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Department of Climate Change, Energy, the Environment and Water

Via email: PEMMreview@dcceew.gov.au

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

Alinta Energy welcomes the opportunity to provide feedback on the consultation paper, *Strengthening the Prohibiting Energy Market Misconduct provisions in the Competition and Consumer Act 2010*.

Key points:

- **We support DCCEEW's proposals to governance arrangements for energy regulation.**
- **We do not support the proposal to make the retail market provision of the PEMM Act symmetrical.**
- **We do not support further prohibitions on conduct in the spot market, ancillary markets and contract markets.**
- **If the cross-market provisions are progressed, they should be appropriately targeted and include dual purpose and effects tests.**

We support DCCEEW's proposals to governance arrangements for energy regulation

We support DCCEEW's proposal to streamline governance between ACCC and AER by removing overlapping responsibilities and reducing duplicated data requests. Multiple regulators with duplicate information and reporting requirements imposes unnecessary compliance costs and administrative burden on market participants without delivering commensurate regulatory benefit.

To strengthen the governance framework, we recommend:

- **Assigning the AER clear responsibility for energy-specific physical market regulation and market monitoring.**

This would allow the ACCC to focus on economy-wide competition policy and enforcement avoiding fragmentation of energy-specific functions.

- **Transferring the ACCC's electricity market monitoring functions (including any ongoing inquiries) to the AER.**

Consolidating technical market oversight with the AER will reduce duplication, improve analytical consistency, and ensure that monitoring is performed by the regulator with the deepest operational and system-level expertise.

- **Where the ACCC continues to need electricity-specific data, it should source that data from the AER rather than collecting it directly.**

A single data collection channel will reduce administrative burden, minimise compliance costs, streamline reporting and improve the quality and consistency of datasets used by government.

Implementing these changes will materially reduce regulatory burden, improve the efficiency of data collection and analysis, and ensure technical market oversight sits with the regulator best placed to interpret operational and market data.

We do not support the proposal to make the retail market provision of the PEMM Act symmetrical.

Extending the PEMM obligation to apply to price increases as well as price decreases represents an unwarranted expansion of the existing framework. A symmetrical application materially expands its reach without clear evidence of a corresponding market problem, with increased regulatory risk affecting competitive pricing behaviour and the costs ultimately faced by consumers.

Price increases in retail electricity markets are already subject to strong competitive and behavioural constraints. Customers actively compare offers, switching is costless and straightforward, and price rises attract close public and political scrutiny. As a result, retailers face immediate commercial consequences if prices are increased prematurely or out of step with the market. There is little evidence of a systemic failure that would justify additional intervention focused on price increases.

Retail prices reflect a portfolio of costs incurred over time, including wholesale hedging, environmental schemes, network charges and operating costs, which do not move in a smooth or synchronised manner. Applying PEMM to price increases would make it more difficult for retailers to respond efficiently when sustained cost pressures emerge, particularly where those pressures arise unevenly or with a lag. Over time, this could distort pricing behaviour by encouraging deferral or artificial smoothing of increases rather than timely alignment with underlying costs.

Applying the framework to price increases would also blur the distinction between competition enforcement and price oversight. It would create implicit expectations around the timing and scale of price adjustments and increase the extent to which pricing decisions are shaped by regulatory interpretation rather than competitive dynamics. This would represent a substantive change in how the regime operates in practice.

Taken together, existing mechanisms already provide a comprehensive framework for oversight of retail pricing outcomes, including transparency measures, comparison tools, reputational accountability and the application of general competition and consumer law. In that context, extending PEMM to price increases would layer an additional intervention over an area of the market that is already subject to multiple forms of scrutiny and enforcement.

Overall, applying PEMM to price increases would expand the framework in the absence of evidence of a systemic problem in the setting of retail price rises. Over time, the additional regulatory risk this introduces would have implications for pricing outcomes and the costs faced by consumers

We do not support further prohibitions on conduct in the spot market, ancillary markets and contract markets

We recommend that the provisions prohibiting conduct in the spot, ancillary and contract markets targeting cross-market manipulation impacts are not progressed (Design Option 1) for the following reasons:

1. No demonstrated market failure

The consultation paper does not establish that cross-market manipulation is occurring at scale or that current frameworks are inadequate, nor provide specific examples of the behaviour to be targeted, leaving a vague and broad scope. This results in a broad, ambiguous scope that risks capturing conduct that is not harmful.

Manipulating contract markets to move spot prices appears particularly unlikely as it would require positions and coordination at a scale that is inconsistent with prudent risk limits and corporate governance. Regulatory intervention, especially where there is such a broad scope of potential impact should follow evidence of harm or risk not speculation. It should also focus on the specific behaviour identified as creating such harm or risk rather than establishing blanket prohibitions over broad categories of conduct.

Notably, of the risks raised in the consultation paper, the NEM Review only flagged the potential consequences of algorithmic bidding and recommended further work to establish risk before any regulatory response. It also recognised the important role autobidders can play and the caution required not to disrupt their efficient use.

2. Potential to create excessive compliance risk that restricts legitimate decision making and undermines market efficiency.

Electricity, secondary and ancillary markets are complex, increasingly dynamic and decisions are often made under significant uncertainty and often within short timeframes. Efficient market outcomes depend on participants being able to react quickly to new information, changing circumstances and operational constraints.

Broad cross market prohibitions could capture legitimate commercial and operational decisions like hedging, portfolio rebalancing, outage scheduling and rebidding that were reasonable at the time they are made but correlate with subsequent price movements. In this context, participants would need to be extremely cautious to mitigate their excessive compliance exposure.

For example, participants would likely delay time-sensitive operational choices to mitigate to seek approvals or compile a body of evidence for their activity, disrupting market efficiency, raise operational costs which will ultimately be borne by consumers.

This chilling effect would be particularly pronounced if the regime relies on an effects-only test given the range of legitimate decisions that can correlate with price impacts and the inherent difficulty of disentangling causation from normal market dynamics.

If the cross-market provisions are progressed, they should be appropriately targeted and include dual purpose and effects tests

Noting the risk of a chilling effect outlined above, the broad scope that can be inferred from the consultation paper, and lack of evidence of specific manipulation risks; we reiterate the importance of any cross-market prohibitions being narrowly targeted and based on analysis

to avoid undermining market efficiency and increasing costs.

To ensure proportionality and workability:

- Provisions must be precisely targeted at conduct demonstrated to create harm, rather than casting a wide net over ordinary commercial and operational behaviour.
- Compliance obligations must not be so onerous that they delay time-critical decisions, many of which are essential to efficient market functioning and system reliability.

Equally important is the inclusion of clear and explicit safe harbours for routine, low risk and necessary activities such as:

- Outage scheduling and plant maintenance;
- Legitimate hedging and portfolio rebalancing;
- Rebids based on new and/or updated information; and
- Any other operational decisions made in good-faith under uncertainty.

Clear safe harbours will provide certainty and reduce the potential for over-compliance, enabling participants to continue making fast, efficient decisions without fear of inadvertent breaches.

Ultimately it should be as clear as possible to Market Participants what conduct is and is not prohibited.

Finally, any cross-market prohibition should incorporate both a purpose test and an effects test. As mentioned, numerous necessary and legitimate behaviours can be perceived as correlating with price effects but are not undertaken with manipulative intent. Without a purpose test (and the clarity outlined above), these behaviours could be captured and participants would be exposed to excessive compliance risk. A dual test would ensure the regime targets genuinely harmful behaviour, not efficient commercial activity that supports market reliability and consumer outcomes.