



Lyn Camilleri
Australian Competition and Consumer Commission
Level 17, Casselden
2 Lonsdale Street
Melbourne Vic 3000
By email: electricitymonitoring@accc.gov.au

06 January 2020

Dear Ms Camilleri,

ACCC guidelines on the Prohibiting Energy Market Misconduct Bill

ENGIE Australia & New Zealand (ENGIE) appreciates the opportunity to respond to the Australian Competition and Consumer Commission (ACCC) in response to the consultation letter on guidelines on the Prohibiting Energy Market Misconduct Bill (“the Bill”).

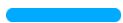
The ENGIE Group is a global energy operator in the businesses of electricity, natural gas and energy services. In Australia, ENGIE has interests in generation, renewable energy development, and energy services. ENGIE also owns Simply Energy which provides electricity and gas to more than 720,000 retail customer accounts across Victoria, South Australia, New South Wales, Queensland, and Western Australia.

ENGIE is also a member of the Australian Energy Council and supports the matters raised in that entity’s submission.

Importance of guidance

ENGIE welcomes the ACCC providing guidance as to how it will approach its enforcement role in respect of the Bill. The key terms set out in the consultation letter on the Bill are capable of a range of interpretations and it is important for the ACCC to provide further definition wherever possible. This will support effective competition in the three segments of the market covered by the Bill: retail, financial contracts, and generation.

A failure to provide adequate guidance will increase uncertainty in an already heavily regulated industry. To that end, the examples provided in the Explanatory Memorandum to the Bill are of limited use in this respect as they largely represent obvious examples of either breach or non-breach. Some further areas where clarification would be welcome are set out below.





Retail market conduct

The Bill requires obligated parties to adjust prices for “sustained and substantial¹” reductions in the “underlying cost of procuring electricity”. The legislation defines the “underlying cost of procuring electricity” in a way that excludes retail costs even though such costs must necessarily be incurred by retailers in acquiring and servicing customers. It would be useful to understand how the ACCC will take into account changes in such costs in how retailers set their prices for the purposes of assessing compliance with the Bill.

The Explanatory Memorandum correctly notes that it is not in either retailers or customers’ interest for prices to change constantly in response to every change in underlying costs. Accordingly, it may be useful for the ACCC to indicate what the range of acceptable frequency of price changes in response to underlying costs is. Given regulatory costs such as network costs and certain environmental costs typically only change annually, retailers may not consider it efficient to change prices any more frequently than annually.

Contract market conduct

The Bill prohibits generators (or related parties) from failing to offer contracts or offering contracts in a way that is limited or restrictive if they do so “for the purpose of substantially lessening competition in any electricity market”². Noting that the purpose may be inferred rather than explicit, it is important to understand how the ACCC will approach evaluation of the normal practices of generators to limit the amount of capacity they offer and to whom they offer capacity.

They may choose not to make offers or make offers on more restrictive terms to counterparties for credit risk management or counterparty concentration reasons.

These are some of the more obvious examples why generators may choose to not contract or to only contract with certain counterparties or on certain terms, with their “purpose” being merely to operate in an appropriately prudent manner and within their own internal risk policies, both as it relates to safety and financial exposures.

Given that this section of the Bill only prohibits the specified contract market conduct where it is for the purpose of lessening competition, some insight as to how the ACCC would go about inferring such a purpose would be welcome.

Remedies

The Bill affords the ACCC a wide range of remedies for rectifying the prohibited behaviour, of varying degrees of severity. At the most severe end of the spectrum, the ACCC may recommend that the Treasurer order a company to enter into contracts or may order the divestiture of assets. These are extraordinarily intrusive powers and it is incumbent on the ACCC to give some guidance on the circumstances in which it would make such recommendations to the Treasurer rather than applying some of the less severe remedies. For example, are such powers reserved for “repeat offenders” or could they be applied to a first breach if it was considered sufficiently egregious?

¹ Section 153E (1) (b) of the Bill

² Section 153F (c) of the Bill



Noting that some of the businesses with the largest share of both generation and retail markets are owned by governments, including one by the federal government, the ACCC should also explain how it will ensure that publicly owned businesses will be treated the same way as privately-owned businesses.

Conclusion

ENGIE welcomes the ACCC's development of guidance materials and notes that this is a critical task that should not be rushed. The industry is already heavily regulated and thus requires appropriate guidance to cover the range of new and potentially very intrusive measures that will be covered by the proposed guidance.

Should you have any queries in relation to this matter, please do not hesitate to contact me on (03) 9617 8415.

Yours sincerely,

A handwritten signature in blue ink, appearing to read "Jamie Lowe".

Jamie Lowe

Head of Regulation

