Law Council
OF AUSTRALIA

Business Law Section

31 January 2025

PEMM Review Taskforce
Department of Climate Change, Energy, the Environment and Water

By email: PEMMreview@dcceew.gov.au

Dear PEMM Review Taskforce

Review into the effectiveness of the Prohibited Energy Market Misconduct Act 2019 (PEMM Act)

1. The Competition and Consumer Committee of the Business Law Section of the Law Council of Australia (the **Committee**) appreciates the opportunity to comment on the *Treasury Laws Amendment (Prohibiting Energy Market Misconduct) Act 2019* (Cth) (**PEMM Act**) as part of its review.

2. The Committee holds concern about the Act in its current form and details these issues below. The Committee urges that close consideration be given to the ongoing relevance and appropriateness of the Act in its current form.

Assessment framework and approach

3. The Committee agrees that, in seeking to assess the effectiveness of the PEMM Act on the operation of the energy market, it is appropriate to consider the counterfactual scenario of the PEMM Act provisions not being introduced and the operation of the market in their absence.

4. As reflected in the "Context for Assessment" section of the Consultation Paper, the COVID-19 pandemic, the global energy crisis, the significant (and continuing) program of regulatory reform, ongoing transformation of the Australian energy sector, and the continued effect of competition, together, have resulted in material changes to the operation of the market and supply chain costs.

5. The Committee considers that it would be challenging to identify the incremental additional impact on price outcomes for consumers, liquidity in electricity contract markets or the level of competition or competitive constraint in wholesale electricity markets as a result of the operation of the PEMM Act. This is particularly so where many of the objectives of the PEMM Act can be achieved—and, in some cases, are arguably better achieved—through other legislation including general competition law and the electricity market regulatory regime.

6. One factor that should be considered as a part of the review is the regulatory burden imposed on retailers and generators by the PEMM Act. There has been significant work by retailers and generators to understand the PEMM Act, implement measures to achieve compliance, and respond to regulatory inquiries about compliance. This is

Telephone +61 2 6246 3737 • ***Fax*** +61 2 6248 0639 • ***Email*** jessica.morrow@lawcouncil.asn.au
GPO Box 1989, Canberra ACT 2601, DX 5719 Canberra • 19 Torrens St Braddon ACT 2612
Law Council of Australia Limited ABN 85 005
www.lawcouncil.asn.au

a material burden on retailers and generators, which necessarily creates cost and creates regulatory risk, which must be factored into business costs, and therefore place upward pressure on prices.

7. Given the significant changes to the energy market since the PEMM Act was introduced (some of which were already becoming evident at the time, as reflected by the ACCC in the REPI Report when it was published), the Committee considers that it would be reasonable to conclude that the reason why it is difficult to assess the effectiveness of the PEMM Act is because its objectives have been achieved by other means.

Retail market prohibition

8. The Committee considers that the retail prohibition contained in section 153E (**retail market prohibition**) has had limited impact on pricing outcomes in retail electricity markets but can be expected to have required many retailers to have incurred material (and ongoing) compliance cost in managing these obligations.

9. The Committee notes the prohibition is a form of price regulation usually reserved for retailers with a significant degree of market power. The prohibition assumes that retailers adjust prices in effectively competitive markets to reflect changes in costs in a mechanistic and transparent fashion. However, in practice, all competition in retail electricity markets reflects a dynamic whereby retailers are managing (amongst other matters) wholesale cost volatility which may involve cost increases and decreases that are not readily or precisely reflected in prices (but noting the asymmetric nature of the prohibition means ACCC can only focus on whether prices should be decreasing). This issue is exacerbated by the fact that the electricity market is transitioning, and one upshot of this is that spot prices can be more readily influenced by unpredictable external factors such as weather conditions, which are harder to anticipate than typical demand fluctuations.

10. The ACCC has made public reference to it seeking information from retailers in respect of their compliance with this prohibition, but no public enforcement action has been taken in respect of the retail market prohibition. The ACCC has reported that it has evidence of retailers managing PEMM obligations through "training packages, and compliance and pricing policies".[1] However, while retailers have taken steps to ensure compliance with their PEMM obligations through staff training, their pricing policies and associated price-setting processes, the Committee submits that it is impossible to identify any impact that the retail market prohibition has had on consumer prices, particularly in the context of the extraordinarily volatile period in energy markets since the prohibition was introduced (including as a result of the impact of the COVID-19 pandemic and disruptions to global energy markets following Russia's invasion of Ukraine).

11. Further complicating any assessment of what, if any, impact the retail market prohibition has had on consumer prices is the fact that key elements of the prohibition are inherently vague and subjective. In particular, the concept of 'reasonable adjustments' is a definition that has no settled economic or legal meaning and depends entirely on the particular context. The Committee notes that these

[1] ACCC, *ACCC Inquiry into National Electricity Market* (3 December 2024) at p.24, available at: https://www.accc.gov.au/system/files/accc-national-electricity-market-december-2024-report.pdf.

complexities further add to the costs of compliance, which are likely to have a more material impact on smaller or emerging retailers.

12. The Committee understands that the retail market prohibition was introduced in part to ensure that disengaged customers, who might be more likely to include vulnerable or hardship customers,[2] received the benefit of falling electricity market costs. Since introduction of the retail market prohibition, in addition to the implementation of the default market offer (**DMO**),[3] and aside from general consumer protection reforms,[4] there has been significant development of specific and targeted regulation to assist these customer cohorts, including:

    (a) The Better Bills Guideline was introduced in New South Wales, South Australia and South-East Queensland in September 2023, which followed the introduction of best offer obligations in Victoria. These measures support provision of information to customers about better retail offers available to them and how to switch to those offers.

    (b) Energy regulators introduced substantial changes to their expectations as to treatment of hardship customers during the COVID-19 pandemic and prioritised enforcement of hardship customer rules through annual enforcement priorities and pro-active enforcement action. In November 2024 the Australian Energy Market Commission (**AEMC**) commenced a rule change process, through which it is considering further changes to the rules relating to supporting people experiencing hardship.[5]

    (c) The AEMC has initiated a substantial consumer focussed reform package which is designed to, among other things: remove unreasonable conditional discounts, ensure energy offer benefits last the length of the contract, prevent price increases for a fixed period under market retail contracts, improve the ability to switch to a better offer, assist hardship customers, remove fees and charges and improve the application of concessions to bills.[6]

13. To the extent that there are policy concerns about electricity pricing in respect of disengaged consumers and/or customers experiencing hardship, the Committee considers that these concerns are better addressed through targeted measures to support these issues such as those identified above, rather than through the retail market prohibition. In this context, the Committee recommends that the government consider allowing the retail pricing prohibition to sunset.

[2] See ACCC Inquiry in above note 18 at p.45-46.
[3] As implemented by the AER in accordance with the *Competition and Consumer (Industry Code—Electricity Retail) Regulations 2019*. See also the equivalent Victorian Default Offer (or VDO) applying to Victorian customers administered by the Victorian Essential Services Commission in accordance with and Order in Council made under section 13 of the *Electricity Industry Act 2000* (Vic).
[4] Including the expansion of the laws prohibiting unfair contract terms, and the introduction of civil pecuniary penalties as a remedy for breach of those laws, on 9 November 2023.
[5] AEMC, '*Rule Changes – Assisting hardship customers*', available at: https://www.aemc.gov.au/rule-changes/assisting-hardship-customers.
[6] AEMC, '*Market Reviews Advice – The Pricing review: Electricity pricing for a consumer-driven future*', available at: https://www.aemc.gov.au/market-reviews-advice/pricing-review-electricity-pricing-consumer-driven-future.

Electricity financial contract market prohibition

14. Section 153F prohibits a corporation (implicitly Generators) from:

    (a) failing to offer electricity financial contracts;

    (b) limiting or restricting its offers to enter into electricity financial contracts;

    (c) offering to enter into electricity financial contracts in a way that has, or on terms that have, the effect or likely effect of preventing, limiting or restricting acceptance of those offers;

    for the purpose of substantially lessening competition in any electricity market.

15. The Committee made submissions on section 153F prior to the introduction of the PEMM Act. The Committee expressed concerns around the vagaries of certain phrases in the prohibition, and the potential for it to undermine legitimate strategies or genuine reasons why a generator might not offer or might craft and structure its electricity financial contracts in particular ways.

16. The ACCC's approach as enforcer of section 153F, including as set out in its PEMM Guidance, has since provided some guidance on these points. However, it is still unclear the exact conduct that is proscribed, including because it is not clear, from a policy perspective, what conduct *ought to be* prohibited.

17. The approach of most antitrust regimes around the world acknowledges that an organisation has the right to deal (or not deal) with whom it chooses on the terms it chooses. The key constraint to that principle arises where the organisation has market power (in which case section 46 of the *Competition and Consumer Act 2010* (Cth) (**CCA**) would prevent the conduct proscribed by section 153F where that conduct has the purpose or effect of substantially lessening competition).

18. The PEMM Act conflicts with this orthodoxy by applying to all generators of any size or market position. Smaller generators should have the flexibility to act in their own interests. The prohibition creates a potentially disproportionate burden on smaller generators, notwithstanding the regime having been targeted at, the Committee infers, larger generators and "gentailers" who already have a strong market position.

19. The prohibition also risks stifling or discouraging market participants of all sizes from developing novel or niche hedge products or a profit maximising trading position as new technologies emerge and the market develops through the energy transition.

20. The Committee acknowledges and agrees with the Consultation Paper[7] identifying the AER's wholesale market monitoring function and notes the ACCC's ongoing electricity market monitoring function, the merits of which are explored in section 0 below. Exposure to oversight by the AER (and the ACCC, to the extent its role continues) is an important additional check on financial hedging activities.

[7] On the Review of the Effectiveness of the *Prohibited Energy Market Misconduct (PEMM) Act 2019* (Cth) (November 2024).

21. As a result, if the PEMM Act were to sunset, the conduct prohibited by section 153F would still be subject to other prohibitions and regulatory scrutiny as summarised in the following table:

Conduct prohibited by section 153F until it sunsets	Is the conduct covered by other legislation?	Is there other regulatory oversight of the conduct?
Refusal or constructive refusal to enter into financial contracts by **large generators** or "gentailers" (for the purpose of substantially lessening competition in any electricity market)	**Longstanding prohibition:** If the generator has a substantial degree of market power, this conduct would be or is prohibited by section 46 of the CCA (misuse of market power).	**New:** AER has powers to monitor electricity and gas contract markets. **Ongoing:** ACCC electricity market monitoring inquiry 2018–25
Refusal or constructive refusal to enter into financial contracts by **small generators** (for the purpose of substantially lessening competition in any electricity market)	No.	

22. As previously noted, the Committee believes that the regime that would remain, absent section 153F, may well be sufficient. However, the Committee goes back, again, to the policy question of what conduct *ought to be* prohibited. This will be informed by:

    (a) The extent to which there is a deficit in hedges that perpetuates.

    (b) If there is a deficit, is it because organisations could or should be offering more financial contracts and are not?

    (c) If so, is it because they have not been complying with the section 153F prohibition or is the market illiquidity attributable to legitimate issues?

    (d) Is the section 153F prohibition therefore appropriate to encourage different behaviours from generators is it appropriate to be targeted at all generators irrespective of size or market position?

23. Contracting orders as a remedy, again, would seem novel and potentially not realistic.

Electricity spot market prohibitions

24. The Committee considers that the electricity spot market prohibitions contained in sections 153G and 153H (**wholesale market prohibitions**) have had limited discernible impact on the overall performance of the wholesale electricity markets; but can be expected to have required many wholesale market participants to have incurred material (and ongoing) compliance costs in managing these obligations.

The key provisions have not been exercised since introduction, and are highly unlikely to be used in the future

25. To the Committee's knowledge, aside from any confidential investigations or compliance inquiries, the ACCC has not pursued any remedies or otherwise invoked the wholesale spot market prohibitions against any wholesale market participant since their inception in 2020. The Committee notes the difficulty in distinguishing between legitimate, profit-maximising pricing that reflects resource scarcity, and bidding that has a purpose of distorting or manipulating prices. High prices have a purpose and are effectively tolerated in the NEM so long as they reflect 'transitory' market power, as prices provide a signal to invest and also account for the market distortion that arises from the price cap on the spot price that prevents prices rising to the true scarcity value. The spot market prohibitions do not aid in differentiating between conduct that has genuinely harmful effects from normal commercial behaviour. To the extent that the pricing reflects market power that is not transitory, it can be addressed through provisions in the CCA.

26. Whilst the Committee recognises that there may been some level of deterrence achieved by the wholesale market prohibitions, the actual level of any deterrence is impossible to quantify. The Committee is unaware of any evidence or analysis which has been produced that could show a meaningful correlation between the introduction of the wholesale market prohibition and any observed change in behaviour by wholesale market participants in the NEM (or any other wholesale electricity market).

27. Given that there has been a sustained public policy focus on the price of electricity and the structure of Australia's wholesale and retail electricity markets since the introduction of the wholesale market prohibition, the Committee considers that the lack of any public enforcement action in relation to the prohibitions should call into question whether the laws are (or remain) fit for purpose. The Committee cannot foresee the practical circumstances in when such prohibitions may be applied in the future.

28. In the context where there is already an extensive program of policy and regulatory reform to Australia's energy markets, which is being driven by Australia's energy transition, the Committee considers it is appropriate to consider what—if any—role the wholesale market prohibition should have in the future regulatory landscape.

29. The Committee expects that the lack of enforcement activity is also likely to have been influenced by a level of uncertainty as to how the provisions are intended to operate, and the practical means by which any enforcement action could be pursued, or remedy sought.

30. On the issue of remedies, the Committee continues to hold the view that the divestiture remedy available under section 153ZA of the CCA is inappropriate and untargeted for the harm it is seeking to redress. Given the widespread impact and consequences a divestiture remedy may bring about, the Committee cannot reasonably foresee a circumstance in which it would be an appropriate outcome to pursue as a consequence of a contravention of the spot market prohibitions.

31. For these reasons, the Committee considers that the practical deterrent effects of the existing spot market prohibitions under the CCA are severely undermined. The Committee also urges caution against the broader adoption or introduction of

divestiture as a remedy for competition concerns in other contexts or markets, given the complications and impacts associated with it.

The NER contains similar prohibitions, which are better suited to directly dealing with the targeted behaviours

32. The Committee considers that other legislative instruments, specifically the National Electricity Rules (**NER**) contain more relevant and appropriate provisions to address the behaviour specifically contemplated by the wholesale market prohibitions.

33. In particular, clause 3.8.22A of the NER restricts a scheduled generator, semi-scheduled generator, or market participant from making an offer, bid, and rebid that is "false, misleading or likely to mislead". As noted in the Consultation Paper, the ACCC itself has identified that it believes section 153G(b)(i) and clause 3.8.22A of the NER "are concerned with similar types of behaviour".[8] Further, for rebids specifically, under the NER all generators are required to provide AEMO with a brief, verifiable and specific reason for the rebid, and the timing of the event or occurrence which gave rise to that reason.[9]

34. In the Committee's view, it is a sub-optimal regulatory outcome to have prohibitions dealing with the same (or very similar) conduct contained in separate instruments that are administered and enforced by separate regulators.[10] Regulatory overlap of this kind can create legal and regulatory uncertainty for market participants, bring about the risk of inconsistent or incompatible regulatory and compliance expectations and increase compliance costs.

35. In the present case, given the highly specialised and specific nature of the wholesale electricity markets, the Committee considers it is preferable for regulation of the way in which market participants bid into the wholesale spot market to be principally contained in the NER (and other wholesale market rules). By way of illustration, in seeking to formulate an example of conduct which could contravene the wholesale market prohibitions, the ACCC's guidelines provide that:

    (a) The ACCC position is that a corporation's offer to supply energy at a particular price will be in 'bad faith' if, at the time when the corporation makes the offer, it does not intend to supply energy, or the relevant amount of energy, at the price made in the offer.[11]

36. In the Committee's view, this example highlights an overlap with the NER—insofar as an assessment of the intent of a corporation and the way in which bidding in the wholesale spot market is actually conducted. This overlap is partially illustrated by the Federal Court proceedings brought by the AER against Pelican Point Power Limited (**PPPL**).[12] In that case, PPPL was found to have partially failed to comply with

[8] ACCC, '*ACCC Guidelines on Part XICA – Prohibited conduct in the energy market*' (May 2020) at p.27 [4.15], available at: https://www.accc.gov.au/system/files/Electricity%20Markets%20-%20PEMM%20-%20Final%20Guidelines.pdf.
[9] NER, clause 3.8.22(c) – which is classified as a tier 2 civil penalty provision
[10] See, for example; Productivity Commission, *Review of Australia's Consumer Policy Framework* (Final Report, 30 April 2008) at p.63, available at https://www.pc.gov.au/inquiries/completed/consumer-policy/report/consumer2.pdf; ASIC, *ASIC Corporate Investigations & Hearings: Regulatory Overlap* at p.1 [1.210]; ALRC, *Confronting Complexity: Reforming Corporations and Financial Services Legislation* (Final Report, November 2023) at p.71 [2.70], available at https://www.alrc.gov.au/wp-content/uploads/2024/01/ALRC-FSL-Final-Report-141.pdf.
[11] ACCC Guidelines (above, note 1) at p.27 [4.17].
[12] *Australian Energy Regulator v Pelican Point Power Ltd* [2023] FCA 1110.

the provisions in chapter 3 of the NER requiring wholesale market participants to submit their short-term Projected Assessment of System Adequacy (**PASA**) availability for each trading interval in the National Electricity Market (NEM).

37. Although the case relates to conduct that occurred before the introduction of Part XICA, the Committee's view is that the technical requirements of the PASA system (and the highly complex evidentiary issues raised in that case as a consequence) provide a clear illustration for why the conduct of energy market participants is more appropriately regulated under the NER laws which have been drafted with the specifics of the wholesale electricity market. Moreover, in light of the outcome in the AER's case against PPPL, there is a question as to how wholesale market participants should adjust their PASA (and bidding approach) going forward to comply with the Federal Court's interpretation of the NER provisions while still taking into account the ACCC's putative concerns under Part XICA, as expressed in the Guidelines.

38. To the extent that there are perceived gaps or compliance issues with the existing NER provisions, these could be bolstered in preference to a position where reliance falls to the wholesale market prohibitions in Part XICA of the CCA.[13] The Committee considers it is an opportune time to consider the relevant NER provisions as part of wide-scale review of the wholesale market settings in the NEM that was announced in December 2024 and is to be conducted by an independent expert panel appointed by the Department of Climate Change, Energy, the Environment and Water.[14]

39. For completeness, the Committee notes that a preference for reliance on the more prescriptive provisions of the NER (and any equivalents) to manage compliance with requirements of a wholesale spot market does not involve an ouster of the anti-competitive provisions in Part IV of the CCA. So much is expressly recognised—in the case of the NER—specifically by subclause 3.1.4(b).

40. The same point is also illustrated by the recent representative proceeding brought by Stillwater Pastoral Company Pty Ltd alleging a breach of section 46 of the CCA by two Queensland electricity generation businesses: Stanwell Corporation Ltd and CS Energy Ltd.[15]

41. Although the applicants were recently found to have been unsuccessful in their claims against both generators—which were brought in respect of conduct which occurred prior to the introduction of Part XICA—the case is a useful reminder that the jurisdiction of the general anti-competitive prohibitions in CCA already extends to the behaviour of energy market participants in the NEM.

[13] See, e.g., Explanatory Memorandum, Competition and Consumer Amendment (Competition Policy Review) Bill 2017 at p.25-26 [3.4]–[3.6]; *Competition Policy Review ('Harper Report')* (Final Report, March 2015) at p.307, available at https://treasury.gov.au/sites/default/files/2019-03/Competition-policy-review-report_online.pdf; Productivity Commission, *Review of Australia's Consumer Policy Framework* (Final Report, 30 April 2008) at p.75, available at https://www.pc.gov.au/inquiries/completed/consumer-policy/report/consumer2.pdf.

[14] https://consult.dcceew.gov.au/nem-review-initial-consultation.

[15] *Stillwater Pastoral Company v CS Energy and Stanwell* [2024] FCA 1382.

The NEM has moved on significantly from the issues in 2019/2020. The changing mix (and behaviour) of generators reduces the relevance of the prohibitions

42. Further, the Committee believes that the NEM has evolved significantly in the past five years, such that the wholesale spot market prohibitions may no longer appropriately reflect the electricity generation and spot market dynamics in the NEM.

43. While the focus of much of Part XICA at the time of its introduction was to address perceived market power issues in connection with the largest wholesale generators in the NEM,[16] the supervening five-year period has involved considerable changes to the wholesale electricity market.

44. More specifically, leaving aside the shocks experienced in the NEM due to the COVID-19 pandemic and the Russian invasion of Ukraine, the Committee notes that the NEM in particular has been impacted by:

    (a) The significant increase in renewables penetration. The maximum renewables penetration in 2020 was 54.2%,[17] whereas in 2024 it was 75.6%,[18] representing an almost 40% increase. Since renewables are intermittent, their generation fluctuates based on the time of day and prevailing weather conditions and cannot be guaranteed until the generation is dispatched. These fluctuations are incompatible with the spot market prohibitions, which seem to be predominantly concerned with generators having a consistent and predictable output, such as coal generators.[19] The prohibitions in Part XICA do very little to address a market where the bidding behaviour of most generators in the NEM can change at a moment's notice due to natural intermittency rather than dishonest or manipulative behaviour.[20] Additionally, the intermittent nature of renewables (and therefore the behaviour of those generators) will be amplified as (i) the retirement of many baseload generators across the NEM is being brought forward, and (ii) the reliance on the NEM's largest participants has decreased over the past 2 years in all but one NEM jurisdiction.[21]

    (b) The increase in renewables penetration is closely linked to an uptake in distributed energy resources (**DERs**), such as rooftop solar and batteries. Between 2020 and 2024, the number of DER units across the NEM has increased by over 40%,[22] and rooftop solar almost doubled its contribution to underlying demand in the NEM (meaning less scheduled generation by all types

[16] See, e.g., Revised Explanatory Memorandum to the Treasury Laws Amendment (Prohibiting Energy Market Misconduct) Bill 2019, paragraph 2.105 and Example 2.18 ("Generator D").
[17] AEMO, Renewable Penetration 'Oct 2020', available at: https://aemo.com.au/energy-systems/electricity/national-electricity-market-nem/data-nem/data-dashboard-nem.
[18] AEMO, Renewable Penetration 'Nov 2024', available at: https://aemo.com.au/energy-systems/electricity/national-electricity-market-nem/data-nem/data-dashboard-nem.
[19] Indeed, many of the examples in the ACCC Guidelines on Part XICA focus on baseload or peaking generators.
[20] Based on data contained in AEMO's 'NEM Data Dashboard - Registration and Exemption List', in which there were more generators with renewable technologies as their primary fuel source than 'Fossil', available at: https://wa.aemo.com.au/-/media/files/electricity/nem/participant_information/nem-registration-and-exemption-list.xlsx?la=en.
[21] AER, '*Wholesale electricity market performance report 2024*' (December 2024) at p.50, available at: https://www.aer.gov.au/system/files/2024-12/Wholesale%20electrcity%20market%20performance%20report%20-%20December%202024.pdf.
[22] Based on data contained in AEMO's 'DER Data Dashboard - Distributed Energy Resource totals', available at: https://aemo.com.au/energy-systems/electricity/der-register/data-der/data-dashboard.

of generators was required).[23] This increase in decentralised generation is not contemplated by the spot market prohibitions, which instead focus on traditional, centralised generation.

(c) The increased reliance by generators on financial instruments like power purchase agreements (**PPAs**) to provide revenue certainty and reduce exposure to the spot market's fluctuations. Between 2018 and 2020, the average annual estimated offtake size under corporate PPAs over 10GWh annually was less than 2,000 GWh, whereas between 2022 and 2024, it was well over 4,000 GWh.[24] If generators have contracted out certain capacity under a PPA, they are incentivised to ensure it is dispatched through submitting a competitive bid to AEMO for that capacity. The Committee does not consider there would be an incentive for generators to bid dishonestly or for the purpose of manipulating prices, as the opportunity cost of doing so could be very high depending on the prevailing spot price.

45. In light of the matters above, the Committee urges that close consideration be given to the ongoing relevance and appropriateness of the wholesale market prohibitions in Part XICA of the CCA.

ACCC NEM Inquiry function

46. The ACCC has been formally monitoring and reporting on the supply of electricity in the NEM (**the NEM Inquiry**) for over five years, and in December 2024 released its twelfth report. During that time, the ACCC has built up a substantial dataset covering over 6.7 million residential customers (78% of residential customers in the National Electricity Market) and 400,000 small business customers.[25]

47. The Committee submits that it is impossible to identify any impact that the NEM Inquiry has had on supporting improved outcomes for electricity customers as there are simply too many moving parts as described earlier in this submission.

48. However, it is clear that the ACCC reports have performed a useful educative role in providing real-world analysis and insights to governments and regulators, particularly on the status of competition in the retail electricity market and the provision of the on-going timeseries of retailers' costs and margins.

49. While useful, the ACCC reports also have a significant cost to the economy including the funding for the ACCC's staff undertaking this work, and the costs of retailers' staff time in providing the data and responding to the ACCC's requests. The ACCC has extensively used its compulsory information gathering powers pursuant to section 95ZK of the CCA to prepare its reports, issuing numerous lengthy complex notices that have changed over time including to expand the data sought. For example, for the last report the ACCC collected information on time of use and demand offers for the first time.

[23] See AEMO, '*Quarterly Energy Dynamics Q3 2024*' (October 2024) at Figure 3, available at: https://aemo.com.au/-/media/files/major-publications/qed/2024/qed-q3-2024.pdf?la=en&hash=290E7B2A8048EED183DC7937851379BF.
[24] Based on data contained in ERM Energetics, 'Corporate Renewable PPA Deal Tracker', available at: https://www.energetics.com.au/corporate-renewable-ppa-deal-tracker.
[25] https://www.accc.gov.au/about-us/publications/serial-publications/inquiry-into-the-national-electricity-market-2018-25-reports/inquiry-into-the-national-electricity-market-report-december-2024.

50. It can therefore be expected that many retailers have incurred material (and ongoing) compliance costs in responding to those notices. Those costs relate to collating, verifying and compiling the information they are compelled to provide in response to the notices, in short timeframes and in the ACCC's required format, as well as in responding to regular ACCC communications. These significant costs and use of staff time, especially for small retailers, must be considered in light of the other reporting activities occurring at the same time that impact the same retailers, including by the AER and, in Victoria, the Essential Services Commission (**ESC**). Of particular relevance is the costs of complying with the AER's collection of retailer cost stack data to inform the DMO, and similarly the ESC's collection of data to inform the VDO.

51. Accordingly, ways to reduce compliance costs for future reports should be considered. For example, the frequency of reporting could change to annually; and the topics covered could be more confined and focussed on material items in the context of the ACCC's broader role of promoting competition in markets to benefit consumers, businesses, and the community.

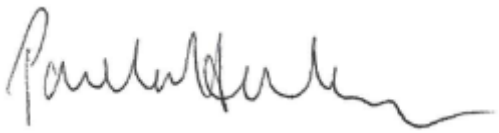
52. The sunsetting of the PEMM Act provisions discussed above would remove the need to monitor compliance with those provisions, and go some way towards reducing compliance costs. Future ACCC reports could provide an opportunity for the ACCC to monitor that change.

Conclusion and further contact

53. The Committee would be pleased to discuss any aspect of this submission.

54. Please contact Peta Stevenson, Chair of the Competition and Consumer Committee [redacted] you would like to do so.

Yours faithfully



Professor Pamela Hanrahan
Chair
Business Law Section