

Guidance to NSW Power Stations

Compliance with Coal Market Price Emergency directions

Introduction

On 9 December 2022, National Cabinet announced¹ an agreement for significant interventions in wholesale gas, coal and electricity markets to “shield Australian families and businesses from the worst impacts of predicted energy price spikes”.

On 22 December 2022, the New South Wales (NSW) parliament passed amending legislation to the *Energy and Utilities Administration Act (NSW) 1987 (Act)*, effecting a price cap on thermal coal sold by coal suppliers (**Coal Suppliers**) to coal fired power stations (**Power Stations**). The same day the NSW Premier, by written order, declared a coal market price emergency under the Act.

Original Directions

On 23 December 2022, the NSW Minister for Energy (**Minister**) made the *Coal Market Price Emergency (Directions for Coal Mines) Notice 2022 (Coal Mine Directions)* and the *Coal Market Price Emergency (Directions for Power Stations) Notice 2022 (Power Station Directions)*² on the basis of the declared emergency. These Directions have been amended and revised a number of times³.

Current Directions

On 12 December 2023, the Minister made the *Coal Market Price Emergency (Directions for Coal Mines) Notice 2023 No. 2 (Coal Mine Directions No.2)* and the *Coal Market Price Emergency (Directions for Power Stations) Notice 2023 No. 2 (Power Station Directions No. 2)*.^{4 5}

From this point forward all references are to the current Power Station Directions No. 2 (**Directions**), unless otherwise stated.

Application

The Directions apply to:⁶

- AGL Macquarie Pty Ltd ACN 167 859 494;
- EnergyAustralia NSW Pty Ltd ACN 163 935 635;
- Origin Energy Eraring Pty Ltd ACN 164 994 012; and
- Sunset Power International Pty Ltd ACN 162 696 335, trading as Delta Electricity.

(**Power Stations**).

¹ <https://www.pm.gov.au/media/energy-price-relief-plan>

² https://gazette.legislation.nsw.gov.au/so/download.w3p?id=Gazette_2022_2022-603.pdf

³ Amendments and revisions to the Directions are summarised in Appendix A.

⁴ https://gazette.legislation.nsw.gov.au/so/download.w3p?id=Gazette_2023_2023-577.pdf

⁵ On 18 December 2023, the Minister made the *Coal Market Price Emergency (Directions for Coal Mines) Amendment Notice December 2023*, which updated the Set Price for one coal supplier in schedule 1 (https://gazette.legislation.nsw.gov.au/so/download.w3p?id=Gazette_2023_2023-591.pdf)

⁶ Section 5.

Heads of Agreement

Power Stations can enter a Heads of Agreement with the NSW Government on coal supply volumes and prices as an alternative to the Power Station Direction. For information about the Heads of Agreement and proposed negotiation protocol Power Stations should contact the NSW Department of Climate Change, Energy, the Environment and Water (formerly the Office of Energy and Climate Change).

Guidance

This guidance has been published by the AER in order to assist Power Stations to understand their obligations under the Directions, and replaces the previous guidance issued in February 2023.

The AER's compliance and enforcement approach

On 13 February 2023, the Minister appointed the AER as regulator under the Act. The AER has been tasked with monitoring compliance with and enforcement of the Directions.⁷

The AER monitors compliance by reviewing reports submitted by Power Stations along with feedback from industry.

The AER may conduct additional occasional spot checks to confirm Power Stations' compliance with the Directions. If non-compliance is uncovered, the AER will take appropriate regulatory action in accordance with its Compliance and Enforcement Policy.⁸

Obligations on Power Stations

Section 7 - Direction about maintaining a stockpile of coal

Power Stations must plan to maintain a stockpile of coal that is more than the expected demand by the Power Station for coal for the next 30 days but less than the expected demand by the Power Station for the next 60 days (**Plan**)⁹ except in specific circumstances.

Power Stations may plan to maintain a stockpile that exceeds the expected demand by the Power Station for the next 60 days if:

- the Power Station is EnergyAustralia NSW Pty Ltd ACN 163 935 635; or
- as at 12 December 2023 the Power Station's stockpile already exceeds the expected demand by the Power Station for the next 60 days. In this case, the Power Station's planned stockpile should not increase by more than 5% as compared to the planned stockpile level on 12 December 2023.¹⁰

This means Power Stations must actively forecast the amount of coal they need on a rolling basis and actively plan steps they will take to ensure stockpiles do not fall below the required level or exceed the maximum threshold. The plan should be based on realistic but conservative assumptions about expected coal deliveries and usage in order to ensure (as far as possible) that stockpiles remain at the required level. It may need to be revised from time to time if expectations about deliveries and usage change.

Power Stations should document their plans and assumptions on an ongoing basis and keep those records for future reference.

⁷ <https://www.aer.gov.au/news-release/expanded-market-monitoring-compliance-and-advisory-role>

⁸ <https://www.aer.gov.au/system/files/AER%20Compliance%20and%20Enforcement%20Policy%20July%202021.pdf>

⁹ Section 7(1).

¹⁰ Section 7(1)(b).

Key terms used

Term	Meaning
Plan ¹¹	<p>Under their plan to maintain a coal stockpile, Power Stations must:</p> <ul style="list-style-type: none"> • calculate the expected amount of coal required using a method approved by the AER; and • calculate the expected amount of coal to be made available under existing coal supply agreements; and • calculate the shortfall (if any) from the coal to be supplied under the existing coal supply agreements and the expected amount of coal required; and • if it calculates that more coal needs to be made available in order to meet the stockpile requirements: <ul style="list-style-type: none"> – identify Coal Suppliers it considers will be able to supply the coal required; and – request each Coal Supplier to confirm the amount of coal they can reasonably supply; and – offer to enter into an agreement with each Coal Supplier to supply coal required in proportion to the amount each can reasonably supply.¹²

Power Stations must offer to enter into agreements with coal suppliers for supply of thermal coal to maintain their stockpile. There are complementary obligations for Coal Suppliers to ensure the availability of coal. This will enable Power Stations to obtain coal for use in electricity generation.

Example 1

A Power Station has a stockpile of 420,000 tonnes of coal on 31 January. The Power Station is expected to consume 380,000 tonnes of coal per month in January and February, and 420,000 tonnes per month for the period starting in March and ending in June. The Power Station previously contracted to purchase 400,000 tonnes per month for the period starting in January and ending in June.

The table below shows the resulting stockpile available to meet expected consumption.

Month	Jan	Feb	Mar	Apr	May	Jun
Contracted delivery	400,000	400,000	400,000	400,000	400,000	400,000
Expected consumption	380,000	380,000	420,000	420,000	420,000	420,000
Surplus/(Shortfall)	20,000	20,000	-20,000	-20,000	-20,000	-20,000
Stockpile (rolling)	420,000	440,000	420,000	400,000	380,000	360,000

The Power Station will have an adequate stockpile of coal from 1 February to 31 March. From 1 April to 30 June the stockpile will not be more than the expected demand. The Power Station forecasts a shortfall of 20,000 tonnes per month in the quarter starting 1 April. The Power Station must plan to take active steps to purchase extra supplies from Coal Suppliers to ensure that an adequate stockpile is maintained.

In this example, the Power Station does not yet have an imminent shortfall (see below). To try to avoid an imminent shortfall arising, it should identify the Coal Suppliers it considers could reasonably supply coal, request coal supply information from each Coal Supplier identified and then make offers for coal in proportion to the amount that each can reasonably supply.

¹¹ Section 7(2).

¹² Section 7(4) provides that Power Stations do not have to enter into an agreement with more than 1 Coal Supplier for amounts below 50,000 tonnes.

Power Stations should keep records of all offers made to enter agreements with Coal Suppliers to supply thermal coal, to ensure they have evidence of how they have complied with this obligation. This will be important if, despite their plans, their stockpiles fall below the required level.

Imminent shortfalls

If a Power Station's Plan identifies that it will have a stockpile of less than 30 days of its expected demand in the next 30 days and the Power Station does not have coal supply agreements to prevent the shortfall, it must take steps to rectify this in a timely manner. Specifically, Power Stations must:

- within three business days of calculating the shortfall:
 - identify Coal Suppliers it considers will be able to supply the coal required; and
 - notify each identified Coal Supplier that the stockpile has fallen below the expected demand by the Power Station for the next 30 days; and
 - ask each Coal Supplier to confirm the amount of coal that the Coal Supplier can reasonably supply; and
- within five business days of receiving confirmation from a Coal Supplier that it can reasonably supply coal
 - offer to enter into an agreement with each Coal Supplier to supply the coal required
 - within 90 days of the offer; and
 - to make up the shortfall in proportion to the amount each Coal Supplier can reasonably supply.¹³

If a Power Station calculates under its Plan that there will be an immediate shortfall in the next 30 days, the Power Station must also notify all Coal Suppliers with which it has existing or new coal supply agreements.¹⁴ Coal Suppliers are obligated to take certain steps to ensure deliveries of coal are made when a Power Station informs them that its stockpile is at risk of shortfall.

Section 8 - Direction about entering coal supply agreements

Power Stations must not enter into a supply agreement with a Coal Supplier unless the agreement is consistent with the Directions and their Plan.¹⁵

Power Stations must not refuse an offer to enter into an agreement with a Coal Supplier that does not ordinarily supply to them on the grounds of either:

- responsibility for coal unloading; or
- coal testing,

provided the Coal Supplier has made a reasonable offer about these matters.¹⁶

¹³ Section 7(4) provides that Power Stations do not have to enter into an agreement with more than one Coal Supplier for amounts below 50,000 tonnes.

¹⁴ Section 7(5).

¹⁵ Section 8(2).

¹⁶ Section 8(1) – specifically, responsibility for unloading coal, and the testing coal to measure its specific energy and suitability for use in a Power Station.

Section 9 - Direction about giving information to coal suppliers

Power Stations that have entered, or are offering to enter, a coal supply agreement with a Coal Supplier must provide coal supply information¹⁷ if asked.¹⁸ The Coal Supplier does not have to enter a new coal supply agreement until this is given.¹⁹

Section 10 - Direction about prohibition on reselling or offering to resell coal

Power Stations must not sell, or offer to sell, coal to another person.²⁰ This is to ensure that coal purchased by Power Stations is not resold into the market but will instead be deployed to generate electricity.

The prohibition does not apply to coal supply agreements entered into before 9 December 2022.²¹

Reporting

Section 11 – Direction about reporting

Power Stations must prepare a monthly report (**Report**), which must be done in the form approved and way decided by the AER.²² The Report must be provided to the Minister and the AER by the due date (**Due Date**) and must be about the required matters (**Information**).

Key terms used

Term	Meaning
Information ²³	<p>For each Power Station:</p> <ul style="list-style-type: none">• new offers made to purchase coal, including the proposed price²⁴, the quantity to be purchased and duration of the proposed agreement;• offers to purchase that were refused by Coal Suppliers including the reasons given for the refusal;• the prices²⁵, average specific energy and quantity of coal delivered from individual agreements to supply coal to the Power Station;• details of the Plan to maintain a stockpile of coal including for each calendar month until 1 July 2024:<ul style="list-style-type: none">– the planned stockpile– the amount of coal the Power Station plans to purchase and the delivery schedule for this coal;– details of all coal supply agreements entered into by the Power Station and details of the coal delivery schedule under each coal supply agreement; and– the expected demand for coal by the Power Station;• on the last day of the month, the quantity of coal in the stockpile and the expected demand from the stockpile for the next 30 days;

¹⁷ Section 9(3) provides that 'coal supply information' means the terms the Power Station proposes to include in the coal supply agreement and evidence showing that those terms are reasonable (where the Power Station offers to enter an agreement) and information about the Power Station's stockpile (if the stockpile is less than the expected demand by the Power Station for the next 30 days), and information about whether a delay in delivery of coal will result in a Power Station's stockpile being less than the expected demand by the Power Station for the next 30 days (where the Power Station has entered into an agreement).

¹⁸ Section 9(1).

¹⁹ Section 9(2).

²⁰ Section 10(1).

²¹ Section 10(2).

²² Section 11(3).

²³ Section 11(1).

²⁴ Section 11(2). A price under \$125 per tonne must be reported as 'less than \$125 per tonne'.

²⁵ Section 11(2). A price under \$125 per tonne must be reported as 'less than \$125 per tonne'.

Term	Meaning
	<ul style="list-style-type: none"> for each coal supply agreement, the quantity of coal contracted compared to that delivered and the reasons given by the Coal Supplier for any difference; and any other matters reasonably required by the AER.
Due date ²⁶	Report due on: <ul style="list-style-type: none"> 15th day of each calendar month (except the first²⁷).

The AER has prepared a reporting template to be used by Power Stations to provide the information required. Care should be taken to ensure the reporting provided is true and correct. Each Report must be accompanied by a statutory declaration confirming this. The statutory declaration must be made by an officer of the Power Station with responsibility for, or oversight of, the matters contained in the Report.

Power Stations should submit their Reports by uploading the completed template and any supporting documents to the AER portal. This is accessible by registered users from the following address: <https://accs.ourshare.com.au/>

Penalties

Failure to comply with the Directions without reasonable excuse is an offence under the Act.²⁸ The maximum penalty:

- for an individual – 1,000 penalty units; or
- for a corporation – the greater of the following:
 - \$10 million;
 - if the court can determine the value of the benefit the corporation, and any corporation related to the corporation, have obtained directly or indirectly that is reasonably attributable to the commission of the offence – 3 times the value of the benefit; and
 - if the court cannot determine the value of the benefit the corporation, and any corporation related to the corporation, have obtained directly or indirectly that is reasonably attributable to the commission of the offence – 10% of the corporation’s adjusted turnover during the breach turnover period for the offence.

It is not a reasonable excuse under the Act that complying with the Directions would cause a Power Station to be in breach of contractual obligations entered into on or after 9 December 2022.²⁹

More information

For more information about this guidance or questions relating to compliance with the Directions, Power Stations should email the AER at marketintervention@ aer.gov.au.

²⁶ Section 11(5).

²⁷ Section 11(4). First monthly report due 20 February 2023 (to cover period 23 December 2022 to 31 January 2023).

²⁸ Clause 7(1) of Schedule 3.

²⁹ Clause 7(2) of Schedule 3.

Appendix A

Summary of Directions versions and revisions

Original Directions

On 23 December 2022, the NSW Minister for Energy (**Minister**) made the *Coal Market Price Emergency (Directions for Coal Mines) Notice 2022* and the *Coal Market Price Emergency (Directions for Power Stations) Notice 2022*³⁰ on the basis of the declared emergency. These Directions have been revised and updated a number of times.

Amended and revised Directions

On 30 January 2023, the Minister made the *Coal Market Price Emergency (Directions for Coal Mines) Amendment (Directions) Notice 2023* and the *Coal Market Price Emergency (Directions for Power Stations) Amendment (Directions) Notice 2023*.³¹

On 15 February 2023, the Minister made the *Coal Market Price Emergency (Directions for Coal Mines) Notice 2023* and the *Coal Market Price Emergency (Directions for Power Stations) Notice 2023*.³²

On 5 June 2023, the Minister made the *Coal Market Price Emergency (Directions for Coal Mines) Amendment Notice 2023* and the *Coal Market Price Emergency (Directions for Power Stations) Amendment Notice 2023*.³³

On 22 June 2023, the Minister made the *Coal Market Price Emergency (Directions for Coal Mines) Amendment (Price Inclusion) Notice 2023*.³⁴

On 27 July 2023, the Minister made the *Coal Market Price Emergency (Directions for Coal Mines) Amendment Notice (No 2) 2023*.³⁵

On 15 August 2023, the Minister made the *Coal Market Price Emergency (Directions for Coal Mines) Amendment Notice August 2023*.³⁶

On 18 September 2023, the Minister made the *Coal Market Price Emergency (Directions for Coal Mines) Amendment Notice September 2023*.³⁷

Current Directions

On 12 December 2023, the Minister made the *Coal Market Price Emergency (Directions for Coal Mines) Notice 2023 No. 2* and the *Coal Market Price Emergency (Directions for Power Stations) Notice 2023 No. 2*.³⁸

On 18 December 2023, the Minister made the *Coal Market Price Emergency (Directions for Coal Mines) Amendment Notice December 2023*.³⁹

³⁰ https://gazette.legislation.nsw.gov.au/so/download.w3p?id=Gazette_2022_2022-603.pdf

³¹ https://gazette.legislation.nsw.gov.au/so/download.w3p?id=Gazette_2023_2023-35.pdf

³² https://gazette.legislation.nsw.gov.au/so/download.w3p?id=Gazette_2023_2023-69.pdf

³³ https://gazette.legislation.nsw.gov.au/so/download.w3p?id=Gazette_2023_2023-243.pdf

³⁴ https://www.energy.nsw.gov.au/sites/default/files/2023-07/Gazette_2023_2023-276.pdf

³⁵ https://gazette.legislation.nsw.gov.au/so/download.w3p?id=Gazette_2023_2023-336.pdf

³⁶ https://gazette.legislation.nsw.gov.au/so/download.w3p?id=Gazette_2023_2023-359.pdf

³⁷ https://www.energy.nsw.gov.au/sites/default/files/2023-10/Gazette_2023_2023-454.pdf

³⁸ https://gazette.legislation.nsw.gov.au/so/download.w3p?id=Gazette_2023_2023-577.pdf

³⁹ This amendment updated the Set Price for one coal supplier in schedule 1 (https://gazette.legislation.nsw.gov.au/so/download.w3p?id=Gazette_2023_2023-591.pdf)

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