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South Australia

**National Electricity (South Australia) (Australian
Energy Regulator—Wholesale Market
Monitoring) Amendment Bill 2016**

A BILL FOR

An Act to amend the *National Electricity (South Australia) Act 1996*.

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The Parliament of South Australia enacts as follows:

Part 1—Preliminary

1—Short title

- 5 This Act may be cited as the *National Electricity (South Australia) (Australian Energy Regulator—Wholesale Market Monitoring) Amendment Act 2016*.

2—Commencement

- (1) This Act will come into operation on a day to be fixed by proclamation.
- (2) Section 7(5) of the *Acts Interpretation Act 1915* does not apply to this Act or a provision of this Act.

10 3—Amendment provisions

In this Act, a provision in Part 2 amends the *National Electricity Law* set out in the Schedule to the *National Electricity (South Australia) Act 1996*.

Part 2—Amendment of *National Electricity Law*

4—Amendment of section 2—Definitions

- (1) Section 2(1)—after the definition of *AER economic regulatory function or power* insert:

5 *AER wholesale market monitoring functions*—the AER wholesale market monitoring functions are as set out in section 18C(1);

AER wholesale market reporting functions—the AER wholesale market reporting functions are as set out in section 18C(2);

- (2) Section 2(1)—after the definition of *VENCorp* insert:

10 *wholesale electricity market* means any wholesale market for electricity regulated under this Law and the Rules.

5—Amendment of section 15—Functions and powers of AER

Section 15(1)—after paragraph (eb) insert:

- 15 (ec) AER wholesale market monitoring functions and AER wholesale market reporting functions; and

6—Insertion of Part 3 Division 1A

After Part 3 Division 1 insert:

Division 1A—Wholesale electricity markets—AER monitoring and reporting functions

20 18A—Definitions

- (1) In this Division—

confidential supplier information means information obtained from a wholesale electricity supplier by the AER under section 18D(1)(b) that is taken to be confidential information under section 18D(2);

25 *effective competition* has the meaning given by section 18B;

wholesale electricity supplier means a Registered Participant who supplies electricity or services through the wholesale exchange operated and administered by AEMO under this Law and the Rules.

30 18B—Meaning of effective competition

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

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

- 5
- (b) whether prices are determined on a long term basis by underlying costs rather than the existence of market power, even though a particular competitor 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 particular competitor 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
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- (e) any other matters that the AER considers relevant.

18C—AER wholesale market monitoring and reporting functions

(1) The AER wholesale market monitoring functions are as follows:

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- (a) to monitor and review on a regular and systematic basis the performance of wholesale electricity markets in accordance with this Law and the Rules;
- (b) in connection with paragraph (a), to identify and analyse whether, in relation to a particular wholesale electricity market—
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- (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
- 25
- (iii) there are features of the market that may be impacting detrimentally on the efficient functioning of the market (and, if so, to assess the extent of the inefficiency);
- (c) other monitoring or analysing functions that relate to offers and prices (including forecast prices, actual prices and bidding) within any wholesale electricity market conferred on the AER by the Rules.
- 30

(2) The AER wholesale market reporting functions are as follows:

- 35
- (a) to prepare, at least once every 2 years, a report on the results of the performance of the AER wholesale market monitoring functions;
- (b) to provide, as the AER thinks fit, advice on the results of the performance of the AER wholesale market monitoring functions to the MCE, including advice as to—
- 40
- (i) the AER's opinion (and reasons for the opinion) on whether those results identify, in relation to a wholesale electricity market monitored, features of the market (whether systemic or otherwise) that—

- (A) may be detrimental to effective competition within the market; or
- (B) may be impacting detrimentally on the efficient functioning of the market,
- 5 such that a legislative, regulatory or other response is required; and
- (ii) any limitations that the AER considers may restrict its ability to communicate with relevant persons about the results of the performance of the AER
- 10 wholesale market monitoring functions;
- (c) other reporting requirements that relate to the AER wholesale market monitoring functions conferred on the AER by the Rules.
- (3) A report prepared under subsection (2)(a) must, in relation to a
- 15 wholesale electricity market monitored during the period to which the report relates (which must be a period of at least 5 years), contain a discussion and analysis of—
- (a) the results of the performance of the AER wholesale market monitoring functions for the relevant period; and
- 20 (b) features of the market that impact detrimentally on the efficient functioning of the market and the achievement of the national electricity objective, including (but not limited to)—
- (i) the presence of significant barriers to entry; or
- 25 (ii) any other features of the industry structure that give rise to concerns that there may not be effective competition within the market; and
- (c) 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
- 30 (d) the monitoring methodology applied and the results of indicators, tests and calculations performed; and
- (e) other matters of a long term nature relevant to effective competition within the market, including, for example, observations relating to planned increases in interconnector capacity and trends in demand for electricity and in the uptake of alternative sources of energy.
- 35
- (4) The AER must publish a report prepared under subsection (2)(a) on
- 40 its website.

18D—Provision, use and disclosure of information

- (1) The following provisions apply to the performance of the AER wholesale market monitoring functions:
- (a) the AER must, in performing the AER wholesale market monitoring functions in relation to a wholesale electricity market, use publicly available information to identify any relevant matter referred to in section 18C(1);
 - (b) if the AER has, in accordance with paragraph (a), identified any such relevant matter, the AER may, in accordance with its powers under this Part, obtain information from a wholesale electricity supplier—
 - (i) to assist it in determining whether—
 - (A) there is effective competition within the market; and
 - (B) there are features of the market that may be detrimental to effective competition within the market; and
 - (C) there are features of the market that may be impacting detrimentally on the efficient functioning of the market (and, if so, to assess the extent of the inefficiency); and
 - (ii) if there is an inefficiency identified, to analyse if the inefficiency gives rise to competition in the market that is not effective competition (or, in relation to an inefficiency identified by the AER but that is no longer present in the market, if the inefficiency gave rise to competition in the market that was not effective competition).
- (2) Information obtained under subsection (1)(b) is taken to have been given to the AER in confidence (whether or not an express claim of confidentiality is made when the information is given).
- (3) Despite anything to the contrary in this Part, the AER must not use confidential supplier information for any purpose other than the performance of the AER wholesale market monitoring functions or the AER wholesale market reporting functions.
- (4) Despite anything to the contrary in this Part, the AER must not disclose confidential supplier information unless—
- (a) the disclosure is for the purposes of the AER wholesale market monitoring functions or the AER wholesale market reporting functions; and

- 5 (b) the confidential supplier information has been combined or arranged with other information so that it does not reveal any confidential aspects of the confidential supplier information or identify the wholesale electricity supplier to whom the information relates.
- 10 (5) A requirement to disclose information at common law, including under the rules of natural justice, to the extent that the information is confidential supplier information, is limited to the disclosure of such information in accordance with subsection (4) (and the common law, including the rules of natural justice, are modified by force of this subsection so as to accord with subsection (4)).
- 15 (6) If the AER exercises its powers under this Part to obtain information contained in a document for the purposes of subsection (1)(b), the AER must return the document to the person from whom it was obtained—
- (a) within 12 months of obtaining the document; or
- (b) if it is not reasonably practicable to return the document within the 12 month period referred to in paragraph (a), as soon as is reasonably practicable to do so after the expiry of that 12 month period.
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18E—Immunity from liability

- 25 (1) Despite any Act or law to the contrary, no liability for breach of confidence attaches to a designated entity with respect to the disclosure of confidential supplier information by any designated entity if the designated entity who made the disclosure reasonably believed—
- (a) that the information was not confidential supplier information; or
- (b) that the information disclosed did not reveal any confidential aspects of the information or would not identify the wholesale electricity supplier to whom the information relates.
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- (2) In this section—
- designated entity* means—
- 35 (a) the AER; or
- (b) a member of the AER; or
- (c) a person assisting the AER to perform its functions (or in the exercise of its powers) under this Division.

7—Amendment of Schedule 3—Savings and transitionals

Schedule 3—after Part 12 insert:

**Part 13—Transitional provision related to AER
wholesale market reporting functions**

**26—Transitional provision related to AER wholesale market
reporting functions**

(1) Despite section 18C(3)—

(a) the first report prepared under section 18C(2)(a) must relate to the period of 2 years after the relevant day; and

(b) the second report prepared under section 18C(2)(a) must relate to the period of 4 years after the relevant day.

(2) In this clause—

relevant day means the day on which this clause comes into operation.