30 January 2026

Department of Climate Change, Energy, The Environment and Water

Submitted online

EnergyAustralia Pty Ltd
ABN 99 086 014 968

Level 19
Two Melbourne Quarter
697 Collins Street
Docklands Victoria 3008

Phone +61 3 9060 0000
Facsimile +61 3 9060 0006

enq@energyaustralia.com.au
energyaustralia.com.au

DCCEEW – Review of the PEMM Act

EnergyAustralia is one of Australia's largest energy companies with around 2.2 million electricity and gas accounts across eastern Australia. We also own, operate and contract a diversified energy generation portfolio across Australia, including coal, gas, battery storage, demand response, wind and solar assets, with control of over 5,000MW of generation capacity.

We appreciate the opportunity to provide feedback on the Department of Climate Change, Energy, the Environment and Water's (**DCCEEW**) review of the *Prohibiting Energy Market Misconduct Act 2019* (**PEMM Act**). EnergyAustralia welcomes DCCEEW's recognition of the need to improve regulatory efficiency and minimise duplication between regulators, and we support efforts to streamline oversight of electricity specific -matters.[1]

Our focus is on helping keep energy costs as low and as predictable as possible for customers by reducing avoidable cost in the system. As the transition places upward pressure on underlying costs, protecting consumers in a way that allows them to continue to benefit from effective retail competition is particularly important as the energy system evolves. In this context, streamlined and well-coordinated regulation plays an important role in supporting stable and sustainable pricing outcomes. One of the most direct ways to achieve this is to remove duplication and improve regulatory efficiency, so retailers' compliance and reporting costs do not grow unnecessarily and flow through to customers. This is the lens through which we consider the proposed changes to the PEMM framework.

In considering any refinements flowing from this review, it will be important that obligations are clearly scoped and proportionate, with evidentiary expectations resting with the regulator and supported by clear guidance to avoid unnecessary compliance burden.

When the PEMM Act was introduced in 2019, the AER did not have access to the depth and breadth of market information that it has today. The PEMM Act enabled the ACCC special powers to investigate areas such as wholesale contracting, hedging risk -management, and retail pricing. The AER has since received expanded wholesale market monitoring powers and gathers detailed information on these areas, including – wholesale contract positions, hedging risk strategies and wholesale costs.[2] Further, the AER has also gained enhanced retailer

---

[1] DCCEEW states '*the department is seeking to improve regulatory efficiency and minimise duplication between agencies in relation to electricity specific matters',* Consultation Paper, 17.

[2] Australian Energy Regulator, Enhanced wholesale market monitoring guideline (2024), 5 November 2024

information, now reporting on more frequent and granular data such as customer outcomes, hardship, billing, complaints, disconnections, and other retailer performance indicators.[3]

Taking these developments together - rather than expanding the PEMM provisions as proposed in the DCCEEW consultation paper, we consider that a more effective and proportionate approach would be to build on the AER's monitoring and enforcement function. This review presents a timely opportunity to reduce regulatory complexity that increases retailer costs, which is ultimately borne by customers. Accordingly, we support:

- **reducing duplication by consolidating monitoring responsibilities to the AER**. There is duplication of monitoring and reporting obligations across the NEM. We do not support "transferring" the ACCC NEM inquiry to the AER, rather - the NEM inquiry should conclude as scheduled and the AER can continue monitoring the market through its general monitoring, reporting and enforcement function. This is appropriate timing given the AER's new expanded wholesale market monitoring, and enhanced retailer performance reporting.
- **retaining clear and stable governance framework for the enforcement of the PEMM Act and the Electricity Retail Code.** The ACCC already has well established expertise in the interpretation and enforcement of competition and consumer law under the provisions of both the PEMM Act and the Electricity Retail Code, which fall under the Competition and Consumer Act (**CCA**). Transferring enforcement responsibilities to the AER would require extensive legislative changes and transitional arrangements, introducing risk and cost at a time when the sector is already managing a large volume of regulatory reform. Retaining existing frameworks avoids unnecessary disruption and cost, preserves settled regulatory understanding, and supports regulatory stability. The benefit of possible consolidation of responsibilities to the AER would unlikely outweigh the costs, risks and uncertainty needed to achieve a net benefit to customers.
- **leveraging the AER-led monitoring and enforcement framework rather than expanding the PEMM Act.** Expansion of the PEMM Act risks duplicating existing oversight without improving customer outcomes. The AER is now well-placed to monitor the energy market with expanded wholesale market monitoring powers and greater retail performance metrics and reporting. In this context, we consider that empowering the AER to continue targeted monitoring of the wholesale market, retailer behaviour and customer price outcomes —supported by its enhanced data reporting—is likely to deliver more meaningful and efficient consumer protections than introducing additional obligations under the PEMM Act.

Importantly, recent reforms introduced by the AEMC—particularly those addressing the concern around the "loyalty penalty" and legacy contract issues—go directly to the consumer protection concerns identified in the consultation paper. As these reforms are introduced and mature, they are expected to improve outcomes for disengaged and vulnerable customers through fairer price movements, enhanced assistance measures and clearer information.

Our full response to the key themes in the consultation paper is set out in the **Attachment**.

[3] Australian Energy Regulator, *2024 review of the retail performance reporting procedures and guidelines*, 28 August 2024.

1. The ACCC NEM Inquiry

The ACCC's NEM Inquiry was established in 2019 (**NEM Inquiry**), at a time when regulators and policy makers did not have direct visibility over wholesale contracting, retailer hedging approaches, or the relationship between wholesale costs and retail prices. The NEM Inquiry has increased transparency, particularly during a period of heightened volatility and limited market data.

Since then, the regulatory landscape has changed significantly. The AER has received expanded wholesale market monitoring powers, giving the AER detailed visibility over key aspects of the NEM, including:

- contract positions and over-the-counter arrangements
- hedging strategies and risk management approaches
- wholesale cost drivers
- operational behaviour.[4]

In addition, the AER now has strengthened retailer performance reporting obligations and receives more granular and frequent retailer performance data, including on:

- customer outcome indicators (hardship, payment difficulty, disconnections)
- debt and billing
- complaints information
- customer switching.[5]

Collectively, this represents a broader and more integrated monitoring and reporting framework than existed when the NEM Inquiry commenced. With these tools now fully operational, the transparency and market insights once provided uniquely through the NEM Inquiry are now broadly available through the AER's enhanced monitoring functions.

For these reasons, **we consider it appropriate for the NEM Inquiry to conclude as scheduled, with the AER continuing to monitor the NEM through its general monitoring, reporting and enforcement functions**. A consolidated, AER led monitoring framework would provide a more coordinated and lower cost approach for both retailers and consumers, consistent with DCCEEW's objectives.

1.1 Cost stack reporting provided by the Inquiry can be continued by the AER

One of the notable contributions of the NEM Inquiry was the development of a publicly accessible electricity cost stack analysis. This helped improve understanding of how wholesale, network, environmental and retail costs contribute to customer bills.

However, we do not consider the cost-stack transparency depends on the existence of the NEM Inquiry. The AER already produces an annual cost stack as part of the DMO determination process. In doing so, the AER:

- consults with retailers and stakeholders
- models wholesale, network, environmental and retail cost components
- publishes a transparent methodology
- updates its cost stack annually
- applies its cost stack in retail market regulation.

[4] AER, *Wholesale Market Monitoring and Reporting Guideline - Version 1 - 5 November 2024(17486868.1).pdf*, 5 November 2024.
[5] AER, *(Retail Law) Performance reporting procedures and Guidelines - Version 4 - 28 August 2024 (1).pdf*, 28 August 2024.

In practice, the AER's DMO cost stack is now the primary reference point for cost in the electricity retail market. Of all the reporting undertaken by the NEM inquiry, we consider there is value in the AER continuing to report retailer cost stack into its existing monitoring reporting. The AER is well placed to report this because it already has:

- familiarity of the relevant data
- the modelling capability
- the stakeholder processes
- the statutory authority
- and an established role in retail price oversight.

1.2 A single -monitoring body delivers more clarity, efficiency and lower system cost

Concluding the ACCC NEM Inquiry and relying on the AER's broad monitoring framework creates a clear and efficient governance structure, with a single body responsible for monitoring electricity:

- wholesale and contract market
- retail performance
- customer outcomes
- retailer cost stack.

This unified monitoring reduces duplication, avoids conflicting expectations, streamlines reporting, and helps contain regulatory costs for retailers and customers.

1.3 State-based- monitoring should also be rationalised over time

EnergyAustralia also supports broader regulatory coherence by consolidating jurisdictional monitoring obligations. Several state-based reporting requirements overlap with AER national reporting and current ACCC reporting and could be streamlined to reduce cost and improve consistency. Over time, state regulators should rely more heavily on metrics already collected by the AER rather than requiring retailers to submit duplicative reporting. For example, jurisdiction-based cost stack reporting undertaken by the ACT regulator, which replicates national cost stack reporting provided to the ACCC. Streamlining would promote national alignment and reduce unnecessary cost, consistent with the government's objectives.

2. Governance of the PEMM Act

This review provides an opportunity to streamline governance of the PEMM Act, consistent with the Department's objective of improving regulatory efficiency. We consider this objective is best achieved by **maintaining a clear and stable enforcement framework**, rather than transferring enforcement responsibilities between regulators.

The PEMM Act sits within the CCA and is grounded in competition and consumer law concepts such as conduct and consumer harm. The ACCC is a mature and well-established regulator with expertise in the interpretation and administration of the PEMM Act. For example, in 2020 the ACCC published extensive guidelines on how the ACCC will interpret the provisions of the CCA introduced by the PEMM Act.[6] This provides electricity industry participants with some transparency as to how the ACCC is likely to interpret the PEMM Act, and therefore how to comply with the PEMM Act.

[6] ACCC, *Guidelines on Part XICA prohibited conduct in the energy market*, 11 May 2020.

Retaining enforcement responsibility with the ACCC supports consistency of regulatory practice and legal certainty for market participants. It also avoids unnecessary system cost to retailers and therefore customers.

Consolidation of enforcement responsibilities to the AER under a single regulator model has an intuitive appeal to improve regulatory efficiency – however, in our view - the possible benefit to the sector and customers of this does not outweigh the additional complexity, cost, legal risk and uncertainty of unintended consequences in doing so at this stage in time. This is because the PEMM Act is already very well established and the ACCC has long standing experience administering the PEMM Act. Preserving regulatory stability aligns enforcement with established competition law expertise and adds no additional system cost.

In contrast, transferring enforcement responsibilities to the AER would introduce unnecessary complexity and cost, potential transitional risk, and uncertainty around interpretation at a time when the sector is already managing substantial regulatory change.

To ensure effective oversight across agencies, we would support information sharing arrangements between the AER and the ACCC being explored, as proposed by the AER. This can help prevent regulatory gaps and avoid duplication of retailers sending the same or similar information to both regulators**.** However, we consider there should be a clear justification as to why expanded information sharing powers are required, noting the extensive powers currently available to the AER under sections 157A and 44AAF of the CCA. To ensure information is only shared to the extent necessary for the AER or ACCC to carry out its market monitoring and enforcement powers, we agree that any new power should provide retailers with transparency as to how information will be shared.

Importantly, we would expect that any information obtained or used by the AER for monitoring or reporting purposes under such arrangements would be treated in a manner consistent with established ACCC practice — including maintaining appropriate confidentiality protections, not publishing individual retailer-level data, not identifying specific market participants, and reporting publicly only on an aggregated and anonymised basis.

Under this approach:
- the ACCC retains responsibility for enforcement of the PEMM Act under the CCA;
- the AER continues NEM market monitoring, reporting and analysis; and
- enhanced coordination can still occur through structured information sharing rather than consolidation of enforcement roles.

3. Governance of the Electricity Retail code

We adopt a similar position in relation to the governance of the Electricity Retail Code. While we recognise the opportunity to reduce duplication and improve efficiency, we consider that the ACCC should retain enforcement responsibility for the Electricity Retail Code under the CCA.

The ACCC has established experience interpreting and enforcing consumer protection under the Electricity Retail Code, noting, for example, the extensive guidelines on the Electricity Retail Code first published by the ACCC in 2019.[7] Retaining enforcement with the ACCC ensures:
- consistency in the application of consumer law principles
- continuity in regulatory and enforcement practice

[7] ACCC, *Guide to the Electricity Retail Code | ACCC*, 16 June 2021.

- avoidance of legislative change solely to transfer responsibilities between regulators.

As with the PEMM Act, care should be taken to avoid unnecessary legislative change, which carries unnecessary risk and cost. Transferring enforcement of the Electricity Retail Code will likely require:

- repeal or substantial amendment of the Electricity Retail Code
- review of wider provisions related to the Electricity Retail Code to ensure no duplication of enforcement responsibility between the ACCC and AER
- re-assessment of how the AER is likely to interpret and enforce the Electricity Retail Code, whereas the ACCC has published extensive guidelines on this subject
- potential significant investment to upskill the AER's personnel, whereas the ACCC has substantial experience enforcing the Electricity Retail Code
- revision of the National Energy Retail Law (NERL) or National Energy Retail Rules (NERR), should the provisions of the Electricity Retail Code be absorbed under either of these instruments,

all of which risks adding complexity and cost without compelling evidence as to why this change in governance will benefit consumers.

Accordingly, we consider that **retaining ACCC governance of the Electricity Retail Code, preserves regulatory stability and avoids unnecessary cost for the sector and customers**.

4. Symmetrical retail provision

We strongly consider that the current PEMM retail pricing provision should be retained without expansion. In our view, **Option 1** remains the most proportionate and credible approach, particularly given the large number of reforms already underway to strengthen customer protections in retail markets from unnecessarily high prices.

In our view, further price regulation through options 2, 3 or 4 would be fundamentally inconsistent with the intent of the 'retail pricing provision' in the PEMM Act, which was to address, in the view of the Australian Government at the time, confusing discounting strategies, high benchmark prices and complex offer structures.[8] The introduction of the DMO, along with the significant policy developments referred to at pages 27-29 of the consultation paper, have been introduced with the intent to address these concerns. Options 2, 3 or 4 would be tantamount to the re-introduction of price regulation for market offers.

Concerns raised in the consultation paper that consumers on market offers – particularly those that are disengaged or have difficulty choosing the best offer for them – could remain susceptible to unreasonable price increases[9] are the subject of the upcoming package of inter-related reforms intended to materially reshape retail market settings. Once introduced, the AEMC-led consumer-focused reforms are expected to fundamentally alter how prices evolve for existing customers, particularly those who are disengaged, - for example, by:

- limiting the price a customer would pay to the standing offer when their benefit changes or expires
- removing unreasonable conditional discounts on older plans, once protected from grandfathering provisions
- restricting retailers to only one price increases every 12 months for both existing and new market contracts

8 Commonwealth, *Parliamentary Debates*, House of Representatives, Wednesday 18 September 2019, p.3353 (Frydenberg, Josh MP).
9 DCCEEW, Consultation Paper, pp25 and 26.

- strengthening requirements to inform customers when prices change and how they will be affected.

We expect that as these reforms are implemented from July 2026, and have had time to take effect, they will materially reduce the risk of customers paying higher prices due to disengagement.

Furthermore, we also consider that concerns raised in the consultation paper on vulnerable customers, such as hardship customers - will be further protected given:

- the consumer-focussed package will prohibit retailers from charging fees to customers experiencing vulnerability[10]
- the consumer-focussed package will ensure where a hardship customer is not on the retailer's lowest cost deemed better offer, the hardship customer will be financially no worse off[11]
- the upcoming changes to the DMO framework in July 2026—moving to an 'efficient' price—will also strengthen consumer protections by benchmarking standing offer prices to this new 'efficient' price level.[12]

Recent ACCC analysis shows that retail electricity markets continue to exhibit competitive dynamics - supporting customer access to lower-priced market offers.[13] We agree with DCCEEW that 'protecting consumers to help them benefit from retail competition is particularly important as the energy transition continues and retail and wholesale markets adjust'.[14] In this context, expanding the PEMM retail pricing provision (either through options 2, 3, and 4) would risk:

- duplicating consumer protection reforms that will be introduced - increasing regulatory cost, and
- interfering with the competitive market dynamics that currently support lower priced market offers by reducing discounting, and creating unnecessary regulatory risk, burden and cost for the sector and customers.

For the reasons set out above, we consider that maintaining the current safeguard in the retail provision (option 1)—while allowing the expected consumer protection reforms to take effect and mature—is the least-cost way to protect customers without introducing unintended consequences and unnecessary cost to the sector and customers.

4.1 Options 2 to 4 sit on a continuum of increasing price oversight

While we do not support options 2, 3 or 4, we provide further commentary below to explain why:

- Option 2 - symmetrical retail pricing obligation
- Option 3 - general reasonable price provision
- Option 4 - pre-approval of market offer price increases

all risk being a disproportionate and a worse approach to Option 1.

Option 4 is the clearest form of ex-ante price intervention and is appropriately not progressed in the consultation paper. We agree with DCCEEW that requiring preapproval of market offer price increases would:

10 AEMC, *Improving consumer confidence in retail energy plans*, 19 June 2025.
11 AEMC, *Improving consumer confidence in retail energy plans*, 19 June 2025.
12 DCCEEW, *Consultation on reforms to the Default Market Offer*, 18 July 2025.
13 ACCC, *Inquiry into the National Electricity Market - December 2025 Report*. The ACCC finds declining market concentration over time (HHI), material customer switching rates, a large number of active retailers, and acquisition market offers consistently priced below default/standing offer levels across NEM regions. See Figures 2.1, 2.4, 2.5, 2.6 and 3.15.
14 DCCEEW consultation paper, p 8.

- be inconsistent with PEMM's ex-post design,
- amount to a form of price regulation of market offers,
- impose a very material resourcing burden on the regulator given the number and complexity of offers, and
- impact innovation in tariff types where costs are less well understood by regulators.

While Options 2 and 3 operate ex post rather than via pre-approval, they share several of the same underlying risks—particularly the risk of regulatory drift toward price regulation, material resourcing and compliance burden, and potential impacts on innovation (especially for non-standard products where costs are less readily benchmarked). These risks become significantly more acute if evidentiary expectations are shifted onto retailers, effectively requiring routine price justification.

4.2 The core problem with Options 2 and 3

The central challenge with Options 2 and 3 is that any price test that needs to be satisfied – either through a symmetrical retail provision (under option 2) or a general requirement for 'reasonable' pricing (under option 3) cannot and should not be determined by using generic or market-wide benchmarks. Retailers have materially different cost structures driven by unique contracting strategies, PPAs, risk appetite, customer mix, Consumer Energy Resources (**CER**) strategy and commercial obligations. A single benchmark cannot capture these differences and creates a risk that legitimate structural cost variation reflected in retail pricing is mischaracterised as "unreasonable." The Explanatory Memorandum for the PEMM Act acknowledges the unsuitability of a single approach to assessing compliance with the 'retail pricing provision', noting there is a need to consider the particular circumstances of the retailer, considering different retailers have different offer constructs, costs and pricing strategies.[15]

A simple illustrative example demonstrates this risk. A retailer may have entered into a long term renewable PPA at $60/MWh as an early supporter to underwrite investment in long-term renewable projects. Over time, as renewable capacity increases and technology costs fall, this may be reflected in a materially lower LGC spot price—for example, around $6/MWh. Assessing the retailer's pricing against the LGC spot price, rather than the contracted PPA cost, would make the retailer's cost base appear artificially high relative to that benchmark. In reality, the PPA strike price represents the retailer's true underlying cost, reflecting long term procurement commitments and the underwriting of new renewable generation. Treating prices that recover that cost as "unreasonable" would be an error; it is the rational and intended outcome of enabling investment.

Many of the investments retailers are now expected to make to support the energy transition share the same economic profile —high upfront costs that decline over time as technologies scale and mature. This includes not only long-term renewable PPAs, but also VPP and CER orchestration platforms, AI enabled optimisation systems and advanced metering and data analytics tools. These investments require retailers to commit early at higher cost, with the expectation that market prices for the underlying services will fall over time. If regulators assess "reasonableness" using spot prices, falling technology costs, or other stylised benchmarks, they risk misinterpreting a retailer's actual cost base and penalising early, policy aligned investment –with flow on unintended impacts on innovation, investment and climate target goals.

---

15 Explanatory Memorandum, *Treasury Laws Amendment (Prohibiting Energy Market Misconduct) Bill 2019* (Commonwealth), pp.18-21 <ParlInfo - Treasury Laws Amendment (Prohibiting Energy Market Misconduct) Bill 2019>.

There's a growing risk that retailers may be unable to meet expectations for the energy transition

Further limits on pricing flexibility—particularly through ongoing reasonableness tests—risk undermining retailers' ability to manage risk and invest at the pace required to support CER and electrification at scale. We have consistently raised that retailers bear more risk – not less - in the current high-cost energy environment. This includes shouldering the risk in DMO/VDO price decisions from rising network costs, a trend likely to continue with the energy transition. We continue to question whether retailers could absorb all this risk, invest in innovative CER products, and continue to compete in this challenging environment. As we move into future pricing DMO/VDO decisions, and the unprecedented volume of market reforms being introduced, we continue to have these concerns and call for regulators and market bodies to carefully consider the appropriate balance when making decisions and introducing regulatory policy. We consider that the short-term focus on affordability can have unintended outcomes and trade-offs with long term benefits of consumers, preserving benefits of competition, achieving sustainability and climate goals (including investment and innovation in CER) and maintaining retailer viability, competition and the value of shopping around for customers.

This risk is exacerbated by the fact that retailers' ability to recover costs over time is already constrained by regulatory settings. While wholesale and network costs—comprising the majority of the customer bill[16]—have become increasingly volatile during the transition, retailers face limited flexibility in when and how prices can be adjusted, including through the operation of the DMO/VDO as effective pricing benchmarks and constraints on repricing frequency.

The regulatory risk that efficient recovery is mischaracterised as "over-recovery" is a strong concern with introducing options 2 or 3. This shared problem underpins concerns with both option 2 and option 3. However, the way it manifests—and the associated regulatory and compliance risk—may differ depending on whether the test is applied to **price increases** (option 2) or to **price levels** more broadly (option 3), as discussed below.

4.3 Options 2: "Symmetrical" provision' is not a minor extension

Option 2 would add an upward price limb to the existing provision, which will require ongoing assessments of whether price increases "reasonably" reflect increases in underlying costs. This shifts this retail PEMM provision from a narrow safeguard (triggered by sustained and substantial cost reductions) toward more regular scrutiny of price movements.

In practice, a symmetrical price increase test is likely to depend on simplified benchmarks—such as short-term wholesale indicators or stylised assumptions (including DMO wholesale estimates). This risks making regulator benchmarks the de facto definition of "efficient cost," and creates pressure for retailers to align pricing behaviour to those stylised assumptions even where their portfolios legitimately diverge (e.g., long dated PPAs, load shaped hedges, firming contracts, CER integration). Over time, this can resemble implicit price regulation rather than a conduct safeguard, and risks narrowing procurement diversity, competitive offerings and innovation, to the detriment of customers in the longer term.

4.4 Option 3: general "reasonable" price provision is broader than option 2

It appears Option 3 moves beyond assessing price movements and instead assesses price levels. This will require a view of what constitutes a "reasonable price," and the consultation

[16] See AER DMO cost stack: AER - Final determination - Default market offer prices 2025–26 - Cost assessment model.xlsx

paper recognises this framing is open to broad interpretation and could operate anywhere along a spectrum from close to the status quo to close to a form of price regulation.[17]

Option 3 expands the monitoring and enforcement task significantly, given it potentially applies across a wider number of market offers. It also risks constraining tariff innovation and non-standard products where costs are less readily benchmarked — a concern the consultation paper itself notes in relation to pre-approval, but which applies in principle to any broad reasonableness test.

4.5 The margin question arises under both Options 2 and 3 — but is unavoidable under Option 3

Any regulatory framework that assesses whether prices or price increases are "reasonable" inevitably raises questions about margins. While this issue is most explicit under Option 3, it also arises under Option 2 in a more indirect way.

Under Option 2, assessing whether a price increase reasonably reflects an increase in underlying costs requires the regulator to consider whether any portion of the price change represents margin recovery rather than cost passthrough. Over time, this can constrain the ability of retailers to recover margins following periods of aggressive competition or cost volatility, effectively placing an implicit cap on margins through repeated price increase assessments

Option 3 goes further. A general reasonable price obligation will require the regulator to assess whether a **price level** is reasonable, not just whether a price change reflects cost movements. In doing so, margin becomes an unavoidable component of the assessment. Once a regulator is required to determine whether prices are reasonable in absolute terms, it must implicitly form a view on what constitutes an acceptable margin.

Retail margins fund core customer services, including billing systems, customer support, regulatory compliance, hardship programs, CER integration and ongoing investment. Margins vary by business model, customer mix, cost of capital and risk exposure. The ACCC have publicly reported on electricity aggregated retailer margins routinely in the NEM inquiry revealing tight margins in recent years reflecting the very competitive retail environment. [redacted]

No regulator can determine by interpretation of reasonable test a "right" margin without becoming a price regulator—which is neither intended nor desirable in a conduct framework. In an environment of increasing wholesale and network volatility, constrained pricing flexibility, and expanding compliance obligations, the ability to recover margins over time is critical to sustaining competition and retailer viability. Eroding this flexibility risks fewer competitors, reduced innovation and higher long-term costs for consumers.

4.6 Critically, the evidentiary onus must remain with the regulator

If Options 2 or 3 were paired with a reversed burden of proof, retailers would have to "prove" the reasonableness of every price increase (Option 2) or price level (Option 3). We agree with

[17] DCCEEW consultation paper, p 36.

the concern recognised in the consultation paper that changing the burden of proof would increase compliance costs.[18] Further, in practice, this would likely:

- create a quasi-price approval regime,
- require tariff-by-tariff documentation such as retailer cost stacks and hedging
- impose ongoing administrative burden unrelated to misconduct, and
- penalise retailers whose legitimate cost structures depart from stylised benchmarks.

This would turn PEMM into continuous price justification, far beyond its original purpose. If any reasonableness assessments exist at all, they should be owned and evidenced by the regulator—not placed on retailers to justify internal pricing decisions. This preserves stability and good regulatory practice as well as the PEMM Act's intended focus on conduct rather than indirect price regulation.[19]

4.7 A purpose -based, or intent-based test, does not remove the risks

Adopting a purpose or intent based test, rather than an effects-based test, will not mitigate the core risks under Options 2 and 3.

Both Option 2 and Option 3 still require a regulator to assess whether prices or price movements are "reasonable." That assessment necessarily depends on a view of underlying costs and benchmarks, regardless of how the legal test is framed. Changing the test does not remove the need to judge cost-price alignment, nor does it resolve the problem that market or generic benchmarks cannot fairly reflect retailer specific cost structures.

A purpose-based test may also increase evidentiary complexity by requiring examination of internal pricing rationales and commercial decisions, expanding compliance burden and cost without a clear improvement of consumer outcomes.

5. Cross market manipulation provision

We support effective oversight of wholesale market conduct and regulators should have appropriate tools to identify and address genuine misconduct where it arises. However, given the AER's expanded wholesale market monitoring and information-gathering powers, we do not consider that introducing a new cross-market manipulation provision for precautionary purposes under the PEMM Act[20] is necessary or proportionate at this time.

As the AER is able to investigate both contract and spot market behaviour, any additional protection should only be contemplated where a clear evidentiary basis for regulatory insufficiency is established. The AER's enhanced wholesale market monitoring framework already provides visibility over contract positions, hedging arrangements and spot market behaviour, materially reducing the information asymmetries that possibly constrained detection of problematic conduct previously. Introducing this new provision as a precautionary measure, risks expanding regulatory obligations, materially increasing compliance costs, and duplicating existing oversight without clearly improving outcomes for customers. This is counter to DCCEEW's objective of improving regulatory efficiency.

The introduction of a cross-market provision under the PEMM Act carries a material regulatory risk that ordinary market behaviour could be reinterpreted as misconduct. In the wholesale electricity market, bidding behaviour in the physical market is, by design, intended to influence

[18] Consultation paper p 35.

[19] DCCEEW notes that 'the policy intent of [option 3] is not to introduce a form of price regulation – which would be a significant reform to the current framework – but rather, give the regulator power to enforce breaches of the provisions where the regulator identifies through price monitoring that prices are higher than reasonable' p 36. Our view is the introduction of such a provision is a form of indirect price regulation.

[20] The consultation paper cites "potential" possibilities – see for example section 4.1.2 pp 41 to 45.

spot prices - reflecting the supply demand balance. The interaction between physical bidding, spot price outcomes and contract market positions is an inherent feature of market design, rather than an indicator of potential misconduct.

Concerns on the introduction of a cross-market provision cannot be resolved through refinements to the evidentiary legal test. The concern goes to the fundamental suitability of introducing such a provision to markets where interaction is an inherent and legitimate feature of market participation. For example, an effects-based test, whereby conduct in one market is assessed based on observed price impacts in another market, would be ill-suited, as legitimate bidding and portfolio optimisation in the physical market can, by design, influence spot prices.

In contrast, a purpose-based or intent-based evidentiary test does not resolve these concerns. Establishing intent to manipulate markets would require scrutiny of internal trading rationales, portfolio exposures and hedging strategies, expanding compliance burden and legal uncertainty without clearly improving the regulator's ability to distinguish legitimate conduct from manipulation. In practice, both effects-based and purpose-based tests would require the regulator to make subjective judgements about acceptable behaviour (e.g. bidding or contracting) in markets that are highly dynamic and portfolio-specific.

These risks would be further exacerbated if evidentiary expectations were shifted onto market participants to prove the legitimacy of trading strategies. This would materially increase administrative burden and compliance costs, and risks penalising behaviour that is efficient and consistent with prudent risk management.

5.1 A proportionate and no added cost alternative: rely on the AER's enhanced monitoring

A more proportionate approach, that adds no additional cost to the sector and customers, is to rely on the AER's enhanced wholesale monitoring framework and allow recently strengthened oversight arrangements to operate in practice. The AER now has visibility over contract positions, hedging arrangements, and interactions between physical and financial markets—addressing the information gaps that limited possible detection of problematic conduct previously.

If clear evidence emerges of the concern and that existing powers are insufficient to address cross-market misconduct, targeted examination could be considered at that point, informed by a clear problem definition and demonstrated regulatory gap. At present, there is limited evidence that an additional PEMM prohibition would deliver incremental consumer benefit.