



25 August 2022

Department of Climate Change, Energy, the Environment and Water
GPO Box 858
Canberra, ACT 2601

Attention: Energy Ministers Secretariat

By email: energyministers@industry.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 AER wholesale market monitoring function. 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 and efficiency and competitiveness of wholesale banking and financial markets in Australia. AFMA has more than 120 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 appreciate recent events in Australian gas and electricity markets have highlighted the need for a well informed regulator. In responding to this consultation, we are 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.

While we are sympathetic to ministers' desire to ensure the AER has appropriate information powers we think the current proposal is inappropriately broad and will have significant cost implications without necessarily delivering the anticipated insights. The associations consider that the proposal

could be improved by clearly understanding the purpose of the information collection and then letting this, and a good appreciation of implementation costs, determine the scope of the information powers and the most appropriate collection mechanisms. We also want to highlight that much of the information collected under the proposed powers will be extremely commercially sensitive and care will need to be taken in how it is used and disclosed. Given this is a new function we also recommend that there should be a post implementation review. Our submission highlights our concerns with the enabling provisions and areas where we anticipate there may be challenges implementing the policy intention.

1. Clearly define the need

The consultation paper does not really define the purpose of the AER's proposed market monitoring function but lists many examples of what the regulator could potentially do with the information. The examples cover a broad range of topics that would require varying types of information. The associations think governments and the AER should try to refine their thinking on why the AER needs the information as this could potentially inform the scope of the information powers and the collection methods. This approach is likely to ensure that the AER has access to the information it needs while reducing the time and cost involved in producing and analysing it for both the AER and regulated businesses.

Based on the consultation paper we suggest that the purposes the AER intends to use the information for could be described as:

1. **Market Insight** – enhancing the AER's knowledge of energy markets to allow them to produce publicly available reports and inform policy development
2. **Risk Management** – give the AER insight into risk management practices at individual firms and across the market
3. **Enforcement** – analyse data to identify misconduct

We think information requirements will differ for each of these purposes and this will have an impact on the type of information and the frequency with which it is required.

The associations also note that there is a mismatch between the scope of the proposed market monitoring function and the AER's market regulatory powers. Most notably the AER does not have any powers regarding financial markets and the AER's risk management powers are confined to its roles under the National Energy Retail Law of administering ROLR arrangements and authorising retailers. We suggest that the AER's market monitoring powers should focus on areas where the AER has regulatory powers.

2. Approach to collection

The consultation paper does not provide much detail on how the AER will collect data. While we appreciate that much of the detail will inevitably be worked through in implementation discussions with the AER, we think it is important that policy makers and the AER consider how they propose to collect information. The method of collection will have a considerable cost impact, particularly for smaller participants and new entrants, and may influence who is the most appropriate body to collect the information.

2.1. Technology requirements

Our members experience of providing data to the AER and ACCC is that they have limited technology resources to assist in their information gathering and rely heavily on the provision of written responses and data in manually populated spreadsheets. This approach is generally adequate for their current information gathering requirements but may not be suitable for the proposed arrangements which envisage collecting a range of information about physical and financial markets as well as physical operations. For example, the proposed expansion of the market monitoring power to electricity contract markets appears to contemplate implementing something broadly equivalent to ASIC's OTC derivative reporting framework but without an OTC repository. The associations caution that this is likely to be impractical to implement. Implementation of OTC derivative reporting was a substantial undertaking in the financial services sector requiring significant time and large investments in technology to allow reporting of all trades within two days of execution. New Zealand has implemented an electricity sector specific derivative reporting framework, while it is in some ways simpler than ASIC's arrangements, it also relies on NZX acting as a repository. Additionally, once the data is collected the AER would need to invest in substantial data analytical capability to make use of it.

The consultation paper is less clear on how contract data will be collected in the physical gas markets. Our expectation is that the AER will adopt a similar manual approach to the ACCC in its Gas Inquiry. This approach is cumbersome and time consuming for regulated entities and while adequate for a fixed term inquiry is probably not appropriate for an ongoing monitoring function. Collecting large amounts of data on gas contracts will be challenging as they are more complex and less standardised than financial derivatives, as a result we anticipate that substantial investment in systems may be required to support any ongoing reporting requirements.

AFMA thinks it is worth considering if mass collection of contract data is the most effective way to give the AER the insights it is seeking, and we discuss alternative approaches below. If policy makers determine the AER needs access to large quantities of contract data, we think they should consider if the AER is the appropriate body to collect this information. Serious consideration should be given to utilising ASIC's existing OTC derivative reporting framework for electricity derivatives.

2.2. Information vs insight

The presumption of the consultation paper is that if the AER has access to enough data it will be able to analyse it to gain new insights into energy markets. The associations think it may be worth considering if this is the best approach or if it may be simpler and substantially cheaper to determine what the AER and policy makers want to know and then determine the most effective way to get it. We think a more targeted approach of requesting explanatory information from regulated businesses rather than large quantities of data may achieve the AER's objectives at lower cost and without the AER needing to develop a large data analysis capability.

Some of the issues raised in the paper concerning risk management have been considered previously in financial markets and this experience could be helpful in designing the AER's approach to information collection. The Australian Prudential Regulatory Authority (APRA) has responsibility for ensuring the financial soundness of Australian banks and other prudentially regulated institutions. Part of this involves understanding the risks of bank's derivative positions to individual banks and to the market as a whole. APRA does not use the data collected by ASIC in the OTC derivative repository

for this task, instead they ask banks to periodically provide position reports which contain aggregated data in a form that allows APRA to perform its analysis without having to sort through the huge volumes of OTC data reported to ASIC. The AER may find that a similar approach would be appropriate at significantly lower cost to the AER and the impacted businesses.

Additionally, mass reporting of transactions may not give the insight the AER anticipates. For instance, the paper proposes that data collection would give the AER increased visibility of new products. While this is possible the mechanics of transaction reporting mean that products have to be reported in clearly defined categories which can obscure new products that do not fit into existing categories as they tend to be bundled together in other or exotic categories. If the AER is interested in understanding innovations in OTC products it would probably be simpler to gather this information through a more qualitative process such as regular, confidential, meetings with market participants to discuss new products. It is worth noting that contract data would not give much insight into how vertically integrated participants manage risk using their own assets while more targeted inquiries about risk management could lead to a better understanding.

2.3. Frequency

The frequency with which the AER requires information will influence the best way to collect it and have a substantial impact on market participants costs. Some of the proposed uses for the information such as monitoring firms risk management practices or anticipating ROLR events would require timely data that would suggest either periodic or near real time reporting which would need substantial investment to support it. Other functions such as more general market studies to support policy development may need much less frequent data and some activities such as understanding logistical constraints at plants are more suited to one off requests.

The associations think policy makers should consider the frequency that data is required when developing the framework as this will have an impact on how the AER approaches data collection and the implementation costs for regulated businesses and the AER.

2.4. Information for enforcement

Some of the purposes for information collected under the proposed market monitoring function relate to compliance and 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.

3. Scope of information

The draft provisions are written very broadly, the associations think they should be refined to limit the scope of information collection to that which is useful to the AER and to avoid duplication of data collection with other bodies.

3.1. Avoid 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 and where the AER is considered to be the better body to collect the data, then the other data collection should cease. Areas where we think this is particularly relevant are:

1. **ASIC's OTC derivative reporting function** – ASIC currently holds data about gas and weather derivatives this data collection should not be duplicated.
2. **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.
3. **Gas Bulletin Board** – AEMO's gas bulletin board is increasingly being used to capture data about gas market activity. The AER should use this data where possible and consideration should be given to if it is more appropriate for any additional data to be collected under the bulletin board arrangements rather than by the AER.
4. **ACCC's Gas Inquiry** – much of the information the AER is proposing to request is similar to that currently provided to the ACCC's Gas Inquiry. We think the AER should avoid duplicating this work for the duration of the inquiry.

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 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 firms supply contracts would provide enough value to warrant collection of the data.
3. **Contracts underwriting the supply of gas or electricity** – we are unsure what is intended by this wording and think it could capture a range of agreements relating to long term off-take or financing. We would appreciate some clarity about the types of information this is intended to capture.

4. Threshold for using powers

The AER's information gather powers were primarily designed to support its role as the economic regulator of monopoly assets. As a result, there are currently few restrictions on when the AER can use its information powers other than the information being required for the performance or exercise of an AER function or power. The purpose of s18D is clearer in this context as at the time policy makers wanted to avoid the cost to the industry of broad information requests to support a broadly worded market monitoring power. For comparison the equivalent provision in the *Competition and Consumer Act*, s95H concerning pricing enquiries, can only be used at the request of the Minister, which prevents the ACCC from asking for information unless a request had been made.

The policy position regarding the AER's market monitoring function has clearly changed but the associations think it is appropriate that before imposing new information requirements on the industry, policy makers consider limiting the circumstances in which these powers can be used. This

could be done by defining the monitoring function more explicitly. This could potentially be done as we have proposed in section 1 with a risk management function that requires more frequent (possibly quarterly) data provision and the market insight function that could be linked to a fixed output, like the biannual report currently produced under s18C(2) of the NEL, which presumably would only require information to be provided once every two years. We think this type of approach could give the AER access to the timely information it wants for some functions while minimising the industry's costs for less time sensitive work.

As discussed above we do not think the market monitoring information powers should be used as an alternative to supplement the AER's compliance and enforcement information gathering powers. We suggest that there should be a restriction on the AER from collecting information under the market monitoring function for the primary purpose of compliance or enforcement.

5. Consider the implementation challenges

The consultation paper does not provide any detail on how the new arrangements would be implemented. The associations think the implementation process should be considered in detail as part of the development of the function. As we have said above, implementing an industry specific OTC derivative reporting regime would be a very significant undertaking for the AER and the industry requiring a lengthy implementation process. Extending ASIC's OTC reporting regime to electricity could be simpler but would also involve significant investment for many of our members.

We also caution that any ongoing industry wide data collection will involve substantial work to agree standards for reporting data and the AER will need to allow a significant period of time 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 provide a detailed plan setting out how it intends to use these powers as part of the consultation on the enabling provisions as this will give the industry greater confidence about how the powers will be used.

We also note that 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.

6. Treatment of confidential information

The market monitoring function will give the AER access to new highly commercially sensitive information. While the AER's protections for confidential information are broadly adequate we think protections should be put in place to ensure the information is not released in a way that can identify or otherwise have a negative commercial impact on the parties it relates to. Our members would appreciate guidance from the AER on how it intends to use and disclose confidential information collected under its market monitoring powers. We think this is particularly important given the ESB's Data Strategy work, the AEC's views on this work are addressed in their recent submission to the ESB.¹ Additionally, we think there should be a prohibition on the AER using information gathered through market monitoring for enforcement.

¹ <https://www.energycouncil.com.au/media/jobmnrfa/20220819-aec-submission-to-esb-s-data-strategy-initial-reforms.pdf>

7. Post implementation review

The associations recommend Energy Ministers conduct a post implementation review of the AER's market monitoring function. The review should look at the outcomes produced by the function, the effectiveness of AER's administration of it and the cost to industry. The review should be conducted after the function has been in operation for 3 years.

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:

AFMA

Lindsay Gamble
02 9776 7994
lgamble@afma.com.au

AEC

Peter Brook
03 9205 3103
Peter.Brook@energycouncil.com.au

Yours sincerely



Lindsay Gamble
Policy Director
Australian Financial Markets Association

Yours sincerely



Peter Brook
Wholesale Policy Manager
Australian Energy Council