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Dear Ms Camilleri

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

EnergyAustralia is one of Australia's largest energy companies with approximately 2.6 million electricity and gas accounts in New South Wales, Victoria, Queensland, South Australia, and the Australian Capital Territory. We also own and operate a multi-billion-dollar energy generation portfolio across Australia, including coal, gas, solar, wind and battery assets in the National Electricity Market (**NEM**).

We welcome 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**).

The report by the Senate Economics Legislation Committee (the **Committee**) into the *Treasury Laws Amendment (Prohibiting Energy Market Misconduct) Bill 2019 [Provisions]*[1] outlined many of the concerns of stakeholders in relation to the unclear and ambiguous drafting of the Act. The Committee concluded that it was the view of Senators (and an expectation voiced by the Government) that it would be the role of the regulator to resolve much of the ambiguity pertained in the drafting of the Act. It stated:

> *"The committee is of the view much of the uncertainty around definitions and the operation of the legislation will be resolved when the ACCC releases guidelines that will make its interpretation and enforcement approach clear."*

EnergyAustralia recognises the enormity and complexity of the task that lies before the ACCC. The Act imports new and complex obligations on electricity market participants into the Competition and Consumer Act 2010, along with some of the most punitive remedies available under Australian competition law.

The ACCC plays a vital role in ensuring that the ambiguity and uncertainty contained within the new laws do not lead to the many unintended consequences identified by stakeholders throughout the consultation process.

[1] https://parlinfo.aph.gov.au/parlInfo/download/committees/reportsen/024378/toc_pdf/TreasuryLawsAmendment(ProhibitingEnergyMarketMisconduct)Bill2019%5bProvisions%5d.pdf;fileType=application%2Fpdf

Ultimately, we hope that the ACCC will provide the clarity and certainty that electricity market participants will require to confidently manage their business operations under the new regime and enable those participants to identify the circumstances in which the new prohibited conduct provisions under the Act apply and the behaviours that are intended to be captured by them.

The other challenge we now confront is the narrow six-month window to the date of enforcement. EnergyAustralia fully appreciates the workload as well as the extensive consultation process that the ACCC needs to embark upon in order to produce the desired fit-for-purpose Guidelines. However, this process will understandably take months to complete. This effectively narrows the window of time that industry will have to prepare to ensure compliance with the new regime. While getting the Guidelines right is of primary importance, we would welcome the ACCC's perspective on its enforcement approach to the new laws, given the short implementation period.

Our submission responds to the key issues and questions raised by the ACCC in its consultation paper. We have also posed a number of questions back to the ACCC, as we seek guidance and additional certainty as to how the ACCC will interpret and enforce the Act.

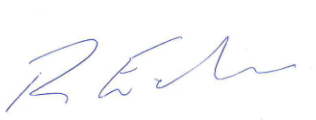
We hope that the ACCC will continue this process of engagement and dialogue with industry participants over the coming months to help maximise the impact and practical effect of the Guidelines.

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 (03) 8628 1501 or at rochelle.younger@energyaustralia.com.au.

Regards



**Ross Edwards**
**Markets Executive**

# 1. Introduction

The NEM is complex and market participants must operate their businesses in accordance with a myriad of laws and regulations. EnergyAustralia supports sensible energy market reform. However, the concerns we, and many other stakeholders, have articulated since the initial inception of the *Treasury Laws Amendment (Prohibiting Energy Market Misconduct) Bill* (**Bill**) in 2018, and over the development of the Act, remain. The Act creates significant challenges for electricity market participants.

The Act introduces further regulatory complexity, a low "reasonable belief" threshold for prohibited conduct recommendations and some of the most significant and interventionist remedies possible under the CCA. This is compounded by prohibitions and concepts in the Act, largely without precedent in the energy laws or CCA, that are either vaguely defined or not defined at all. This lack of clarity increases the importance of the ACCC's Guidelines.

While EnergyAustralia remains concerned about the negative impact the Act will have on investor confidence in the electricity sector, we are hopeful the ACCC will make the most of this opportunity to provide clear and unambiguous guidance in relation to its intended enforcement approach.

During the consultation and committee processes, the Government placed great emphasis on the revised explanatory memorandum (the **EM**) as a response to the calls for further clarity and definition in the legislation. While EnergyAustralia would have preferred this clarity to have been included in the final drafting of the Act, the EM does provide some useful content to illustrate the Government's intentions for how the legislation should be interpreted and enforced.

Accordingly, as a starting point, we encourage the ACCC to confirm that it intends to interpret and enforce the Act consistently with the EM so as to avoid creating further uncertainty from having to grapple with two potentially different interpretations of the Act.

We also encourage the ACCC to go further than the EM, where necessary, in order to clearly set out the key principles it will use to identify potential prohibited conduct and its approach to compliance. Understanding the ACCC's views and intended approach is essential to enable retailers and generators to develop their compliance frameworks and run their businesses with confidence.

# 2. Key Concepts

The ACCC has recognised that each of the prohibited conduct provisions in the Act contains key concepts that would benefit from meaningful clarity and guidance. We agree with this approach and have set out below our feedback on these key concepts.

## 2.1 Retail Pricing (s153E)

EnergyAustralia understands the general premise of section 153E is that retailers should pass on reductions in electricity procurement costs to small consumers so that those customers can also share in the benefits of falling costs.[2]

Section 153E is not intended to discourage investment, nor is it intended to result in more frequent price changes to the detriment of the customer experience.[3] It is also intended that the particular circumstances, overall operating costs and risk management strategies of the retailer would be taken into account in determining whether an adjustment is necessary.[4]

[2] EM, paragraphs 2.15 and 2.19.
[3] EM at 2.37, 2.38 and 2.40.
[4] EM at 2.42

However, this additional context is only apparent from the EM.

While section 153E was amended to clarify that a contravention does not occur if the price is a standing offer price (s153E(2)) or if the adjustments would contravene an Act of the Commonwealth, a State or a Territory or an instrument made under such an Act (s153E(3)), there is still significant uncertainty in relation to how the retail prohibition in the Act will be interpreted by the ACCC.

A significant barrier to understanding what a retailer must do to comply with the Act stems from the fact that the Act simply does not reflect the way that many retailers factor electricity procurement costs into retail prices. The Act appears to assume that a retailer will "feel" the effect of a sustained and substantial reduction in the costs of procuring electricity in "real time".

However, changes in wholesale prices are not immediately, or uniformly, reflected in retail prices. As wholesale prices change, the impact on retail prices will depend, for example, on how exposed individual retailers are to the spot price, how they structured their portfolios, when they entered into contracts and when those contracts expire. Many retailers set their prices on a 12 month or more forward view of demand and prices, based on their individual hedging and risk strategies. This protects both customers and retailers from exposure to the volatility of wholesale electricity prices.

Passing on reductions in electricity procurement costs is, therefore, a significantly more complicated concept than the drafting of section 153E suggests.

We consider the ACCC's Guidelines could provide a great deal of clarity to section 153E. While the EM does contain some helpful examples for how section 153E is intended to be applied and enforced, we consider the ACCC's Guidelines could more clearly articulate circumstances where retailer conduct would not be considered contrary to the Act. We outline our thoughts on each of the relevant concepts below.

*(a) "reasonable adjustments"*

The concept of "reasonableness" is fundamental to understanding the boundaries of section 153E. EnergyAustralia has previously submitted that the Act should have been amended to expressly specify that a reasonable adjustment to prices must be considered in all the circumstances relevant to the particular retailer, including the retailer's overall operating costs and existing contractual commitments. We also submitted that the Act should include a definition of "reasonable adjustment" or at least articulate the types of conduct that would not be considered to breach the obligation.

Given that these amendments were not incorporated into the legislation itself, retailers face an almost impossible task of seeking to comply with the Act. Accordingly, it is essential that the Guidelines set out factors that the ACCC will take into account in forming a view as to whether the retailer has made a "reasonable adjustment" and clear examples to illustrate the ACCC's expectations of retailer behaviour so that retailers are able to develop and execute their retail pricing strategies with a complete understanding of the regulatory landscape.

Specifically, we believe that the Guidelines should clarify each of the below key points:

<u>Normal pricing cycles</u>

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.[5] 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.[6]

However, the EM goes on to include an example of a reduction that would be reasonable, but which occurs only one month before the retailer's next annual price update (Example 2.3). In practice, the process for implementing an annual price update may commence at least 12 weeks before the price change takes effect. The process itself is logistically quite complicated, particularly for a retailer who operates in several jurisdictions. In our case, we have approximately 1.5 million electricity accounts across 11 distribution zones on different plan options and tariffs. Once analysis of network prices[7], planning, decision-making, IT implementation and execution, front-of-house training, website changes, mail house lead times, regulatory requirements and other factors are considered, the organisational impact is significant.

With one month to go before a price adjustment, a retailer may have customer data lists, price impacts and communications finalised to allow for system testing, configuration and timely mailing to ensure compliance with regulatory timeframes. It is therefore potentially unrealistic for that retailer to be able to factor in a new cost reduction within a month of an already planned price adjustment.

Accordingly, it would be helpful to understand the parameters for what the ACCC would consider a reasonable period in which to make the adjustment in the context of more practical examples. In our view, the Guidelines need to strike an appropriate balance between the frequency of reductions (and increases) in supply chain costs and the benefit to consumers, given that implementing price changes is not without cost. That is, the costs associated with price changes are large, and would likely reduce the ultimate benefit for customers if they must occur too often.[8]

For example, the Guidelines could clarify that if a sustained and substantial reduction in the underlying costs of procuring electricity occurs within four to six months of a retailer's next planned price adjustment then it would be reasonable for the retailer to wait until that next scheduled price adjustment to make the reduction. For retailers who operate in Victoria and another NEM jurisdiction, scheduled price adjustments may occur half-yearly due to the timing of network pricing approvals (network prices reset on 1 January in Victoria and on 1 July in other NEM jurisdictions). Given network prices comprise a large proportion of the retail bill, they are generally a key input in assessing whether a change in retail prices is warranted.

It would also be helpful for the Guidelines to explicitly take customer experience into account and recognise the highly prescriptive regulatory obligations retailers face when implementing price changes. We expect more frequent notification of price changes will lead to customer confusion and potentially disengagement due to extra interaction with their retailer in the form of mandatory price change notifications, particularly in the event the customer's price fluctuates multiple times.

<u>Offsetting circumstances</u>

The EM notes at 2.44 that a retailer's overall operating costs are relevant in determining a reasonable adjustment for the costs of procuring electricity. The EM at 2.47 also recognises that increases in one element of the supply chain may offset reductions in another.

[5] EM at 2.40.

[6] EM at 2.34, 2.36 and 2.38.

[7] Retailers are typically reliant on the AER's approval of network prices, which occurs within 30 business days of the distributor submitting a pricing proposal, as they are a significant input into retail prices. Distributors must submit pricing proposals "at least 3 months" before the start of a regulatory year (National Electricity Rules, clause 6.18).

[8] EM at 2.38.

It would be helpful for the ACCC to confirm that it is reasonable for a retailer not to make an adjustment if the reduction in the underlying cost of procuring electricity is offset by an increase in:

- other cost of procuring electricity; or
- other costs incurred by the retailer reasonably attributable to the supply of electricity to small customers (including the cost of implementing the changes, the overall operating costs, current costs, costs over the longer term, viability, risk management strategies and the costs of other retail investments or projects).

Further, we consider the Guidelines should clarify that even if a sustained and substantial reduction in relevant costs has occurred, it would be reasonable for a retailer not to make an adjustment if the retailer forecasts that the underlying cost of procuring electricity is likely to rise again in the near term and offset the sustained and substantial reduction. It is important that the retailer's conduct is not viewed in isolation by reference to previous prices and that price forecasts are also taken into account.

Similarly, and consistently with Example 2.9 in the EM, we consider the Guidelines should clarify that it would be considered reasonable for a retailer to only make a small adjustment or no adjustment to its prices to reflect a reduction in electricity procurement costs where a retailer has previously chosen to absorb price increases and not pass them onto consumers.

From an overall policy perspective, we also believe that the Guidelines should expressly acknowledge that retailers remain free to adjust their prices to reflect upward movements in supply chain costs.

Flexibility

It is common for retailers to offer a range of products to customers to cater for different consumer preferences. Combined with the policy shift from the Australian Energy Market Commission and AER in recent years towards cost-reflective pricing, there is also an increasing number of available tariff types, small customer cohorts and, therefore, retail offers. Given this, when determining its pricing strategy across its customer base overall, it is possible for a retailer to adjust different offers in different ways. Time of use tariffs may be set differently to flat tariffs, for example, or customers with particular usage characteristics may require complex offers or tariffs. This is recognised in the EM at 2.43.

There is no explicit requirement under the Act for all customers, products and tariffs to be adjusted by the same amount. Accordingly, we recommend the Guidelines clarify that a "reasonable adjustment" does not require the same adjustment for all customers, but rather can allow retailers the flexibility to determine their customer tariffs.

Similarly, if a retailer increases their advertised discounts on a particular product for a quarter to win customers and electricity procurement costs decrease around the same time, the retailer should not be expected to further reduce an already heavily discounted price; that current price in market should not be considered a baseline price against which future price reductions are measured.

We also consider the Guidelines should confirm that a retailer has the flexibility to determine what *form* a reasonable adjustment to the price of offers or supplies will take. That is, that there should be no obligation or expectation that the adjustment must always be in the form of a reduction to the base usage rate and/or daily supply charge. For example, adjustments may reasonably be made to the underlying tariff or price, by way of an increase to a discount applied to the price, in the form of a one-off or ongoing credit to customers or through some other benefit. It is important that retailers preserve some flexibility in how they structure

their retail customer propositions and benefits and that the Act does not have the unintended consequence of reducing innovation and product differentiation between retailers.

Prudent governance and risk mitigation

We agree with the EM at 2.45 that a retailer should not be required to undermine their viability or risk management strategies or pricing strategies in order to pass through savings in electricity procurement costs. In our view, the Guidelines need to explicitly recognise the role of prudent hedging practices in the retail price-setting process and that, as a result, the impact of any sustained and substantial reduction in the market wide costs of procuring electricity on the costs of an individual retailer may be delayed. For example, it may be reasonable for a retailer who hedges based on a prudent 12 month or more forward view of demand and prices to not make any adjustments to its retail prices outside of its normal annual price cycle. The retailer would need to demonstrate its hedging strategy takes reductions in supply chain costs into account.

Product design

An underlying assumption of the Act (and, to some extent, the EM) seems to be that there is a single price or product offered to small consumers that can be adjusted at any point in time. Increasingly, as retailers seek to innovate, there are 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).

These plans are carefully developed based on pricing assumptions over the term of the plan and, realistically, can only be offered if a retailer is able to know 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. This could significantly discourage retailers from developing or offering new and innovative products to customers.

Accordingly, we would welcome clarification from the ACCC on whether 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 or terms of the product. Pertinent examples include where a consumer has chosen:

- a product that fixes usage and/or daily supply charges for a certain period;
- to pay a set monthly price over a benefit period or contract term; or
- a product where energy equipment or other products are subsidised or included in the price.

*(b) "sustained and substantial"*

It is necessary for the Guidelines to clearly articulate what the ACCC considers to be a "sustained and substantial reduction".

The EM states at 2.37 that a reduction in supply chain costs that lasted a week or a month would not be considered sustained. The EM also acknowledges at 2.38 that it is not intended that retailers adjust their retail prices in response to small moderations in their supply chain costs, as this would place "an unreasonable burden on retailers with little benefit flowing to consumers". However, it goes on to state that "to be substantial, the reduction in costs must be real or of substance, relative to the overall costs of procuring electricity, though not necessarily large". Unfortunately, this is unlikely to provide much meaningful assistance to retailers in seeking to understand the intent of the provisions.

Given this, we believe that the Guidelines need to clarify:

- The ACCC's views on how long a reduction in a retailer's underlying cost of procuring electricity would need to last to be considered "sustained".
- What degree of reduction would be required before a reduction is considered "substantial"? The EM uses an example (2.2) where the wholesale spot price falls by 20%. Does the ACCC believe that a reduction would need to result in the retailer's underlying cost of procuring electricity to decrease by at least 20% in order to be considered "substantial"?
- In determining whether there has been a "sustained and substantial" reduction, that the retailer may take into account seasonality in wholesale electricity costs so that normal seasonal fluctuations in pricing over the course of a year are not considered to be representative of a longer-term price trend.

*(c) "underlying cost of procuring electricity"*

We believe that the Guidelines should outline what is intended by the "underlying costs of procuring electricity" consistently with the EM at 2.28 to 2.33 (for example, including forecast wholesale energy procurement and risk management/hedging costs, network costs, environmental scheme costs and excluding retail costs and retail margins).

Additionally, and consistently with the EM at 2.46, the Guidelines should also clarify that the primary driver for price reductions is broad, market-wide trends rather than retailer-specific efficiency gains or cost reductions. This clarification is important because the Act requires a retailer to make reasonable adjustments to reflect sustained and substantial reductions in "*its*" underlying costs of procuring electricity, whereas the EM describes the costs of procuring electricity as broad, *market-wide* costs. This creates ambiguity for how the Act will be applied. We consider both of these concepts are important as they enable a retailer to recover the cost of risk in procuring electricity, incentivising innovation and investment and to have regard to all the surrounding circumstances of a retailer's cost position.

For example, the competitive retail market creates a continuous incentive for retailers to improve their efficiency and innovate to win customers. A strict reading of the Act may require these gains to be passed through to customers. However, consistently with the EM, our position is that, absent a broad, market-wide reduction in relevant supply chain costs, retailers should not be *required* to pass through efficiency gains (but, of course, would have the freedom to do so should they wish to). Examples 2.7 to 2.10 illustrate this concept reasonably well and it would be useful for the ACCC to consider them in the Guidelines and potentially expand on them.

It would also be helpful to understand whether the ACCC will play any part in identifying whether an industry-wide reduction in the relevant costs of procuring electricity has occurred and is expected to continue to persist in the future, so that retailers are able to identify when the relevant "trigger event" has occurred.

## 2.2 Financial contract liquidity (s153F)

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.[9]

[9] EM at 2.48 to 2.51.

What remains unclear, however, is whether or not the contract liquidity prohibition is intended to apply to contracts with commercial and industrial (large) customers who negotiate directly with generators (or a related body corporate of a generator). On a plain reading of the Act, these large customers would be captured but the tenor of the EM suggests they are outside its scope. The EM's examples are also limited and do not contemplate this scenario. We would appreciate clarification from the ACCC, through the Guidelines, of its intended approach to interpreting the scope of section 153F.

We also have views on the key concepts contained in section 153F, outlined below.

*(a) "preventing, limiting, or restricting acceptance of … offers"*

There are many legitimate reasons why a corporation may not offer contracts. For example, for safety reasons (to both people and assets). Additionally, corporations have individual energy market risk policies that govern the extent to which contracts may be sold and the extent to which capacity must be reserved to meet risk measures within the corporation's set risk appetite.

It is also possible to construe any term of a contract that seeks to manage the risk to the corporation as a limit or restriction on the offer to supply or a term that would potentially limit acceptance of those offers. For example, there will be legitimate counterparty credit assessment reasons for including terms that could be unfairly interpreted as restricting acceptance. Clearly, this is not the intended application of the Act, but it is not explicit in the Act itself, and the ability to infer purpose in section 153J exacerbates the issue.

Accordingly, to ensure that the Act will not be enforced in a way that unfairly impacts legitimate business practices, we believe it is essential that the Guidelines validate the following general principles:

- It is legitimate business behaviour and not a contravention of the Act for a generator to follow a conservative hedging strategy that does not forward sell all of a generator's capacity.
- It is legitimate business behaviour and not a contravention of the Act for a generator to limit or restrict the contracts it offers in accordance with its risk management policy, including internal contracting, asset management strategies – including the retiring or mothballing of generation facilities, operational health and safety considerations or other governance, risk and compliance requirements.
- It is not a contravention of the Act if a corporation makes a genuine offer to enter into an electricity financial contract but the counterparty does not accept an offer.
- It is not a contravention of the Act if a generator fails to offer contracts or is required to limit or restrict the contracts it makes available due to safety concerns (people and assets), unplanned maintenance, outages or other operational reasons, including closures in accordance with NEM rules, supply issues, directions from a market operator, weather or other environmental factors (such as bushfires) or insufficient firm capacity.
- It is not a contravention if the corporation is unable to offer firm financial contracts against non-firm physical assets.
- It is not a contravention if the corporation would need to vary or terminate binding contractual arrangements in order to offer electricity financial contracts to customers.
- It is not a contravention if offering electricity financial contracts would compromise the corporation's ability to meet its commitments under existing contracts.

It would be useful to understand how the ACCC proposes to identify terms that are "[so] commercially unattractive that no reasonable counterparty would be likely to accept [them]"

or when an offer to enter into an electricity financial contract that is not accepted by the customer, is not genuine.

It would also be helpful to understand how the ACCC considers section 153F will intersect with the Retailer Reliability Obligation.

### 2.3 Electricity spot market (ss153G and 153H)

The EM confirms that the intention of sections 153G and 153H are to prevent generators engaging in conduct which undermines the effective operation of the electricity spot market and is intended to capture all forms of bidding behaviour, including failure to bid.[10]

EnergyAustralia remains of the view that the Act should not apply to conduct that is ordinary market conduct that is consistent with the operation and policy objectives of the electricity spot market, which was designed so that generators could bid higher in times of greater demand to send price signals to encourage investment in generation. This is something that the EM recognises (for example, at 2.98 to 2.100) but the drafting of the Act does not specifically exclude behaviour expected by the design of the NEM from prohibited conduct. Accordingly, a key principle of enforcement should be that ordinary permissible conduct is not captured by the provisions.

The Guidelines should also clarify that an electricity generator does not breach section 153G or 153H merely because it closes a generator in accordance with the NEM market rules.

Further guidance is also necessary on the distinction between section 153G and 153H given the significant additional penalties that apply to a contravention of section 153H.

*(a) "fraudulently, dishonestly, or in bad faith"*

We believe that the Guidelines should attempt to define what a fraudulent, dishonest or bad faith bid would entail and how (if at all) its approach to applying this element would differ from the already existing rebidding rules in the NER.

For example, is it the ACCC's intention to approach interpretation of this element in a manner that is consistent with rule 3.8.22 of the NER, and with rule 3.8.22A, which prohibits offers, bids or rebids that are false or misleading or likely to mislead?

It would be helpful if the ACCC could confirm via the Guidelines that, to avoid acting in a fraudulent, dishonest or bad faith manner, a generator is not required to bid at short-run marginal cost at all times. Rather, generators can legitimately bid above and below short-run marginal cost depending on their ability to generate or switch off generation, which is not always reflective of cost.

It is also vital that the ACCC recognises that generators need to earn enough to cover not just their short-term costs, but also their fixed costs – that is, labour costs, maintenance costs, capital costs of running the business, financing costs, insurance, etc. This relies on there being periods where the generator is able to offer part of its volume at prices that are significantly above the generator's marginal cost of production. EnergyAustralia believes that bidding to ensure that a generator is able to operate in a profitable manner should not be viewed as inherently dishonest, fraudulent or in bad faith.

It is essential that the ACCC confirms through the Guidelines that it will not seek to intervene in this normal functioning of the market, so that the Act does not lead to additional volatility, risks and ultimately, costs that would be borne by consumers.

[10] EM at 2.77, 2.83.

The Guidelines should also confirm that the ACCC will take into account the corporation's broader bidding strategy across its entire asset base in determining whether prohibited conduct has occurred, rather than focusing on an isolated bid or offer or conduct that applies to one particular generation asset.

*(b) "distorting or manipulating prices"*

We believe the Guidelines need to clearly articulate the ACCC's expectation of what is required for distortion or manipulation of prices to occur. The EM outlines some general principles acknowledging the characteristics of the spot market (at 2.91 to 2.104) that provide useful guidance, but also notes that it is not possible to exhaustively prescribe conduct which will or will not have the purpose of distorting or manipulating prices.

While we expect the facts of a particular case will be relevant in determining whether a distortion or manipulation of prices has occurred, it would assist us if the Guidelines clearly define what is not distortion or manipulation, giving effect to the principles outlined in the EM. For example:

- Prices would not be considered distorted or manipulated just because they are changed as a result of the corporation's behaviour (EM at 2.95).
- Behaviour that is genuine commercial behaviour as intended by the design of the electricity spot market would not of itself constitute distorting or manipulating prices (EM at 2.96).
- Short-term price spikes (which could signal transitory market power), in and of themselves, are not distortion or manipulation of prices (EM at 2.98 to 2.100).

We also consider the Guidelines should clarify that:

- The Act is not intended to catch single or one-off bids or failures to bid and, therefore, the ACCC will be focused on identifying market participants who distort or manipulate prices systemically or repeatedly, as part of a series of bids.
- The ACCC recognises that sometimes it is necessary to take plant offline on a hot summer day for maintenance and/or safety reasons and that this, without something more, will not be considered "distorting or manipulating" prices.

## 3. Processes and remedies

The ACCC has also asked for input in relation to what aspects of the new processes and remedies should be included in the Guidelines. EnergyAustralia requests that the ACCC Guidelines provide clarity in relation to the following points.

### 3.1 General approach to enforcement

Given that the Act creates entirely new forms of prohibited conduct and some of the most serious remedies in the CCA, as a starting point it would be helpful to understand how the ACCC will approach enforcement of the Act, especially in the introductory period after the new provisions take effect. We appreciate the ACCC has limited control over the commencement date of the Act, but the reality is there is extremely limited time available for retailers and generators to prepare following the proposed finalisation window for the ACCC's final Guidelines.

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, and for the ACCC to initially focus on encouraging compliance with the law, particularly by educating and informing consumers and traders about their rights and responsibilities under the Act.

We have also included questions below about some of the specific remedies available to the ACCC that we believe can be clarified in the Guidelines.

*(a) Divestiture orders*

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".[11]

We would appreciate clarity from the ACCC with regards to its power to recommend divestiture 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 buyer on just terms – that represents the value of the asset or interest to the corporation?

*(b) Public notices*

Public 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, a lack of any explicit requirement for the ACCC to have regard to a corporation's representations in response to a draft notice and no avenue of review. Accordingly, we would appreciate some clarity on the ACCC's likely use of public notices. For example:

- Can the ACCC provide clarity on the circumstances in which it would consider the "public interest" to be served by it issuing a public warning notice?
- Given the complexity of the allegations that will be contained in the notice, will the ACCC consider the timeframes set out in the Act as a minimum only and offer longer timeframes to corporations to allow them a fair and reasonable time to respond?
- Will the ACCC commit to reviewing and responding in a meaningful way to the corporation's representations before issuing the notice to the public in section 153M(2)?

## 3.2 Other matters

EnergyAustralia would also appreciate guidance on the following procedural questions:

- Will the ACCC commit to informing corporations at the same time that the Commission provides its recommendations, variations or revocations to the Treasurer?
- Can the ACCC confirm that it will only seek court enforcement of contracting orders where the corporation has failed to comply with section 153F in a material respect?
- Can the ACCC specify explicit rules about circumstances in which the Treasurer may vary a contracting order from that recommended by the ACCC (if at all) as allowed under section 153Y?
- Can the Guidelines provide clarity on how the ACCC proposes to approach the pricing, terms and duration of a contracting order?

[11] EM at 5.7.

- 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. Can the ACCC in the Guidelines confirm its approach to how it will decide which enforcement path to take or recommend? Can the ACCC also confirm that it would only employ its new powers and penalties in circumstances where existing laws and remedies would not adequately deal with the alleged conduct?
- Can the ACCC confirm that it would only recommend that an order be applied to a "connected body corporate" if that company has been directly involved in the prohibited conduct?
- In what circumstances would the ACCC consider it necessary to exercise the power in section 153J to infer purpose? Section 153J is particularly concerning in relation to prohibited conduct in sections 153G and 153H given the significant number of operational and regulatory constraints incumbent upon generators.