

Strengthening the Prohibiting Energy Market Misconduct provisions in the *Competition and Consumer Act 2010*

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About the Justice and Equity Centre

The Justice and Equity Centre is a leading, independent law and policy centre. Established in 1982 as the Public Interest Advocacy Centre (PIAC), we work with people and communities who are marginalised and facing disadvantage.

The Centre tackles injustice and inequality through:

- legal advice and representation, specialising in test cases and strategic casework;
- research, analysis and policy development; and
- advocacy for systems change to deliver social justice.

Energy and Water Justice

Our Energy and Water Justice work improves regulation and policy so all people can access the sustainable, dependable and affordable energy and water they need. We ensure consumer protections improve equity and limit disadvantage and support communities to play a meaningful role in decision-making. We help to accelerate a transition away from fossil fuels that also improves outcomes for people. We work collaboratively with community and consumer groups across the country, and our work receives input from a community-based reference group whose members include:

- Affiliated Residential Park Residents Association NSW;
- Anglicare;
- Combined Pensioners and Superannuants Association of NSW;
- Energy and Water Ombudsman NSW;
- Ethnic Communities Council NSW;
- Financial Counsellors Association of NSW;
- NSW Council of Social Service;
- Physical Disability Council of NSW;
- St Vincent de Paul Society of NSW;
- Salvation Army;
- Tenants Union NSW; and
- The Sydney Alliance.

Website: www.jec.org.au

The Justice and Equity Centre office is located on the land of the Gadigal of the Eora Nation.

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1. Introduction

The Justice and Equity Centre (JEC) welcomes the opportunity to respond to the Consultation Paper¹ considering proposals to strengthen the Prohibiting Energy Market Misconduct provisions (PEMM provisions) in the *Competition and Consumer Act 2010*.

The JEC supports measures to ensure competition regulation and consumer protection instruments are effective, and contribute to better outcomes for energy consumers.

2. Strengthening the effectiveness of the existing provisions

We contend that, given this process arises from a review of the ongoing need for and effectiveness of PEMM provisions, the priority focus of this process should be on strengthening the effectiveness of the existing PEMM provisions to deliver their intended purpose. We interpret this to be:

- Ensuring genuine, effective competition in the wholesale energy market through the prevention of anti-competitive or manipulative practices, and
- Ensuring a meaningful link/relationship between wholesale energy prices and the retail energy price paid by consumers.

In this context, the JEC strongly supports the continued existence and further strengthening of the provisions in the PEMMS Act. The three existing provisions have an important function in signalling expected behaviour in the energy market to retailers, generators, gentailers, and market participants in the wholesale spot market. These provisions also have deterrence value beyond any practical role they may play. We consider it likely these provisions will become increasingly important as the energy system transition unfolds, and further reforms to market structures are implemented.

2.1 Enabling measures required to improve effectiveness

As noted in our prior submission the Australian Competition and Consumer Commission (ACCC) – the regulator of the PEMM provisions - faces several difficulties effectively monitoring and enforcing the provisions. Viewed from an external perspective, the same outcomes in the market could be assessed as resulting from normal business behaviour, prudent risk management, permitted competitive market practices, or manipulative and prohibited practices. Reliably identifying and establishing a breach of the provisions is difficult in many cases.

If the existing provisions are to be rendered more effective in delivering their intent – notwithstanding any strengthening or expansion of the provisions - greater access to more

¹ DEECCW (Cth), *Strengthening the Prohibiting Energy Market Misconduct provisions in the Competition and Consumer Act 2010 – Consultation Paper*, December 2025, see link at - <https://consult.dcceew.gov.au/strengthening-the-pemm-provisions-in-the-competition-consumer-act-2010>, (Consultation Paper).

detailed and comprehensive market information is required to robustly assess the nature of energy business practices.

2.2 Governance

We do not support transferring regulation of the PEMM provisions to the Australian Energy Regulator (AER).

We consider this would be a misalignment of roles and would weaken the effectiveness of the provisions. The AER should have an enabling role in supporting effective regulation of the PEMM provisions through its contribution to monitoring and reporting.

While the upcoming structural separation of the AER from the ACCC should trigger consideration of the effective (and efficient) distribution and sharing of roles, it does not (and should not) result in the AER becoming the sole regulator of all activity in the energy sector. There are distinct differences between the focus, approach, resources and expertise of the two organisations and these should be recognised in the distribution of responsibilities.

There are many other sectors of the economy where there is regulation by multiple regulators with different – if sometimes overlapping - focuses. We consider this appropriate, and in no way ‘inefficient’ or unnecessarily duplicative.

The ACCC is most appropriately responsible

The regulation of energy markets (wholesale and retail) exists on a spectrum – from monitoring markets’ day to day functionality, and regular reporting on market performance against defined measures and outcomes, to investigation and enforcement in respect of more generally anti-competitive behaviour between market participants, or egregious behaviour towards retail consumers. The later is prescribed by the CCA, including its general provisions and energy specific PEMM provisions. Regulation of the PEMM provisions, alongside corresponding, more general provisions of the CCA, lie within the clear purview and expert competencies of the ACCC as the nation’s expert competition and consumer regulator.

The ACCC’s focus is on competitive markets with the broad objective they deliver good outcomes for consumers. This is in many senses a broadly defined purpose, with wide scope of action as to how this is delivered. The ACCC has developed a relatively proactive and flexible approach to regulating positive market and consumer outcomes, by pursuing breaches of prescribed behaviours using all tools at its disposal. This sometimes extends to adapting or actively seeking new tools and investigating and advocating for policy reform.

The AER’s focus is generally narrower. It tends to be focussed on details of the national energy rules, monitoring the performance of energy markets, and their structure. The focus is on assessment against defined measures and ensuring adherence to prescriptive market and retail rules and requirements. In effect this can mean the focus is not unequivocally on consumers, but more broadly on the ‘energy market’. Notwithstanding the value of this role, and the fact the AER undertakes critical actions in respect of breaches of national energy laws and rules, the ACCC remains arguably much better placed – and much better suited - to regulate the PEMM provisions.

Effective regulation of the PEMM provisions requires that the regulator has available to it the necessary expertise, resources, information gather powers, and detailed market information.

Information sharing

Effective regulation of the PEMM provision requires the regulator to have the necessary information to identify and establish that there has been a breach of the prohibitions. Regular monitoring of markets by the AER provides the starting point by which potential instances of breaches of prescribed behaviour can be observed. This is then followed by ensuring the ACCC has adequate powers to further investigate, gathering information from other regulators (such as the AER), and market participants. Greater ongoing transparency of contract positions, wholesale energy costs and retail market offers will be crucial, as discussed below.

We welcome the proposals made in the Consultation Paper to strengthen the ability for information sharing between the AER and the ACCC. Strengthening the collective resources and capability of the two regulators will go a long way to reducing any regulatory burden on industry with respect to regular reporting requirements. It provides a practical alternative to ill-advised attempts to shift the regulation of the PEMM provisions from the ACCC to the AER.

We highlight the value of enabling the AER to collect comprehensive offer information from retailers, which the ACCC should be able to access as part of its PEMMs responsibility. This would include requiring retailers to regularly (ideally as part of quarterly reporting) provide the AER with a comprehensive summary of *all* their retail offers, the price terms of those offers, and how many customers are on each offer. We see such information as a critical existing gap in transparency and a crucial enabler to more effective market monitoring as well as enforcement action.

NEM Inquiry

We understand it is proposed the NEM Inquiry function be wholly transferred from the ACCC to the AER. We do not support such a move.

The NEM Inquiry has proven to be a critical resource in recent years, which has added value beyond the market performance monitoring provided by the AER and other regulatory bodies. While we are encouraged to see the Consultation Paper notes the intention that there is no reduction in scrutiny or coverage of NEM Inquiry once the function transfers to the AER,² we do not consider it preferable to rationalise market inquiry functions in a single process or regulatory body.

We strongly encourage this process to consider recommending the ACCC retain some form of ongoing market inquiry function, power and resourcing.

2.4 Retail pricing

We support continuation of the existing PEMMs provisions, in addition to any measures intended to ensure they are better able to deliver on their core intent in the future.

² Consultation Paper, pp.12-14.

The existing retail pricing provision as drafted is somewhat ambiguous and relies on the ACCC being able to establish an absence of retailer action to reduce prices through assessment of available retail data which is currently opaque and incomplete. The examples set out in the ACCC's *Guidelines on Part XICA – Prohibited conduct in the energy market* (Guidelines), point to the importance of the ACCC being able to see in detail the shifts in the hedging positions of individual retailers as expressed in the contracts market prices they negotiate with generators, including internally negotiated prices within a gentailer.

However, effective ACCC monitoring is somewhat problematic in a retail market where there are multiple offers from each individual retailer at any one time particularly where the terms of these offers and how many people are impacted by those terms, is not transparent. There is often effectively 'individual pricing' to customers and no transparency as to what offers retail customers are actually on, what they are paying at any point in time and how they are varied. This complicates monitoring and makes establishing a clear relationship between wholesale and retail energy price extremely difficult.

Improvements to the scope of monitoring, and greater transparency are required to effectively deliver the intent of this provision, and any addition retail provision. In this context we note our recommendation in the previous section regarding the value of empowering the AER to collect comprehensive information from retailers relating to how many of their customers are on offers of particular price terms.

Notwithstanding current complications, in future years (as the transition to cheaper renewables progresses) it will be increasingly important to determine whether the likely sustained and substantial changes in wholesale spot market prices, translate into the retail energy prices for small consumers. We note that energy is an essential service, and there is a tendency of many consumers to set and forget their energy retail contracts. The implication of this is that consumers must have meaningful and strong protections, both in the PEMM provisions, and other regulator schemes to ensure the assumed benefits of market efficiencies underpinning their energy services, are actually being delivered.

3. Proposed extension of the PEMM provisions

3.1 Retail Pricing

The Consultation Paper provides four options in respect of a proposed new provision to provide symmetry and not only ensure that drops in retailer costs are reflected in corresponding drops in retail pricing, but also to ensure rises in retailers' costs do not result in unjustified retail price increases. While we understand and support the intent of considering such a measure, we strongly recommend caution in pursuing it further. While the intent is to strengthen the relationship between wholesale energy price and retail energy prices paid by consumers by *limiting* any increase in retail prices to 'actual' wholesale costs, there is a risk of unintended consequences that must be fully considered. For example, it may create the risk of guaranteed retail price increases in circumstances where they may not otherwise be required.

We recommend the final determination explicitly consider the scope for such consequences.

Of those presented, we support Option 2 – a specific provision prescribing the behaviour by which retailers seek to unjustifiably increase prices following rises in underlying costs. If introduced, the new provision should focus on solely the relationship between the price of the retail energy component, and underlying wholesale energy costs. It should look at underlying pricing trends, and those which are sustained and substantial.

We do not support adoption of Option 3 (reasonable pricing) or Option 4 (preapproval for price rises) as new PEMM provisions. While we do think that price regulation in the retail energy sector is an important issue which should be explored further, it more appropriately belongs in other regulatory schemes, and is more appropriately advanced through other means and mechanisms – in particular through further reform of default pricing and the Default Market Offer (DMO).

The CCA is not the correct place to put a requirement for Option 3 ‘reasonable pricing’ and the ACCC, or a court, are arguably not the correct bodies to enforce and adjudicate on whether retail pricing represents ‘reasonable pricing’ without comprehensive changes to the wider regulatory framework. This is a matter of economic regulation better suited to the AER as an expert economic regulator, with a specific focus on the energy sector. On the other hand, a court is arguably be well placed to make a determination on a prohibition against unreasonable price rises following rises in underlying costs (and the existing failure to pass on price declines), relying on detailed evidence presented on a case-by-case basis.

We agree that Option 4 - preapproval of price increases - should not be explored further at in respect of the PEMM provisions. Nonetheless, we recommend measures requiring greater transparency of retailers’ market offers. This includes requiring retailers to regularly report on:

- every offer they provide,
- the pricing terms of these offers, and
- the number of consumers on each of these offers.

Inserting such a requirement in the energy rules, will assist in the ACCC enforcing the existing PEMM retail provision, and an extension in line with Option 2. This process should recommend and support such a measure.

The Consultation Paper’s gap analysis in respect of different groups of consumers is, while useful, arguably not particularly relevant when examining the effectiveness of the PEMM provision. All consumer groups should be able to benefit from the protections of the PEMM retail provisions.

In any case, this process should recognise that other regulations and protections – such as the DMO and measures to regulate retail price changes – are the appropriate means to address other issues identified by this process. It is neither necessary nor appropriate to attempt to address all energy related issues through the PEMMs Act.

We reiterate our recommendation that this process focus on delivering the intent of the PEMM provisions, rather than a wider attempt to address all issues in energy markets.

3.2 Market manipulation

We support extension of the current spot market provision so the PEMM provisions prohibit cross market manipulation between spot markets, ancillary markets, and contract markets. We support Design Option 3 to implement this intent.

We agree with the analysis in sections 4.1 and 4.2 of the Consultation Paper. Practices of rebidding, or altering supply (whether increasing, withdrawing or withholding supply) may represent fraudulent, dishonest, or bad faith actions by a market participant for the purpose of spot market manipulation. As we go further into the energy market transition to net zero, and there is a proliferation of market participants who own multiple resources, or even single large resources traded across multiple markets it is important that cross market manipulation is prohibited.

The ACCC's ability to monitor the character and purpose of market participants behaviour and distinguish between legitimate and manipulative behaviour is of paramount importance. It is therefore important the ACCC has access to detailed information from market participants, both bidding activities in all market, and their contract positions.

However, any effectiveness of the PEMMs market provisions is likely to be materially undermined by the current structure and nature of the markets they are designed to police. This is particularly true of the current scope for rebidding. Allowing rebidding in market design and whether this is in the long-term interest of electricity consumers, must be closely considered.

4. Continued engagement

We welcome the opportunity to meet with the Department and stakeholders to discuss these issues in more depth.