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Dear PEMM Review Taskforce

Re: Review of the effectiveness of the PEMM Act 2019 (Cth)

The Australian Energy Regulator (AER) welcomes the opportunity to provide a submission to the Review of the effectiveness of the Prohibiting Energy Market Misconduct (PEMM) Act 2019 (Cth).

Role, functions and capabilities of the AER

The AER is an independent decision-making body responsible for regulating wholesale and retail energy markets, and energy networks, under national energy legislation and rules. This submission is informed by our comprehensive experience in collecting, analysing and reporting on market performance data, setting the regulated Default Market Offer (DMO), and our surveillance, compliance and enforcement work.

Monitoring and reporting

The AER monitors and reports on the wholesale and retail energy markets as well as energy network performance through a range of products. We report on wholesale market activity including reports into high wholesale price events in electricity and gas spot markets; quarterly reports on the performance of the wholesale electricity and gas markets; a biennial assessment of competition and efficiency in the wholesale electricity market (known as the Wholesale electricity market performance report); our annual State of the energy market report; and gas reporting on the Short Term Trading Market, gas supply hubs, day ahead auctions and the gas bulletin board. We are also starting work on our first report into the competition and efficiency of wholesale gas markets, with our inaugural biennial Wholesale gas market performance report due for publication in 2026.

We are also responsible for reporting on the performance of retail energy markets and energy businesses through the Annual retail markets report and quarterly reports. These reports include information on energy affordability, difficulties consumers face in paying their energy bills and movements in market share across retailers. We also report on the performance of retail energy markets and energy businesses.

We monitor network performance through a suite of reports such as our network performance and benchmarking reports. Our network performance reports measure the operational and financial performance of regulated electricity and gas network businesses. This includes newly established reporting into the growing role that customer exports, i.e. energy exported into the grid from consumer energy resources like rooftop solar, are playing within distribution networks. Our annual benchmarking reports measure network

performance on operating expenditure and productivity over time against other businesses and the economy.

These reports provide information that helps illuminate the drivers of pricing outcomes, the conduct of market participants and the performance of energy markets and identify behaviour that warrants further investigation.

The AER's functions were recently expanded to enable systematic monitoring of electricity and gas wholesale spot and contract markets and provide the AER with visibility of the underlying drivers influencing market outcomes. We used these new powers as part of WEMPR 2024 to collect data on contracts and risk management strategies from selected large participants. This enabled us to understand their net position,¹ providing a full picture of incentives and behaviour in both spot and contract markets. In WEMPR 2024 we used the information we collected to confirm instances of economic withholding.

Regulating

Since its introduction on 1 July 2019, the AER has determined a DMO price annually to be applied in NSW, South East Queensland and South Australia. The DMO is an electricity price 'safety net' protecting consumers from unjustifiably high prices, while also allowing retailers to recover reasonable costs. The AER determines the maximum price that a retailer can charge a standing offer customer each year.² We set these price caps annually based on our assessment of reasonable costs in every part of the supply chain.

As part of this process the AER determines a wholesale cost component based on an assessment of contract and spot market behaviour and prices. Our wholesale cost forecast is a function of energy supply and demand forecasts, the assumed hedging strategy of a retailer to manage their exposure to the spot market, and any final exposure to the spot market.

The publicly available Australian Securities Exchange (ASX) electricity contract prices and traded volumes are used to model the cost of implementing the hedging strategy. The low liquidity in South Australia created a risk that the ASX trade data was not reflective of a prudent retailer's hedging costs. To investigate this risk, we collect confidential over-the-counter (OTC) contracts from retailers and generators. We also collect cost data directly from retailers to understand their costs to serve customers and profit margins.

We also regulate electricity and gas network service providers (NSPs) in all Australian states and territories, excluding Western Australia. We collect operational and financial data from NSPs through Regulatory Information Notices and use this information to monitor and assess the financial, operational, productivity and service performance of the monopoly networks. We also use benchmarking tools to monitor the productivity growth and efficiency of the networks and set key financial market parameters that influence the regulated revenues, and prices paid by energy consumers. We make decisions on revenue proposals by NSPs based on factors including projected demand for electricity and natural gas, age of infrastructure, operating and financial costs and network reliability and safety standards.

¹ A vertically integrated participant can either be long or short generation. Long means they have more generation than needed to meet their retail load and short means they don't. This is affected by both how much physical generation the participant owns and what contracts they have sold. When a participant is long generation they benefit from higher spot prices.

² The cap on standing offer prices does not apply to customers on demand tariffs or small business customers on flexible or time of use tariffs.

Compliance and enforcement

The AER has responsibility for ensuring compliance by energy retailers, generators and networks, through a range of tools including administrative and enforcement action. Many of our compliance and enforcement actions involve highly complex markets and conduct, and involve significant data analysis by teams from across the AER, including compliance and enforcement staff, technical experts and where required, pricing experts.

The AER has experience taking compliance and enforcement action relating to retail markets and consumer protection. Examples of AER enforcement outcomes relating to standing offer prices and retailers, include:

- Australian Energy Regulator v AGL Retail Energy Limited [2024] FCA 969 – litigation
In December 2024 the Federal Court ordered AGL Retail Energy Limited and three other subsidiaries of AGL Energy Limited to pay penalties totalling \$25 million for failing to comply with their overcharging obligations related to Centrepay payments. The investigation that culminated in civil proceedings involved intensive analysis of customer data.
- Australian Energy Regulator v EnergyAustralia Pty Ltd [2022] FCA 644 - litigation
On 1 June 2022, the Federal Court ordered EnergyAustralia to pay a penalty of \$12 million in relation to 14,637 contraventions of its life support obligations under the National Energy Retail Rules.
- Trinity Place Investments Pty Ltd – enforceable undertaking
In August 2023 the AER accepted a court enforceable undertaking from Trinity Place Investments Pty Ltd after it admitted to overcharging consumers for electricity by approximately \$34,000 between December 2019 and January 2023. This undertaking included a requirement to refund affected customers.
- CovaU Pty Ltd– infringement notice and enforceable undertaking
In July 2023 the AER announced that CovaU Pty Ltd paid a \$67,800 infringement notice after it allegedly failed to present the prices for its standing offers (also known as standard contracts) on its website for 19 months.
- Australian Energy Regulator v Origin Energy Electricity Limited and others [2024] FCA – litigation
On 18 December 2024, the Federal Court ordered three Origin subsidiaries to pay penalties totalling \$12 million in relation to over 5,000 contraventions of its life support obligations under the National Energy Retail Rules. The AER also accepted a court enforceable undertaking from Origin, which included a community-based contribution of \$1 million to organisations which assist sections of the community who rely on life support equipment.
- Australian Energy Regulator v Origin Energy Electricity Ltd [2022] FCA 802
On 29 June 2022, the Federal Court ordered Origin Energy Electricity Ltd and other Origin related entities pay penalties totalling \$17 million for failing to comply with their obligations to protect customers experiencing hardship and payment difficulties. Origin admitted the automated processes it put in place in relation to its customers experiencing hardship and payment difficulties resulted in it breaching its hardship obligations in the National Energy Retail Law and Rules on more than 100,000 occasions between January 2018 and October 2021.
- Alinta Energy Sales Pty Ltd– administrative undertaking, including waiving customer debt

In October 2021, Alinta Energy improved its systems and waived more than \$1 million in energy debt owed by more than 400 customers, following an AER investigation. The AER had been concerned that Alinta Energy may have contravened the National Energy Retail Law and/or National Energy Retail Rules in relation to Alinta Energy's obligations to customers experiencing hardship and payment difficulties.

Examples of AER enforcement outcomes involving wholesale markets include:

- 2016 South Australian black system event compliance and enforcement outcomes
From September 2016 the AER conducted a detailed compliance review and investigation into the events that led to South Australia experiencing a state-wide blackout. This work involved team members across the AER, obtaining and analysing significant amounts of complex data and culminated in a detailed compliance report and civil proceedings against four wind farm operators. The Federal Court ordered the Hornsdale, Hallett 1, 2, 4 and 5, Clements Gap, Snowtown 2 windfarm operators to pay penalties totalling \$6.15 million.
- Australian Energy Regulator v Santos Direct Pty Ltd [2024] FCA 579
In June 2024 the Federal Court ordered Santos Direct Pty Ltd to pay a penalty of \$2.75 million for breaches of important record keeping obligations in the National Gas Rules relating to the Day Ahead Auction for gas pipeline capacity. The investigation that led to these proceedings involved detailed analysis of gas auction data to understand the impact on gas market outcomes.

Proposed framework for assessing effectiveness of PEMM

The Review proposes to consider a “no PEMM” counterfactual and what conduct and market performance outcomes may have occurred had PEMM not been introduced. It also proposes to consider the extent to which price outcomes reflect underlying wholesale costs, contract markets are sufficiently liquid to allow for retail competition and wholesale markets are effectively competitive. To date, no court proceedings have been brought under the PEMM prohibitions. This raises the question of whether this is due to the deterrent effect of the prohibitions, the challenges of enforcing them or that other regulatory settings including the AER's oversight and ACCC general competition powers are sufficient. Below, we set out our observations on these issues, informed by our broad-ranging suite of market surveillance activities.

Do price outcomes for consumers, both individually and on average reflect underlying wholesale electricity costs?

PEMM was introduced at a time when prices were trending down and this was reflected in the design of the provisions.³ However, there have been times where prices have increased since 2021-22. During these periods the retail prohibition had no impact. Price increases have been predominantly driven by factors in the wholesale market including sharp increases in international fuel prices, significant outages of thermal generation and fuel supply problems straining the generation fleet, availability of renewable resources and network outages. These factors flowed through to increases in contracting costs. Network prices have also risen to a lesser extent in recent years due to a range of factors including recent revenue determinations, cost pass-throughs, efficiency incentive payments and

³ The retail prohibition under PEMM is asymmetrical. There is only an obligation for prices to reflect underlying costs when costs are decreasing, not that price increases also reflect changes in the underlying costs. This is discussed below.

updated transmission costs. While the future trend of prices is not known, consumers are clearly facing a market capable of producing rising or falling prices from year to year.

There are two types of retail electricity offers. Standing offers, which in NSW, South East Queensland and South Australia are capped by the DMO and market offers which are set by retailers (uncapped), but which must be offered using the DMO as a benchmark price.⁴ Since the introduction of the DMO, retail market offers have responded to changes in the underlying cost of electricity, mostly driven by changes to wholesale market outcomes. The DMO's annual recalculation appears to influence changes in market offers above the median, whereas the most competitive offers in the market appear to be driven by movements in the underlying cost of electricity.

When wholesale costs increase, retailers typically recoup this through the upper end of the range of market offers, not the lower end. There is no evidence to suggest retailers have responded to the DMO by reducing the number of lower priced market offers.

From DMO 4 (2022–23) the spread of market offers increased, largely driven by increased risk in wholesale markets. There were a large number of market offers above the DMO and the median market offer was at the same level as the DMO. For DMO 5 (2023–24) the median market offer decreased back below the DMO. Some higher priced market offers priced up to the DMO remained in DMO 5, with very few market offers priced above the DMO.

Are electricity contract markets sufficiently liquid to allow for competition among retailers?

Liquidity plays a crucial role in contract markets. A liquid market is one in which a participant can buy or sell contracts within a reasonable price range without causing significant price fluctuations. It ensures smooth entry and exit from contract positions, enables faster incorporation of new information into prices, and supports effective risk management by allowing participants to adjust their contract positions quickly in response to market changes. Overall, liquidity enhances the overall functioning and attractiveness of contract markets.

The liquidity ratio is one measure of liquidity. It compares the traded volume of ASX contracts to the underlying demand in each region. While the liquidity ratio is a rudimentary tool, increased figures indicate that participants have greater opportunities to hedge their risks. Since 2022, the liquidity ratio has significantly improved in NSW, Queensland and Victoria, and is currently at an all-time high in all regions except South Australia. During the same time period, the liquidity ratio has fallen in South Australia. In all regions except South Australia between 7MW and 10 MW of contracts were traded for every 1MW of demand in 2023-24. In contracts, South Australia traded only 0.3MW of contracts per 1MW of demand over the same period.

ASX contract volumes have fallen across all contract types in South Australia. Low contract volumes can be driven by market design, changing operational environment and participant conduct. The decrease in contract volumes and the contract size (that is, volume per trade) is likely because standard ASX contracts are less attractive for hedging in South Australia compared with other NEM regions, due to South Australia's unique demand and generation profiles.

Our analysis of the contract positions of selected large participants in the South Australian market indicates they are mostly internally hedged and have reduced their contracting levels

⁴ ESC, ICRC, OTTER and QCA also have price regulation roles in Victoria, ACT, Tasmania and regional Queensland respectively.

over recent years. This could be due to aging assets with reduced reliability, the changing role of thermal plant and risk preferences, or the inability of the market to clear at the desired volumes or price.

Are wholesale electricity markets characterised by effective competition and competitive constraint?

There are elements of the market where we consider there is insufficient competitive tension to deliver efficient outcomes.

Ownership of dispatchable generation remains concentrated and a few large participants are often needed to meet demand, outside of solar hours. This increases the scope of those participants to exercise market power. The top 4 participants control 69% of the dispatchable generation in Queensland, 87% in NSW, 88% in Victoria and 86% in South Australia.

The entry of wind and solar generators has reduced market concentration. The market is least concentrated when these assets are generating and more concentrated at other times. The time-of-day profile of market concentration reflects this, with lower concentration in the middle of the day due to higher solar output. This is clearest in Queensland and NSW, which have more large-scale solar capacity. Victoria and South Australia have relatively less large-scale solar and more wind capacity, meaning that market concentration is more closely linked to wind conditions.

On average, market concentration levels are moderate in mainland NEM regions. However, the market can still be highly concentrated at times – particularly in South Australia and Victoria.

In South Australia low to mid-priced participant offers have now all but disappeared due to increased renewable generation and with thermal plants making high offers to avoid uneconomic dispatch. This is resulting in increased price volatility and creates greater incentives for participants to withhold capacity with the intent of benefiting from the higher prices this can create. A case study we examined in WEMPR 2024 indicates that, at least in certain instances, participants can take advantage of market conditions to make significant financial returns from this strategy. While the case study analyses the behaviour of one participant in particular, we consider that market conditions in South Australia have created an opportunity for many participants to exercise this strategy at times and the incentive is particularly pronounced for marginal thermal generators who may struggle with returns on average.

These market dynamics reflect the rapidly changing nature of the energy system and are a priority in the AER's market monitoring work. Market structure and dynamics are key drivers of pricing outcomes which is why our recommendations in WEMPR 2024 went to diversification, policy levers accompanying entry and exit of capacity and future market design. We also continue to look at conduct and will consider whether we should take any enforcement steps or make any referrals to other regulators in this regard.

Regulatory and policy environment

As noted in the consultation paper, the energy market is dynamic and is undergoing a transformation. The continued evolution of the regulatory framework and government policy should also inform the considerations around the future of the PEMM.

The review should consider whether the policy objectives of the PEMM can be achieved and supported by other changes. For example, the Capacity Investment Scheme and similar state programs and the [NEM wholesale market settings review](#) provide opportunities to

mitigate the use of market power in the wholesale market. If the PEMM is retained, it needs to be able to achieve its aims in an evolving market.

PEMM prohibitions

The AER has considered the Commonwealth's *Regulatory Policy, Practice & Performance Framework* in forming its views on the questions raised by this review, in particular the following principles:

- Principle 1: Targeted and risk based. Regulation must be targeted, risk based and proportionate.
- Principle 2: Integrated in existing systems. Take a whole-of-system approach by integrating, leveraging, improving, and modernising existing regulatory systems, where appropriate.

Retail market prohibition (s 153E(1))

A corporation contravenes this section if:

- a) the corporation offers to supply electricity, or supplies electricity, to small customers; and
- b) the corporation fails to make reasonable adjustments to the price of those offers, or to the price of those supplies, to reflect sustained and substantial reductions in its underlying cost of procuring electricity.

Section 153E is designed to ensure retailers pass on sustained cost reductions to consumers. It is not clear whether this prohibition has had any discernible impact on the behaviour of retailers in this respect. Since its introduction there have been periods where it has not applied at all (ie. periods in which prices have been rising).

While there is no explicit legislative relationship between s 153E and the DMO/Victorian Default Offer (VDO), in practice it has been observed that a downward movement in the DMO/VDO (which reflect forecasts of net reductions in total input costs) may prompt downward movements in retail prices to ensure compliance with s 153E. The median market offer went down from DMO 1 to DMO 2, and initially went down from DMO 2 to DMO 3, but started increasing as the wholesale prices rose. For DMOs 4 and 5, the median market offer increased in line with an increase in the DMO. For DMO 6 the median market offer fell in all DMO regions in response to a lower DMO, except for in the Energex region, where it rose in line with an increase in the DMO for Energex.

Issues the PEMM review should consider:

1. Whether the retail provision should be 'symmetrical', that is, imposing an obligation on retailers to reduce prices as costs decline, and increase prices only in line with costs?
2. How this prohibition relates to the DMO and other pricing regulations in States and Territories (eg. the VDO)? For example, should there be an explicit connection between retail offers and prices, and the annual DMO (in relevant jurisdictions)?
3. Where these provisions should be located and who should be responsible for administration?

Symmetry and link to retail price regulation

As noted above, changes in wholesale costs have been a key driver of changes in the DMO and market offers. Wholesale prices can vary year to year, both up and down. This will continue to contribute to movements in retail prices. The principle underpinning the retail

prohibition is prices should reflect underlying costs. This raises the question of whether the prohibition should apply regardless of whether prices are rising or falling.

Possible changes to the role of any agency

The administration of the retail prohibition requires the assessment of the costs to a retailer of supplying electricity to small customers, including wholesale, network, retail and environmental costs. The AER is responsible for assessing movements in these costs for the purposes of setting the annual DMO and has existing related compliance and enforcement responsibilities. For example, as outlined above, the AER has used this expertise to investigate overcharging of customers in embedded networks.

Any required uplift in capability

The AER currently collects cost data to determine the DMO under s 44AAFA of the Competition and Consumer Act (CCA) and has compliance and enforcement capability and expertise. The AER regularly undertakes complex investigations and works holistically across the AER to identify and use relevant expertise to secure compliance. Were it considered appropriate for the AER to assume responsibility for this provision, there would be little need for uplift in capability or expertise.

Through existing provisions, the AER can share relevant information with the ACCC for it to monitor and enforce the retail prohibition. But these arrangements could be improved. This is discussed further below.

Cost implications

Data collection would be streamlined if the AER took on PEMM functions, as duplication in obtaining information would be significantly reduced. This in turn will reduce the compliance burden on energy market participants (and ultimately the cost to supply customers) and the overall cost to government of regulating this sector.

Possible legislative change

The CCA currently provides for Part XICA to sunset on 31 December 2025. Any option, other than permitting this to occur, will require amendments to the CCA. Subject to the agreement of National Energy Customer Framework (NECF) jurisdictions, the prohibition could be moved to the National Energy Retail Law (NERL). However, this is not essential. Both the AER and ACCC currently perform functions under the CCA or instruments made under that Act (eg. the Electricity Retail Code). The location of these provisions does not determine responsibility for their administration. The AER has information collection powers under the CCA which do not have state-based limitations (s 44AAFA). If the PEMM was moved to the NERL, a minor amendment to Victoria's application legislation would be required to enable the AER to collect certain price information directly from retailers in that jurisdiction. The CCA also contains provisions that enable the AER to take action in Federal Court to enforce national energy laws (s 44AAG). These could be easily modified to extend to contraventions of the PEMM prohibitions.

Wholesale market prohibitions (ss 153F, 153G and 153H)

A corporation contravenes s 153F if:

- a) any of the following conditions are satisfied:
 - i. the corporation generates electricity;
 - ii. a body corporate that is related to the corporation generates electricity; and
- b) the corporation does any of the following:

- i. fails to offer electricity financial contracts;
 - ii. limits or restricts its offers to enter into electricity financial contracts;
 - iii. offers to enter into electricity financial contracts in a way that has, or on terms that have, the effect or likely effect of preventing, limiting or restricting acceptance of those offers; and
- c) the corporation does so for the purpose of substantially lessening competition in any electricity market.

Section 153F prohibits specific conduct that has the purpose, or is likely to have the effect, of substantially lessening competition. It operates alongside the existing prohibitions in Part IV of the CCA, including s 46.

A corporation contravenes s 153G if:

- a) the corporation:
 - i. bids or offers to supply electricity in relation to an electricity spot market; or
 - ii. fails to bid or offer to supply electricity in relation to an electricity spot market; and
- b) the corporation does so:
 - i. fraudulently, dishonestly or in bad faith; or
 - ii. for the purpose of distorting or manipulating prices in that electricity spot market.

A corporation contravenes s 153H if:

- a) the corporation:
 - i. bids or offers to supply electricity in relation to an electricity spot market; or
 - ii. fails to bid or offer to supply electricity in relation to an electricity spot market; and
- b) the corporation does so fraudulently, dishonestly or in bad faith, for the purpose of distorting or manipulating prices in that electricity spot market.

Sections 153G and 153H are designed to prevent the manipulation of electricity spot markets. It is not clear whether these prohibitions have had any discernible impact on the behaviour of generators in this respect. There is a degree of overlap with the National Electricity Rules (NER). For example, a generator which submitted a fraudulent offer may well contravene cl 3.8.22A, which prohibits offers or rebids that are false or misleading. However, other conduct captured by these provisions might not be prohibited by the NER.

Issues the PEMM review should consider:

1. Whether competition law is an effective way of addressing concerns about availability of financial contracts in energy markets? Whether direct regulatory intervention would be more effective?
2. Whether the scope of laws concerned with market manipulation should be widened?
3. Who is best placed to be responsible for enforcement of laws concerned with market manipulation?

The effectiveness of s 153F

Section 153F is designed to deter electricity generators from withholding access to financial contracts for an anti-competitive purpose. It is not clear whether this prohibition has had any discernible impact on the behaviour of generators in this respect.

The AER's most recent wholesale electricity market report shows financial contract liquidity remains a concern in parts of the NEM (in particular South Australia). What is more difficult to determine is whether this is the result of conduct that is intended to damage competition, or other commercial considerations that are driving the actions of generators. The wholesale electricity market operates on a 5-minute basis and there are multiple generators capable of offering contracts for sale. As our WEMPR analysis has shown, there are also a range of factors affecting the extent to which generators offer contracts for sale including the level of internal hedging for vertically integrated market participants, reliability and fuel issues with generating plant and internal risk strategies.

The AER considers that direct regulatory intervention may be a more effective measure to address concerns about the availability of financial contracts where those concerns exist.

For example, the Retailer Reliability Obligation (RRO) is supported by a "Market Liquidity Obligation" (MLO) that requires key generators to offer financial contracts once the RRO has been triggered for a region. Direct intervention such as the MLO is a more effective market making tool than the deterrent effect of a law concerned with anti-competitive conduct. The RRO is an example of such intervention being targeted at those regions (and in those periods) where it is deemed necessary. Further consideration should be given to whether an intervention of this type may be more suitable.

The role of a sector specific competition prohibition is a lesser consideration. Section 153F currently sits alongside the existing prohibitions in Part IV of the CCA. Unlike s 46, s 153F does not require proof that a generator has a substantial degree of market power, but does require proof that a generator has engaged in proscribed conduct for the purpose of substantially lessening competition. A breach of s 46 can be found on the effect of conduct alone. In its current form, s 153F arguably adds little to the deterrent effect of the more general provisions in Part IV of the CCA. Even if modified, competition-based prohibitions are likely to be less effective than direct intervention to require hedge contracts to be provided where necessary.

There may also be benefits in targeting this issue through stronger laws against electricity market manipulation. This is discussed further below.

Market manipulation laws

As with s 153F, we consider that ss 153G and 153H may have had limited impact on the market. This is because of the design of the provisions, including the overlap with existing NER requirements and the focus on manipulating prices in spot markets rather than on the cross-market manipulation risk between spot *and* contract markets. Contract prices are set based on the expectation of future spot prices. Spot price movements today can impact the current quarterly contract price, but also future contract prices. This provides an incentive for a participant to engage in manipulative behaviour in spot markets, not solely for the purpose of affecting spot prices, but also to potentially increase the participant's revenue from contracting. This dynamic flows directly through to retail prices as it affects the cost to retailers of managing spot price risk in contract markets as well as the overall level of that spot price risk.

Electricity contract markets are currently regulated under the Corporations Act, with ASIC being responsible for enforcement. There is no law that explicitly targets conduct in the

electricity spot market that is engaged in for the purpose of manipulating an electricity contract market. It is not clear if such conduct would be prohibited under the Corporations Act.

Under Part 22 of the Gas Rules the AER already has responsibility for monitoring market manipulation provisions for the Gas Supply Hubs at Wallumbilla in Queensland and Moomba in South Australia. The AER can prosecute a manipulation which concerns, for example, the physical Wallumbilla Gas Supply Hub exchange being manipulated to influence related ASX/ASIC regulated derivative positions. Part 25 of the Gas Rules also prohibits manipulation of the Day Ahead Auction which the AER monitors for.

The AER is responsible for monitoring and enforcing compliance with the electricity spot market rules found in Chapter 3 of the NER. The AER's functions were recently expanded to enable systematic monitoring of electricity and gas wholesale spot and contract markets and provide the AER with visibility of the underlying drivers influencing market outcomes. There would be clear synergies in the AER administering a strengthened market manipulation law applying to electricity spot and contract markets. Subject to the agreement of NECF jurisdictions, the electricity market manipulation prohibition could be moved to the National Electricity Law or NER. However, this is not essential. The location of these provisions does not determine responsibility for their administration.

Any required uplift in capability or expertise

The AER is required under statute to collect data and monitor and report on the performance of wholesale electricity spot and contract markets, and has compliance and enforcement capability and expertise. Were it considered appropriate for the AER to assume responsibility for compliance with a market manipulation law, there would be little need for uplift in capability or expertise.

Regardless of any changes to Part XICA, the ACCC will require access to market data to monitor and enforce compliance with Part IV in energy markets. While there are existing provisions that allow one regulator to provide information to another, this has, on occasion, proven itself to be impractical due to wider administrative law constraints. The AER considers there is merit in developing a new and transparent legislative scheme under which data is collected once and made available, as of right, to those entities that require access in order to perform their functions.⁵ This would better enable the AER to share information with the ACCC to monitor and enforce compliance with Part IV in energy markets and also lower the cost to industry and government.

Cost implications

The streamlining of data collection that would occur if the AER took on PEMM functions can be expected to significantly reduce duplication in obtaining information. This in turn will reduce the compliance burden on energy market participants (and ultimately the cost to supply customers) and the overall cost to government of regulating this sector).

Monitoring the market

The AER agrees effective market monitoring plays an important role in ensuring markets deliver the outcomes the community expects of them. It does this in several ways:

- By providing transparency as to market performance

⁵ A similar approach is to be found in section 27 of the *National Greenhouse and Emissions Reporting Act 2007*.

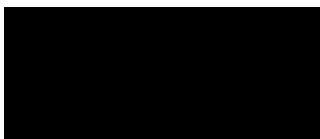
- By sending a clear signal to market participants that their conduct is under surveillance. This makes an important contribution to compliance with rules and laws.
- By providing policy makers and governments with insights that can assist with market reforms or the development of regulatory solutions when required.

The AER has been established to carry out a range of functions under law to undertake comprehensive, routine monitoring of Australian energy markets, including surveillance of participant conduct, and assessing the effectiveness of competition and market efficiency. We produce a range of reports covering the retail and wholesale markets on a regular basis. Our powers have been expanded by Parliaments since the ACCC Inquiry was initiated (in line with recommendations from the ACCC itself) to include electricity contract markets (among other markets). These changes mean the AER now has both the powers and capabilities necessary to cost-effectively perform the functions the Inquiry was set up to deliver in a time-limited fashion. The AER has a wide range of powers to obtain and use information for the purpose of performing its monitoring and reporting functions. While a minor amendment to Victorian legislation would be needed to enable the AER to collect certain price information directly from Victorian retailers under the NERL, the AER currently reports on retail market performance in Victoria using a combination of AER data and information provided by the Essential Services Commission of Victoria.

In January 2021 the civil penalties that apply for breaches of National Energy Laws increased significantly. Since this time, the AER's compliance and enforcement capability has increased significantly. In the 15 years between 2006 and 2020 the AER secured \$3.44 million in infringement notice penalties and \$4.7 million in court penalties. In the 4 years between 2021 and 2024 the AER secured \$2.87 million in infringement notice penalties and \$81.7 million in court penalties.

The ACCC Inquiry has served its purpose since being established in 2018, providing a range of insights and recommendations that have been acted upon by governments. However, the need for it has been displaced by subsequent changes made to the regulatory and reporting framework. Renewing it for a further period would risk being duplicative with the ongoing work of the AER and would increase the cost to government and industry. As noted above, information sharing provisions already exist to allow the AER to share data with the ACCC to fulfil its competition regulatory functions, and there may be opportunity to strengthen these provisions.

Yours sincerely



Clare Savage
Chair
Australian Energy Regulator

Sent by email on: 03.02.2025