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

Submitted via email: PEMMReview@dcceew.gov.au.

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PEMM Act Review

The Australian Energy Council ('AEC') welcomes the opportunity to make a submission to the Department of Climate Change, Energy, Environment, and Water's consultation on the *Review into the effectiveness of the Prohibiting Energy Market Misconduct Act 2019* ('PEMM Act Review').

The Australian Energy Council is the peak industry body for electricity and downstream natural gas businesses operating in the competitive wholesale and retail energy markets. AEC members generate and sell energy to over 10 million homes and businesses and are major investors in renewable energy generation. The AEC supports reaching net-zero by 2050 as well as a 55 per cent emissions reduction target by 2035 and is committed to delivering the energy transition for the benefit of consumers.

The AEC submits that there was no policy case for the PEMM Act when it was introduced and there is no policy case for it now. The legislation has significant legal flaws that needlessly increase the risk profile of energy businesses, is incongruent with recent changes to the policy and economic environment of the energy market, and is not conducive to the regulatory landscape Australia needs to attract clean energy investment to achieve its climate transition goals. We strongly encourage the PEMM Act and its provisions to be left to sunset on 1 January 2026.

During the initial, limited consultation on the PEMM Bill, a range of stakeholders including the AEC, Law Council of Australia, Grattan Institute, and Business Council of Australia raised fundamental issues with the legal integrity of the proposed legislation. These issues included, but were not limited to:

- Duplicative provisions – prohibitions against the misuse of market power are already contained in section 46 of the *Competition and Consumer Act 2010* ('CCA').
- Vague and subjective phrasing – clauses such as those around the definition of prohibited conduct for retail pricing rely on concepts like "reasonable adjustments" that have no legal precedent or even settled economic meaning.
- Procedural unfairness – clauses such as section 153C – Contracting Order give power to the Treasurer rather than the Court to be the decision-maker, removing the opportunity for an independent hearing and effectively reversing the burden of proof (e.g. companies are forced to prove their innocence to the Treasurer).
- No basis for reform – contrary to claims made at the time, the ACCC's Retail Electricity Pricing Inquiry did not recommend for the introduction of powers contained in the PEMM Act, and specifically recommended against a divestiture order, stating it was an "extreme measure".

Because the Bill passed through Parliament with minimal amendments, these design flaws persist today.

It is not possible to quantify this regulatory risk in dollar terms because the Act is too ambiguous and duplicative to isolate from other compliance activity. Indeed, since becoming law, neither

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the ACCC nor Australian Energy Regulator ('AER') have found any reason to use the PEMM's powers, with repeated retail and wholesale market monitoring reports demonstrating no anti-competitive behaviour.

Given this context, the AEC considers it is unreasonable to expect industry to prove a negative (i.e. what the market might look like *without* the PEMM Act) and the Taskforce should be willing to accept the absence of evidence (i.e. the ACCC and AER finding no cause to use the PEMM Act) as a basis for its ineffectiveness.

Even then, the Consultation Paper puts forward the possibility that the PEMM Act might have had some deterrent effect on generator and retailer behaviour. Such a view is again impossible to quantify given that, even without the PEMM Act, anti-competitive behaviour is still regulated through the *Competition and Consumer Act*, *National Electricity Rules,* and other regulations.

Aside from this duplication, the utility of the PEMM Act has been further diminished by the changing policy and regulatory environment. The retail market has seen the introduction of price regulation through the Default Market Offer (DMO) and the Victorian Default Offer (VDO), as well as the Best Offer provisions. This means the regulator now plays a major role in benchmarking retail pricing, including supply chain costs, confusing how provisions like Section 153E - Retail Pricing can operate. In any event, the ACCC has observed that the retail market is illustrating evidence of improving competition.

As for the wholesale market, the Market Liquidity Obligation (MLO) and Reliability and Emergency Reserve Trader (RERT) program have given the market bodies powers to manage reliability, while state governments have developed bespoke jurisdictional policies to handle coal exits and incentivise new renewable generation.

Most significantly is the Federal Government's Capacity Investment Scheme, which is expected to have a large impact on liquidity in the contracts market going forward. This is because government underwriting insulates these projects from market risk, reducing the incentive for generators to participate in the contracts market. It would be incongruous to a smooth energy transition if CIS-backed projects found themselves subject to section 153F – Financial Contracts Prohibition because of this market behaviour. It is not clear how this and similar provisions can reasonably be enforced in conjunction with the CIS without chilling investment in new renewable generation.

These ongoing changes to the economics of the energy market have resulted in the announcement of the Wholesale Market Settings Review, which will determine the NEM's market design for 2030 and beyond. It is too early to tell which direction this review is heading, but it is nonetheless contemplating fundamental market design questions, including:

- Whether to continue with the current energy only market or shift to a capacity design
- How to incentive participation in a liquid contracts market in a high renewables grid
- Encourage retail innovation, especially in the delivery of Consumer Energy Resources

The Taskforce should consider how the PEMM Act would interact with any future market, and whether its presence risks complicating an otherwise efficient market design.

The AEC considers that the AER's existing market monitoring functions are sufficient to see the ACCC's NEM Inquiry wind down by the end of this year. The current arrangement of dual reporting

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only increases regulatory burden, without any meaningful differentiation between the two market monitoring functions.

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Yours sincerely,

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