

30 January 2025

PEMM Act Review

Department of Climate Change, Energy, the Environment and Water
51 Allara Street, Canberra, ACT 2601

By email: PEMMReview@dcceew.gov.au

Dear Sir/Madam,

Review of the effectiveness of the PEMM Act

The Justice and Equity Centre (JEC) 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 JEC welcomes the opportunity to comment on the effectiveness of the *Treasury Laws Amendment (Prohibiting Energy Market Misconduct) Act 2019* (Cth) (the PEMM Act), which inserted Part XICA into the *Competition and Consumer Act 2010* (Cth).

At the outset we note that a definitive determination of the effectiveness of the PEMM Act is likely to be difficult. Confidently determining the character and purpose of actions and actors in the energy market can be difficult, if not impossible as the market currently operates. This does not undermine the value of the PEMM Act provisions, but must be considered when assessing whether they are effectively delivering on their intent.

The Australian Competition and Consumer Commission (ACCC) task of monitoring and enforcing the provisions is similarly difficult. Viewed from an external perspective, the same practices in the market could be assessed as normal business behaviour, prudent risk management, permitted competitive market practices, or manipulative and prohibited practices. This makes determining a breach of the provisions difficult, and places greater importance on the ACCC having ongoing access to the detailed information required to robustly assess the nature of a company's business practices.

Notwithstanding these difficulties, the JEC strongly supports the continued existence of the provisions. The three provisions in the PEMM Act 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.

The JEC considers the remedies available under the PEMM Act appropriate, as they allow the ACCC to take a graduated approach to enforcement.

Retail pricing provision

We support continuation of this provision and any measures which may help ensure its intent is able to be effectively delivered into the future.

The 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 opaque and varied retail market data. 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. More problematically, there is individual pricing to customers and no transparency as to what offers retail customers are actually on and what they are paying at any point in time. This complicates monitoring and makes establishing a clear pattern of response extremely difficult. This process may consider whether improvements to the scope of monitoring are required to effectively deliver the intent of this provision.

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 drops in wholesale spot market prices, translate into a trend of retail bill reductions for small consumers.

Electricity financial contracts liquidity provision

We support continuation of this provision and any measures to ensure its intent is able to be delivered.

The ACCC explanation in the Guideline as to what forms of conduct it would view as breaching this provision, underlines the importance of it having ongoing access to detailed financial contracts information, both of offers made and agreed contracts, to effectively monitor and enforce the provision.

Electricity spot market provision

We support continuation of this provision and any measures which may help ensure its intent is able to be effectively delivered into the future. We consider reforms to the market structure are likely to be required to do so.

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. However, many of these same behaviours can also result from legitimate causes, such as unplanned outage or rebids due to other changes in material conditions and circumstances. The Australian Energy Regulator's *Rebidding and*

Technical Parameters Guideline 2024 provide participants must provide the reason for the rebid using one of four categories. Namely, 'either P for a plant or physical change, A for an AEMO forecast or dispatch change, F for a financial or commercial change or E for a *rebid* to address an error in a previous *bid* or *rebid*.'

The ACCC's ability to monitor the character and purpose of market participants behaviour and distinguish between legitimate and manipulative behaviour is limited, if not non-existent in reality. It involves establishing, with a high degree of certainty, that circumstances indicate bad-faith or manipulative behaviour. Technical outages are common, and market participants are allowed to record the reason for a rebid as including an AEMO forecast or dispatch change, or a financial or commercial change. Further, as noted in the review consultation paper, price volatility in the electricity wholesale spot market is intended by design, including to encourage new generator capacity to enter the market.

The examples of behaviour which could breach the provision, as provided in the Guideline, point to the importance of the ACCC having access to detailed information from market participants, including their contract positions, so that the ACCC can properly monitor and enforce the provision. However, any effectiveness is likely to be materially undermined by the current structure and nature of the market 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. The JEC intends to examine this (and other issues of market design) in our submission to the NEM Wholesale Market Settings Review, chaired by Associate Professor Tim Nelson. We encourage this process to engage with that review.

We welcome the opportunity to meet with the Department and stakeholders to discuss these issues in more depth. Please contact Douglas McCloskey on dmcloskey@piac.asn.au regarding any further follow up.

Yours sincerely

Douglas McCloskey
Program Director, Energy and Water Justice

+61 2 8898 6534

dmcloskey@jec.org.au