



Response to the IPART Draft Determination on Electricity Pricing

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1. Introduction

This submission to the Independent Pricing and Regulatory Tribunal (the Tribunal) Draft Determination on Electricity Prices establishes the centrality of consumers and the essential nature of electricity services being regulated in the price determination process.

Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) seeks to promote a just and democratic society by making strategic interventions on public interest issues.

PIAC is an independent, non-profit law and policy organisation that identifies public interest issues and works co-operatively with other organisations to advocate for individuals and groups affected.

In making strategic interventions on public interest issues PIAC seeks to:

- expose unjust or unsafe practices, deficient laws or policies;
- promote accountable, transparent and responsive government;
- encourage, influence and inform public debate;
- promote the development of law—both statutory and common—that reflects the public interest; and
- develop community organisations to pursue the interests of the communities they represent.

Established in July 1982 as an initiative of the Law Foundation of New South Wales, with support from the NSW Legal Aid Commission, PIAC was the first, and remains the only, broadly based public interest legal centre in Australia. Financial support for PIAC comes primarily from the NSW Public Purpose Fund and the Commonwealth and State Community Legal Centre Funding Program. PIAC generates approximately forty per cent of its income from project and case grants, seminars, consultancy fees, donations and recovery of costs in legal actions.

PIAC established the Utility Consumers' Advocacy Program (UCAP) in 1998 with a grant of funding from the NSW Government. UCAP aims to advocate for the interests of residential consumers of electricity, gas and water utilities, with a particular focus on the needs of low-income and disadvantaged groups. UCAP staff receive broad policy direction from a community based Reference Group. This includes representatives from the following organisations/population groups:

- Council of Social Service of NSW (NCOSS)
- Combined Pensioners and Superannuants Association of NSW (CPSA)
- Park and Village Service (PAVS)
- Western Sydney Community Forum
- Central Coast Community Council
- Rural and remote consumers
- Bourke Family Service
- Institute of Sustainable Futures, University of Technology, Sydney
- Tenants Union of NSW

The Public Interest Advocacy Centre has a mandate to ensure that the development of the electricity market in NSW appropriately considers the interests of residential consumers, particularly low-income consumers.

2. Policy Context for the Determination

2.1 Terms of Reference and effective competition

For the first time in IPART's price determination process, the Terms of Reference issued by the Minister for Energy did not explicitly require the Tribunal to take into consideration the impacts of the determination on consumers. PIAC has expressed its disappointment directly to the Minister. It is disappointing that the Tribunal has interpreted the absence of this requirement to mean that it owes no obligation to address the needs of consumers. PIAC takes this opportunity to restate its disappointment in this decision.

The Tribunal has instead derived two objectives from the Terms of Reference. One is to deliver cost reflective tariffs and the other is to facilitate the development of effective retail competition.¹ The Terms of Reference are very clear on the issue of cost reflectivity. Under the heading 'Matters for consideration', the Minister for Energy has required that the determination should ensure that cost reflectivity is achieved by 2010.² It remains unclear whether this requirement stands for obsolete tariffs.

However, PIAC queries the second objective derived by the Tribunal. That is the mandate claimed 'to facilitate the development of effective retail competition for small retail customers'. The Terms of Reference are in fact silent on this issue.

The *Electricity Supply Act 1995*, along with the *Terms of Reference*, requires consideration of the Government's policy aim of reducing customers' reliance on regulated prices and the effect of the determination on competition in the retail electricity market. The latter requirement is not a new term. It stood in the previous determination. At that time the Tribunal gave the following commentary to this clause:

Many submissions to the review insisted that the Tribunal should allow higher operating costs and an additional margin within the regulated tariff to encourage competition... The Tribunal strongly believes that this is not desirable from an economic efficiency perspective and maintains that the regulated retail tariffs should be neutral with respect to competition.³

It is disappointing that the Tribunal has moved away from this interpretation of its obligations under the *Energy Supply Act*. That the Tribunal has elected to interpret the Act as a positive obligation to promote effective competition, risks reducing access to an essential service and undermines the development of appropriate policy.

Effective competition is a value-laden concept in its application to the energy market. PIAC and its constituent stakeholders argue that an effective retail energy market is one that enables customers to move freely in and out of the marketplace, ie, freely between a regulated and a market contract. It is a market in which price regulation crosses the information divide to establish a fair, efficient and transparent price-to-beat for what is basically a homogenous product. And most importantly, an effectively competitive market is non-discriminatory in the access it delivers to essential electricity services. The primary objective of the Tribunal should be the fair and efficient pricing of electricity in New South Wales.

The Tribunal's interpretation of effective competition appears to prioritise the profitability of energy retailers above non-discriminatory, equitable and transparent pricing.

¹ IPART, 'Draft Determination' (April 2007) 3.

² Minister for Energy, 'Terms of Reference', 14 June 2006, 3.

³ IPART, *Review of Regulated retail prices for electricity to 2007* (2004) 23.

The NSW Government has clearly committed to retain retail price regulation of the standard contract until 2010. It has not asked the Tribunal to remove price regulation. Beyond 2010, the NSW Government is a signatory to the Australian Energy Market Agreement (AEMA), which, while setting the framework to remove retail price regulation where competition is found by the AEMC to be effective, also provides for ongoing regulation to address social welfare concerns. The AEMA states:

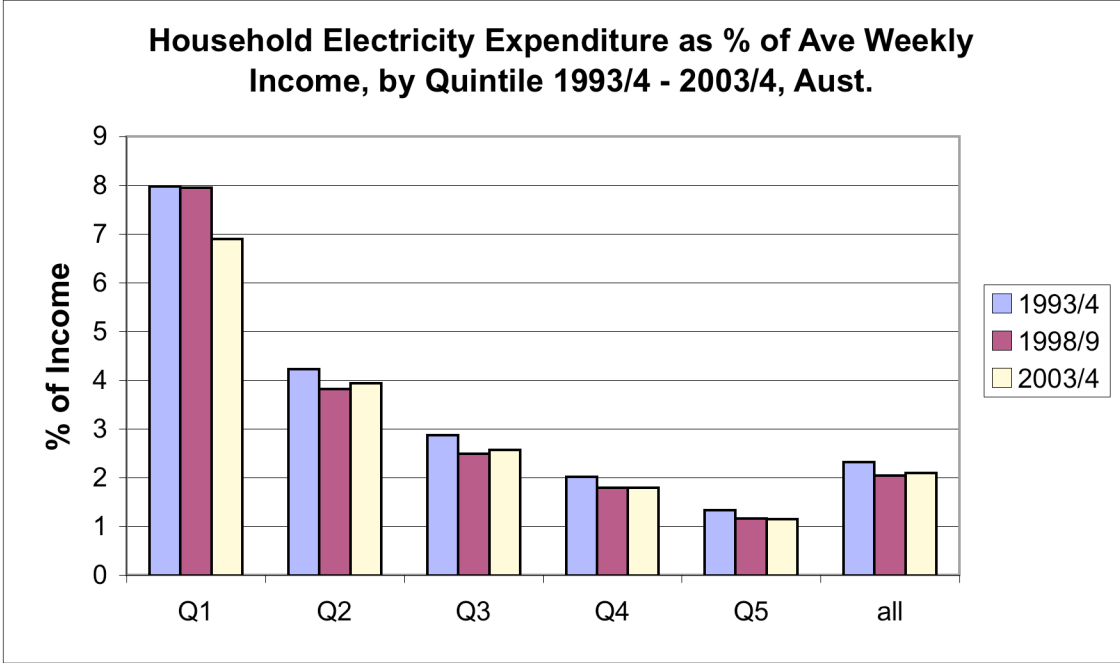
- 14.12 The Parties agree that where competition is not yet effective for a market, group of users or a region:
 - (a) retail energy price controls (including those furthering social welfare and regional equity objectives) can be imposed by the relevant State or Territory but should, to the extent possible, not hinder further development of competition and ensure that the benefits outweigh the costs, and costs are minimized.⁴

PIAC believes that the Tribunal has interpreted a mandate where none exists. Moreover, its interpretation of effective competition is not based on NSW Government policy.

If the Tribunal is to proceed with its unsubstantiated efforts to promote effective competition, it must be linked to the policy position of the NSW Government. The Tribunal should acknowledge an ongoing role for retail price regulation for categories of users. PIAC calls on the Tribunal to acknowledge that in order to be effective, competition must incorporate the capacity for vulnerable classes of consumers to benefit without discrimination from the marketplace or receive adequate price protections in its stead.

3. Outcomes for customers

All stakeholders, including industry bodies, acknowledge that low-income households are disproportionately affected by increases in electricity prices. The graph below demonstrates the regressive nature of price-driven policies. PIAC believes that a more progressive approach to encouraging consumers to engage in the market place will be delivered from price comparators, regulatory requirements that improve consumer protections such as unfair contract legislation.



⁴ Revised Australian Energy Market Agreement, June 2006.

It is disappointing that the Tribunal has not acknowledged the challenges faced by low-income households and the direct impacts inflated costs will have on low-income households.

4. Current Level of Retail Competition

The assessment undertaken in Chapter 4 of the Draft Determination does not constitute a review of the effectiveness of competition. Rather, it is a catalogue of the level of customer switching and churn behaviour over the five years of retail competition in NSW. There can be no doubt that the data presented in Figure 4.1 of the Draft Determination confirms that customers' reliance on the standard tariff is reducing at an increasing rate across all three standard retailers. It suggests that, all things being equal, the continuation of the current regulatory arrangements would deliver the goal of reduced reliance on the regulated tariff throughout the determination period.

PIAC believes the Tribunal's analysis should cease at that point, as there is insufficient data of verifiable quality to comment on other aspects of the market's development.

4.1 Effectiveness of competition

In PIAC's previous submission to the Tribunal's Issues Paper, PIAC argued against a hasty and ill-informed assessment of competition. PIAC pointed out that the Terms of Reference provided to the Tribunal do not permit a decision to be made about the current effectiveness of retail competition in NSW nor to assess the likely impact of the move towards deregulated prices.⁵ The Tribunal has not addressed these concerns (raised more than five months ago) but rather gone on to claim that competition is effective in metropolitan NSW.

PIAC disputes the Tribunal's findings that, based on the data provided in Chapter 4 of the Draft Determination, competition is effective in Metropolitan NSW. Switching rates disclose very little about the nature of competition in the marketplace. They reveal even less about the actual outcomes for customers and the specific experiences of vulnerable groups within the marketplace.

The Australian Energy Market Commission (AEMC) recently released its draft Statement of Approach to assess the competitiveness of competition in the retail energy market. The AEMC understands effective competition to be a market in which incentives for efficiency and protection of consumers in terms of price and service are achieved.⁶ Analysis of effective competition is essentially about the outcomes achieved by consumers. To this end the AEMC has developed the following draft list of indicators.

⁵ PIAC, *Submission to Issues Paper* (October 2006) 4.

⁶ Australian Energy Market Commission, *Review of the effectiveness of competition in the gas and electricity retail markets Draft Statement of Approach*, p7.

Area of analysis	Indicators
Market conduct	The number of customers accepting market offers and/or switching retailers, and whether switches are by first tier or second tier customers
	Market research on customer awareness of competition and choice
	Market research on ease of obtaining, understanding and comparing information
	Extent and type of marketing activity
	Extent of offers being sought and made
	The nature and frequency of customer complaints
	The nature of regulatory enforcement investigations
Market performance	Evidence of changes in the retail price of gas and electricity
	Evidence of prices converging to an efficient long term cost of supply
	Evidence that differentiated and innovative products and services are being offered to the market which meet customer preferences and needs.
Market structure	The number, type and size of contestable customers, and changes in the number and size of those customers over time
	The number, type and size of competitors, and changes in the number and size of competitors over time
	Market concentration indices
	The market shares of competitors, and changes to those shares over time
	Barriers to entry including the extent, and effect, of economies of scale and scope, and access to wholesale markets and risk management vehicles

The Tribunal's analysis can claim only to assess one of these indicators and that is the number of contestable customers. And even then, to fully understand the market's development PIAC requires further disclosure about the proportion of households switching categorised by consumption class and evidence of geographic distribution of positive churn behaviour across the greater metropolitan area.⁷

The Tribunal bases the remainder of its analysis on select pieces of its Household Survey, a piece of research that has not been publicly released nor fully verified.⁸ PIAC has not been consulted on the design of the survey nor its application to the market. Preliminary results have not been made available for PIAC's scrutiny.

It is unprecedented for the Tribunal to utilise supposedly independent data in this way. In the previous retail price determination, the Tribunal contracted Price Waterhouse Coopers to undertake an independent study on the level of competition. With the appropriate commercial-in-confidence arrangements, that data was made publicly available at the time of the draft determination. It is

⁷ PIAC is aware that second tier retailers target very specific geographic regions in Sydney. Marketing complaint data may assist in this analysis.

⁸ At the time of the release of the Draft Determination the material was not publicly available. PIAC made verbal requests for the information, which were refused.

PIAC's view that the Tribunal must not base its deliberations on material that is not fit for public consumption and has not had the benefit of public scrutiny.

In its submission to the Issues Paper, PIAC directed the Tribunal to a series of research papers and analysis of consumer outcomes in other jurisdictions. Indeed, PIAC pointed out that a valid assessment of the effectiveness or the extent of retail competition in NSW will require consideration of a wider range of information rather than simply relying on crude data about customer churn.

The research identified by PIAC in its submission six months ago demonstrated the need for outcomes based research. PIAC pointed to recent research undertaken in Victoria demonstrating a poor distribution of the gains and losses by consumers under full retail competition in Victoria.⁹ This distributional outcome provides a strong argument for curtailing the tariff restructuring by energy retailers. PIAC's submission also pointed to evidence from the UK that suggested that even with churn rates as high as 50%, many customers are paying prices as much as 30% above the competitive level.¹⁰

PIAC is now able to point the Tribunal to a larger body of research suggesting that assumptions about churn and competition are ill conceived. Research coming out of the UK argues that low-income households are particularly vulnerable in the market place, often paying a premium in the 'competitive' tariff offered to them. It suggests that while in the early years of competition these customers were generally considered best avoided, they developed into a market niche, at which point tariffs offered were generally in excess of the public supplier.¹¹

Research undertaken in Australia applying theories of behavioural economics adds much to PIAC's perception of switching. Professor Gans of the University of Melbourne has analysed switching behaviour in the Victorian market.¹² He argues that consumers will underestimate the costs involved, including disconnection fees, future switching costs and the inflexibility of automated payments. This is based on a combined failure to invest in information and a lack of incentive for firms to freely offer pricing transparency. He concludes that the likelihood for effective competition is bleak and that regulated pricing structure should focus on simplicity and transparency.

Until the outcomes for consumers who switch is understood, it is impossible to comment on the effectiveness of competition. The Tribunal has undertaken no such assessment of outcomes achieved, against a body of evidence that seriously challenges the claim that switching must deliver positive benefits for consumers. PIAC therefore rejects the claim that competition is effective in metropolitan NSW.

⁹ Consumer Law Centre Victoria (CLCV) and Centre for the Study of Privatisation and Public Accountability, *Electricity Reform in Victoria: Outcomes for Consumers*, February 2006,

¹⁰ Waddams Price, C. et al, 'Consumer Choice And Competition Policy: A Study Of UK Energy Markets' in *The Economic Journal*, 115 (October 2005)

¹¹ Bitten Brigham and Michael Waterson, *Strategic Change in the market for domestic electricity in the UK*, University of Warwick, 2003

¹² Dr Joshua Gans, *The Road to Confusopoly*, Paper presented to the ACCC Regulatory Conference 2005

5. How Tariffs will be regulated

The Tribunal has determined the form of regulation based on an assumption that competition in the retail energy market is effective. As outlined above, PIAC regards the analysis of effective competition undertaken by the Tribunal to be flawed. The form of regulation is critical in delivering a price determination that addresses distributional impacts of tariff reforms and restrains the power imbalance between retailers on the supply side and household customers on the demand side. The proposed form of regulation fails to appropriately balance the distributional impacts of tariff reform. It is NSW Government policy to provide a regulated tariff until 2010. A less regulated market will not be forced on consumers before such time. PIAC does not see any justification for removing or significantly weakening the form of regulation for the sake of competition at this determination.

5.1 Weighted Average Price Cap

The proposed Weighted Average Price Cap (WAPC) form of regulation grants greater discretion to retailers to determine the allocation of costs both between and within tariff classes. Moreover, the WAPC does not deliver greater simplicity or transparency, the likes of which would stimulate more effective consumer engagement in the competitive market.

The Tribunal states that its analysis of competition was a key consideration in its decision to adopt this form of regulation.¹³

The need for price regulation stems from a concern that competitive forces are not sufficiently developed to ensure that customers are offered services with the mix of characteristics they demand (including quality and price), at prices that reflect efficient costs.

More intrusive forms of regulation may be justified where there is little competition (that is, where the potential costs resulting from market power are likely to be high)...

The Tribunal's assessment is that there is sufficient competition in the metropolitan market to restrain increases in each individual tariff.¹⁴

PIAC holds a very serious concern that competitive forces are not sufficiently developed to restrain residual market power and meet the informational needs of consumers. Energy Australia and Integral Energy retain 80% of the total market share in each of their standard supply areas. PIAC believes this figure would be even higher when residential customers alone are considered. PIAC is firmly of the view that this level of market power demands a higher standard/degree of regulation.

On this basis, PIAC seeks an adjustment on the draft determination to retain side constraints as a necessary accompaniment to a WAPC form of regulation.

5.2 Price Constraints

The chief objective of the determination period is to achieve cost reflectivity. PIAC understands that side constraints can be applied to tariffs without limiting the achievement of that goal and asks the Tribunal to model this option.

A side constraint is necessary to restrain the market power of the incumbent suppliers. If the modelling demonstrates an incompatibility with cost reflectivity and the side constraints proposed below, PIAC will seek an extension of the determination period from three to five years.

¹³ IPART Draft Determination, above n1 p 33.

¹⁴ Ibid 37-39.

To assist this goal, PIAC has advocated for a side constraint limited to the 'R' component, rather than the current practice of applying the side constraint to the 'N+R' component. This also overcomes concerns about the applicability of network tariffs designed to drive demand management. The future of network tariffs will appropriately be decided through the Ministerial Council on Energy and Australian Energy Market Commission processes currently underway.

In the case of Energy Australia and Integral Energy, PIAC's preference is for a side constraint on individual bills. While this information is not disclosed in the Draft Determination, it is PIAC's understanding that the overwhelming majority of residential customers are concentrated on one single tariff for both Energy Australia and Integral Energy's standard customers. Where the majority of households are on one single tariff, and where customers cannot be forcibly moved onto a new retail tariff and no new tariffs can be created without approval, a side constraint at the tariff level would not sufficiently curb the market power of the incumbent retailer.

In the case of Country Energy, where customers are spread over a very large number of tariffs, PIAC believes there is a case to be made for a different approach to side constraints. This would enable tariff consolidation and expose customers to the benefits of cross-subsidies.

PIAC believes that a distinction ought to be made between obsolete and non-obsolete tariffs. Again, while this information is not disclosed in the Draft Determination, it is PIAC's understanding that the majority of Country Energy customers are on non-obsolete tariffs. These tariffs are expected to reach cost-reflective levels in the first year of the next determination. The minority of customers on a large array of obsolete tariffs are facing very large price increases and even then may not reach cost reflective levels.

PIAC therefore endorses the application of a side constraint to Country Energy's WAPC at the individual bill level for non-obsolete tariffs and at the tariff level for obsolete tariffs. This is not inconsistent with the Terms of Reference.

6. Allowance for Costs

PIAC believes it is in the interests of consumers to restrain price increases to efficient levels. It is extremely disconcerting that half of the proposed price increase is designed solely to increase retailer profitability. Specifically, PIAC believes that customer acquisition costs are unwarranted at this time, where competition is not yet effective, and 70% of the customer base receives supply from the incumbent retailer under a regulated contract. In the context of greater pressure to adopt cleaner energy and amidst higher contract prices, it is in the public interest to minimise such costs.

6.1 Customer Acquisition Costs

The Tribunal's consultant found that 'the overall cost of acquiring customers was approximately \$200 per customer'. The Tribunal has further estimated that residential customers will remain with retailers for an average of eight years. The Draft Determination proposes that customers pay a levy of \$35 a year.

PIAC has requested clarification as to the costs actually associated with the proposed Customer Acquisition Costs. This information has not been forthcoming. PIAC is therefore led to assume that the customer acquisition costs includes incentives such as DVDs, football club memberships and other goods unrelated to the energy market.

The Terms of Reference do not explicitly require customer acquisition costs to be factored into the determination. They require the Tribunal to include mass-market, new entrant retail costs. Retail

costs have never previously been interpreted to include customer acquisition costs. They have, however, previously been interpreted to include activities such as marketing.

The broadening of the terms of reference was, PIAC believes, intended to account for the cost asymmetries between the standard 'stapled' retail/distributor and that of its retailer competitors. At the previous determination, the Tribunal refused to allow costs to inflate above purely reflective levels.

PIAC rejects the view that customer acquisition costs should be considered as part of the regulated cost bundle of retail operating costs. PIAC believes retailers should offer true competition based on effective productivity incentives around price and service.

PIAC believes the introduction of customer acquisition costs will encourage 'free' giveaways, such as DVDs, on signing up to contracts. This was not the sort of market competition consumers envisaged.

No other jurisdiction has developed regulated customer acquisition costs. PIAC believes the Tribunal is setting an unwarranted and poorly interpreted precedent in allowing the standard retailers to collect an additional payment for competition. It is a windfall for retailers and a poor direction for energy market competition.

PIAC calls on the Tribunal to reject Customer Acquisition Costs.

6.2 Energy Costs

PIAC notes concern amongst energy retailers that the contract market has recently experienced an unanticipated increase in costs.

PIAC's view is that the ETEF will continue to manage the cost implications in the short term. PIAC does not believe any substantial deviation from the proposed energy costs is required at this time. Those rates relate to the long-run costs of energy, which are not affected by short term deviations. PIAC also particularly notes Frontier Economic's comments that the contract market is expected to adapt to the removal of ETEF as NSW generators particularly change their contract and bidding behaviour.

PIAC would, however, support a model that enables a review of costs based on a materiality threshold, subject to that model delivering a symmetrical approach.

This, PIAC believes, may prove impossible. The contract arrangements between energy retailers and generators are not publicly available so PIAC is unable to see how the Tribunal or consumer advocates can expect to understand where energy costs are over-estimated in the review. PIAC does not believe that rivalrous behaviour is sufficient to drive down such excess profits. If a symmetrical arrangement cannot be guaranteed, PIAC's preference is to retain the current energy costs.

7. Non-tariff charges

7.1 Security Deposits

PIAC supports the Tribunal's decision to not endorse the proposal to have security deposits held for the term of the contract. Adopting such a policy would potentially have disadvantaged electricity customers that are already suffering financial hardship. PIAC applauds action taken to reduce the burden placed on low-income customers.

PIAC takes this opportunity to highlight that the provisions explaining when a security deposit must be returned can create confusion. Clause 20.7 of the Draft Determination provides that security deposits must be returned to a customer when they have completed 'on time payment[s] of all electricity retail bills for one year from the date of the first electricity retail bill'.

PIAC considers the phrase, 'date of the first Bill' to be ambiguous. Does it mean the date that the first Bill was issued by the retailer to the customer, or the date of the first bill that was not paid on time, or the date of the first bill that was paid following a bill that was paid late?

As currently worded, the provisions allow, theoretically, for retailers to continuously hold a customer's security deposit. It is unclear whether it is the Tribunal's intention to allow this practice to continue. PIAC seeks clarification of the definition to make it easier for retailers and customers alike to know when a security deposit must be returned.

PIAC objects to the continued policy of retailers not having to pay consumers the interest they would have earned on the security deposit held by the Retailer. In previous determinations the Tribunal has criticised this practice. Further, it is a policy that is out of step with other industries. For example, tenants earn interest on the bond that they provide to landlords, which are held on trust by the Rental Bond Board.

PIAC requests that customers be allowed to earn interest on their money that they provide as security deposits to retailers. Alternatively, any interest generated from security deposits could be pooled and used to fund a customer assistance scheme or another scheme that benefits retailers and consumers.

PIAC does not support the Tribunal's determination to allow security deposits to be demanded of new customers who have defaulted on their payment plan. PIAC believes it is unfair to add an additional payment to a customer's account at a time when the customer is already experiencing financial difficulty.

If the purpose of a security deposit is to cover the time frame between the first energy usage and the first bill, what then is the justification for requiring a security deposit after a number of bills have been paid?

The proposed amendment may inconvenience or disadvantage customers who have not committed any wrongdoing. PIAC requests that evidence be given to demonstrate that the loophole, referred to in the Draft Determination, is being exploited in a fashion that warrants the new charge. To insist on this amendment in the absence of this evidence undermines the integrity of payment plans, reducing their worth.

7.2 Late Payment Fees on Electricity Bills

The Tribunal's Draft Determination has increased the charge for late payment from \$5 to \$7. This represents a 40% increase. At a time when consumers are already going to be hit with larger energy bills, this increase is unjustifiable.

PIAC considers that as long as late payment fees exist, they will continue to be increased. This will be matched by the increase of the burden that they place on consumers, becoming increasingly punitive. The only way to prevent this from occurring is to remove late fees altogether.

Retailers have submitted that current late fees are not cost reflective. However, PIAC believes that the risk of late payment by consumers is an inherent part of running a business in a competitive market. The Tribunal already takes account of these business costs and compensates retailers through retail margin allowances.

Consumers adopt a comparable risk when entering into contracts with retailers, yet are not compensated for their risk. For example, electricity supply contracts denounce retailer liability where a failure to supply causes a loss for a consumer, even when the failure is due to the retailer's negligence. Consumers accept this risk without compensation.

Therefore, the existence of late payment fees allow retailers to be compensated twice for a business cost, whilst consumers are denied access to compensation for similar risks undertaken by consumers.

PIAC notes that there is an absence of evidence to show that late payment fees actually deter people from paying late. Indeed retailers have submitted that late payment fees currently do not provide sufficient incentive for customers to pay on time.

In the absence of this evidence it is difficult to substantiate a fee that adversely affects those in the weakest position to pay. Late payment fees are a punitive charge on top of the threat of disconnection. For many, they are a penalty for being poor.

Retailers may find that a more effective method of encouraging payment would be to provide the incentive to pay before the date the bill is due. This is a proactive innovation that is more likely to receive a positive response from consumers. Some retailers have already introduced these measures and enjoyed their success, demonstrating that schemes to achieve timely payment of bills do not have to adversely effect poorer customers.

Of concern to PIAC are reports that late payment fees are often charged to those who are exempted from the fee, such as pensioners. An explanation for this occurrence is that late fees are generated automatically. In light of this, PIAC stresses that an automated system is not an appropriate method of generating penalty fees.

The practice of issuing or waiving fees, required by the Draft Determination and the *Electricity Supply Act* necessitates discrete management. PIAC contends that if a Retailer cannot properly administer a fee scheme, as evidenced above, it should not be permitted to operate it at all. At the very least penalty provisions should apply to reimburse consumers for the losses suffered in challenging an erroneously issued late payment fee.

The Victorian Essential Services Commission's Energy code (the 'Code') provides a blueprint for better practice regarding late payment fees. The Code states that a retailer must receive permission from the Essential Services Commission to issue a late fee. The Code also requires a retailer to offer the customer a waiver if certain steps are taken. These measures would minimise the incidence of

late fees being issued to those who are exempt from paying the fee or are would be placed in hardship if they had to pay such a fee.

However, even with these provisions, the Victorian Government considers late payment fees for small retail customers to be so draconian a practice as to warrant their abolition. The Victorian Government reported to Parliament that 'people who are unable to pay their bills on time, should not be penalised further by late payment fees'.¹⁵

National consistency of regulations is a goal of energy reform. PIAC recommends the adoption of the Victorian Government's policy towards late payment fees, in order to adhere to COAG's policy of achieving nationally consistent practice in the energy market.

New regulations regarding payment plans are to be introduced shortly. An increase in the cost of a late fee is likely to adversely affect/skew results. PIAC contends that priority should be given to these payment plans. Adopting the Victorian Government's approach to late payment fees would give the new regulations the necessary breathing space to gauge how they are affecting payment behaviour.

At the very least the safeguards outlined in the Victorian Code should be adopted, as they are generally accepted by consumer groups as providing for best practice standards in the energy industry.

7.3 Dishonoured cheque fees

The Tribunal has indicated that it will recommend that the Government amend the *Electricity Supply Act* to allow retailers to charge a fee for dishonoured direct debit payments on the basis that it is anomalous to have dishonour fees for cheques but not for non-cheque forms of dishonoured payment.

Part 4, section 18(a) of the Draft Determination states that a retailer may only impose charges for dishonoured cheques if the retailer 'actually incurs a bank or other financial institution fee for that dishonoured cheque'. The fee is designed to recompense retailers for costs they have actually incurred.

PIAC understands that banks do not charge the institutions that process dishonoured direct debits. Accordingly, retailers do not incur bank fees for processing dishonoured direct debit payments and cannot make claims for compensation for costs they have not incurred.

The additional costs for retailers, identified in the Draft Determination, such as customer contact and mail outs are business costs that the Tribunal has accounted for in retail operating costs allowance.

PIAC cannot support a recommendation is proposed compensate a retailer where there is actual cost to the retail. Such an approach is without legitimate basis.

Further, PIAC stresses that the introduction of additional penalty fees will adversely affect those suffering financial hardship. At approximately \$35, the fee that banks charge for a dishonoured direct debit is already substantial. For those who have established payment plans with their retailer, a dishonoured direct debit gives a good indication that the consumer simply does not have the capacity to pay. When a consumer is already signalling that they are in financial difficulty, the imposition of a retailer penalty fee on top of the bank fee will place low-income earning consumers at a considerable further disadvantage.

¹⁵ Victorian, *Parliamentary Debates*, Legislative Assembly, 4 November 2004, Mr Brumby, Treasurer 2nd Reading. Energy Legislation (Amendment) Bill

PIAC questions how the introduction of a new penalty fee will promote competition for the benefit of consumers. If the Tribunal's determination seeks to promote competition and investment in the NSW energy industry, as its label claims, PIAC asks how allowing Standard Retail Suppliers to charge additional fees will achieve that end?

For these reasons PIAC does not support the Tribunal's recommendation to introduce penalty fees for dishonoured direct debit payments.