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Australian Competition & Consumer
Commission
GPO Box 520
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Submitted via email: electricitymonitoring@accc.gov.au

ACCC Guideline on the Prohibiting Energy Market Misconduct Bill 2019

Alinta Energy welcomes the opportunity to make a submission to the consultation on the proposed ACCC Guideline on the *Treasury Laws Amendment (Prohibiting Energy Market Misconduct) Bill (Bill)*.

Alinta is an active investor in energy markets across Australia, with an owned and contracted generation portfolio of nearly 3,000MW, with in excess of 1.2 million electricity and gas customers. As such is therefore well placed to provide comments on the above mentioned consultation.

The adoption of the Bill will introduce significant market monitoring and administrative compliance concepts, prohibitions and processes. In order for the Bill to operate efficiently the administrative compliance concepts and processes need to be clearly defined, such that their application is consistent and transparent. The lack of clarity provided in the Bill increases the importance in the role that the Guideline will play. Any varied interpretation of the application of any of the key concepts contained in the Bill must be limited to an absolute minimum. Where interpretation is required, clear assessment criteria must be established, such that they are used on a common basis to determine if a concept has or has not been achieved and therefore whether compliance has been achieved.

It has been noted through the Senate Economics Committee that the definitions and operation of the legislation is largely without precedent in both the energy law and Competition and Consumer Act, creating a challenge for the ACCC to make its interpretation and enforcement approach clear¹.

Whilst it may be reliant on the individual market participant to demonstrate their compliance with the obligations / compliance criteria as set out in the Bill, in order to

¹ Economics Legislation Committee, Treasury Laws Amendment (Prohibiting Energy Market Misconduct) Bill 2019 [Provisions], Pg. 68

do so a baseline understanding of what “minimum” compliance looks like is a basic requirement.

This is where the proposed ACCC Guideline plays a material role, in clarifying not only the concepts included in the Bill but also their compliance application. The appropriate interpretation of the key concepts and their application to the electricity industry will be key to ensuring the success of the Bill.

For the Guideline to have any ability to achieve this it must set out how the ACCC will interpret and enforce the Bill. Further the ACCC's interpretation and enforcement approach must align with that of the Explanatory Memorandum or that of existing Competition provisions.

The consultation paper suggests that the Guideline will include examples of conduct that the ACCC considers is unlikely or likely to breach the prohibitions.

While examples will provide some indication of acceptable behaviour, given the broad nature of the concepts, any examples will be based or influenced by assumptions around the participant portrayed in any example. That is, examples will be based on or influenced by the size of the participant, level of integration, level of market power and potential ability to exercise (any) market power etc, even their length of time in that market, e.g. level of market maturity etc.

Suffice to say that the level of relevance of any examples of acceptable conduct and any ability for a participant to rely on these examples would continue to be quite subjective.

It is our understanding that examples included in the Guideline will attempt to provide appropriate interpretation on key concepts including the following;

- Reasonable adjustments,
- Sustained and substantial,
- Underlying costs of procuring electricity,
- Preventing, limiting, or restricting acceptance of offers,
- Fraudulently, dishonestly, or in bad faith,
- Distorting or manipulating prices

These concepts are key to the assessment and application of compliance against the prohibitions. Again the appropriate interpretation of these concepts in the Guideline must align with those in the Explanatory Memorandum, or that of existing Competition provisions.

Concerning for Alinta is the potential variability in the application of the key concepts. Our further comments on the content and application of the Guideline are contained in the following.

It is also worth noting that Alinta Energy is a member of the Australian Energy Council and supports the submission and issues the industry association has raised as part of their response to the consultation process.

Should you wish to discuss any aspect of our submission I may be contacted on (02) 9372 2600 or via email: shaun.ruddy@alintaenergy.com.au

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Shaun Ruddy', written in a cursive style.

Shaun Ruddy
Manager National Retail Regulation

ACCC Guidelines Prohibiting Energy Market Misconduct Bill

The proposed Guideline should attempt to set out clearly defined interpretive definitions of the key concepts contained in the Bill, as these concepts are key to the assessment and application of compliance against the prohibitions.

Alinta holds the view that the definitional interpretation of the key concepts in the Guideline should be aligned with either the Explanatory Memorandum or that contained within existing Competition provisions.

The following is provided in support of this view.

New Prohibition Provisions

Retail Pricing Prohibitions

Underlying Cost of Procuring Electricity

The best guidance on this concept is in the Revised Explanatory Memorandum to the Bill introducing the new prohibitions, which explains the phrase to mean '*the net cost to the retailer of getting electricity to their small customers*'. The Explanatory Memorandum also lists the components of this 'underlying cost' or 'cost stack'. The commentary in the Explanatory Memorandum can be compared with the approach of the AER in determining the Default Market Offer under the Electricity Retail Code.² In that context, the AER determined the Default Market Offer by using a 'top-down' approach using publicly available information about current prices and taking into account forecast changes in key cost inputs such as wholesale costs, network charges and environmental costs.

Any uncertainty regarding what costs this term covers will make it difficult to comply with this new provision. It would be valuable for the ACCC to set out in detail the types of costs the ACCC considers fall under this term – including by reference to the guidance on this term in the Explanatory Memorandum.

Reasonable Adjustments, Sustained and Substantial Reductions

These terms are not defined in the Act and we understand they are not borrowed from a different context. As a result, we think the best guidance on these terms is in the Explanatory Memorandum. However we note that it only gives limited guidance on the meaning of the term 'substantial'.

Any uncertainty regarding these terms will make it difficult to comply with this new provision.

² See: <https://www.aer.gov.au/retail-markets/retail-guidelines-reviews/retail-electricity-prices-review-determination-of-default-market-offer-prices>

It would be valuable for the ACCC to set out the factors which are relevant to determining what are 'reasonable adjustments' and the circumstances in which there will be 'sustained' and 'substantial' reductions in costs – including by reference to the guidance on these terms in the Explanatory Memorandum.

Contract Liquidity Prohibitions

Fail to Offer Electricity Financial Contracts / Hedges

The Explanatory Memorandum states that a corporation 'fails' to offer electricity financial contracts where it has the *ability* to do so but chooses not to – noting a corporation may not have the ability due to operational reasons, such as if its generation capacity is not sufficiently firm.

Any uncertainty regarding these terms will make it difficult to comply with this new provision. It would be useful for the ACCC guidelines to refer to this explanation given in the Explanatory Memorandum.

Preventing, Limiting or Restricting Acceptance of Offers to Enter Into Electricity Financial Contracts / Hedges

Use in other Competition provisions

The phrase 'preventing, limiting or restricting' exists in other parts of the *Competition and Consumer Act 2010* (Cth) (**CCA**). In particular, it is included in the prohibitions on certain types of cartel conduct (in s45AD(3)(a)) and was also included in the now-repealed prohibition on exclusionary provisions (the former s4D).

In that context, the High Court has noted that the term 'preventing, limiting or restricting' was part of a 'compound concept' relevant to exclusionary provisions, being '*the purpose of preventing, restricting or limiting supply or acquisition of services to or from particular persons or classes of persons*'. Judicial consideration of that concept has tended to focus on the relevance of the words 'persons or classes of persons', rather than the words 'preventing, limiting or restricting'. However, in one case, Gleeson CJ noted that 'preventing' supply to one person would essentially be a complete boycott, while limiting or restricting supply would mean something less than a complete boycott – ie, 'partial supply'.³

Comparison to the Current Context

The use of the phrase 'preventing, limiting or restricting' in this context is novel – since it relates to limiting the *acceptance of offers* of financial contracts, rather than limiting the *supply or acquisition* of goods and services more generally. In the context of s153F, the phrase appears to mean 'preventing' or 'limiting' persons from accepting offers of financial contracts because the terms of those contracts are not commercially reasonable (see the Explanatory Memorandum at paragraph 2.56). Paragraph 2.57 of the Explanatory Memorandum goes on to say that 153F(b) will not

³ *News Ltd v South Sydney District Rugby League Football Club* (2003) 200 ALR 157 at 165 per Gleeson CJ.

be satisfied in circumstances where a corporation makes a 'genuine offer' to enter into an electricity financial contract, but the offer is not accepted (except in the circumstances described in 153F(b)(iii) – that is, except where the corporation prevents, limits or restricts the acceptance of offers). Unhelpfully, this suggests that there may be circumstances where a corporation makes a 'genuine' offer to enter into an electricity financial contract but that the terms of that offer are still so uncommercial that the corporation has prevented, limited or restricted acceptance of the offer.

Uncertainty regarding when a corporation 'prevents, limits or restricts' the acceptance of offers will make it difficult to comply with this new provision. It would be useful for the ACCC guidelines to clarify the ACCC's approach to this term. In particular, the ACCC should give guidance on what it considers will be a 'genuine offer' as referred to in the Explanatory Memorandum, and whether there may be circumstances in which a gentailer considers an offer to be 'genuine', but the other party still considers the offer to be uncommercial such that they are 'prevented' from accepting it.

Effect of Preventing Limiting or Restricting Acceptance of Offers

Use in other competition provisions

The term 'effect' appears in various other provisions of the CCA. In the context of the prohibition on the misuse of market power (under s46), the ACCC's guidelines describe 'effect' as *'the direct consequence of a firm's conduct... determined objectively by examining the actual impact'*.⁴

Likely Effect of Preventing Limiting or Restricting Acceptance of Offers

Use in other competition provisions

Similarly, this term is also used in various provisions of the CCA. There has been judicial consideration and debate between parties in different contexts about whether the term 'likely' means 'a real chance' or 'more probable than not'. In respect of certain elements of the cartel conduct provisions, the term 'likely' is expressly defined to mean 'a possibility that is not remote': s45AB of the CCA. This term is also addressed in the ACCC's misuse of market power guidelines, which state:

'Likely effect' refers to the likely consequences of a firm's conduct, including its potential impact on the competitive process. 'Likely' means that there is a real chance or a possibility that is not remote

In relation to the above two concepts, the ACCC should adopt a similar interpretation of the term 'likely effect' as it has in other contexts (as set out above). We would request that the ACCC state its approach in its guidelines.

Purpose of Substantially Lessening Competition

Use in other competition provisions

The term 'purpose' includes a 'substantial purpose' of conduct, not just the 'sole purpose' of conduct: see s4F of the CCA and paragraph 2.75 of the Explanatory

⁴ See: <https://www.accc.gov.au/publications/guidelines-on-misuse-of-market-power>

Memorandum.

In the context of other provisions in the CCA, the term 'purpose' has been found to mean the practical effect sought to be achieved by the provision – ie, the 'end in view'. Purpose is not to be confused with motive, which is the reason for seeking an end, rather than the effect sought to be achieved.⁵

The Act further provides that a corporation may be taken to have done something for this particular purpose even though, after all the evidence has been considered, the existence of that purpose is ascertainable only by inference from the conduct of the corporation or of any other person or from other relevant circumstances: s153J. The Explanatory Memorandum also addresses the concept of 'purpose' at paragraphs 2.75-2.76 and 2.015, noting that the purpose test requires an objective assessment of all the relevant facts and circumstances to ascertain whether the corporation acted for the relevant purpose.

Again for the purpose of the Guideline the ACCC should adopt a similar interpretation of the term 'purpose' as it has in other contexts. We would request that the ACCC state its approach in its guidelines.

Substantially Lessening Competition

Use in other competition provisions

This term is well-established under Australian competition law and the Explanatory Memorandum notes that:

- this term in s153F is intended to carry the same meaning as it has in other parts of the CCA, adapted to the context of electricity markets and the conduct described by s153F(b);
- by virtue of s4G of the CCA, the term 'lessening' of competition includes 'preventing or hindering' of competition; and
- the concept of substantially lessening competition is generally concerned with the impact on the competitive process rather than the impact on any particular participant in the market, noting that, in some instances, harm to an actual or potential individual competitor may also substantially lessen competition where that competitor represents a strong competitive constraint.

The ACCC would be very familiar with this term and we note the ACCC does not ask for input on what this term means in its discussion paper. The ACCC's current misuse of market power guidelines state that:

There is no legislative definition of 'substantially lessen competition'; however, the test is longstanding within Australia's competition laws. In essence, conduct substantially lessens competition when it interferes with the competitive process in a meaningful way by deterring, hindering or preventing competition. This can be done by raising barriers to competition or

⁵ *News Ltd v South Sydney District Rugby League Football Club Ltd* (2003) 200 ALR 157.

to entry into a market.

'Lessening competition' means that the process of rivalry is diminished or lessened, or the competitive process is compromised or impacted....

'Substantially' means meaningful or relevant to the competitive process. It is a relative concept and does not require an impact on the whole market.

In Rural Press v ACCC (2003), the majority of the High Court relevantly assessed 'substantially' by asking:

...whether the effect of the arrangement was substantial in the sense of being meaningful or relevant to the competitive process, and whether the purpose of the arrangement was to achieve an effect of that kind.

In Universal Music v ACCC (2003), the Full Court observed:

... The lessening of competition must be adjudged to be of such seriousness as to adversely affect competition in the market place, particularly with consumers in mind. It must be 'meaningful or relevant to the competitive process.

There are examples of this prohibition at 2.76 of the Explanatory Memorandum.

The ACCC should adopt a similar interpretation of this term as it has in other contexts however we would request that the ACCC state its approach in its guidelines.

Wholesale Prohibition

Wholesale Prohibition (Base Case) Fails to Bid or Offer to Supply Electricity

The Explanatory Memorandum states that this term is intended to capture conduct occurring in relation to a spot market that results in bids or offers not being made, such as decisions about whether or when to partially or wholly power down a generating unit (at 2.84).

The ACCC Guideline should refer to this explanation / interpretation as set out in the Explanatory Memorandum.

Wholesale Prohibition (Aggravated Case) Fraudulently, Dishonestly or in Bad Faith

The Explanatory Memorandum describes this phrase at paragraphs 2.89 – 2.90. In doing so, it appears to both conflate the terms 'fraudulent', 'dishonest' and 'bad faith' into one broad definition, while also suggesting that each word has its own separate standard of conduct. Arguably, the words 'fraudulently' and 'dishonestly' are not necessary in this provision (since the provision includes the lower standard of 'bad faith'), but a general principle of statutory interpretation is that particular phrases in statute are to be given meaning and not assumed to be superfluous.

National Electricity and Gas Rules

We note that:

It appears that this prohibition will sit concurrently with:

- the provisions in the National Electricity Rules which prohibit making false or misleading offers / bids in the National Electricity Market, which were amended by the 'Bidding in Good Faith' Rule Change of 2015;⁶ and
- the provisions in the Wholesale Energy Market Rules regarding making balancing submissions in good faith.

The Treasury Bills Digest states that these prohibitions are equivalent to Rule 542 of the National Gas Rules.⁷ From our preliminary research, we have not found any commentary around the interpretation and operation of those rules. However further context as to the definitions associated with Fraud, Dishonesty and Bad Faith are set out as follows.

'Fraud'

- Under NSW statute, 'fraud' generally involves obtaining property or a financial advantage (or causing a financial disadvantage) by deception or dishonesty: see Part 4AA of the *Crimes Act 1900* (NSW).
- The concept of 'fraud' also exists at common law and in equity
- The ACCC has also adopted its own definition of fraud in the context of monitoring potential misconduct within the ACCC.⁸ That definition is that fraud involves 'dishonestly obtaining a benefit, or causing a loss, by deception or other means'. This echoes the description given in the Explanatory Memorandum set out above.

'Dishonesty'

- The concept of 'dishonesty' was discussed by the High Court in the context of criminal charges of conspiracy to defraud and to pervert the course of justice. There, Toohey and Gaudron JJ stated that:
 - different standards of dishonesty may apply depending on whether the term is used in its ordinary sense or in a special legislative context; and
 - if the term 'dishonest' is used in its ordinary sense, it is necessary to determine whether the accused had the relevant knowledge or intent said to make their conduct dishonest and if so, ask whether the conduct was dishonest based on the standards of ordinary, decent people.⁹

⁶ See: <https://www.aemc.gov.au/rule-changes/bidding-in-good-faith>

⁷ See: https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/bd/bd1920a/20bd047

⁸ See: <https://www.accc.gov.au/about-us/australian-competition-consumer-commission/accountability/fraud-prevention>

⁹ See: *Peters v The Queen* (1998) 192 CLR 493 at <http://www6.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/1998/7.html>

- This was summarised by the Full Federal Court in a later case as follows:

*A conclusion that something is said dishonestly requires reference to the state of the speaker's mind. A conclusion of dishonesty cannot be reached if they believe in the truth of the statement. A person is deceitful if they know or believe that that which they say is false. Deceit of course involves dishonesty. Dishonesty is assessed by reference to the standard of ordinary, honest persons and is not a term of art.*¹⁰

'Bad Faith'

- The term 'bad faith' is used in a range of contexts including when considering the concepts of dishonesty, fraud, malice, self-interest and corruption. There is no fixed definition of 'bad faith' under general law.
- In the context of contract law, bad faith arises as an opposing ideal of acting in good faith. Where parties are required not to act in bad faith in this context, that generally involves cooperating in achieving the contractual objectives and acting honestly and reasonably.
- In the context of the law of equity, bad faith has traditionally been linked to the breach of a fiduciary's duties to their clients – and can include fraud or acting for an ulterior motive.
- In the context of administrative law, migration cases have stated that bad faith implies a lack of an honest or genuine attempt to undertake the relevant task, and involves a personal attack on the honesty of the decision maker.

A similar issue is presented under the CCA in respect of the prohibition on 'unconscionable conduct'. In that context, what is 'unconscionable' is determined with reference to all the circumstances and by reference to 'societal norms'.

Given the above we would request the ACCC that it clarify its understanding / approach to the use of this phrase "Aggravated Case" – and whether the ACCC considers the phrase involves one broad definition or is to be applied on the basis of three separate standards of conduct.

Purpose of Distorting or Manipulating Prices

Use in other competition provisions

The term 'purpose' includes a 'substantial purpose' of conduct, not just the 'sole purpose' of conduct: see s4F of the CCA and paragraph 2.75 of the Explanatory

¹⁰ *McCarthy v St Paul International Insurance* (2007) 239 ALR 527 at [34-35] per Kiefel J (citing *Peters v The Queen* and others), Stone and Allsop JJ agreeing:
<http://www6.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCAFC/2007/28.html>

Memorandum.

In the context of other provisions in the CCA, the term 'purpose' has been found to mean the practical effect sought to be achieved by the provision – ie, the 'end in view'. Purpose is not to be confused with motive, which is the reason for seeking an end, rather than the effect sought to be achieved.¹¹

The Act further provides that a corporation may be taken to have done something for this particular purpose even though, after all the evidence has been considered, the existence of that purpose is ascertainable only by inference from the conduct of the corporation or of any other person or from other relevant circumstances: s153J. The Explanatory Memorandum also addresses the concept of 'purpose' at paragraphs 2.75-2.76 and 2.015, noting that the purpose test requires an objective assessment of all the relevant facts and circumstances to ascertain whether the corporation acted for the relevant purpose.

The ACCC should adopt a similar interpretation of the term 'purpose' in the Guideline as it has in other contexts. We would request that the ACCC state its approach to the term 'purpose' in the Guideline.

Distorting or Manipulating Prices

The Explanatory Memorandum addresses this concept at paragraphs 2.91 onwards, explaining that a corporation would act for the *purpose* of distorting or manipulating prices in an electricity spot market where it *seeks to undermine the process by which market participants would reasonably expect prices to be determined in a market characterised by effective competition*.

Analogy to financial market manipulation

The concept of manipulating prices can also be found in the *Corporations Act 2001* (Cth). In particular, Part 7.10 of the *Corporations Act* prohibits different types of conduct in relation to financial markets, including 'market manipulation' involving transactions which create or maintain an 'artificial price' for trading in financial products on a financial market. The concept of market manipulation in this context is still evolving through case law, but generally has been found to involve trading in a way to create or maintain a particular price in contrast to a price set by the interplay of 'genuine market forces' of supply and demand – that is, forces created by buyers whose purpose is to acquire at the lowest available price and sellers whose purpose is to sell at the highest realisable price.

Any uncertainty regarding this term will make it difficult to comply with this new provision. It would be valuable for the ACCC to set out in the Guideline what it understands this term to mean and the circumstances in which a corporation will

¹¹ *News Ltd v South Sydney District Rugby League Football Club Ltd* (2003) 200 ALR 157.

have the purpose of 'distorting or manipulating prices' – including by reference to the guidance and examples in the Explanatory Memorandum at paragraphs 2.91 – 2.105.