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Regulatory Activities: Inquiry into Auditor-General's Report No. 5 (2020-21) Regulation of the National Energy Market

AGL Energy (**AGL**) welcomes the opportunity to comment on the Joint Committee of Public Accounts and Audit inquiry into the recent Auditor-General's (**AG**) Report No.5 2020-21 on the Regulation of the National Energy Market (**NEM report**)¹.

The Australian Energy Market is comprised of a range of state and federal bodies that help operate, monitor, and structure the flow of energy to Australians. Since the establishment of the National Energy Customer Framework (**NECF**) in 2012, the energy market has undergone significant changes and revisions and over time the role of the energy market bodies has become increasingly blurred.

Reviews and audits, such as that undertaken by the AG for the NEM report are one of many important tools to ensure that regulatory bodies are accountable, and that the rules and bounds that govern them remain fit-for purpose. The NEM report was undertaken to determine whether the Australian Energy Regulator (**AER**) is effective in the regulation of the NEM and made six recommendations to improve outcomes and processes.

AGL agrees with all six recommendations and welcome the AER and Australian Competition and Consumer Commission's (**ACCC**) acceptance of these recommendations but consider there is more that needs to be done to offer an effective energy market for both industry and its consumers. In the following submission we make two additional recommendations for broader consideration by this Committee:

- 1) the need to create appropriate clarity between energy market body functions and roles; and
- 2) the importance of undertaking cost-benefit assessments when seeking to introduce new regulatory obligations on markets.

These two recommendations help to reframe the concept of effectiveness within AG NEM Report to include broader regulatory considerations and market needs. To do this, the structure that governs the AER must also be reviewed to determine effectiveness and their role as rule enforcer

¹ https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Public_Accounts_and_Audit/RegulatoryActivities



– but increasingly as a rules maker through new mandatory guideline making powers made under the National Energy Rules and Laws.²

While we recognise that the AG was limited to the AER roles and requirements outlined within the National Energy Rules and Laws, it is our position that the described role is too limited, and fails to consider broader matters such as whether policy and regulatory changes have been effective (e.g. post-implementation review), and appropriate in relation to relative costs and benefits.

To ensure the AER exercises its powers in the long-term interests of consumers, there must be a reasonable level of certainty and consistency in the development of regulatory obligations. It is appropriate to place greater rigour and certainty into the AER's process by introducing clear considerations for the AER to include in decision-making processes, particularly in relation to their mandatory guideline making powers to ensure that regulation on the industry is both necessary and efficient and that any new regulations clearly show that the AER has considered and sought out the solution that provides the best net benefit to the community and industry.

Role of market bodies

The NEM report notes that there is ongoing community, political and media interest in energy supply and that decisions made by the AER can affect energy prices, security and reliability. Given the significance of the AER in the broader energy market structure and increased interest, we believe there should be broader and independent consideration of the energy sector's governance arrangements.

The NEM report notes that promoting competition, reliability and security is shared with other energy market institutions, and the AER has not clearly established its purpose, priorities and contributions to these objectives aligned to its roles in the energy market.

In particular, the report notes that in relation to governance and risk management, where multiple institutions operate in an industry (such as energy) regulators need clarity about the extent of their roles and influence on market outcomes, and to reflect those in governance, risk management and performance reporting frameworks.³

This is increasingly important, as market design and overarching strategies (such as the Energy Security Board's (ESB) Data Strategy) seek to create efficiencies but under a governance structure that may not be operating as effectively as it should. We noted in our submission to the ESB that the role of market bodies needs to be more closely considered.⁴ This view was supported by the Productivity Commission, which concluded:

The fundamental objective of the National Electricity Market (NEM) — the need for efficient investment in, and operation of, electricity networks in the long-term interests of consumers

² See, Benefit Change Guidelines (NERR, 48B), Retail Pricing Information Guideline (NERL, s61), Compliance and Reporting Guideline (NERL, s281), Performance Reporting Guideline (NERL, s286), Hardship Guidelines (NERR, 75A), Retailer of Last Resort (ROLR) Guideline (NERL, Division 4).

³ Auditor-General's Report No.5 (2020-21), Regulation of the National Energy Market, p.17.

⁴ See AGL Submission to the ESB Data Strategy on the [AGL Hub](#)



— has been frustrated by flaws in its (ever more) complex regulatory and institutional arrangements.⁵

In particular, we noted that issues raised by the ESB about the apparent failings of the market appears to be strongly related to overlapping and unclear roles of core agencies creating inefficiencies and 'gaps'. The ESB Data Strategy included comments relating to the overlapping functions of government and regulatory bodies creating burdensome reporting obligations on market participants.⁶

It is AGL's position that the role of the AER as well as other market bodies require greater clarity and limitation to reduce duplication and inefficiencies.

These views are consistent with a range of other reviews, such as the final report of the Review of Governance Arrangements for Australian Energy Markets⁷ which found that there was a strategic policy deficit, which led to diminished clarity and focus in roles, fragmentation and a diminished sense of common purpose.

The original intent of the Australian Energy Market Agreement (AEMA), is the separation of responsibilities, in which the Australian Energy Market Commission (AEMC) is the rule-maker and the AER is the rule-enforcer, no longer holds true. Through the increasing use of guidelines, the role of rules making is falling to the AER creating an inconsistent and confused regulatory regime.

Clarifying regulatory functions

The AG identifies in the NEM report that the AER's management of reviews and assessment processes has been partially effective, but that they are typically not completed in accordance with set timeframes. What we identify here is an issue with the frameworks in which the AER's performance is being addressed. The statutory requirements focus on timeliness but not on cost-benefit assessment of the contents or the overall effectiveness of these changes.

Increasingly more obligations are being placed on industry participants through the development and amendment of AER guidelines under both the NERL and the NERR.⁸ As noted above, this is blurring the lines between rules maker and rules enforcer.

Even currently, the AEMC, traditionally the rules maker, is consulting on proposed simplification of retailer billing obligations and has suggested that this could be achieved by introduction of guideline making powers under the AER.⁹ The AEMC has proposed that in addition to introducing objectives the AER are bound by, there should also be considerations (such as costs to industry) that must also be considered when developing and updating the billing guideline. While this is the

⁵ Productivity Commission, Electricity Network Regulatory Frameworks, Report No 62 (2013), page 4

⁶ See the ESB Data Strategy here: <http://www.coagenergycouncil.gov.au/publications/energy-security-board-data-strategy-submissions-consultation-paper-published>

⁷ Review of Governance Arrangements for Australian Energy Markets (Vertigan report) October 2015.

⁸ See for example, NERR 48B (Benefit Change Guideline), NERL 61 (Retail Pricing Information Guideline), NERL s281 (Compliance and Reporting Guideline), NERR 75A (Hardship policy Guideline), NERL Division 4 (Retailer of Last Resort Guideline).

⁹ <https://www.aemc.gov.au/rule-changes/bill-contents-and-billing-requirements>



right intention, applying this type of assessment on an ad hoc basis into individual guidelines is neither efficient nor promoting consistency of practice.

At present, the obligations on the AER for creating guidelines are significantly high level and only focus on consultation process, they do not relate to tests that the AER must apply or what outcome the AER should seek in making and amending guidelines. There is no obligation for broader economic considerations, impacts to investment, competition, or the market or how these balance with any proposed benefits to be delivered to consumers. There is no requirement to ensure the effectiveness of the guidelines or to undertake any review.

In the first instance, the AEMC should consider whether any regulatory change can be achieved through amendments to the National Energy Rules before seeking to delegate to the AER through additional guideline making powers. Where delegation of rules making through guidelines does occur, appropriate measures and requirements must be put in place to provide clarity of market body roles and ensure that consumers and industry participants experience consistent, measurable, transparent and proportionate regulatory obligations imposed through such guidelines.

Please contact us if you have any questions regarding our submission.