



Australian Government

Electricity price monitoring and response legislative framework

Consultation paper
October 2018

Notes to participants

This consultation paper outlines a series of proposals for implementing the electricity price monitoring and response regime announced on 20 August 2018. The Government seeks comment on these proposals to inform the development of a legislative framework. These are draft proposals and not final government policy.

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Consultation Process

Request for feedback and comments

We invite you to review the proposals outlined in this document, and make submissions in response.

Closing date for submissions: 07 November 2018

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The principles outlined in this paper have not received government approval and are not yet law. This paper is a guide as to how the principles might be designed and operate.

Electricity price monitoring and response regime: Legislative implementation

Introduction

On 20 August 2018, the Government announced a package of measures to put downward pressure on electricity prices.

As part of this package, the Government announced that it would task the ACCC with monitoring of retail prices, wholesale bids and conduct and contract market liquidity in the National Electricity Market (NEM) between 2018 and 2025.

Under this public inquiry, the ACCC will prepare six-monthly reports to the Treasurer reporting on its findings including any identified unacceptable outcomes.

The Government also announced that where the ACCC identifies unacceptable outcomes, businesses will have the opportunity to explain and rectify issues raised by the ACCC. Where issues are not resolved, the ACCC will have the power to recommend a proportional and targeted response for the Treasurer's determination.

The Government's announced range of enforcement remedies and responses that could be applied if the ACCC identifies problems include:

- A public warning notice issued by the Treasurer or ACCC;
- A court enforceable undertaking as currently used by the ACCC in other contexts;
- Converting the default market offer into a binding cap price;
- Tightening guidelines for how the AER sets the default market offer to further drive down the default electricity price;
- Fines and other financial penalties;
- Extending market making obligations beyond South Australia which is a form of structural separation; and
- Ordering divestiture of assets or parts of an energy business (as a last resort).

The new remedies would be specific to the electricity sector and complement the existing rules and actions that exist under the *Competition and Consumer Act 2010* and the National Electricity Law.

The Government is in the process of developing legislation to implement the announced regime under the *Competition and Consumer Act 2010*. The legislation will include:

- defining the prohibited conduct which may lead to a remedy or response;
- new remedies and criteria around their use;
- pathways for the ACCC to impose an immediate remedy, apply to the Court for civil penalties, or recommend a remedy to the Treasurer as appropriate for identified prohibited conduct;
- a process for a corporation to seek to explain or rectify their conduct ahead of any recommendation by the ACCC to the Treasurer;
- a process for the ACCC to recommend a proportional and targeted remedy or response for the Treasurer's determination and for the Treasurer to make that determination; and

- avenues for review.

This paper outlines a proposed approach to implementing this policy for the purposes of consultation. The Government seeks stakeholder views on these approaches as input to the development of the associated legislation.

The appendix includes a series of flowcharts detailing the overall process.

Prohibited conduct

Prohibited conduct is proposed to broadly correspond to the three limbs of the ACCC's electricity price monitoring: retail prices, wholesale bids and conduct, and contract market liquidity.

The Government is considering, and invites views on, how best to frame the prohibitions. The key concepts are included in text boxes below with explanations of the intended scope. The intention is that these concepts form the basis for a legislative definition of prohibited conduct.

The proposed prohibitions will be framed bearing in mind that they could give rise to significant remedies including potentially divestiture. Existing prohibitions, for example, under the *Competition and Consumer Act 2010*, would continue to apply.

Retail prices

Option A: An electricity retailer must not charge its small customers a price that is higher than the default market offer unless this is justified by a substantial difference in the terms and conditions of the offer.

Option B: An electricity retailer must adjust the prices charged to its small customers to reflect sustained decreases in wholesale market costs.

The objective of this limb is to target retailer conduct which takes unfair advantage of consumers' confusion around retail electricity offers and their difficulty in identifying and switching to better deals. Residential customers and small to medium businesses are considered particularly vulnerable to such behaviour.

A hypothetical example of such conduct is where:

- a retailer's costs fall substantially (due to, for example, a significant and sustained reduction in wholesale costs); and
- that retailer fails to pass through any of the savings to the end consumer.

The Government is considering two ways of achieving this objective as detailed in the proposed Option A and Option B above.

Wholesale bids and conduct

An electricity generator must not, when making a bid or offer to dispatch electricity, act fraudulently, dishonestly or in bad faith with the purpose of distorting or manipulating prices.

The objective of this limb is to prevent conduct in the wholesale spot market (in the case of the NEM) or other form of wholesale market (outside the NEM) which is anti-competitive and can lead to an increase in prices which flows through to end consumers. The relevant conduct could involve bidding, or could involve non-bidding behaviour, such as a decision to supply or withhold supply.

The Government is considering how best to distinguish between behaviour which takes advantage of periods of high prices (which, over time, should be a signal to investors) and behaviour which seeks to manipulate or distort prices in a way not intended by the design of the relevant wholesale market.

Stakeholder feedback is sought on the **hypothetical example** below, including under what circumstances of this sort of conduct should or should not be captured by a prohibition:

- Generator A schedules discretionary maintenance on a power plant to occur during a peak period in order to increase the market price, and increase the revenue received by the other power plants owned by Generator A.

Another **hypothetical example** that may represent conduct that could be prohibited is where:

- Genter A continually bids in significant capacity at a low price in times of relatively low demand incurring significant losses in doing so for a sustained period of time; and
- Genter A's purpose is to ensure that a Genter B (a rival), which cannot incur the same losses and must bid at a price sufficient to cover its costs, is unable to be dispatched and is driven from the market.

This limb is not intended to interfere with the design and operation of the relevant wholesale market. For example, the NEM wholesale spot market permits rebidding in good faith as it can allow market participants to respond to changing market conditions. Similarly, transient instances of market power can act as a market signal for more investment, stimulating competition.

Contract liquidity

An electricity generator must not withhold, limit or restrict the availability of electricity financial contracts with the purpose of substantially lessening competition in an electricity market.

The objective of this limb is to target conduct whereby a generator (likely a gentailer) unreasonably refuses to offer contracts to a rival at the retail level for anti-competitive purposes.

A hypothetical example of such conduct is where:

- Genter A typically offers electricity financial contracts (cap and swap contracts) to third parties, including rival retailers through a trading platform, including Retailer B (a small retailer with no generation assets);
- Over time, Retailer B becomes a significant competitive threat to Genter A at the retail level; and
- Genter A then decides to significantly reduce the amount of contracts it offers through the trading platform for the purpose of ensuring Retailer B is unable to manage its risk and becomes unviable.

This limb is not intended to interfere with efficient risk management strategies by electricity market participants including a gentailer contracting from its generation arm to its retail arm and prudent management of operational risks of a generation asset. Nor is it intended to extinguish contractual rights already on foot.

Available remedies

The legislative framework will include a graduated series of remedies and responses. The responses are proposed to be available for a breach of any of the three prohibition limbs outlined above. The responses are proposed to be included as follows.

ACCC-issued - Public warning notice

Upon identifying prohibited conduct, the ACCC will be able to issue an immediate public warning notice.

ACCC-issued - Infringement notice

Upon identifying prohibited conduct, the ACCC will be able to issue an immediate infringement notice which includes a penalty amount. Infringement notices are used by the ACCC as an enforcement tool in a number of

other contexts.

Court-ordered - Civil penalties

Upon identifying prohibited conduct, the ACCC will be able to apply to the Court for a civil penalty order. It is expected that civil penalties would be in line with those available for other breaches of the competition law, and significantly higher than the penalties available under an infringement notice.

Treasurer-ordered – Default market offer as a price cap

Upon identifying misconduct, the ACCC will be able to initiate a notice and response process with the corporation (see Flowchart B at Appendix). Following this process, the ACCC could make a recommendation to the Treasurer that would allow the Treasurer to make an order that the corporation's retail offers are capped for a specified period at the level of the default market offer set by the AER. (In the absence of such an order, retailers are able to make market offers above the default market offer.)

Treasurer-ordered – Contracting obligation

Upon identifying misconduct, the ACCC will be able to initiate a notice and response process with the corporation (see Flowchart B at Appendix). Following this process, the ACCC could make a recommendation to the Treasurer that would allow the Treasurer to make an order that the corporation offer generation capacity through contracts with unrelated parties.

The order will need to specify details such as:

- the amount of generation capacity which must be offered;
- a requirement that offers be made on commercial terms;
- the period over which offers must be made; and
- any other details necessary to give effect to the order.

Treasurer-ordered – Divestiture order

Upon identifying misconduct, the ACCC will be able to initiate a notice and response process with the corporation (see Flowchart B at Appendix). Following this process, the ACCC could make a recommendation to the Treasurer that would allow the Treasurer to make an order that a corporation divest some or all of its assets. Such an order would only be able to be made if other remedies were insufficient to address the conduct and the public benefit of the order outweighed any public detriment.

The order will need to specify details such as:

- the asset(s) to be divested;
- the period of time permitted to carry out the order; and
- any other details necessary to give effect to the order.

It is expected that the legislation will provide a process for the corporation to apply to the Treasurer to revoke the order in circumstances where there are insurmountable issues with selling the asset.

The three Treasurer-ordered remedies are proposed to be subject to criteria around their use given they are intended for more serious conduct. It is proposed that the three remedies would be subject to requirements that their use would be:

- proportionate to the offending conduct; and
- targeted to the offending conduct.

Additionally, the divestiture order is proposed to be subject to further criteria which could be framed as follows:

- the public benefit of the order would outweigh any public detriment; and
- none of the other remedies would resolve the issue.

ACCC engagement with corporation and report to Treasurer

For the three Treasurer-ordered remedies, the ACCC would engage with the corporation and provide an opportunity for the corporation to explain and/or rectify the issue.

The proposed process is as follows:

1. The ACCC would serve the corporation with a notice specifying that the ACCC considers the corporation has engaged in prohibited conduct and that the ACCC is considering recommending one or more remedies to the Treasurer.
2. The corporation would have [30 days] to respond to the ACCC's notice explaining and/or rectifying its conduct. The corporation could also comment on the proposed remedy.
3. The ACCC would then have a further [30 days] to provide a report to the Treasurer either:
 - 3.1 advising the Treasurer that no action is to be taken because the ACCC is satisfied with the corporation's response; or
 - 3.2 advising the Treasurer that the ACCC is not satisfied with the corporation's response, and recommending one or more of the three available remedies to the Treasurer;
4. The Treasurer would then have a further [30 days] to consider the ACCC's report and make an order applying a remedy (or no remedy), following which the ACCC's report is publicly released along with the Treasurer's determination.

The ACCC will be able to accept a court-enforceable undertaking under section 87B of the *Competition and Consumer Act 2010* at any stage throughout the process.

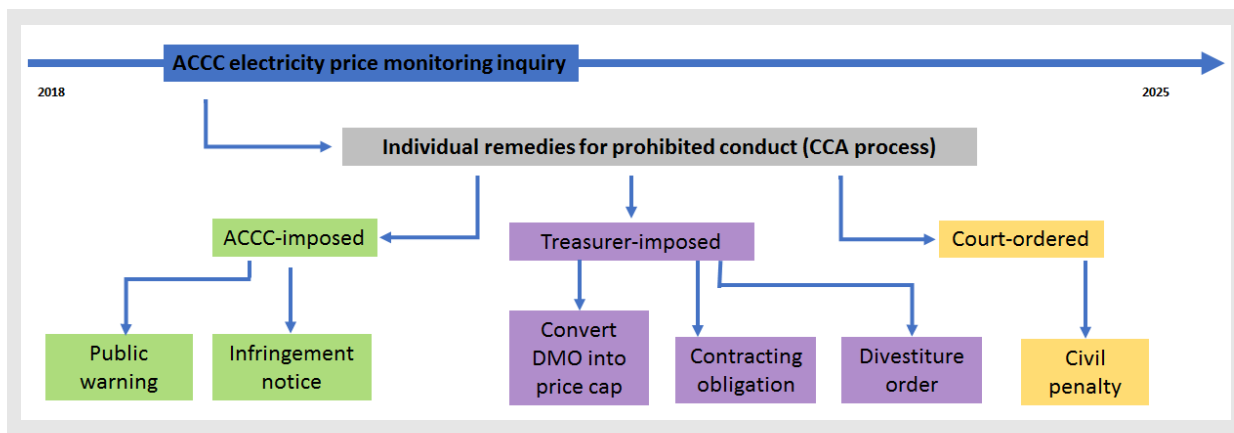
The process is set out in Flowchart B at Appendix.

Review processes

It is proposed that merits review and judicial review would be available for the Treasurer's determinations.

Appendix: Process flowcharts

Flowchart A: Suite of remedies



Flowchart B: ACCC notice and response process (Treasurer-imposed remedies)

