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Performance Audit

Regulation of the National Energy Market

Australian Energy Regulator

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Canberra ACT
3 September 2020

Dear Mr President
Dear Mr Speaker

In accordance with the authority contained in the *Auditor-General Act 1997*, I have undertaken an independent performance audit in the Australian Energy Regulator. The report is titled the *Regulation of the National Energy Market*. I present the report of this audit to the Parliament.

Following its presentation and receipt, the report will be placed on the Australian National Audit Office's website — <http://www.anao.gov.au>.

Yours sincerely

A handwritten signature in black ink, reading 'Grant Hehir'.

Grant Hehir
Auditor-General

The Honourable the President of the Senate
The Honourable the Speaker of the House of Representatives
Parliament House
Canberra ACT

AUDITING FOR AUSTRALIA

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Audit snapshot

Auditor-General Report No.5 2020–21 *Regulation of the National Energy Market*



Why did we do this audit?

- ▶ To determine whether the Australian Energy Regulator (AER) is effectively regulating the National Energy Market.
- ▶ There is ongoing community, political and media interest in energy supply, particularly the impact of rising energy prices on Australian households and business.



What did we find?

- ▶ The AER has been a partly effective regulator of energy markets.
- ▶ It could have been more strategic in prioritising activities, particularly in adopting risk-based approaches to compliance and enforcement.
- ▶ Performance reporting arrangements have not enabled the AER to demonstrate it is meeting its purposes, such as promoting the efficient operation of energy services for the long-term interests of energy consumers with respect to price, quality, reliability and security.



Key facts

- ▶ The AER can influence energy prices through its regulatory activities, such as determining the amount of revenue that network businesses can charge.
- ▶ In 2018–19 the AER was responsible for regulating:
 - ▶ 110 generation businesses with an annual turnover of \$19.4 billion;
 - ▶ 84 retail businesses that provided energy services to around 9.5 million customers; and
 - ▶ 30 transmission and distribution networks with infrastructure assets valued at \$107 billion.



What did we recommend?

- ▶ The Auditor-General made six recommendations in relation to risk management, performance measurement, tools to support assessment processes, an information framework for compliance activities, and decision frameworks to streamline enforcement approaches.
- ▶ The AER agreed to all six recommendations.

\$9.5 billion

less revenue was approved by the AER than proposed by network businesses in determination processes between 1 July 2015 and November 2019.

56

infringement notices, 2 administrative undertakings, 6 enforceable undertaking and no court orders between 1 July 2015 and 30 June 2019.

208

'no action' letters issued by the AER in response to potential breaches by market participants between 1 July 2015 and 30 June 2019.

Summary and recommendations

Background

1. The National Energy Market commenced operation in 1998. In 2004, the Council of Australian Governments (COAG) established a governance framework to oversee the National Energy Market. The governance framework provides for participating jurisdictions to develop and implement Australian Energy Market Legislation relating to electricity and gas, and includes three market institutions that are accountable to the COAG Energy Council.¹
2. The Australian Energy Regulator (AER)² is one of three energy market institutions³, and is responsible for regulating the National Energy Market in accordance with the National Energy Laws. These laws aim to promote efficient investment in, and operation and use of, energy services for the long-term interests of energy consumers with respect to price, quality, safety, reliability and security. The National Energy Laws include the National Energy Retail Law, National Electricity Law and National Gas Law, and refer to national legislation that is implemented in each participating state and territory.⁴ Under the national legislation, the AER regulates wholesale and retail energy markets where competition exists, and provides economic regulation of monopoly networks through price-setting.
3. The National Energy Market is comprised of wholesale electricity and gas markets, the transmission and distribution networks and the retail sector. The energy supply chain begins with electricity and gas being generated or produced to be sold in wholesale markets. Energy retailers buy gas and electricity in the wholesale markets, and then bundle it with transportation services of transmission and distribution networks to sell to end-use customers. The retail energy markets allow retailers to supply and sell electricity, gas and energy services to residential and business customers.

Rationale for undertaking the audit

4. There is ongoing community, political and media interest in energy supply, particularly rising energy prices and their impact on Australian households and businesses. In regulating the energy sector, the AER makes decisions that can affect energy prices, security and reliability. The audit findings can provide lessons for more effective monitoring, reporting and enforcement of compliance with National Energy Laws, Rules and Regulations by the AER.

-
- 1 The COAG Energy Council was established in 2013 and coordinates government energy policy (primarily in relation to electricity and gas) in Australia. The COAG Energy Council is a ministerial forum made up of representatives from across the Commonwealth, each state and territory, and New Zealand. The Commonwealth Energy Minister is the Chair of the Energy Council. The COAG Energy Council reports to COAG.
 - 2 The AER (five Commonwealth, state and territory members who form the AER Board) is established as an independent entity under Section 44AE of the *Competition and Consumer Act 2010* that meets and makes decisions relating to its energy regulation functions and powers. The Australian Competition and Consumer Commission Chairperson provides staff and consultants to assist the AER Board to undertake its functions. These resources are managed in a division of the ACCC.
 - 3 The other market institutions are the Australian Energy Market Commission and the Australian Energy Market Operator.
 - 4 All jurisdictions have adopted the National Gas Law, all jurisdictions except Western Australia have adopted the National Electricity Law, and all jurisdictions except Western Australia, Victoria and the Northern Territory have adopted the National Energy Retail Law.

Audit objective and criteria

5. The audit assessed the effectiveness of the Australian Energy Regulator's regulation of energy markets. The high-level criteria were:

- Has the AER established and effectively communicated regulatory requirements to market participants and information to consumers to support informed decision-making?
- Has the AER identified compliance risks and developed an effective strategy to guide its regulatory activities?
- Has the AER effectively implemented a strategy and program of work to promote compliance, monitor compliance and address non-compliance, and fulfil other regulatory responsibilities?
- Has the AER established appropriate governance arrangements to manage the operation and performance of its regulation of the National Energy Market?

Conclusion

6. The Australian Energy Regulator has been a partially effective regulator of energy markets.

7. The AER has partially appropriate governance arrangements to oversight its National Energy Market regulatory responsibilities. At the time of the audit, the AER was implementing a range of recommendations from previous reviews aimed at improving its governance, management and risk approaches. The AER has not established a performance monitoring, measurement and reporting framework that enables it to clearly demonstrate its effectiveness in regulating energy markets.

8. The AER has been partially effective in undertaking regulatory activities. It has supported market participants by providing extensive information to help them fulfil regulatory requirements, including through a range of reports on compliance and performance, hosting public registers, and conducting prescribed reviews and assessments. There is scope for the AER to improve timeliness in meeting legislative timeframes and content requirements for reports, and in documenting assessment decisions. The AER has not been able to demonstrate that the Energy Made Easy energy price comparator website has been effective or represents value for money.

9. The AER has been partially effective in identifying compliance risks. Its approach to collecting and storing compliance intelligence did not support timely, complete and efficient retrieval and analysis of this information for compliance monitoring and risk management purposes. The AER maintained a strategy to guide its compliance activities, comprised of a principles-based overarching strategy document and separate annual compliance priorities. The basis for, and effectiveness of, the AER's annual compliance priorities was not clear.

10. The AER has been partially effective in identifying and resolving non-compliance through education, compliance monitoring and enforcement activities. While many individual education activities sought to address non-compliance, the absence of an education strategy and evaluation framework made it difficult for the AER to demonstrate that its approach was effective. The AER conducts many compliance monitoring activities, but did not have a triaging process to assist in deciding whether to pursue inquiries and investigations on a risk-basis. The absence of a decision

framework for selection and evaluation of enforcement outcomes has limited the AER's capacity to demonstrate that it has a proportionate and effective approach to resolving non-compliance.

Supporting findings

AER governance

11. The AER has established largely effective governance and oversight arrangements for its National Energy Market regulatory activities. The AER Board is responsible for oversight and making all decisions for its National Energy Market regulatory activities. The AER Board is supported by the ACCC through the AER division and structured governance arrangements. Between April 2019 and April 2020, the AER was progressing the implementation of recommendations from a number of reviews to improve governance and operational management arrangements, including to increase the strategic focus of the AER Board.

12. The AER has not established an effective performance monitoring, measurement and reporting framework that assists it to demonstrate its effectiveness as a regulator. The AER has two distinct arrangements for external reporting on its performance — the Commonwealth performance framework and the statements of expectations from the COAG Energy Council and Commonwealth Treasurer. These two frameworks were not well linked, and neither adequately captured the AER's purposes or provided a clear read from the purposes to the AER's deliverables. The frameworks were not complete, as reliability, quality, safety and efficiency elements were not explicitly measured, and there was limited consideration of security and price particularly with respect to the long term interests of consumers.

Regulatory activities

13. The AER's development and communication of procedures and guidelines has been largely effective. In February 2020 the AER had 76 guidelines, schemes and models (instruments) on its website, of which 62 per cent were required by legislation and the remainder were developed by the AER to explain obligations to market participants and inform consumers. Of 17 instruments examined: the 12 required to include content established by legislation did so; and all four instruments required to be developed by a specific date did so. Of 14 instruments examined that were required to comply with a consultation procedure, the procedure was generally complied with except for four instances where the instrument was not published within required timeframes. Bi-annual surveys indicate that stakeholders are satisfied with consultation procedures but approximately one third considered that the procedures did not lead to consistent or predictable outcomes.

14. The AER established and maintained an energy price comparator website that is largely appropriate, but cannot demonstrate that the website is effective or value for money. The AER established the Energy Made Easy website in accordance with legislative requirements by 1 July 2012, in order to allow residential and small business customers to compare available energy offers. The website provided only basic comparisons until 2015, and did not support smart meter comparisons until April 2020. Establishment and maintenance was achieved through procuring website development and maintenance services. Due to significant increases in the value of contracts, numerous changes in requirements during development stages, and failure to deliver key functionality of the website, the procurements did not demonstrate value for money.

The AER has not developed adequate performance measures and targets to measure the effectiveness of the website.

15. The AER has been partially effective in publishing timely and accurate performance and compliance reports. The AER has produced 15 types of reports, of which six addressed legislative requirements and nine were intended to increase transparency and inform stakeholders. The AER advised there were: report preparation procedures for 14 reports, of which six were not documented; and quality assurance processes for 14 reports, of which nine were not documented. Where procedures were documented they addressed some, but not all, of the report preparation or quality assurance processes. The AER met or mostly met the content requirements for all six report types required under legislation, and the timeliness requirements for three of the five report types examined. The AER could not fully ensure the accuracy of information presented in types of reports required by legislation due to information sources for reports often relying on self-reporting and public information, data quality concerns, and lack of processes to verify accuracy.

16. The AER has been largely effective in establishing and maintaining public registers. The AER was required to establish and maintain six registers on its website. All these registers have been established and most contained required content. The web content management system that hosts the registers includes some controls including user access, although there are opportunities to strengthen these controls. The AER has established a three-stage approval process for publishing content, which has not been consistently implemented. There were limited instances of incorrect information contained in, and delays in publishing on, the registers.

17. The AER has undertaken a number of activities to support contestability, reliability and security in the energy market. However, these activities have not been part of specific strategies and there has been little measurement of their impacts. 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.

18. The AER's management of reviews and assessment processes has been partially effective, with the processes typically having not been completed in accordance with set timeframes. The AER's review of customer hardship policy guideline updates completed in 2019 were effectively managed and met timeframes. For the remaining four assessment processes examined, the AER: documented assessments of retail authorisations and exemptions, but did not adequately document assessments when making network decisions in all cases examined or approving network tariffs in 80 per cent of cases examined; and did not meet statutory or target timeframes in 50 per cent or more of assessment processes examined. Tools had been developed but were not adequately designed or sufficiently maintained to support the effective management, and specifically the timeliness, of the AER's assessment processes.

Compliance arrangements

19. The AER did not fully establish and consistently apply robust systems and processes for gathering, storing, retrieving and analysing compliance intelligence from all sources. While the AER collected significant amounts of information, it was often captured or stored in ways that did not allow for efficient retrieval or analysis to inform the AER's compliance and enforcement

activities. In instances where the AER had a structured, reliable and complete intelligence dataset (based upon sound capture and storage processes), this facilitated analysis to be performed that allowed the AER to better understand risks of non-compliance with the National Energy Market Laws, Regulations and Rules.

20. The AER established a partially appropriate risk-based framework for assessing, prioritising and managing risks of non-compliance in the National Energy Market. The framework requires risk assessments of each obligation contained in the National Energy Laws. However, many obligations have not been assessed and the framework does not sufficiently distinguish risk levels to support prioritisation and allocation of resources. The AER does not monitor and adjust risk assessments and related strategies and priorities.

21. From April 2014 to July 2019, the AER maintained a high-level compliance and enforcement framework, referred to as the Compliance and Enforcement Statement of Approach. This framework was updated in July 2019 and was renamed the Compliance and Enforcement Policy. Annual work programs, which covered regulatory and compliance activities, were in place during 2015–16, 2016–17 and 2017–18. For 2018–19, the AER continued to use its 2017–18 work program, and in July 2019 separately published annual compliance priorities for 2019–20. The high-level frameworks and work programs promoted compliance by defining the AER's compliance and enforcement activities, options, approach and priorities to stakeholders. However, the framework and work programs: did not address a number of key elements of the AER's purpose or the overarching strategy statement outlined in the corporate plan; were not supported by a performance or evaluation framework; and did not further develop strategies for individual elements of the overarching strategy.

Compliance and enforcement activities

22. The AER has not developed an overarching education strategy, program of work or tools to assist in determining when education would be an effective mechanism to address non-compliance. The AER has used 10 types of educational activities in 39 instances. In 27 of the 39 instances (69 per cent) the AER intended that the education activity would address areas of non-compliance. In the remaining 12 instances (32 per cent) education activities did not address non-compliance, instead they were intended to educate and inform stakeholders. An evaluation was conducted by the AER of two of the 39 instances of education activities, although these evaluations did not seek to establish whether education activities effectively encouraged compliance or addressed non-compliance.

23. The AER has established partially effective arrangements to monitor compliance with the National Energy Laws. The arrangements consist of a broad range of monitoring activities which are not clearly instigated on a risk-basis. Few activities draw a conclusion about compliance and non-compliance. The arrangements are not supported by a triage process that would allow the AER to more efficiently deal with potential non-compliance, including escalating non-compliance issues of greater significance on a risk-basis.

24. The AER has been partially effective in addressing and resolving non-compliance, including through enforcement action. The AER has not established a triaging or decision-making framework that it consistently applies when deciding on enforcement action. Enforcement outcomes between 1 July 2015 and 30 June 2019 include: 56 infringement notices; two

administrative undertakings; 6 enforceable undertakings; and 208 no action letters. Since 1 July 2019 the AER has commenced court proceeding for four separate matters. The AER has not assessed whether enforcement outcomes have resolved non-compliance.

Recommendations

25. Six recommendations have been made.

Recommendation no.1 Paragraph 2.23

The AER:

- (a) develops risk reporting to the AER Board and ACCC Corporate Governance Board that presents the AER's risks and concisely reports on whether risks have been realised, current management arrangements are sufficient, overall risk ratings remain appropriate and any emerging risks; and
- (b) implements arrangements to effectively identify and manage shared risks with other government and non-government entities.

Australian Competition and Consumer Commission and the Australian Energy Regulator: *Agreed.*

Recommendation no.2 Paragraph 2.47

The AER develops a performance measurement and evaluation framework that:

- (a) establishes the corporate plan as the primary planning document, which includes references to other key planning documents for the AER; and
- (b) contains short, medium and long term measures that are consistent with section 16EA of the *Public Governance, Performance and Accountability Rule 2014* and Resource Management Guide 131 *Developing performance measures* and supports the AER to report on its effectiveness with respect to its purpose and primary activities and strategies.

Australian Competition and Consumer Commission and the Australian Energy Regulator: *Agreed.*

Recommendation no.3 Paragraph 3.78

The AER develops and uses tools that promote consistent:

- (a) documentation of reviews and assessments, including tasks completed;
- (b) management of reviews and assessments, including key timeframes; and
- (c) provision of reliable information for performance reporting.

Australian Competition and Consumer Commission and the Australian Energy Regulator: *Agreed.*

**Recommendation no.4
Paragraph 4.11**

The AER develops and implements an information management framework or arrangements for compliance intelligence that defines:

- (a) the AER’s main intelligence sources and how each is to be gathered so that information that is needed is created in a format that enables efficient business processes and maximises potential for use and reuse;
- (b) the nature of information to be collected for each intelligence source with reference to a regulatory or compliance data model;
- (c) where and how each intelligence source is to be stored in the AER’s systems so that it is secure, accessible and retrievable for as long as required; and
- (d) how and when the AER will use compliance intelligence to inform its activities, including documenting the extent to which compliance intelligence is complete and can be relied upon.

Australian Competition and Consumer Commission and the Australian Energy Regulator: *Agreed.*

**Recommendation no.5
Paragraph 4.35**

In setting its regulatory and compliance strategy and priorities, the AER:

- (a) demonstrates the link between regulatory obligations and non-compliance risks in the National Energy Market and the priorities selected;
- (b) explains how the achievement of its regulatory and compliance priorities delivers upon the AER’s purpose;
- (c) develops strategies for key elements of the AER’s purpose and its regulatory and compliance objectives that demonstrate how activities are intended to contribute to the purpose, including strategies to drive competition, and promote reliability and security in the energy market and for the use of education to encourage compliance and address non-compliance;
- (d) provides an evaluation framework, including performance indicators and targets to measure the effectiveness of strategies and activities in achieving the AER’s purpose, regulatory and compliance objectives; and
- (e) revises its risk approach and implements processes that enable effective assessment, prioritisation and management of non-compliance risks in the National Energy Market.

Australian Competition and Consumer Commission and the Australian Energy Regulator: *Agreed.*

Recommendation no.6
Paragraph 5.29

The AER develops risk-based triaging processes to support decision-making in relation to: undertaking further inquiries to establish compliance and non-compliance; and selecting the enforcement outcome when non-compliance had been established.

Australian Competition and Consumer Commission and the Australian Energy Regulator: Agreed.

Summary of entity response

The AER welcomes the ANAO's performance audit report on its Regulation of the National Energy Market. The audit is timely as, since the end of the period reviewed by the audit, the AER has welcomed four new Board members to our expanded Board, including a new Chair, and a new Chief Executive Officer has also joined. The new AER Board is currently in the process of revising the strategic priorities for the organisation.

We accept all six recommendations contained in the report and their implementation will be overseen by the AER Board and the Audit Committee for the ACCC and AER.

The report notes that in a number of areas, the AER had already started to address some issues identified by the ANAO. In making these changes, we benefited from discussions with the audit team. Below are some of the activities we are currently undertaking or have planned to implement the recommendations.

- We have undertaken a significant amount of work on risk management, with the development of an AER-specific approach to project risk, an overhaul of the AER risk register and the establishment of Board level processes for monitoring strategic risks.
- We have commenced the development of an AER-specific corporate plan, which will be informed by the new strategic priorities and form the centrepiece of the AER's new planning and reporting arrangements.
- We are currently rolling out a new project management framework, which will assist in projects being managed in a more consistent, structured and effective way, and will include the development of periodic status updates.
- Since July 2019, the AER has been implementing the recommendations of an internal review of its compliance and enforcement function, which are broadly consistent with the relevant recommendations of the ANAO. For example, we have developed a new agency-wide policy for assessing non-compliance, implemented improved governance arrangements and are currently developing a new risk assessment model.

As demonstrated above, we are committed to implementing the ANAO's recommendations and to improving the efficiency and effectiveness of our operations and governance arrangements.

Key messages from this audit for all Australian Government entities

26. Below is a summary of key messages, including instances of good practice, which have been identified in this audit and may be relevant for the operations of other Australian Government entities.

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.
- A transparent approach to shared risks that reflects cooperation between stakeholders and an understanding of the various tolerances and priorities of the market institutions can help ensure a broad perspective is taken to manage those risks.
- Obtaining structured feedback or intelligence from stakeholders can help regulators identify and manage key sector-wide risks. For example, the Australian Energy Regulator regularly engages with key stakeholders, including through a biennial survey.
- Regulators' compliance activities should be based on clearly articulated risk-based priorities. This assists in providing assurance that regulators are appropriately allocating resources to identified risk areas.

Performance and impact measurement

- To promote transparency and accountability, regulators should publicly report on the number and outcomes of core compliance activities such as compliance assessments. Regulators should also report on the extent to which regulated entities comply, and fail to comply, with obligations under the legislation.
- Clear articulation of program objectives provides a basis to evaluate the extent to which outcomes are being delivered. This is particularly important for discretionary activities, so as to provide assurance regarding the proper use of public resources.

Audit findings

1. Background

National energy governance

1.1 The National Energy Market commenced operation in 1998. In 2004, the Council of Australian Governments (COAG) established a governance framework to oversee the National Energy Market, which is set out in the Australian Energy Market Agreement.⁵ The governance framework provides for participating jurisdictions⁶ to develop and implement Australian Energy Market Legislation relating to electricity and gas, and includes three market institutions that are accountable to the COAG Energy Council.⁷

1.2 The Australian Energy Regulator (AER) is one of three market institutions established under the Australian Energy Market Agreement and Australian Energy Market Legislation. The other market institutions are the Australian Energy Market Commission and the Australian Energy Market Operator. The Australian Energy Market Commission creates and revises National Energy Rules under the National Energy Laws, and provides advice to governments. The Australian Energy Market Operator is responsible for operating Australia's electricity and gas markets and systems, through day-to-day management of wholesale and retail energy market operations. There is also an Energy Security Board that coordinates the implementation of an energy reform blueprint, and provides whole of system oversight for energy security and reliability.⁸

Australian Energy Regulator

1.3 The AER is responsible for regulating the National Energy Market in Australian jurisdictions that have adopted national legislation. The national legislation aims to promote efficient investment in, and operation and use of, energy services for the long-term interests of energy consumers with respect to price, quality, safety, reliability and security. Under the national legislation the AER regulates wholesale and retail energy markets where competition exists, and provides economic regulation of monopoly networks through price-setting. In 2018–19 the AER responsibilities included regulating: 110 generation businesses with an annual turnover of \$19.4 billion⁹; 84 retail businesses that provided energy services to around 9.5 million residential and commercial

5 The Commonwealth and participating states and territories entered into the agreement on 30 June 2004. The agreement is available at <http://www.coagenergycouncil.gov.au/publications/australian-energy-market-agreement-amended-december-2013> [accessed October 2019]. The National Energy Market Agreement replaced the National Electricity Market Legislation Agreement of 9 May 1996.

6 The jurisdictions are outlined in paragraph 1.10.

7 The COAG Energy Council was established in 2013 and coordinates government energy policy (primarily in relation to electricity and gas) in Australia. The COAG Energy Council is a ministerial forum made up of representatives from across the Commonwealth, each state and territory, and New Zealand. The Commonwealth Energy Minister is the Chair of the Energy Council. The COAG Energy Council reports to COAG.

8 Established in August 2017, the Energy Security Board is also accountable to the COAG Energy Council. It is comprised of an independent chair and deputy chair, and the most senior leaders of the Australian Energy Market Commission, Australian Energy Market Operator and the AER.

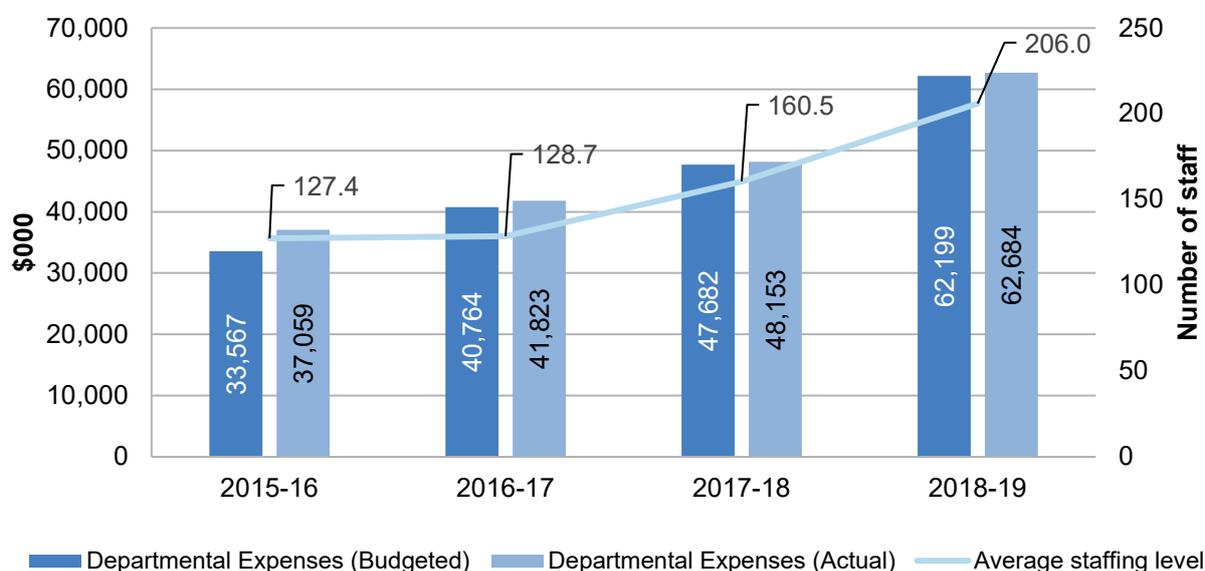
9 Annual turnover represents the spot market revenue (price multiplied by the megawatts produced) and therefore does not reflect their total revenue as the generators have supply contracts outside the market arrangements.

customers; and 30 transmission and distribution networks with assets (such as gas pipelines and electricity poles and wires) valued at \$107 billion.

1.4 The AER is established as an independent entity under Section 44AE of the *Competition and Consumer Act 2010*. From February 2020, the AER consists of two Commonwealth members and three state or territory members.¹⁰ These members form the AER Board — who meet and make decisions on matters relevant to the AER’s functions and powers.¹¹ The Chairperson of the Australian Competition and Consumer Commission (ACCC) makes available staff and consultants to assist the AER Board to perform its functions, mainly through the AER division of the ACCC. The AER division is led by an ACCC employee referred to as the AER Chief Executive Officer. To aid readability, this report generally uses the term ‘AER’ to reflect the AER Board and division. However, in some instances, particularly in respect of governance in Chapter 2, it is necessary to distinguish the AER Board and division.

1.5 The AER is funded through departmental appropriations as part of the ACCC’s Outcome 1.¹² The AER’s annual expenses increased by almost 70 per cent over the last four years, rising from \$37.1 million in 2015–16 to \$62.7 million in 2018–19 (Figure 1.1), with annual increases to its actual expenses ranging from 13 to 30 per cent.

Figure 1.1: AER’s budgeted and actual expenses, and average staffing levels between 2015–16 and 2018–19



Source: Budgeted and actual expenses from the ACCC’s and the AER’s Annual Reports for 2015–16, 2016–17, 2017–18 and 2018–19, Table A1.2 Budgeted expenses and resources for Outcome 1. Average staffing levels are from the AER’s Annual Reports for 2015–16, 2016–17, 2017–18 and 2018–19.

- 10 Paragraph 2.16 of this report discusses the increase in the size of the Board from three members.
- 11 The *Competition and Consumer Act 2010* sets out that the AER Board’s functions and powers are conferred on the AER Board by state and territory energy laws or local energy instruments under Sections 44AI, 44AJ and 44AK (for example, the South Australian national energy laws), or conferred on the AER Board under a Commonwealth law, or prescribed by Section 44AH.
- 12 The AER’s activities are referred to as Program 1.2 in Portfolio Budget Statements, the ACCC’s and AER’s corporate plans and annual reports.

1.6 Since 1 July 2016 the AER has received additional funding on several occasions. The additional funding has been provided to: address a continuously increasing workload (as a result of Australian Energy Market Commission rule changes and COAG Energy Council decisions) resulting in an increase to base funding¹³; and to implement specific initiatives leading to one-off increases in funding.¹⁴ The average staffing level of the AER division increased from 127 in 2015–16 to 206 in 2018–19 (Figure 1.1).

1.7 The Australian Energy Market Agreement establishes the functions of the AER, which include: economic regulation of electricity and gas networks; exercising regulatory functions or powers in relation to the retail of energy; enforcing the National Energy Laws and rules; monitoring and reporting on compliance with national electricity and retail energy laws and rules; and such other functions as conferred by legislation.¹⁵ The National Energy Laws provide the AER with more detailed functions and obligations in relation to electricity, gas and retail energy.

1.8 The AER's key activities remained essentially the same between 1 July 2015 and 30 June 2019, and included:

- monitoring electricity and gas markets to ensure energy businesses comply with the legislation and rules, and taking enforcement action where necessary;
- setting the amount of revenue that network businesses can recover from customers for using these networks and promoting efficient pricing structures¹⁶;
- regulating retail energy markets in Queensland, New South Wales, South Australia, Tasmania (electricity only) and the Australian Capital Territory;
- operating the Energy Made Easy website and providing other information for energy consumers;
- publishing information and reports on energy markets, including the annual State of the Energy Market report; and
- assisting the ACCC with energy-related issues arising under the *Competition and Consumer Act 2010*, including anti-competitive conduct, mergers and authorisations.

13 The AER received additional funding to undertake legislated functions including: \$8 million in the 2016–17 Budget to determine the resourcing required to ensure the AER can perform its legislated functions going forward; \$8 million in the 2017–18 Budget; as part of the 2017–18 Mid-Year Economic and Fiscal Outlook a further \$7.5 million in 2017–18, \$19.9 million in both 2018–19 and 2019–20, and \$20.1 million in 2020–21; and in the 2019–20 Budget a further \$13.3 million over four years.

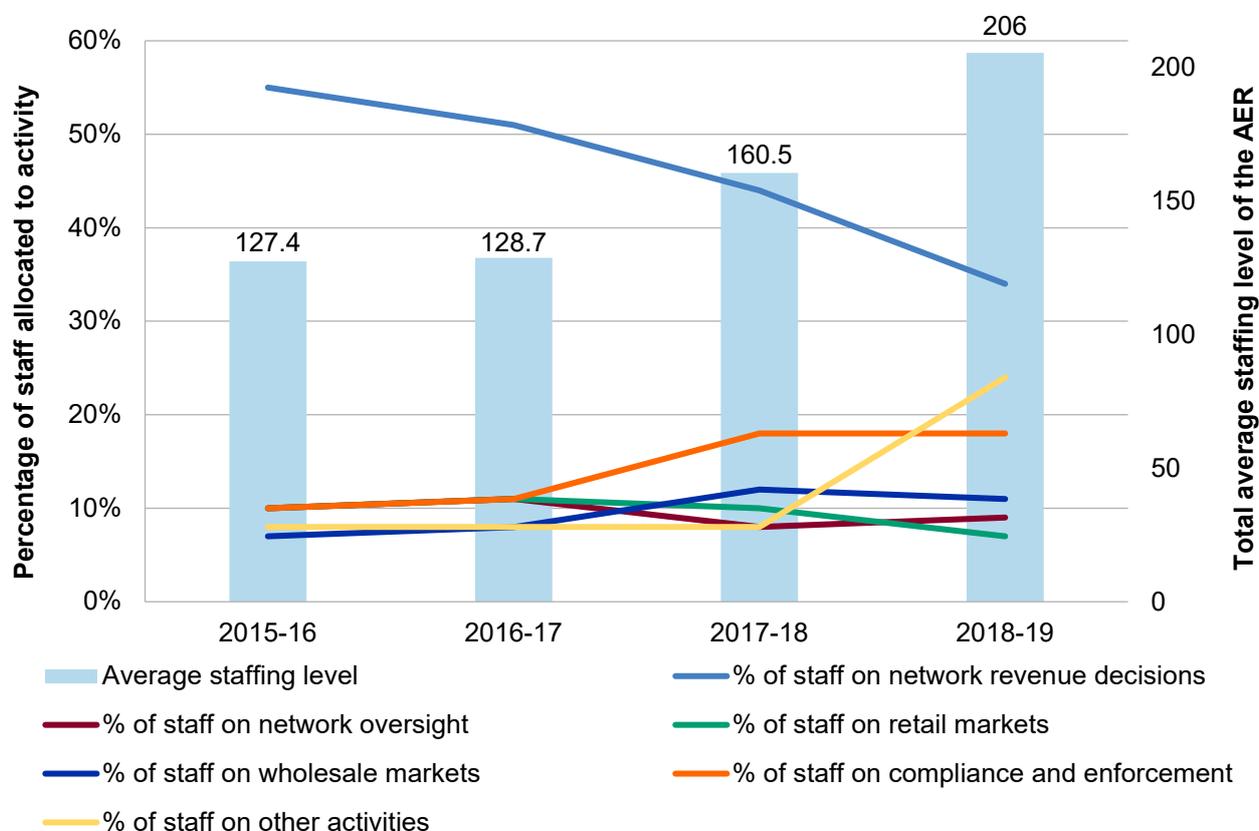
14 One off initiatives included: as part of the 2017–18 Mid-Year Economic and Fiscal Outlook \$5.3 million and \$2.8 million in 2018–19 and 2019–20 for the AER to optimise the Energy Made Easy website as part of the *Powering Forward — Delivering More Affordable, Reliable and Sustainable Energy*; as part of the 2018–19 Mid-Year and Economic Fiscal Outlook \$50.2 million was provided to the ACCC and AER over four years to implement initiatives as part of the measure to *Placing downward pressure on power bills*, including establishing a default market offer and reference bill for consumers, support the Energy Security Board and implement the retailer reliability obligation.

15 COAG Energy Council, *Australian Energy Market Agreement* [Internet], clause 9.1, available from <http://www.coagenergycouncil.gov.au/sites/prod.energycouncil/files/publications/documents/Australian%20Energy%20Market%20Agreement%20-%20Dec%202013.pdf> [accessed 8 November 2019].

16 While the AER sets total amount of revenue that network businesses can recover from network users, the AER does not have a role in setting retail energy prices.

1.9 The AER division has been structured to support the AER Board to meet these and other responsibilities. As shown in Figure 1.2, the AER division had the most resources allocated to revenue decisions over the past four years, albeit with a declining share of total staffing. The compliance and enforcement functions (and other activities) have had the greatest growth in staffing in the AER division over the period, particularly in 2018–19.¹⁷

Figure 1.2: AER division’s average staffing levels and staff utilisation by activity, 2015–16 to 2018–19



Source: Summary of data recorded in ACCC and AER’s Annual Reports, and AER’s Annual Report for the financial years 2015–16 to 2018–19.

National legislation and rules, and participating jurisdictions

1.10 The National Energy Laws refer to national legislation that is implemented in each participating state and territory. South Australia is the lead legislator¹⁸, and each participating state and territory needs to introduce its own legislation to adopt the National Energy Laws in its jurisdiction. The National Energy Laws include the National Energy Retail Law, National Electricity Law and National Gas Law. The legislation has been progressively adopted since December 1998, with all jurisdictions adopting the National Gas Law, all jurisdictions except Western Australia

¹⁷ An organisational change in 2018 means that data for 2018–19 is not directly comparable to previous years. In particular, the increase in ‘other activities’ largely reflects the creation of two branches (Policy and Performance and Strategic Communications and Engagement) that support and contribute to the other key activities (such as retail and wholesale markets).

¹⁸ South Australia establishes the National Energy Law and other Commonwealth, state and territory jurisdictions pass legislation to adopt the National Energy Law.

adopting the National Electricity Law, and all jurisdictions except Western Australia, Victoria and the Northern Territory adopting the National Energy Retail Law.

1.11 The National Energy Laws are supported by regulations and rules (specifically, the National Energy Retail Rules, National Electricity Rules and National Gas Rules). These rules are collectively referred to as the National Energy Rules and determine how businesses operate and participate in supplying and selling energy services. A state or territory may vary the application of the laws, regulations and rules in its jurisdiction.

National Energy Market prices

The energy supply chain

1.12 The energy supply chain begins with electricity and gas being generated or produced to be sold in wholesale markets. Energy retailers buy gas and electricity in the wholesale markets, and then bundle it with transportation services of transmission and distribution networks to sell to end-use customers. The retail energy markets allow retailers to supply and sell electricity, gas and energy services to residential and business customers.

Retail energy prices

1.13 Retail electricity and gas prices are comprised of costs relating to wholesale, network, retail and environmental schemes, as well as the retailer’s margin. The AER reports on the composition of residential retail bills for electricity and gas in the State of the Energy Market reports (and in a November 2019 update), as shown in Table 1.1. Factors that can reduce residential customer bills include regular switching between providers, being in states and territories with lower average energy use, being in urban rather than remote or regional areas, and meeting some energy needs through rooftop solar systems.

Table 1.1: Cost composition of residential (retail) bills for national electricity and gas

Cost type	Percentage of electricity bill ^a	Percentage of gas bill
Wholesale costs of retailers buying energy, for example, by entering into forward contracts referred to as hedges or derivatives for electricity or confidential bilateral contracts for gas	33.0%	33.0%
Network costs for transporting energy and metering	42.0%	42.5%
Environmental schemes for promoting generation, energy efficiency and reducing carbon emissions	8.0%	-
Retail costs of servicing, acquiring and maintaining customers and profit margin	17.0%	24.5%

Note a: The contribution of different components of retail electricity and gas bills varies across National Energy Market participant states and territories.

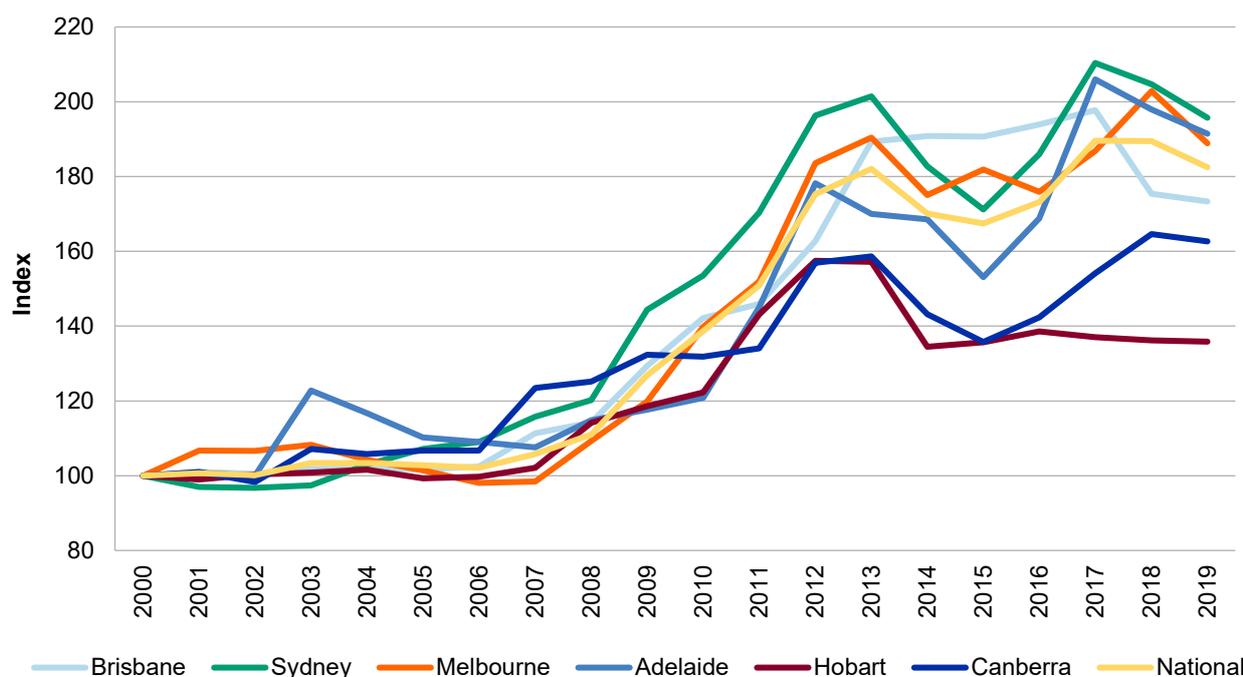
Source: AER, *State of the Energy Market data update November 2019*, 2019, Figures 1.2 and 1.3.

1.14 Retail electricity and gas prices have increased since 2005. Over the 10 years to¹⁹:

- 30 June 2018, national electricity retail prices rose by 56 per cent from 19 cents to 29.6 cents per kilowatt hour, ranging between increases of 39 per cent (in Tasmania) and 71 per cent (in Queensland); and
- 2017, national gas retail prices rose by 46 per cent from 2 cents to 2.9 cents per megajoule, ranging between 27 per cent (in New South Wales) and 51 per cent (in Victoria).

1.15 Inflation adjusted retail price indexes for electricity and gas show real price changes for metropolitan households, and generally increasing price trends over this period (see Figure 1.3 and Figure 1.4).

Figure 1.3: Electricity retail price index (inflation adjusted) between 2000 and 2019

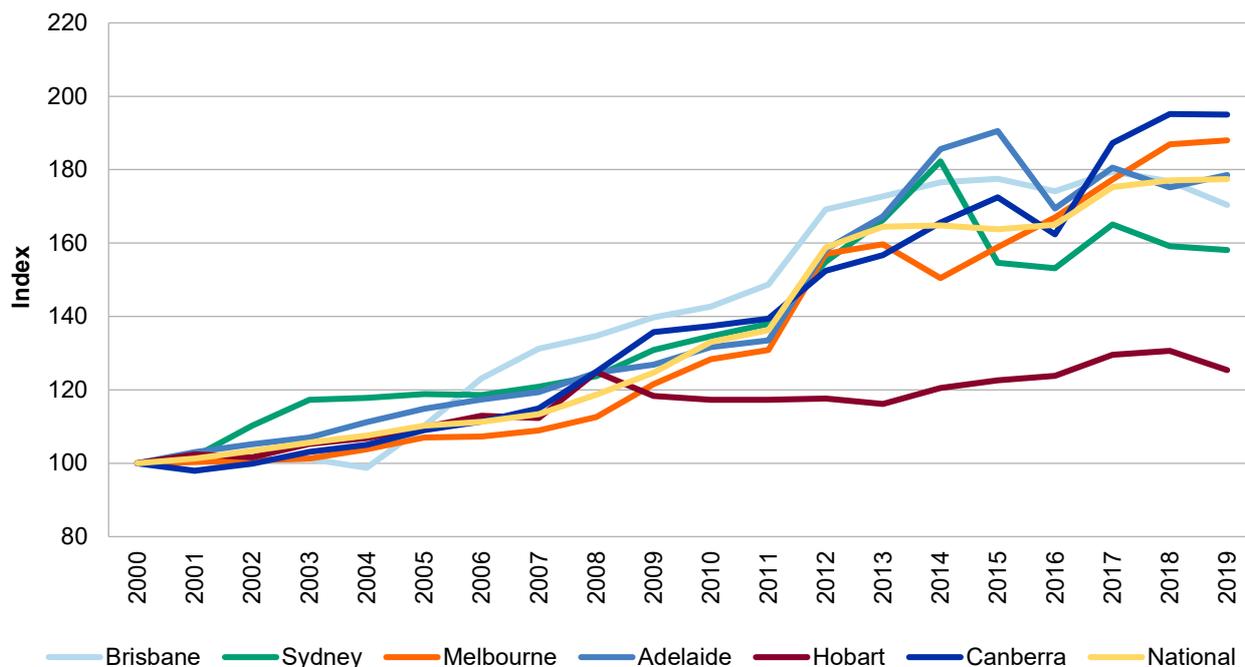


Note: Consumer price index electricity and gas series for each region, deflated by the consumer price index for all groups. Data at September quarter each year.

Source: AER, *State of the Energy Market data update November 2019*, 2019, Figure 1.7. The AER notes that the source of the index is ABS, Consumer price index, cat. No. 6401.0, various years.

¹⁹ AER, *State of the Energy Market 2018*, for electricity prices see page 40 and 42, and Figure 1.5. For gas prices see page 41 and 43, and Figure 1.6.

Figure 1.4: Gas retail price index (inflation adjusted) between 2000 and 2019



Note: Consumer price index electricity and gas series for each region, deflated by the consumer price index for all groups. Data at September quarter each year.

Source: AER, *State of the Energy Market data update November 2019*, 2019, Figure 1.8. The AER notes that the source of the index is ABS, Consumer price index, cat. No. 6401.0, various years.

1.16 The AER has a limited role in relation to influencing retail energy prices. As discussed in paragraph 1.8, it does not regulate wholesale or retail prices or have responsibility for retailer costs or the costs of government energy efficiency or environmental schemes. However, it does play a key role in relation to network costs (see Table 1.1), through network determinations that include determining the level of investment in capital equipment. The level of investment rose significantly in electricity networks between 2006 and 2012, but decreased steadily since 2013. According to the AER Board, its recent decisions (in relation to network determinations and access arrangements) reduced distribution charges in residential energy bills by 1 to 2.5 per cent per year, on average, in all states and territories.²⁰

1.17 In respect of electricity, an ACCC inquiry found that price increases have resulted from a number of factors including:

- the loosening of the framework that governs regulation of monopoly infrastructure, limiting the regulator’s ability to constrain excess spending; and

20 AER, *State of the Energy Market Report 2018* [Internet], p.24, available from https://www.aer.gov.au/system/files/State%20of%20the%20Energy%20Market%202018%20-%20Full%20report%20A4_2.pdf [accessed 8 November 2019].

- increased expenditure on reliability of these networks driven by reliability standards that were in some cases set too high without due regard for consumers' willingness to pay for marginal increases in reliability.²¹

1.18 The ACCC inquiry found that increases in gas prices are primarily attributable to wholesale market effects caused by the exports of LNG from Queensland, which have meant that previously low domestic gas prices are now linked to international LNG prices.²²

Rationale for undertaking the audit

1.19 There is ongoing community, political and media interest in energy supply, particularly rising energy prices and their impact on Australian households and businesses. In regulating the energy sector, the AER makes decisions that can affect energy prices, security and reliability. The audit findings can provide lessons for more effective monitoring, reporting and enforcement of compliance with National Energy Laws, Rules and Regulations by the AER.

Audit approach

Audit objective, criteria and scope

1.20 The audit assessed the effectiveness of the Australian Energy Regulator's regulation of energy markets.

1.21 To form a conclusion against the audit objective, the audit adopted four high-level criteria:

- Has the AER established and effectively communicated regulatory requirements to market participants and information to consumers to support informed decision-making?
- Has the AER identified compliance risks and developed an effective strategy to guide its regulatory activities?
- Has the AER effectively implemented a strategy and program of work to promote compliance, monitor compliance and address non-compliance, and fulfil other regulatory responsibilities?
- Has the AER established appropriate governance arrangements to manage the operation and performance of its regulation of the National Energy Market?

1.22 The audit focused on the AER's regulation of the National Energy Market. The audit considered the AER's access to and use of other entities' information to meet its objectives. The audit did not examine the activities of COAG and state and territory entities. The audit also did not examine the activities of retail, wholesale, and network participants, and other energy market institutions, except to the extent to which these entities are regulated by the AER.

21 ACCC, *Retail Electricity Pricing Inquiry*, June 2018, pp.iv-v, [Internet] available from https://www.accc.gov.au/system/files/Retail%20Electricity%20Pricing%20Inquiry—Final%20Report%20June%202018_0.pdf [accessed May 2020]. Note that the AER is a division of the ACCC.

22 ACCC, *Retail Electricity Pricing Inquiry*, June 2018, pp.iv-v, [Internet] available from https://www.accc.gov.au/system/files/Retail%20Electricity%20Pricing%20Inquiry—Final%20Report%20June%202018_0.pdf [accessed May 2020]. Note that the AER is a division of the ACCC.

Audit methodology

1.23 In undertaking the audit, the ANAO:

- examined documentation collected from the AER relating to its regulation of the National Energy Market, including: procedures and guidelines that the AER provides to energy market participants; risk assessments; documents supporting the development, implementation and management of regulatory, compliance and enforcement activities; and governance and performance measurement documentation;
- assessed the AER's energy price comparison website;
- examined relevant national energy legislation; and
- interviewed relevant ACCC and AER staff.

1.24 The audit was conducted in accordance with ANAO Auditing Standards at a cost to the ANAO of approximately \$885,000.

1.25 The team members for this audit were Tracey Martin, Nathaniel Loorham, Chay Kulatunge, David Willis, David Van Schoten, Supriya Benjamin and Andrew Morris.

2. Australian Energy Regulator governance

Areas examined

This chapter examines whether the AER has appropriate governance arrangements to regulate the National Energy Market, particularly oversight and performance monitoring arrangements.

Conclusion

The AER has partially appropriate governance arrangements to oversight its National Energy Market regulatory responsibilities. At the time of the audit, the AER was implementing a range of recommendations from previous reviews aimed at improving its governance, management and risk approaches. The AER has not established a performance monitoring, measurement and reporting framework that enables it to clearly demonstrate its effectiveness in regulating energy markets.

Areas for improvement

The chapter includes two potential recommendations aimed at: the AER division systematically reporting strategic risks to the AER Board and Corporate Governance Board (paragraph 2.23); and strengthening the performance measurement framework for the AER (paragraph 2.47).

The chapter also suggests that the AER: ensures the out-of-session decision register is complete (paragraph 2.9); develops a consolidated register of all Board decisions (paragraph 2.11); establishes a plan to review governance arrangements, including the effectiveness of committees (paragraph 2.25); modifies its purpose to reflect its primary responsibilities in accordance with the National Energy Laws (paragraph 2.37); includes a purpose statement in the statement of intent, work program and standalone annual report (paragraph 2.40); and establishes additional performance benchmarks (paragraph 2.44).

2.1 Governance is generally considered to include two elements: conformance (compliance with legal requirements and corporate governance and industry standards, and accountability to relevant stakeholders); and performance (monitoring the performance of the organisation and the Chief Executive Officer).²³ Governance is different to management and involves the systems and processes in place that shape, enable and oversee management of an organisation. Management is concerned with doing — co-ordinating and managing the day-to-day operations of the business.²⁴ Having effective oversight and performance measurement, monitoring and reporting arrangements supports the entity to comply with requirements and standards, determine whether it is meeting its objectives, and shape change when necessary.

23 Good governance is those high-level processes and behaviours that ensure an organisation performs by achieving its intended purpose, and conforms by complying with all relevant laws, codes and directions while meeting community expectations of probity, accountability and transparency. Audit Office of New South Wales, *Governance Lighthouse* [Internet], 2015, available from <https://www.audit.nsw.gov.au/our-work/resources/governance-lighthouse> [accessed 15 January 2020].

24 ANAO, *Audit Insights on Board Governance* [Internet], May 2019, available from <https://www.anao.gov.au/work/audit-insights/board-governance> [accessed 6 March 2020].

Has the AER established effective oversight arrangements for its National Energy Market regulatory activities?

The AER has established largely effective governance and oversight arrangements for its National Energy Market regulatory activities. The AER Board is responsible for oversight and making all decisions for its National Energy Market regulatory activities. The AER Board is supported by the ACCC through the AER division and structured governance arrangements. Between April 2019 and April 2020, the AER was progressing the implementation of recommendations from a number of reviews to improve governance and operational management arrangements, including to increase the strategic focus of the AER Board.

Governance structure

2.2 The AER Board is established as an independent entity under Section 44AE of the *Competition and Consumer Act 2010* (CC Act) (see paragraph 1.4). From February 2020, under Section 44AG of the CC Act, the AER Board has five members.²⁵ Since 2005 the AER Board has responsibility for meeting and making decisions that relate to its functions and powers as the National Energy Market regulator²⁶, including those functions and powers conferred on the AER Board by states and territories through the National Energy Laws or prescribed in the CC Act. At meetings of the AER Board, a minimum of three members (including the Chair) must attend to make decisions²⁷, and matters for decision are determined by the majority vote at the meeting.²⁸ Out-of-session, all members must agree in writing to make a resolution.

2.3 Under Section 44AAL of the CC Act, the Australian Competition and Consumer Commission (ACCC) Chairperson is the accountable authority for the AER Board and division for the purposes of the *Public Governance, Performance and Accountability Act 2013* (PGPA Act) — but not for statutory decision-making in accordance with National Energy Laws (see paragraph 2.2). The ACCC Chairperson's responsibilities include promoting proper use and management of public resources, the achievement of the purposes of the ACCC (and the AER Board), financial sustainability, and establishing and maintaining systems relating to risk and control.²⁹ The Chairperson of the ACCC makes available staff and consultants (in the form of the AER division of the ACCC) to assist the AER Board to perform its functions (Section 44AAC of the CC Act). The ACCC also provides additional

25 The arrangements for appointment of AER Commonwealth and state and territory members, and the Chair are outlined in sections 44AM through 44AS of the *Competition and Consumer Act 2010*. Prior to February 2020, there were three members of the AER Board under paragraph 7.3 of the Australian Energy Market Agreement and Section 44AG of the CC Act.

26 The CC Act sets out that the AER Board's functions and powers are conferred on the AER Board by state and territory energy laws or local energy instruments under Sections 44AI, 44AJ and 44AK (for example, the South Australian national energy laws), conferred on the AER under a Commonwealth law, or prescribed by the CC Act (Section 44AH).

27 Prior to February 2020, a minimum of two members (including the Chair) must be present at the meeting for decisions to be made.

28 When there were three members of the AER Board, a quorum of two members (including the Chair) was required.

29 The accountable authority is also responsible for preparing a corporate plan, budget estimates, measuring and assessing performance of the ACCC (including the AER Board and division), establishing an audit committee and publishing an annual report that includes annual performance and financial statements.

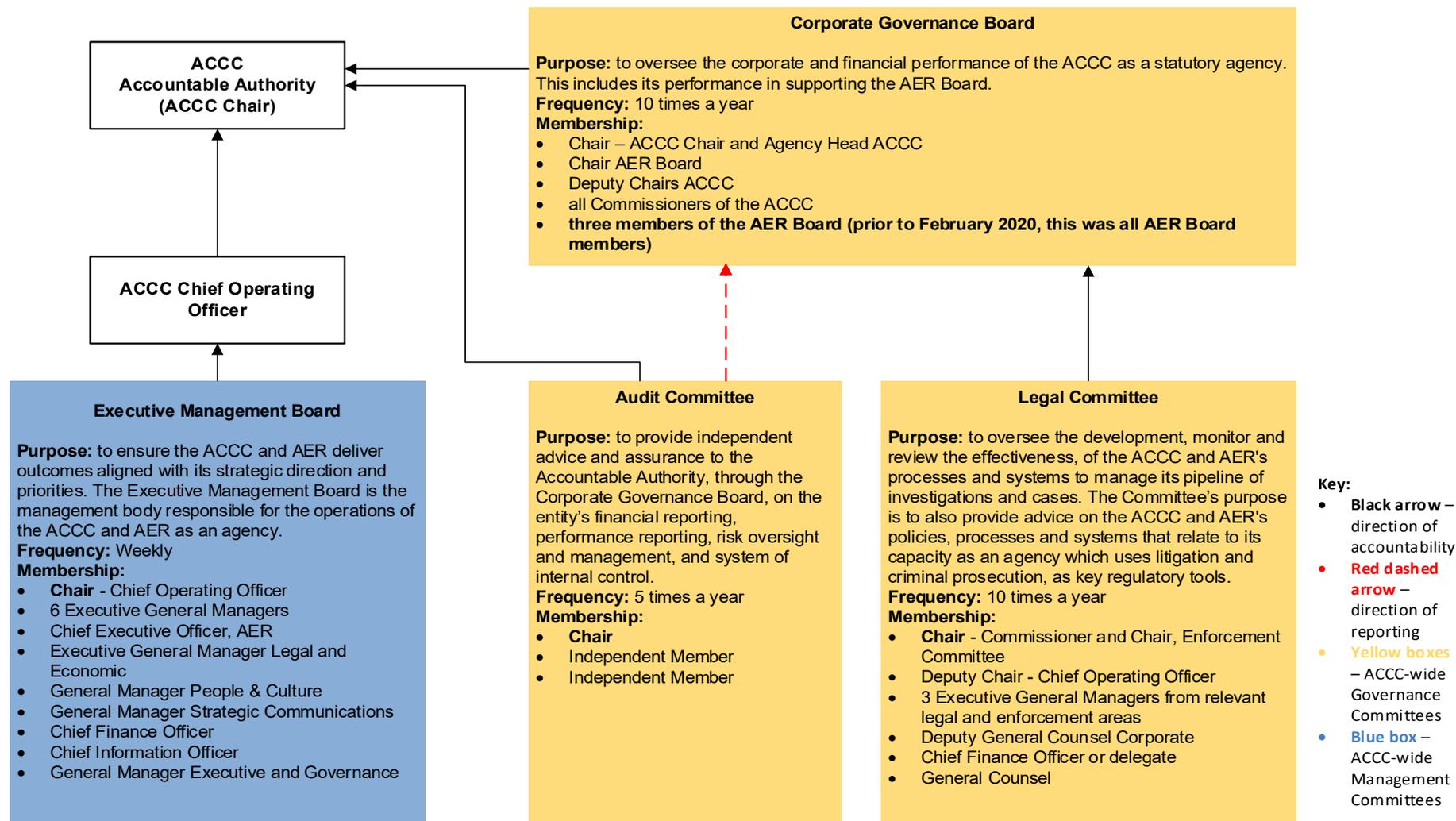
support to the AER Board and AER division by sharing legal and economic, and corporate services staff (including human resource, finance and information and communication technology staff).

2.4 Some ACCC committees provide oversight of the AER Board and division's resources, systems of risk and control, planning and performance. Figure 2.1 provides an overview of the ACCC committees that have oversight of the AER Board and division's activities from the perspective of the PGPA Act. The figure focuses on the accountability and reporting arrangements, as well as the intended purpose, meeting frequency and membership³⁰ for the ACCC Boards and committees, set out in each committee's terms of reference. Prior to February 2020, all three AER Board members were members of the ACCC Corporate Governance Board.³¹ The AER Board influences resourcing through its membership on the Corporate Governance Board.

30 AER Board members or the AER division's Chief Executive Officer are members of a number of ACCC governance committees. ACCC staff are members of some of the AER division's operational management committees.

31 In February 2020 when there was an increase in the number of AER Board members, the number of AER Board members on the Corporate Governance Board was not increased.

Figure 2.1: ACCC committees and reporting responsibilities, December 2019



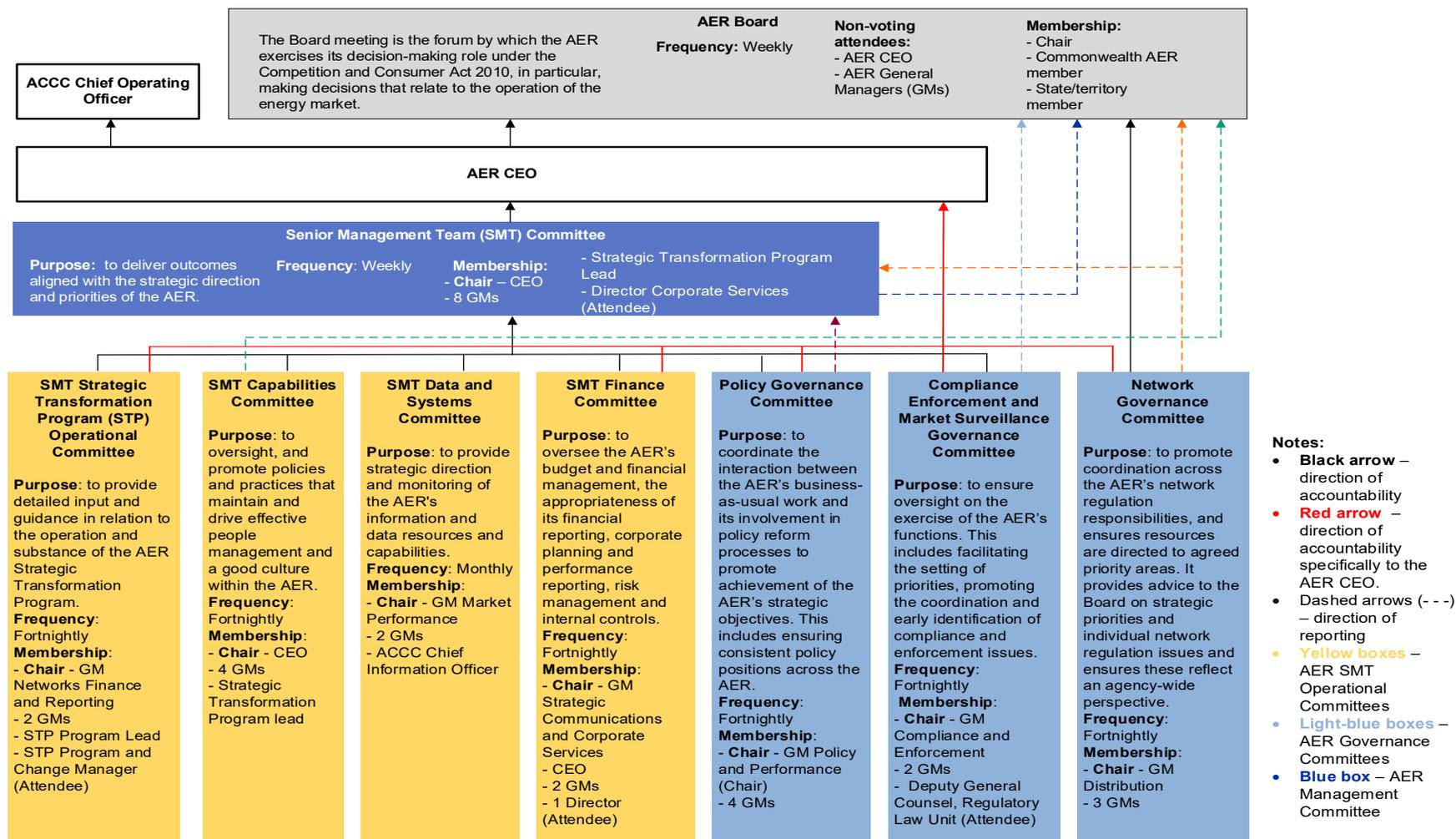
Source: ANAO analysis of terms of reference documents.

2.5 The AER Board has established senior management positions within the AER division including the AER Chief Executive Officer (CEO)³² to lead the AER division with the assistance of General Managers. The AER CEO, General Managers and staff provide advice to the AER Board about matters relating to the National Energy Laws. The CEO also reports to the ACCC Chief Operating Officer and, ultimately, the ACCC Chairperson for matters relating to the PGPA Act. Figure 2.2 provides an overview of the AER Board and AER division operational management committee structure focusing on accountability and reporting arrangements, as at December 2019. The figure also outlines the intended purpose, meeting frequency and membership for the AER division operational management committees, as set out in the terms of reference for AER Board (that were in draft) and each committee. The terms of reference for the AER operational management committees typically include reporting lines to the AER CEO and AER Board. The AER division advised the ANAO that in practice the committees are not accountable to and do not report to the CEO or the AER Board — rather, they are a management tool for internal coordination and quality assurance. These operational management committees do not form part of the governance of the AER Board and AER division.

2.6 Between August 2018 and June 2019 the AER division established seven operational management committees (see Figure 2.2, purple and green boxes), in addition to the Senior Management Team. These committees are not statutory decision-making bodies. Instead they provide a forum to test and shape a matter before it is discussed with the AER Board. At the time of the audit, many committees were in the early stages of establishing how they would operate. In some cases, staff committees were established to discuss, consider and address matters collaboratively within the AER division.

32 The AER Chief Executive Officer (senior executive service band three) appears alongside Executive General Managers of the ACCC (senior executive service band two) in the ACCC organisation structure.

Figure 2.2: AER Board and AER division internal operational management committees and reporting responsibilities, December 2019



Note: In July 2020 the AER advised the Policy and Governance Committee and the Network Governance Committee have now been replaced by AER Board committees.
 Source: ANAO analysis of terms of reference documents.

2.7 For each committee, the AER division and ACCC established terms of reference that outlined: the purpose, and roles and responsibilities of the committee; standing agenda items; a requirement to maintain meeting minutes; and a requirement to periodically review the effectiveness of the committee. For many committees, the terms of reference were not clearly marked as final documents, as they were not signed or were marked as a draft version. Some inconsistencies were noted in the content of individual committee terms of reference, including:

- all committees except for the AER Board outlined accountability and reporting arrangements. The AER advised that these arrangements were not included in the terms of reference as they are outlined in the National Energy Laws; and
- the AER Board terms of reference does not articulate the responsibilities and functions of the Board or its Chair and members. The AER advised that these responsibilities were not included in the AER Board's terms of reference as they are outlined in the CC Act and National Energy Laws.

2.8 Between 1 July 2015 and 30 June 2019³³, the majority of AER division operational management committees (and the AER Board) did not meet as frequently as intended by their terms of reference.³⁴ Most of the AER division committees were recently established and met for the first time in 2019, which explains some but not all of the differences between planned and actual meetings.

2.9 The AER division maintained records of meetings³⁵, including clearly documenting the AER Board's decisions and instructions in relation to matters presented to the AER Board. In addition, the AER division maintained an out-of-session decisions register for decisions made by the AER Board on papers circulated out-of-session. The register indicated that the AER Board had been approached on 58 occasions to make an out-of-session decision between 8 April 2016 and 12 June 2019. Some elements of the register were incomplete. For example, the register did not record: a date for the decision (12 per cent of total entries); the decision made following out-of-session consideration (28 per cent of total entries); or links to records of AER Board approval. The AER division should ensure the out-of-session decision register is complete.

2.10 Matters discussed during meetings of the AER Board and the AER division operational management committees were generally consistent with the committees' purposes and roles. The broad range of matters considered by the AER Board included matters that addressed the AER Board's functions under the National Energy Laws, as well as: assessment processes; enforcement and compliance approaches and actions; guidelines and communications; and AER Board policy direction.

2.11 The AER division does not have a consolidated register of decisions and action items for all AER Board decisions. This can make it difficult to locate and track relevant AER Board (and other committees') directions and decisions on specific matters. Accordingly, the AER division should consider developing a consolidated register. The AER division advised that action items that result from the meetings of the AER Board and AER division committees are tracked with the aid of branch plans. In mid-2019 the AER division introduced a portfolio tracker to provide oversight of the AER

33 Meetings of the Boards and committees were not often held out-of-session, although in 2015–16 and 2016–17, the Audit Committee held a third or more of its meetings out-of-session.

34 The ACCC's Executive Management Board also did not meet as frequently as planned in its terms of reference.

35 Records of the AER's Senior Management Team were not made until March 2019.

division's business as usual and project work with regard to milestones, resources, risk and status. On 22 November 2019, there were 281 activities listed in the portfolio tracker.

2.12 The terms of reference documents for each committee contain a requirement for periodic review of the committee's effectiveness. The AER division advised that there have been no formal reviews of AER division operational management committees, especially given that many of the committees have only recently been established. The AER division had not established a plan to review committees including establishing a timeframe within which the review would be completed. Establishing a plan to review committees will assist the AER division to address the periodic review requirement in the terms of reference.

2.13 In January 2018, Nous prepared a blueprint for reform for the AER Board and AER division. The blueprint recommended changes to the AER Board and AER division's governance arrangements and structure. The review made seven recommendations relating to governance, focusing on increasing the strategic focus of the AER Board and making the workload more manageable by setting a regulatory strategy, requiring board papers to be concise and well tested, and providing the AER Board with regular reports on organisational health and performance (including risk).

2.14 In August 2019, the AER division advised that it was implementing recommendations from this review, including introducing reformatted board papers to concisely provide the AER Board with information, and developing a three-week rolling schedule for AER Board meetings that commenced in August 2019.³⁶ The Senior Management Team Strategic Transformation Program Committee provided the first dashboard report (to report on organisational health and performance) to the Senior Management Team on 22 October 2019 for the quarter 1 July to 30 September 2019. The report included budget and actual expenditure, resources including staffing levels, wellbeing, people development and engagement measures.³⁷ The AER division also established a policy branch in 2018 for the purpose of supporting its role in the Energy Security Board and influencing the direction of energy policy. Papers prepared by the branch are considered by the AER Board.

Delegation of powers and functions under the National Energy Laws

2.15 Under Section 44AAH of the CC Act, the AER Board may delegate functions and powers to an AER Board member, a senior executive service (SES) employee (the AER CEO or a general manager), or an acting SES employee assisting the AER Board. The AER Board authorised 28 delegations between 1 July 2015 and 31 June 2019. Two of the 28 delegations were not signed by all Board Members. The AER Board delegated routine, administrative or time sensitive powers and functions such as the decision to: serve regulatory information notices to gas network businesses; and approve applications for electricity retailer authorisations.

36 In the three-week meeting cycle arrangement, the AER governance committees rotate responsibility for organising the structure of the Board meetings. Following these changes, AER Board meetings are focused on a particular topic, such as networks, policy, or compliance and enforcement.

37 The engagement measures include the number of policy submissions, media reach (online, print, TV and radio), potential audience, social media followers, measures for the Energy Made Easy website (home page users, home page sessions, users plan searches) and AER Centre contacts.

Changes to the number of AER Board members

2.16 In response to the AER Board's rapidly expanding role and responsibilities (including membership on the Energy Security Board) and additional resourcing (see Chapter 1), a number of reviews were undertaken that included a focus on governance. One of these was a resourcing review commissioned by the Department of Treasury and undertaken by KPMG that was completed in May 2017. The resourcing review noted that due to increasing responsibilities and resourcing shortfalls, the AER Board and AER division was choosing between compromising quality assurance processes and meeting regulatory timeframes (in these circumstances the AER Board and AER division chose to maintain quality). The review presented a number of options for consideration including: that the AER Board increases from three to five members; and increasing the use of AER Board sub-committees for decision-making purposes. In October 2019, legislation was passed by the Australian Parliament resulting in the AER Board comprising two Commonwealth members and three state and territory members. In February 2020 this change took effect. The AER division advised the ANAO in April 2020 that following the increase in the size of the Board, it is establishing a Board committee structure.

Risk management

2.17 Subsection 16(a) of the PGPA Act requires the accountable authority to establish and maintain an appropriate system of risk oversight and management for the entity. Non-corporate Commonwealth entities must comply with the nine elements of the Commonwealth Risk Management Policy.³⁸

2.18 The ACCC has developed a risk management framework that is endorsed by the accountable authority and an enterprise risk register (that identifies risk at an enterprise and division level within the ACCC, and includes AER division risks).

2.19 At the whole-of-ACCC level, the ACCC's APS Census and the Comcover Risk Management Benchmarking Survey results identified risk management areas that were below the ACCC's nominated target level of maturity. The areas identified included developing a positive risk culture, maintaining risk capability and managing shared risks. In response, the ACCC approved a Risk Management Project Plan ('the plan') aimed at developing a positive risk culture and maintaining risk management capability. Implementation of the plan commenced with the ACCC developing its Enterprise Risk Register, overhauling its Strategic Risk Profile and revising internal guidance. The Risk Management Framework was reviewed, presented to the Corporate Governance Board in February 2020 and approved by the accountable authority on 12 March 2020.

2.20 The ACCC did not address identification and management of shared risk in a consistent and systematic way³⁹ under the plan. The AER division advised the ANAO that the ACCC and AER division will focus on improving the formal management of shared risks as part of a future risk program. The

38 Available from <https://www.finance.gov.au/government/comcover/commonwealth-risk-management-policy> [accessed 12 March 2020].

39 The Department of Finance's Resource Management Guide 211 defines shared risks as those risks that extend beyond a single entity, requiring high levels of cooperation between stakeholders to effectively understand and manage those risks. Where risks extend beyond organisational boundaries it is important that entities, in collaboration with their stakeholders, cooperate to identify and manage risks, including developing clear roles and responsibilities and agreeing outcomes.

AER Board and division shares many risks with other stakeholders including energy market institutions, the COAG Energy Council and energy market participants. For example, the AER division has identified a risk that substantial new functions are assigned to the AER Board without appropriate funding increases, sufficient notice, or in an area where the AER division does not have relevant expertise.⁴⁰ The ACCC and AER Board and division's controls and treatments reflect that other parties need to be consulted. However, the risk is not shared or managed collaboratively with COAG, the Australian Energy Market Commission and the Department of the Treasury to ensure new functions can be effectively implemented to achieve National Energy Market objectives.⁴¹ The AER division advised the ANAO that the Energy Security Board (within which the AER Board Chair is a member) provides the key mechanism used by the AER Board and division for identifying and managing shared risk with other market institutions and stakeholders.

2.21 The AER division provided an update on issues and risks for the period January to June 2019 at the Corporate Governance Board Meeting of 25 September 2019. However, the biannual report did not present the risks in a format that would assist the Corporate Governance Board to quickly gauge from the list of division-level risks whether: risks have been realised; current management arrangements are considered sufficient; overall risk ratings remain appropriate; or there are emerging risks that need to be managed.⁴²

2.22 The AER division was also developing a new approach to risk management at the time of the audit as part of its Strategic Transformation Program. The AER division advised the new arrangements are intended to complement the risk management framework established by the ACCC. In addition to contributing to ACCC strategic risk management, the arrangements involve improvements to the management of strategic risks managed by the AER's CEO and the AER division's Senior Management Team, with oversight by the AER Board, and operational risk management. The AER division advised that by February 2020 it had completed training 98 per cent of executive level and SES officers on the new approach to managing AER division operational risks and risk management. Following completion of training the AER division has developed a risk spreadsheet (the AER division's operational risk register) to manage risk at a project level. The AER division advised the ANAO that: the risk register has been completed and project risk work, the process for pulling all project risks together in one place is currently on hold due to COVID-19; and new arrangements are actively being developed to support regular Senior Management Team and AER Board discussion of risk.

40 This risk was included in the ACCC and AER's Enterprise Risk Register 2019.

41 In August 2019 the AER division provided a briefing to the AEMC Commissioners outlining resourcing and timing implications of AEMC rule changes and proposing a way forward to address these implications in the future.

42 Similarly the AER division prepared an operational and risk update for the ACCC Audit Committee in November 2018 that did not present the risks in a format that would assist the committee to quickly gauge risk status.

Recommendation no.1

2.23 The AER:

- (a) develops risk reporting to the AER Board and ACCC Corporate Governance Board that presents the AER's risks and concisely reports on whether risks have been realised, current management arrangements are sufficient, overall risk ratings remain appropriate and any emerging risks; and
- (b) implements arrangements to effectively identify and manage shared risks with other government and non-government entities.

Australian Competition and Consumer Commission and Australian Energy Regulator response: *Agreed.*

2.24 *The AER has undertaken a significant amount of work on risk management over the past year, with the development of a new AER-specific approach to project risk and extensive staff training. This work will feed into the AER's organisational-level risk register that is required by the ACCC, which was recently overhauled and includes a number of shared risks. The newly formed Policy and Governance Committee, which includes all AER Board members, will regularly review the risk register and receive monthly CEO updates, including on strategic risks. These arrangements will allow us to improve our management and reporting of risk, including periodic reporting to the Corporate Governance Board of the ACCC and AER.*

2.25 There would also be merit in the AER Board and division reviewing governance and operational management arrangements including the purpose and effectiveness of committees, delegations, portfolio and risk spreadsheets, and dashboard reports after 12 months of operation. This would enable the AER Board and division to determine whether these arrangements provide effective support to the AER Board in overseeing the AER's regulation of the National Energy Laws in accordance with other requirements.

Has the AER established an effective performance monitoring, measurement and reporting framework, including to the Minister and the COAG Energy Council?

The AER has not established an effective performance monitoring, measurement and reporting framework that assists it to demonstrate its effectiveness as a regulator. The AER has two distinct arrangements for external reporting on its performance — the Commonwealth performance framework and the statements of expectations from the COAG Energy Council and Commonwealth Treasurer. These two frameworks were not well linked, and neither adequately captured the AER's purposes or provided a clear read from the purposes to the AER's deliverables. The frameworks were not complete, as reliability, quality, safety and efficiency elements were not explicitly measured, and there was limited consideration of security and price particularly with respect to the long term interests of consumers.

2.26 The ANAO examined the AER's⁴³ performance reporting under the Commonwealth performance framework (described below) and through other established mechanisms, including the COAG Energy Council's reporting, the AER's work program reporting, and Regulator Performance Framework reporting.⁴⁴

The AER's primary planning documents

2.27 The Commonwealth performance framework is established in the PGPA Act. The PGPA Act is supported by the PGPA Rule 2014 (PGPA Rule), which requires the accountable authority (the ACCC Chair and Agency Head) to:

- publish a corporate plan for the entity at least once each reporting period; and
- include a performance statement in the entity's annual report that measures the achievement of the entity's purposes.⁴⁵

2.28 The corporate plan is intended to be the entity's primary planning document. It is required to set out the purposes and activities that the entity will pursue and the results it expects to achieve, including explaining the environment and context in which the entity operates, its planned performance measures, risk profile and capabilities over a minimum of four reporting periods.

2.29 The AER's planning, performance and evaluation arrangements are not outlined in a framework document. They are not included under any performance measurement and evaluation framework developed by the ACCC. To ensure that the AER is well positioned to demonstrate that its purpose is met, the AER should develop a performance measurement framework that details the AER's purpose, strategies and activities to achieve the purpose, measures for assessing performance in the short to long term, and arrangements for evaluating the AER's success in achieving its purpose (refer to Recommendation no.2 at paragraph 2.47).

2.30 The AER has two distinct sets of planning and performance reporting arrangements for external reporting on its performance. These arrangements and their relationships with each other are outlined in Figure 2.3.

2.31 One set of planning and performance reporting arrangements relate to the Commonwealth performance framework and includes the portfolio budget statements, corporate plan and annual report for the ACCC and AER (covering 23 performance measures in 2018–19).⁴⁶ The second relates to the AER preparing a separate annual report for the purpose of meeting accountability and transparency expectations outlined in the COAG Energy Council's and the Commonwealth Treasurer's statements of expectations⁴⁷, the AER's statement of intent, work program (including 61 performance measures in 2018–19) and priorities — this annual report is not tabled in the

43 The AER's performance monitoring, measurement and reporting is the responsibility of the AER Board, and implemented by the AER division. Recognising these arrangements, this section refers simply to the AER.

44 The AER Board is not required to report on the Regulator Performance Framework. However, it has included the Framework in the measures it reports against in its statement of intent and work program.

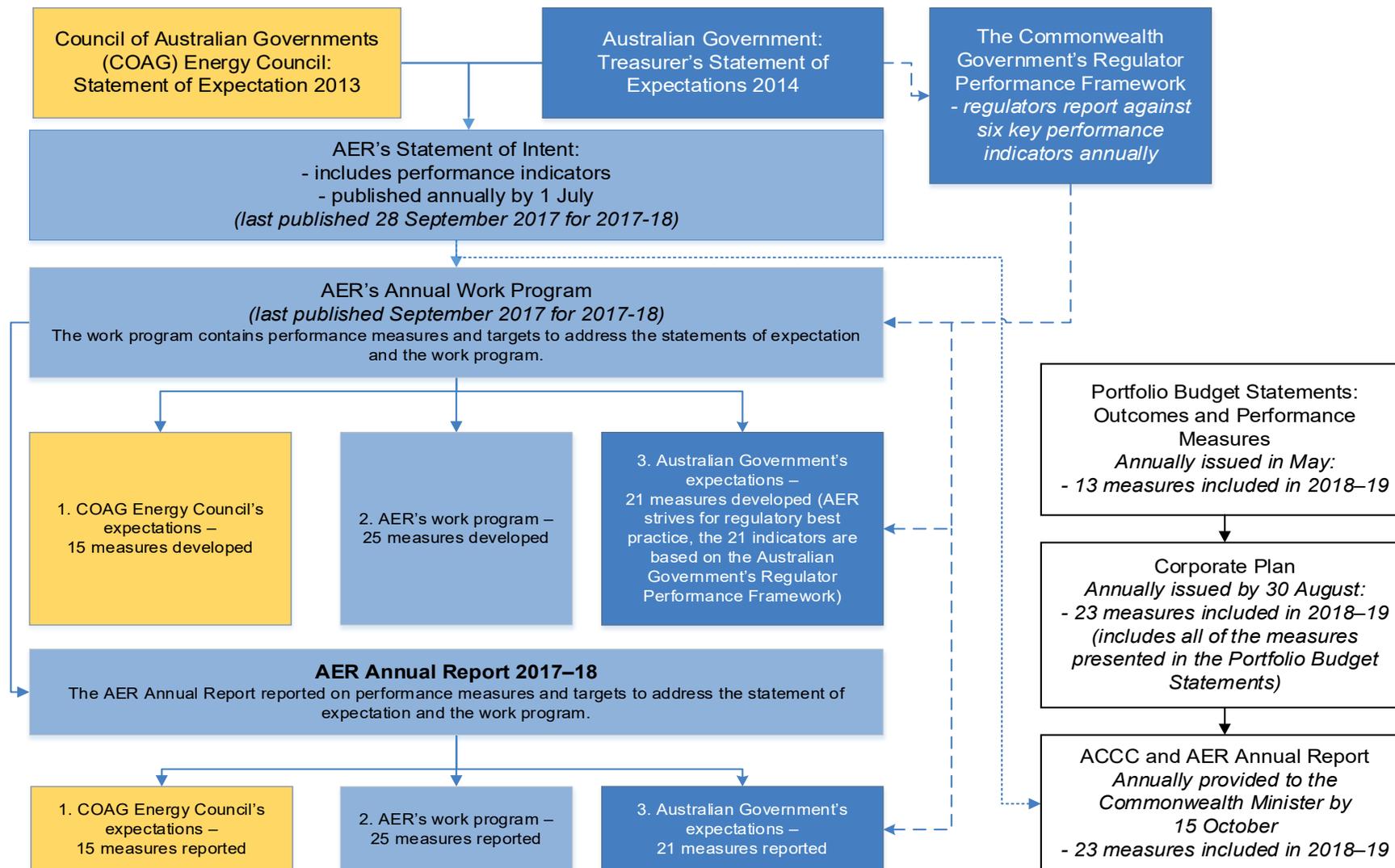
45 Sections 16E and 27A of the PGPA Rule set out the matters that the accountable authority must include in the entity's corporate plan.

46 The measures in the portfolio budget statements are a subset (13 in 2018–19) of those outlined in the corporate plan (23 in 2018–19).

47 The Australian Government expects Ministers will establish statements of expectation for entities such as statutory authorities or government business enterprises. The AER is part of the ACCC (and is considered a secondary statutory structure) but not a separate entity for the purpose of the PGPA Act.

Commonwealth Parliament. There were 15 common or similar performance indicators contained in the corporate plan and arising from the COAG Energy Council's and the Australian Government's Statements of Expectations in 2017–18 and 2018–19.

Figure 2.3: The AER's planning and external performance reporting arrangements



Source: ANAO summary of the AER's planning and external performance reporting arrangements.

2.32 The ACCC and AER corporate plan is not positioned as the central planning document for the AER. The 2018–19 ACCC and AER Corporate Plan does not reference the 2013 and 2014 Statements of Expectations or the 2017 AER Statement of Intent. Similarly, the 2017 AER Statement of Intent does not reference the ACCC and AER corporate plan, the AER’s purpose nor obligations under the PGPA Act. The ACCC and AER corporate plan should refer to other key planning documents to provide Parliament with sufficient information about the AER’s purposes, activities and the results it expects (also refer to Recommendation no. 2 at paragraph 2.47).

2.33 At the time of audit fieldwork, a combined statement of expectation (covering both COAG and the Australian Government’s expectations as a single document) was being considered by the COAG Energy Council. In August 2019, the COAG Energy Council requested that the draft statement of expectations reflect the COAG Energy Council Strategic Energy Plan, noting that this should occur when the Strategic Energy Plan is finalised. The AER plans to produce a statement of intent each year, but in anticipation of the combined statement of expectation the AER last published a statement of intent in September 2017. The AER advised the ANAO that the statement of intent will be updated when the joint COAG and Treasurer’s statement of expectation is released.

The AER’s purpose statement

2.34 Section 16E of the PGPA Rule requires that an entity’s corporate plan state the entity’s purpose(s) over the next four years. The PGPA Act defines purpose(s) as including the objectives, functions or role of the entity. Department of Finance (Finance) guidance notes:

Well-expressed purpose statements make it clear who benefits from an entity’s activities, how they benefit and what is achieved when the entity successfully delivers its purposes. Essentially, purposes describe the value an entity seeks to create or preserve.⁴⁸

2.35 The aim of specifying purposes is to give context to the significant activities that the entity will pursue over the period covered by the plan.⁴⁹ Clearly and concisely presenting purposes in a corporate plan better allows a clear read through to results reported at the end of the reporting period in annual performance statements. The description of purposes and activities in the corporate plan forms the foundation on which to develop performance information and tell a meaningful performance story.⁵⁰

2.36 The AER’s purpose is combined with the ACCC’s purpose and has remained generally consistent over the period 2015–16 to 2018–19. It comprised an initial purpose sentence and additional context. In 2018–19 the AER’s purpose was (the ANAO has bolded key words in the following purpose statement to assist comparison with deliverables, activities and performance indicators in Table 2.1):

48 Department of Finance, *2017–18 Corporate Plan Lessons Learned*, November 2017 [Internet], available from <https://www.finance.gov.au/sites/default/files/2019-11/2017-18%20Corporate%20Plan%20Lessons%20Learned.pdf> [accessed November 2019].

49 Department of Finance, *Resource Management Guide No.132: Corporate Plans for Commonwealth entities*, January 2017, p. 18, [Internet], available from <https://www.finance.gov.au/government/managing-commonwealth-resources/corporate-plans-commonwealth-entities-rmg-132> [accessed November 2019].

50 Department of Finance, *Resource Management Guide No.131: Developing good performance information*, April 2015, p. 10, [Internet], available from <https://www.finance.gov.au/government/managing-commonwealth-resources/developing-good-performance-information-rmg-131> [accessed November 2019].

The ACCC and the AER work in close coordination to achieve our common purpose: making markets work for consumers, now and in the future...

The AER is an independent decision-making body responsible for **regulating** energy markets and networks under national legislation and rules, which aim to **promote efficient investment in, and operation and use of, energy services** for the **long term interests of energy consumers** with respect to **price, quality, safety, reliability and security**...

The roles of the ACCC and AER should be seen in the context of the thinking that underpins National Competition Policy — that **competition** provides the best incentive for businesses to become more **efficient, innovative and flexible** and to operate in the long term interests of consumers. Together the ACCC and AER champion **strong, efficient and effective** markets.⁵¹

2.37 In the second paragraph of the AER's purpose statement (see paragraph 2.36) it is not clear whether the aims of the national legislation and rules are also the objectives of the AER, or the extent to which the AER will contribute to these objectives.⁵² It is important to understand that other market institutions such as the Australian Energy Market Operator have responsibilities in relation to the aims of national legislation and rules. The AER's purpose should be modified to be clearer, and the AER should consider whether all elements reflect the primary role and responsibilities of the AER in accordance with the National Energy Laws.

2.38 The AER's deliverables, activities and performance indicators presented in the ACCC and AER Corporate Plan and Annual Report 2018–19 are summarised in Table 2.1, with key words highlighted where elements of the purpose statement are addressed. The purpose does not provide a 'clear read' to the AER's deliverables as it is not clear which deliverables contribute to efficient investment, operation and use of energy services for the long term interests of consumers with respect to price, quality, safety, reliability and security. The absence of a 'clear read' continues through to the AER's activities and performance indicators. This means that not all parts of the purpose are covered by the performance indicators. Reliability, quality and safety elements of the AER's purpose are not explicitly covered in performance indicators, and there is limited consideration of security and price particularly with respect to the long term interests of consumers.⁵³ In the 2019–20 Corporate Plan the AER retained its purpose statement and essentially the same set of performance measures, but replaced the deliverables with its strategic objectives and provided new detailed activity statements. These changes linked the strategic objectives to the purpose, although further improvements are required to provide a clear read (as discussed in paragraph 2.40).

2.39 Efficient investment is another element of the purpose that is not reflected in the performance indicators. The AER should consider if this is a material part of its functions, and if so, ensure that its performance against this element is demonstrated in the performance indicators, and through the activities.

51 ACCC, *ACCC and AER Corporate Plan 2018–19*, August 2018, pp. 5–6, [Internet], available from <https://www.accc.gov.au/system/files/ACCC%20and%20AER%20Corporate%20Plan%202018-19.pdf> [accessed July 2019].

52 The AER Board adopts the aims of the national legislation and rules as its strategy in its corporate plan and ACCC and AER annual report.

53 Audits of energy businesses is the only indicator to mention security (and only tangentially), and furthermore none mention safety or reliability.

Table 2.1: The AER’s deliverables, activities and performance measures presented in the ACCC and AER Corporate Plan and Annual Report for 2018–19

Deliverable	Activities	Performance measures
1) Deliver network regulation to promote efficient investment in energy network services that customers value	A. Setting the amount of revenue that network businesses can recover from customers for using these networks and promoting efficient pricing structures.	1.1 Number of completed revenue decisions for electricity networks and gas pipelines 1.2 Percentage of revenue reset determinations for electricity networks and gas pipelines and distribution networks completed within statutory timeframes 1.3 Number of annual benchmarking reports on electricity networks 1.4 Percentage of disputes resolved within legislated timeframes, including on network access and connections, and regulatory investment tests 1.5 Number of electricity distribution annual pricing (tariff) proposals and annual gas tariff variations approved
2) Build consumer confidence in retail energy markets	B. Regulating retail energy markets in Queensland, New South Wales, South Australia, Tasmania (electricity only) and the Australian Capital Territory. C. Operating the Energy Made Easy, a price comparator website and providing other information for energy consumers.	2.1 Number of annual reports on compliance in, and performance of, retail energy markets 2.2 Number of retailers’ hardship policies and proposed amendments assessed (externally driven) 2.3 Percentage of new and amended retailer hardship policies assessed within 12 weeks of receiving all relevant information 2.4 Number of retail authorisations and exemptions assessed (externally driven) 2.5 Percentage of retail authorisations and exemptions applications assessed within 12 weeks of receiving all relevant information 2.6 Support the timely transfer of affected customers in the event of a retailer failure (externally driven) 2.7 Number of formal energy retail enforcement interventions (court proceedings commenced, s. 288 (Retail Law) undertakings accepted, infringement notices issued) (externally driven) 2.8 Percentage of offers published on the AER’s Energy Made Easy price comparator website within two business days of receipt from retailers

Deliverable	Activities	Performance measures
3) Promote efficient wholesale energy markets	D. Monitoring electricity and gas markets to ensure energy businesses comply with the legislation and rules, and taking enforcement action where necessary.	3.1 Number of quarterly reports on compliance in wholesale electricity and gas markets 3.2 Percentage of quarterly compliance reports published within six weeks of the end of the quarter 3.3 Number of audits completed of systems for energy businesses that are critical to market efficiency and energy security 3.4 Number of weekly electricity and gas monitoring reports 3.5 Percentage of weekly reports published within 12 business days of the end of the relevant week 3.6 Number of reports on extreme price events in wholesale electricity and gas markets (externally driven) 3.7 Percentage of reports on wholesale electricity market high price events and significant price variations in spot gas markets activity published within statutory timeframes 3.8 Number of targeted reviews of compliance with the national energy rules 3.9 Number of reports on effective competition in the wholesale electricity market
4) Contribute our expertise and insight to inform energy policy development processes and working in partnership with the COAG Energy Council, the Energy Security Board and other market institutions to advance energy market reforms	E. Publishing information on energy markets, including the annual State of the energy market report, and reports on effective competition to assist stakeholders and the wider community.	4.1 Publish the State of the energy market report.

Source: ANAO summary based on the ACCC and AER Corporate Plan and Annual Report for 2018–19.

2.40 The AER’s statement of intent, work program and standalone annual report would benefit from articulating the AER’s purpose, consistent with the other documentation, as a purpose statement is not included in these documents.⁵⁴ Instead of including a purpose, the statement of

54 The AER includes a purpose statement in its August 2017 *Strategic Statement* similar to the first sentence of the purpose statement in the ACCC and AER corporate plan. AER, *Strategic Statement* [Internet], August 2017, p. 1, available from <https://www.aer.gov.au/system/files/AER%20Strategic%20Statement%20August%202017.pdf> [accessed May 2020].

intent provides five strategic objectives.⁵⁵ The purpose (see paragraph 2.36) does not provide a clear read to the AER's five strategic objectives. For example, it is not clear which objectives contribute to efficient investment in energy services.

Commonwealth performance framework information analysis

Performance measures support the needs of the audience

2.41 The type of performance information used depends on the needs of the audience. For example, Finance guidance (Resource Management Guide 131, *Developing Good Performance Information*) indicated that when reporting to the Parliament and the public (for example, in the ACCC and AER annual report and the AER's standalone annual report) accountability information should be presented to demonstrate whether the use of public resources is making a difference and delivering on government objectives. Performance information should include effectiveness measures at the purpose level. However, performance indicators developed by the AER are focused on information for operational managers to understand whether they are providing results expected by senior managers and largely provide information on outputs (such as the number of reports produced or the timeliness of assessments). There would be merit in the AER considering whether these indicators can be refined to provide a more strategic view of the performance of the entity.

Assessment of appropriateness of the AER's performance measures

2.42 Guidance from Finance notes that 'appropriate' performance information is 'relevant, reliable and complete'. The ANAO assessed whether the AER's performance indicators contained in the corporate plan, and the statement of intent and work program satisfied these characteristics. The basis for this assessment is drawn from the characteristics of 'good' performance information as defined by Finance in Resource Management Guide 131 *Developing Good Performance Information*, and applied at the time of the audit.⁵⁶

2.43 The analysis found that the:

- corporate plan indicators were largely relevant and reliable but not complete⁵⁷; and
- indicators from the statement of intent, work program and Regulator Performance Framework were mostly or partly relevant and reliable.⁵⁸ The statement of intent and

55 The five strategic objectives are: drive effective competition where it is feasible; provide effective regulation where competition is not feasible; equip consumers to engage effectively, and protect those who are unable to safeguard their own interests; use our expertise to inform debate about Australia's energy future, the long-term interests of consumers and the regulatory landscape; and take a long-term perspective while also considering impacts on consumers today. AER, *Statement of Intent 2017–18*, p. 2, 2017 [Internet], available from <https://www.aer.gov.au/system/files/AER%20Statement%20of%20Intent%202017-18.pdf> [accessed November 2019].

56 In May 2020, the Department of Finance issued new guidance through Resource Management Guide 131 *Developing performance measures*. This guide provides information on the requirements, set out by section 16EA of the *Public Governance, Performance and Accountability Rule 2014*, for performance information developed by entities. It replaces Quick Reference Guide – RMG 131 *Developing good performance information*, and is expected to guide implementation from 2020–21.

57 Of the 23 measures in 2018–19: 19 were assessed as fully or mostly relevant; all were mostly or partly reliable (18 mostly, five partly); but overall were not complete.

58 Of the 61 measures in 2018–19 across the three reporting frameworks: 59 were generally relevant as they broadly linked to the AER's purpose described in the corporate plan; and 32 were reliable (19 mostly, four partly).

work program indicators were not complete, while the Regulator Performance Framework indicators were partly complete.

2.44 The corporate plan indicators assessed as not reliable were either externally driven or did not have a target to be achieved, and as such do not provide information on the AER's performance. Indicators from the other frameworks assessed as not reliable had deficiencies in defining terms or providing sufficient information to remove potential for bias. Overall, few indicators were benchmarked or compared against a time series. The AER should establish benchmarks, either internally through time series data or comparisons to other similar agencies to make the indicators more meaningful.

2.45 The corporate plan indicators were not complete. Issues with completeness included that: indicators were primarily quantitative rather than qualitative; targets were short term in nature and static rather than dynamic over the forward years; measures were primarily output measures, with some proxies for effectiveness measures; few efficiency, impact or quality measures were evident; and there were significant gaps in the coverage of the corporate plan performance indicators compared to the work performed by the AER as outlined in the purpose.⁵⁹ As mentioned in paragraphs 2.38 and 2.39, major elements of the AER's purpose were not covered by performance indicators. Similar issues were identified in relation to the completeness of the indicators for the statement of intent, work program and Regulator Performance Framework (see footnote 44), including an absence of efficiency and effectiveness measures.⁶⁰

2.46 The current performance information, including the indicators and the purpose, do not allow the AER to demonstrate it is an effective regulator of the energy market. It is timely for the AER to review its framework in light of the ANAO's findings.

59 For example, despite the AER outlining that 'Effective stakeholder engagement is a pivotal element in the regulatory process', it has no metrics pertaining to stakeholder engagement and satisfaction, or industry education.

60 The COAG Energy Council Statement of Expectations December 2013 expects the AER to undertake its responsibilities efficiently and effectively. There would be merit in the AER reviewing performance measures to support an assessment of performance in relation to efficiency and effectiveness.

Recommendation no.2

2.47 The AER develops a performance measurement and evaluation framework that:

- (a) establishes the corporate plan as the primary planning document, which includes references to other key planning documents for the AER; and
- (b) contains short, medium and long term measures that are consistent with section 16EA of the *Public Governance, Performance and Accountability Rule 2014* and Resource Management Guide 131 *Developing performance measures* and supports the AER to report on its effectiveness with respect to its purpose and primary activities and strategies.

Australian Competition and Consumer Commission and Australian Energy Regulator response: *Agreed.*

2.48 *To assist the AER in implementing this recommendation, it has obtained agreement from the ACCC to produce an AER-specific corporate plan as part of the broader agency 2020-21 corporate plan. Complementary to this, we have recently undertaken a significant strategic planning exercise that outlines our vision, outcomes, objectives, priorities and enablers across our people, stakeholders and systems. Once completed, this will form the centrepiece of the AER's new planning and reporting arrangements. It will also enable us to consider refinements to our current evaluation framework so that we move towards a clearer program logic incorporating output, outcome and impact measures as appropriate.*

Reporting on performance

Public reporting against the AER's corporate plan (ACCC and AER Annual Report)

2.49 The AER reports against its performance indicators in its combined annual report with the ACCC.⁶¹ The AER has reported on a mostly consistent set of 23 performance indicators for these deliverables since 2015–16.

2.50 Performance reporting between 2015–16 and 2017–18 indicates mixed performance.

- For deliverable 1 (Network), across six performance indicators, performance generally met or exceeded targets, except for the timeliness of revenue reset determinations made by the AER, although the results show improvement over time.
- For deliverable 2 (Retail), four of eight performance indicators do not have targets as they are driven by external demand, and the AER has not consistently met targets for two indicators (timely assessment of hardship policies, and timely assessment of applications for retail authorisations and exemptions).
- For deliverable 3 (Wholesale), there is no target for one of the 10 deliverables as it is externally driven, and AER has not consistently met targets for another seven indicators.

61 Under Section 44AAL of the CC Act, for the purposes of the PGPA Act, the combination of the ACCC and the AER Board is a listed entity, known as the ACCC. The Chairperson of the ACCC is the accountable authority for the purposes of the PGPA Act. Under Section 46 of the PGPA Act, after the end of each reporting period for a Commonwealth entity, the accountable authority of the entity must prepare and give an annual report to the entity's responsible Minister, for presentation to the Parliament.

Reporting against the AER's work program (in the AER standalone annual report)

2.51 The standalone AER annual report (for 2017–18, prepared to meet the expectations of the COAG Energy Council) includes 61 performance indicators outlined in the AER's work program. For each indicator, the report included a 'traffic light assessment' — a green light indicates full achievement of the performance target, orange indicates partial achievement and red indicates non-achievement. The performance results in the standalone annual report against each of the three sets of performance measures from 2015–16 to 2017–18 indicated that the performance targets were mostly met.

3. Regulatory activities

Areas examined

This chapter examines whether the AER has effectively undertaken regulatory activities, including communicating regulatory requirements to market participants and information to consumers to support informed decision-making. It also examines the AER's activities to ensure the contestability, reliability and security of the energy market, provide reports on energy markets, maintain public registers and manage reviews and assessment processes.

Conclusion

The AER has been partially effective in undertaking regulatory activities. It has supported market participants by providing extensive information to help them fulfil regulatory requirements, including through a range of reports on compliance and performance, hosting public registers, and conducting prescribed reviews and assessments. There is scope for the AER to improve timeliness in meeting legislative timeframes and content requirements for reports, and in documenting assessment decisions. The AER has not been able to demonstrate that the Energy Made Easy energy price comparator website has been effective or represents value for money.

Areas for improvement

The chapter includes a recommendation that the AER develops and uses tools that support it to meet key timeframes for reviews and assessments (paragraph 3.78).

The chapter also suggests that the AER documents procedures and quality assurance processes for preparing reports (paragraph 3.37), and takes steps to ensure the reports satisfy requirements on reporting timeframes, frequencies and content requirements (paragraph 3.44).

3.1 As discussed in Chapter 1, the AER has many regulatory responsibilities under the National Energy Laws. These include:

- providing information to support energy businesses to comply with the legislation and rules;
- operating an energy price comparator website;
- publishing performance and compliance reports on energy markets;
- implementing arrangements to ensure the contestability, reliability and security of the energy market;
- managing review and assessment processes in electricity and gas markets; and
- establishing and maintaining public registers, including for retailer authorisations and retail and network businesses exemptions.

Has the AER established and communicated procedures and guidelines to fulfil its regulatory obligations and support market participants?

The AER's development and communication of procedures and guidelines has been largely effective. In February 2020 the AER had 76 guidelines, schemes and models (instruments) on its website, of which 62 per cent were required by legislation and the remainder were developed by the AER to explain obligations to market participants and inform consumers. Of 17 instruments examined: the 12 required to include content established by legislation did so; and all four instruments required to be developed by a specific date did so. Of 14 instruments examined that were required to comply with a consultation procedure, the procedure was generally complied with except for four instances where the instrument was not published within required timeframes. Bi-annual surveys indicate that stakeholders are satisfied with consultation procedures but approximately one third considered that the procedures did not lead to consistent or predictable outcomes.

3.2 The National Energy Laws require the AER to develop and publish instruments such as guidelines, schemes and models to establish requirements in relation to specific matters for network, wholesale and retail energy businesses. The AER may also develop instruments to assist energy business and consumers understand obligations established by the National Energy Laws. Where the AER is required to make an instrument, the law may establish minimum content requirements, timeframes for establishment and review, and consultation procedures to be undertaken when developing the instrument.

3.3 Table 3.1 outlines the guidelines, schemes and models developed and published by the AER. The AER publishes such instruments on four web pages on its website — retail, wholesale, networks and publications.⁶² Table 3.1 shows that as at February 2020 the AER had 108 unique documents on its website, of which 76 were considered to be instruments.⁶³

3.4 Of the 76 instruments on the AER website as at February 2020: 47 were required to be made by law; 10 were made under options provided by law; and 19 were not provided for by law. The AER was required to publish 25 instruments by a specified date under the law, and the AER met these dates for all instruments. The law set minimum content requirements for 47 instruments and required specified consultation procedures to be used for 51 instruments. The AER had reviewed 26 of the 76 instruments.

62 Instruments published by AER are available at <https://www.aer.gov.au/> [accessed February 2020].

63 At that time, the AER had 18 instruments under development and 119 instruments had been retired.

Table 3.1: Guidelines, schemes and models prepared by the AER

	Total ^a	National Energy Retail Legislation and Rules	National Electricity Law Legislation and Rules ^b	National Gas Legislation and Rules ^b
Number of instruments that must be made	47	8	35	4
Number of instruments that can be made ^c	10	1	8	1
Number of instruments published on the AER's website current at February 2020	76 ^d	9	43	5
Number of instruments that have been reviewed as at February 2020	26 ^e	8	16	0
Number of instruments that are required to be made within a certain timeframe and percentage that were made on time	25 of which 100% met timeframe	3 of which 100% met timeframe	20 of which 100% met timeframe	2 of which 100% met timeframe
Number of instruments where legislation established a minimum content requirement	47	8	34	5

Note a: The total reflects the number of unique instruments required, thus eliminating duplicate requirements for instruments across the retail, electricity and gas law.

Note b: The Rate of Return Instrument is required to be made under both the National Electricity Rules and National Gas Rules. This instrument is included in the column for National Electricity Law and Rules, and not recorded against the National Gas Laws and Rules in this table.

Note c: Sometimes the legislation does not require the AER to make an instrument but if the AER chooses to make the instrument, the law establishes minimum content requirements.

Note d: Nineteen instruments are excluded from this table because they were not required or provided for by legislation.

Note e: Two instruments reviewed were not required by legislation.

Source: ANAO analysis of instruments published on the AER website.

Minimum content requirements and consultation procedures for guidelines, schemes and models

3.5 The ANAO examined a selection of 17 of the AER's guidelines, schemes and models to determine whether they were required by legislation to be developed, met minimum content requirements and were developed by a specified date.⁶⁴ The results are provided in Table 3.2. The table shows that all 12 instruments examined that were required to meet minimum content

64 The selection of instruments included: a mix of recently made and long term guidelines, including guidelines related to important regulatory and compliance activities; a mix of those required under Retail Energy, Electricity and Gas Laws; and instruments that were both required and not required to be made.

requirements did so. Similarly, all four instruments examined that were required to be made by a specified date⁶⁵ did so.

Table 3.2: ANAO analysis of a selection of the AER’s published guidelines, schemes and models

Source of requirements	Number examined	Number that met content requirements	Number that met date requirements
National Electricity Laws	7	4 of 4	4 of 4 ^a
National Gas Laws	1	1 of 1	0 of 0
National Energy Retail Laws and Rules	8	7 of 7	0 of 0
Not required by legislation	1	0 of 0	0 of 0
Total	17	12 of 12	4 of 4

Note a: This figure includes one guideline (the *Distribution Reliability Measures Guideline 2018*) that has a date requirement which is not yet due (the AER is required to review it every five years).

Source: ANAO analysis of legislation and AER documentation.

3.6 The National Retail, Gas and Electricity Rules set out consultation procedures to be used by the AER when developing, making, amending or varying an instrument. Across the legislation any one of seven (or more) specific consultation procedures could apply to either the development or review, or both the development and review, of guidelines.

3.7 The AER was required to follow a specific consultation procedure for 14 of the 17 instruments examined. These 14 instruments met the core requirements set out in the relevant consultation procedure.

3.8 The 14 instruments examined that were made in accordance with a consultation procedure also had minimum time requirements for the length of the submission period, and the date of publishing the final instrument on the AER website. All 14 instruments met the timeframe required for submission periods, but four of these instruments did not meet the timeframe for publishing the final instrument, and delays were 12, 20, 159 and 284 business days in duration.

Performance monitoring and evaluation

3.9 The AER has developed five performance indicators that directly relate to the development, maintenance and publishing of instruments to monitor and report against to COAG in the AER’s standalone annual report. A further 10 performance indicators are included in the AER’s standalone annual report that cover instruments as part of a broader program of work, such as in meeting statutory timeframes. Across the five indicators the targets did not set a goal to be achieved, instead they were usually framed to document instances where the activity measured by the indicator was not undertaken.⁶⁶

65 Where the specified date related to an earlier version of the guideline being considered, the ANAO reviewed whether the earlier version met this requirement.

66 The AER Board has not established performance indicators in its corporate plans since 2015–16 to report on performance in developing and maintaining instruments or determining whether instruments effectively communicate requirements to market participants and provide useful information to consumers to support decision-making.

3.10 The AER conducts a stakeholder survey every two years of the attitudes of energy market participants. Results for the 2016 and 2018 surveys showed an overall increase in satisfaction with the way AER engages stakeholders during consultation and decision-making processes. The 2018 survey also identified that stakeholders considered there were good opportunities for input (88 per cent) and that the AER's processes were transparent during the decision-making process (74 per cent). However, approximately one in three stakeholders did not consider that instrument procedures (frameworks, processes and decisions) led to consistent or predictable outcomes, or that processes were available that they could follow.

3.11 The AER has undertaken reviews of guidelines to meet review timeframes established in the legislation, to address changes in rules or laws or to address unintended consequences of guidelines. Reviews have not determined whether guidelines effectively communicate requirements to market participants and provide useful information to consumers to support decision-making.

Has the AER appropriately established and maintained an energy price comparator website for residential and small business customers?

The AER established and maintained an energy price comparator website that is largely appropriate, but cannot demonstrate that the website is effective or value for money. The AER established the Energy Made Easy website in accordance with legislative requirements by 1 July 2012, in order to allow residential and small business customers to compare available energy offers. The website provided only basic comparisons until 2015, and did not support smart meter comparisons until April 2020. Establishment and maintenance was achieved through procuring website development and maintenance services. Due to significant increases in the value of contracts, numerous changes in requirements during development stages, and failure to deliver key functionality of the website, the procurements did not demonstrate value for money. The AER has not developed adequate performance measures and targets to measure the effectiveness of the website.

3.12 Section 62 of the National Energy Retail Law, which came into effect on 1 July 2012, requires the AER to develop and make available a price comparator website.

Establishment of the price comparator website

3.13 In August 2010, the AER division advised the AER Board that it would be necessary to undertake a procurement and enter into a contract to design, develop, implement and maintain an energy price comparator website.⁶⁷ At the time it was understood that the website would be able to compare available energy prices, was open to all jurisdictions as they adopted the National Energy Retail Law (retail law), and would have to support changes to types of offers, as well as

⁶⁷ The procurement must be conducted in accordance with the *Commonwealth Procurement Rules* and relevant Accountable Authority Instructions and procedures of the ACCC. The *Commonwealth Procurement Guidelines December 2008* ([Internet] available at <https://www.legislation.gov.au/Details/F2008L04459> [accessed March 2020]) were in place at the time of the initial procurement. These were replaced by the Commonwealth Procurement Rules on 1 July 2012.

legislative and rule changes.⁶⁸ The AER estimated that the budget required to develop and operate the website would be \$400,000.

3.14 To assist in developing more detailed objectives and requirements for the price comparator website content and functionality, the AER consulted stakeholders between July and August 2011, including state jurisdictions⁶⁹, jurisdictional regulators, consumer representatives and energy retailers. Feedback received during the consultation informed the statement of approach which was finalised in January 2012. The statement of approach established the overarching objectives and requirements relating to the contents and functions of the price comparator website. It also includes a set of general principles that the website would be independent and impartial, accessible, simple, accurate and current.

3.15 By September 2011 the AER developed a procurement plan to build the price comparator website. The plan proposed a select tender procurement method.⁷⁰ It was not clear whether the AER was using a multi-use list or panel to identify suitable suppliers, due to inconsistent information in AER procurement documentation. The plan divided the price comparator website project into two phases: Phase 1 — standard functionality; and Phase 2 — enhanced functionality, hosting, and ongoing support and maintenance.

3.16 In October 2011 tenders were requested for Phase 1 and Phase 2, from identified suppliers. As a result of this process, a contract was signed with a provider in January 2012 for the provision of Phase 1 (including interim support and maintenance) at a fixed cost of \$556,930 to be paid over 10 milestones. A tender evaluation plan and a tender evaluation report were documented. Weightings for tender evaluation criteria were not applied as intended, with the AER changing the weighting of and adding additional criteria for the tender evaluation report. At least two of the procurement processes included an evaluation criterion requiring potential suppliers to demonstrate capability with government projects of this nature. This criterion sought to exclude suppliers for reasons that do not relate to capability and was not consistent with the Commonwealth Procurement Rules, which states that relevant prior experience may be included as a condition for participation where it is essential to meet the requirements of the procurement but must not specify, as a requirement, that potential suppliers have previous experience with the agency, with the Australian Government or in a particular location.⁷¹

3.17 Following establishment of the contract, a number of issues resulted in the contract running over cost and behind schedule.⁷² The online price comparator website, named Energy Made Easy (EME), was launched on 1 July 2012 to coincide with the commencement of the National Energy Retail Law — therefore meeting its primary goal.

68 The website would need to be supported, maintained and hosted indefinitely.

69 At the time of the consultations, state-based price comparators were in operation for Victoria, South Australia and Queensland.

70 A select tender is where potential suppliers are approached to provide a quote or tender.

71 For example see *Commonwealth Procurement Guidelines 2008*, paragraph 8.53, and *Commonwealth Procurement Rules 2012*, paragraph 10.14. An evaluation criteria is a requirement or condition for participation for the purposes of a procurement.

72 For example, the Australian Capital Territory and Tasmania were the only participating jurisdictions of the retail law when the website went live. The final contract deliverable was accepted in January 2013, seven months after the original contract deliverable date of June 2012. The procurement expenditure exceeded the initial contract value by \$70,752 (13 per cent).

Ongoing development and maintenance of the price comparator website

3.18 As identified in August 2010, the energy price comparator website required ongoing development and maintenance following its establishment. At the time, this was expected to include supporting changes to types of offers, accommodating legislative and rule changes, as well as ensuring that the website was maintained and hosted indefinitely. EME has undergone several major redevelopments since its launch in 2012.

3.19 The AER undertook five procurement processes with four suppliers to develop and maintain the EME website: Revium in 2011; Link Digital in 2012 and 2013; PreviousNext in 2014; and Mantel in 2018.⁷³ The final of these was a redevelopment scheduled to be completed by 1 July 2020. These procurements are summarised in Table 3.3.

Table 3.3: AER procurements for the energy comparator website, as at 30 March 2020

Provider	Year of initial procurement	Number of contracts	Estimated value of contracts	Value of contracts (post-variations)	Variance
Revium	2011	1	\$556,930	\$627,682	+70,752 (13%)
Link Digital	2012	6	\$459,736	\$869,562	+\$409,799 (89%)
PreviousNext	2014	9	\$675,339	\$1,492,561	+\$817,222 (121%)
Mantel Group	2018	1	\$4,600,000	\$6,710,000	+\$2,110,000 (46%)

Source: ANAO analysis of AusTender data.

3.20 All of the procurements the AER conducted for EME exceeded the threshold that required additional rules set out in Division 2 of the Commonwealth Procurement Rules to be followed.⁷⁴ Achieving value for money is the core rule of the Commonwealth Procurement Rules. The ACCC's Accountable Authority Instructions state that officials 'must ensure that any procurement will achieve a value for money outcome.' Value for money involves a comparison of financial and non-financial costs and benefits including understanding whole-of-life cost. Prior to commencing each of the EME procurement processes, the AER did not develop whole-of-life cost estimates.

3.21 For procurements in excess of \$80,000 the process would be expected to include a delegate approval of proposed expenditure, a procurement plan, a supplier evaluation plan, a request for supplier, a supplier evaluation report, negotiations with the preferred supplier and, ultimately, a contract. The AER could not demonstrate that it had prepared a complete set of appropriately approved documentation for each of the procurement processes (except for the final procurement process) to develop EME.

3.22 The AER's documentation indicates that these procurements were from a panel or multi-use list (and in some cases from both), or approached more than one supplier. Documentation outlining the panels' existence, purpose, eligible suppliers and terms of use (including the AER's ability to use the panels) was only available for the final procurement. The AER concluded during each procurement process (with the exception of PreviousNext where the AER could not demonstrate that there was a value for money assessment made) that the procurement decision

⁷³ Other procurement processes resulted in contracts for support and maintenance, as well as hosting.

⁷⁴ The initial Link Digital contract was for \$78,000 (for support and maintenance) which is just below the threshold. The final contract value was \$340,920. There were two contracts for Link Digital — one involved development and the other related primarily to maintenance.

represented value for money. However, each of the contracts with the four separate suppliers resulted in delays to product delivery and at least one variation that increased costs and changed product requirements by adding functionality not considered during the initial procurement process and/or removing requirements. As issues emerged requiring financial and functionality variations to the contracts, the AER did not re-assess value for money (instead where value for money was discussed in procurement documentation it reiterated the initial value for money selection decision).

3.23 In 2018, the AER procured a redevelopment of the EME website from the Mantel Group.⁷⁵ When planning for this procurement, the AER advised that it applied lessons learned from previous reviews of EME procurements. The AER sought advice from the Digital Transformation Agency and made a decision to adopt an agile project management approach.⁷⁶ To January 2020, contract variations of \$2,110,000 (+46%) had been made to provide for delivery of ‘must have’ scope and smart meter readings. The AER’s procurement minute (of 5 June 2019) seeking the delegate’s approval explains that⁷⁷:

Ongoing discovery and scoping activities during the agile delivery process have further expanded the scope and identified more specific detail of the AER’s requirements for the new EME solution. This has resulted in an increase in estimated delivery effort and cost, necessary to deliver the AER’s requirements.

3.24 Evaluations of procurements consistently identified chosen suppliers as presenting a notable level of risk, when risk was assessed. With the exception of the final procurement, the AER did not demonstrate plans it had to manage the risk, or the action to be taken if the risk was realised (for example, to return to market or engage alternate suppliers).⁷⁸ The procurement processes for each stage of the development of EME were often inconsistent, unclear, and did not consistently meet elements of the Commonwealth Procurement Rules. Decisions made during some of the procurement processes, and as part of managing the contracts, made it difficult to demonstrate that AER had achieved value for money across its engagement with four different suppliers throughout the life of the development of EME. The total value of the contracts for the development of EME covering the period January 2012 to January 2020 is estimated to be in excess of \$9.5 million.

Price comparator usability and functionality

3.25 The purpose of EME is to be a trusted, simple and user-friendly website that enables residential and small business customers to accurately compare available energy offers.

75 This procurement was funded through the 2017–18 *Powering Forward* measure referred to in footnote 14.

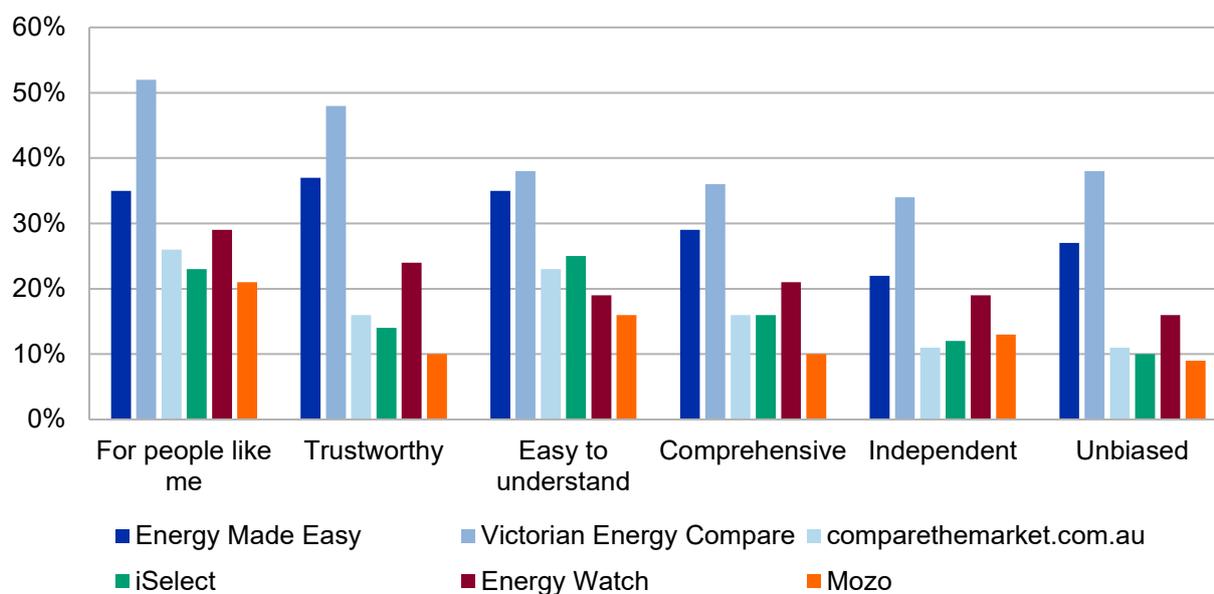
76 Agile project management is an iterative approach to the development of IT projects such as websites, involving: frequent review, feedback and adaption to work out the right thing to build; collaboration with the customer; and determining a minimum viable product. Digital Transformation Agency, *3 Agile and user-centred process* [Internet], available at <https://www.dta.gov.au/help-and-advice/digital-service-standard/digital-service-standard-criteria/3-agile-and-user-centred-process> [accessed June 2020].

77 The tender evaluation report anticipated that an agile approach would lead to scoping continuing through the discovery phase. It was considered that this approach would not lead to an increase in total contract costs.

78 For the Mantel procurement, the risk management plan anticipated in the worst case scenario that costs would not exceed 10 per cent of the budgeted amount. Further, a treatment to mitigate consequences noted that the agile approach would assist with reducing the consequences (such as incomplete and missing functionality, and schedule and budget overruns) of an iterative approach.

3.26 A market research study in 2017 revealed that 57 per cent of users found information requirements on EME’s search function easy to understand. The same study compared user feedback from EME with the Victorian Government’s Victorian Energy Compare and commercial websites. While EME performed better than commercial websites overall, less than half of users responded positively to descriptions of EME as ‘easy to understand’ (35 per cent), ‘trustworthy’ (37 per cent) and ‘for people like me’ (35 per cent). Figure 3.1 summarises these results.

Figure 3.1: Associations with website (among those aware)



Source: Bastion Latitude, ACCC/AER – *Energy Made Easy – Research Report*, May 2017, page 54.

3.27 A June 2019 study identified ongoing functionality issues that continue to reduce EME’s effectiveness as a comparator website. Users noted that the website includes confusing terminology, overwhelming amounts of information, and lacks guidance for users to switch plans after comparing relevant offers.⁷⁹

3.28 The redevelopment scheduled to be completed in June 2020 aims to incorporate greater functionality and resolve recurring usability issues raised following previous developments of the website. EME had lacked the functionality for users to compare energy offers based on usage data extracted from their smart meters. The AER has stated that incorporating smart meter functionality, including the customer’s capacity to request and authorise a third party to provide meter data, is a

79 The ANAO reported on advertising campaign *Powering Forward — Delivering More Affordable, Reliable and Sustainable Energy*, in ANAO Auditor-General Report No.7 2019–20, *Government Advertising: June 2015 to April 2019* [Internet], p. 29 and Chapter 3, specifically Table 3.1, available at <https://www.anao.gov.au/work/performance-audit/government-advertising-june-2015-to-april-2019> [accessed June 2020]. The campaign focused on the Department of Environment and Energy Powering Forward website, which linked to the EME website. The ANAO noted that the overall evaluation for the Powering Forward campaign’s first three phases reported that its impact was limited; a fourth phase struggled to engage the audience; and a fifth phase was conducted without documenting whether this represented a proper use of public resources. The Powering Forward campaign ran from September 2017 to April 2019, and included funding for Energy Made Easy website in 2018–19 and 2019–20.

key outcome of the current redevelopment project. The new EME website was launched in May 2020 and includes the ability to upload smart meter data for personalised estimates.⁸⁰

Performance Monitoring and Reporting

3.29 The performance of EME is measured against functionality and accessibility targets. The reporting arrangement from 1 July 2018 to 30 June 2019 cited the following:

The contractor will manage the relationship with Amazon Web Services to ensure a 99.95% uptime. If there are ongoing issues with the hosting provider the customer (Australian Energy Regulator) will expect the contractor to resolve in a timely manner.

The AER advised that it has met service delivery targets for EME since 2015.

3.30 The AER captures and reports externally on two performance measures for EME. The number of offers for residential and small business customers and the total website visits. Table 3.4 provides an overview of the results for these measures from 2015–16 to 2018–19.

Table 3.4: Annual performance metrics for EME

Measure	2015–16	2016–17	2017–18	2018–19
Number of offers for residential and small business customers published	5,000	<15,000	<13,000	<37,000
Number of individual website visitors	400,000	<600,000	<895,000	1.2 million

Source: AER Annual Reports 2015–16 to 2018–19.

3.31 The AER has also collected data on EME’s performance since the launch of the original website in 2012. This has included the total number of visitors, new and returning visitors, sessions per user, pages per session, and average duration of each user session. However, the way these metrics are collected has changed over time so it is not possible to obtain reliable trend information. Further, the AER has not measured a key outcome of the price comparator website — the incidence of customers being provided with comparisons of available offers and accessing supplier websites as a result of information provided by EME.⁸¹

3.32 Through the *Powering Forward* measure, the AER received \$8.1 million to optimise the EME website (see footnote 14). The Department of Environment and Energy also received funding for this measure for an advertising campaign, which was undertaken in five stages.⁸² Each stage had specific objectives, for example, phase 5 objectives were to increase awareness of actual savings made available to consumers through government actions, and increase the number of households

80 AER, *Energy just got easier* [Internet], 6 May 2020, available at <https://www.aer.gov.au/news-release/energy-just-got-easier> [accessed August 2020].

81 Noting that EME is not a switching site.

82 The ANAO reported on the advertising campaign *Powering Forward — Delivering More Affordable, Reliable and Sustainable Energy*, in ANAO Auditor-General Report No.7 2019–20, *Government Advertising: June 2015 to April 2019* [Internet], available at <https://www.anao.gov.au/work/performance-audit/government-advertising-june-2015-to-april-2019> [accessed June 2020], Chapter 3, specifically Table 3.1.

benefiting from these reforms by taking action to lower their bills. The AER does not have measures in place to ascertain whether these objectives have been met.

Has the AER published timely, accurate and reliable monitoring, performance and compliance reports?

The AER has been partially effective in publishing timely and accurate performance and compliance reports. The AER has produced 15 types of reports, of which six addressed legislative requirements and nine were intended to increase transparency and inform stakeholders. The AER advised there were: report preparation procedures for 14 reports, of which six were not documented; and quality assurance processes for 14 reports, of which nine were not documented. Where procedures were documented they addressed some, but not all, of the report preparation or quality assurance processes. The AER met or mostly met the content requirements for all six report types required under legislation, and the timeliness requirements for three of the five report types examined. The AER could not fully ensure the accuracy of information presented in types of reports required by legislation due to information sources for reports often relying on self-reporting and public information, data quality concerns, and lack of processes to verify accuracy.

3.33 The AER publishes on its website performance and compliance reports, which cover a range of AER activities and energy markets. The AER publishes reports to address legislative requirements, such as reporting on efficiency of network service providers, significant price variations in the gas and electricity markets, competition in the electricity wholesale market, and summaries of compliance and performance activities in the retail energy market. The AER's reports also intend to increase transparency, strengthen market confidence, as well as inform stakeholders of the AER's findings from reviews and responses to non-compliance, and significant market events.

3.34 The AER published 15 types of performance and compliance reports between July 2015 and June 2019, as shown in Table 3.5. The table also identifies whether the reports are supported by documented procedures for report preparation, including quality assurance processes, to promote consistency and quality overtime. For example, when planning for the development of the first wholesale electricity market performance report, the AER identified developing 'a transparent, documented and repeatable process for preparing the AER's monitoring report' to be one of three factors that would contribute to the delivery of a high quality report.

Table 3.5: Reports: focus, requirements, report preparation procedures and quality assurance processes

Report	Report focus	Is it required under legislation?	Is there required contents of the report?	Required/ planned frequency/timeframe?	Are there documented procedures for developing this report?	Are there documented QA processes for developing this report?
Annual benchmarking reports of transmission and distribution network service providers	Performance	Yes	Yes	Yes — required frequency under legislation	Yes — information collection	No ^d
Annual report on compliance and performance in the retail energy market	Compliance and performance	Yes	Yes	Yes — required timeframe under legislation	Yes — information collection and processing of performance data	Yes — quarterly retail performance data
Annual ring-fencing compliance report	Compliance	No	No	Yes — planned annually	No ^d	No ^d
Compliance reviews ^a	Compliance	No	No	No	No ^d	No ^d
Demand management incentive scheme report	Performance	No	No	No	Yes — information collection	Yes — information collection
Gas annual compliance report	Compliance	No	No	Yes — planned annually	No ^d	No ^d
Quarterly compliance report	Compliance	No	No	Yes — planned quarterly reports	Yes — responsibilities for tasks and approvals, some information sources, review and approval	No ^d
Retail energy market update	Performance	No	No	Yes — planned to publish on a quarterly basis	Yes — information collection and processing of performance data	Yes — quarterly retail performance data
Significant price variation report	Performance	Yes	Yes	Yes — required timeframe under legislation	Yes — tasks and information sources	Yes — tasks, and information collection and processing completion

Report	Report focus	Is it required under legislation?	Is there required contents of the report?	Required/ planned frequency/timeframe?	Are there documented procedures for developing this report?	Are there documented QA processes for developing this report?
Special reports	Compliance and performance	No	Yes	No	No	No
State of the energy market report	Performance	No	No	Yes — planned to publish a report every 12 to 18 months	No ^d	No ^d
Transmissions performance data	Performance	No	No	No	No ^d	No ^d
Weekly report	Performance	Yes ^b	Yes	Yes ^c	Yes — tasks and information sources, collection, processing and some analysis, web publishing	Yes — tasks, and completion information collection and processing
Wholesale electricity market performance report	Performance	Yes	Yes	Yes — required frequency under the legislation	No ^d — instead there was a project plan, and published focus and statement of approach for 2018	No ^d — instead there was a project plan that contained some review tasks for 2018
\$5000 report	Performance	Yes	Yes	Yes — required timeframe under legislation	Yes — information sources, collection and processing some review process	No ^d

Note a: An example of a compliance review is the AER's investigation report into South Australia's 2016 state-wide blackout, which was published in December 2018.

Note b: The AER meets reporting requirements for significant price events in the National Electricity Market in the weekly report. Whereas for the National Gas Market the AER meets reporting requirements for significant price events in a significant price event report, and in the weekly reports.

Note c: Weekly reports are not required. Reports on Significant Price Variation events in the National Electricity Market are required under the legislation on a quarterly basis. However, the AER planned to publish a report 10 to 12 business days following the end of the relevant week.

Note d: The AER advised that a procedure or process was in place. It was not documented.

Source: ANAO analysis.

3.35 Of the 15 types of reports: six (40 per cent) were required under the National Energy Laws and Rules; seven (47 per cent) had content requirements; and 11 (73 per cent) had an established timeframe or frequency for publishing.

3.36 As part of its report preparation process, the AER advised that there were procedures for 14 report types (of which six were not documented) and quality assurance process for 14 report types (of which nine were not documented). Where procedures were documented, they addressed part, but not all, of the report preparation process.⁸³ The AER advised that it uses information collected through the issuance of Regulatory Information Notices in its annual benchmarking report and demand management incentive scheme report. The Regulatory Information Notices outline the AER's information and data requirements when businesses self-report to the AER. The AER also has a work instruction for processing retail performance reporting data that it collects from businesses; data which the AER advised that it uses in its annual compliance and performance retail energy market report.

3.37 The template for preparing papers for the AER Board provides for the AER division to advise the AER Board of any quality assurance undertaken, for example in relation to preparing reports. The ANAO observed instances where the Board paper indicated peer review had been undertaken. In other instances the papers did not record quality assurance processes had been undertaken or advised that they were not relevant. By documenting report preparation procedures and quality assurance processes, the AER will support greater consistency in preparing and publishing the reports.

3.38 In addition to the reports listed in Table 3.5, there were:

- publications listed under performance or compliance reporting on the AER's website that were not reports⁸⁴; and
- compliance or performance report types that had not been published between 1 July 2015 and 30 June 2019, including: Service Provider Performance Reports (published prior to July 2015); and since July 2019 the AER published a Wholesale Markets Quarterly report and a report on affordability in retail energy markets.

3.39 The ANAO examined a selection of 35 reports (published between 1 July 2015 and 30 June 2019) across the six report types that were required by National Energy Laws to determine whether the reports: met content and timeframe requirements; contained accurate information that could be relied upon; and had been evaluated. The results of the analysis for the six types of reports required under legislation is shown in Table 3.6. All report types met or mostly met the content requirements, and three of the five report types tested for timeliness met the established publishing timeframe or frequency. Three of the six reports required by legislation did not have a documented quality assurance process to substantiate the report's accuracy. Where the process was documented it covered part but not all of the process. The AER advised the ANAO of data

83 The report preparation process involves: outlining responsibilities for report preparation tasks and approvals; standards to be applied; identifying information sources, data collection and analysis, and drawing conclusions; quality assurance process; preparing the report including addressing content requirements; and review and approval processes.

84 There were 13 types of documents published on the website under performance or compliance reporting that the AER did not consider reports.

quality concerns for four of the six types of required reports, but considered these to be limited in nature.

Table 3.6 Timeliness, accuracy and evaluation of reports required by legislation, 1 July 2015 to 30 June 2019

Report	Number of reports published	Sample size for testing	Were content requirements met?	Were reports timely?	Were data quality concerns raised?	Was there an evaluation of the report?
Annual benchmarking reports of transmission and distribution network service providers	8	8	Yes	Yes	Yes ^a	Yes
Annual report on compliance and performance in the retail energy market	6	6	Mostly	Mostly	Yes	No
Significant price variation report	8	8	Yes	Not determined	No	No
Weekly report	404	4	Yes	No	Yes	Yes
Wholesale electricity market performance report	1	1	Mostly	Yes	No ^a	No
\$5000 report	46	8	Yes	Occasionally ^b	Yes ^a	Under review

Note a: There are no documented quality assurance processes to substantiate accuracy of the report, see Table 3.5.

Note b: Legislative timeframes only applied to the \$5000 reports relating to spot prices, as a result only four items from the sample were tested to determine whether reports were timely.

Source: ANAO analysis and AER advice and documentation.

3.40 The source of information for these reports is often reporting by wholesale, network and retail businesses. The AER advised that it relied on a number of information sources to prepare the six reports required by legislation, including public and self-reported data.⁸⁵ Self-reporting introduces an inherent risk to the reliability of the information provided. To address this risk, the AER advised it has some quality assurance processes, however, these processes were largely undocumented. The AER has advised that some quality assurance processes are limited to data entry sheets that restrict the type of information that can be provided or checking for reasonableness based on previous results, and cannot identify all inaccuracies in the information reported. For its annual benchmarking reports, the AER advised the ANAO that transmission and distribution network service providers are required to provide a consistent set of data, which is independently audited and verified by each chief executive officer. The AER also advised that it separately tests and validates the data provided by network service providers. At times, documentation demonstrated the AER: queried individual businesses about the data provided by the business to the AER; and provided opportunities for businesses to review and provide feedback on draft reports.

3.41 In one specific instance, data quality issues impacted the AER meeting statutory timeframes. In another instance, data quality impacted the usability of information within a report. Data quality issues have undermined the usability of prior year report, and led to the AER taking enforcement action on more than one occasion. Specifically, the annual report on compliance and performance of the retail energy market in 2017–18 did not meet statutory reporting timeframes due to significant data quality concerns with self-reported data.⁸⁶ The AER identified anomalies when undertaking reasonableness comparisons of data provided for the current period with prior years. The AER made inquiries about the anomalies and determined that the retail business had changed the way it determined results for data types. Material data quality errors were identified in data provided by three other entities in 2016–17, in all cases this led to infringement notices.

3.42 The reliability of a report is a factor of the timeliness with which it is published, its contents and data quality. The extent to which the AER's reports can be relied upon were impacted by delays in meeting timeframes, some absence of required content and data quality concerns.

3.43 The AER advised the ANAO that it had conducted a review for two of the six types of report and, as at August 2019, had commenced reviews of one further type of reports (as shown in Table 3.6). The AER advised the ANAO of an ongoing program to review elements of its benchmarking methodology and data for its Annual Benchmarking Reports, and that for example, changes from the review have been reflected in its 2018 Annual Benchmarking Report for distribution networks. The AER also advised that it reviewed the weekly report in December 2019. The scope of the review did not include whether legislative requirements, such as timeliness and

85 Self-reported data from retail energy business is certified by the chief executive officer, and network service providers provide data for the benchmarking report which is independently audited and certified by the chief executive office. The AER division also advised that it relied on publically available data and received information from other energy market institutions, such as the Australian Energy Market Operator audited market data, and other institutions, such as the state ombudsmen.

86 In November 2019, the AER Board commenced proceedings in the Federal Court against four subsidiaries of AGL Energy Limited alleging they failed to submit timely and accurate retail market performance data in breach of the National Energy Retail Law. The AER Board is seeking declarations, pecuniary penalties and costs. AER, *AGL in court over alleged failure to provide accurate and timely performance data*, 12 November 2019 [Internet], available at <https://www.aer.gov.au/news-release/agl-in-court-over-alleged-failure-to-provide-accurate-and-timely-performance-data> [accessed March 2020].

content requirements, were being met. These reviews have considered refinements in data quality and benchmarking techniques to improve the reliability of the reports.

3.44 The ANAO suggests that in reviewing the performance and compliance reports required under legislation, the AER considers how it can better ensure the reports satisfy requirements on reporting timeframes, frequencies and content requirements. The AER should also develop processes to document the quality assurance processes for reports, and evaluate the effectiveness of these processes in substantiating the accuracy of the reports. This evaluation could be informed by AER undertaking audits and targeted compliance reviews of businesses' control systems and processes for preparing and providing data to the AER.

Has the AER effectively established and maintained public registers?

The AER has been largely effective in establishing and maintaining public registers. The AER was required to establish and maintain six registers on its website. All these registers have been established and most contained required content. The web content management system that hosts the registers includes some controls including user access, although there are opportunities to strengthen these controls. The AER has established a three-stage approval process for publishing content, which has not been consistently implemented. There were limited instances of incorrect information contained in, and delays in publishing on, the registers.

3.45 The National Energy Laws require the AER to establish registers on its website to communicate details of dedicated connection assets and which energy businesses: hold or are seeking retail authorisations; hold or are seeking exemptions; or are retailers of last resort in a jurisdiction. The AER has also established registers to assist energy business and consumers access information for which the AER is not required to establish a register on its website, such as approved retailer hardship policies and network exemptions. Where the AER is required to establish a register, the law may establish minimum content requirements, and timeframes for the establishment of the register or publication of material on the register.

3.46 Table 3.7 provides an overview of the eight registers established and maintained by the AER. Six registers were required by legislation to be established and contain minimum content, two of which were to be established by a specified date. There were no specific requirements for when information should be entered into registers. Five of the six registers with content requirements met both the required and optional content. The AER did not meet the date for publishing the register of dedicated connection assets.

Table 3.7: Legislative requirements for the AER's registers, and the number of items in registers as at 1 July 2019

Register name	Legislation requiring the register	Content requirements	When the register was required to be established	When the register was established	Number of items in the register as at 1 July 2019
AER approved hardship policy register	None	None	Not specified	1 July 2012	38 entries
Authorised retailer and authorisation applications	Section 119 of the Retail Law	Section 119 of the Retail Law and Retail Rule 164 — required and optional content ^b	Not specified	1 July 2012	129 entries, of which 105 were current
Retail exemption register	Section 119 of the Retail Law	Section 119 of the Retail Law and Retail Rule 164 — required and optional content ^b	Not specified	1 July 2012	3678 entries, of which 3314 were current
Retailers of last resort Register	Section 127 of the Retail Law	Section 127 of the Retail Law — required and optional content	Not specified	1 July 2012	10 entries
Network exemption register	None	None	Not specified	1 July 1997	5028 entries, of which 4518 were current
Part 23 of the National Gas Rules: non-scheme pipeline exemptions register	Rule 585(7) of the National Gas Rules	Rule 585(7) of the National Gas Rules and the Application Form	Not specified Part 23 to commence 1 August 2017	7 December 2017 Part 23 1 August 2017	76 entries, of which 74 were current
Part 24 of the National Gas Rules: capacity trading platform	Rule 611(9) of the National Gas Rules	Rule 611(9) of the National Gas Rules and the Application Form	Not specified	30 November 2018	51 entries, of which 34 were full exemptions
Register of dedicated connection assets	Section 11.98.2(b) of the National Electricity Rules	Section 11.98.2(b) of the National Electricity Rules — required and optional content	1 July 2018	9 July 2018 (published)	4 registrations were received by 1 May 2018

Source: ANAO analysis of National Energy Law and registers published on the AER website.

Publishing information on the register

3.47 The AER had established a website publication process including a three-step approval process for publishing information on the website.⁸⁷ This guidance is focused on ensuring review has occurred so that no confidential information is published on the AER's website.

3.48 The website content system includes some systems controls, including user access controls (although there are four users with authoring, approving and publishing access and a further five users with authoring and approving access). The system includes an audit trail. Entries in a register do not have a unique system generated number applied to assist with managing completeness of records. Information can be deleted from the system, although the AER web publishing team usually marks material as retired rather than deleting it from the system.

3.49 The AER did not consistently follow approval processes set out in guidance for general manager approvals. Of the 33 instances where a general manager approval was required to be stored on file, in twelve instances the records of general manager approval to publish via email were not stored in the relevant file, for example for retail authorisations. Records of approvals were generally maintained in a web publishing schedule by the web publishing team. For processes where general manager approval should occur in the content management system (such as, individual exemptions), emails were sent to the general manager seeking approval to publish. There has been one breach of confidentiality through content published on an AER register since 1 July 2015.

3.50 Some errors were observed in relation to information published on the registers including incorrect classification of the status of items in the registers, incorrect dates for when an exemption or authorisation became effective and website links that did not work (to retail energy business hardship policies). The AER rectified errors identified during the audit. The ANAO also noted instances where approval to publish on a register took 2 to 44 days after the decision to approve, authorise or exempt. Specifically, of the 21 instances where general manager approval was on file, there were seven instances where approval to publish occurred more than two weeks after approval of an authorisation or exemption.

Has the AER established and implemented arrangements to ensure the contestability, reliability and security of the energy market?

The AER has undertaken a number of activities to support contestability, reliability and security in the energy market. However, these activities have not been part of specific strategies and there has been little measurement of their impacts. 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.

3.51 Contestability is not explicitly identified as a key purpose or objective of the AER. However, contestability refers to competition or the prospect of competition to improve both efficiency and effectiveness. The AER's purpose, strategy, strategic objectives and statement of intent seek to

⁸⁷ This process applies to all publications, and is not limited to publishing material on the AER's public registers.

drive effective competition, and promote reliability and security in the energy market.⁸⁸ In particular:

- the ACCC and AER corporate plan outlines the AER's purpose and strategy as regulating energy markets and networks under national legislation and rules, which aim to promote efficient investment in, and operation and use of, energy services for the long term interests of energy consumers with respect to price, quality, safety, reliability and security of supply;
- two of the AER's strategic objectives focus on competition, with the AER aiming to drive effective competition where feasible and to provide effective regulation where competition is not feasible; and
- the AER's 2017–18 Statement of Intent, Strategic Statement and 2017–18 Work Program state that the AER plays a part in delivering a secure, reliable and affordable energy future for Australia.

3.52 The national retail, electricity and gas objectives seek to promote efficient investment in, and efficient operation and use of, energy services for the long term interests of consumers of energy with respect to price, quality, safety, reliability and security of supply of energy, electricity and gas, respectively. The National Energy Laws require the AER to exercise all of its functions and powers in a manner that will or is likely to contribute to the national energy objectives.⁸⁹ This requirement creates an expectation that the AER will aim to contribute to the reliability and security of the energy supply and electricity systems, where appropriate.⁹⁰

3.53 The AER advised the ANAO that a number of specific arrangements are undertaken to ensure the contestability, reliability and security of the energy market. For each of these arrangements, the following sections outline the extent of the AER's role and impact on the competition, or reliability and security, of the energy market.

Competition

3.54 Driving effective competition in the energy market is a strategic objective of the AER. Effective competition is defined in the National Electricity Law, with regard to the wholesale electricity market, as '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)'.⁹¹ Similarly, the National Gas Rules define a contestable service as one in which it is permitted by law that the service can be provided by more than one

88 The AER's Compliance and Enforcement Policy includes a focus on competition, reliability and security as the AER's compliance and enforcement work addresses conduct that harms the competitiveness of energy markets and harms the security or reliability of the gas and electricity systems.

89 The ACCC and AER Annual Report 2018–19 states that the AER's 'program and priorities are guided by the objectives of the national energy legislation.'

90 This means that when designing templates and arrangements for each of its activities, the AER would have regard to whether it can contribute to reliability and security through an activity.

91 The National Electricity Law (Division 1A, Section 18C(1)) requires the AER to analyse whether there is effective competition in the electricity wholesale market and identify factors that are detrimental to effective competition.

supplier as a contestable service or on a competitive basis. The definition in the National Electricity Law is reflected in the wholesale electricity market performance report.⁹²

3.55 The AER identified five activities related to its role in ensuring contestability in the energy market:

- ring-fencing for Distribution Network Service Providers;
- annual report on compliance and performance in the retail energy market;
- the AER wholesale electricity market performance report;
- monitoring rules around metering contestability; and
- framework and approach to assessments of network services.

3.56 The AER's role in these activities generally involves developing and publishing guidelines and reports, and enforcing obligations that deal with competition. Three of the five arrangements were introduced in the past two to four years.

3.57 None of the five activities include strategies to drive effective competition in the energy market. Reports relating to ring-fencing for distribution network service providers, compliance and performance in the retail energy market and wholesale electricity market performance drive greater transparency of competition and barriers to competition in the electricity and retail markets respectively. Ring-fencing has also had an impact in driving compliance with rules that seek to prevent anti-competitive behaviour amongst distribution businesses.

3.58 The AER has developed performance measures related to some of the arrangements that are intended to drive competition in the energy market. The focus of these indicators is on quantity or timeliness rather than whether they ensure effective competition.

Reliability and security

3.59 Promoting the reliability and security of the energy supply are core to the AER's purpose and strategy. The National Energy Laws do not define the terms reliability or security. Reliability and security are defined in the AER's wholesale electricity performance report and state of the energy market report in reference to the power system. The AER defines: reliability in the power system as 'when there is enough generation and network capacity to supply customers with the energy they demand'⁹³; and security of the power system as 'if it is able to operate within defined technical limits ... and maintain supply to customers even if there is an incident such as an unplanned network or generator outage'.⁹⁴

3.60 The AER advised the ANAO that its role in relation to the reliability and security of the power system is to: assess whether the obligations under the National Energy Laws are being complied with by the Australian Energy Market Operator and market participants; develop and administer

92 AER, *Wholesale Electricity Market Performance Report 2018*, December 2018, p. 2 [Internet], available at <https://www.aer.gov.au/wholesale-markets/market-performance/aer-wholesale-electricity-market-performance-report-2018> [accessed June 2020].

93 AER, *Wholesale Electricity Market Performance Report 2018*, December 2018, p. 54 [Internet], available at <https://www.aer.gov.au/wholesale-markets/market-performance/aer-wholesale-electricity-market-performance-report-2018> [accessed June 2020].

94 AER, *Wholesale Electricity Market Performance Report 2018*, December 2018, p. 54 [Internet], available at <https://www.aer.gov.au/wholesale-markets/market-performance/aer-wholesale-electricity-market-performance-report-2018> [accessed June 2020].

specific mechanisms required by rules (for example, the Retailer Reliability Obligation); and report on market outcomes, including through commenting on outcomes that may require a regulatory or rule based response.

3.61 The AER identified six activities related to the its role in ensuring reliability and security in the energy market:

- Values of Customer Reliability review (a measure of how customers value reliability relative to price under different conditions);
- the Retailer Reliability Obligation;
- investigation into South Australia’s 2016 state-wide blackout;
- transmission annual planning report guidelines;
- demand management incentive scheme; and
- the Retailer of Last Resort scheme.

3.62 The AER’s role in these activities is generally to develop and publish guidelines and reports and enforce obligations that deal with reliability and security.

3.63 None of the activities include strategies to promote reliability and security in the energy market. The investigation report into South Australia’s 2016 state-wide blackout and the transmission annual planning report guidelines have both provided greater transparency of the impact of non-compliance on reliability and security in the electricity market. The Retailer of Last Resort scheme has resulted in customers facing no interruption to their supply of energy when their retailer failed. The other four activities were introduced in the last year, thus having limited opportunity to be implemented and have an impact on reliability and security in the energy market.

3.64 The AER has developed performance measures related to some of the activities that are intended to promote reliability and security in the energy market. The focus of these indicators is on quantity or timeliness rather than whether they ensure reliability and security of the energy market or supply to customers.

3.65 The AER should develop: strategies to support its purpose and objectives to drive competition, and promote reliability and security in the energy market; and an evaluation framework (see Recommendation no.5 at paragraph 4.35). The AER noted in April 2020 that driving competition, reliability and security in the National Energy Market is shared across all of the energy market institutions including the COAG Energy Council, the Energy Security Board, the AEMC and the Australian Energy Market Operator. The AER further advised that it is the COAG Energy Council’s role to develop strategies to drive competition, promote reliability and security in the energy market. The AER also advised that the AER Board and Senior Management Team are currently undertaking a process to establish the AER’s strategic priorities, which are to take an organisation-wide approach and be aligned with the role the AER plays in the energy market. The AER should review its purpose and objectives and align them with the role the AER plays in the energy market (see paragraph 2.37), any changes should be reflected in the focus of strategies to be developed.

Has the AER effectively managed reviews and assessment processes, including undertaking timely processes?

The AER's management of reviews and assessment processes has been partially effective, with the processes typically having not been completed in accordance with set timeframes. The AER's review of customer hardship policy guideline updates completed in 2019 were effectively managed and met timeframes. For the remaining four assessment processes examined, the AER: documented assessments of retail authorisations and exemptions, but did not adequately document assessments when making network decisions in all cases examined or approving network tariffs in 80 per cent of cases examined; and did not meet statutory or target timeframes in 50 per cent or more of assessment processes examined. Tools had been developed but were not adequately designed or sufficiently maintained to support the effective management, and specifically the timeliness, of the AER's assessment processes.

3.66 The National Energy Laws require the AER to undertake specific review and assessment processes relating to network, wholesale and retail energy businesses.⁹⁵ Assessment and review processes can involve the AER making decisions about energy business revenues, market entry, exemptions, disputes, and other matters covered by the law. For these assessment and review processes the laws establish criteria or conditions to be satisfied and may set timeframes within which applications, submissions and assessments need to be made. The AER must make an assessment of whether the criteria or conditions have been satisfied.

3.67 The ANAO selected five review or assessment processes to examine:

- network revenue decisions through making determinations and access arrangements⁹⁶ — these are the most significant and resource intensive assessment processes of the AER;
- the AER's review and approval of annual pricing proposals (tariffs) from network service providers — another network revenue assessment that occurs annually;
- retailer authorisations — the AER assesses applications from energy businesses to determine whether they meet retail market entry conditions to sell energy;
- retailer (individual) exemptions — the AER assesses applications from energy businesses to determine whether they meet retail market exemption conditions to sell energy; and
- review and approval of authorised retailers' hardship policies — once retailers are authorised to sell energy, the AER must review and approve a retailer's hardship policy and, over time, any changes to these policies.

3.68 The audit examined the AER's management of these five review or assessment processes, and specifically whether assessments and reviews: met assessment criteria and information requirements set out in the national energy laws and guidelines together with internal procedures and performance indicators developed by the AER; documented assessments, approvals and other key aspects of each process; and were completed in a timely manner.

95 The AER may also perform reviews at the request of the COAG Energy Council, Ministers or to assist in implementing new, or meeting existing, legislative requirements.

96 An electricity determination sets the amount of revenue an electricity network business can earn. An access arrangement sets the price that a gas network business can charge a customer (usually a retailer, who on-sells gas to end users) for access to a fully regulated gas pipeline.

3.69 For each of these processes, an energy network service provider or retail energy business must submit to the AER a proposal or application addressing criteria and information requirements. When the application is accepted, the AER may be required to publish the application or proposal and seek submissions from stakeholders in accordance with consultation procedures established by legislation. The AER is responsible for reviewing or assessing the proposal or application, and seeking additional information or changes where it does not meet requirements. Following the completion of an assessment process, a recommendation to approve or refuse the application will be made to the AER Board or the relevant delegate. The applicant will be notified of the AER Board's decision, and the decision and approved documentation may be published on the AER website.

3.70 The ANAO reviewed a selection of each of the review and assessment processes to determine whether they were completed within set timeframes, met requirements and appropriately documented assessments and approvals. The results are shown in Table 3.8, which shows:

- with the exception of the Hardship Policy Review update completed in 2019, between 25 and 94 per cent of the AER's reviews and assessments examined were not timely⁹⁷;
- retail reviews and assessments always documented the AER's assessments, whereas networks tariff reviews did not document assessments in 80 per cent of cases, and advice to the AER Board addressed the overall assessment of components of revenue proposals, while not addressing each legislative requirement, and supporting documentation was incomplete;
- approvals were documented for all assessment and review processes, except in a small number of cases for network tariffs; and
- minimum content requirements were generally met across all assessment processes.

97 In respect of the analysis presented in the Table 3.8, the AER division advised the ANAO that:

- the period examined by the ANAO represented an unusually high volume of retail authorisation and exemptions applications, with unusually complex applications, and the AER division considers since 1 July 2015 it has met exemption timeframes in 56 per cent of cases and authorisation timeframes in 77 per cent of cases; and
- it sought to publish tariff reviews in clusters throughout the year and this could lead to some approved tariffs being published late (delays ranged from 1 to 7 days). In most cases the delay was considered immaterial or had no impact on the market.

Table 3.8: Reviews and assessments — timeliness and documentation

Assessment type	Population ^a	Number examined	Met timeframe	Met criteria and information requirements	Assessment documented	Documented approval
Annual Network Tariff Proposal Reviews	103	20	9 (45%)	4 (20%)	4 (20%)	17 (85%)
Network Revenue Assessments	29	4	3 ^b (75%)	4 (100%)	4 ^c (100%)	4 (100%)
Retailer Authorisation Assessments	36	21	3 (14%)	17 (100%)	17 (100%)	17 (100%)
Retailer Exemption Assessments	84	18	1 (6%)	18 (100%)	18 (100%)	17 (100%)
Retailer Hardship Policy Review	49 ^d	38	38 (100%)	38 (100%)	38 (100%)	38 (100%)

Note a: The population refers to the total number of reviews and assessments conducted between 1 July 2015 and 30 June 2019 according to the ACCC and AER's Annual Reports for each year.

Note b: Publicly available documentation indicates the final decision for one of the gas network revenue assessments was made within the absolute time limit for making a decision on a proposal established in Rule 13 of the National Gas Rules and on this basis is considered to have met timeframes. This decision did not meet timeframes established in Rule 62 (7) and (8).

Note c: The AER division made recommendations to the AER Board in a series of board papers proposing to accept or reject components of revenue proposals at key stages of the process (such as issues papers, draft decisions and the final decision). These papers included some references to legislative requirements and considerations made by AER staff in making the recommendations, but usually did not demonstrate underlying assessment against specific requirements. Other tools used by the AER to support the assessment process that were not maintained or were incomplete included: an information request register (incomplete); compliance checklist for regulatory proposals and Regulatory information notices (incomplete); and the reset - weekly team checklist (not maintained). Detailed assessment documentation and completed quality assurance was not made available to the ANAO.

Note d: The sample is made up of 38 of the 49 assessments of updated hardship policies completed by the AER following implementation of the new Customer Hardship Policy Guideline of March 2019. The ACCC and AER's Annual Reports did not include the assessments of the 49 updated policies (instead referring to 27 assessments).

Source: ANAO analysis.

Documentation of reviews and assessments

3.71 The AER maintained records of, and reported on, the number of assessments completed in multiple locations such as registers on the AER's website, tracking sheets, the AER's Compliance System (for Hardship Policies and Authorisations) and annual reports of the ACCC and AER and the AER Board. The number of assessments commenced and completed were inconsistently recorded between two or more of these locations between 1 July 2015 and 30 June 2019 (discussed in paragraph 3.76): in three of the four years for hardship policies; in all four years for tariff reviews;

in two of the four years for network revenue decisions; three of four years for retailer authorisations; and three of four years for individual exemptions.

3.72 Records of the conduct of assessments are also maintained across a number of locations and may include the AER website, tracking sheets, the AER's Compliance System, files (known as 'trackits') in the recordkeeping system, shared drives and emails. These records did not consistently contain a full record of the assessment process including key documents, actions, decisions and approvals.⁹⁸

3.73 The AER developed tracking sheets for each type of assessment process to oversee all assessments that had commenced, except for electricity pricing proposals and network revenue decisions.⁹⁹ Tools that should support the management of the process such as tracking sheets and the AER's Compliance System often contained inconsistent, incomplete and different records. This limited the reliability and usefulness of such tools in assisting the AER to monitor and manage regulatory activities, including using the system to support the completion of assessments within timeframes. For example, the AER maintains disparate records of hardship policies within a tracking spreadsheet and the AER's Compliance System. The Compliance System is missing key information about the AER's assessment of more than half of the hardship policies recorded as submitted in the system. Specifically, of the 118 hardship policy assessment processes recorded in the system, 61 did not have an outcome, end date or follow-up date recorded, including assessment processes where the policy had been approved.¹⁰⁰

3.74 The AER advised in July 2020 that tracking sheets were designed to assist staff in managing and tracking assessment process. The focus of tracking sheets meant that non-compliance was not actively monitored and resolved as quickly as possible. For example, where an authorised retailer had been operating for two years without an approved hardship policy (see paragraph 3.73) or where businesses seeking an individual exemption had been selling energy without an exemption for in excess of 13 months.

The AER's reporting of performance in conducting reviews and assessments

3.75 The AER reports against a number of indicators relating to its review and assessment processes, against the five assessment types outlined in the previous section. The indicators generally seek to measure the number of processes completed and the timeliness of those processes. The results reported against these indicators for the period 2015–16 to 2018–19 show that the AER is not regularly meeting its targets. This is consistent with the findings of the ANAO's testing, outlined in Table 3.8.

3.76 There are inconsistencies in results reported against the indicators across various documents produced by the AER, including the ACCC and AER annual report, the AER annual report,

98 For example, key records (including papers making recommendations to the AER Board at key stages of the assessment process, detailed assessments and completed quality assurance documentation) were not maintained in the relevant records management file for the business making a network revenue proposal.

99 The AER division developed a list of tasks to complete for Victorian pricing proposals for 2020, which did not support tracking timeframes. The AER division developed traffic light reports for revenue determinations that include an overall assessment by determination of whether the process is on time and supports recording details of milestones.

100 The Compliance System records were inconsistent with the AER division's tracking sheet. For example, the Compliance System records that 14 hardship policy reviews were completed between 2015–16 and 2018–19. Over the same period the tracking sheet recorded that 28 reviews had been completed.

AER registers, and the AER's tracking sheets. These inconsistencies do not provide comfort over the accuracy of the information reported by the AER. For example, in each of the four years different results were reported in four different reports for annual pricing proposals, retail authorisations, retail exemptions and timeliness of hardship policy reviews. Differences could be as small as reporting one to two more or less authorisations, revenue decisions or exemptions of a total of three to 14 assessments, or as large as 400 per cent more retailer hardship policies reviewed in a year.

3.77 The AER's reviews of network tariff proposals, and assessments of network revenue, have an impact on the price consumers pay for energy. The AER has not established a performance measure to determine impact on consumers, however, it has regularly reported on the impact of network revenue assessments in AER annual reports. For the 29 determinations and access arrangements approved between 1 July 2015 and November 2019, the AER's final decision was, on average, 13.1 per cent lower than the revenue amount originally proposed by the network business (ranging from 1 to 17 per cent by financial year). Across all current determinations and access arrangements the AER approved nominal revenues totalling \$63.8 billion, which was \$9.5 billion less than the \$73.3 billion initially proposed by network businesses. The estimated reduction in revenue arising from the AER's decisions is approximately \$386 million more than reported in the AER's annual report.

Recommendation no.3

3.78 The AER develops and uses tools that promote consistent:

- (a) documentation of reviews and assessments, including tasks completed;
- (b) management of reviews and assessments, including key timeframes; and
- (c) provision of reliable information for performance reporting.

Australian Competition and Consumer Commission and the Australian Energy Regulator response: Agreed.

3.79 *Two recent initiatives will assist the AER in addressing this recommendation. Firstly, a new project management framework has been developed and is currently being rolled out. This will assist in projects being managed in a more consistent, structured and effective way across the AER and will include the development of periodic status updates. Secondly, the AER has designed a project portfolio management process that will assist in providing oversight of progress across the organisation.*

4. Compliance arrangements

Areas examined

This chapter examines whether the AER effectively identified compliance risks and established a strategy to guide its compliance activities. The focus was on the AER: having robust systems and processes to manage compliance intelligence; establishing a framework to manage non-compliance risk; and developing a strategy and program of work that promotes compliance.

Conclusion

The AER has been partially effective in identifying compliance risks. Its approach to collecting and storing compliance intelligence did not support timely, complete and efficient retrieval and analysis of this information for compliance monitoring and risk management purposes. The AER maintained a strategy to guide its compliance activities, comprised of a principles-based overarching strategy document and separate annual compliance priorities. The basis for, and effectiveness of, the AER's annual compliance priorities was not clear.

Areas for improvement

The chapter includes two recommendations aimed at the AER improving its: collection, handling and use of compliance intelligence (paragraph 4.11); and arrangements for setting regulatory and compliance strategy and priorities (paragraph 4.35).

The chapter also suggests that the AER extends its suite of templates and guidance for gathering information from intelligence sources (paragraph 4.4).

4.1 In line with the requirements of the Australian Government's Regulator Performance Framework¹⁰¹, the Australian Government's 2014 Statement of Expectations for the AER states:

regulators should adopt a risk-based approach to compliance obligations, engagement and enforcement, allowing for proportionate approaches suited to the size, nature, complexity and risk of regulated entities. This allows regulators to achieve their objectives more efficiently and reduce the overall regulatory burden, particularly for small businesses. This approach also recognises that it is not possible or efficient to eliminate all risks and that trade-offs in risk reductions are necessary.

4.2 Robust systems and processes for collecting, managing and using compliance intelligence assists a regulator to identify compliance trends, compare the relative extent and nature of non-compliance between different obligations (areas of responsibility) and rate emerging compliance risks to target compliance and enforcement activities to the areas of greatest detriment. Use of compliance intelligence and a risk-based approach to compliance obligations assists a regulator to assign scarce resources to the areas of greatest priority. Between 2015–16 and 2018–19, the AER reported that it had insufficient resources and increasing responsibilities, exacerbating the need for risk-based prioritisation of regulatory activities, including compliance and enforcement.¹⁰²

101 The AER Board is not required to implement the Regulator Performance Framework (see footnote 44). However, it has included the Framework in the measures it reports against in its statement of intent and work program.

102 Figure 1.2 in Chapter 1 shows that the AER division applied approximately 18 per cent of its resources to compliance and enforcement activities in 2018–19, up from approximately 10 per cent in 2015–16 and 2016–17.

Does the AER have robust systems and processes for gathering, storing, retrieving and analysing relevant intelligence on compliance with the National Energy Market Laws, Regulations and Rules?

The AER did not fully establish and consistently apply robust systems and processes for gathering, storing, retrieving and analysing compliance intelligence from all sources. While the AER collected significant amounts of information, it was often captured or stored in ways that did not allow for efficient retrieval or analysis to inform the AER’s compliance and enforcement activities. In instances where the AER had a structured, reliable and complete intelligence dataset (based upon sound capture and storage processes), this facilitated analysis to be performed that allowed the AER to better understand risks of non-compliance with the National Energy Market Laws, Regulations and Rules.

Gathering intelligence

4.3 The AER gathers significant volumes of information on compliance with the National Energy Laws and the performance of energy businesses. Most information is gained from market participants and other stakeholders. As shown in Table 4.1, the AER has various arrangements for collecting intelligence.

Table 4.1: The AER’s main sources of compliance intelligence

Intelligence type	Source(s)	Description	How does the AER gather the intelligence?
Market data	Australian Energy Market Operator (AEMO)	AER obtains gas and electricity market data from AEMO to monitor compliance with energy laws.	Market data is automatically imported into the AER’s Compliance System. The information to be provided is outlined in an information protocol agreed by the AER and AEMO.
Generator Performance Standards (GPS) reports	AEMO	The National Electricity Rules require energy generators to report to AEMO breaches of GPS. AEMO must provide a copy of the report to the AER within five business days.	A copy of GPS reports are emailed to a central AER inbox. AEMO published a template for generators to complete when there is a breach.
Retail self-reports	Retailers and distributors	Retail exception reports are required under the Retail Law. The Retail Law requires energy retailers to self-report specific breaches of the rules in compliance with the AER compliance procedures and guidelines. Depending on the nature of the breach exception reports are required to be provided on an immediate, quarterly or half yearly basis.	Energy retailers email reports to a central AER inbox. Reporting templates are provided for energy businesses to complete and supporting guidance is provided in the AER’s compliance procedures and guidelines.

Intelligence type	Source(s)	Description	How does the AER gather the intelligence?
Voluntary self-reports	Market participants	From time to time energy businesses self-report breaches of the National Energy Laws (breaches not covered by the mandatory retail exception reporting framework). Self-reports may be provided in the context of requesting a 'no action letter' ^a from the AER.	These reports are generally received by email. There is no standard process or template for gathering voluntary self-reports.
Third-party reports	Market participants, state regulators and Ministers	From time to time third party reports and other intelligence are provided by: <ul style="list-style-type: none"> • Market participants (such as one retailer 'dobbing in' another retailer); • State regulators (for example, Essential Services Commission of Victoria); and • Ministers (such as following complaints by constituents). 	These reports are generally received by email. There is no standard process or template for gathering voluntary self-reports.
Complaints to the ACCC Infocentre and AER Contacts Team	Businesses or members of the public	The purpose of the ACCC's Infocentre is to receive inquiries and complaints from members of the public. The Contacts Team receives all Infocentre contacts (except basic Energy Made Easy inquiries) and can respond to the matter or refer it to relevant sections of the AER as appropriate.	Complaints and inquiries are made by telephone, email or in writing. There is no standard template or form for making a complaint or inquiry.
Ombudsman reports	Businesses or members of the public	Energy ombudsman schemes exist to help consumers resolve disputes with energy businesses. The ombudsman schemes in each jurisdiction collect data as part of their operations, such as the quantum and type of complaints received.	Ombudsman reports are emailed to the AER (sometimes to a central inbox and other times to individual AER staff). There is no standard template for gathering information from ombudsman schemes. Individual memorandums of understanding have been established between the AER and state and territory ombudsmen that outline the type of information to be shared and information to be discussed at annual or quarterly meetings.

Intelligence type	Source(s)	Description	How does the AER gather the intelligence?
AER performance and compliance activities	AER	The AER undertakes a range of compliance activities including monitoring and reporting, targeted compliance reviews, audits, inquiries and investigations.	Energy businesses providing information in response to: information notices issued by the AER as part of standard performance reporting processes; or specific inquiries, investigations, targeted reviews, audits and other compliance activities. Some of these processes are supported by reporting templates and guidance.

Note a: A 'no action letter' is a document provided by the AER to a regulated market participant indicating that the AER will not take compliance or enforcement action in response to a potential breach of the National Energy Laws.

Source: ANAO analysis.

4.4 Some of the AER's information collection processes are supported by templates and guidance, while others are not. In the absence of guidance or templates for providing intelligence, the AER receives unstructured data that may not contain important information for assessing compliance risk or identifying potential compliance breaches. Identifying its information needs for each type of intelligence will assist the AER to develop templates and guidance, where appropriate, to assist with the collection of structured information that is relevant to its obligations and that can be related to other intelligence held by the AER.¹⁰³

Storing and retrieving

4.5 Intelligence is required to be stored in the ACCC and AER's ICT systems in accordance with the ACCC's Records and Information Management Policy. The ACCC's approved electronic document records management system (records management system) is referred to as DORIS/TRIM by the ACCC. Records must be maintained in the records management system wherever possible.¹⁰⁴ Within the records management system, records are often grouped using a file number, so that related records can be quickly and easily found. During the audit, the ACCC was migrating to a new records management system.

4.6 In addition to the records management system, the AER had two databases where compliance information was stored. The AER Compliance System was the AER's database for network, wholesale and retail information, as well as the AER's compliance and enforcement activities. The AER Networks database held information on the financial and operational performance of gas and electricity networks, but not network compliance matters. Limited guidance was available to support staff to store intelligence in a consistent way.¹⁰⁵ As a result, the method for storing each type of compliance intelligence was different and based on practices

103 This includes considering the focal points for which the AER seeks to monitor performance and compliance.

104 The ACCC *Records and Information Management Policy* states that digital records must be maintained in approved recordkeeping systems. The primary record keeping system in the ACCC is DORIS/TRIM, and records must be maintained in this system wherever possible.

105 Guidance was available within the AER division's Compliance System in the Help tab on each screen. Some other guidance was available in work instructions relating to specific compliance activities. For example, the AER developed guidance for retail audits that instructed AER officers to store records in the ACCC's records management system.

developed at branch, section or individual levels over time. The absence of guidance also meant that it was not clear where intelligence should be stored and why some information was captured in databases, and other information not.

4.7 Table 4.2 shows that it was common for intelligence of the same type to be stored in numerous ways or duplicated across systems. For example, for retailer self-reports, immediate self-reports were manually entered into the AER's Compliance System, while quarterly and half yearly reports were not. Instead, quarterly and half-yearly reports were collated in spreadsheet format, with original reports and the spreadsheet being stored in the records management system. In July 2019, the AER developed a work instruction to carry out these functions.

Table 4.2: The AER's storage and retrieval of compliance intelligence

Intelligence type	How is the intelligence stored?	Can all relevant intelligence be quickly and easily retrieved from the AER's systems?
Market data	AER Compliance System. ^a	Yes — information is held in a structured format. The AER developed a number of standard reports that extract market data.
Generator Performance Standards reports	AER Compliance System stores each report as an individual matter. ^a The AER's records management system stores each report within a single file.	Yes — intelligence can be retrieved from either the records management system or the AER Compliance System. There were more than 1265 individual records stored in the records management system.
Retail self-reports	AER Compliance System stores immediate reports. ^a The AER's records management system stores quarterly and half yearly reports as part of a group file for all reports in a reporting period and, for the period 1 July 2017 to 30 March 2019, in a master tracking spreadsheet. The spreadsheet is stored in the records management system.	Yes — information is held in a structured format. The AER can retrieve immediate reports using the AER Compliance System. Quarterly and half-yearly reports can be retrieved individually, or in aggregate via AER's Exception Reporting Master Tracking sheet.
Voluntary self-reports	The ACCC's records management system stores reports as an individual file for one report or as part of a group file for more than one report. AER's Compliance System stores reports as a matter. ^a	No — there is not one complete source of voluntary self-reports received by the AER. There were 15 records stored in four files in the records management system. ^b While information is accessible, it is not easy to retrieve the information quickly or in a format that supports analysis.
Third-party reports	The ACCC's records management system stores reports as an individual file for one report, as part of a group file for more than one report, or in more than one file. AER's Compliance System stores reports as a matter. ^a AER's contacts log.	No — there is not one complete source of third-party reports received by the AER. There were 129 records stored in five files in the records management system. ^b While information is accessible it is not easy to retrieve the information quickly or in a format that supports analysis.

Intelligence type	How is the intelligence stored?	Can all relevant intelligence be quickly and easily retrieved from the AER's systems?
Complaints to ACCC Infocentre and AER Contacts Team	The ACCC's records management system. Prior to 19 May 2018 the AER captured Infocentre intelligence in spreadsheets. Customer relationship management software — from 19 May 2018.	Yes — the information was held in a structured format. The AER can extract intelligence using the customer relationship management software. The AER provided the ANAO with spreadsheets containing intelligence received from 1 January 2015 to 18 May 2018.
Ombudsman reports	The ACCC's records management system stores all ombudsman reports in a single file.	No — while individual reports can be retrieved, ombudsman reports cannot be extracted in an aggregate and structured form. There were more than 292 individual records stored in the records management system. While information is accessible it is not easy to retrieve the information quickly or in a format that supports analysis.
AER performance and compliance activities	AER's Compliance System records compliance activities. ^a	Yes — information is held in a structured format. The AER can retrieve all compliance activities entered into the AER's Compliance System by generating a report.

Note a: The AER advised that while matters are stored individually in the AER's Compliance System, matters can be linked to allow intelligence from one investigation to be quickly and easily linked to other matters.

Note b: The number of records and files is illustrative, based on specific examples provided by the AER. The semi-structured nature of information held in the records management system means that not all relevant reports can be identified quickly and easily.

Source: ANAO analysis, as at October 2019.

4.8 The AER's approach to storing information directly impacted its ability to quickly and easily retrieve all relevant intelligence from where it was stored. Where intelligence was stored consistently in a structured system (such as a database) it was straightforward to extract information, either through running a predefined report, or by extracting raw data into a spreadsheet format. Where intelligence was not stored consistently or there was a significant volume of records stored in an unstructured or semi-structured environment, this had a direct impact on the AER's ability to: quickly and easily retrieve all relevant intelligence; or be confident that the extracted intelligence was a complete reflection of the intelligence held by the AER, and did not contain duplicate records. For example, in the records management system as at October 2019, single files held more than 1200 generator performance standard reports stored as individual emails, and 292 emails relating to ombudsman reports. In 2020, the AER introduced work instructions and guidance¹⁰⁶ to support storing compliance information in a consistent way, which will facilitate retrieval of compliance intelligence.

Analysing

4.9 The AER analyses information as part of its business-as-usual functions, such as generating performance and compliance reports to publish on its website. The AER does not have an overarching framework, arrangements or plan that guides the use of compliance and performance

¹⁰⁶ These were a work instruction on assessing compliance matters and an assessment template for ombudsman reporting.

intelligence to inform risk identification and management, to develop or inform a compliance or regulatory strategy and program of work, or to inform enforcement activities.

4.10 In July 2018, as part of an organisational restructure, the AER created a dedicated Analytics and Insights Team within the Market Performance Branch to enhance market analysis and monitoring and provide the AER with organisation-wide analytical capability. Shortly after being established, the team was re-deployed to work on the Retailer Reliability Obligation that came into effect on 1 July 2019. In mid-2019, the AER was involved in a successful ACCC-led trial of data analytics software. Notwithstanding the successful analytics trial, the full benefits to be derived from enhanced analytics capabilities cannot be achieved if arrangements for gathering, storing and retrieving and analysing information are incomplete and inconsistent.

Recommendation no.4

4.11 The AER develops and implements an information management framework or arrangements for compliance intelligence that defines:

- (a) the AER's main intelligence sources and how each is to be gathered so that information that is needed is created in a format that enables efficient business processes and maximises potential for use and reuse;
- (b) the nature of information to be collected for each intelligence source with reference to a regulatory or compliance data model;
- (c) where and how each intelligence source is to be stored in the AER's systems so that it is secure, accessible and retrievable for as long as required; and
- (d) how and when the AER will use compliance intelligence to inform its activities, including documenting the extent to which compliance intelligence is complete and can be relied upon.

Australian Competition and Consumer Commission and the Australian Energy Regulator response: *Agreed.*

4.12 *The AER has commenced initial planning for the development of an Information Management Framework. It is intended that the framework will be an AER-wide repository of compliance intelligence that will document key aspects of this information including sources, storage locations, uses and reliability. The framework will leverage off existing work undertaken for the ACCC/AER Enterprise Data Asset Register and its creation will support the implementation of Recommendation No.5.*

Has the AER established an appropriate framework for assessing, prioritising and managing risks of non-compliance in the National Energy Market?

The AER established a partially appropriate risk-based framework for assessing, prioritising and managing risks of non-compliance in the National Energy Market. The framework requires risk assessments of each obligation contained in the National Energy Laws. However, many obligations have not been assessed and the framework does not sufficiently distinguish risk levels to support prioritisation and allocation of resources. The AER does not monitor and adjust risk assessments and related strategies and priorities.

4.13 The ACCC and AER Enterprise Risk Management Framework aim to fully integrate risk management in planning and decision-making activities, including taking a risk-based approach to regulation. Underpinning this approach is the need to identify, analyse, prioritise and respond to regulatory risks, and to have resources allocated on the basis of risk. The Framework recognises the need to monitor regulatory risk and adjust strategies, goals and enforcement activities to reflect changing risks and resulting priorities. Examples of high risk areas include:

- circumstances when a retailer may and may not disconnect customers;
- requirements for registration and notification of life support premises relating to retailers and distributors;
- notification of interruptions to energy supply of life support customers;
- actions of distributors when there are unplanned interruptions;
- registered participants plants complying with performance standards and ensuring that their plant will not cause a material adverse effect on power system security; and
- generators ensuring their facilities comply with connection agreements with distributors and performance and system standards.

4.14 Consistent with the risk management framework, AER's *Compliance and Enforcement Statement of Approach* (2014) indicates that a risk-based approach to compliance and enforcement activities has been adopted. The AER's approach to assessing compliance risk is to undertake a risk assessment of each obligation in the National Energy Laws. This risk assessment is used to assist the AER to target and prioritise its monitoring and compliance activities. For example, the AER intends to pay particular attention to obligations that have a significant impact on the National Energy Laws' objectives and which are more likely to be breached.

Completion and review of risk assessment processes

4.15 In 2006, the AER Board adopted a risk-based approach to compliance with the National Energy Laws. The initial risk assessment process was completed in 2007 and assessed risks in relation to the National Electricity Laws. As new legislation was introduced, risk assessments were

extended to include the National Gas Laws in 2009, and then to the National Energy Customer Framework (the Retail Laws) in 2011.¹⁰⁷

4.16 The frequency and timing of risk assessments has varied for electricity, gas and retail legislation and rules; in some cases risk assessments have focused on specific parts of the gas or electricity rules. With the exception of the Electricity Rules, the AER commenced a review of the law and rules in 2017 or 2018 but did not complete the assessment process. Risk assessment processes have been targeted at a full assessment of a law or rule type, a review of existing assessments for the law or rule type, or an assessment of a particular section following the introduction of new requirements (for example, Part 23 of the Gas Rules). Since commencing the risk assessment process, the AER has (to August 2019) completed assessments at an individual obligation level 36,124 times across a total of 7098 different clauses, and across 44 commenced assessments.

4.17 The AER's risk assessments have not kept pace with changes in the energy laws, for example, the last version of the Electricity Law Rules assessed was version 89 which commenced in February 2017. The current version of these Rules is version 124 which commenced in August 2019. Risk assessments have been completed on an irregular basis, and have taken between one and 29 months to finalise. The AER advised that risk assessments are undertaken when resourcing has permitted, leaving a backlog of provisions waiting to be assessed following law and rule changes. The backlog means that AER do not have a complete understanding of compliance risk (for continuing obligations where there is a change in circumstances, or new obligations where risk has not been assessed), which limits the extent to which it can ensure compliance and enforcement priorities appropriately target and prioritise obligations on a risk-basis.

The risk assessment process

4.18 Risk assessments are completed by AER staff in the AER Compliance System (known as 'the Hub') — a custom built database. The AER has developed guidance to assist staff undertake risk assessments in the Hub. The guidance does not outline when risk assessments should be undertaken or the circumstances that should lead to an assessment being reviewed. The guidance includes: a work instruction (last updated in 2011) that supports the risk assessment process for the Retail Law (accessible through the Hub); a work instruction (last updated in 2017) for performing Electricity and Gas Law assessments (accessible in the ACCC's records management system used by the AER)¹⁰⁸; and built-in instructions in the Hub that can be accessed by staff on an as-needed basis.

4.19 The risk assessment process begins by determining if a clause imposes one or more obligations on market participants. Should the clause impose an obligation, the AER decides a non-compliance risk rating based upon a high, medium or low assessment against the following criteria: the probability of a breach occurring; and the potential impact of a breach on key

107 The AER division advised that while this risk assessment process is the primary process, it adopts additional inputs to managing non-compliance risks including: when reviewing the compliance procedures and guidelines by identifying obligations for self-reporting (see paragraph 5.15); and other compliance intelligence sources such as ombudsman schemes. The AER division did not document risk assessments associated with these other inputs to support the assessment or management of non-compliance risk.

108 The two work instructions outline the same risk assessment process. This risk assessment process is different to the process established in the *ACCC and AER Enterprise Risk Management Framework* which establishes a scale of five impact and five probability assessments.

stakeholders. The result is a classification of each obligation based on where it fits within the risk matrix, as shown in Table 4.3.

Table 4.3: AER’s risk assessment matrix and its role in prioritising compliance activity

		Probability assessment		
		High	Medium	Low
Impact assessment	High	Major or catastrophic consequences, almost certain to occur. Intensive compliance monitoring.	Major or catastrophic consequences, possible, or even likely to occur. Intensive compliance monitoring.	Major or catastrophic consequences, unlikely to occur (or rare). Cost of compliance activity weighed against benefit.
	Medium	Moderate or manageable consequences, almost certain to occur. Intensive compliance monitoring.	Moderate or manageable consequences, possible, or even likely to occur. Intensive compliance monitoring.	Moderate or manageable consequences, unlikely to occur (or rare). Cost of compliance activity weighed against benefit.
	Low	Insignificant or minor consequences, almost certain to occur. Less intensive compliance monitoring.	Insignificant or minor consequences, possible, or even likely to occur. Less intensive compliance monitoring.	Insignificant or minor consequences, unlikely to occur (or rare). Less intensive compliance monitoring.

Source: AER’s compliance risk assessment work instructions.

4.20 Risks that are considered to have a medium to high probability combined with a medium to high impact are to be prioritised in the compliance strategy and work program (that is, obligations with a risk rating that falls in the red zone). This matrix does not sufficiently support the AER to distinguish between compliance risks, such as those with catastrophic versus major consequences or those that are possible or likely to occur. The risk assessment process and work instruction do not provide for further prioritisation of risks. This limits the AER’s ability to prioritise obligations with more significant consequences and/or that are more likely to occur, which is important given the AER’s lack of capacity to address many ‘red zone’ cases, as discussed below.

4.21 Table 4.4 provides the non-compliance risk profile (for assessments commenced between February and April 2017) for electricity, gas and retail law. At that time, 3321 obligations were recorded for consideration and the AER completed an assessment of 3064 obligations, of which 60 were considered both high impact and probability. Under the AER’s work instruction 761 obligations were priorities to be included in the compliance strategy, and would require intensive compliance activity. This is a large number of obligations to manage as a priority, involving intensive compliance activities. For example, between 2015–16 and 2018–19 eight audits (an intensive compliance mechanism) were recorded in the AER’s Compliance System and conducted by the AER. Of these, five targeted obligations in the priority red zone were selected for audit, but none were risk rated with a high probability and high impact with a primary compliance monitoring mechanism of audit.

Table 4.4: The AER's assessment of the National Energy Laws, February to April 2017

National Energy Laws				
All national energy laws (Retail, Electricity, and Gas Law, Regulations and Rules)				
	Probability			
Impact	Total = 3064	High	Medium	Low
	High	60	392	533
	Medium	12	297	653
	Low	3	64	1050
National Energy Customer Framework (Retail Law, Regulations and Rules)				
	Probability			
Impact	Total = 712	High	Medium	Low
	High	52	214	7
	Medium	5	106	45
	Low	0	8	275
National Electricity Law, Regulations and Rules				
	Probability			
Impact	Total = 1624 ^a	High	Medium	Low
	High	7	109	257
	Medium	4	115	406
	Low	3	41	682
National Gas Law, Regulations and Rules				
	Probability			
Impact	Total = 728 ^b	High	Medium	Low
	High	1	69	269
	Medium	3	76	202
	Low	0	15	93

Note a: 14 obligations were not assessed for impact or probability.

Note b: 243 obligations were not assessed for impact or probability.

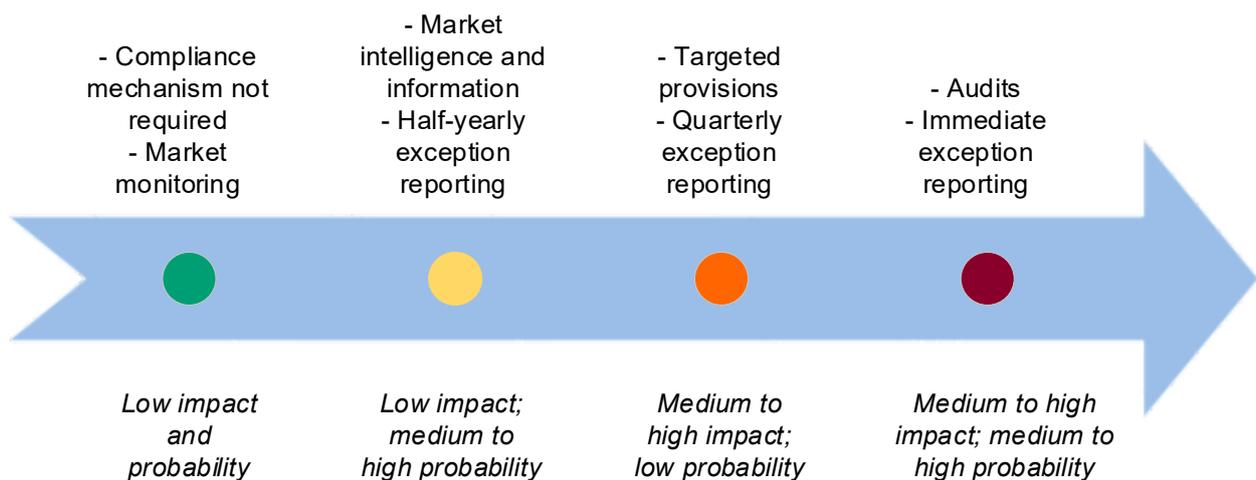
Source: Extract of the AER's Compliance System.

Compliance monitoring mechanisms

4.22 Individual risk assessments and the overall profile allows the AER to discriminate between provisions for the purpose of prioritising its work. These may also be considered when determining the AER's response to breaches of the National Energy Laws. To supplement the risk assessments, AER has stated it draws on other information sources when prioritising its work. These include intelligence gained from ombudsman schemes, market monitoring and reports under the Retail Law mandatory exception reporting framework. The AER does not have a framework or guidance outlining how risk and intelligence should be used to establish priorities.

4.23 During the risk assessment process, the AER attributes monitoring mechanisms to each obligation identified in the National Energy Laws. The selection of a primary mechanism seeks to assign the most passive mechanism by which the AER can monitor compliance; other more active mechanisms can be assigned to escalate monitoring where the primary mechanism does not secure compliance. Consistent with its risk-based approach, obligations posing greater non-compliance risks can expect to receive stronger or multiple monitoring mechanisms¹⁰⁹ and are more likely to involve use of the AER’s intrusive compliance powers. For example, audits and immediate exception reporting may involve an increased frequency of contact, an increase in the amount of information required, or the nature of the contact may move from information requests to access to people, systems and records. This is shown in Figure 4.1, where risk increases as more intrusive compliance powers are used. For example as an obligation’s compliance risk increases the compliance mechanism may move from half-yearly to quarterly or immediate exception reporting. The risk assessment process does not indicate whether assigning a mechanism is sufficient to mitigate the risk. The process also does not indicate whether and how frequently risks at different levels should be monitored and reported on to AER risk owners to ensure mitigations are effective. Further, the process does not indicate if the AER considers some risks unavoidable and instead should have an action plan for when the risk occurs.

Figure 4.1: Escalating monitoring and compliance mechanisms, as risk increases



Note: The colours contained in this figure represent the colours assigned to final probability and impact risk assessments presented in Table 4.3. As the colours move from green to yellow, yellow to orange and orange to magenta the compliance mechanisms become increasingly intrusive.

Source: ANAO analysis.

4.24 In 2019, the AER recognised the need to improve its risk-based approach to compliance and enforcement when briefing the AER Board on new policy and priorities, and when reviewing

¹⁰⁹ Risk-assessed obligations regularly have multiple monitoring mechanisms. The primary mechanism is the one that the AER has deemed most appropriate in the circumstances. Primary mechanisms can be supplemented by one or more secondary mechanisms, especially where the secondary mechanism provides an escalation point if the primary mechanism is not effective.

compliance and enforcement. Specifically, as part of the process for developing 2019–20 priorities, stakeholders regularly raised the need for priorities to reflect outcomes rather than focusing on specific provisions and rules.¹¹⁰ The AER’s Compliance and Enforcement Strategic Review Project concluded in May 2019 that the AER could improve its compliance risk approach by regularly reviewing risk, preparing regulated entity-specific risk assessments and following a consistent risk assessment process (refer to Recommendation no.5, paragraph 4.35(e)).¹¹¹

Has the AER developed a compliance and enforcement strategy and program of work that promotes compliance and conducts compliance activities, including monitoring compliance and addressing non-compliance by applying regulatory options?

From April 2014 to July 2019, the AER maintained a high-level compliance and enforcement framework, referred to as the Compliance and Enforcement Statement of Approach. This framework was updated in July 2019 and was renamed the Compliance and Enforcement Policy. Annual work programs, which covered regulatory and compliance activities, were in place during 2015–16, 2016–17 and 2017–18. For 2018–19, the AER continued to use its 2017–18 work program, and in July 2019 separately published annual compliance priorities for 2019–20. The high-level frameworks and work programs promoted compliance by defining the AER’s compliance and enforcement activities, options, approach and priorities to stakeholders. However, the framework and work programs: did not address a number of key elements of the AER’s purpose or the overarching strategy statement outlined in the corporate plan; were not supported by a performance or evaluation framework; and did not further develop strategies for individual elements of the overarching strategy.

Compliance and Enforcement Statement of Approach (April 2014)

4.25 In 2014, a Compliance and Enforcement Statement of Approach (Statement of Approach) was developed to replace two separate statements of approach: one for electricity and gas laws, and another for the retail law. The AER division advised the AER Board the amalgamation was appropriate as the previous documents covered similar content and were directed at similar audiences. It was endorsed by the AER Board and subsequently published on the AER website in April 2014, remaining the AER’s core compliance and enforcement strategy document until July 2019.

4.26 The objective of the Statement of Approach was ‘to see businesses achieve high levels of compliance with the national energy laws’. The document provided a framework defining the AER’s powers and approach to detecting and treating breaches of the National Energy Laws. The document sought to encourage compliance initially through educating and informing regulated

110 The concern with only focusing on specific provisions is that issues of potential non-compliance under these provisions may only cause limited detriment even though it may indeed raise breaches. An outcomes-based approach helps ensure that the AER Board is focusing its compliance and enforcement work on matters that deliver the best outcome for consumers and the operation of the energy markets.

111 The AER’s Compliance and Enforcement Strategic Review Project was undertaken in 2019 and involved an internal review of the AER’s compliance and enforcement approach over the previous two years. The review was reported in three phases: review (April 2019); analysis (May 2019); and recommendations (June–July 2019). Twenty-four recommendations were made relating to compliance and enforcement governance, expertise, implementation and performance.

entities about their obligations under law, and then outlining a range of compliance and enforcement tools that it could use to identify and address instances of non-compliance. This Statement of Approach was supported by a range of material available on AER’s website and provided through direct engagement by AER with regulated entities, including education, guidance, established reporting frameworks, compulsory notices, other compliance activities and reporting on enforcement action. Through this, the AER aimed to deter wrongdoing, which is important in developing a compliance culture across the energy industry.

4.27 While highlighting the AER’s compliance and enforcement activities and powers, the Statement of Approach was clear that the AER sought ‘to demonstrate proportionality and procedural fairness (where required) in enforcement action.’ The AER had (and maintains under the new Compliance and Enforcement Policy discussed from paragraph 4.31 onwards) a broad range of activities that it can undertake to encourage compliance, or deal with non-compliance (as shown in Table 4.5). The AER advised the ANAO that it tailors its activities relative to the potential or actual non-compliance.

Table 4.5: The AER’s activities to encourage compliance and deal with non-compliance

	Description	Examples of activities
Education	The AER promotes compliance through informing market participants of their rights and obligations under the National Energy Laws.	<ul style="list-style-type: none"> • Publishing compliance bulletins and reports • Publishing investigation, performance and market reports • Attending industry forums and engaging with stakeholders
Regulation	The AER has regulatory functions under the National Energy Laws, whereby it controls or restricts the behaviour of energy market participants.	<ul style="list-style-type: none"> • Transmission and distribution network revenue determinations • Retailer authorisations and exemptions • Maintaining public registers (e.g. public register of network exemptions) and the Energy Made Easy website
Compliance	The AER performs administrative or legislatively mandated activities to monitor compliance with obligations under the National Energy Laws.	<ul style="list-style-type: none"> • Information requests and compulsory notices requiring a market participant to provide information • Business reporting, including the self-reporting framework under the Retail Law • Audits, targeted reviews and projects
Enforcement	The AER uses its powers to respond to and resolve instances of non-compliance with the National Energy Laws.	<ul style="list-style-type: none"> • Administrative resolutions (e.g. voluntary undertaking) • Issuing infringement notices • Court enforceable undertaking • Civil proceedings

Source: ANAO summary of the AER’s Compliance and Enforcement Statement of Approach, and the AER’s Work Program 2017–18.

4.28 The statement of approach was supported by annual work programs, which detailed the AER's compliance and enforcement priorities and targets for the year.¹¹²

4.29 The AER did not demonstrate a link between its risk assessments and work program priorities. Without this line of sight it was not clear how the priorities in the annual work programs were selected, or if they were risk-based as required by the Enterprise Risk Management Framework and a 2006 decision of the AER Board (see paragraphs 4.13 and 4.15). This is consistent with a recent AER internal review (the Compliance and Enforcement Strategic Review Project, April 2019) finding that AER did not have an established, centralised process for setting compliance and enforcement priorities. Additionally, neither the Statement of Approach nor the work programs set clear expectations of how the AER would address its priorities, or identify instances of non-compliance more generally.

4.30 The framework and work programs also did not:

- address a number of key elements of AER's purpose or the overarching strategy statement outlined in the corporate plan (or Australian Energy Market Agreement);
- include an evaluation framework;
- include strategies for individual elements of the overarching strategy;
- specify the tools to assist in determining when education or compliance activities were appropriate to encourage compliance and address non-compliance (refer paragraphs 4.20 to 4.24);
- promote reliability and security (refer paragraphs 3.63 and 3.65); and
- for education programs, encourage compliance and address non-compliance (refer paragraphs 5.4 and 5.5).

112 In 2015–16 and 2016–17, the work program was included within the AER Board's statement of intent, while in 2017–18 it was a standalone document. In 2018–19, a statement of intent and work program was not developed pending approval of a revised statement of expectations from the COAG Energy Council (discussed in Chapter 2 in paragraph 2.33 and Figure 2.3).

Compliance and Enforcement Policy and priorities (July 2019)

4.31 In June 2019, the AER Board endorsed a revised and renamed Statement of Approach, known as the Compliance and Enforcement Policy (the Policy). In July 2019 the AER Board publicly released the Policy and a set of five priorities to guide its compliance and enforcement activities for 2019–20.¹¹³ The Policy and priorities were published on the AER’s website in July 2019 and promoted by a media release.

4.32 The creation of a dedicated Compliance and Enforcement Branch in October 2018 presented an opportunity to define centralised, whole-of-agency compliance and enforcement priorities for the first time.¹¹⁴

4.33 A methodology was implemented to guide the process, including consultation with internal and external stakeholders, and regular opportunities for management to review and approve the Policy and priorities. However, as with the work programs, the AER could not demonstrate the use of its National Energy Laws risk assessments in the priority setting process.

4.34 Neither the Policy nor the priorities addressed the shortcomings of the AER Board’s previous compliance and enforcement documentation (Statement of Approach and annual work programs) as identified in paragraph 4.29. As a result the AER Board’s compliance and enforcement framework still does not: address a number of key elements of the AER Board’s purpose or overarching strategy statement outlined in the corporate plan; allow the effectiveness of activities to be measured using a performance or evaluation framework; or further develop strategies for individual elements of the overarching strategy.

113 The five compliance and enforcement priorities for 2019–20 were:

- ensuring that customers in financial difficulty receive the required assistance, with a focus on the new hardship guidelines;
- ensuring that customers using life support equipment are protected, with a focus on the new life support rules;
- the provision of accurate and timely information: (a) to the Australian Energy Market Operator which is critical to ensuring power system security and/or the efficient outcomes in or effective operation of wholesale energy markets, and (b) to the AER Board which is critical to performance of the AER Board’s economic or market monitoring functions;
- support the transition to metering contestability to ensure consumer and market benefits are delivered; and
- implementation of capacity trading markets under the East Coast Gas Reforms and improving gas market transparency through strengthening the Gas Bulletin Board.

114 Prior to centralising the majority of compliance and enforcement functions in the Compliance and Enforcement Branch, each individual branch carried out its own compliance and enforcement activities. This also meant that priorities were selected within branches that were siloed from each other. An internal review (the Compliance and Enforcement Strategic Review Project, April 2019) found that each branch had its own processes for setting priorities.

Recommendation no.5

4.35 In setting its regulatory and compliance strategy and priorities, the AER:

- (a) demonstrates the link between regulatory obligations and non-compliance risks in the National Energy Market and the priorities selected;
- (b) explains how the achievement of its regulatory and compliance priorities delivers upon the AER's purpose;
- (c) develops strategies for key elements of the AER's purpose and its regulatory and compliance objectives that demonstrate how activities are intended to contribute to the purpose, including strategies to drive competition, and promote reliability and security in the energy market and for the use of education to encourage compliance and address non-compliance;
- (d) provides an evaluation framework, including performance indicators and targets to measure the effectiveness of strategies and activities in achieving the AER's purpose, regulatory and compliance objectives; and
- (e) revises its risk approach and implements processes that enable effective assessment, prioritisation and management of non-compliance risks in the National Energy Market.

Australian Competition and Consumer Commission and the Australian Energy Regulator response: Agreed.

4.36 *A number of initiatives are planned or underway to implement this recommendation. In particular, an annual priority setting project is planned that will develop a consistent methodology for setting annual compliance and enforcement priorities. The framework will draw upon a range of compliance intelligence resources, including risk assessments, and be informed by our new strategic priorities. In addition, a new evaluation framework is under development that will be used to measure the effectiveness of our compliance strategies for each of our priority areas. As noted in response to Recommendation No. 6, work is also well advanced on a new risk assessment model, which will allow us to better distinguish between compliance risks.*

5. Compliance and enforcement activities

Areas examined

This chapter examines whether the AER has effectively conducted activities to promote compliance with the National Energy Laws, including education programs, arrangements to monitor compliance, and actions to address and resolve non-compliance.

Conclusion

The AER has been partially effective in identifying and resolving non-compliance through education, compliance monitoring and enforcement activities. While many individual education activities sought to address non-compliance, the absence of an education strategy and evaluation framework made it difficult for the AER to demonstrate that its approach was effective. The AER conducts many compliance monitoring activities, but did not have a triaging process to assist in deciding whether to pursue inquiries and investigations on a risk-basis. The absence of a decision framework for selection and evaluation of enforcement outcomes has limited the AER's capacity to demonstrate that it has a proportionate and effective approach to resolving non-compliance.

Areas for improvement

This chapter makes one recommendation aimed at developing decision frameworks and triage processes to support compliance and enforcement decision-making (paragraph 5.29).

5.1 Through the Australian Energy Market Agreement, the AER is responsible for promoting compliance with the National Energy Laws by market participants. In discharging these responsibilities, the AER educates energy businesses about their obligations, monitors and reports on compliance with those obligations, and undertakes compliance and enforcement activities to address and remedy potential instances of non-compliance. Poorly designed, implemented and enforced regulation can: burden businesses and consumers; and limit a regulator's effectiveness by not allocating scarce resources to compliance and enforcement activities that will have the greatest impact on reducing non-compliance.¹¹⁵

Has the AER implemented compliance education programs to address areas of non-compliance?

The AER has not developed an overarching education strategy, program of work or tools to assist in determining when education would be an effective mechanism to address non-compliance. The AER has used 10 types of educational activities in 39 instances. In 27 of the 39 instances (69 per cent) the AER intended that the education activity would address areas of non-compliance. In the remaining 12 instances (32 per cent) education activities did not address non-compliance, instead they were intended to educate and inform stakeholders. An evaluation was conducted by the AER of two of the 39 instances of education activities,

115 NSW Department of Finance, Services and Innovation, *Guidance for regulators to implement outcomes and risk-based regulation*, page 3, [Internet] available at http://productivity.nsw.gov.au/sites/default/files/2018-05/Guidance_for_regulators_to_implement_outcomes_and_risk-based_regulation-October_2016.pdf [accessed March 2020].

although these evaluations did not seek to establish whether education activities effectively encouraged compliance or addressed non-compliance.

The AER's approach to addressing compliance concerns through education

5.2 Both the AER's *Compliance and Enforcement Statement of Approach* (April 2014) and July 2019 *Compliance and Enforcement Policy*¹¹⁶ (that replaced the Statement of Approach) identify education of energy businesses as a key component of the AER's approach to encouraging a culture of compliance in energy markets, specifically:

[The AER] aims to educate and inform businesses about obligations under the national energy laws by publishing documents (for example compliance bulletins and reports, investigation reports, performance reports, market reports, and this Statement of Approach), attending industry forums and actively engaging with stakeholders.¹¹⁷

5.3 Further, the Statement of Approach outlined that by publishing reports about its monitoring, enforcement and investigation activities, the AER seeks to educate and inform customers and other stakeholders.¹¹⁸ Key planning and performance reporting documents also highlight the importance of the AER educating consumers.

5.4 The AER has not developed an overarching strategy or plan for undertaking education activities, including details of when it is an appropriate mechanism to address non-compliance. The AER has not developed instructions or guidance, or implemented an approach to assist in determining the circumstances in which education (or a particular education activity) is an appropriate or effective mechanism to address instances of (or systematic) non-compliance. For example, the Statement of Approach and subsequent Policy state that the AER's regulatory approach to compliance and enforcement is risk-based, although education and awareness is not a treatment option or mechanism available to address non-compliance risks as part the AER's risk assessment process.

5.5 The AER should develop an education strategy and tools to assist in determining when education is an appropriate tool to use to encourage compliance and address non-compliance. It should also periodically evaluate the effectiveness of the education strategy and individual activities to determine whether they are effective, encourage compliance and address non-compliance. These activities would contribute to proposed reforms to the AER's broader compliance strategies and priorities, as set out in Recommendation no.5, paragraph 4.35.

Types of education activities

5.6 In April and August 2019, the AER advised the ANAO that it had employed ten types of education activities since 1 July 2015. Some of these education activities are not undertaken exclusively for education and awareness purposes, with education often an incidental purpose of

116 The *Compliance and Enforcement Policy* replaces the Statement of Approach. AER, *Compliance and Enforcement Policy* [Internet], 10 July 2019, p.4, available at https://www.aer.gov.au/system/files/AER%20Compliance%20%26%20Enforcement%20Policy%20-%20July%202019_1.pdf [accessed September 2019].

117 AER, *Compliance and Enforcement Statement of Approach*, April 2014, p.5.

118 AER, *Compliance and Enforcement Statement of Approach*, April 2014, p.14.

the activity. Table 5.1 provides the purpose of these activities and the planned frequency with which the AER intends to undertake the education activity.

5.7 Consistent with the Statement of Approach, education activities broadly take the form of guidance, reports, and forums, or advertising campaigns. The AER is not required by law to undertake any of these types of education activities for any purpose such as education, monitoring, reporting or enforcement. The AER had established an expectation that half of these types of education activities would be delivered on a quarterly, biannual or ongoing basis, the remaining five activities (which included three advertising campaigns) were to be undertaken on a discretionary basis. With the exception of three activities (emails to retailers, promotion of the Energy Made Easy (EME) website and the metering education campaign) the education activities were available on the AER's website or referred to in published reports.

Table 5.1: Types of education activities used by the AER and their purpose

Education activity type	Purpose and description of the education activity set out in the AER's documentation	Frequency
Compliance bulletins	Compliance bulletins inform energy market participants of the AER's compliance expectations and approach to monitoring and enforcing the National Energy Laws. The AER's Internal Compliance Manual May 2013 indicates the bulletins have an enforcement role as they are considered to be an administrative outcome that can be taken when a breach has been established. The AER advised in July 2020 that the compliance bulletins do not have an enforcement role and do not provide an administrative outcome.	At the AER's discretion
Compliance checks or guidance notes	Compliance checks set out requirements and responsibilities for significant compliance issues and developments under the Retail Law and Rules. Compliance checks promote good compliance practice by highlighting non-compliance and the AER's regulatory intervention response.	Bi-annually and Quarterly
Emails to retailers and distributors	Emails are to be sent to retailers and distributors operating in areas of the National Energy Retail Law and Rules where the AER identifies a large number of reported breaches through the Compliance Procedures and Guideline exception reporting process. ^a The emails include an update that outlines the relevant requirements, obligations and rules, compliance reporting arrangements for potential breaches, and enforcement action taken in response to breaches.	Quarterly from May 2018
Guides	Guides are developed to assist retailers and distributors to understand their responsibilities. ^b	At the AER's discretion
Quarterly compliance reports	Quarterly compliance reports educate and inform stakeholders by highlighting compliance issues, enforcement outcomes and raising awareness of market participant obligations in the wholesale energy market. The reports also seek to promote transparency and good practice in energy markets. Quarterly compliance reports: summarise the findings from the AER's targeted compliance reviews and compliance audits; and include the outcomes of the AER's rebidding inquiries, investigations and other monitoring and enforcement activities.	Quarterly
Targeted compliance reviews	These reviews are a tool for monitoring compliance, and usually involve writing to energy businesses to request information about their compliance with one or more related obligations of the National Energy Laws. This can include looking at the policies, systems and procedures that businesses have in place to meet the targeted obligations. The provisions selected for review may be selected either: in response to non-compliance or where there are compliance concerns; or where non-compliance has not been identified, but if it occurred it would have a significant impact on markets or stakeholders. ^c	Regularly, typically quarterly

Education activity type	Purpose and description of the education activity set out in the AER's documentation	Frequency
Promotion of Energy Made Easy (EME) website	The AER has undertaken two advertising campaigns of the EME website, which included the use of online videos, social media, and search engine marketing activity. The promotions had the following objectives: to (a) position the EME website as a source of valuable, independent information, and (b) increase the use of the EME website (May to June 2018 campaign); and to raise awareness of EME in the National Energy Retail Law states and territories and empower consumers to use the site to find and compare energy plans (June 2019 campaign).	At the AER's discretion, and when funding is provided for this purpose
Life support education campaign	In response to identified non-compliance, the AER commenced an education campaign in March 2016 to increase awareness in the medical, care and community services industries of life support obligations contained in the National Energy Laws. This campaign included: issuance of guidance and campaign brochures; an article in an industry newsletter; industry conferences facilitated by the AER; and phone calls to businesses regulated by the AER to assess their understanding of relevant rules.	At the AER's discretion
Metering education campaign	Prior to new rules coming into effect in December 2017, the AER ran a campaign to raise awareness of obligations under the National Energy Retail Rules for metering contestability in July 2017. The campaign included a radio interview, emails to stakeholders, forums, consumer factsheets, and letters to retailers and metering coordinators. In 2018, the AER continued to pursue this campaign in response to poor customer outcomes and a lack of readiness of retailers to provide metering services, especially given that the AER received complaints about delays in installing meters for new connections and meter upgrades.	At the AER's discretion
Improvements to the Natural Gas Bulletin Board	From September 2018, the AER engaged in an ongoing project to raise awareness of changes to the National Gas Bulletin Board. The AER's approach to raising awareness and improving the National Gas Bulletin Board includes engaging with external stakeholders through letters, guidance notes, meetings and forums.	Ongoing

Note a: The emails to retailers are not referred to in the AER Internal Compliance Manual or the AER website, and no other guidance or procedure documentation was available. The AER considers these emails to be a distinct and separate activities, however, emails to retailers and distributors attached updates, and therefore may be more appropriately classified as a form of compliance check and update, rather than a separate program.

Note b: Guides are not referred to in the AER Internal Compliance Manual, and while Guides are published on the AER's website there is not a description of the general purpose and use of Guides by the AER.

Note c: The AER may also undertake strategic compliance projects, which involve identifying a particular compliance problem, inefficiency, harm or risk within the energy markets and working toward solving the issue or reducing its severity or likelihood of occurring.

Source: Extracts and summaries from the AER's *Compliance and Enforcement Statement of Approach*, *Internal Compliance Manual*, website and other documentation.

Table 5.2: The number of education activities undertaken between 1 July 2015 and 1 July 2019, and their focus on compliance

Type of education product	Stakeholder group	First publication or commencement date	Final publication or end date	Number of instances each education activity was used	Number of instances that intended to address areas of non-compliance	Number of instances in which each education activity was evaluated
Compliance bulletins	Wholesale markets	July 2016	July 2016	1	0	0
Compliance checks or guidance notes	Retail markets	November 2015	February 2019	11	4	0
Emails to retailers	Retail markets	May 2018	July 2018	2	1	0
Guides	Retail markets	September 2018	January 2019	1	1	0
Quarterly compliance reports	Wholesale markets (gas and electricity)	September 2015	September 2018	12	12	0
Targeted compliance reviews	Wholesale markets (gas and electricity)	September 2015	April 2019	8	7	0
Promotion of Energy Made Easy website	Consumers	May 2018	June 2019	2	0	2
Life support education campaign	Retail Markets Network businesses	March 2016	January 2019	1	1	0
Metering education campaign	Retail Markets Network businesses	July 2017	January 2019	1	1	0

Source: ANAO analysis of AER's documents.

5.8 In addition to the AER's education activities, the AER publishes on its website an array of resources for targeting all energy stakeholder groups. This information serves to inform and educate. Examples of additional resources include: guidelines and reviews; reporting on compliance and enforcement matters; industry statistics; market and network performance reports; and useful contacts for customers and information for energy customers on choosing an energy retailer.

The use and evaluation of education activities to address non-compliance

5.9 The AER has used education activities in 39 instances between 1 July 2015 and 1 July 2019. The ANAO reviewed documentation relating to these 39 instances to determine the extent to which education activities sought to address non-compliance. Table 5.2 provides an overview of the AER's education activities, by type, undertaken between 1 July 2015 and 1 July 2019 and indicates whether in each instance the AER: intended to address non-compliance when using the activity; and evaluated education activities. The table also shows that different education activities target one or more stakeholder group, including retail and wholesale markets, network businesses, and consumers.

5.10 The majority of education activities examined by the ANAO were intended to be used to address areas of non-compliance (in 27 of 39 instances), with 13 instances not intended to address areas of non-compliance. Four types of education activities had a preventative focus and did not address non-compliance; these were the compliance bulletins¹¹⁹, guides and two of the promotions and campaigns.

5.11 Evaluation of activities helps to determine whether the activity was effective and achieved its objectives and targets, including whether it has been an effective tool to use to encourage compliance and address areas of non-compliance. The AER conducted an evaluation of only two of 39 instances of education activities. This evaluation was of the Energy Made Easy advertising campaigns, which identified that some advertising platforms were more successful than others as a means of advertising, but did not conclude whether the campaign achieved its objective of increasing energy consumers' use of the EME site.¹²⁰

5.12 The AER commenced two other review and evaluation activities (the Life Support Campaign¹²¹ and a review of quarterly compliance reports¹²²), neither of which concluded on the effectiveness of the education activity, including its impact on encouraging compliance or addressing non-compliance. Information held but not analysed and reported on by the AER for the Life Support Campaign suggested that the activity had not improved the understanding of requirements by regulated businesses and, therefore, in this instance had not demonstrated that

119 This focus is inconsistent with the intended purpose of this activity, as outlined in Table 5.1, compliance bulletins are a tool that can be used to address non-compliance.

120 At the same time that the AER division was promoting the Energy Made Easy website, the Department of Environment and Energy was also conducting advertising for the Powering Forward advertising campaign. ANAO Report No.7 2019–20 *Government Advertising: June 2015 to April 2019* [Internet], available at <https://www.anao.gov.au/work/performance-audit/government-advertising-june-2015-to-april-2019> [accessed June 2020], paragraph 3.33 reported about the Powering Forward advertising campaign including the Powering Forward website (which was linked to the EME website) see footnote 79 and 82.

121 While the AER did not complete an evaluation of the Life Support campaign, it surveyed energy businesses twice during the campaign (in November 2018 and January 2019) to gain an understanding of retailers' processes to manage life support customers.

122 The AER has included the review of quarterly compliance reports in a broader review of compliance reporting.

the activity had been an effective tool for encouraging compliance and addressing areas of non-compliance.

Has the AER established appropriate arrangements to monitor compliance with National Energy Laws, Rules and Regulation?

The AER has established partially effective arrangements to monitor compliance with the National Energy Laws. The arrangements consist of a broad range of monitoring activities which are not clearly instigated on a risk-basis. Few activities draw a conclusion about compliance and non-compliance. The arrangements are not supported by a triage process that would allow the AER to more efficiently deal with potential non-compliance, including escalating non-compliance issues of greater significance on a risk-basis.

5.13 In accordance with the Australian Energy Market Agreement, the AER is responsible for regulation and compliance with the National Energy Laws. Each of the National Electricity, National Gas and National Energy Retail Laws provide the AER with the power to monitor and report on compliance with national electricity and retail energy laws and rules, investigate potential breaches and take enforcement action for breaches of the law.

5.14 Both the *Compliance and Enforcement Statement of Approach* and *Compliance and Enforcement Policy* set out the information sources and monitoring tools the AER uses to assess levels of compliance and identify potential breaches of the National Energy Laws. These information sources and tools are summarised in Table 5.3. The AER intended that these tools would be applied on a risk-basis (see Figure 4.1 in Chapter 4), for example stakeholder intelligence would be used to monitor low risk obligations, while exception reporting and audits would be used to monitor high risk obligations.

Table 5.3: Compliance information sources and monitoring tools

Monitoring activities	Examples	Frequency
Analysis of market intelligence	Customer Consultative Group	Three meetings per year
	Tip-offs to the ACCC Infocentre and AER Contacts Team	As provided by consumers and energy businesses
Information requests and compulsory notices	Information requests	As determined by the AER Board
	Mandatory information notices	As determined by the AER Board
Market surveillance	Collection and analysis of Australian Energy Market Operator data Reviewing information published by regulated retail businesses on their websites	Daily
Targeted compliance reviews and projects	Reviews of compliance with one or more obligation Projects to resolve compliance problems, inefficiencies and potential risks of harm	As determined by the AER

Monitoring activities	Examples	Frequency
Business reporting	Energy retailer exceptions reporting under the Retail Law	Immediate, quarterly and half-yearly (depending on the breach)
	Other self-reports by energy businesses	As provided by energy businesses
Audits	Technical audits Retail audits	As determined by the AER

Source: AER, *Compliance and Enforcement Statement of Approach*, April 2014 and *AER Compliance and Enforcement Policy*, July 2019, pp. 6–7.

5.15 As discussed in Chapter 4 (at paragraphs 4.21, 4.24 and 4.29), the AER did not select topics or compliance activities on a risk-basis.¹²³ For retail audits, the AER division developed a program of audits (approved by the AER Board), but did not clearly document the rationale for selecting topics for this program (relative to other matters covered by the retail law). For targeted compliance reviews and strategic review projects it was not clear why the AER selected a provision to examine relative to other provisions, although some reviews were selected in response to issues that had arisen. In relation to energy retailer exception reporting:

- seven of the 14 obligations, that require retailers and distributors to provide an immediate report when there is non-compliance, underwent a risk assessment and received a high probability and high impact risk rating; but
- the remaining seven obligations did not have a risk assessment. Consequently, there was not a clear risk-based rationale for conducting compliance activities in response to those reports.

5.16 Compliance activities include inquiries and investigations undertaken to further examine potential breaches to assist in determining the extent of non-compliance and appropriate enforcement action. The AER maintains records of compliance activities in the AER Compliance System.¹²⁴ The AER Compliance System recorded 2527 compliance activities commencing between 1 July 2015 and 30 June 2019. In that period compliance monitoring activities have included the commencement of: 87 investigations; 102 enquiries; 225 immediate exception reports; 12 audits; five strategic projects; and 59 targeted provisions. Compliance activities leading to outcomes are summarised in Table 5.4. There is a high proportion of records without outcomes recorded, which in some cases reflects work in progress.

123 The AER division advised in April 2020 that it also considers other compliance intelligence inputs including complaints and self-reporting to determine compliance risk. Risk assessments of other intelligence inputs are not documented.

124 Records may also be maintained in the records management system and tracking and analysis sheets.

Table 5.4: Compliance and enforcement activities, 1 July 2015 to 30 June 2019

Compliance activity	Number undertaken (number with no outcome recorded)	Number and nature of enforcement outcomes
Investigations	87 (25 no outcome recorded)	1 enforceable undertaking 16 infringement notices 23 no action letter 22 no further action — satisfied, no issue, not practical to pursue
Inquiries	102 (14 no outcome recorded)	4 infringement notices 1 escalated 1 report issued 1 rule change 12 no action letters 6 opinions 61 no further action — advisory notice, no issue, not practical to pursue, satisfied 2 transferred
Exception reporting: immediate	225, including four that led to multiple outcomes (69 no outcome recorded)	4 enforceable undertakings (two were issued with infringements notices and two were issued with no action letters) 32 infringement notices (two were issued with enforceable undertakings) 1 administrative undertaking 18 escalated 103 no action letters (two were issued with enforceable undertakings) 2 no further action
Audit	12 (10 no outcome recorded)	1 report issued 1 no further action
Strategic compliance projects	5 (4 no outcome recorded)	1 no further action — advisory notice
Targeted provisions	59 (10 no outcome recorded)	9 escalated 40 no further action — satisfied, no issue, not practical to pursue
Annual, half yearly and quarterly exception reports	55 (14 no outcome recorded)	3 infringement notices 7 escalated 28 no action letters 2 reports issued 1 no further action — advisory notice
Incident reports, stakeholder liaison, referred, general request	67 (14 no outcome recorded)	7 no action letter 46 no further action — satisfied, no issue, or not practical to pursue

Compliance activity	Number undertaken (number with no outcome recorded)	Number and nature of enforcement outcomes
Market survey	3 (2 no outcome recorded)	1 no action letter
Monitoring	16 (8 no outcome recorded)	1 enforceable undertaking 1 infringement notice 4 no further action — satisfied or not practical to pursue 1 transferred
No action request	37 (5 no outcome recorded)	26 no action letters 1 no action granted 5 no further action — satisfied or no issue
Performance standards	236 (47 no outcome recorded)	1 escalated 188 no further action
Compliance publication	2 (2 no outcome recorded)	
Retail performance	1131 (1063 no outcome recorded)	68 reports issued
Retailer of Last Resort (RoLR) events	6 (6 no outcome recorded)	
STPIS	20 (0 no outcome recorded)	20 reports issued
Chapter 9 reviews, rebidding, Regulatory Investment Test (RIT) and Annual Planning Report (APR) reviews	357 (137 no outcome recorded)	5 reports issued 10 no further action — advisory notice 205 no further action — no issue, not practical to pursue, satisfied
Under assessment	10 (0 no outcome recorded)	7 no action letters 3 no further action — satisfied, no issue

Source: Summary of AER's Compliance System records, based on an extract made in August 2019.

5.17 A documented triage process would support the AER to escalate the most important matters for further action and resolution. The *Australian Government Investigation Standards* states that agencies should have written procedures that outline how the initial evaluation and actioning of matters will occur. Guidance released by the New South Wales Government for regulators suggests that:

a regulator could begin to triage complaints at the point of receipt based on information obtained from the complainant, with:

- low priority complaints being noted but not actioned unless further complaints are received;
- mid priority complaints being followed up with an inspection or audit, and

- high priority complaints being followed up with an inspection or audit, an enforcement response (if necessary), and follow up interactions over time to promote better compliance.¹²⁵

5.18 The AER did not have a triage process for dealing with potential non-compliance including setting out circumstances when no further action was necessary or when it would be appropriate to escalate matters from business-as-usual monitoring to an active compliance activity, such as inquiry, investigation and audit.¹²⁶ Instead, the AER addressed each matter on a case-by-case basis.

5.19 In limited cases the monitoring activities of the AER allowed for quick identification of non-compliance with the National Energy Laws. In particular: retail audits must draw a conclusion about compliance and non-compliance with provisions examined; and the energy retailer exception reporting under the National Energy Retail Law, which requires energy businesses to self-report suspected breaches of specific provisions of the Retail Law, identifies potential non-compliance. Often the AER undertook further inquiry to confirm non-compliance in relation to provisions where potential breaches must be reported immediately, quarterly or half yearly. The majority of the AER's remaining monitoring activities require the AER to take further action, such as making inquiries to energy businesses or beginning an investigation, before non-compliance can be reasonably established. Similar to the finding in paragraph 5.18, the AER did not have a consistent process for escalating matters identified in monitoring activities so that non-compliance could be established, based on the likely harm or risk impact posed by the obligation that may be breached.

5.20 The absence of a clear decision process for managing potential breaches arising from information sources and monitoring tools is demonstrated in Table 5.4. In most cases, there are a significant number of compliance activities where an outcome is not recorded. While a small proportion of the matters recorded as having no outcome were in progress at the time of the audit, others should have an outcome recorded. For example, audits and immediate exception reports are intended to deal with priority obligations based on a risk assessment and, therefore, an outcome should be reached for all potential non-compliance activities (where possible outcomes can include a decision to take no further action). In contrast, individual market monitoring activities (which are intended to deal with low risk obligations) may be efficiently dealt with, on a risk-basis, by recording the matter for intelligence purposes and taking no further action. For these market monitoring activities, further investigating an issue may only be appropriate when trends in market surveillance show that an issue affects a large number of participants and the extent of potential non-compliance is increasing. The AER advised in April 2020 that the introduction of a new work instructions (*Assessing Compliance Matters*) in February 2020 will resolve many issues identified with consistency of recording compliance assessments. This work instruction also provides a basis for escalation of compliance breaches for enforcement outcomes, although discretion remained in the escalation process.

125 Government of New South Wales, *Guidance for regulators to implement outcomes and risk-based regulation* [Internet], NSW Department of Finance, Services and Innovation, 2016, http://productivity.nsw.gov.au/sites/default/files/2018-05/Guidance_for_regulators_to_implement_outcomes_and_risk-based_regulation-October_2016.pdf [accessed March 2020].

126 There was not a triage process that encapsulated all information sources and monitoring tools, linking decisions to risk. While there was some individual guidance that set out factors to be considered in dealing with a potential non-compliance there was not a clear decision framework leading to likely outcomes including, when appropriate, escalation.

Has the AER effectively addressed and resolved non-compliance in accordance with established requirements, including through enforcement action?

The AER has been partially effective in addressing and resolving non-compliance, including through enforcement action. The AER has not established a triaging or decision-making framework that it consistently applies when deciding on enforcement action. Enforcement outcomes between 1 July 2015 and 30 June 2019 include: 56 infringement notices; two administrative undertakings; 6 enforceable undertakings; and 208 no action letters. Since 1 July 2019 the AER has commenced court proceeding for four separate matters. The AER has not assessed whether enforcement outcomes have resolved non-compliance.

5.21 Both the *Compliance and Enforcement Statement of Approach* and the *AER Compliance and Enforcement Policy* set out multiple enforcement options available for the AER to pursue in response to breaches of the National Energy Laws. These options include: administrative resolutions; infringement notices; court enforceable undertakings; civil proceedings; and revocation of retailer authorisation.

5.22 The AER's internal guidance recognises that each enforcement option has strengths and weaknesses, and should be used as appropriate in the circumstances at hand. The guidance also aims to achieve proportionately and consistency in the AER's enforcement actions. The need to be selective in choosing the enforcement action to pursue (if any) is recognised in both the:

- *Compliance and Enforcement Statement of Approach*, which states that while the AER assesses all complaints and breaches and records them in its systems, the AER cannot pursue enforcement action in all cases; and
- the *AER Compliance and Enforcement Policy*, which requires the AER to focus on matters that provide the greatest overall benefit to both consumers and the energy market.

5.23 Between 1 July 2015 and 1 July 2019, the AER did not have a documented triaging process in place to consistently determine the enforcement outcome when non-compliance had been established.¹²⁷ The *Compliance and Enforcement Statement of Approach* and the *Compliance and Enforcement Policy* set out eight to six factors, respectively, that could be considered on a discretionary basis, to achieve consistency and proportionately in response to non-compliance. The absence of a triage or decision-making tool means that the AER did not have a framework in place to support consistency in the selection of enforcement options, and proposed enforcement approaches meant that different enforcement outcomes could apply to the same breach.

5.24 In June 2019, the AER Compliance Advisory and Triage Committee met for the first time. The purpose of this committee is to identify and choose consistent approaches to compliance issues, prioritise potential matters and allocate resources at initial stages of investigation. The AER advised that its Compliance Enforcement and Market Surveillance Committee considers significant investigations, and provides pre-approval of enforcement matters prior to Board consideration. The AER maintains records of enforcement outcomes from compliance activities in the AER Compliance System, as summarised in Table 5.5.

¹²⁷ Similarly the AER Board and division's approach to establishing compliance and non-compliance was not supported by a triaging process (see paragraph 5.18).

Table 5.5: Enforcement activities, 1 July 2015 to 30 June 2019

Enforcement type	Total	Compliance activities leading to outcome
Court Order	0	Not applicable
Enforceable undertaking	6	1 investigation, 1 monitoring and 4 immediate reports
Infringement notice	56	3 biannual exceptions, 32 immediate reports, 4 inquiries, 16 investigations, 1 monitoring
Administrative undertaking	2	1 monitoring, 1 immediate report
Escalated	36	18 immediate reports, 1 inquiry, 1 performance standard, 7 quarterly reports, 9 targeted provisions
NFA — advisory notice	14	1 biannual, 2 inquiries, 10 rebidding, 1 strategic compliance project
No action letter, no action granted	208	2 annual exception, 23 biannual exception, 4 general request, 1 half yearly, 103 immediate reports, 12 inquiries, 23 investigations, 1 market survey, 27 no action request, 2 quarterly report, 3 referred, 7 under assessment
No further action, no issue or satisfied	513	1 audit, 18 Chapter 9 reviews, 6 general request, 12 hardship policies, 2 immediate report, 35 incident reports, 44 inquiries, 18 investigations, 4 monitoring, 5 no action request, 180 performance standards, 134 rebidding, 12 Regulatory Investment Test (RIT) and Annual Planning Report (APR) reviews, 1 stakeholder liaison, 38 targeted provisions, 3 under assessments
No further action — not practical	75	4 incident reports, 15 inquiries, 4 investigations, 1 monitoring, 8 performance standards, 37 rebidding, 4 RIT and APR reviews, 2 targeted provisions
Opinions	6	6 inquiries
Report issued	97	2 annual exception, 1 audit, 1 inquiry, 68 retail performance, 5 RIT and APR reviews, 20 STPIS
Rule change	1	1 inquiry
Transferred	3	2 inquiry, 1 monitoring
No outcome	1515	1 Additional Retailer of Last Resort (RoLR) — firm, 3 Annual exception, 10 audit, 24 authorised retailer, 1 biannual exception, 2 compliance publication, 1 default RoLR, 1 general request, 59 hardship policies, 69 immediate reports, 10 incident reports, 14 inquiries, 25 investigations, 2 market survey, 8 monitoring, 5 no action requests, 47 performance standards, 10 quarterly reports, 66 rebidding, 2 referred, 1063 retail performance, 71 RIT and APR reviews, 6 RoLR Events, 1 stakeholder liaison, 4 strategic compliance projects, 10 targeted provisions

Source: Summary of the AER division's Compliance System records, based on an extract made in August 2019.

5.25 As shown in Table 5.1, the enforcement outcomes recorded in the AER Compliance System between 1 July 2015 and 30 June 2019 included: 56 infringement notices; two administrative undertakings; 6 enforceable undertakings; and 208 no action letters (or no action was granted).

5.26 Since inception in 2005, the AER Board has instituted civil proceedings on seven occasions — three for potential breaches of the National Energy Retail Law and four for potential breaches of the National Electricity Law. Four of these were instituted in 2019, including against:

- four wind farm operators (AGL, Neoen, Pacific Hydro and Tilt Renewables) for potential breaches of the National Electricity Rules in August 2019 following the South Australia Black System Event of September 2016;
- Pelican Point Pty Ltd for potential breaches of the National Electricity Rules in August 2019;
- AGL in November 2019 for potential breaches of the National Energy Retail Law in November 2019; and
- EnergyAustralia in November 2019 for potential breaches of the National Energy Retail Law and Rules.

5.27 The Final Report for the *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* observed court action is an important power for regulators to use where appropriate, as it directly addresses wrongdoing and is a strong deterrent. Specifically the final report stated:

Breach of the law carries consequences. Parliament, not the regulators, sets the law and the consequences. There are cases where there is good public reason not to seek those consequences. Prosecution policies have always recognised that there may be good public reasons not to pursue a particular case. But the starting point for consideration is, and must always be, that the law is to be obeyed and enforced. The rule of law requires no less. And, adequate deterrence of misconduct depends upon visible public denunciation and punishment.

The regulatory pyramid, to which so much reference has been made in evidence and submissions, reflects two very practical observations: not all contraventions of law are of equal significance; and regulators do not have unlimited time or resources. But it is wholly consistent with the analyses that are expressed by the metaphor of the regulatory pyramid, that serious breaches of law by large entities call for the highest level of regulatory response. And that is what has been missing. Too often serious breaches of law by large entities have yielded nothing more than a few infringement notices, an enforceable undertaking (EU) not to offend again (with or without an immaterial ‘public benefit payment’) or some agreed form of media release.¹²⁸

5.28 The AER has not assessed the effectiveness of enforcement action at addressing non-compliance.

128 K. M. Hayne, Final Report, *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* [Internet], Volume 1, February 2019, pp.432–433, <https://www.royalcommission.gov.au/sites/default/files/2019-02/fsrc-volume-1-final-report.pdf> [accessed August 2020].

Recommendation no.6

5.29 The AER develops risk-based triaging processes to support decision-making in relation to: undertaking further inquiries to establish compliance and non-compliance; and selecting the enforcement outcome when non-compliance had been established.

Australian Competition and Consumer Commission and the Australian Energy Regulator response: *Agreed.*

5.30 *The AER is in the process of implementing a number of initiatives to address this recommendation. In particular, we have developed a new agency-wide policy for assessing non-compliance and work is well advanced on a new risk assessment model which will allow us to better distinguish between compliance risks, particularly in the high and very high risk groupings. We have also aligned our governance processes to the new compliance assessment process, for example through the creation of a centralised assessment team and a new AER Board Enforcement and Compliance Committee. These will provide valuable forums for triaging matters and decision-making.*



Grant Hehir
Auditor-General

Canberra ACT
3 September 2020

Appendices

Appendix 1 Entity response



30 July 2020

Our Ref: 11251490
Contact Officer: Scott Haig
Contact Phone: 02 6243 1207

Mr Grant Hehir
Auditor-General for Australia
Australian National Audit Office
GPO Box 707
Canberra ACT 2601

Dear Mr Hehir

Thank you for your correspondence of 3 July seeking comment from the Australian Energy Regulator (AER) on the Australian National Audit Office's (ANAO) proposed performance audit report (report) on the AER's *Regulation of the National Energy Market*. We acknowledge the work of the ANAO audit team and thank them for their analysis and insights. This is particularly timely for the AER as, since the end of the period reviewed by the audit, we have welcomed four new Board members to our expanded Board, including a new Chair, and a new Chief Executive Officer has also joined. The new Board is currently in the process of revising the strategic priorities for the organisation.

We accept all six recommendations contained in the report and have commenced planning and implementation. Implementation of the recommendations will be overseen by the AER Board and the Audit Committee for the ACCC and AER.

The report notes that in a number of areas, the AER had already started to address some issues identified by the ANAO. In making these changes, we benefited from discussions with the audit team. Below are some of the activities we are currently undertaking or have planned to implement the recommendations.

Risk management

The report recommends improvements to the reporting of risk and the management of shared risks. We have undertaken a significant amount of work on risk management over the past year, with the development of a new AER-specific approach to project risk and extensive staff training. This work will feed into the AER's organisational-level risk register that is required by the ACCC, which was recently overhauled and includes a number of shared risks. The newly formed Policy and Governance Committee, which includes all AER Board members, will regularly review the risk register and receive monthly CEO updates, including on strategic risks. These arrangements will allow us to improve our management and reporting of risk, including periodic reporting to the Corporate Governance Board of the ACCC and AER.

Performance management and reporting

We accept the ANAO's recommendation that we develop a performance measurement and reporting framework, which includes the corporate plan as the primary planning document. To assist us in implementing this recommendation, we have obtained agreement from the ACCC to produce an AER-specific corporate plan as part of the broader agency 2020-21 corporate plan. Complementary to this, we have recently undertaken a significant strategic planning exercise that outlines our vision, outcomes, objectives, priorities and enablers across our people, stakeholders and systems. Once completed, this will form the centrepiece of the AER's new planning and reporting arrangements. It will also enable us to consider refinements to our current evaluation framework so that we move towards a clearer program logic incorporating output, outcome and impact measures as appropriate.

Management of reviews and assessments

In terms of the recommendation around the need to develop tools to promote consistent management of reviews and assessments, two recent initiatives will assist in addressing this recommendation. Firstly, a new project management framework has been developed and is currently being rolled out. This will assist in projects being managed in a more consistent, structured and effective way across the AER and will include the development of periodic status updates. Secondly, the AER has designed a project portfolio management process that will assist in providing oversight of progress across the organisation.

Compliance and enforcement

The report makes three recommendations in relation to the management of the AER's compliance and enforcement function. We accept these recommendations and note that they are broadly consistent with the findings of a 2019 review we initiated into our compliance and enforcement activities. Since July 2019, the Compliance and Enforcement Branch has been implementing the recommendations from that review.

In terms of the recommendation regarding the development of risk-based triaging processes for compliance and enforcement activities, we note that we are in the process of implementing a number of initiatives. In particular, we have developed a new agency-wide policy for assessing non-compliance and work is well advanced on a new risk assessment model which will allow us to better distinguish between compliance risks, particularly in the high and very high risk groupings. We have also aligned our governance processes to the new compliance assessment process, for example through the creation of a centralised assessment team and a new AER Board Enforcement and Compliance Committee. These will provide valuable forums for triaging matters and decision-making.

The report recommends that in the setting of regulatory and compliance strategies and priorities, we amongst other things: demonstrate the relationship between priorities and risk; demonstrate how the priorities achieve our purpose; and put in place performance measures to evaluate the effectiveness of our strategies. We note that an annual priority setting project is planned that will develop a consistent methodology for setting annual compliance and enforcement priorities. The framework will draw upon a range of compliance intelligence resources, including risk assessments, and be informed by our new strategic priorities. In addition, a new evaluation framework is under development that will be used to measure the effectiveness of our compliance strategies for each of our priority areas.

Consistent with the recommendation on compliance intelligence, we have commenced initial planning for the development of an Information Management Framework. It is intended that the framework will be an AER-wide repository of compliance intelligence that will document key aspects of this information including sources, storage locations, uses and reliability.

As demonstrated above, the AER is committed to implementing the ANAO's recommendations and to improving the efficiency and effectiveness of our operations and governance arrangements. The AER's summary response can be found at **Appendix A**.

If you require further information on the AER's response, please contact Mr Scott Haig on (02) 6243 1207 or via scott.haig@aer.gov.au

Yours sincerely



Liz Develin

Chief Executive Officer

Sent by email on: 30.07.2020