



public interest
ADVOCACY CENTRE LTD

How to level a playing field:

**Response to the Australian Energy Market Commission's
Review of the Effectiveness of Competition in the Electricity
Market in the ACT**

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1. Introduction

1.1 The Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is an independent, non-profit law and policy organisation that works for a fair, just and democratic society, empowering citizens, consumers and communities by taking strategic action on public interest issues.

PIAC identifies public interest issues and, where possible and appropriate, works co-operatively with other organisations to advocate for individuals and groups affected. PIAC seeks to:

- expose and redress unjust or unsafe practices, deficient laws or policies;
- promote accountable, transparent and responsive government;
- encourage, influence and inform public debate on issues affecting legal and democratic rights;
- promote the development of law that reflects the public interest;
- develop and assist community organisations with a public interest focus to pursue the interests of the communities they represent;
- develop models to respond to unmet legal need; and
- maintain an effective and sustainable organisation.

Established in July 1982 as an initiative of the (then) Law Foundation of New South Wales, with support from the (then) 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 Services Program. PIAC also receives funding from Industry and Investment NSW for its work on energy and water, and from Allens Arthur Robinson for its Indigenous Justice Program. PIAC also generates income from project and case grants, seminars, consultancy fees, donations and recovery of costs in legal actions.

1.2 Energy + Water Consumers' Advocacy Program (EWCAP)

This Program was established at PIAC as the Utilities Consumers' Advocacy Program in 1998 with NSW Government funding. The aim of the Program is to develop policy and advocate in the interests of low-income and other residential consumers in the NSW energy and water markets. PIAC receives policy input to the Program from a community-based reference group whose members include:

- Council of Social Service of NSW (NCOSS);
- Combined Pensioners and Superannuants Association of NSW (CPSA);
- Park and Village Service;
- Ethnic Communities Council NSW;
- rural and remote consumers;
- Institute of Sustainable Futures (ISF), University of Technology (UTS);
- Western Sydney Community Forum (WSCF); and
- National Seniors.

2. The current inquiry

PIAC welcomes the opportunity to respond to the Australian Energy Market Commission (AEMC) Review of the Effectiveness of Competition in the Electricity Market in the ACT.

This submission will confine its comments to the methodology being adopted by the AEMC for the conduct of this review, as outlined in the AEMC Issues Paper for the Review of the effectiveness of competition in the electricity market in the ACT (4 March, 2010). Specifically PIAC comments on problems associated with approaching the review on the basis that there is not a definitive set of criteria or benchmarks to guide the AEMC in its analysis of whether there is effective competition in the energy market in the ACT.

The submission also sets out PIAC's concerns regarding how, in the absence of definitive criteria to assess whether effective competition exists, individual market characteristics of the electricity market can be construed to both support a finding of effective competition, and support a finding that there is not effective competition. Moreover, PIAC is concerned that for certain market characteristics, the Issues Paper appears to prefer a construction in support of the existence of effective competition, indicating a predisposition towards such a review outcome.

PIAC also refers to the possible impact of the *Human Rights Act 2004 (ACT)* on pricing decisions of energy retailers, in the absence of price regulation.

3. The absence of definitive set of criteria

The AEMC has indicated that 'there is no definitive set of criteria that, if met, will give rise to an unambiguous finding that a market is effectively competitive. The AEMC has also indicated that it will undertake a 'dynamic analysis of the various factors that, when viewed collectively, are likely to result in effective competition'. These factors will then be considered in conjunction with the Ministerial Council on Energy (MCE) criteria and identified characteristics of effective competition, as outlined in the AEMC Revised Statement of Approach.¹

PIAC accepts that a flexible and expansive approach to the assessment of whether effective competition is present may be necessary, as a market may exhibit numerous characteristics that could be indicative of both the presence and absence of workable competition. However, the absence of definitive criteria that incorporates the various factors and characteristics of effective competition could be open to opposing and competing conclusions. Moreover, an absence of definitive criteria is likely to ultimately result in non-definitive conclusions as to whether effective competition exists. PIAC submits that it is not in the best interests of energy consumers to base a decision on whether to discontinue price regulation on such uncertain and non-specific criteria.

In addition, PIAC is concerned that the description of the various characteristics and factors contained in the Issues Paper indicates a predisposition by the AEMC towards a finding of effective competition. The lack of definitive criteria permits open conclusions of individual characteristics, which could be construed in support of such a finding. Examples of these are included below.

¹ Australian Energy Market Commission (AEMC), *Issues Paper – Review of the effectiveness of competition in the electricity market in the ACT*, (2010) 7.

4. Economies of Scope and ‘multi-utility’ services

The Issues Paper states:

“The opportunity for retailers to offer products across a number of different utility services (so called ‘multi-utility’ services) and dual fuel products has provided retailers with the potential to benefit from economies of scope. Multi-utility and dual fuel products lower the average cost to serve by spreading the retailer’s fixed costs over a larger number of customer connections.”²

While this may be true, the existence of a dominant retailer in the market that offers dual fuel and multi-utility products, does not necessarily automatically provide an incentive for other retailers to enter the market. A dominant retailer that offers dual fuel and multi-utility services provides that retailer with a significant market advantage over any new or potential entrants into the market. However, as a market characteristic, multi-utility services is only mentioned as a market opportunity, and therefore a positive indicator of effective competition, rather than as an entrance barrier, and therefore a negative indicator of effective competition. PIAC is concerned that such a comment indicates a predisposition to find such a market characteristic as supporting the existence of effective competition, and that insufficient attention may be given to the strong rationale that such a market characteristic may well be indicative of the opposite.

5. Customer participation – switching retailers

The Issues Paper states:

“In assessing the effectiveness of retail competition, it is appropriate to have regard to the proportion of customers who have switched retailer or who have switched from a standing customer contract to a market contract.”³

The Issues Paper also states:

“It is important to consider switching rates in light of the reasons for customers’ decisions to switch.”⁴

Somewhat tautologically, the Issues Paper also states that it is relevant to understand why some customers elect not to switch.⁵ However, unlike reasons for switching, which can be considered through exit and entry surveys and information collected by retailers, reasons for not switching are difficult to ascertain, and may be open to conjecture. However, the Issues Paper presumes to suggest possible reasons for not switching, which are then extrapolated as indicating a market source of information for retailers that their product and service offerings do not satisfy customers and that improvements to their offers are required.

PIAC is concerned that any consideration of reasons for not switching, as canvassed in the Issues Paper, are likely to be based on conjecture, given that reliable data on this question will be difficult to obtain.

In addition, the conjectured reasons for non-switching expressed in the Issues Paper would suggest that the messages sent to retailers from such customer behaviour are indicative of effective competition. Moreover,

² AEMC, above n 1, 10.

³ AEMC, above n 1, 13.

⁴ AEMC, above n 1, 14.

⁵ Ibid

the Issues Paper appears to presuppose that issue of the proportion of switching customers can only be considered as follows:

- Customers' decisions to switch reinforces the pro-competitive effects of rivalrous conduct between retailers;
- Customers' decisions not to switch, in the absence of evidence of reasons for non-switching, should not be assumed to indicate an absence of rivalrous behaviour between retailers.

Paradoxically, this approach negates the effectiveness of consideration of switching rates as a reliable indicator of effective competition. PIAC submits that in the ACT, this negation serves to bias the inquiry in favour of a conclusion assessing that there is effective competition, given that there has been a noticeable reduction in customer switching in the ACT.

6. Consumer access to the benefits of competition and financial hardship

The Issues Paper states:

"The principal explanation for why certain customers may be unable to participate effectively in the competitive retail electricity market is because they are experiencing temporary or permanent financial hardship. ... it is important to distinguish clearly between any failure of competition and issues of hardship and affordability. Retail electricity prices may be determined by competition but still cause financial hardship for some individuals."⁶

This appears as an attempt to neutralise the issue of hardship and affordability as an area for consideration in the review.

However in the next statement the Issues Paper states:

While it is not within the scope of the Request for Advice to assess the causes of financial hardship or to make policy recommendations to address them, where markets are effectively competitive, price regulation, which distorts the efficient operation of the market to the detriment of all consumers, is not the appropriate means to deal with financial hardship in relation to electricity products.⁷

PIAC submits that such a statement indicates a predisposition in favour of removing price regulation in order to achieve effective competition. However, the Issues Paper fails to recognise that price regulation is a mechanism to address existing market failure, and the inability for disadvantaged consumers facing financial hardship to participate effectively in the energy market. Whilst competition failure may not be the cause of hardship and problems with affordability, the difficulties faced by people in hardship to effectively participate in the market is an indicator of market failure, and provides a strong rationale for the continuation of price regulation.

⁶ AEMC, above n 1, 18.

⁷ Ibid

7. Relevance of the *Human Rights Act 2004 (ACT)*

PIAC notes that the AEMC has not mentioned the possible impact of the *Human Rights Act 2004 (ACT)* (the Human Rights Act) on any proposal to remove price regulation. Under section 40B of the Human Rights Act, it is unlawful for a public authority to act in a way that is incompatible with a human right, or in making a decision, to fail to give proper consideration to a relevant human right. Under section 40, a public authority includes an entity whose functions include functions of a public nature, when it is exercising those functions for the Territory. Under section 40A, the provision of gas, electricity and water supply are taken to be functions of a public nature.

This means that any entity that provides electricity services in the ACT will be required to act in a way that is compatible with the human rights detailed in the Human Rights Act.

Where a consumer is at risk of disconnection as a result of hardship, and that disconnection may impact on the consumer's human rights, as recognised by the Human Rights Act, eg, right to life, protection of family life, the retailer's response to the hardship must be compatible with the human rights. Moreover, where the retailer makes a pricing decision, a failure to consider the human rights implications of that decision will mean that the retailer has acted unlawfully under the Human Rights Act.

8. Conclusion

The assessment of whether effective competition exists in the ACT electricity market, and consequently whether to remove price regulation in the electricity market in the ACT, needs to be undertaken in a careful and transparent manner, without a predisposition towards a preferred outcome. Ultimately the decision to remove price regulation can have a significant impact on electricity consumers, particularly those facing hardship or problems with affordability. Those lacking economic power and facing hardship will not necessarily have their interests protected in a market free from price regulation. Moreover, the ability of people in hardship to participate effectively in the electricity market is a strong indicator of market failure.

PIAC has previously recommended to the AEMC the issues that should be considered in reviews into effectiveness of competition. In the context of the current review, PIAC recommends that the AEMC:

1. give close attention to the social and environmental criteria for assessing the effectiveness of competition;
2. undertake an analysis of the economic costs and benefits to consumers of effective competition in the electricity market in the ACT;
3. include data on the actual impacts of competition on electricity consumers' bills; and
4. examine the potential impacts on consumers of price deregulation.

The AEMC should also consider the impact of the *Human Rights Act 2004 (ACT)* on any move to proposal to remove price regulation in the ACT.