



4 May 2023

Consultation – Wholesale market monitoring and reporting reforms

Attention: Energy Ministers Secretariat

By email: WMMR@dcceew.gov.au

Dear Sir/ Madam,

Wholesale Market Monitoring and Reporting Reforms

The Australian Financial Markets Association (**AFMA**) and the Australian Energy Council (**AEC**), jointly ***The Associations***, have decided to respond jointly to the Energy Minister's consultation on the proposed legislative changes to expand the AER wholesale market monitoring and reporting framework. AFMA is the leading industry association promoting efficiency, integrity, and professionalism in Australia's financial markets. AFMA represents the common interests of its members in dealing with issues relevant to the good reputation, efficiency and competitiveness of wholesale banking and financial markets, in Australia. AFMA has more than 125 members reflecting the broad range of participants in financial markets, including energy companies which are key participants in the Australian energy market. The AEC is the peak industry body for electricity and downstream natural gas businesses operating in the competitive wholesale and retail energy markets. AEC members generate and sell energy to over 10 million homes and businesses and are major investors in renewable energy generation.

The Associations responded to your earlier consultation drawing on our members' experience of similar reforms to ASIC and APRA's information gathering powers in response to the global financial crisis and their experience of the ACCC's ongoing Gas Inquiry.¹ We are concerned that our recommendations to streamline the proposal for the benefit of both participants and the AER do not appear to have been reflected in the exposure draft. In the Association's view, the current proposal

¹ <https://www.energy.gov.au/sites/default/files/2022-09/WMM%20Consultation%20Paper%20Response%20-%20AFMA%20and%20AEC%20%28joint%29.pdf>

is inappropriately broad, fails to fully appreciate the scale of the proposed reporting obligation and will have significant cost implications for both participants and the AER and is unlikely to deliver the anticipated insights. We are therefore restating the concerns we expressed in relation to the earlier consultation and ask Ministers to take the opportunity to develop an alternative approach to achieve their objectives of understanding competition and risk management in the energy market.

1. Previous submission

In our previous submission, the Associations drew on our members' experience of the implementation of a number of reporting regimes by the ACCC, ASIC and the AER in the hope of assisting policy makers to design a regime that would meet the AER's needs at the lowest cost to all involved. We felt policy makers needed to clearly articulate the purpose of the information collection and understand what information was currently held by market bodies. Once this was understood, we thought it could guide the development of a reporting regime that would allow the AER to access the information it needed, including by allowing the AER to access information held by other regulators or market bodies.

This consultation is clear about the purpose of the information collection, being:

- Reporting on competition in energy markets
- Understanding risk management of energy market participants

But we do not think this increased clarity about the purpose of the information collection has been reflected in more precise thinking about the required information powers. As stated in our previous submission, we consider that a failure to fully consider the AER's information needs is likely to result in unnecessarily cumbersome and costly information gathering that may not lead to the insights that the AER is hoping to gain. We encourage policy makers to re-read our previous submission, but we also repeat our key points here.

2. Approach to collection

The Associations' key comment on these reforms is that we do not think adequate attention has been given to how the AER will collect information. The consultation papers have provided no detail on how information will be collected. The Associations' discussions with the AER indicated this work is at a very preliminary stage within the regulator, with no additional resourcing anticipated until they commence the implementation process after the policy positions have been set. We think this is a flawed strategy as the approach to information collection will be the main driver of costs for both the AER and participants; and we think these are critical issues that should be considered as part of the policy making process.

We do not want to repeat all our comments from our earlier submission but the key issues we identified are:

- a) **Technological requirements** - our members' experience is that the AER has limited technology resources to assist in their information gathering and relies heavily on the provision of written responses and data in manually populated spreadsheets. We do not consider this approach is appropriate for reporting high volume financial contract information. We consider that the AER will need to either; invest significantly in technology to allow an ASIC like OTC reporting framework or limit the data it collects.

- b) **Information vs insight** – in our previous submission we recommended that policy makers should determine what insights the AER wants to get and then determine the most appropriate way to collect this information, rather than collecting large volumes of data which then have to be processed. We contrasted the approaches APRA and ASIC take to data collection and noted that APRA’s more targeted approach appears to give greater insight into participants’ risk management than the much more costly ASIC OTC reporting regime.
- c) **Frequency** – the frequency that data is required to be reported is a significant driver of costs for both the AER and participants. There continues to be no clarity about the frequency of data collection that the AER will require, and we encourage policy makers to provide this as soon as possible.

We also note additional regulatory reporting requirements could act as a barrier for new entrants as the compliance costs will fall particularly heavily on new entrants and smaller participants. We recommend that the reporting obligations should be proportional to participants impact on the market, this could mean either exempting small participant or reducing their reporting obligations proportional to their impact on the market.

AFMA and AEC Recommendations

- i. Policy makers and the AER should immediately commence detailed work on the AER’s proposed information collection approach.
- ii. Stakeholders should be given substantial time to review and respond to proposals about the AER’s approach to information collection.
- iii. Policy makers should provide clarity about the anticipated reporting frequency under the proposed framework.
- iv. The framework should apply proportionally to a participants impact on the market. Consideration should be given to exempting small participant or reduced their reporting requirements.

3. Scope of information

In our previous submission, we provided a number of comments about the scope of information to be collected. The current amendments do not provide any greater clarity on this, so we repeat our comments here:

3.1. Avoiding duplication

A number of regulatory bodies currently collect data about energy markets, the Associations are keen to avoid duplication and believes that where possible, the AER should rely on data collected by other bodies. Areas where we think this is particularly relevant are:

- a) **ASIC’s OTC derivative reporting function** – ASIC currently holds data about gas and weather derivatives, and Treasury is currently reviewing the instrument that exempts electricity derivatives. Only a single regulator should collect critical data elements for OTC derivatives.
- b) **AEMO’s planning powers** – AEMO currently collects large amounts of data about physical energy markets that could be used by the AER for its market monitoring function. We particularly think that the information provided to AEMO for the Energy Adequacy Assessment Projection regarding fuel supplies and other restrictions on generator

availability should be used by the AER in preference to requesting similar additional information.

- c) **Gas Bulletin Board** – AEMO’s gas bulletin board is increasingly being used to capture data about gas market activity and there are a number of current reforms that will increase the amount of data AEMO holds. The AER should use this data where possible, and consideration should be given to whether it is more appropriate for any additional data to be collected under the bulletin board arrangements rather than by the AER.

We note the exposure draft contains a provision requiring the AER to consider if it is able to obtain information in another way before requesting information. While this approach is potentially helpful it is not in and of itself, adequate to address our concerns about duplication and efficiency and we think policy makers need to provide additional detail about how the AER will use its powers. We also think they should consider if additional provisions are required to allow the AER to access information held by other regulators or market bodies, such as derivative data held by ASIC. Any powers to facilitate the sharing of information between regulators should be accompanied by appropriate protections for confidential information.

We also wish to draw particular attention to the interaction between the AER’s proposed new powers and the ongoing ACCC Gas Inquiry. The Associations’ find it difficult to distinguish between the purpose of the ACCC’s inquiry and the proposed AER functions as both seem to be directed at understanding competition and risk in the gas market. We think it is inappropriate for two closely related regulators to both be performing near identical reviews of the gas market. Given that policy makers appear to want ongoing monitoring of the gas market, it would seem appropriate for this function to move from the ACCC’s inquiry to a permanent AER function; but as the ACCC’s inquiry was recently extended to 2030 this does not appear to be policy makers intention. We consider that it is extremely wasteful to have two closely related regulators preparing similar reports and recommend that policy makers determine which regulator should have carriage of and accountability for this work.

3.2. Types of information

The Associations consider that the AER’s data collection powers should be limited to information that will materially assist them to perform their functions. We note that the previous reference to contracts “underwriting the supply” of gas or electricity has been removed which we think is positive as we were unclear what it was intended to capture, but we continue to think the following classes of information are not necessary for the AER to perform its market monitoring function:

1. **Contracts for the transmission or distribution of electricity** – in the current regulated open access framework it is unclear what value these contracts would have for the AER.
2. **Contracts relating to the cost of fuel** – the information in these will primarily relate to the cost of coal, gas, and liquid fuels. These are all tradable commodities with easily observable prices. We do not think individual firm’s supply contracts would provide enough value to warrant collection of the data.

The exposure draft proposes a restriction on the AER collecting information about contracts that were in effect more than 5 years prior to the commencement of the legislation. While we appreciate the restriction on the AER’s backward looking powers for periods before the scheme started, we would also like clarity about how the AER will use its information powers to request

backward looking information as we would expect that the AER should be focusing on recent and future periods, rather than spending substantial resources updating historic information.

The exposure draft also contains the capacity for the scope of the AER's market monitoring function to be expanded by regulation, through the definitions of "monitored market" and "wholesale gas market" in the NEL and NGL respectively. The Associations think this is inappropriate as it allows the scope of the AER's market monitoring powers to be expanded without consultation and potentially allows their powers to be expanded beyond markets for gas and electricity. The Associations recommend that this provision be deleted or, if it is considered necessary, the regulation making power should be limited to markets for gas and electricity in participating jurisdictions.

AFMA and AEC Recommendations

- v. Policy makers and the AER should provide clarity about how they will avoid duplication of reporting requirements.
- vi. Only one regulator should monitor the gas market. Policy makers should decide if this is the AER or ACCC and the other should cease involvement in the space.
- vii. The AER should not be able to collect information about the transmission or distribution of electricity or the cost of fuel for generators.
- viii. Policy makers should consider if additional provisions are required to allow the AER to receive information from other regulators or market bodies that currently collect it.
- ix. Appropriate protections for confidential information should be put in place for any information shared between regulators.
- x. Policy makers should provide clarity about the extent to which the AER will use its powers to collect backward looking information.
- xi. The ability to expand the AER's market monitoring power by regulation should be removed or restricted to adding new markets for gas and electricity in the participating jurisdictions.

4. Information for enforcement

The consultation paper makes it clear that the AER will be able to use information collected under the market monitoring framework for enforcement. The Associations' view is that the AER's market monitoring should be clearly delineated from its compliance and enforcement functions. Our view is that current information powers under the NEL and NGL are adequate to support investigations of potential breaches of the law and rules, and that data should not be collected under the market monitoring function for enforcement purposes. We consider that the AER should be required to use its existing information gathering powers to support formal enforcement activity.

AFMA and AEC Recommendations

- xii. Information collected for the purpose of market monitoring should not be able to be used for enforcement.
- xiii. The AER should be required to make separate formal requests for information to support enforcement activity.

5. Consider the implementation challenges

The consultation paper still does not provide any detail on how the new arrangements will be implemented. The Associations think the implementation process should be considered in detail as part of the development of the function.

Ongoing industry wide data collection will involve substantial work to agree standards for reporting data and a significant period of time will need to be provided for this work. This work was not done prior to the commencement of the ACCC's Gas Inquiry resulting in a sub-optimal reporting process while data collection standards were agreed. The Associations suggest that the AER should develop and consult on a detailed implementation plan setting out how it intends to use these powers.

AFMA and AEC Recommendations

- xiv. Policy makers should allow a 24-month window for implementing the new obligations.
- xv. The AER should work with participants to develop a detailed implementation plan.

6. Post implementation review

We support the proposal for a review of the market monitoring arrangements after four years of operation but would appreciate it if policy makers could commit to this review either in legislation or as a definitive Energy and Climate Change Ministerial Council decision.

The Associations welcome the opportunity to directly discuss the proposed changes to the AER's information gathering powers. Please contact either organisation regarding this letter:

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Yours sincerely



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