



20 December 2019

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Australian Competition and Consumer Commission
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Submitted by email: electricitymonitoring@accc.gov.au

Dear Ms Camilleri

Guidelines on the Prohibiting Energy Market Misconduct Bill – Initial Consultation Letter

Origin Energy Limited (Origin) welcomes the opportunity to provide comments on the Australian Competition and Consumer Commission's (ACCC) Guidelines on the Prohibiting Energy Market Misconduct Bill.

The Guidelines have an essential role to play in setting out the ACCC's approach to interpreting/enforcing the new prohibitions and the intended application of the additional remedies. As identified by many stakeholders during consultation on the Bill, the ambiguous nature of some aspects of the legislation is likely to be challenging from both an enforcement and compliance perspective. For industry, this could prove problematic if it constrains legitimate behaviour that is consistent with the efficient operation of the market.

To address this, the Guidelines should (as far as practicable) specify the types of conduct that are unlikely to represent a contravention of the new prohibitions, as well as the circumstances under which the ACCC may recommend the use of contracting and divestiture orders. The Guidelines should also maintain consistency with the Explanatory Memorandum (EM) to the Bill, particularly where it clarifies the intent of the new prohibitions and outlines what would be considered appropriate behaviour given the nature of retail and wholesale electricity markets. The value of many of the examples of acceptable conduct provided in the EM is diluted by the use of ambiguous language; the acceptable conduct is often qualified by the use of the word 'may'.¹ The ACCC guidelines should provide greater clarity.

Noting the above, Origin has outlined key aspects of the Bill that should be addressed through the Guidelines (as summarised below), with more detail provided in Attachment 1.

- **Retail pricing (153E):** The Guidelines should reflect the intent expressed in the EM, namely that "*the legislation is primarily concerned with broad, market-wide price trends*"² and does not require a retailer to adjust its prices to pass through efficiency gains. In determining such price trends, Origin suggests the Guidelines require the ACCC to have regard to both wholesale spot market and contract price movements.

It is important the Guidelines also ensure retailers are not required to make pricing adjustments that are inconsistent with their risk management or price setting strategies, having regard to the retailer's current and future costs. Further, retailers should retain the flexibility to adjust various

¹ e.g. Revised Explanatory Memorandum, *Treasury Laws Amendment (Prohibiting Energy Market Misconduct) Bill 2019*, Example 2.9 – "*All else held constant, when considering the retailer's pricing over the longer term, it may be considered reasonable for that retailer to make only small adjustment, or no adjustment, to its prices in the third year.*"

² Revised Explanatory Memorandum, *Treasury Laws Amendment (Prohibiting Energy Market Misconduct) Bill 2019*, paragraph 2.46.

offers in different ways, noting retailers provide a wide range of products that vary in their terms and features (e.g. time varying, green power, solar feed-in tariff) and may therefore warrant different treatment.

- **Electricity financial contract liquidity (153F)**: Section 153F seeks to ensure vertically integrated firms do not unreasonably refuse to offer financial contracts for anti-competitive purposes. As noted in the EM, it is not intended to:
 - “*extinguish contractual arrangements already on foot or compromise a generator’s ability to meet its commitments under existing contracts;*
 - *deal with contract illiquidity as a result of physical issues in the electricity sector; or*
 - *interfere with genuine efficient risk management strategies by participants in electricity markets, including internal contracting by a gentailer.*”³

This distinction should be reflected in the Guideline to ensure prudent risk management activities are not misinterpreted as a contravention. It is crucial the Bill does not inadvertently lead to a vertically integrated firm being compelled to trade in a manner that is inconsistent with its view of the commercial realities/risks of operating in the market.

- **Electricity spot market (153G/H)**: The EM notes sections 153G and 153H are not intended to interfere with genuine commercial behaviour, as intended by the design of the National Electricity Market (NEM). In the context of generator bids, the prohibition should not impede the ability for prices to reach a level that allows for the recovery of long run costs, which is crucial in ensuring dynamic efficiency and maintaining investment signals. To address this, the Guideline should characterise the design of the NEM and include examples of acceptable behaviour within the NEM framework and maintain consistency with existing National Electricity Rules (NER) and market design principles.⁴
- **Process and remedies**: Contracting and divestiture orders represent significant interventions, with contracting orders not subject to any court oversight. To provide greater clarity on how these could be applied in practice, it would be useful for the Guidelines to set out the conditions under which the ACCC would progress from the use of lower order instruments (e.g. a draft warning notice) to a recommendation for the utilisation of these more extreme remedies, as well as the process that would be followed.

If you wish to discuss any aspect of this submission further, please contact Steve Reid at steve.reid@originenergy.com.au or on 02 9503 5111.

Yours Sincerely,



Keith Robertson
General Manager, Regulatory Policy

³ Ibid, paragraph 2.52.

⁴ The rules prescribed under Chapter 3 of the NER are intended to give effect to a broad set of NEM market design principles, as set out under clause 3.1.4.

Table 1: Proposed Guideline content - prohibited conduct

| Prohibition | Assessment of key terms | Conduct examples |
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| Retail pricing (153E) | <ul style="list-style-type: none"> ▪ <u>'Reasonable adjustments'</u>: The Guidelines should specify that: <ul style="list-style-type: none"> - regard will be given to a retailer's current and future costs, noting it would not be reasonable to require pricing adjustments that are inconsistent with a retailer's risk management or price setting strategies and may undermine a retailer's viability; - it is reasonable for a retailer to adjust various offers in different ways, noting retailers provide a wide range of retail products that vary in their features (e.g. time varying, green power, solar feed-in tariff) and terms and conditions; and - a retailer is not expected to adjust prices more than once within a 12-month period. ▪ <u>'Sustained and substantial'</u>: The Guidelines should specify that: <ul style="list-style-type: none"> - it is a movement in market wide price trends that is of relevance; and - it is not intended that a retailer would be required to adjust their retail prices in response to short term fluctuations in supply chain costs, such as those that reflect normal variations in spot market prices. ▪ <u>'Underlying cost of procuring electricity'</u>: Consistent with the intent of the EM, the underlying cost of procuring electricity should be determined by reference to whether there has been a reduction in the industry benchmark costs (i.e. the costs that would be incurred by a prudent and efficient standalone retailer in managing the risks of supplying customers in the relevant market). | <ul style="list-style-type: none"> ▪ Consistent with the assessment principles proposed, the Guidelines should include the following as examples of conduct that will not breach the prohibition: <ul style="list-style-type: none"> - A retailer has not had a reasonable amount of time to make an adjustment. - A retailer's own costs have not gone down to reflect reductions in the underlying market-based wholesale price of electricity and network costs.⁵ - A retailer is precluded from making an adjustment under other relevant regulations. - There has not been a real, sustained or substantive reduction relative to the overall cost of supplying electricity to small customers. - A substantial reduction in wholesale prices is observed, but the reduction was not sustained.⁶ - A retailer takes steps to reduce its own supply costs through efficiency improvements.⁷ |
| Electricity financial contract liquidity (153F) | <ul style="list-style-type: none"> ▪ <u>'Fails to offer' / 'limits or restricts its offers'</u>: The Guidelines should specify that a corporation does not contravene this prohibition where: <ul style="list-style-type: none"> - it is providing market making services under a prescribed regime;⁸ - operational issues (e.g. generator unit failure, concerns about ongoing plant reliability) have | <ul style="list-style-type: none"> ▪ Consistent with the assessment principles proposed, the Guidelines should include the following as examples of conduct that will not breach the prohibition: <ul style="list-style-type: none"> - A corporation does not have sufficiently firm capacity to guarantee it |

⁵ Ibid, example 2.7.

⁶ Ibid, example 2.1.

⁷ Ibid, example 2.10.

⁸ Market making services require participating corporations to offer contracts in line with a prescribed set of terms (e.g. price spread). The ASX introduced a voluntary scheme on 1 July 2019. The Retailer Reliability Obligation (RRO) and associated Market Liquidity Obligation (MLO) were also established on 1 July 2019 and provide for a mandatory market making requirement to take effect in the event a reliability shortfall is triggered.

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| | <p>reduced the level of generation capacity available for contracting; and/or</p> <ul style="list-style-type: none"> - it is applying genuine strategies to mitigate the risk of generating and offering electricity, which can include internal contracting and retaining a capacity reserve margin to mitigate the risk of unplanned maintenance/outages, customer sales uncertainty and load variability. <ul style="list-style-type: none"> ▪ <u>'Preventing, limiting, or restricting acceptance of ... offers'</u>: The Guidelines should specify that in deciding whether to offer (and setting the terms of) an electricity financial contract, it is reasonable for a corporation to consider: <ul style="list-style-type: none"> - the creditworthiness of the counterparty; and/or - the compatibility of the electricity contract with the corporation's generation portfolio. ▪ <u>'Substantially lessening competition in any electricity market'</u>: The Guidelines should seek to maintain alignment with the Competition and Consumer Act (CCA) and ensure the prohibition principally targets cases where conduct at least has the potential to have an anti-competitive effect. Given such cases are more likely to be limited to scenarios where there is a high degree of market concentration, a threshold requirement should be introduced such that a corporation must have a substantial degree of market power in a relevant electricity market for the prohibition to be breached. | <p>can meet the commitments required under a contract.⁹</p> <ul style="list-style-type: none"> - A corporation leaves a portion of its generation capacity uncontracted to manage the risk of: unplanned outages and maintenance;¹⁰ and/or uncertain customer load, which can result in the uncontracted capacity being required for internal hedging purposes. - A corporation is unable to offer electricity contracts due to a decision to optimise its energy portfolio by making sales in the gas market rather than running a gas-fired generator. |
| <p>Electricity spot market (153G/153H)</p> | <ul style="list-style-type: none"> ▪ <u>'Fraudulently, dishonestly or in bad faith'</u>: These terms should be assessed on a consistent basis with existing provisions in the NER that: <ul style="list-style-type: none"> - prohibit a generator from making false or misleading offers; and - require a generator to honour its offer unless there is a material change in the conditions upon which the offer was based. ▪ <u>'Distorting or manipulating prices'</u>: The Guidelines should acknowledge the nature of the NEM's energy only market design. Consistent with the EM, it should also specify the following market features/behaviours as being acceptable and part of the efficient operation of the spot market and its participants: <ul style="list-style-type: none"> - generators may make many bids each day, and the fact that these bids alter spot prices is not of itself distortion or manipulation in the relevant sense;¹¹ - transitory market power can be an acceptable feature of the spot market, since it can create a signal for investment in new generation;¹² - the design of the spot market allows for price spikes – short-term price spikes, generally in response to | <ul style="list-style-type: none"> ▪ Consistent with the assessment principles proposed, the Guidelines should include the following as examples of conduct that will not breach the prohibition: <ul style="list-style-type: none"> - A peaking generator does not bid capacity into the spot market other than during price spikes in order to recover operating and fixed costs.¹⁷ - A large coal-fired generator bids capacity below cost to ensure dispatch and avoid shut down and subsequent start-up costs.¹⁸ - A generator undertakes economic rationing of |

⁹ Ibid, example 2.12.

¹⁰ Ibid, example 2.14.

¹¹ Ibid, paragraph 2.95.

¹² Ibid, paragraph 2.99.

¹⁷ Ibid, example 2.15.

¹⁸ Ibid, example 2.16.

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| | <p>peak events, allow for peaking capacity to remain viable;¹³</p> <ul style="list-style-type: none"> - generators can undertake strategies to optimise their operation, which may factor into the price at which a generator bids into the market, the amount of capacity they bid in, or a decision not to bid in on an occasion;¹⁴ - generators may engage in economic rationing, (e.g. choosing not to bid into the market at a point in time due to limited fuel and an expectation that prices will be higher in the future);¹⁵ - bidding and optimisation strategies generally seek to recover a generator's efficient costs over time and may change in response to various market signals such as the forecast supply and demand balance.¹⁶ | capacity due to fuel constraints. ¹⁹ |
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Table 2: Proposed Guideline content – process and remedies

| Item | Proposed content |
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| ACCC notices | <ul style="list-style-type: none"> ▪ <u>Conditions for issuing notices</u>: The Guidelines should specify that public warning notices, infringement notices and prohibited conduct notices will only be issued in circumstances where the ACCC is 'satisfied on reasonable grounds' that the specified preconditions for issuing such notices have been met. The Guidelines should also clarify the circumstances under which the ACCC is likely to graduate its responses from lower order to higher order notices (e.g. from a draft warning notice to a prohibited conduct notice). |
| Contracting and divestiture orders | <ul style="list-style-type: none"> ▪ <u>Conditions for recommending contracting and divestiture orders</u>: The Guidelines should provide a clear threshold for recommending a contracting or divestiture order such that the ACCC is satisfied 'on reasonable grounds' that: <ul style="list-style-type: none"> - the specified pre-conditions are met; - the respective order will result, or is likely to result, in a 'significant and material' benefit to the public; and - other remedy or remedies available would be insufficient to prevent the corporation from engaging in the prohibited conduct identified in the future. <p>The Guidelines should also specify that contracting orders will not be recommended in circumstances where the corporation reasonably considers that doing so would:</p> <ul style="list-style-type: none"> - compromise the corporation's ability to meet commitments under existing contracts; and/or - require generation facilities to be operated in a manner that is inconsistent with safe operating practices. ▪ <u>Content of contract order recommendations</u>: Where the ACCC does make a contracting order recommendation, the Guidelines should require the ACCC to specify an indicative price or price range for the electricity financial contracts that must be offered, having had regard to: <ul style="list-style-type: none"> - the market price of electricity at the time the offers will be required to be made; - the corporation's costs of procuring and producing electricity; - the ongoing financial viability of the corporation; and - any other relevant matters. |

¹³ Ibid, paragraph 2.100.

¹⁴ Ibid, paragraph 2.101.

¹⁵ Ibid, paragraph 2.102.

¹⁶ Ibid, paragraph 2.103.

¹⁹ Ibid, example 2.17.

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| | <ul style="list-style-type: none">▪ Notifications to impacted corporations: Where the ACCC does make a prohibited conduct recommendation to the Treasurer, or seek to vary a recommendation, the Guidelines should specify that the impacted corporation will also receive notification of the recommendation / requested variation, along with any relevant supporting information around the nature of the recommendation / requested variation. |
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