

20 March 2020

Ms Lyn Camilleri  
Australian Competition and Consumer Commission  
Level 17, 2 Lonsdale Street  
MELBOURNE VIC 3000

Dear Ms Camilleri

## **Business NSW response to Draft Guidelines on the Prohibiting Energy Market Misconduct Act**

Business NSW welcomes the opportunity to comment on the Draft Guidelines on the Prohibiting Energy Market Misconduct Act.

Business NSW supports the intent of the legislation to bring down prices paid by retail energy consumers, particularly those in the small business sector. Since 2017, our members have consistently identified energy costs as one of their top areas of concern for cost control. Many have been on standard offers, as pointed out in the *Retail Electricity Pricing Inquiry Final Report*, and most are now moving onto default market offer tariffs.

Our recommendations in relation to the Draft Guidelines are outlined below.

### **Recommendation 1**

The ACCC should clarify the Guidance over what constitutes “sustained and substantial reductions”, particularly regarding the cumulative impacts of multiple changes in market conditions, rather than the single effects of one big change as illustrated in Examples 6 and 7.

It is often observed that prices in the energy sector ‘rise like a rocket, but fall like a feather’. That is, suppliers will pass through to their customers any increase in costs from wholesale prices or network costs immediately and in full. However, when the same cost bases fall, retail price drops are deferred as long as possible, or passed on only in a limited proportion to the scale of the fall.

The reforms proposed in the Draft Guidelines seem to rest heavily on how enforcement officers would interpret the terms “sustained and substantial reductions” and “reasonable adjustments”. While point 2.21 states that the Australian Competition and Consumer Commission (ACCC) “will not apply a set threshold in determining whether a reduction is sustained and substantial”, Examples 6 and 7 in the Draft Guidelines indicate “sustained and substantial” will in practice prove a high bar to clear.

Example 6 depicts the arrival in the marketplace of a new large generator and the ensuing impact on prices. In practice, the market is far more likely to be characterised in future years by the arrival of many smaller generators, each of whose marginal impact on prices is likely to be more modest than the large generator in the example, but whose cumulative impact

### **About Business NSW**

Formerly NSW Business Chamber, Business NSW is the peak policy and advocacy body which has been representing businesses in NSW since 1826. Business NSW is one of Australia’s largest business support groups with a direct membership of 20,000 businesses. Business NSW works with government, industry groups, as well as business and community leaders to provide a voice for our members. Operating throughout a network in metropolitan and regional NSW, Business NSW represents the needs of business at a local, state and federal level.

could have the same results. It is unclear from the way the example is described whether this would constitute a “sustained and substantial” price reduction, if it is prompted by multiple causes and occurs piecemeal, rather than as one clearly demarcated shift in the market.

### **Recommendation 2**

Guidance should oblige retailers to pass on price reductions resulting from reductions in network costs immediately and in full. Price reductions from other wholesale costs should be expected to be passed on as soon as practicable, rather than waiting for scheduled tariff changes in most circumstances where a scheduled tariff change is not imminent.

Similarly, Example 7 depicts a 10 per cent drop in network costs and identifies that this would likely be “a sustained and substantial reduction”. This guidance is likely to be tested frequently, if network costs reduce by smaller increments. In practice, the ACCC will struggle to avoid pinpointing more precisely whether network cost reductions must be passed through to customers if they occur in lesser increments. For example, does an 8, 6, 4 or 2 per cent reduction qualify? Clearer guidance for retailers, and better outcomes for customers, would be achieved by setting the expectation that *any reduction* in network costs be passed on to customers immediately and in full.

The descriptions of “reasonable adjustments” should also be strengthened considering the ‘rise like a rocket, fall like a feather’ problem. Point 2.25 states merely that it “may be reasonable” for retailers to implement price reductions in between its usual schedule of a tariff changes. There is space for the ACCC to take a firmer line on this point, and to state that it would expect changes to be made as soon as practicable. The threshold for “sustained and substantial” reductions in prices already creates a high hurdle to trigger application of Section 153E. This should not be further weakened by allowing retailers to delay implementation of price reductions for as long as they can hold out.

### **Recommendation 3**

The ACCC must carefully monitor supplier behaviour following the introduction of the Prohibiting Energy Market Misconduct Act and associated Guidelines. Specifically, it needs to look out for, and be prepared to act promptly on, any coordination of pricing behaviour resulting from (but not necessarily in direct breach of) these Guidelines.

If competitive pressure in the electricity retail market were strong, consumers, including small business consumers, might expect these Draft Guidelines to act solely as a backstop and for competitive pressure to motivate retailers to pass through price reductions rapidly. However, as the Retail Price Inquiry demonstrated, the market is not characterised by strong competitive pressure.

Without strong competition, there is a risk that not only will these guidelines not address the problem (by imposing too high a hurdle to trigger their application), but will also give retailers greater predictability of other retailers’ pricing strategies. By formalising what circumstances in the ACCC’s view constitute grounds to reduce prices, there is a risk that retailers see those circumstances as being the *only* time they need to reduce prices. With confidence that their competitors’ responses will be the same, because the terms have been codified in the Guidelines, competitive pressure may be weakened.

Our concern is that, in drafting the obligation on retailers in this way, the Guidelines may work against their intent by making it easier for retailers to justify keeping prices high, and to have more predictability that their competitors will do the same. This risks reducing

*competitive pressure* for retailers to cut prices when wholesale costs fall, while only adding a weak and hard-to-enforce *regulatory pressure* on retailers to lower prices.

#### **Recommendation 4**

If “sustained and substantial” price wholesale reductions are observed, the Australian Energy Regulator (AER) should conduct ‘out of schedule’ revisions to the Default Market Offer (DMO).

The Guidelines provide little information on the interaction of Section 153E and the Default Market Offer (DMO). Given the importance of the DMO for many energy consumers, including small business consumers, we would have expected more comprehensive consideration than Point 2.41 provides on these interactions.

There is a strong case that the AER should conduct “out of schedule” adjustments to the DMO if a “sustained and substantial” wholesale price reduction is observed. Just as we believe there should be an expectation on retailers to pass on “sustained and substantial” price reductions as soon as practicable, we have the same expectation that the AER make corresponding adjustments to the DMO as quickly as practicable, rather than sticking to its annual review cycle.

If you have any questions about this submission or would like to discuss in more detail, please feel free to contact me at [REDACTED]

Yours sincerely

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