

National Energy Laws Amendment (Wholesale Market Monitoring) Bill 2023

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National Energy Laws Amendment (Wholesale Market Monitoring) Bill 2023

1 Name of Act

This Act is the *National Energy Laws Amendment (Wholesale Market Monitoring) Act 2023*.

2 Commencement

This Act commences on a day or days to be appointed by proclamation.

Schedule 1 Amendment of National Electricity Law

[1] Section 2—Definitions

Insert in alphabetical order in section 2(1)—

effective competition, for Part 3, Division 1A—see section 18B;

electricity contract, for Part 3, Division 1A—see section 18A;

financial risk management product, for Part 3, Division 1A—see section 18A;

general information gathering powers, for Part 3, Division 1A—see section 18A;

monitored market, for Part 3, Division 1A—see section 18A;

relevant agreement, for Part 3, Division 1A—see section 18A;

South Australian Minister means the Minister in right of the Crown of South Australia administering Part 2 of the *National Electricity (South Australia) Act 1996* of South Australia;

wholesale market monitoring guidelines, for Part 3, Division 1A—see section 18EA.

[2] Section 18A—Definitions

Omit section 18A(1). Insert instead—

In this Division—

effective competition—see section 18B;

electricity contract means an agreement, entered into by a registered participant, however described and whether coming into existence before or after the commencement of this section, that relates to a wholesale electricity market and includes an agreement—

- (a) to supply electricity; or
- (b) to purchase electricity; or
- (c) for the transmission or distribution of electricity; or
- (d) relating to fuel and other inputs used in the generation of electricity;

financial risk management product means a contract or other arrangement entered into by a registered participant to manage financial risk including, without limitation, risks associated with the following—

- (a) price volatility in a wholesale electricity market;
- (b) volatility in supply and demand in a wholesale electricity market;
- (c) volatility in the price of fuels and other inputs used in the generation of electricity;

general information gathering powers means the powers under section 28;

monitored market means—

- (a) a wholesale electricity market; and
- (b) a market for financial risk management products; and
- (c) a market prescribed by the Regulations;

relevant agreement means—

- (a) an electricity contract; and
- (b) a financial risk management product;

wholesale market monitoring guidelines—see section 18EA.

[3] Section 18B—Meaning of effective competition

Omit “wholesale electricity market”. Insert instead “monitored market”.

[4] Section 18C—AER wholesale market monitoring and reporting functions

Omit section 18C(1)(a). Insert instead—

- (a) to, in accordance with this Law and the Rules, regularly and systematically monitor and review the performance of monitored markets;

[5] Section 18C(1)(b) and (3)

Omit “wholesale electricity market” wherever occurring. Insert instead “monitored market”.

[6] Section 18C(1)(c)

Omit the paragraph. Insert instead—

- (c) other monitoring or analysing functions, conferred on the AER by the Rules, relating to the following matters within a monitored market—
 - (i) offers;
 - (ii) prices, including forecast and actual prices and bidding.

[7] Section 18C(2)(b)(i)

Omit “wholesale electricity market monitored”. Insert instead “monitored market”.

[8] Section 18C(5)

Insert after section 18C(4)—

- (5) Before publishing a report prepared under subsection (2)(a) the AER must consult with relevant stakeholders.

[9] Sections 18D–18EA

Omit sections 18D and 18E. Insert instead—

18D AER may obtain agreements and information about agreements

- (1) In undertaking a function under this Division the AER—
 - (a) may use the general information gathering powers to obtain the following—
 - (i) a relevant agreement;
 - (ii) the information about a relevant agreement that the AER reasonably requires to undertake the function; and
 - (b) must not use the general information gathering powers in respect of a relevant agreement that ceased to have effect more than 5 years before the commencement of this section, as substituted by the *National Energy Laws Amendment (Wholesale Market Monitoring) Act 2023*.
- (2) When obtaining an relevant agreement or information about a relevant agreement for the purposes of a function under this Division, the AER must consider a request to omit information that would identify a party to the agreement who is not a registered participant.
- (3) The AER must grant the request unless satisfied that omitting the information is likely to materially affect the AER’s ability to undertake 1 or more functions under this Division.

- (4) The Regulations or the Rules may provide that the general information gathering powers must not be used for a function under this Division for 1 or more classes of relevant agreement.

18E Matters to be considered before using compulsory information gathering powers

Before using the general information gathering powers for a function under this Division, the AER must—

- (a) be satisfied the information is reasonably required for the AER to carry out the function; and
- (b) consider whether the information—
 - (i) is publicly available; or
 - (ii) can be obtained by the AER in another way.

18EA Wholesale market monitoring guidelines

- (1) The AER must prepare guidelines (*wholesale market monitoring guidelines*) about the following—
 - (a) the scope of the AER wholesale market monitoring functions;
 - (b) the collection of information for the purposes of this Division;
 - (c) the publication and reporting of information under this Division.
- (2) Without limiting what may be included in wholesale market monitoring guidelines, the guidelines must include the following—
 - (a) information about the things the AER proposes to consider in assessing—
 - (i) competition in markets; and
 - (ii) the effective functioning of markets;
 - (b) a summary of the compliance obligations of persons who hold information;
 - (c) the processes the AER proposes to adopt in requesting information including processes designed to minimise the time and resources market participants will devote to responding to a request;
 - (d) the type of information the AER expects to routinely request and how frequently it will request that information;
 - (e) the type of information the AER does not expect to request;
 - (f) classes of relevant agreements the AER does not expect to request;
 - (g) the formats in which the AER expects information to be submitted;
 - (h) a general outline of the way the AER will ensure that commercially sensitive information obtained for wholesale market monitoring functions is kept securely;
 - (i) other matters prescribed by the Regulations or the Rules.
- (3) Wholesale market monitoring guidelines are not required to address matters that are addressed in a guideline made under section 28ZF.
- (4) Before making wholesale market monitoring guidelines the AER must consult stakeholders in accordance with the Rules.
- (5) Wholesale market monitoring guidelines must be published on the AER website within 6 months after commencement of this section.

[10] Section 28—Power to obtain information and documents in relation to performance and exercise of functions and powers

Insert before section 28(17)(a)—

- (aa) the number of notices given under this section for the purposes of a function under Division 1A;

[11] Sections 90(1) and 90A(1)

Omit “The Minister in right of the Crown of South Australia administering Part 2 of the *National Electricity (South Australia) Act 1996* of South Australia” wherever occurring.

Insert instead “The South Australian Minister”.

[12] Sections 90(2) and 90A(4)

Omit “Minister referred to in that subsection” wherever occurring.

Insert instead “South Australian Minister”.

[13] Sections 90(5) and 90A(7)

Omit “Minister referred to in subsection (1) makes Rules under that subsection” wherever occurring.

Insert instead “South Australian Minister makes Rules under subsection (1)”.

[14] Section 90A(2)

Omit “Minister referred to in subsection (1).”

Insert instead “South Australian Minister”.

[15] Sections 90AB(1), 90B(1), 90C(1), 90D(1), 90DA(1), 90E(1), 90EA(1), 90EB(1) and 90F(1)

Omit “The Minister in right of the Crown of South Australia administering Part 2 of the *National Electricity (South Australia) Act 1996* of South Australia (the *South Australian Minister*)” wherever occurring.

Insert instead “The South Australian Minister”.

[16] Section 90BA—South Australian Minister may make consequential Rules relating to rate of return instrument

Omit section 90BA(8), definition of *South Australian Minister*.

[17] Section 90EC

Insert after section 90EB—

90EC South Australian Minister to make initial Rules relating to the making of wholesale market monitoring guidelines

- (1) The South Australian Minister may make Rules for the purpose of the AER consulting stakeholders on the wholesale market monitoring guidelines under section 18EA(4).
- (2) Section 34(3) applies to Rules made under subsection (1) in the same way as it applies to Rules made by the AEMC.
- (3) As soon as practicable after making Rules under subsection (1), the South Australian Minister must—
 - (a) publish notice of the making of the Rules in the South Australian Government Gazette; and

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- (b) make the Rules publicly available.
- (4) The notice referred to in subsection (3)(a) must state—
 - (a) the date on which the Rules commence operation; or
 - (b) if different Rules will commence operation on different dates, those dates.
- (5) The Rules made under subsection (1) may only be made on the recommendation of the MCE.
- (6) Once the first Rules have been made under subsection (1), no further Rules can be made under that subsection.

Schedule 2 Amendment of National Gas Law

[1] Section 2—Definitions

Insert in alphabetical order in section 2(1)—

AER wholesale market monitoring functions—the AER wholesale market monitoring functions are set out in section 30AC(1);

AER wholesale market reporting functions—the AER wholesale market reporting functions are set out in section 30AC(2);

bilateral trading agreement, for Chapter 2, Part 1, Division 1AA—see section 30AA;

effective competition, for Chapter 2, Part 1, Division 1AA—see section 30AA;

financial risk management product, for Chapter 2, Part 1, Division 1AA—see section 30AA;

gas contract for Chapter 2, Part 1, Division 1AA—see section 30AA;

general information gathering powers, for Chapter 2, Part 1, Division 1AA—see section 30AA;

relevant agreement, for Chapter 2, Part 1, Division 1AA—see section 30AA;

wholesale gas market, for Chapter 2, Part 1, Division 1AA—see section 30AA;

wholesale gas market participant, for Chapter 2, Part 1, Division 1AA—see section 30AA;

wholesale market monitoring guidelines, for Chapter 2, Part 1, Division 1AA—see section 30AA;

[2] Section 27—Functions and powers of AER

Insert after section 27(1)(g)—

- (ga) AER wholesale market monitoring functions and AER wholesale market reporting functions; and

[3] Chapter 2, Part 1, Division 1AA

Insert after section 30—

Division 1AA Wholesale gas markets—AER monitoring and reporting functions

30AA Definitions

In this Division—

bilateral trading agreement means an agreement, entered into outside a wholesale gas market, to supply gas—

- (a) to a wholesale gas market participant; or

- (b) to an end user—

- (i) other than by a retailer; or

- (ii) by a retailer in a quantity exceeding the amount prescribed by the wholesale market monitoring guidelines;

effective competition has the meaning given by section 30AB;

financial risk management product means a contract or other arrangement, entered into by a wholesale gas market participant, to manage financial risk including, without limitation, risks associated with the following—

- (a) volatility in the price for 1 or more covered gases in a wholesale gas market;
- (b) volatility in supply and demand in a wholesale gas market;
- (c) volatility in the price of services involved in the extraction, refinement or processing, transportation or storage of 1 or more covered gases;

gas contract means an agreement, entered into by a wholesale gas market participant, however described and whether coming into existence before or after the commencement of this section that relates to 1 or more of the following—

- (a) the supply of covered gas; or
- (b) the purchase of covered gas; or
- (c) the transportation of covered gas; or
- (d) the storage of covered gas; or
- (e) the refining or processing, including compression and blending, of covered gas;
- (f) a function or process prescribed by the Regulations or the Rules;

general information gathering powers means the powers under section 42;

relevant agreement means the following—

- (a) a bilateral trading agreement;
- (b) a financial risk management product;
- (c) a gas contract;

wholesale gas market means a wholesale market for covered gas—

- (a) regulated under this Law and the Rules including the following—
 - (i) a declared wholesale gas market;
 - (ii) a short term trading market;
 - (iii) a gas trading exchange; or
- (b) prescribed by the Regulations;

wholesale gas market participant means a person who is 1 or more of the following—

- (a) a person who is registered on the Gas Bulletin Board;
- (b) a person who supplies covered gas to or withdraws covered gas from a gas trading exchange administered by AEMO;
- (c) a Registered participant;
- (d) a member of a class of persons prescribed by the Regulations or the Rules;

wholesale market monitoring guidelines has the meaning given by section 30AF.

30AB Meaning of effective competition

For the purposes of this Division, the AER must, in assessing whether there is effective competition within a wholesale gas market, have regard to—

- (a) whether—
 - (i) there are active competitors in the market and whether those competitors hold a reasonably sustainable position in the market; or
 - (ii) there is merely the threat of competition in the market; and

- (b) whether prices are determined on a long term basis by underlying costs rather than the existence of market power, even though a wholesale gas market participant may hold a substantial degree of market power from time to time; and
- (c) whether barriers to entry into the market are sufficiently low so that a substantial degree of market power may only be held by a wholesale gas market participant on a temporary basis; and
- (d) whether there is independent rivalry in all dimensions of the price, product or service offered in the market; and
- (e) other matters the AER considers relevant.

30AC AER wholesale market monitoring and reporting functions

- (1) The AER wholesale market monitoring functions are as follows—
 - (a) to, in accordance with this Law and the Rules, regularly and systematically monitor and review—
 - (i) the performance of wholesale gas markets; and
 - (ii) the operation and effect on wholesale gas markets of financial risk management products; and
 - (iii) whether the availability of financial risk management products has an effect on competition within, and the efficient functioning of, wholesale gas markets; and
 - (iv) bilateral trading agreements, including their effect on wholesale gas markets;
 - (b) in connection with paragraph (a), to identify and analyse whether, for a particular wholesale gas market—
 - (i) there is effective competition within the market; and
 - (ii) there are features of the market that may be detrimental to effective competition within the market; and
 - (iii) there are features of the market that may be impacting detrimentally on the efficient functioning of the market and, if so, the extent of the inefficiency; and
 - (iv) bilateral trading agreements have an impact on the efficient functioning of the market;
 - (c) other monitoring or analysing functions, conferred on the AER by the Rules, relating to the following matters within a wholesale gas market—
 - (i) offers;
 - (ii) prices, including forecast and actual prices and bidding.
- (2) The AER wholesale market reporting functions are as follows—
 - (a) to prepare, at least once every 2 years, a report on the performance of the AER wholesale market monitoring functions (a **monitoring report**);
 - (b) to provide, as the AER thinks fit, advice to the MCE on the results of the performance of the AER wholesale market monitoring functions, including advice as to—
 - (i) whether the results identify a need for a legislative, regulatory or other response to address systemic or other features of a market that may—
 - (A) be detrimental to effective competition within the market; or

- (B) detrimentally impact on the efficient functioning of the market; and
 - (ii) limitations on the AER's ability to communicate with relevant persons about the performance of the AER wholesale market monitoring functions;
 - (c) other reporting requirements, conferred on the AER by the Rules, relating to the AER wholesale market monitoring functions.
- (3) A monitoring report must, for a wholesale gas market monitored during the period to which the report relates—
 - (a) be for a monitoring period of at least 5 years; and
 - (b) contain a discussion and analysis of—
 - (i) the results of the performance of the AER wholesale market monitoring functions for the relevant period; and
 - (ii) features of the market with a detrimental impact on the efficient functioning of the market and the achievement of the national gas objective, including, but not limited to, significant barriers to entry; and
 - (iii) the effect of bilateral trading agreements on the efficient functioning of the market; and
 - (iv) structural features of the covered gas industry that generate concerns that there may not be effective competition within the market; and
 - (v) inefficiencies in the market, their causes and whether conditions in the market are such that the inefficiencies are likely to impact detrimentally in the long term on the efficient functioning of the market; and
 - (vi) the monitoring methodology applied and the results of indicators, tests and calculations performed; and
 - (vii) other matters of a long term nature relevant to effective competition within the market, including, for example—
 - (A) observations relating to planned increases in pipeline capacity; and
 - (B) trends in demand for covered gases; and
 - (C) trends in the uptake of alternative sources of energy.
- (4) The AER must publish a monitoring report on its website.
- (5) Before publishing a monitoring report the AER must consult with relevant stakeholders.
- (6) Despite subsection (3)(a), a report prepared within the 5 years after the commencement of this section must relate to the period commencing on the day this section commences.

30AD AER may obtain agreements and information about agreements

- (1) In undertaking a function under this Division the AER—
 - (a) may use the general information gathering powers to obtain the following—
 - (i) a relevant agreement;
 - (ii) the information about a relevant agreement the AER reasonably requires to undertake the function; and

- (b) must not use the general information gathering powers in respect of a relevant agreement that ceased to have effect more than 5 years before the commencement of this section.
- (2) When obtaining a relevant agreement or information about a relevant agreement for the purposes of a function under this Division, the AER must consider a request to omit information that would identify a party to the agreement who is not a wholesale gas market participant.
- (3) The AER must grant a request made under subsection (2) unless satisfied that omitting the information is likely to materially affect the AER's ability to undertake 1 or more functions under this Division.
- (4) The Regulations or the Rules may provide that the general information gathering powers must not be used for a function under this Division for 1 or more classes of relevant agreement.

30AE Matters to be considered before using compulsory information gathering powers

Before using the general information gathering powers for a function under this Division, the AER must—

- (a) be satisfied the information is reasonably required for the AER to carry out functions under section 30AC(1); and
- (b) consider whether the information—
 - (i) is publicly available; or
 - (ii) can be obtained by the AER in another way.

30AF Wholesale market monitoring guidelines

- (1) The AER must prepare guidelines (*wholesale market monitoring guidelines*) about the following—
 - (a) the scope of the AER wholesale market monitoring functions;
 - (b) the collection of information for the purposes of this Division;
 - (c) the publication and reporting of information under this Division.
- (2) Without limiting what may be included in wholesale market monitoring guidelines, the guidelines must include the following—
 - (a) information about the things the AER proposes to consider in assessing—
 - (i) effective competition in markets; and
 - (ii) the effective functioning of markets;
 - (b) a summary of the compliance obligations of persons who hold information;
 - (c) the processes the AER proposes to adopt in requesting information including processes designed to minimise the time and resources wholesale gas market participants will devote to responding to a request;
 - (d) the type of information the AER expects to routinely request and how frequently it will request that information;
 - (e) the type of information the AER does not expect to request;
 - (f) classes of relevant agreements the AER does not expect to request;
 - (g) the formats in which the AER expects information to be submitted;

- (h) a general outline of the way the AER will ensure that commercially sensitive information obtained for wholesale market monitoring functions is kept securely;
- (i) other matters prescribed by the Regulations or the Rules.
- (3) Wholesale market monitoring guidelines are not required to address matters that are addressed in a guideline made under section 68.
- (4) Before making wholesale market monitoring guidelines the AER must consult stakeholders in accordance with the Rules.
- (5) Wholesale market monitoring guidelines must be published on the AER website within 6 months after commencement of this section.

[4] Section 42—Power to obtain information and documents in relation to performance and exercise of functions and powers

Insert before section 42(17)(a)—

- (aa) the number of notices given under this section for the purposes of a function under Division 1AA;

[5] Section 294FD

Insert after section 294FC—

294FD South Australian Minister to make initial Rules relating to the making of wholesale market monitoring guidelines

- (1) The South Australian Minister may make rules for the purpose of the AER consulting stakeholders on the wholesale market monitoring guidelines under section 30AF(4).
- (2) The Rules made under subsection (1) may only be made on the recommendation of the MCE.
- (3) Section 74(3) applies to Rules made under subsection (1) in the same way as it applies to Rules made by the AEMC.
- (4) As soon as practicable after making Rules under subsection (1), the South Australian Minister must—
 - (a) publish notice of the making of the Rules in the South Australian Government Gazette; and
 - (b) make the Rules publicly available.
- (5) The notice referred to in subsection (4)(a) must state—
 - (a) the date on which the Rules commence operation; or
 - (b) if different Rules will commence operation on different dates, those dates.
- (6) Once the first Rules have been made under subsection (1), no further Rules can be made under that subsection.