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AER's draft Guideline and Explanatory Statement – Enhanced Wholesale Market Monitoring and Reporting

Proudly Australian for more than 186 years, AGL Energy (**AGL**) supplies around 4.3 million energy and telecommunications customer services. AGL is committed to providing our customers simple, fair, and accessible essential services as they decarbonise and electrify the way they live, work, and move.

AGL welcomes the opportunity to provide feedback on the draft Guideline and Explanatory Statement regarding the AER's enhanced wholesale market monitoring and reporting functions.

The Guideline does not include information about the scope of the AER wholesale market monitoring functions despite being required under the Energy Laws

The National Electricity Law (**NEL**) and the National Gas Law (**NGL**) (**the Energy Laws**) require the AER to prepare guidelines about (amongst other things) the scope of the AER wholesale market monitoring functions.¹

AGL considers that the draft Guideline does not meet this requirement.

In our submission to the AER's issues paper, we said it would be useful for the Guideline to clarify the scope of the AER's wholesale market monitoring functions. In response, the AER stated in the draft Guideline's explanatory statement that:

The scope of the AER's wholesale market monitoring and reporting functions is defined by the energy laws. Our Draft Guideline outlines the framework and approach we intend to apply in performing these functions.²

AGL acknowledges that the AER wholesale market monitoring functions are set out in the Energy Laws and notes that the wholesale market monitoring functions in the NEL and the NGL differ significantly.³

While we understand producing a single guideline about the AER's functions in both the NEL and the NGL may have some benefits, by choosing not to set out the different wholesale market monitoring functions under these laws stakeholders may be given the impression that the AER's market monitoring functions are the same for gas and electricity – when this is not the case.

We would strongly recommend that the AER clarifies the scope of its wholesale market monitoring functions under the NEL and the NGL separately in the Guideline, to avoid confusion amongst participants. Clarifying the wholesale market monitoring functions under the NEL and the NGL – and their differences – is critical, as their scope in part determines:

- the scope of the AER wholesale market reporting functions
- the scope of the AER's information gathering powers

These points are explained in more detail below.

¹ s.18EO(1) of the NEL and s.30AT(1) of the NGL

² AER, *Draft Guideline – explanatory statement*, p. 33

³ s.18C(1) of the NEL and s.30AC(1) of the NGL



The scope of the AER wholesale market reporting functions

The AER wholesale market reporting functions under the Energy Laws are:⁴

- to prepare, at least once every 2 years, a report on the results of the performance of the AER wholesale market monitoring functions
- to provide, as the AER thinks fit, advice on the results of the performance of the AER wholesale market monitoring functions to the Ministerial Council on Energy
- other reporting requirements that relate to the AER wholesale market monitoring functions conferred on the AER by the National Electricity Rules or National Gas Rules

Each of the reporting functions above contain a direct reference to the AER wholesale market monitoring functions.

It is therefore necessary for the Guideline to provide clear information about the scope of the AER wholesale market monitoring functions as this will in turn help identify which reports are in or out of scope of the AER wholesale market reporting functions under the relevant divisions of the Energy Laws.⁵

For example:

- The draft Guideline refers to the AER's suite of reports published on the performance of wholesale electricity and gas markets,⁶ and, in this context, refers to 'Investigation of complex issues and behaviours of concern'.⁷ We consider it would be useful for the AER to explain the relationship between these 'investigations' and the AER's wholesale monitoring reporting functions (and functions more broadly), including whether such investigations relate to the performance of monitored markets or may address other issues.
- The draft Guideline refers to AER reports 'play[ing] a role in identifying potential harms in the market and protecting consumers from high prices as a result of uncompetitive behaviour or inefficient market design'. For example, we consider it would be helpful for the draft Guideline to set out how, in the context of its reporting, this role inter-relates with the function set out in s18C(3) to identify and analyse whether, in relation to a particular monitored market, there are features that may be impacting detrimentally on the achievement of the national electricity objective (including all of the factors set out in that objective).

The scope of the AER's information gathering powers

Under the AER's enhanced wholesale market monitoring and reporting functions, the AER has two new information gathering instruments: market monitoring information orders (**MMIOs**) and market monitoring information notices (**MMINs**).

The Energy Laws state that the AER may serve an MMIO or make an MMIN if it considers it reasonably necessary for the performance of its functions under the relevant divisions.⁸

⁴ s.18C(2)(c) of the NEL and s.30AC(2)(c) of the NGL

⁵ Part 3, Division 1A (for the NEL) and Chapter 2, Part 1, Division 1AA (for the NGL)

⁶ "Our existing wholesale market reporting products include: the Wholesale markets quarterly; the Wholesale electricity market performance biennial report; the State of the energy market annual report; prices above \$5,000/MWh reports; significant price variation reports; special reports produced on an ad hoc basis and quarterly market statistics." – AER, *Wholesale Market Monitoring and Reporting Guideline* – Draft, p. 9

⁷ AER, *Wholesale Market Monitoring and Reporting Guideline* – Draft, p. 10

⁸ s.18EG(1) of the NEL and s.30AL(1) of the NGL



Further, the Energy Laws also state that the AER, when considering if it is reasonably necessary to serve an MMIN or make an MMIO, the AER must (amongst other things) be satisfied it requires the information or agreement to carry out a wholesale market monitoring function.⁹

A similar requirement applies to the AER's use of its general information gathering powers (under s.28 of the NEL and s.42 of the NGL) in undertaking a function under one of the relevant divisions. The AER is required to be satisfied the information is reasonably required for the AER to carry out a function under the relevant division before relying on these powers.¹⁰

By not providing clear information about the scope of the AER wholesale market monitoring functions, there is a risk that the AER may request information that goes beyond the scope of its information gathering powers.

The draft Guidelines provides a list of details which the AER anticipates will be included in an information collection instrument – including ‘the reasons the AER requires the information’.¹¹

AGL considers that any information collection instrument must identify the relevant wholesale market monitoring function/s and, where applicable, the relevant wholesale market reporting function/s.

Also, AGL considers the AER should also state why the information being sought is reasonably required (in the case of a general information gathering instrument) to carry out a function under the relevant division, or reasonably necessary to carry out a wholesale market monitoring function under the relevant division (in the case of an MMIO or MMIN).

Burden

AGL continues to have concerns about the burden (including cost, time and resources) imposed on regulated firms that are required to respond to broad statutory notices requiring information and documents.

AGL acknowledges that section 3.2.1 of the AER's Guideline sets out four principles around the collection of information for its wholesale market monitoring powers. AGL considers that point 3 of section 3.2.1 should be expanded to ensure, consistent with s18EB of the NEL, that the AER considers the most efficient way to obtain relevant information, including whether it could obtain such information in another way. For example, it is rare that the only way to obtain particular information is through issuing a statutory notice requiring the provision of a wide range of documents over a long time period, and thereby imposing a significant burden on a market participant. In our view, it is not enough for the AER to issue notices efficiently. It should also consider the efficiency of the entire process, including whether the information is truly required for the function (as required by s.18EB in the NEL and s.30AG of the NGL), different potential ways of obtaining that information (as distinct from other information) and the burden on the recipient of the notice (which may impact the efficiency of that entities operations).

In this context, AGL considers that the AER should pause and carefully consider whether it is necessary to issue broad information requests for documents, particularly where these document requests effectively require a market participant to search the mailboxes of a variety of custodians over many years. AGL notes that these types of document request involve an extraordinary amount of work for market participants.

Common information requests

AGL suggests that if the AER requires information which has already been provided to another regulator, that it requests this information by reference to the relevant information request, e.g. AGL's response to item

⁹ s.18EG(2)(a) of the NEL and s.30AL(2)(a) of the NGL

¹⁰ s.18EB of the NEL and s.30AG of the NGL

¹¹ AER, Wholesale Market Monitoring and Reporting Guideline – Draft, p. 14



[X] of the other regulator's Notice dated DD MM YYYY. This type of approach would help avoid creating additional burden on AGL by ensuring that even unintentional wording differences do not require AGL to duplicate information gathering, assurance, and sign-off processes.

If you would like to discuss any of the matters raised in this submission, we would be happy to meet with the AER.

Yours sincerely,

Chris Streets

Senior Manager Policy and Markets Regulation