

31 January 2025

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By email: PEMMReview@dcceew.gov.au.

Dear Gillian and colleagues

Review of the *Prohibiting Energy Market Misconduct (PEMM) Act 2019 (Cth)* Consultation Paper

Energy Locals Pty Ltd (**Energy Locals**) is an authorised electricity and gas retailer that supports customers directly as well as via partnerships with newcomers to the energy retail sector, such as RACV, RAA, Indigo Power, IO Energy, Tesla, and others.

We welcome the opportunity to provide feedback to the Department of Climate Change, Energy, the Environment and Water (**DCCEEW**) in response to the consultation paper concerning the review of the effectiveness of the *Prohibiting Energy Market Misconduct (PEMM) Act 2019 (Cth)* (**PEMM Act**) (**Consultation Paper**). We also thank DCCEEW for the opportunity to discuss the review directly during our meeting on 9 December 2024. As discussed in that meeting, we do not have definitive answers to each of the questions raised in the Consultation Paper, however, we wish to take this opportunity to provide our general observations of the market to assist DCCEEW in evaluating the effectiveness of the PEMM Act.

We support the competition and consumer objectives of PEMM Act.¹ We think it is imperative to promote and ensure a fair and transparent market free from anti-competitive behaviour and market manipulation. While we see the need for monitoring of the electricity, environmental forward contract markets and spot prices, we have not seen any improvement in the liquidity of the market since the introduction of the PEMM Act provisions.

1. Retail Market Prohibition

As flagged in Consultation Paper, there have been several regulatory changes in the energy sector since the introduction of the PEMM Act.² As a result of these changes, we consider that the retail market prohibitions are no longer necessary. The Default Market Offer (**DMO**) and the Victorian Default Offer (**VDO**) are now being used to set retail margins for the overall market, and we believe this approach is more effective at driving competition on consumer pricing than the retail market prohibitions.

We are not aware of any influence of the PEMM Act prohibitions on retailer pricing strategies in the market. For a small retailer, like Energy Locals, it would be very rare to experience sustained and substantial reductions in underlying costs of procuring electricity. [REDACTED]

We have no comment on the appropriateness of the remedies under the PEMM Act, particularly given that there has been no public enforcement action by the ACCC in relation to these provisions since their introduction.³ Additionally, we are not aware of any use of the compulsory information-gathering powers under the PEMM Act provisions. [REDACTED]

¹ DCCEEW, Review of the effectiveness of the Prohibiting Energy Market Misconduct (PEMM) Act 2019 (Cth), para. 4.1, p11.

² Ibid, p.7.

³ Ibid, p12.

2. Electricity Financial Contract Market Prohibition

As highlighted in the Consultation Paper, it is important for retailers to have access to ASX-traded contracts, over the counter (OTC) contracts and other financial instruments for effective risk management.⁴ A deep and liquid market is essential. Without it, a risk premium is incorporated into prices, which ultimately leads to higher electricity costs for consumers.

While we support the objective of these prohibitions – to prevent electricity generators from refusing to offer financial contracts in a way that substantially lessens competition – we have not observed any improvement to market liquidity since the introduction of the PEMM Act. Despite the financial contract prohibitions, we have experienced more difficulty obtaining contracts. In the period that the PEMM Act has been operational, access to clearing services has also lowered due to exit of clearers⁵ and ASX margins have substantially increased.

We refer DCCEEW to the insights in the Australian Energy Regulator’s “State of the energy market report for 2024” which comments further on these observations. We urge DCCEEW to consider the additional difficulties for small retailers in accessing contract markets.⁶ One such example, noted by the AER, is the barrier of credit for small retailers with many counterparties imposing stringent credit support requirements in the OTC market.⁷

In assessing the contract market prohibitions, we also encourage DCCEE to look more broadly, notably to environmental markets. Retailers need to hedge for the costs associated with complying with environmental schemes, such as renewable energy targets and energy efficiency measures.

[REDACTED] we do not know the extent to which the remedies under the electricity financial contract liquidity prohibition have influenced investment decisions by generators. However, to date, we are unaware of any substantive actions taken under these provisions. Considering this, we would expect that the prohibitions are unlikely to influence decisions or prompt behavioural change.

We also note that for the ACCC to take enforcement action, “*the behaviour of participants in the wholesale contract market must be for the purpose of lessening competition, rather than for legitimate commercial reasons.*”⁸ However, as the Consultation Paper outlines, the contract market is influenced by a range of factors that may not have anti-competitive intent. This suggests that isolating behaviour with anti-competitive intent is inherently difficult, further undermining the effectiveness of these prohibitions.

In summary, we consider that these prohibitions are ineffective in their design, and we are sceptical that continuing them will influence market behaviour and improve the liquidity of the wholesale market.

3. Spot Market Prohibition

We are not aware of any direct correlation between the electricity spot market prohibitions in the PEMM Act and improvements in electricity market performance. We have not seen any change in the bidding behaviour from generators since the introduction of the PEMM Act.

As discussed in our meeting, it would be useful for DCCEE or the ACCC to review instances where generators have withdrawn bids and the reasoning behind these actions. Understanding the rationale for withdrawing bids, may help determine whether actions have been taken to distort or manipulate the spot market. We suggest reviewing data at the 5-minute intervals to better understand these market dynamics.

⁴ DCCEE, Review of the effectiveness of the Prohibiting Energy Market Misconduct (PEMM) Act 2019 (Cth), p.19.

⁵ Australian Energy Regulator, “State of the Energy Market 2024” report, page 32.

⁶ Ibid, section 2.5.6.

⁷ AER “State of the Energy Market 2024” report, p.32

⁸ DCCEE, Review of the effectiveness of the Prohibiting Energy Market Misconduct (PEMM) Act 2019 (Cth), p.18.

4. ACCC NEM Inquiry Function

In considering the effectiveness of the PEMM Act, Energy Locals has noted the lack of public reporting on actions taken under the PEMM Act. For example, there has been no mention of the PEMM Act in the ACCC and AER's 2023-2024 Annual Report.⁹

Since the publication of guidance material in 2020, we have also not seen any further communications from the ACCC or follow-up reports, and we are eager to understand the reasons for this. If the PEMM Act provisions are to continue, we would expect more regular public commentary on its outcomes.

5. Regulatory Reform and Coordination

We acknowledge that this review appears to assess a number of areas of the market that are the subject of concurrent studies by other regulatory or government bodies in the energy sector. In reviewing the PEMM Act, we urge DCCEEW to ensure close collaboration with ongoing regulatory reforms consultation, including the AEMC Pricing Review¹⁰ and the National Energy Market Review by the Independent Expert Panel.¹¹

Given the significant overlap with existing consultations and reviews, it is crucial that the DCCEEW makes full use of the insights already gathered. We strongly urge the DCCEEW to incorporate findings from these past efforts to avoid duplication and to ensure a more streamlined, effective approach to regulation.

Summary of Energy Locals' position

In summary, based on the current state of the market, our view is that the PEMM Act has had a limited impact in improving the liquidity of the market.

We note the following:

- The retail prohibitions are no longer needed due to the existence of the DMO and VDO which have a greater influence on retailer price setting.
- We have not seen any change to bidding behaviour from generators or an improved liquidity in the market since the introduction of the PEMM Act provisions.
- Ongoing monitoring of the spot market and financial contracts is important, and we encourage proactive enforcement to identify and address potential misconduct. However, we are not confident that the PEMM Act is the correct mechanism to achieve behaviour change.
- In assessing the effectiveness, DCCEEW must consider the market more broadly, factoring all markets that retailers utilise to hedge, notably in connection with environmental schemes.
- We encourage DCCEEW, or the ACCC if it has not already, to consider the spot prices at 5-minute intervals and examine instances where generators have withdrawn bids to better understand market dynamics.
- The PEMM Act's ability to ensure fair pricing largely depends on robust enforcement and coordination with other regulatory measures. However, we are not aware of any enforcement actions taken by the ACCC under these provisions. The lack of meaningful enforcement mechanisms could imply that the PEMM Act prohibitions are not designed effectively to be sufficiently impactful, or there may be reluctance from the ACCC to take action.
- In reviewing the PEMM Act, we urge DCCEEW and ACCC to consider the diverse challenges faced by smaller retailers, particularly those related to limited access to hedging options, compared to gentailers.

⁹ ACCC and AER, Annual Report 2023 -2024, October 2024. <https://www.accc.gov.au/system/files/annual-report-2023-24.pdf>

¹⁰ <https://www.aemc.gov.au/market-reviews-advice/pricing-review-electricity-pricing-consumer-driven-future>

¹¹ <https://www.dcceew.gov.au/energy/markets/nem-wms-review>



Energy Locals expects that it may have further feedback as the review progresses, and we look forward to participating in the targeted workshops.

We are happy to discuss any aspect of our submission.

Yours sincerely,

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Energy Locals Pty Ltd