8 April 2020

Michael Drake
Director, Electricity Markets Branch
Australian Competition and Consumer Commission
GPO Box 3131
Canberra ACT 2601

Sent electronically to electricitymonitoring@accc.gov.au

EnergyAustralia Pty Ltd
ABN 99 086 014 968

Level 33
385 Bourke Street
Melbourne Victoria 3000

Phone +61 3 8628 1000
Facsimile +61 3 8628 1050

enq@energyaustralia.com.au
energyaustralia.com.au

Dear Michael

Draft ACCC Guidelines in relation to the Treasury Laws Amendment (Prohibiting Energy Market Misconduct) Act 2019

EnergyAustralia welcomes the opportunity to provide input in relation to the ACCC's guidance on its Electricity Industry enforcement functions in Part XICA of the *Competition and Consumer Act 2010* (**CCA**), introduced by the Treasury Laws Amendment (*Prohibiting Energy Market Misconduct) Act 2019* (the **Act**).

EnergyAustralia appreciates the comprehensive effort undertaken by the ACCC in preparing the draft Guidelines to clarify its position in relation to conduct that would or would not contravene the prohibited conduct provisions in the Act.

While, as discussed below, EnergyAustralia considers there is scope for some parts of the draft Guidelines to be further clarified, we believe the draft Guidelines will, once finalised, provide much-needed clarity for industry stakeholders seeking to prepare for, and comply with, Part XICA. We have set out in the attachment some further questions that remain unaddressed or could be further clarified in the Guidelines.

The energy industry is not unique in seeking to grapple with the extraordinary circumstances created by the global COVID-19 pandemic – both for our operations in Australia and our partners overseas. We appreciate that the ACCC cannot control the commencement date of the Act, but we would be grateful if the ACCC could take into account the serious logistical and operational challenges that organisations like EnergyAustralia face when juggling our continued response to COVID-19 while simultaneously preparing our business for the commencement of the Act during these unprecedented and exceptional times.

It is important to acknowledge that preparing for reforms such as this takes significant effort by key people in our business at a time when EnergyAustralia needs to prioritise the health and safety of our people, "keeping the lights on" through the continued operation of our power stations and servicing our customers, particularly those facing financial stress from COVID-19. Furthermore, the forthcoming period when we commence training frontline staff will be operationally challenging. These staff will also be managing high call volumes from customers facing financial hardship due to the pandemic, and many of these staff are now working from home, creating another logistical complexity. These are not business as usual conditions and, as we have empathy for the ACCC's position, we hope that spirit will be mutual.

We encourage the ACCC to allow electricity retailers and generators a reasonable period of time to develop their approach to complying with the new provisions, including after the commencement date, and for the ACCC to initially focus on encouraging compliance with the

law, particularly by educating and informing retailers and generators about their responsibilities under the Act.

EnergyAustralia remains available for contact and looks forward to cooperatively and constructively engaging with you. We would be pleased to answer any questions you may have regarding this submission.

Contact

Should you require any further information regarding this submission, please contact Rochelle Younger on [redacted].

Regards

Ross Edwards
Markets Executive

1. Introduction

We appreciate the comprehensive effort the ACCC has undertaken to date and we welcome the inclusion of practical examples in the Guidelines.

While we acknowledge that it will not be possible to remove all uncertainty from the Act and that ultimately it will be the role of the courts to interpret the new laws and determine whether contraventions have occurred, we believe there are some aspects of the Guidelines that could be further clarified to assist industry stakeholders to develop their approach to compliance. These aspects predominantly relate to section 153E and the ACCC's approach to enforcement.

2. Retail pricing prohibition

2.1 Definitions

(a) Small business customers (Para 2.7)

We note that s153C of the Act defines "small business customer" to mean a customer who purchases or proposes to purchase electricity at a rate less than 100 MWh in a financial year and is not a residential customer in relation to that electricity.

Based on paragraph 2.27 of the Explanatory Memorandum (**EM**), it is our view that the reference to "customer" in this definition means that it is appropriate to have regard to the customer's energy consumption at the customer level, rather than the individual premises level. That is, a small business customer may have many accounts across many sites or premises and would only be captured by the definition of "small business customer" if their aggregate energy usage across their sites and accounts is less than 100 MWh in a financial year. As this is a key threshold question, it would be helpful for the ACCC to confirm that this is consistent with their interpretation.

(b) Financial year (Para 2.7)

In addition, we assume that the reference to "financial year" in the definition above can refer to whatever financial year the retailer applies for tax and accounting purposes. Please let us know if this is not your understanding.

2.2 Reasonable adjustments

We appreciate the ACCC's efforts to explain when an adjustment or decision not to adjust would be reasonable. However, since the notion of reasonableness, which is not defined in the Act, is arguably the most important aspect in determining whether a retailer has contravened section 153E, we believe further clarity is important.

(a) When adjustments need to be made

We note the discussion in paragraph 2.25 of the Guidelines that if a retailer's next regular price reset process is not "commencing soon" it may be reasonable to expect the retailer to make a specific adjustment to reflect a new cost decrease.

The question of whether the price reset process is "commencing soon" leaves considerable uncertainty in relation to how the laws will be interpreted and enforced.

Our view is that, due to the significant logistical effort, time and cost that is typically involved in conducting a price reset, retailers should not be expected to undertake mid-cycle adjustments unless there are exceptional circumstances. Ordinarily, leaving aside circumstances particular to a retailer, competitive market pressures provide an incentive to pass on cost reductions to customers as soon as possible, subject to the costs of doing so. Additionally, price reset lead times and complexity have increased over time due to the

introduction of new regulations, creating additional constraints to the way we communicate to customers. As noted in our previous submission:

> *The EM suggests that in determining whether an adjustment has been made within a reasonable period of time, retailers should not be expected to make many changes to retail prices throughout a year and it would only be in exceptional circumstances that a retailer would be required to make an adjustment outside its normal annual price adjustments.[1] The EM also recognises that consumers face costs associated with pricing adjustments because they "need to understand and adjust to changes", that "excessively frequent price changes can be detrimental to customers" and that retailers incur costs to implement price changes.[2]*

To this end, it would be helpful to understand (and for the ACCC to confirm in paragraph 2.23 of the Guidelines) whether the ACCC supports this general policy intent articulated in the EM.

This would provide some additional certainty around the ACCC's expectations of retailers undertaking mid-cycle price adjustments.

We also note that the "commencing soon" test put forward by the ACCC could result in a situation where a retailer is potentially required to make multiple price resets, with operational processes that potentially overlap with already scheduled price reset processes. This is an untenable situation that we believe would almost certainly result in errors and confusion – both for a retailer's staff and customers – as well as increased costs. On that basis, we think it should be reasonable for retailers to seek to avoid this operational overlap and confusion and to align its adjustments with its scheduled price resets unless exceptional circumstances apply.

(b) Fixed price contracts (Example 10)

We welcome the ACCC's confirmation that it would be reasonable for a retailer to leave a 12 month fixed price contract unchanged. In this example, you note that "the longer the period of a fixed rate contract, the less likely it would be that not adjusting prices within the term of the contract following a relevant cost reduction would be reasonable".

We note that retailers offer a range of fixed rate products – some offer customers the benefit of fixed rates for a period of 24 months. These contracts provide valuable benefits to customers who are seeking additional certainty in relation to their energy prices and protection from increases to their energy usage rates. Retailers assume a degree of risk in offering these products as they would need to defer any price increases for these customers until the end of their benefit period. By creating uncertainty over whether retailers would be required to make reasonable adjustments to the prices of these products, the Act effectively places downside risk on retailers, which could inadvertently deter retailers from offering these popular and attractive products to customers in the future. We note that customers on these plans are generally free to switch to another plan at any time during the contract term, so would not be "locked in" to any unfavourable pricing if the retailers have made an adjustment. In our view, it would be reasonable for a retailer not to adjust the prices for customers on these products until the end of the benefit period.

(c) New product constructs (Para 2.29)

As noted in our previous submission, many retailers are seeking to innovate, by offering different plans and offers available to retail customers, many of which are designed to offer customers simpler and more certain prices or energy solutions (which may include equipment that results in broader customer benefits).

[1] EM at 2.40.
[2] EM at 2.34, 2.36 and 2.38.

These plans are carefully developed based on pricing assumptions over the term of the plan and, realistically, can only be offered if a retailer knows with some certainty that it is able to recover its supply costs and make a reasonable return over the term of the plan. If the Act was enforced in a way that ultimately rendered these different and new types of products to be uncommercial, not only would it be detrimental for consumers, it may also curtail investment in innovative energy solutions.

For example, some innovative products do not have the seasonal, quarterly bills that most customers receive. The customer may instead pay a set monthly amount, receive rebates for participating in behavioural initiatives such as demand response events, or both. Meanwhile, the retailer is still exposed to a changing cost profile each month for this customer and may face additional costs in funding equipment or provision of a value-add service. This means the retailer may have an uneven monthly margin profile for each customer and across customers on the same plan.

It would be complex and virtually meaningless to assess how market-wide cost reductions should be factored into set pricing for such customers. That is, should retailers factor in a forecast of how that customer or group of customers will behave in future to understand how their cost profile will change? Should we base the decision on their historical margin? This situation arises as the retailer is combining a range of different products and services with energy provision, taking an overall view of total costs and providing a simple and stable price that is easy for the customer to understand and assess whether it suits their needs.

We are concerned that the Act will significantly discourage retailers from developing or offering new and innovative products to customers.

Accordingly, we would welcome further clarification from the ACCC that it would be reasonable for a retailer not to adjust the prices on plans or products where the price adjustment is incompatible with the underlying design of the product, such as products where:

- the customer pays a set monthly price over a benefit period or contract term; or
- energy equipment, hardware or other products are subsidised or included in the price paid by the customer.

(d) Reasonable adjustments other than to underlying tariffs

In paragraph 2.27 of the draft Guidelines, you have cautioned retailers about making adjustments other than through reductions to underlying tariffs. We understand that the ACCC is primarily concerned with ensuring that all eligible customers receive the benefit of any reduction for the duration of the reduction.

We would be interested in the ACCC's perspective on whether making an adjustment in the form of increases to guaranteed discounts would be acceptable, provided it has the same effect as reducing base prices. Depending on the retailer's billing system, this type of an adjustment may be simpler and faster to implement. Our view is that this should be acceptable, given that customers are ensured of receiving the benefit.

We also note the ACCC's comments in paragraph 2.28. Does the ACCC have an example in mind where a change to a term or condition might result in customers not receiving the benefit of the reduction?

(e) Comments on specific examples

Example 14 uses the example of a "profitable retailer", as contrasted with "a recent market entrant". Can the ACCC confirm if the outcomes would be the same if the fictional retailers' roles were reversed? It would also be helpful to understand how the ACCC plans to assess the profitability of a retailer.

Example 14 and example 12 also raise some uncertainty around how the starting point of a product's pricing relative to cost ought to be taken into account when determining the reasonableness of an adjustment. These examples recognise that product pricing strategies may differ across retailers and within a retailer's own product suite. However, there seems to be a disconnect in the logic between the two examples. Example 14 suggests it is acceptable for a retailer making low or no profit on its products to pass on less of a reduction than a retailer who is profitable. However, example 12 and paragraph 2.32 suggest a retailer would need to make equivalent reductions to its products whether they are profitable or aggressively priced, unless the retailer would be offering a product below cost. We would appreciate some further clarity on this issue.

2.3 Underlying costs of procuring electricity

We note that the phrase "underlying costs of procuring electricity" is not defined in the Act. It is helpful to understand that the ACCC intends to maintain consistency with the explanation of what these costs comprise in the EM. However, while the concepts of wholesale prices and network costs may be well understood, there is little guidance in the EM in relation to what is intended to be covered by "the costs of complying with environmental schemes" at paragraph 2.29.

Our assumption is that the ACCC's interpretation will mirror that of its Retail Electricity Pricing Inquiry, which categorises environmental costs as national schemes such as LRET, SRES and State-based government premium feed-in tariff schemes and certificate schemes, the costs of which are passed through to all customers. It would be helpful for the ACCC to confirm this in the Guidelines.

2.4 Sustained and substantial reductions

We appreciate it is difficult to define "sustained and substantial" but we welcome the ACCC's confirmation that seasonality will be taken into account when you consider whether a sustained and substantial reduction in the underlying costs of procuring electricity has occurred.

We seek clarification, however, on example 7, which deals with a scenario where there is a sustained and substantial reduction in a network tariff that applies to all retailers in the relevant network region. The ACCC states that this is a reduction that, on its face, should be passed onto customers.

Network cost reductions are specific to customers depending on their location and meter configuration, meaning the components of the network tariff may increase or decrease by different amounts. For example, the network supply charge may decrease by $15c/day, the peak usage rate may decrease by 0.5c/kWh and the off peak usage rate may increase by 0.5c/kWh.

Our expectation is that a retailer would be able to determine its own adjustment in the retail price provided that adjustment generally reflects the network decrease rather than mirroring exactly the network tariff changes. Please advise if this differs from your view.

2.5 Pre-commencement effects (paragraph 2.42)

We note that the Guidelines make it clear that the ACCC expects retailers and generators to comply with the Act from the commencement date on 10 June 2020.

However, we are concerned about the suggestion in paragraph 2.42 that when assessing whether there has been a sustained and substantial reduction that the ACCC may consider reductions in the underlying cost of procuring electricity that occur, or partially occur, prior to the commencement of the Act. In our view, this would be an extraordinary outcome, particularly given that the prohibitions in the Act are new and unprecedented in the industry.

EnergyAustralia is committed to ensuring that it is ready to comply with the Act from the commencement date. However, we note that industry stakeholders are still trying to make sense of the new prohibitions and will be relying on the final Guidelines from the ACCC to interpret and apply the new laws to their operations.

Accordingly, we think it would be unreasonable (and arguably contrary to traditional principles of statutory interpretation to only seek to apply laws retroactively where this is expressly contemplated in the legislation) for the ACCC to expect corporations to comply with the new laws before the commencement date defined in the Act. We also note, with some concern, that the ACCC does not appear to have placed any limits on how far back into historical prices it will look for evidence of sustained and substantial reductions in the costs of procuring electricity. We ask that the ACCC reconsider its position in relation to the pre-commencement operation of the Act in the final Guidelines.

3. Contract liquidity prohibition

3.1 Application to large C&I customers (paragraph 3.7)

Section 153F is aimed at ensuring generators do not refuse to offer financial contracts for the purposes of substantially lessening competition. While not apparent from the Act, the EM clarifies that the prohibition is intended to ensure retailers who do not own generation assets, reliant on the liquidity of the financial contract market, are able to adequately hedge their risk so they can compete in the retail electricity market.[3]

We were disappointed that the Guidelines have left open the possibility that section 153F could be applied to other types of counterparties, including large commercial and industrial (C&I) customers. While it may be that conduct in relation to such contracts is unlikely to have the effect of substantially lessening competition, generators (particularly large generators) will nevertheless need to extend their compliance activities to cover these potential scenarios.

3.2 Electricity financial contracts (paragraph 3.5)

We welcome your confirmation that electricity financial contracts do not include contracts for the supply of electricity (or physical contracts).

It would be helpful to understand whether this would include any customer arrangement where EnergyAustralia supplies electricity to the customer with a pricing model that may relate to the spot market price. We offer many different pricing models to large C&I customers including pool pass through and progressive hedging contracts. While these arrangements do relate to the spot price, the relationship is one of customer and retailer. For example, a pool pass through arrangement simply means the customer has opted to be exposed to the spot market so, as their retailer, we pass through to the customer the pool bill that we settle with AEMO. In our view, this type of arrangement should not be captured by section 153F, notwithstanding the retailer-customer contract relates to the spot price. Can the ACCC confirm if this is consistent with your understanding?

3.3 Example 19

Example 19 is written in relation to a "small gentailer". Can the ACCC confirm that it is also legitimate for a large generator to follow a conservative hedging strategy that does not forward-sell all of a generator's capacity? That is, if the gentailer in example 19 was a "large gentailer", the principle would still apply. The additional commentary in paragraphs 3.30 to 3.22 suggests that this would be the case, but it would be helpful if example 19 was re-drafted so that the principle can be applied irrespective of the size of the gentailer.

[3] EM at 2.48 to 2.51.

4. Spot market prohibitions

EnergyAustralia considers that the Guidelines have helped provide clarity in relation to how the spot market prohibitions will be applied by the ACCC. However, we have two further points for which we would appreciate further guidance.

4.1 Required maintenance during periods of high demand

EnergyAustralia would appreciate further clarity in the Guidelines in relation to how the ACCC will assess whether maintenance was discretionary or mandatory on a particular day.

In particular, we note that sometimes it is possible to postpone maintenance so that it does not fall on a hot summer day. However, there will be some circumstances where it is necessary to take plant offline on a hot summer day for maintenance or safety reasons (or both) and that maintenance or outage simply cannot be postponed any longer without significant risk to the asset and employees. In this circumstance, the maintenance may not be considered "emergency maintenance" as contemplated in example 26, but is nonetheless still necessary. In our view, this, without something more, should not be considered "distorting or manipulating" prices.

4.2 Asset closures

The Guidelines do not appear to specifically address asset closures. In example 16, Generator C's ageing coal plant is its *only* generation asset. While example 16 relates to financial contract liquidity, this scenario is equally applicable to the spot market prohibitions. It would be helpful for the ACCC to confirm that an electricity generator does not breach section 153F, 153G or 153H if it closes a generation asset in accordance with the NEM market rules.

5. Penalties and enforcement

The EM (at paragraph 1.8) and statements by Government Ministers over the course of the development of the Act emphasise that the penalties available under the Act are "graduated" and that the most severe penalties contemplated in the Bill would be considered penalties of "last resort". However, there is no such graduation or escalation of penalties apparent on the face of the drafting in the Act. We note that the Guidelines state that contracting and divestiture orders will only be considered for the most serious conduct.

Can the ACCC in the Guidelines confirm its approach to how it will decide which enforcement path to take or recommend?

5.1 Divestiture

EnergyAustralia's view on divestiture remains that it is an extreme remedy. Appropriately, the EM clarifies that court-ordered divestiture is a "last resort" remedy that would be used only "in the most exceptional circumstances where other responses available to the ACCC and the Treasurer would not sufficiently address the alleged prohibited conduct".

We would appreciate further clarity from the ACCC with regards to its power to recommend a divestiture order to the Treasurer:

- When would divestiture ever be a proportionate response to prohibited conduct?
- How would the ACCC determine the impact of a divestiture order on undivested parts of a business?
- Would the ACCC allow more than 12 months for disposal of the interests in the securities or assets, taking into account the likely market for buyers of the relevant securities or assets?

- What approach would the ACCC take if there is no buyer – or no reputable buyer or no buyer on just terms – that represents the value of the asset or interest to the corporation?

5.2 Public warning notices

Public warning notices have the potential to significantly impact on a retailer or generator's reputation, yet the Act contains very short timeframes for responding to a draft notice and no avenue of review. Accordingly, we would appreciate some clarity in the Guidelines as to how the ACCC intends to use public notices. For example, it would be helpful to understand the circumstances in which the ACCC would consider the public interest to be served by it issuing a public warning notice.

5.3 Contracting orders

We note in paragraph 6.46 that a prohibited conduct recommendation will include the ACCC's views on the appropriate terms and conditions for a contracting order. Can the Guidelines provide further clarity on how the ACCC proposes to approach the pricing, terms and duration of a contracting order?

5.4 Inferring purpose

The broad drafting used in the contract liquidity and spot market prohibitions means that generators will be under pressure to prove that they were not acting for the purpose or with the effect or likely effect of substantially lessening competition in any electricity market or for the purpose of distorting or manipulating prices in an electricity spot market.

However, we also note that as a result of section 153J of the Act, a corporation's purpose can be inferred, after all the evidence has been considered, from their conduct or the conduct of any other person or from other relevant circumstances. The Guidelines do not elaborate on when the ACCC believes it would be appropriate to rely on inference or what circumstances or evidence would be considered to ascertain a corporation's purpose. Given the extraordinary penalties that could flow from such an inference, we would appreciate any further insights that the ACCC can provide in relation to such situations.

6. Additional comments

EnergyAustralia is also very keen to understand more about the ACCC and Government's plans for media education in relation to the Act around the commencement date. As you would appreciate, statements from a regulator or Government minister can have an immediate impact on our frontline people, driving a significant additional volume of calls into our contact centres. If we were anticipating this type of launch, it would require us to rollout widespread training and supporting information to our frontline agents, so that they feel equipped to respond to any inbound queries from customers. We are particularly concerned about the impact of this as we seek to manage our frontline resources here in Australia and overseas amidst the global COVID-19 pandemic. Any public campaign about the Act could place even greater pressure on our people, who are currently focused on supporting our customers through these unprecedented times. As such, we would appreciate some advance notice of the ACCC and Government's public activity in relation to the Act so that we can prepare our people accordingly.

To this end, we would also hope that any public campaigns in relation to the commencement of the Act would be prepared so as not to give rise to unrealistic expectations in the minds of customers as to when they might see a reduction in prices on their electricity bills. As the ACCC has noted in its Guidelines, it may take time for a retailer who has hedged their wholesale electricity costs far in advance to be able to pass on any eligible reductions to its customers, so it would be unfortunate if consumers were led to believe that price reductions would be immediately forthcoming.