1. INTRODUCTION

1.1 The objects of the Energy Procurement Supply Association (**EPSA**), as set out in EPSA's Rules, are as follows:

(a) EPSA brings together procurement professionals from different utility companies operating in the region, with the purpose of creating tangible business benefits to members and becoming a source of best practices through sharing practices and collaborating on supply chain management activities of members.

(b) EPSA holds regular conferences/workshops, sets up workgroups on common issues, and conducts qualitative and quantitative benchmarking.

1.2 EPSA and its members acknowledge that EPSA members may be actual or potential competitors with one another for the supply and/or acquisition of goods or services.

1.3 EPSA and its members are committed to complying with the *Competition and Consumer Act 2010* (Cth) (**CCA**).

2. COMPETITION LAWS

The key rules

2.1 **Cartel conduct:** Among other things, the CCA prohibits making or giving effect to a contract, arrangement or understanding ("arrangement") that contains a cartel provision. A cartel provision includes any provision that has:

(a) the purpose or effect of fixing, controlling or maintaining the price of goods or services to be supplied or acquired by any party to the arrangement (**price-fixing**);

(b) the purpose of preventing, restricting or limiting the production, capacity, supply or acquisition of goods or services by any party to the arrangement (**restricting competition**);

(c) the purpose of allocating actual or likely customers, suppliers or territories between the parties to the arrangement (**market allocation**); or

(d) the purpose of bid rigging, which can take a variety of forms (e.g. submitting competing bids on the understanding that one party's bid is likely to be more successful than the other) (**bid-rigging**),

provided that at least two of the parties to the arrangement are, or are likely to be, in **competition** with each other in relation to the relevant goods or services covered by the cartel provision.

2.2 Cartel conduct is prohibited regardless of its effect on competition. This means that such conduct does not need to have the purpose, effect or likely effect of substantially lessening competition in a market in order to breach the CCA.

2.3 **Anti-competitive arrangements and concerted practices:** Even if conduct is not cartel conduct, it may still breach the CCA's prohibition on making or giving effect to an arrangement, or engaging in a concerted practice, that has the purpose, effect or likely effect of substantially lessening competition in a market. A "concerted practice" includes cooperation (and potentially other forms of conduct) that falls short of a contract, arrangement or understanding. This may include, for example, the disclosure of competitively sensitive information (such as pricing

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information) between competitors (whether directly or indirectly, e.g. via an industry body or other third party).

Rules apply to procurement as well as supply activities

2.4 The rules outlined above do not only apply to the *supply* of goods and services – they also apply to *acquisition/procurement* activities. For example, under the cartel rules, parties who do (or may) compete to acquire goods or services must not enter any arrangement as to:

(a) the price to be paid for the goods or services (including price-related features such as discounts, allowances, rebates or credits);

(b) the volume of goods or services to be acquired; or

(c) limiting, or allocating between the parties, the suppliers from whom the parties will acquire the goods or services (e.g. agreeing that they will acquire certain goods or services from particular suppliers only and, by implication, not other suppliers).

Consequences of non-compliance

2.5 There are significant legal, financial and reputational consequences for breaching the CCA. For a corporation, the maximum financial penalty for each breach is currently the greater of:

(a) $10 million;

(b) three times the value of the benefit obtained from the conduct (if calculable); or

(c) 10% of the entity's annual turnover during the preceding 12 months (if the benefit is not calculable).

2.6 For individuals found liable for a breach, the maximum penalty is $500,000 per contravention, and the individual may also be disqualified from managing a corporation.

2.7 Additionally, a breach of the cartel rules by a corporation or individual may constitute a criminal offence. An individual convicted of a cartel offence may be sentenced to up to 10 years' imprisonment and/or fined up to $444,000.

2.8 The ACCC (and other affected parties) may also seek damages, injunctions, and other orders for a breach of the CCA.

Examples of conduct that may breach the CCA

2.9 Examples of conduct that may breach the CCA include:

(a) **Collective boycott cartels.** EPSA members collectively agreeing not to buy goods or services from a particular supplier, even if the agreement is reached for 'positive' social or environmental reasons.

For example, an agreement or understanding between members that they will not use a particular supplier because that supplier scores poorly on EPSA's modern slavery compliance assessment questionnaire.

(b) **Exchanging competitively sensitive information.** EPSA members sharing confidential information of the kind described under paragraph 3.4 below.

For example, sharing confidential information about the terms of bids received by members from potential suppliers of vegetation management services.

(c) **'Nod and a wink' cartel understandings.** Informal understandings between members to modify or limit competitive activities.

For example, a discussion between two EPSA members where the first member hints that there is "no need" for their company to bid for a certain renewables project opportunity if they understand that the second member will not bid for another similar project.

3. PROTOCOLS TO MANAGE COMPETITION LAW RISK

Avoiding unlawful arrangements or practices

3.1 In all EPSA meetings and in any other forum associated with EPSA, members will take care to ensure there is no suggestion that a cartel arrangement, anti-competitive arrangement or concerted practice may have formed between any members.

3.2 In addition to the other protocols outlined below, EPSA members will not:

(a) discuss how they may act in relation to particular suppliers, customers, or terms and conditions (e.g. what terms and conditions, including price, they may accept or reject);

(b) seek to influence another member regarding how it may act in relation to particular suppliers, customers or terms and conditions;

(c) discuss how they may act in relation to particular tenders or other competitive opportunities; and

(d) seek to influence another member regarding how it may act in relation to tenders or competitive opportunities.

Information exchange

3.3 EPSA members will not exchange competitively sensitive information with each other in any forum associated with EPSA, either directly or through any representative of EPSA.

3.4 "Competitively sensitive information" includes non-public information about:

(a) pricing (or components of price such as discounts, rebates, freight or service charges etc) of goods or services supplied or acquired by a member;

(b) current profit margins, volumes or revenue;

(c) customers or suppliers, including their identity and material contract/trading terms;

(d) costs or significant components of costs, including cost information by customer, supplier, service or product;

(e) bids, tenders or negotiations with current or potential customers or suppliers, including any future bidding intentions; and

(f) confidential business strategies, including plans for expansion into, or exit from, particular activities.

Meetings

3.5 At all meetings of EPSA members, EPSA and its members will endeavour to adhere to the following guidelines:

(a) EPSA will circulate a written agenda in advance of the meeting;

(b) participants will not depart from the written agenda;

(c) each meeting will begin with a reminder to participants about the need to ensure discussions are conducted in accordance with the CCA and this policy; and

(d) participants will immediately cease a discussion if any participant raises concerns that the discussion may raise competition law risks or fail to comply with this policy, until such time as the participants can obtain legal advice to confirm that it is safe to proceed with the discussion.

Procurement practices

3.6 EPSA and its members acknowledge that EPSA may develop materials to assist members to implement procurement best practices, including tools to assess and benchmark potential suppliers.

3.7 The following are key principles for those materials and related discussions:

(a) EPSA and its members must not refer to individual suppliers. It is up to each member whether and how to use the tools to make decisions in respect of individual suppliers;

(b) Where EPSA materials are used by members to assess or benchmark suppliers, the outcome of that assessment must not be discussed between members. For example, members must not discuss whether any of them will or should engage (or not engage) particular suppliers or types of suppliers;

(c) Discussions must not involve any discussion or exchange of competitively sensitive information, as outlined above; and

Subject to the principles above, members may otherwise provide input and feedback on the materials produced by EPSA.