

Mr Simon Duggan
Deputy Secretary
Department of Climate Change, Energy, the Environment and Water

Sent by email to [REDACTED]

Dear Simon

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

The Australian Energy Regulator (AER) welcomes the opportunity to provide a submission to the Australian Government’s consultation paper on “Strengthening the Prohibiting Energy Market Misconduct provisions on the Competition and Consumer Act 2010 (Cth)”.

Transfer of the NEM Inquiry and PEMM enforcement to the AER

The AER supports the transfer of the NEM Inquiry function and Prohibiting Energy Market Misconduct (PEMM) enforcement and compliance responsibilities from the ACCC to the AER.

The effect of these changes is to consolidate and streamline electricity monitoring, reporting and enforcement functions within the AER as the electricity sector specific regulator. This should deliver multiple benefits including:

- reducing regulatory burdens, cost and duplication for industry stakeholders who engage with both the AER and ACCC in relation to their respective regulatory functions (noting that these costs are likely to be passed onto electricity consumers)
- regulatory cost efficiencies (and associated savings to government) by leveraging off the AER’s existing analysis, monitoring, reporting and enforcement roles in the electricity sector
- enabling the AER to draw on its extensive expertise and experience in electricity and gas wholesale and retail markets as sector specific regulator, bringing additional transparency benefits and insights into market trends through its reporting function
- enabling the AER to draw insights from its wholesale and retail monitoring, surveillance and reporting to inform electricity sector specific compliance and enforcement activities under PEMM.

As we noted in our PEMM Review submission in February 2025, the AER’s powers have also been expanded by Parliaments since the ACCC Inquiry was initiated (in line with recommendations from the ACCC itself) to include electricity contract markets. These changes mean the AER now has both the powers and capabilities necessary to cost-effectively perform the functions the Inquiry was set up to deliver in a time-limited fashion.

In relation to PEMM enforcement, as noted in our previous submission to the PEMM review, the CCA contains provisions that enable the AER to take action in the Federal Court to

enforce national energy laws (s44AAG). These could be modified to extend to contraventions of PEMM provisions.

Expanding the AER's retail monitoring function – actual customer data

The transfer of the NEM Inquiry will have the effect of expanding the scope of the AER's retail market reporting. Whilst the AER currently conducts monitoring of retail offers this relies on data from Energy Made Easy that does not include actual billing data, prices paid by consumers, plan-level data on the individual charges making up customer prices, and number of customers on each plan. The transition of the NEM Inquiry will therefore involve new retail monitoring analytical work for the AER that relies on actual customer data.

This work can be integrated into the AER's existing market monitoring functions (with a small resourcing uplift) enabling it to expand upon its existing reporting functions and report on matters including trends in actual prices and bills paid by electricity consumers across the NEM (including for different cohorts of customers, e.g. those with or without access to consumer energy resources and those experiencing vulnerability).

As noted in our submission to the PEMM Review, the AER has a wide range of powers to obtain and use information for the purpose of performing its monitoring and reporting functions. While a minor amendment to Victorian legislation would be needed to enable the AER to collect certain price information directly from Victorian retailers under the National Energy Retail Law (NERL), the AER currently reports on retail market performance in Victoria using a combination of AER data and information provided by the Essential Services Commission of Victoria.

An alternative approach would be to directly confer electricity prices monitoring and surveillance powers on the AER through the Minister directing the AER to undertake an electricity inquiry (as per the current ACCC NEM Inquiry) under section 95H of the CCA, or by amendments to the CCA if necessary. This may prove to be a more effective course of action if Victoria is not in a position to amend its legislation applying the NERL.

Information sharing frameworks

The ACCC's NEM Inquiry relies on information gathering powers which make it an offence to disclose protected information obtained voluntarily or under section 95ZK, unless disclosure occurs in the course of an entrusted person performing or exercising a function, power or duty under the CCA. Where protected information is subject to a competitive damage claim under section 95ZN, and that claim is justified, the Commission is required to make a formal decision that disclosure is necessary in the public interest before it can be disclosed. This can hamper not only the publication of market monitoring but also the provision of advice to governments and regulators.

In contrast, the AER's market monitoring is governed by the confidentiality and information sharing framework that applies to the AER under the NERL and CCA. The AER is permitted to disclose and share confidential information received, and use it in its market performance reports, subject to certain conditions.

The AER supports the ACCC having the information it needs to undertake its general competition and consumer roles. While the AER currently makes information available to the ACCC in the course of carrying out its general functions, amendments to the CCA to impose an obligation on the AER and the ACCC to share data would facilitate a "collect once" approach to data gathering. This would enable the AER to function as the primary monitor of the markets, while ensuring the ACCC has unfettered access to the data it requires to support its functions as the economy-wide competition regulator.

While the ACCC and the AER have some powers to share information with each other at present, these are not established as obligations. Efforts have been made to improve information flows between agencies, but the current framework effectively requires an administrative decision to be made whenever this occurs. Section 27 of the *National Greenhouse and Energy Reporting Act 2007* provides a model for successfully overcoming this through the use of an obligation to share data, along with appropriate protections for that data.

Electricity Retail Code

The AER considers that it should have full responsibility for the Retail Code, including monitoring and compliance, as this would further enhance regulatory streamlining and consolidation in the electricity sector.

With the reforms being made to the Retail Code to enhance the framework for the DMO, there is both an opportunity and increased need to consider this now. The introduction of a tariff structure for Default Market Offer (DMO) prices in particular, requires a shift in compliance monitoring. This is likely to be complex and duplicative for the ACCC to enforce, when they are not responsible for developing the tariffs. Whilst the AER can share information with the ACCC, having the ACCC closely involved in the development of DMO tariffs brings complexity, and added costs and risk in terms of governance and regulatory decision making.

The AER notes that functions can be conferred on the AER through regulations made under the Competition and Consumer Act (section 44AH(1)(b)). If further legislative change is needed to complete the transfer of these responsibilities, we recommend this be prioritised in order to reduce regulatory burden and associated costs, which ultimately find their way to consumers, for example, by widening the AER's existing powers to enforce national energy laws under section 44AAG of the CCA.

ACCC enforcement of PEMM provisions in the absence of a NEM Inquiry function

As noted above, the AER supports the transition of PEMM enforcement and compliance from the ACCC to the AER, noting the benefits this provides in relation to reduced regulatory duplication and delivering regulatory efficiencies.

However, if the Government decides to maintain PEMM enforcement and compliance with the ACCC, the ACCC will need to be able to access information from the AER to support this function. The information sharing obligation described above could strengthen existing frameworks in this regard.

This would also enable the NEM Inquiry functions to be transferred across to the AER in a manner that maintains continuity of reporting and allowing the ACCC to discharge its responsibility for PEMM enforcement.

Expanding the retail pricing provision in the PEMM – section 153E

The consultation paper has set out three options (in addition to maintaining the status quo) for reform of the PEMM retail provision (section 153E) to expand protections for consumers from increasing retail prices. These include a symmetrical retail provision (Option 2), a new general requirement for “reasonable” retail pricing (Option 3) and a requirement on retailers to seek regulatory pre-approval of market offer price increases (Option 4).

In discussing these options, the Government has identified that there is a gap in consumer protections governing retail price increases. The paper notes that small customers that are

on market offers and are not actively engaged in switching behaviour will not benefit from the DMO standing offer or its use as a comparison price.

These customers who have not switched are more likely to find themselves paying higher electricity retail prices – namely a “loyalty penalty”. The ACCC in its most recent December 2025 NEM Inquiry report has found that customers on older plans continue to pay more than customers on newer plans.¹ Whilst the gap in annual prices between customers on older plans and new plans has decreased since 2024, customers on older plans are paying on average 4.7 percent higher on flat rate plans.² In addition, 73 percent of customers on plans that are 3 years or older are paying above the default offer, with this decreasing to 42.3 percent for plans that are 2-3 years old.³ The ACCC identifies that customers on plans more than 3 years old are paying on average \$221 more than those on new plans.⁴

The AER has the following comments on these options:

- Option 3 would best address the gap identified by the Government – namely, the risk to consumers on older plans associated with the “loyalty penalty”. This is because it focuses on the reasonableness of the price paid by these customers. By contrast, Option 2 focuses on an assessment of price increases and whether these are reasonable having regard to underlying increases in costs. In this sense, Option 2 has a narrower application than Option 3 and would not address the “loyalty penalty” faced by consumers who remain on high priced market contracts.
- In its submission to the PEMM Review, the AER also noted that whilst there is no explicit relationship between section 153E and the DMO/Victorian Default Offer, in practice it has been observed that downward movements in the DMO/VDO may prompt downward movements in market offers, and vice-versa in relation to upward movements in the DMO/VDO. This implicit relationship may weaken the case for an Option 2 based reform.
- Option 3 (reasonable retail pricing) would allow for a targeted and flexible regulatory approach that could focus on addressing the costs to consumers associated with a loyalty penalty. As suggested in the Government’s consultation paper, the reasonable pricing provision could be drafted in a targeted manner to apply only to legacy offers (i.e. market contracts of more than a certain age). This would be based on the approach to be adopted from July 2026 in Victoria under the Essential Services Commission’s Energy Retail Code of Practice.⁵
- A targeted version of Option 3 would minimise regulatory costs and compliance burdens on retailers, whilst focussing on a cohort of consumers paying consistently higher prices for an essential service.
- Furthermore, an Option 3 approach could be supplemented by a model of self-assessment and self-reporting by retailers to the AER. Under this approach, there would be an onus on retailers to identify, flag and address systemic problems or provide evidence that the prices are reasonable. This onus would sit alongside the AER’s own data and surveillance systems for monitoring compliance with the provision, consistent with the ESCV approach.

¹ ACCC, Inquiry into the National Electricity Market: December 2025 report, Australian Government, 22 December, p 30

² Ibid., p31

³ Ibid., p33

⁴ Ibid., p32

⁵ Energy Retail Code of Practice, Essential Services Commission of Victoria, sections 120A-D

Wholesale provisions and addressing cross-market manipulation

In its February 2025 submission to the PEMM Review, the AER noted that it is unclear whether the PEMM wholesale market prohibitions (sections 153F, 153G and 153H) have had any discernible impact on the behaviour of generators in the NEM.

The AER also noted that there is no law that explicitly targets conduct in electricity spot market that is engaged in for the purpose of manipulating an electricity contract market. This could include for example, a participant engaging in manipulative behaviour in the NEM spot market to increase the participant's revenue from contracting.

In turn, the AER suggested that the PEMM review consider whether the scope of the market manipulation laws should be widened to directly address cross-market manipulation risks.

PEMM and the NEM Review

The Government's consultation paper discusses the risks of cross market manipulation in the context of the energy transition and the growth of battery energy storage systems. The paper notes that the involvement of batteries across multiple markets may increase the prospect of cross market optimisation opportunities impacting the risk of cross-market manipulation.

The NEM Review Panel has noted that the move to an increasingly weather dependent energy system will mean that prices are likely to become predictably more variable and unpredictably more volatile. The Panel notes that:

*“Variability, such as the predictable daily rise and fall of solar output, or seasonal wind patterns, can be forecast and managed. But volatility, such as the sudden, unplanned withdrawal of capacity during generator and network outages, or extended and unforeseen periods of low wind and solar output ('dunkelflaute'), poses more significant challenges.”*⁶

The Panel notes that *“while sharpening price signals introduce some challenges, they are not inherently problematic if tools exist to respond to those signals or to manage risks.”*⁷ In this respect the Panel's recommendations focus on the development of fungible and standardised derivatives products across energy services (bulk, shaping and firming) to help drive liquidity, transparency and investment signals, supported by the Electricity Energy Services Mechanism and the MMO.⁸

Separately, the Panel has also recommended market bodies use the rule change process to ensure the efficient and competitive functioning of the electricity spot market. This includes market bodies and the Australian Competition and Consumer Commission (ACCC) working together to develop a broader understanding of the risks and opportunities created by algorithmic bidding to inform regulatory responses, including rule changes if needed, along with market body work on battery state of charge information and minimising the impact of transmission outages on the spot market.⁹

⁶ National Electricity Market wholesale market settings review, Final Report, December 2025, p12

⁷ Ibid., p12

⁸ Ibid., pp 14-15 and pp23-25

⁹ Ibid., p22

The AER considers that the implementation of the Panel's recommendations should help drive electricity market transparency, liquidity and competition (at both the wholesale and retail level). This should assist in mitigating market concentration, and market power risk factors that can be associated with cross market manipulation.

However, even with the implementation of the NEM Review recommendations, the risk of cross market manipulation and the importance of addressing it through PEMM reform, remains significant. The AER considers that there are several reasons for progressing reform, most notably within the context of the significant transition underway in the energy sector.

Overall, and consistent with the observations of the NEM Review Panel, the AER considers that the NEM will continue to rely on very high spot prices, with consequential impacts on forward prices to manage risk and support investment in generation, storage and other technologies. For this reason, it is important that the relationship between the spot and contract market has effective regulatory oversight including through cross-manipulation provisions.

Energy markets are also becoming increasingly complex and, as we advance towards net zero, subject to significant shifts in energy mix and participation, inter-dependencies within the energy ecosystem and growing demand requirements driven by AI enabled data centres and electrification. As a result, the pace and size of structural change in the market is increasing. As outlined in the NEM Panel Review Recommendations, algorithms and AI are reshaping how the sector generates, stores, prices, trades, and hedges in electricity markets and across markets. This increasing complexity is driving behavioural shifts and new opportunities for market manipulation.

Furthermore, whilst the consultation paper focusses on batteries, risks from cross-market manipulation are likely to extend into generation. For example, cross market manipulation risks may increase during periods of renewable energy droughts when the NEM is reliant on limited sources of long duration storage or dispatchable capacity for a significant period.

During a renewable drought, there may be limited generation from wind and solar power for extended periods. Similarly, battery technology may also be limited in its ability to service demand over an extended time. In practice, this would mean that the market will be reliant on a few sources of long duration storage or gas powered generation to meet demand, and in circumstances where demand may also be increasing (for example, during the winter to accommodate increasing heating load as the economy undergoes electrification).

It is in these circumstances that owners of limited firming capacity may have market power and the ability to manipulate spot prices to push contract prices up. Conversely, owners of these assets may seek to restrict access to hedging contracts that would otherwise help retailers manage price risks during renewable droughts. This would have the effect of pushing up spot prices during these periods leading to higher retail prices for electricity consumers.

Existing competition laws, in particular section 46 of the CCA, are directed towards such behaviour to the extent it is undertaken for the purpose of damaging competition. However, market manipulation is potentially wider, capturing, for example, conduct that is designed to artificially manipulate the price of products bought or sold in spot and contract markets.

Designing a cross-market manipulation provision

The AER supports consideration of a broad test that captures interactions across different technologies participant types and markets - namely, the spot market, contracts markets and ancillary services, noting that many market participants will operate and optimise across all three areas.

An effective test would also address incentives across a spectrum of market attributes that market participants could influence - for example - bidding behaviour, generation availability/outages, load and demand response, generation ramp rates, access to and pricing of financial contracts, transmission constraints and the exploitation of other market design features that can span across the full electricity dispatch life cycle.

The AER also notes that any conduct that ultimately has the effect of manipulating prices in the NEM spot market will impact all customers across the NEM. Ultimately, all electricity is traded through the NEM (as a gross pool) and all costs across spot, contracts and ancillary services will flow through into retail bills for customers.

Whilst there are likely to be different formulations, the AER considers that any cross-market manipulation rule should have its focus on ensuring that market participants do not engage in conduct that interferes with the efficiency and integrity of the market and which prevents manipulative behaviour within a market and across markets.

Comments on section 153F and the proposed market making obligation

In its previous submission, the AER noted that section 153F (financial contracts provision) arguably adds little to the deterrent effect of the more general provisions of Part IV of the CCA and that a more direct regulatory intervention may be a more effective measure to address concerns about the availability of financial contracts where those concerns exist.

Since the completion of the PEMM Review, the independent panel conducting the NEM Review Panel has delivered its final report recommending the introduction of a permanent market making obligation framework (MMO).¹⁰

Under this framework obligated market makers would be required to offer financial contracts for electricity services at minimum volumes and against fixed bid-offer spreads set by the AER as regulator. The application of the market making obligation across different NEM regions and services would be subject to an objective liquidity trigger determined by the AER. Obligated market makers would include generation businesses that meet pre-set market share thresholds.¹¹

The objectives of this framework include boosting wholesale contract market liquidity and price transparency and increasing access to wholesale contracts on competitive terms for non-vertically integrated retailers and generators. The establishment of a well-designed MMO framework *“would help to provide market participants with access to a reliable source of contract offerings at a price that is reasonable and fair under all market conditions”*.¹²

In December 2025, Energy Ministers (with the exception of Queensland) agreed in principle to the core recommendations of the NEM Review, including the introduction of the MMO.¹³ Work is currently being progressed on the implementation of the framework, with the South

¹⁰ Ibid., p23

¹¹ Ibid., p148

¹² Ibid., p147

¹³ Energy and Climate Change Ministerial Council, Meeting Communique, Tuesday 16 December, 2025

Australian Government considering its initial implementation through the SA Firm Energy Reliability Mechanism arrangements from mid-2026 prior to the implementation of a national MMO framework in 2027, subject to National Electricity Law and Rule changes.¹⁴

The AER considers that the introduction of a mandated market maker framework applying to existing NEM market participants has significant implications for the PEMM financial contracts obligation under section 153F. This is because the MMO is a direct regulatory intervention intended to drive financial contract liquidity and access in the NEM and therefore traverses similar or equivalent policy objectives to section 153F.

Overall, the AER recommends that DCCEEW may wish to consider whether section 153F is necessary going forward. This is for two reasons:

- The introduction of the MMO framework may ultimately negate the need for the 153F in so far as it represents a direct regulatory intervention with a similar purpose
- It is preferable to focus on a broader cross-market manipulation provision that addresses conduct across a broader span of services, technologies and circumstances, as described earlier in this submission.

PEMM reforms and cost implications for the AER

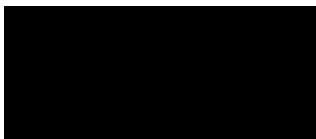
The AER considers that a like for like transfer of existing PEMM provisions and PEMM enforcement would require only a small uplift in surveillance, reporting and compliance/enforcement resourcing and can be achieved with associated savings to the government.

However, the introduction of new cross-market manipulation provisions is likely to require additional funding and resources for surveillance and enforcement and compliance, relative to a “like for like” transition of the existing PEMM provisions.

Depending on the legislative framework, cross market manipulation surveillance will require establishing new frameworks for surveillance and enforcement including integrated and synchronised data, identification of market participant incentives and financial risks that impact behaviour, models linking behavioural patterns, along with explainable analytics, alerts for potential breaches and case management tools.

Some additional resourcing would be required to develop new surveillance and compliance approaches including issue guidance materials to industry participants and providing compliance education.

Yours sincerely



Clare Savage

Chair

Australian Energy Regulator
Sent by email on: 06.02.2026

¹⁴ See “Firm Energy Reliability Mechanism, Market Liquidity Obligation, Consultation Paper, January 2026, p17