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Via email: PEMMReview@dcceew.gov.au

Re: Strengthening the Prohibiting Energy Market Misconduct provisions in the *Competition and Consumer Act 2010* – Consultation paper

Thank you for the opportunity to comment on your consultation paper for *Strengthening the Prohibiting Energy Market Misconduct (PEMM) provisions in the Competition and Consumer Act 2010*.

Overview of ACCC role

The Australian Competition and Consumer Commission (ACCC) is Australia's national competition and consumer regulator. Our role is to promote competition, fair trading and, when necessary, regulate markets for the benefit of all Australians. The ACCC is responsible for enforcing compliance with the *Competition and Consumer Act 2010* (CCA) across the economy, including the electricity sector.

In addition to our economy-wide role, we also currently have electricity-specific responsibilities for:

- monitoring and enforcing compliance with the PEMM provisions in Part XICA of the CCA (PEMM Provisions)
- monitoring and enforcing compliance with the Competition and Consumer (Industry Code—Electricity Retail) Regulations 2019 (Cth) (Electricity Retail Code)
- undertaking an inquiry under Part VIIA of the CCA into the National Energy Market (NEM) since 2018 (NEM Inquiry).

Overview of ACCC submission

The ACCC continues to support the Department of Climate Change, Energy, the Environment and Water (DCCEEW) in its review of the PEMM provisions. Our submission to this phase of the review provides views on:

- optimal governance arrangements for electricity sector-specific functions and how best to progress the transfer of the NEM Inquiry function.
- key considerations for amendments to the retail provision.

- any potential addition of a cross-market manipulation prohibition and amendments to the financial contract provision.

As noted in the Consultation paper, this review will be the primary mechanism to determine the ongoing governance arrangements for the ACCC's electricity-specific functions.

The ACCC recommends in its submission the transfer of all its electricity-specific functions to the Australian Energy Regulator (AER) through legislative change.

The NEM Inquiry is integral to our ability to monitor and enforce compliance with the PEMM Provisions and the Electricity Retail Code. The monitoring and enforcement of the PEMM Provisions in particular is complex and the ACCC relies on the expertise and data that the NEM Inquiry provides. While the ACCC retains responsibility for any electricity-specific function, we recommend the continuation of our NEM Inquiry until legislative change can be made which completes the transfer of all our electricity-specific functions to the AER.

The continuation of our NEM Inquiry until the transfer of these functions will ensure that the ACCC retains the capability, capacity and resources to fulfil our current electricity-specific responsibilities. This will guarantee that there is no gap in consumer protections or reduction in market scrutiny during the transfer of functions.

The transfer of all the ACCC's electricity-specific functions to the AER will provide clarity and certainty for market participants and stakeholders. It will also leverage the existing electricity sector expertise of the AER as a market body.

To this end, the ACCC will continue to work with DCCEE and the AER throughout this review to ensure a smooth and efficient transfer of the inquiry function between agencies.



Strengthening the Prohibiting Energy Market Misconduct provisions in the Competition and Consumer Act 2010

ACCC submission

January 2026

Introduction

The ACCC welcomes the opportunity to support the Department of Climate Change, Energy, the Environment and Water (DCCEEW) in its review into *Strengthening the Prohibiting Energy Market Misconduct provisions in the Competition and Consumer Act 2010*.

As the national competition and consumer regulator the ACCC's role is to promote competition and, when necessary, regulate markets for the benefit of consumers across the economy, including the electricity sector. We do so primarily by enforcing compliance with the competition and consumer provisions in the *Competition and Consumer Act 2010* (Competition and Consumer Act).

As stated in our previous submission to the *Review into the effectiveness of the Prohibiting Energy Market Misconduct (PEMM) Act 2019 (Cth)* (First Consultation Paper), the Competition and Consumer Act (and competition policy more generally) is designed to prevent market participant behaviour from damaging the competitive process to the detriment of consumers.¹ This includes Part IV of the Competition and Consumer Act, which prohibits a range of anticompetitive conduct.

In addition to its economy-wide role under the Competition and Consumer Act, the ACCC currently has electricity sector-specific functions including:

- monitoring, investigating and enforcing compliance with the PEMM provisions in Part XICA (introduced by the PEMM Act) of the Competition and Consumer Act (PEMM Provisions)
- monitoring and enforcing compliance with the Competition and Consumer (Industry Code—Electricity Retail) Regulations 2019 (Cth) (Electricity Retail Code)
- undertaking an inquiry, under Part VIIA of the Competition and Consumer Act, into the National Electricity Market (NEM Inquiry).

In this submission, the ACCC provides its views on:

1. governance arrangements and the transfer of electricity-specific functions to the AER,
2. the possible extension of the retail provision, and
3. the potential addition of a cross-market manipulation provision and amendments to the financial contract liquidity provision.

Overall, we consider that regulation of the electricity sector could be streamlined by transferring all the ACCC's electricity-specific functions (or functions of similar scope and purpose) to the Australian Energy Regulator (AER), leaving the ACCC with only its complementary economy-wide functions in relation to electricity.

Currently, electricity market participants face a complex regulatory environment that requires engagement with multiple agencies. Transferring all the ACCC's electricity-specific functions to the AER would reduce duplicative and overlapping processes between the agencies, reduce frictions in relation to data collection and reduce duplication in our workforces.

To ensure there are no gaps in consumer protections during the transfer of these functions to the AER, we submit that these functions should be transferred simultaneously as a package. Progressing these legislative changes as a single package will provide clarity and

¹ ACCC, Submission to the Review of the effectiveness of the PEMM Act 2019 (Cth) – Consultation Paper, 31 January 2025, p.3.

certainty to stakeholders and ensure that the legislation works holistically to provide for distinct yet complementary roles for both the ACCC and the AER.

1. Governance arrangements and the transfer of electricity-specific functions

The *Strengthening the Prohibiting Energy Market Misconduct provisions in the Competition and Consumer Act 2010* consultation paper (Consultation Paper) seeks views around the appropriate governance and compliance arrangements of the ACCC's electricity-specific functions.

All ACCC electricity-specific functions should be transferred to the AER simultaneously through legislative change

The ACCC supports collectively transferring all of its current electricity sector-specific functions (or functions of similar scope and purpose) to the AER. This includes:

- compliance and enforcement of PEMM Provisions (with appropriate amendments)
- compliance and enforcement of the Electricity Retail Code, and
- the NEM Inquiry that the ACCC currently conducts.

In our response to the government's request to identify regulatory reform opportunities, we stated that the transfer of the ACCC's electricity-specific functions to the AER would reduce regulatory overlap and streamline regulation in the electricity sector.² The AER currently collects a range of information for its default market offer determinations and market monitoring activities that the ACCC has previously collected and reported on as part of its NEM Inquiry. This includes retailers' underlying costs of procuring electricity in addition to their operating costs and retail margins.

To ensure the ACCC retains the capability, resources and information required to enforce our electricity-specific functions during the transfer of these functions, we consider these functions should be transferred to the AER simultaneously. We recognise that to fully effect the transfer of these functions to the AER simultaneously requires substantive changes to primary legislation to be made together. However, we consider doing so will provide clarity and certainty to stakeholders, remove potential duplication or regulatory overlap and ensure there are no gaps in consumer protections during the transfer of these functions. If government considers it preferable to transfer responsibility for either the PEMM provisions or the Electricity Retail Code to the AER in a staggered approach, as discussed next, we submit that the ACCC NEM Inquiry should continue while the ACCC retains responsibility for any electricity-specific function.

We note that the Electricity Retail Code and PEMM Provisions are established under the Competition and Consumer Act, and there are related parts of the Competition and Consumer Act (including monitoring and enforcement) that may need to be amended to give effect to a transition of these functions. The ACCC will support government in relation to the transfer of these functions to ensure an orderly transition to the AER, and to help avoid any unintended consequences for the ACCC's other functions and industry stakeholders.

² ACCC, Response to Treasurer and Minister for Finance - Regulatory Reform Opportunities (Cth), August 2025, p.4.

The ACCC NEM Inquiry should continue until all electricity-specific functions are transferred to the AER

As identified in the Consultation Paper, the ACCC NEM Inquiry is a key source of information that supports our PEMM and Electricity Retail Code compliance monitoring programs.³ Where the ACCC continues to be responsible for ensuring compliance with any electricity-specific function, prior to any transfer to the AER, it will also need to maintain responsibility for the NEM Inquiry to enable it to continue its robust compliance monitoring.

The ACCC NEM Inquiry provides the ACCC with the resources, expertise, capability and information to independently and proactively identify and act in relation to potential non-compliance with the PEMM Provisions and the Electricity Retail Code. It also provides the ACCC with the ability to flexibly respond to behaviour in a rapidly changing market. Without the inquiry function, the ACCC will be significantly impacted in its ability to proactively and independently monitor and enforce compliance with the PEMM Provisions, particularly the retail provision.

We note the Consultation Paper raises options for information sharing between the AER and ACCC. These seek to require or ensure that the AER provides the ACCC with information it collects under an AER NEM inquiry to enable the ACCC to fulfill its functions under the Competition and Consumer Act.⁴ However, even in circumstances in which the AER does provide information to support an ACCC PEMM compliance and monitoring function, the AER may not prioritise using its inquiry function to collect all the information, or information in the form, necessary for the ACCC to effectively monitor compliance with PEMM Provisions, meaning our ability to effectively monitor compliance may still be impacted. The ACCC would also not be able to retain the expertise and specialist staff required to review any information provided by the AER without an inquiry function.

To ensure appropriate consumer protections remain in place and there is no reduction in scrutiny of consumer protection and competition issues, we support the ACCC NEM Inquiry continuing until legislation is made that transfers all electricity-specific regulations to the AER.

Stakeholders continue to note the importance of the ACCC's collection and reporting of electricity billing data in providing transparency in the electricity market. Once all the ACCC's electricity-specific functions are transferred to the AER, government should consider continuing to collect and use billing data that the ACCC currently collects and reports on as part of its inquiry. The Australian Energy Market Commission (AEMC) has indicated that it will also consider this as part of its market review of billing data transparency.⁵

The ACCC's economy-wide role will complement the AER's electricity-specific role

The ACCC is responsible for compliance and enforcement of the economy-wide provisions of the Competition and Consumer Act. The Competition and Consumer Act sits alongside, and is complementary to, many industry-specific regulations.

While the Competition and Consumer Act primarily focuses on promoting competition across the economy and providing general protections for consumers, additional regulations apply to infrastructure and service providers in essential service markets which are enforced

³ DCCEEW, Strengthening the Prohibiting Energy Market Misconduct provisions in the Competition and Consumer Act 2010 – Consultation Paper, 5 December 2025, p.14.

⁴ DCCEEW, Strengthening the Prohibiting Energy Market Misconduct provisions in the Competition and Consumer Act 2010 – Consultation Paper, 5 December 2025 pp.14-15.

⁵ AEMC, [Billing Data Transparency](#) report, September 2024.

by industry-specific regulators. For example, insurance, banking and finance customers have additional protections enforced by the Australian Securities and Investments Commission (ASIC). Similarly, the Australian Communications and Media Authority (ACMA) sets and manages rules applying to communications and media services and markets. We work closely with industry-specific regulators when issues of shared concern arise. This close collaboration can be seen in the ACCC and ASIC's monitoring of debt collection consumer protections.⁶

Where the ACCC's electricity sector-specific functions are transferred to the AER, the ACCC would continue to monitor electricity markets as part of our compliance and enforcement role under both the competition and consumer provisions of the Competition and Consumer Act. As outlined in our enforcement and compliance priorities for 2025-26, promoting competition in essential services (including electricity) and misleading pricing and claims in relation to essential services (with a particular focus on energy) are a priority for the ACCC this year.⁷

The PEMM Provisions require appropriate information-gathering and enforcement powers to ensure effective enforcement and compliance monitoring

As part of transferring the ACCC's electricity sector-specific functions to the AER, it is important to consider what types of information gathering powers the AER requires to administer these functions. The AER's current information gathering powers should be amended as needed to allow it to independently and flexibly enforce and monitor compliance with the PEMM Provisions and the Electricity Retail Code.

The Competition and Consumer Act provides the following compulsory information-gathering powers for the ACCC's administration of its electricity sector-specific functions:

- Section 51ADD which confers a power upon the ACCC to require a corporation to give information or provide documents which it is required to keep under an applicable industry code, including the Electricity Retail Code.
- Section 95ZK which confers a power upon the ACCC to require a person to provide information or documents relevant to a price notification, inquiry or monitoring under Part VIIA of the Competition and Consumer Act, including the ACCC's Electricity Inquiry. The ACCC has the power to hold hearings and compel parties to give evidence at those hearings.
- Section 155 which confers a power upon the ACCC to obtain information, documents and evidence in relation to certain matters including investigations of suspected contraventions of the Act.
- Part XID which sets out the ACCC's search and seizure powers available in relation to investigations of suspected contraventions of the Act.

The ACCC would continue to use these powers as part of administering the Competition and Consumer Act. ASIC has similar compulsory information-gathering powers across the *Corporations Act 2001* and the *Australian Securities and Investments Commission Act 2001* to support its role as the corporate, markets, financial services and consumer credit regulator. We note these may be of particular relevance to the AER where it obtains greater

⁶ ASIC and the ACCC are responsible for administering the Commonwealth consumer protection legislation in relation to the debt collection industry. The agencies have drafted jointly produced guidelines to assist stakeholders understand their rights and obligations, and to ensure that debt collection activities are undertaken in a way that is consistent with consumer protection laws.

ACCC, Debt collection guideline: for collectors and creditors, April 2021, pp.54-55.; ASIC, [Credit - Debt collection](#) [accessed 29 January 2026].

⁷ ACCC, 2025-26 Compliance and enforcement priorities (Cth), February 2025, p.1.

responsibility for ensuring regulatory compliance in the market for financial risk management products.

It is also important to ensure the AER can seek adequate remedies for contraventions of the PEMM Provisions. As stated in our submission to the First Consultation Paper, the specific remedies and significant penalties that apply to contraventions of the PEMM provisions, coupled with the ACCC's investigative powers, enables the PEMM provisions to operate as a behavioural constraint on market participants.⁸

The ACCC will work with the AER to ensure there are appropriate referral processes in place

As stated in our submission to the First Consultation Paper, if the government shifts compliance and enforcement of the PEMM Provisions and the Electricity Retail Code to the AER, it will be beneficial to establish appropriate referral processes between the ACCC and the AER particularly as the ACCC will retain economy-wide functions under the Competition and Consumer Act, including section 46.⁹ This would assist in instances where the ACCC becomes aware of information relevant to a potential contravention of the PEMM provisions or the AER identifies conduct that could potentially breach Part IV of the Competition and Consumer Act. The ACCC will work with the AER to ensure there are appropriate referral processes in place.

⁸ ACCC, Submission to the Review of the effectiveness of the PEMM Act 2019 (Cth) – Consultation Paper, 31 January 2025, p.1.

⁹ ACCC, Submission to the Review of the effectiveness of the PEMM Act 2019 (Cth) – Consultation Paper, 31 January 2025, p.12.

2. Amendments to the retail provision

The Consultation Paper seeks stakeholder views on whether to amend the retail provision, such that it would protect customers in both increasing and decreasing cost environments. In its submission to the First Consultation Paper, the ACCC noted the government may wish to consider the merits of making the retail provision symmetrical.¹⁰ An amendment of this nature requires careful consideration to ensure it does not adversely impact market dynamism and outcomes.

The retail provision was initially introduced to address competition concerns

As set out in the ACCC's previous submission to the First Consultation Paper, the retail provision was initially introduced to address competition concerns highlighted in the ACCC's 2018 Retail Electricity Pricing Inquiry report. In this report, the ACCC found that the retail electricity market displayed several characteristics that led to ineffective competition, including a concentrated and vertically integrated set of market participants as well as a loyal and disengaged customer base.¹¹

In the absence of effective competition, retailers within the electricity market were thought to have limited incentive to pass on cost reductions to customer prices, such that they would likely retain any savings to raise their profit margins.¹² This was of particular concern in the context of falling wholesale prices in the 2019-20 financial year.¹³

The retail provision was therefore designed to address competition concerns (and allow consumers greater access to the cost-reflective prices) by requiring retailers to make reasonable adjustments to their market offer prices where they experienced sustained and substantial declines in the underlying cost of procuring electricity. This was intended to complement the default offers, which aim to set a reasonable price cap for standing offers and set a benchmark reference price for meaningful comparisons between market offers.

However, the retail provision was not designed to require retailers to also make reasonable adjustments in response to increases in underlying costs or decreases that are not both 'sustained' and 'substantial'.¹⁴ The current design permits retailers, subject to other regulations, to exercise discretion in how they set and increase their offer prices in response to higher costs.¹⁵ This means customers are not protected from excessive price increases, which may occur in highly concentrated markets where market power is exercised.

The ACCC observes that the retail electricity market has not recently entered a cost environment where the retail provision in its current form would be enlivened. Our sector-

¹⁰ ACCC, Submission to the Review of the effectiveness of the PEMM Act 2019 (Cth) – Consultation Paper, 31 January 2025, p.9.

¹¹ ACCC, Retail Electricity Pricing Inquiry – Final Report June 2018, ACCC, Australian Government, 1 June 2018, pp i–xvi.

¹² Parliament of Australia, Revised Explanatory Memorandum to the Treasury Laws Amendment (Prohibiting Energy Market Misconduct) Bill 2019, Parliament of Australia, Australian Government, 2019, paragraph 8.10, p.83.

¹³ ACCC, Inquiry into the National Electricity Market: Supplementary report - impact of COVID-19 and ACCC monitoring and enforcement activities, ACCC, Australian Government, 21 September 2020, p.15-17.

¹⁴ The revised explanatory memorandum for the PEMM defines 'sustained' as something that is continuing and expected to continue and 'substantial change' as one that is real or of substance.

Parliament of Australia, Revised Explanatory Memorandum to the Treasury Laws Amendment (Prohibiting Energy Market Misconduct) Bill 2019, Parliament of Australia, Australian Government, 2019, paragraph 2.38, p.17.

¹⁵ The Victorian Essential Services Commission has implemented rules restricting retailers from increasing their prices more than once a year, with the AEMC set to introduce similar rules in all other NEM regions from 1 July 2026.

AEMC, National Energy Retail Amendment (Improving consumer confidence in retail energy plans) Rule 2025 – Rule determination (Cth), pp.30-41.; Victorian Essential Services Commission, Energy Retail Code of Practice (version 4) - final version, Victorian Government, pp.73-74.

wide cost monitoring has found that, over 2023-24 and 2024-25, the cost to supply residential electricity customers broadly increased, alongside the default offers. Moreover, we found that some retailers raised their prices by proportionally greater amounts, compared to underlying costs and relevant default offers, in 2023-24.¹⁶ More recently, the ACCC's December 2025 report observed that retailers generally increased their prices in line with the default offers in 2025.¹⁷

These observations highlight how the current retail provision does not apply in a range of market conditions and may benefit from the proposed amendments. However, we note the evolving state of competition in the retail market and reforms to regulatory frameworks may help deliver similar objectives to an amended retail provision, including more cost-reflective pricing for customers, without intervening as deeply in retailers' operations.

Improving competitive conditions are delivering positive customer outcomes

As reported in the ACCC's December 2025 electricity inquiry report, competitive conditions in the retail market have improved over time and continue to do so.¹⁸ This likely reflects the impact of more favourable wholesale market conditions and several regulatory interventions aimed at increasing access to cost-reflective prices for customers engaged in the market.¹⁹

Across all regions, indicators of market concentration have fallen significantly since the ACCC's 2018 Retail Electricity Pricing Inquiry report. While there continues to be 3 dominant retailers (AGL, EnergyAustralia and Origin), their combined residential market share declined across all regions in 2025, and we have seen an increase in the number of active retailers.²⁰

Measures of customer engagement have also incrementally improved. The proportion of customers on new plans (that are less than 1 year old) increased from 29% to 42% in 2025, suggesting that more customers are switching offers. This is despite the annual rate of customer transfers between retailers remaining steady at around 20%.²¹ One contributing factor to this result may be the increased maturity of the Better Bills Guideline, which requires retailers to include messages on customer bills informing customers whether the retailer has a better offer available.

These improvements in competitive conditions are delivering positive outcomes for customers engaged in the market. The ACCC's July 2025 inquiry report found that, at the median, customers on market offers were paying less than those on standing offers in the third quarter of 2024.²² We note that standing offer prices are capped at the relevant default offer, which are set to be a reasonable price for electricity.²³

Despite this, the ACCC considers that there are further opportunities to improve competition and outcomes for customers who do not, or cannot, regularly switch electricity plans. As our

¹⁶ ACCC, Submission to the Review of the effectiveness of the PEMM Act 2019 (Cth) – Consultation Paper, 31 January 2025, p.8.

¹⁷ ACCC, Inquiry into the National Electricity Market: December 2025 report, Australian Government, 22 December 2025, pp.21-22.

¹⁸ Ibid., p.2.

¹⁹ Wholesale market prices have notably improved since the market events of 2022, which saw the Australian Energy Market Operator suspend the market in all NEM regions after extreme spot price outcomes. ACCC, Inquiry into the National Electricity Market: Addendum to the May 2022 report, June 2022, p2-8.

²⁰ ACCC, Inquiry into the National Electricity Market: December 2025 report, Australian Government, 22 December 2025, pp.10-12.

²¹ Ibid., pp.38-39.

²² ACCC, Inquiry into the National Electricity Market: July 2025 report, Australian Government, 1 August 2025, p.41.

²³ The default market offer sets a benchmark price for electricity that includes efficient supply costs, customer acquisition and retention costs, and a competition allowance. This contrasts with Victorian Default Offer which sets a reasonable price based predominantly on the efficient costs of supplying retail electricity.

December 2025 electricity inquiry report found, across the National Electricity Market, most customers do not switch regularly, with 58% (3,975,000) of customers on plans that are more than 1 year old. We also observed that most loyal customers continue to pay more than others and many remain on offers priced above the default offers.²⁴

Current policy reforms may help to improve consumer outcomes

In the retail electricity market, several regulatory mechanisms have been introduced to support access to cost-reflective prices, in addition to the retail provision. These include the default offers, which ensure customers who are either unable or unwilling to engage in the market are protected from paying an unreasonable price for electricity and enable engaged customers to effectively compare market offers.

The default offers were first introduced to address concerns about standard retail contract prices. These concerns were highlighted in the ACCC's 2018 Retail Electricity Pricing Inquiry report, which found that standing offer contracts were being set as a high-priced benchmark from which retailers' market offer prices were derived. In this report, we recommended the creation of a default market offer (set at the efficient cost of operating) to enhance customers' experiences and outcomes.²⁵ We note that an independent review of the Victorian electricity and gas markets conducted in 2017 similarly recommended the introduction of a default offer.²⁶

The default offers complement the retail provision. The retail provision seeks to affect the price of electricity for customers on market offers by requiring retailers to pass through reductions in underlying costs. The default offers, in contrast, seek to provide price protections to customers on standing offers and act as a benchmark price for customers to compare market offers when they actively engage in the market.

However, up until recently the importance of the default offers in providing price protections to customers has been diminishing relative to the retail provision. Across most National Electricity Market regions, the number of customers on standing offers has been steadily declining since the introduction of the default offers in 2019. As of September 2024, approximately 9% of residential customers and 18% of small business customers were on standing offers.²⁷

Recent changes to regulatory frameworks will expand the application of default offer price protections. Reforms to the Default Market Offer (DMO) framework will extend its application to all small customers on standing offers from 1 July 2026.²⁸ Meanwhile, changes to the National Electricity Retail Rules (NERR) and the Victorian Energy Retail Code of Practice will increasingly see the default offers used as a reasonable price cap for particular groups of market offer customers.²⁹

²⁴ ACCC, Inquiry into the National Electricity Market: December 2025 report, Australian Government, 22 December 2025, pp.26-33, 40-41.

²⁵ ACCC, Retail Electricity Pricing Inquiry – Final Report June 2018, ACCC, Australian Government, 1 June 2018, pp.249-252.

²⁶ Thwaites, T, Faulkner, P, and Mulder, T, Independent review into the electricity & gas retail markets in Victoria, August 2017, p. xi.

²⁷ ACCC, Inquiry into the National Electricity Market: July 2025 report, Australian Government, 1 August 2025, pp.40-41.

²⁸ DMO protections will be extended to small customers in embedded networks, business customers on time-of-use tariffs and standing offer customers with demand tariffs, where protections currently apply to all other small customers.

DCCEE, Review Outcomes – 2025 reforms to the Default Market Offer (Cth), November 2025, p.8-9.

²⁹ Changes to the NERR will require retailers to charge customers whose benefits expire or change before their contract expires no more than the standing offer from 1 July 2026. Similarly, changes to the ERCoP will require Victorian retailers to charge customers who are on the same contract for 4 or more years no more than the VDO from 1 July 2026. Although we note the ERCoP currently requires Victorian retailers to roll customers onto standing offers at the end of a fixed-term contract where they do not give explicit informed consent to be moved onto a different offer.

These regulatory changes will provide more customers with access to more cost-reflective prices, reducing price dispersion and in some cases the loyalty penalty. For example, changes to the Victorian Energy Retail Code of Practice that require retailers to charge customers who have been on the same contract for 4 or more years no more than the Victorian Default Offer (VDO) will put more loyal or disengaged customers on a reasonable price that has a reduced loyalty penalty.³⁰ This could affect a material number of customers as we have found that, across the National Electricity Market, around 24% of customers are on flat rate plans without demand charges that are at least 3 years old as at August 2025.³¹

These changes will also support customer engagement, increasing competitive conditions. We observed in the ACCC's August 2019 electricity inquiry report that the introduction of the default offers saw the number of flat rate market offers priced higher than the default market offer fall in July 2019, with the 3 dominant retailers showing the most notable price reductions.³² The expansion of the default offers to more offer types could therefore similarly encourage more competitive retailer pricing behaviour due to increased customer awareness of where market offers are not providing value relative to the benchmark price.

Notwithstanding these changes, the ACCC considers there may be need for additional regulatory change to improve customer outcomes. As the Consultation Paper highlights, there are many types of customers who would not receive price protections even with recent regulatory changes, which include loyal or disengaged customers outside of Victoria.³³ The ACCC has expressed particular concern about the pricing outcomes of loyal and disengaged customers in past inquiry reports.

Ongoing work by the AEMC (specifically its pricing review) could help provide protections for loyal and disengaged customers. The AEMC's pricing review draft report recommends that retailers should be required to charge all customers on the same plan the same price which, if both adopted and appropriately implemented by government, may further diminish penalties for customer loyalty.³⁴

Any amendments to the retail provision should holistically consider impacts from recent policy reforms and improving competitive conditions

As was highlighted in the ACCC's submission to the First Consultation Paper, the ACCC considers that the current retail provision acts as a constraint on retailer behaviour. We have observed in our compliance monitoring that, where costs are decreasing, retailers tend to broadly change their market offer prices in line with these declines.³⁵

Although, as we noted earlier, the provision is currently not designed to constrain retailer behaviour under all market conditions. Specifically, it does not act as a constraint where retailers experience increases in underlying costs or decreases that are not both 'sustained' and 'substantial'.

³⁰ Exceptions are allowed where an added benefit could justify a price seemingly higher than the VDO (for example Virtual Power Plants or solar and battery bundled plans).

Essential Services Commission, Energy Consumer Reforms: Final Decision, 30 September 2025, pp.37-39.

³¹ ACCC, Inquiry into the National Electricity Market: December 2025 report, Australian Government, 22 December 2025, pp.32-33.

³² ACCC, Inquiry into the National Electricity Market: August 2019 report, Australian Government, 16 September 2019, pp.5-11.

³³ DCCEE, Strengthening the Prohibiting Energy Market Misconduct provisions in the Competition and Consumer Act 2010 – Consultation Paper, 5 December 2025, p.30.

³⁴ AEMC, The pricing review - Electricity pricing for a consumer-driven future – Draft report. 11 December 2025. p.vi, 28-29.

³⁵ ACCC, Submission to the Review of the effectiveness of the PEMM Act 2019 (Cth) – Consultation Paper, 31 January 2025, p.1.

To expand the applicability of the retail provision, and protect consumers from excessive price increases, we understand that government is considering several possible amendments, which include:

- making the provision symmetric (to capture retailer cost increases as well as decreases),
- creating a new general requirement for ‘reasonable’ pricing, or
- requiring the pre-approval of price increases above a set threshold.³⁶

The proposed amendments would be a significant intervention in retail markets, increasing the degree of price regulation in the sector. The ACCC supports a holistic consideration of the proposed amendments in view of current and proposed regulatory reform and improving competitive conditions from previous regulatory reform. These reforms may help government deliver its dual policy objectives of more cost-reflective pricing and streamlined regulation.³⁷

The ACCC considers that the proposed amendments to the retail provision may also provide overlapping consumer protections with the default offers. As we highlighted previously, the expansion of the default offer price protections could see more customers on market offers with access to cost-reflective prices similar to what would occur under an amended provision. Although, the full impact of these regulatory changes on both competition and consumer outcomes will not be known until after their respective introductions (most of which occur after 1 July 2026).

Government may therefore wish to move with caution as it considers what would be quite significant amendments to the retail provision. Although the ACCC submits that, it is a decision for government as to how the provision should be amended to apply in the retail electricity market in view of any potential regulatory overlaps.

The ACCC also submits that immediate concerns about excessive prices must be carefully weighed against consideration of long run competitive dynamism. While the ACCC considers concerns about customer pricing to be valid, stronger regulation of the retail electricity market (through increased price regulation) could interfere with the competitive process.

Stronger price regulation may risk effectively prescribing a business model for retailers that discourages innovation and dynamism.³⁸ This is more likely where regulation places an expectation on retailers to set or change their prices according to either historical costs or expected costs, or some combination of these factors. It may deter retailers from supplying innovative energy services, limiting the variety of products available to the market.

Subsequently, this type of regulation may hold particular risks for retailers in emerging market segments (such as those for electric vehicles or virtual power plants), where there may be uncertainties around how a regulator applies the provision to new services. However, these risks should be balanced against the need for consumers to have access to energy as an essential service at an affordable price.

Amendments may ensure the continued effective operation of the current retail provision

Leaving the form of the future retail provision aside, the ACCC supports government consideration of amendments to enable the effective operation of the provision. Specifically,

³⁶ DCCEEW, Strengthening the Prohibiting Energy Market Misconduct provisions in the Competition and Consumer Act 2010 – Consultation Paper, 5 December 2025, p.31-41.

³⁷ The Hon Dr Jim Chalmers MP, Treasurer. Press conference, Canberra: Economic Reform Roundtable, tax, productivity, road user charge, 21 August 2025.

³⁸ ACCC, Submission to the Review of the effectiveness of the PEMM Act 2019 (Cth) – Consultation Paper, 31 January 2025, p.9.

we support consideration of amendments that would require retailers to produce evidence that their price adjustments are reasonable where the provision is enlivened.

The ACCC considers that such requirements would be beneficial in view of our compliance experiences, which have found establishing what is a 'reasonable adjustment' under the provision is a complex task that presents as a significant barrier to progressing matters.³⁹

³⁹ ACCC, Submission to the Review of the effectiveness of the PEMM Act 2019 (Cth) – Consultation Paper, 31 January 2025, pp.8-9.

3. Cross-market manipulation and the financial contract liquidity provision

The Consultation Paper seeks stakeholder views on whether:

- a cross-market manipulation provision is necessary, and if so, how it could be implemented,
- whether the existing electricity financial contract liquidity provision could be amended to better achieve the policy objective, including through the removal of the substantial lessening of competition test.

Market manipulation provisions complement economy-wide laws aimed at protecting competition

Market manipulation provisions complement, rather than overlap or duplicate, existing economy-wide competition laws. While both types of provisions share the goal of ensuring markets are governed by the competitive forces of well-informed buyers and sellers, they target different types of conduct.

Anti-competitive conduct is concerned with the competitive process. Business behaviour interferes with or damages the competitive process in a meaningful way where it limits, deters, hinders or prevents firms from engaging in competitive conduct in a market. This can impact on market efficiency and outcomes, particularly where it involves the expansion, entrenchment, or extension of market power and leads to higher prices and profits, and or lower quality products.

In contrast, market manipulation is conduct that is focused on outcomes, usually prices, that a corporation artificially brings about to mislead participants as to the strength of underlying market forces in order to gain an unfair advantage or profit.⁴⁰ Cross-market manipulation, by extension, is then conduct where an entity manipulates one market with the intent of artificially impacting outcomes in related or interlinked markets. Both types of manipulation can cause significant damage to market integrity and confidence as they distort outcomes and harm counterparties and consumers.

Market manipulation may also result in anti-competitive outcomes. For example, a generator or gentailer (a participant in both the generation and retail markets) artificially distorting prices may lessen competition in a market where such conduct deters or forces out competitors. However, it is not always the case that conduct which distorts market outcomes will undermine the long run competitive process.

The distinctions between anti-competitive conduct and market manipulation mean that each should be addressed by a specialised regulatory mechanism. The anti-competitive provisions of the Competition and Consumer Act are intended to protect the competitive process in a market rather than individual competitors, while the market manipulation provisions contained in the *Corporations Act 2001* are directed at specific instances of market distortion by prohibiting transactions which have, or are likely to have, the effect of creating or maintaining an 'artificial price' for trading in various financial products, including shares and futures.⁴¹ Section 101JG of the *Water Act 2007* contains a similar market manipulation prohibition for eligible tradeable water rights.⁴²

⁴⁰ Both the *Corporations Act 2001* and *Water Act 2007* defines market manipulation as conduct which has, or is likely to have, the effect of creating or maintaining an 'artificial price' for trading in various financial products (including shares and futures) and eligible tradeable water rights respectively.

⁴¹ Section 1041A of the *Corporations Act 2001*.

⁴² Section 101JG is scheduled to take effect on 1 June 2026.

The ACCC considers concerns about potential cross-market manipulation in the Australian energy markets are valid. This was reflected in our submission to the First Consultation Paper where the ACCC suggested government consider whether bidding conduct in the spot market, with a purpose to influence price outcomes in the contracts market, should be more explicitly addressed by the PEMM provisions.⁴³

The financial contract liquidity provision overlaps with the economy-wide restrictive trade practices provisions in the Competition and Consumer Act

The ACCC considers that there are overlaps between the financial contract liquidity provision and specific anti-competitive conduct provisions in Division 2 of Part IV of the Competition and Consumer Act. In particular, both provisions prohibit conduct that has the purpose of substantially lessening competition.

The overlap between these provisions reflects the motivation for introducing the financial contract liquidity provision. The availability of financial contracts from generators or gentailers is necessary for retailers to manage the risk of price volatility in the electricity wholesale markets.⁴⁴ Without access to these financial contracts on competitive terms, retailers face increased costs which can ultimately lead to less competitive price offerings compared to those that can effectively manage price volatility risk.

The financial contract liquidity provision was therefore introduced to limit the potential for gentailers (participants in both generation and retail markets) in particular to use their position to harm their competitors in retail markets by withholding or offering on unreasonable terms financial contracts required by retailers to manage risk.⁴⁵

However, there are also differences between the financial contract liquidity provision and specific anti-competitive conduct provisions in Division 2 of Part IV of the Competition and Consumer Act:

- the financial contract liquidity provision only prohibits conduct that has the purpose of substantially lessening competition, while Division 2 of Part IV also prohibits conduct that has the effect or likely effect of substantially lessening competition.
- the financial contract liquidity provision does not require establishing a corporation has a substantial degree of market power which is required under section 46 of the Competition and Consumer Act.
- A remedy for prohibited conduct under the financial contract liquidity provision is that the Treasurer can issue a contracting order, upon recommendation by the ACCC, requiring a corporation to make offers to enter into electricity financial contracts with particular kinds of third-party entities. There is no equivalent remedy available for a contravention of Part IV.

⁴³ ACCC, Submission to the Review of the effectiveness of the PEMM Act 2019 (Cth) – Consultation Paper, 31 January 2025, p.15.

⁴⁴ As explained in the Revised Explanatory Memorandum: 2.49 *For an electricity retailer to be able to compete in the retail market, they need to be able to effectively manage the risk of price volatility in the wholesale market. The availability of financial contracts with counterparties is critical to managing that risk. Those counterparties will usually be electricity generators or those that can enter into financial contracts with such generators*

The Parliament of the Commonwealth of Australia – Senate, Treasury Laws Amendment (Prohibiting Energy Market Misconduct Bill) 2019, *Revised Explanatory Memorandum*, p. 21.

⁴⁵ As explained in the Revised Explanatory Memorandum: 2.51 *A gentailer may be well-placed to ensure that its price risk is adequately managed. However, a retailer that does not have a generation arm relies on a liquid financial contract market for the availability of hedging arrangements. A gentailer could potentially use its position to restrict the availability of electricity financial contracts for the purpose of substantially lessening competition*

The Parliament of the Commonwealth of Australia – Senate, Treasury Laws Amendment (Prohibiting Energy Market Misconduct Bill) 2019, *Revised Explanatory Memorandum*, p. 21.

As the ACCC currently administers both the PEMM Provisions and the provisions in Division 2 of Part IV of the Competition and Consumer Act, it can manage the overlap between them by determining, in light of their differences, which provision is better suited to addressing the conduct in question.

The financial contract liquidity provision in its current form should be amended to ensure it complements existing competition law

Given the overlap identified above, if government shifts the enforcement and compliance monitoring functions of the financial contract liquidity provision to the AER, the ACCC considers that the provision should also be amended to replace the substantial lessening of competition test with a more targeted tool.

Transferring responsibility for the financial contract liquidity provision in an unamended form to the AER would result in two different regulatory authorities having responsibility for applying the substantial lessening of competition test and, in some instances, within the same market. This risks divergent application of the test. The potential for the substantial lessening of competition test to be applied differently by different agencies may create regulatory uncertainty and legal risk for businesses across the Australian economy.

The ACCC considers that maintaining a consistent approach to the application of the substantial lessening of competition test by a single regulator provides for the effective administration of the overall competition law framework.

An amended financial contract liquidity provision could better address the conduct that was the rationale for its introduction

As mentioned previously, the financial contract liquidity provision was introduced in recognition that gentailers could harm or hinder smaller retailers from providing competitive services in the retail electricity market. The ACCC considers the retention of a similar but more targeted provision in any transfer of the PEMM Provisions to the AER would retain and strengthen an important deterrent to this type of conduct, and signal that it is harmful to the competitiveness of electricity markets and to consumers. This is particularly important with the growth of new energy services and the growth of smaller retailers offering these innovative services.

The ACCC considers there are a range of potential alternative approaches the government could consider in amending the financial contract liquidity provision that may enhance the effectiveness of the provision to address conduct that was the rationale for its introduction. These alternatives range from minor amendments that still consider whether the conduct's purpose was to hinder competition or a competitor, to significant amendments that transform the approach to regulating the conduct. For example:

- In the United States, tests such as the 'no economic sense' and 'profit sacrifice test' and 'less efficient competitor' tests explore whether a business's particular conduct only makes sense because it would eliminate or lessen competition, rather than because it is economically efficient.⁴⁶
- The European Union considers a dominant firm's refusal to supply an input is liable to eliminate effective competition in a downstream market if the refusal relates to an input that is objectively necessary to be able to compete effectively on a downstream market.⁴⁷

⁴⁶ The ACCC notes none of these tests have been officially adopted by the US Supreme Court.

⁴⁷ European Commission, *Communication from the Commission – Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings*, 24 February 2009, paras 75-90.

- Focussing the provision on whether a business's contracting behaviour limits, deters, hinders or prevents a specific competitor or a specific group of competitors from effectively competing in the market. The pre-Harper section 46 of the Competition and Consumer Act included "eliminating or substantially damaging a competitor" and "detering or preventing a person from engaging in competitive conduct" as proscribed purposes. This contrasts with the substantial lessening of competition focus of the present section 46. An amended financial contract liquidity provision could potentially draw from those historical proscribed purposes, without the accompanying requirement for the firm in question to possess 'substantial power in a market' or to 'take advantage' of that power, two challenging elements of the former test. The omission of those elements could be justified on the policy grounds that a total or partial withholding of financial contracts by a generator or gentailer for the purpose of hindering a competitor will often significantly harm consumers of an essential service, even if the withholding is not undertaken by a firm with substantial market power or the harm is not sufficiently large or durable to constitute a 'substantial lessening of competition'.
- Referencing the factors the AER must have regard to in assessing whether there is effective competition within a monitored market.⁴⁸ These factors include whether there are active competitors in the market and whether those competitors hold a reasonably sustainable position in the market or whether there is independent rivalry in all dimensions of the price, product or service offered in the market.
- Considering whether a corporation has acted 'fraudulently, dishonestly or in bad faith' as provided in the electricity spot market provision. An amendment of this form could be included in any addition of a cross-market manipulation provision as currently being considered by government.
- Creating a positive obligation on generators to make available financial contracts on reasonable terms to retailers, unless for genuine commercial reasons. This approach could require generators and gentailers to produce evidence of the genuine commercial reasons to the relevant regulator.

The alternate approach may also need to specify the types of contracting behaviour proscribed under an amended financial contract liquidity provision. This could help it avoid capturing contracting behaviour that reflects genuine and legitimate risk management. The ACCC acknowledges that any alternative approach may still require the AER to assess the conduct's purpose in relation to competition or a competitor. The ACCC considers the aim of amending the provision is to minimise any such overlap to the extent possible.

The ACCC also acknowledges amending the financial contract liquidity provision requires further consideration beyond this round of consultation to develop an effective alternative approach. The AER's views will be particularly important to ensure it is consistent with the AER's current roles and responsibilities.

Given the potential overlap between an amended financial contract liquidity provision and Division 2, Part IV of the Competition and Consumer Act, it is important to review whether existing referral processes and information-gathering powers allow both the ACCC and AER to efficiently and effectively carry out their functions under their respective legislative frameworks.

Any amendments to the financial contract liquidity provision should consider future market design principles.

The ACCC suggests that developments in the National Electricity Market could necessitate further amendments to the financial contract liquidity provision.

⁴⁸ Section 18B of the *National Electricity (South Australia) Act 1996*.

For example, the Nelson Review recommended the introduction of the Energy Services Entry Mechanism. The Energy Services Entry Mechanism is designed to address the 'tenor gap' – the mismatch between multi-decadal timeframes for investment and the shorter contracting tenors used by retailers and commercial and industrial users for managing risk. If adopted, the Energy Services Entry Mechanism is intended to improve market liquidity by creating an alternative source of contracts for non-vertically integrated retailers. This was one of the underlying issues that the financial contract liquidity provision sought to address when it was introduced.⁴⁹

⁴⁹ If adopted, the ESEM will address the 'tenor gap' by providing long-term contracting for new projects via standardised and fungible financial derivative contracts. These contracts would be progressively sold back into the forward derivatives market so that at the relevant period in the future, retailers and commercial and industrial users will be able to manage the risks of operating in the spot market by procuring derivative contracts. The ESEM would effectively be a 'warehouse' for these contracts until the market requires them.