

9 April 2020



Director
Electricity Markets Branch
Australian Competition and Consumer Commission
GPO Box 3131
Canberra ACT 2601

Dear Commission,

Subject: Submission regarding Draft Guidelines on Part XICA – Prohibited conduct in the energy market

The Public Interest Advocacy Centre (PIAC) is an independent, non-profit legal centre based in New South Wales. Established in 1982, PIAC tackles systemic issues that have a significant impact upon people who are marginalised and facing disadvantage. We ensure basic rights are enjoyed across the community through litigation, public policy development, communication and training. The Energy + Water Consumers' Advocacy Program represents the interests of low-income and other residential consumers, developing policy and advocating in energy and water markets.

PIAC welcomes the opportunity to respond to the Australian Competition and Consumer Commission's (the Commission) consultation on *Draft Guidelines on Part XICA – Prohibited conduct in the energy market (the Guidelines)*.

We support the intent of the Guidelines. However, we are concerned the Guidelines do not go far enough in preventing consumers being overcharged for their electricity, and allow consumers to be charged differently, despite imposing the same costs on suppliers.

We discuss retailer costs and spot market and contracting practices below.

Retailer practices

The Guidelines stipulate a retailer will be required to adjust its prices in response to reductions in its 'underlying cost of procuring electricity', which includes network, wholesale and environmental costs and excludes retail costs and margins.

PIAC considers this treatment of costs allows retailers to maintain existing unfair and uncompetitive pricing practices and is inconsistent with the intent of the Bill to prohibit 'conduct that, if engaged in by certain participants in energy markets, can be detrimental to competition or to consumer welfare'. We also consider it will potentially make enforcement prohibitively difficult.

Requiring that retailers only pass through reductions in 'underlying' costs allows them to maintain their existing retail margins, which are not consistent across

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their customers and do not reflect the costs those individual customers impose. Allowing retailers to maintain their existing margins ensures some customers imposing the same costs will continue to pay more than others for the same service, even while the 'underlying costs of procuring electricity' decline.

Additionally, excluding retail margins from 'underlying' costs makes determining whether retailers are passing through reductions in network, wholesale and/or environmental costs difficult. Retailers' costs, including their margins and what the Guidelines consider the 'underlying cost of procuring electricity', are not transparent. As a result, reductions in 'underlying' costs are hard to separate from retailer costs, giving retailers the opportunity to avoid passing through reductions in underlying costs by obscuring them in their retail margin.

PIAC recommends including retailer costs in 'underlying' costs to limit unfair price dispersion between customers and to allow easier monitoring and enforcement of the Guidelines.

Furthermore, the complexity of some retailers' wholesale energy costs - particularly gentailers, which have internal contracting, cost allocations and financial products - means it will be difficult to tell whether a retailer is able to pass through wholesale cost reductions.

Reductions in network costs will also be difficult to monitor and enforce. Retailers are currently not required to be transparent about how they pass through network and other costs, and monitoring this would likely require new accountability from retailers. A network area may cover only part of a retailers' customers so the Commission would have to potentially determine whether costs are being passed through for a subsection of a retailer's customers.

PIAC is concerned the requirement that reductions in 'underlying' costs be 'sustained and substantial' for retailers to be required to pass them on is too subjective and may result in vulnerable consumers missing out on valuable bill reductions. We consider whether something is 'substantial' is relative to the customer, with even small cost reductions having an impact on vulnerable households. While the Commission has indicated it will not apply a set threshold for determining whether a reduction is 'sustained and substantial', we consider more prescription may benefit consumers. As such we recommend, in the absence of a set threshold, the Commission outline which type of consumers it has in mind when judging whether costs are 'substantial'.

We are concerned the caveat that reasonable adjustments in response to reductions in 'underlying' costs do not cause retailers to operate at a loss may result in some consumers missing out on cost reductions due to the business practices of their retailer. We do not consider this fair or competitive. We recommend retailers be required to pass through reductions in 'underlying' costs even if it causes them to operate at a loss as long as it doesn't result in insolvency.

Other matters

PIAC highlights that competition in the wholesale energy and contract liquidity markets has, over recent years, been effective at lowering wholesale energy prices. We welcome measures in the Guidelines to ensure competition in these markets is supported. However, we are concerned proving a corporation's contracting behaviour is designed to substantially lessen competition, or a generator's spot market behaviour is to distort or manipulate prices in that market will be difficult.

PIAC considers other measures can put downwards pressure on energy prices and these should be given priority over the Prohibiting Energy Market Misconduct Bill. These include the introduction of a demand response mechanism into the wholesale energy market, government

underwriting of required new transmission infrastructure so new low-cost renewable energy can be brought online, the development of a cost-based DMO similar to the Victorian Default Offer across all NEM jurisdictions, and the implementation of the Integrated System Plan.

PIAC would welcome the opportunity to meet with the Commission and other stakeholders to provide further input and discuss these issues in more depth.

Yours sincerely

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