

# A GUIDE TO ENERGY MARKET MANIPULATION

*Edited by Gordon Kaiser*

*Reviewed by A. Neil Campbell\**

Despite its title, *The Guide to Energy Market Manipulation*<sup>1</sup> is not a how-to book for entrepreneurial energy traders! Rather, as Joseph Kelliher notes in the foreword, it is a first-of-its-kind survey of the developing law of market manipulation across nations and energy sectors that combines contributions from recognized experts in each area.<sup>2</sup> The editor and driving force behind the book is Gordon Kaiser, a former vice-chair of the Ontario Energy Board and long-time co-chair of the Canadian Energy Law Forum. It has been published with high production values by Law Business Research.<sup>3</sup>

## I. LEGISLATION AND JURISPRUDENCE

The core of the book consists of eight chapters that explain the regulatory frameworks and jurisprudence applicable to energy markets in the US, Canada, the EU and Australia.

In the US, the overlapping jurisdictional reach of the Federal Energy Regulatory Commission (FERC) and the Commodity Futures Trading Commission (CFTC) is set out thoroughly in chapters by Robert Fleishman and Paul Varnado and by Anthony Mansfield, respectively.<sup>4</sup> Fleishman and Varnado usefully go beyond the legal framework and identify several areas where there are unresolved issues regarding the substantive legal standards as well as controversial aspects of the FERC's practices. Mansfield's contribution is less specific to energy markets, reflecting the wide range of commodity markets that are subject to CFTC oversight. However, it provides energy market participants and their advisors, as well as energy regulators, with valuable comparative perspectives from other commodity markets.

The European energy markets and related regulatory regimes will be less familiar to North American audiences. The chapter by Peter Willis contains an in-depth discussion of the EU's Regulation on Wholesale Energy Market Integrity and Transparency (REMIT) as well as the enforcement activities of various na-

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1. THE GUIDE TO ENERGY MARKET MANIPULATION (Gordon E. Kaiser ed., 2018) [hereinafter *Energy Market Manipulation*].

2. J.T. Kelliher, "Foreword", in *Energy Market Manipulation*, at 12.

3. Robert Fleishman, the Energy Law Journal's Editor-in-Chief, wrote a chapter in this book and is mentioned in the foreword. He did not participate in the preparation or editing of Mr. Campbell's book review.

4. Robert S. Fleishman and Paul C. Varnado, "Perspectives on FERC's Enforcement Programme as it relates to Energy Market Manipulation", ch. 2, and Anthony M. Mansfield, "Commodity Futures Trading Commission Enforcement", ch. 3, in *Energy Market Manipulation*.

tional regulatory authorities and the coordinating role of the Agency for the Cooperation of Energy Regulators (ACER).<sup>5</sup> It includes helpful summaries of key cases arising under European competition law as well as REMIT. An accompanying report by James Jameson and Nenad Njegovan of the UK's Competition and Market Authority (CMA), which describes the results of the CMA's Energy Market Investigation in 2014, is perhaps out of place in part one of the book since it is not really about the regulatory framework. However, it is a particularly interesting contribution that explains in plain language "for both wholesale market power and CfD contract for differences manipulation, how manipulation might occur, how we set about assessing it and our findings."<sup>6</sup>

The Ontario and Alberta markets have generated relatively few cases to date, but the very distinctive legal frameworks in both provinces are well described in this volume. The Alberta overview takes full advantage of the co-authors' recent experience as counsel for the Market Surveillance Administrator (MSA) in the *TransAlta* case to discuss several specific issues arising in the proceedings before the Alberta Utilities Commission (AUC).<sup>7</sup> While the procedural issues are canvassed effectively, less attention is paid to the substantive market power and market regulation issues arising under Alberta's "fair, efficient and open competition" (FEOC) regime.<sup>8</sup> Glenn Zacher's discussion of the Ontario regulatory regime traces the historical development of the shared enforcement responsibilities of the Independent Electricity System Operator (IESO)'s compliance division and the Ontario Energy Board's Market Surveillance Panel (MSP), including the recently developed and not yet tested "general conduct rule," which reflects notable differences from the FERC and FEOC models.<sup>9</sup> A parallel chapter by George Vegh overlaps somewhat, but focuses heavily on institutional design and investigative process issues that he considers to be of concern.<sup>10</sup> In contrast, Canadian administrative law scholar Professor David Mullan puts forward a very supportive view of the Ontario as well as the Alberta regulatory regime in his chapter dealing with administrative law principles.<sup>11</sup>

The Australian contribution by Peter Adams and his colleagues at the Australian Energy Regulator is particularly valuable because it includes a discussion

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5. Regulation No. 1227/2011, [Dec. 28, 2011] (E.U.); Peter Willis, "REMIT Energy Market Manipulation", ch. 6, in *Energy Market Manipulation*.

6. James Jameson and Nenad Njegovan, "Testing Energy Market Manipulation in Great Britain", ch. 7, in *Energy Market Manipulation*, at 80.

7. *Re Market Surveillance Administrator Allegations Against TransAlta Corporation et al*, Alberta Utilities Commission Decision 3110-D01-2015, Phase 1 (27 July 2015); Randall W. Block, John D. Blair and Laura M. Poppel, "Energy Market Manipulation in Alberta", ch. 5, in *Energy Market Manipulation*.

8. The Electric Utilities Act, S.A. 2003, ch. E-5.1, s. 6, imposes an obligation on all market participants to support the fair, efficient and openly competitive operation of the Alberta electricity market. This obligation is fleshed out in the Fair Efficient and Open Competition Regulation, Alta. Reg. 159/2009 (FEOC Regulation).

9. Glenn Zacher, "Compliance and Enforcement in the Ontario Electricity Sector", ch. 3, in *Energy Market Manipulation*.

10. George Vegh, "Investigating Energy Market Activity in Ontario", ch. 4, in *Energy Market Manipulation*.

11. David J. Mullan, "Administrative Law Principles", ch. 13, in *Energy Market Manipulation*.

of the monitoring function in energy markets.<sup>12</sup> It also considers some of the challenges involved in the interface “between the oversight of energy derivative products in the financial markets and physical products in the energy markets.”<sup>13</sup> This is certainly one of the central issues in energy market manipulation cases. Traders make decisions related to the overall economic incentives in both physical and financial markets, and enforcement authorities need to have effective jurisdictional reach and investigative powers to address such conduct on an integrated basis.

## II. ENFORCEMENT PRACTICES

The second part of the book contains quite varied contributions on topics that are loosely categorized as relating to enforcement practices. The chapters on practice and procedure before the FERC and under REMIT in the EU are somewhat repetitive of the FERC and REMIT overview chapters.<sup>14</sup> However, they do take a deeper dive into procedural issues and provide some useful practice points for counsel working on such cases.

The sanctions and private actions chapters are two areas in which the book offers systematic multi-jurisdictional comparisons. J.P. Mousseau of the AUC puts forward a compact and readily digestible survey of the applicable sanctioning and settlement frameworks in the US (FERC but not CFTC), Alberta, Ontario and Australia.<sup>15</sup> However, an analysis of the actual sanctions and settlement outcomes in these jurisdictions would have been a useful addition. The private actions chapter embraces such an approach with brief summaries of cases that have emerged thus far in the US, EU and Canada.<sup>16</sup>

## III. EXPERT EVIDENCE

The concluding part of the book includes two very interesting chapters on expert evidence. Philip Tunley contrasts the AUC’s receptive approach to expert economic and technical evidence in the TransAlta case with the trend in Canadian courts to apply more rigorous screening with respect to the admissibility of expert evidence<sup>17</sup> (albeit one which may seem tame for counsel that are familiar with “Daubert” challenges in the US).<sup>18</sup> A chapter on economic analysis by Brian Rivard, Chris Russo and colleagues at CRA is less jurisdiction-bound and provides useful (albeit brief) overviews of the types of manipulation theories that have been addressed in the US, the EU and Canada as well as the outcomes in such cases.<sup>19</sup>

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12. Peter Adams, Kate Murphy and Jeremy Llewellyn, “Australia”, ch. 8, in *Energy Market Manipulation*.

13. *Id.*, at 95.

14. David A. Applebaum, Todd L. Brecher and J. Porter Wiseman, “FERC Practice and Procedure”, ch. 9, and Mark J. Mills, “Energy Market Manipulation in the EU: Practice and Procedure”, ch. 10, in *Energy Market Manipulation*.

15. J.P. Mousseau, “Fines, Sanctions and Settlements”, ch. 11, in *Energy Market Manipulation*.

16. Randall Hofley, Justine Johnston and Joseph J. Bial, “Private Actions in the United States, Canada and Europe”, ch. 12, in *Energy Market Manipulation*.

17. M. Philip Tunley, “The Use of Expert Evidence”, ch. 14, in *Energy Market Manipulation*.

18. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, (1993) 509 U.S. 579.

19. Robin Cohen, David Hunger, Brian Rivard and Christopher Russo, “Economic Evidence of Market Power and Market Manipulation in Energy Markets”, ch. 15, in *Energy Market Manipulation*.

## IV. CONCLUDING OBSERVATIONS

A key strength of the book is the participation of many authors who are current or former energy regulators. This adds significant credibility and balance to the volume. Unlike some multi-jurisdictional reference books, the editor has not prescribed a template for each author to follow. This approach allows chapter authors to focus on the areas that they consider to be most important, but does result in some coverage gaps (e.g. the administrative law and expert evidence contributions are limited to Canadian law) and makes comparative analysis more cumbersome.

Mousseau touches briefly on the importance of compliance programs as a mechanism for mitigating potential sanctions, particularly under the FERC's penalty guidelines where a reduction of up to 60% may be available.<sup>20</sup> Compliance programs are also a key preventive strategy for companies, and if a second edition of this book is prepared in the future, a chapter on energy trading compliance program design and implementation from an in-house legal or compliance officer would be a worthwhile addition.<sup>21</sup>

Kaiser modestly notes in his introductory essay that “this book is a first attempt to survey a new and complex form of regulation that applies to one of the most important industry sectors in the world”.<sup>22</sup> The book more than achieves this objective and will be an indispensable resource for regulators and counsel practicing in the area — not because it has the definitive answers to all of the questions in this complex field, but because it provides extensive points of reference that will facilitate efficient domestic and comparative analysis when issues arise.

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20. Mousseau, *Fines*, at 130; Revised Policy Statement on Penalty Guidelines, 132 FERC Paragraph 61,216, September 17, 2010.

21. A useful starting point is the FERC guidance on the topic: Staff White Paper on Effective Energy Trading Compliance Practices, November 2016, <https://www.ferc.gov/legal/staff-reports/2016/tradecompliance-whitepaper.pdf>.

22. G.E. Kaiser, “Energy Market Manipulation: A New Regulatory Regime”, in *Energy Market Manipulation*, at 10.