GTS (cl 8.1(a)(vi)).
111. The fact that APA is required to make available personnel and that AEMO is required to comply, subject to some exceptions, with APA's policies in regard to the operation of the GTS implies that APA would have some authority to introduce and implement health and safety policies in relation to the GTS operating facility.

Summary

112. APA's legislated and contractual health and safety responsibilities as outlined above would require APA to prepare health and safety policies and to put those policies into effect.
113. In my opinion, the *Gas Safety Act 1997 (Vic)* and Service Envelope Agreement provide APA with the authority to introduce and implement health and safety policies for the GTS operating facility.

D.8 APA's authority to introduce and implement environmental policies

Pipelines Act 2005 (Vic)

114. The *Pipelines Act 2005 (Vic)* applies to APA as the licensee of the GTS under the Act. Section 133 of the Act requires a licensee to prepare for the Minister, an Environment Management Plan prior to carrying out any pipeline operation. Operation is defined in the Act to include maintenance, alteration, decommissioning and removal.
115. Under section 133 of the *Pipelines Act 2005 (Vic)*, the Environment Management Plan must:
 - identify the risks to the environment arising from the pipeline operation,
 - specify what the licensee will do to eliminate or minimise those risks, including rehabilitation of the land.
116. The *Pipelines Regulations 2007 (Vic)* specify a number of additional matters to be contained in the Environment Management Plan including:
 - environmental performance objectives and standards against which the performance by the licensee in protecting the environment from the pipeline is to be measured,
 - a statement of the licensee's environmental policy.
117. Regulation 41 of the *Pipelines Regulations 2007 (Vic)* requires that the Environmental Management Plan contain an implementation strategy for the pipelines operation. Among the matters to be included in the implementation strategy is the identification of specific systems, practices and procedures used to ensure that:

- any adverse environmental impacts and risks to the environment arising from the pipeline operation are eliminated or minimised as far as reasonably practicable,
- the environmental performance objectives and standards in the Environmental Management Plan are met.

118. I consider that the Environmental Management Plan, which requires ongoing implementation, is evidence of APA's authority to introduce and implement environmental policies for the GTS operating facility.

Service Envelope Agreement

119. Clause 15.1 of the SEA also refers to environmental policies. Worded in the same way as clause 15.2 (health and safety policies), clause 15.1 requires the parties to cooperate in good faith to the extent that they are reasonably able to do so, to enable the other party to achieve compliance with all relevant environmental laws, policies, schemes etc.

120. I consider that the drafting of clause 15.2 provides APA with the authority to implement environmental policies in order to achieve compliance with APA's environmental obligations.

Summary

121. I consider that the *Pipelines Act 2005* (Vic) and the Service Envelope Agreement provide APA with the authority to introduce and implement environmental policies in relation to the GTS operating facility.

D.9 Which corporation has the greatest authority to introduce and implement operating policies and environmental policies for the GTS operating facility?

122. In D.3 – D.8 above I have considered whether AEMO and/or APA have the authority to introduce and implement operating policies, health and safety policies or environmental policies for the GTS operating facility.

123. In my opinion, in accordance with paragraph 11(1)(a) of the NGER Act, both AEMO and APA have the authority to introduce and implement operating policies, health and safety policies and environmental policies for the GTS operating facility.

124. However, subsection 11(3) of the NGER Act only permits one corporation to have operational control over a facility at any one time. In situations where two or more corporations satisfy paragraph 11(1)(a), section 11A of the NGER Act is applied.

125. Under section 11A if one of the corporations has the greatest authority to introduce and implement operating **and** environmental policies for the facility then that corporation has operational control over the facility.

126. Subsection 55(3) of the NGER Act requires that in considering making a declaration that a corporation has operational control over a facility, I must have regard to paragraph 11(1)(a) of the NGER Act. However, I am not required, under subsection 55(3) of the NGER Act, to consider section 11A.

127. However, as discussed above, I may take section 11A of the NGER Act into consideration if I consider it relevant and able to assist me in determining which of AEMO and APA has operational control over the GTS operating facility.

128. As under normal circumstances, section 11A of the NGER Act forms a part of the overall operational control 'test' I consider that section 11A of the NGER Act is particularly relevant as it is an objective means of deciding which of AEMO and APA has operational control over the GTS operating facility.

129. However, and importantly, under section 11A of the NGER Act a corporation will have operational control over the facility only if the corporation has the greatest authority to introduce and implement both operating **and** environmental policies.

130. I will now consider which of AEMO and APA has the greatest authority to introduce and implement operating policies, and the greatest authority to introduce and implement

environmental policies, and in turn, if either AEMO or APA has the greatest authority to introduce and implement both operating **and** environmental policies.

AEMO has the greatest authority to introduce and implement operating policies for the GTS operating facility.

131. I consider that AEMO has greater authority than APA to introduce and implement operating policies for the GTS operating facility.
132. AEMO's authority to introduce and implement operating policies for the GTS operating facility is primarily derived from the *National Gas Law* and the *National Gas Rules*, which confer responsibility on AEMO for the operation and security of the GTS operating facility. AEMO is empowered to make wholesale market procedures for this purpose and is the only entity entitled to approve those procedures⁸.
133. Operating policies such as the Wholesale Market Gas Scheduling Procedures (Victoria) and Wholesale Market System Security Procedures (Victoria) for the GTS operating facility are amongst the matters for which wholesale market procedures have been made by AEMO under the *National Gas Rules*.
134. The authority provided to AEMO, by the *National Gas Law* and *National Gas Rules*, to operate the GTS and to make policies in regards to the operation of the GTS gives AEMO substantial authority to introduce operating policies in relation the GTS operating facility.
135. In regards to implementing operating policies, the fact that AEMO is the day-to-day operator of the GTS operating facility would give AEMO significant authority to implement those policies.
136. Additionally, AEMO has the power, under section 91BC, to issue compulsory directions to Registered Participants of the GTS (including APA) to ensure the reliability of gas supply through the GTS, security of the GTS, and public safety.
137. Also, section 91BN gives AEMO the power to direct users of the GTS whom AEMO considers to have breached the wholesale market procedures to rectify the breach or to take specified measures to ensure future compliance.
138. Taken together, these provisions give AEMO substantial authority to put operating policies into effect for the GTS operating facility by empowering AEMO to ensure compliance with directions it makes to users of the GTS.
139. While APA, as the service provider for the GTS is required under the *National Gas Rules* and Service Envelope Agreement to carry out some functions in relation to the GTS, I do not consider that these rules provide APA with greater authority than AEMO to introduce and implement operating policies for the GTS operating facility.
140. As noted previously, Rules 288 and 293 of the *National Gas Rules* provides APA with authority to introduce and implement operating policies for the GTS operating facility. However, in my opinion, these Rules only allow APA to introduce and implement a limited range of operating policies, covering specific aspects of the GTS operating facility.
141. Additionally, there is a limit to APA's authority as Rule 288 requires that the gas quality monitoring system be approved by AEMO which suggests that AEMO also has some authority over the design and function of the monitoring system.
142. In contrast, under the *National Gas Law* and *National Gas Rules*, AEMO has an overarching responsibility to operate the GTS and is granted substantial authority to introduce and implement a wide range of operating policies covering the majority of activities comprising the GTS operating facility.
143. Under the Service Envelope Agreement APA does have some authority to introduce and implement operating policies. As noted previously, under clause 8.1(a)(vi) of the SEA, AEMO is required to comply with APA policies relevant the operation of the GTS operating facility

⁸ National Gas Rules, rules 135EA(2), 135ED, 135EE, 135EF and 135EG

as advised by APA from time-to-time, except where such policies would result in an increase in AEMO's costs of providing its services and a revised charge to cover the increased costs has not been agreed.

144. It is relevant, in my view, that there is a potential limit to AEMO's obligation to comply with APA policies as outlined above, and that in practice, APA only provides informal guidance concerning the technical operation of the system.
145. In contrast, sections 91 BC and 91BN of the *National Gas Law* expressly provides AEMO with authority to issue compulsory directions in regards to the GTS and the wholesale market procedures. This supports AEMO having a greater authority to introduce operating policies for the GTS operating facility.
146. In addition, the phrase from 'time-to-time', suggests that the issuing of policies by APA under clause 8.1(a)(vi) of the Service Envelope Agreement is intended to be made as a particular matter which needs to be addressed arises rather than on a regular basis. As indicated above, in practice only informal guidance is provided under this power. It is also noted that AEMO remains the day-to-day operator of the GTS.
147. Having considered the relative authority for AEMO and APA to introduce and implement operating policies it is my opinion that AEMO has greater authority than APA to introduce and implement operating policies for the GTS operating facility.

AEMO's arguments as to why it does not have operational control over the GTS operating facility

148. In the AEMO Submission, AEMO provides three arguments⁹ as to why it does not have operational control over the GTS operating facility. These arguments are, in summary:
 - AEMO has no discretion to operate the Victorian GTS within the framework of the *National Gas Law* in a way that would control its greenhouse gas emissions or energy consumption;
 - AEMO has no control over the configuration of the Victorian GTS; and
 - APA, to the exclusion of AEMO, has authority to introduce and implement environmental policies.
149. I will consider the first two arguments below as they relate to operating policies. The third argument I will address in my consideration of which of AEMO and APA has the greatest authority to introduce and implement environmental policies for the GTS operating facility.

AEMO argument 1 - Restricted discretion in operation

150. AEMO contends in its submission that:

Although the National Gas Law and National Gas Rules refer to AEMO as operating the GTS, it is the scheduling of gas injections and withdrawals that actually drives the operation of that system

and

AEMO is required to undertake scheduling in accordance with the requirements of the National Gas Rules and procedures made under the National Gas Rules¹⁰.

151. In regards to the first part of AEMO's argument, I do not agree that because it is the scheduling of gas injections and withdrawals that drives the operation of the GTS that AEMO could not have operational control over the GTS operating facility.
152. Rather it is the authority to introduce and implement the policies mentioned in paragraph 11(1)(a) of the NGER Act that is relevant in determining operational control over a facility.
153. In regards to the second part of AEMO's argument, while it is correct that the *National Gas Law* and the *National Gas Rules* are prescriptive in the manner and form in which AEMO

⁹ AEMO Submission, pages 1-5, paragraphs 1.4 to 4.2.

¹⁰ AEMO Submission, paragraph 2.1

carries out its functions, I do not agree with AEMO's contention that the restrictive nature of the legislation leaves AEMO with no authority to introduce and implement the policies mentioned in paragraph 11(1)(a) of the NGER Act.

154. While the *National Gas Law* and the *National Gas Rules* set parameters for AEMO in the way it operates the GTS, it is my view that AEMO still has scope within those parameters to introduce and implement operating policies for the GTS operating facility.
155. Rule 135EB(1) of the *National Gas Rules* set out the preconditions that must exist before AEMO may make procedures. While this creates a high level framework that places some constraints on the scope of policies introduced and implemented by AEMO, it does not dictate the particular content of such policies. Instead, the framework allows AEMO discretion to use its own judgment in developing policies that best meet the objectives and principles outlined in the legislation.
156. In my view, while this framework may place some constraints on the scope of policies, it does not significantly diminish AEMO's authority to introduce and implement these policies under the *National Gas Law* to such an extent that I would consider that APA has greater authority than AEMO to introduce operating policies.
157. AEMO further contends that:

*In summary, AEMO has no discretion to operate the Victorian GTS in such a way as to control the greenhouse gas emissions or energy consumption associated with the transportation of gas through that system, at least to the extent that such manner of operation would be different from that dictated by the National Gas Rules and the relevant procedures. Yet control over these factors is a hallmark of operational control because operational control is intended to signify that the relevant entity is in the best position to manage the greenhouse gas emissions, energy consumption and energy production of the facility*¹¹.
158. The criteria for determining operational control set out in section 11 and 11A of the NGER Act does not make any reference to a corporation's ability to manage greenhouse gas emissions, energy consumption or energy production. The NGER Act provides a framework for corporations that meet a threshold to report their emissions, energy consumption and energy production – it does not impose obligations on those corporations to manage them.
159. In my view, the inability to manage the GTS operating facility's greenhouse gas emissions, energy production or energy consumption through the introduction and implementation of policies mentioned in sections 11 and 11A does not prevent AEMO from having operational control over the GTS operating facility.
160. The criteria for determining operational control set out in sections 11 and 11A is authority to introduce and implement the policies. There is no reference in the NGER Act to those policies affecting greenhouse gas emissions, energy production or energy consumption.
161. I do note that the Revised Explanatory Statement to the National Greenhouse and Energy Bill 2007 does indicate that the corporation with the greatest control over operating policies and environmental policies (i.e. section 11A of the NGER Act¹²) for the facility would have operational control over the facility. This is because those policies as compared to health and safety policies are more analogous to control over greenhouse gas emissions, energy consumption and energy production than health and safety policies.
162. However, the criteria as set out in section 11A of the NGER Act for determining operational control do not make any reference to the corporation's ability to manage greenhouse gas emissions, energy consumption or energy production. It is the corporation with the greatest authority to introduce and implement operating policies and environmental policies that is

¹¹ AEMO Submission, paragraph 2.8

¹² Note when the *NGER Act* became law, the corporation with the greatest ability to introduce and implement operating policies and environmental policies were covered under section 11(4). However, this part of the operational control 'test' under the current version of the *NGER Act*, which took effect on 1 July 2012, is covered under section 11A of the *NGER Act*.

relevant not that a corporation has the greatest control over greenhouse gas emissions, energy consumption or energy production.

163. Consequently, in my opinion the question of the ability of a corporation to manage greenhouse gas emissions, energy consumption or energy production for a given facility is not relevant to the consideration of operational control under section 11 and 11A of the NGER Act. Instead, it is the authority to introduce and implement the policies specified in section 11 and 11A of the NGER Act that is relevant to the consideration of operational control.

AEMO argument 2: AEMO has no control over the configuration of the GTS

164. AEMO contends that it cannot be said to have operational control over the GTS operating facility because it has no control over the configuration of the GTS or the type of equipment that makes up the GTS. In particular AEMO states:

It is APA, and APA alone, that determines the physical configuration of the GTS and that designs, specifies, procures and maintains the equipment that comprises the GTS...As a result AEMO is not at liberty to determine many key operational parameters that are associated with the GTS as the determination of these issues is already "hardwired" into the configuration of the GTS or is the province of APA. It is therefore APA that has the greatest control over the greenhouse gas emissions and energy consumption of the Victorian GTS, including the compressors¹³.

165. This argument is similar to AEMO's first argument. I consider that the *National Gas Law* and the *National Gas Rules* provide scope for AEMO to introduce and implement operating policies for the GTS operating facility, even if AEMO is somewhat constrained by the system configuration of the GTS.
166. Additionally, as mentioned above, in my opinion the question of the ability of a corporation to manage greenhouse gas emissions, energy consumption or energy production for a given facility is not relevant to the consideration of operational control under section 11 and 11A of the NGER Act. Instead, it is the authority to introduce and implement the policies specified in section 11 and 11A of the NGER Act that is relevant to the consideration of operational control.

APA has greater authority to introduce and implement of environmental policies

167. Other than the requirement under clause 15.1 of the SEA for AEMO and APA to cooperate in good faith in regards to relevant environmental laws, policies, schemes etc., I have not been presented with any evidence, nor am I aware of any other evidence indicating that AEMO has any authority to introduce and implement environmental policies for the GTS operating facility.
168. In the AEMO Submission and AEMO's Additional Information Submission, AEMO indicates that its functions are limited to its declared functions specified in the *National Gas Law*, *National Gas Rules* and Service Envelope Agreement and that AEMO's declared functions do not give AEMO any role or authority with regard to the introduction or implementation of environmental policies.
169. In regards to APA's authority to introduce and implement environmental policies, I consider that the obligations imposed on APA by the *Pipelines Act 2005 (Vic)*, including for APA to produce an Environment Management Plan under section 133, provides APA with greater authority than AEMO to introduce and implement environmental policies for GTS operating facility.

¹³ AEMO Submission, paragraph 3.6

AEMO argument 3: APA, not AEMO has the authority to introduce and implement environmental policies

170. In its submission, AEMO contends that APA has greater authority to introduce and implement environmental policies:

Neither the National Gas Law / National Gas Rules, nor the SEA deal with the environmental policies that govern the GTS operating facility. Instead, as the owners of that system, APA has the authority (to the exclusion of AEMO) to introduce and implement environmental policies for the GTS.

and

Authority to introduce and implement environmental policies for a facility, along with authority to introduce and implement operating policies for a facility, is a critical determinant of the entity that has the greatest authority in relation to those policies and therefore operational control over the facility¹⁴.

171. I am in agreement with AEMO that APA has greater authority to introduce and implement environmental policies for the GTS operating facility.
172. However, in regard to making a declaration under subsection 55(3) of the NGER Act, it is not necessary that a corporation have the greater authority to introduce environmental policies for a facility in order to have operational control.
173. Under subsection 55(3), in making a declaration as to which corporation has operational control over the GTS operating facility I am required to have regard to the matters dealt with in paragraph 11(1)(a) of the NGER Act (i.e. authority to introduce and implement operating policies, health and safety policies or environmental policies). I am also not permitted to declare that a corporation has operational control over a facility unless satisfied that the corporation has substantial authority to introduce and implement either or both of the following for the facility: operating policies and environmental policies.
174. As previously indicated, while I am not required to consider section 11A of the NGER Act, to the extent that it assists in determining which corporation has operational control over a facility, regard can be given to that section.
175. I do note however, that section 11A is not directly applicable in the current circumstances, because it is my view that AEMO has the greatest authority to introduce and implement operating policies for the GTS operating facility, but APA has the greatest authority to introduce and implement environmental policies. Section 11A requires a corporation to have the greatest authority to introduce and implement **both** these sets of policies.
176. I now consider all three policies in paragraph 11(1)(a) of the NGER Act for the purpose of determining which of AEMO or APA has operational control of the GTS operating facility.

D.10 Consideration of operating, health and safety policies and environmental policies.

177. While subsection 55(3) of the NGER Act requires me to have regard to operating policies, health and safety policies and environmental policies when determining which corporation has operational control, I have discretion to decide how much weight to attach to those policies when determining operational control.
178. In recognition of the greater importance afforded operating policies and environmental policies under subsection 11A and section 55(3A), I have decided to attach greater weight to those policies relative to health and safety policies in making my decision.
179. As previously discussed, it is my opinion that AEMO has the greatest authority to introduce and implement operating policies for the GTS operating facility and APA has the greatest authority to introduce and implement environmental policies.

¹⁴ AEMO Submission, paragraphs 4.1 and 4.2.

180. I also note that the Service Envelope Agreement provides that neither AEMO nor APA is the agent of the other (see cl.25.1).
181. I will now consider which of AEMO and APA has the greatest authority to introduce health and safety policies for the GTS operating facility.

Introduction and implementation of health and safety policies

182. As previously mentioned, both AEMO and APA are required to submit a safety case to Safe Energy Victoria.
183. Under the Service Envelope Agreement (SEA), both parties are required to co-operate to enable the other to comply with OH&S requirements under relevant Victorian law.
184. AEMO is required to comply, subject to some exceptions, with APA's policies in regard to the operation of the system. APA is also required to supply personnel necessary for the performance of the GasNet Service Envelope Obligations. This would imply that APA has some authority to introduce and implement health and safety policies in relation to the GTS operating facility.
185. Under clause 8.1(a)(vii) of the SEA, AEMO must provide all personnel, facilities, material, equipment etc. to enable AEMO to provide the VENCORP Services (these are specified in the MSO Rules - now the Wholesale Market Procedures). While it is noted that AEMO does not have personnel on site at the GTS, it is required to provide personnel to perform the services specified in the Wholesale Market Procedures in relation to the GTS operating facility. As AEMO staff are involved in performing those services relating to the operation of the GTS operating facility, AEMO will on that basis have a level of authority to introduce and implement health and safety policies in regard to the facility.
186. In addition, under Rule 205 of the *National Gas Rules*, AEMO has produced the Wholesale Market System Security Procedures (Victoria), which indicates that AEMO must monitor a range of operational factors for the purpose of ensuring that the GTS operating facility is operating in a normal state and so that, amongst other reasons, there is no threat to public safety.
187. Rules 333 and 339 of the *National Gas Rules* establish the responsibilities of AEMO in declaring and responding to an emergency, which includes a threat to public safety. These Rules provide AEMO with the authority to introduce and implement health and safety policies relating to an emergency.
188. AEMO is required to make and keep up-to-date an Emergency Gas Protocol and Emergency Procedures (Gas) in accordance with the *National Gas (Victoria) Act 2008*.
189. On balance, I consider that AEMO has greater authority than APA to introduce and implement health and safety policies in relation to the GTS operating facility.

D.11 AEMO has operational control over the GTS operating facility

190. Taking into consideration all the evidence that has been presented to me, I consider that AEMO has operational control over the GTS operating facility for the following reasons:
- AEMO has the greatest authority to introduce and implement two of three the policies mentioned in paragraph 11(1)(a) of the NGER Act- operating policies and health and safety policies;
 - APA has the greatest authority to introduce and implement only one of the three policies mentioned in paragraph 11(1)(a) of the NGER Act- environmental policies;
 - The *National Gas Law* and *National Gas Rules* confer on AEMO the function of controlling the operation and security of the GTS operating facility. In my opinion, this provides AEMO with substantial authority to introduce and implement operating policies covering most aspects of the GTS operating facility;

- In controlling the day-to-day operation of the GTS operating facility AEMO has substantial authority to implement the operating policies and health and safety policies, which it has also prepared and introduced, for the GTS operating facility.

191. Additionally, under the *National Gas Law*, *National Gas Rules* and Service Envelope Agreement AEMO is considered the ‘operator’ of the GTS operating facility. While the ‘operator’ of a facility is not synonymous with ‘operational control’ under the NGER Act, it would be an unusual outcome for operational control of a facility under the NGER Act to rest with the asset owner when there is a separate entity charged with controlling the operation and security of the facility under applicable legislation and agreements.

D.12 AEMO has substantial authority to introduce and implement either or both operating policies and health and safety policies

192. Subsection 55(3A) of the NGER Act prevents the making of a declaration that AEMO has operational control over a facility unless I am satisfied that AEMO has substantial authority to introduce and implement either or both operating policies and environmental policies for the GTS operating facility.

193. As previously discussed in parts D.9 and D.11, I consider that AEMO has substantial authority to introduce and implement operating policies for the GTS operating facility. In my opinion, the *National Gas Law* and *National Gas Rules* provide AEMO with substantial and wide-ranging authority to introduce and implement operating policies covering most aspects of the GTS operating facility.

194. Therefore, I am not prevented from making a declaration under paragraph 55(1)(b) that AEMO has operational control over the GTS operating facility.

E. Decision

195. For the reasons outlined above I have decided to declare, under section 55(1)(b) of the *National Greenhouse and Energy Reporting Act 2007*, that the Australian Energy Market Operator Limited (ABN 94 072 010 327), has operational control over the Victorian Gas Transmission System operating facility. This facility does not include the maintenance activities at the Victorian Gas Transmission System maintenance facility.

Timing of Decision

196. In the Agreed Statement of Facts AEMO and APA did not indicate the period that they wished the requested declaration to cover.

197. In letters of 30 July 2010, additional information was requested regarding AEMO and APA’s joint request for a declaration, including the period both parties wished such a declaration to cover.

198. In a letter of 27 August 2010 in response, AEMO and APA jointly indicated that:

“The period which AEMO and APA seek the declaration to cover is to have effect from the time the reporting obligations commenced and thereafter”.

199. Noting the agreement of AEMO and APA to such a period, it is my decision that this declaration will commence from 1 July 2008, which is the date reporting obligations commenced under the NGER Act. Such a declaration will best serve the object of the NGER Act by allowing the reporting of relevant data for the GTS operating facility from the commencement of the NGER Act.

F. Appeal Rights

200. In accordance with paragraph 56(i) of the NGER Act, an application may be made to the Administrative Appeals Tribunal (AAT) for the review of a decision of the Clean Energy Regulator to declare that a corporation has operational control over a facility under paragraph 55(1)(b) of the Act.

201. In accordance with subsection 29(2) of the *Administrative Appeals Tribunal Act 1975* an application for a review of this decision can be made to the AAT within 28 days after the day on which a person receives this decision with this Statement of Reasons.

Ross Carter
Executive General Manager
Regulatory Division
Clean Energy Regulator

[Month] 2012

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