Supporting innovation in consumers’ interests:
20 March 2015

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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 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 Trade and Investment, Regional Infrastructure and Services NSW for its work on energy and water, and from Allens 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.

Energy + Water Consumers’ Advocacy Program

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;
• Ethnic Communities Council NSW;
• Salvation Army;
• St Vincent de Paul Society;
• Physical Disability Council NSW; and
• Tenants Union.
1. The current state of consumer protections

The Public Interest Advocacy Centre Ltd (PIAC) is pleased to have the opportunity to respond to the Energy Market Reform Working Group’s consultation paper ‘New Products and Services in the Electricity Market’. This paper begins an important discussion about the overall question as to:

Whether the regulatory frameworks that govern the NEM are appropriate in the context of new products and services being offered to small electricity customers.

There are no easy answers to this question. However, there is ample evidence that the current customer protections are failing, for example:

- Very high levels of debt ($8,000-$10,000) are not uncommon (according to Energy Ombudsmannen)
- Only 20% of customers are successfully completing hardship plans every year\(^1\)
- Complaints to the Energy and Water Ombudsman of NSW (EWON) have doubled over the last five years.\(^2\)

While these examples are in part related to the significant price rises of the last five years, they suggest that consumer protections are currently inadequate, without even taking into account new products and services.

PIAC was pleased, therefore, to learn that a review of the National Energy Consumer Framework (NECF) is being planned for later in 2015.

PIAC suggests that in the NECF review, consideration be given to developing an enforceable energy-related code to complement the Australian Consumer Law (ACL), rather than amending the NECF. If such an approach were taken, the new code would need to include dispute resolution provisions, as the ACL does not provide these.

**Recommendation 1**

*That in the review of the NECF, the COAG Energy Council considers an energy-related code (including dispute resolution provisions) to complement the Australian Consumer Law, rather than amending the NECF.*

1.1 A vulnerability-based approach

PIAC suggests the consumer protections in the energy market should be developed using an inclusive understanding of consumer vulnerability. Citizens Advice in the UK considers that the essential factors in inclusive services are:

- Choice of access method for service users and customers.
- A preventative approach.
- Proactive approach to identifying vulnerability.
- Appropriate support targeted to the user’s needs.
- An enabling approach to service users and customers.

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• Willingness to help resolve problems.
• Accurate recording of personal information, establishing follow-up procedures and early investigation of non-compliance.
• Respect for and trust in intermediaries/advocates.
• Appropriate data-sharing to improve customer service.
• Engaging one agency to coordinate access for very vulnerable people.³

European legislation includes a Directive designed to fill current and future gaps in consumer protection law and provides specific requirements for the protection of vulnerable consumers.

Recommendation 2
That the COAG Energy Council takes a vulnerability-based approach to improving consumer protections in the review of the NECF.

1.2 The importance of innovation
At the same time, it is important that consumer protections do not create barriers to innovation as new products and services can support greater consumer choice and engagement and reduce costs. There are already multiple barriers to innovation in the energy market such as:

• increases to fixed charges (which penalise prosumers – consumers who generate their own electricity)
• the lack of solar feed-in tariffs that reflect the true benefits of rooftop solar electricity
• the lack of a Demand Response Mechanism in the wholesale market
• the low level of demand management being undertaken by network businesses
• the relatively low take up of smart grid technologies by networks
• the lack of smart meters (except in Victoria)
• the inability to export from storage and automatic approval for PV systems under 30kW that are unable to export to the grid in Queensland⁴
• consumers in Victoria being told either that they cannot install systems, or will have to downsize the number of modules. There is anecdotal evidence this is also happening in other states⁵
• no mechanism for consumers to buy and sell excess distributed generation without a retail licence (i.e. no ‘virtual net metering’ or equivalent provision)
• no clear regulation of networks investment in or use of PV and storage.

It is in consumers’ interest that these and other barriers to innovation and deployment of new products and services are removed. PIAC urges the COAG Energy Council to prioritise support for innovative products and services that can reduce costs for consumers, for example, by ensuring the Demand Response Mechanism is extended to household consumers over time.

⁴ In 1 July 2014, a new connection standard for Small Scale Parallel Inverter Energy Systems (IES) up to 30kVA was introduced. Any rooftop solar system under 30kW will gain automatic approval from the networks, as long as it has equipment installed that can prevent it from exporting electricity back into the grid.
2. **Which products and services**

The consultation paper discusses supply services, demand management services and energy information as three ‘markets’ of new products and services.

In PIAC’s view, the distinction between NEM grid-connected and AER-relevant contracts and ‘behind the meter’ technologies is the key principle for defining difference and regulating differentiated responsibilities.

Supply behind the meter (including from storage) and demand management have the equivalent impact of reducing supply from the grid. The ‘primary’ source of energy, in the sense of the largest proportion of energy supply to a customer, may or may not be via the NEM network. The retail NEM-related contract is, nonetheless, the primary contract because it enables the NEM connection and, as such, the provision of an essential service and associated consumer protections.

As the AER paper on *Regulating innovative energy selling business models under the National Energy Retail Law* makes clear a ‘key difference is the impact disconnection of energy services would have on a customer’.

PIAC is not convinced that ‘energy information’ needs to be defined as a separate service to ‘behind the meter’ or any other information provision service.

There is also an additional market of off-grid services that should be differentiated for the purpose of regulation, including consumer protection legislation and regulation.

**Recommendation 3**

*That the categories of energy services (new and emerging) be defined as grid-connected, behind the meter or off-grid.*

3. **Principles for inclusion in the NEL or NER**

PIAC is not convinced that the principles proposed in the consultation paper:

1. it affects the operation of or confidence in the wholesale electricity market;
2. it is a monopoly activity; or
3. it affects power system quality, safety, reliability and security (referred to as ‘power system operations’ in the rest of this paper).

are the optimal way to identify whether a product or service should be drawn into the NEL or NER, especially as only the last of these principles focuses on the consequences for consumers. PIAC recommends that further consideration be given to the most appropriate principles, and suggests they could be based on the concept of grid-connectivity (which could include micro-grids). Grid-connectivity means that a facility interacts with other electricity generating or consuming facilities and so there are ‘system’ consequences; perhaps this should be the principle

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6 AER, ‘Regulating innovative energy selling business models under the National Energy Retail Law’ (Issues Paper, Australian Energy Regulator, 20154).

7 ‘Power system security’ has a specific meaning in the NER, and we are interested in a wider range of issues in this paper.
for inclusion in the NEL or NER. This could be further explored in the review of the NECF later in the year.

4. **Consumer protections**

4.1 **Principles**

The principle proposed in the consultation paper for inclusion in the NECF:

> Energy-specific consumer protections are required when a product or service impacts on a customer’s access to a reliable, safe and high-quality supply of energy on fair and reasonable terms.

is reasonable. However, it is insufficient as it does not take into account vulnerability. PIAC suggests that a further principle related to vulnerability is required. PIAC suggests a principle such as:

> Energy-specific consumer protections should protect and empower customers in vulnerable situations in the energy market and to ensure equality of access to market benefits.

which is based on the objective of Ofgem’s consumer vulnerability strategy. The definition of vulnerability used by Ofgem is:

vulnerability is when a consumer’s personal circumstances and characteristics combine with aspects of the market to create situations where he or she is:

- Significantly less able than a typical consumer to protect or represent his or her interests in the energy market; and/or
- Significantly more likely than a typical consumer to suffer detriment, or that detriment is likely to be more substantial.

4.2 **Alternative sellers**

PIAC supports the view expressed in the consultation paper that:

> we do not consider that fundamental changes to the National Electricity Law and Rules are needed to support the entry of most new products and services in the electricity supply market especially given the importance of innovative products and services to empowering consumers to be more active participants in the energy system.

PIAC’s view is that there should be differentiated consumer protections, depending on whether the energy service is grid-connected, behind the meter or off-grid – as set out in our attached submission to the AER’s issues paper ‘Regulating innovative energy selling business models under the National Energy Retail Law’.

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4.3 **Off-grid customers**
Different considerations and in some cases different protections will be required for off-grid customers. PIAC supports the ATA’s view that particular attention should be given to performance guarantees and that additional information requirements should be developed to ensure consumers are fully informed about the risks and benefits of living with a stand alone power system\(^9\).

4.4 **Demand management**
It seems unlikely that demand management will result in significant consumer protection issues for residential consumers, given the way in which energy efficiency and demand management work in commercial and industrial contexts. Informed consent obligations should be similar to those required of retailers and distributors.

4.5 **Energy information and privacy**
PIAC shares the Consumer Action Law Centre’s concerns\(^{10}\) that the Australian Privacy Principles (APPs) enshrined in the Privacy Act 1998 (Cth) may not apply to emerging energy or energy information businesses. PIAC recommends the COAG Energy Council investigate how the APPs could be brought to bear on the use of metering data by third parties.

**Recommendation 4**

*That the COAG Energy Council investigate how the Australian Privacy Principles apply to the use of metering data by third parties.*

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\(^9\) Craig Memery, ATA, Presentation to the Innovative Products and Services workshop, Melbourne, 12 March.

\(^{10}\) Set out in CALC, ‘Smart Moves for a Smart Market’ (Report, Consumer Action Law Centre, 2014).
16 February 2015

Ms Sarah Proudfoot
General Manager, Retail Markets Branch
Australian Energy Regulator

Submitted via: AERinquiry@aer.gov.au

Dear Ms Proudfoot

Regulating innovative energy selling business models under the National Energy Retail Law

The Public Interest Advocacy Centre (PIAC) thanks the Australian Energy Regulator (AER) for the opportunity to provide comment on the Issues Paper, *Regulating innovative energy selling business models under the National Energy Retail Law*. Given how fast the energy market is changing, it is appropriate that the AER explores the applicability of electricity retail regulation to new business models.

Defining differences between retailers and alternative energy services

PIAC notes that overall the AER’s framework for regulation of alternative energy sellers seems to be working. The AER’s Issues Paper asks:

What difference, if any, should storage and/or other emerging technologies have on how the AER proposes to regulate SPPA and other alternative energy selling models?

PIAC’s view is that while the advent of solar PV, storage, smart appliances and the like are changing the way in which electricity is generated, used and stored, these technologies can be defined as ‘behind the meter’ technologies. That is, consumers in almost all cases are connected through a commercial contract with a retailer to the NEM network or grid (or the ‘interconnected national electricity system’ as it is called in the rules). When consumers choose to purchase energy using, generating or storing appliances, these transactions are not generally subject to AER regulation because they are not part of the national energy market.

In PIAC’s view, this distinction between NEM grid-connected and AER-relevant contracts and ‘behind the meter’ technologies is the key principle for regulating differentiated responsibilities. The ‘primary’ source of energy in the sense of the largest proportion of energy supply to a customer may or may not be via the NEM network, but the retail NEM-related contract is the primary contract because it enables the NEM connection and, as such, the provision of an essential service and associated consumer protections. As the Issues Paper makes clear a ‘key difference is the impact disconnection of energy services would have on a customer’.

Recommendation 1

PIAC recommends that the AER define the ‘primary’ source of energy as the retailer providing a NEM network connection to the customer. Further, the AER should use the principle of differentiated responsibilities for NEM network-connected services and ‘behind the meter’ services (including solar and storage).
The proposed options
The AER’s Issues Paper asks:

What are stakeholders’ views on the AER’s proposed options? Are there other options to which the AER should have regard?

In PIAC’s view, the exempt seller framework is adequate for current and future purposes until such time as a significant number of consumers begin to leave the NEM.

Whether exempt sellers offer solar PV or storage or electric vehicles or energy efficiency, in all cases they are reducing the electricity sourced from the NEM. This is also a consequence of energy efficiency upgrades to buildings, appliances or equipment – appropriately, none of which is in the remit of the AER.

PIAC believes it is important that regulation does not create barriers to innovative business models, especially those that are likely to reduce energy use and therefore costs to consumers. However, in cases where an alternative energy seller will be the consumer’s only energy supply without the option of reconnecting to the NEM, it is reasonable to require the alternative energy seller to obtain a retailer authorisation.

It is appropriate that retailers have additional requirements, given their unique role in providing a connection to the NEM (and/or a sole supply of electricity). PIAC agrees with the AER that conditions for exemptions should take into account that a ‘customer may not need the level of protection an authorisation would require a retailer to offer in relation to its customers’ and that there exists a risk of duplication if additional consumer protection requirements are placed on exempt sellers.

Recommendation 2
On balance, PIAC supports Option 2 – of exemption for innovative or alternative energy selling, managing or storing models.

Conditions for exempt sellers
The AER’s Issues Paper asks:

In relation to Option 2 (exemption, rather than authorisation), what, if any, conditions should be placed on an individual exemption for an alternative energy seller?

PIAC’s priority is to ensure residential consumers are effectively and adequately protected. In terms of how this should be undertaken, PIAC believes that the principle of differentiated responsibility for sellers ‘in front’ and behind the meter is appropriate, and that regardless of the mix of technologies, adequate consumer protections should be in place. PIAC is also concerned to ensure compliance requirements do not present a barrier for new competitors to enter the market so a balancing exercise is required here by the AER.

PIAC supports the AER’s conditions for solar PPA individual exemptions, which require the seller to:

- clearly inform its customers that their seller is not an authorised retailer;
- explain it is not bound by obligations under the Retail Law that apply to an authorised seller, but is bound by all other relevant customer protection legislation;
- refrain from registering in the wholesale market for the purposes of purchasing energy; and
- not be the financially responsible retailer for the premises.
PIAC notes that the solar PV industry has developed an ACCC-approved Code of Conduct to address consumer protection issues in relation to standards of service and product quality and that the Clean Energy Council is seeking ACCC authorisation to extend the scope of the Code to alternative energy sellers. PIAC is supportive of this industry initiative, which promotes consumer confidence in the solar industry, including the demonstration of best practice pre- and post-sale activities.

PIAC notes that the Council of The Ageing (COTA) Queensland has suggested that an additional condition be placed on an individual exemption for the ‘payment of a fee to the customer’s authorised retailer to contribute towards the cost of providing hardship, life support and concession/rebate services for that customer’. PIAC recommends that this option be investigated.

PIAC also support’s COTA Queensland’s suggestion that it may be timely to consider an alternative approach whereby responsibility for provision of hardship services is addressed at a jurisdictional level.

NSW is currently the only jurisdiction where the Energy Ombudsman has jurisdiction to investigate disputes between customers and an exempt seller under the National Energy Retail Law (NSW) and customers have the right to apply to EWON for a review of a decision arising from any matter relating to the supply of electricity or gas by the exempt person to the customer. Currently EWON handles these disputes (for example, meter malfunctions, irregular billing) free of charge and does not require these exempt sellers to become members of EWON. In future it might be appropriate for jurisdictions to legislate that exempt sellers over a particular size be required to become members of an Ombudsman scheme.

In addition, while PIAC recognises that the creation of hardship programs can be a significant cost to an energy seller, it is important that hardship programs are available in situations where energy sellers have a significant number of customers to whom they are selling the majority of those customers’ electricity. PIAC suggests the AER monitor industry developments in this area and consider the cases where it might be necessary to require exempt sellers (including via mini-grids) to develop hardship plans.

**Recommendation 4**

*PIAC recommends that the AER continue to monitor industry developments with respect to the desirability of imposing conditions on exempt sellers requiring:*

- fee payment to the customer’s authorised retailer to contribute towards the cost of providing hardship, life support and concession/rebate services for that customer;
- membership of Ombudsman scheme; and/or
- the development of hardship plans for businesses over a particular size.

**Trigger points for review**

The AER’s Issues Paper asks:

Should the AER include a ‘trigger point’ for review of individual cases if it proceeds with Option 2?

In PIAC’s view, the most important ‘trigger point’ for the AER as a whole should be if a significant number of consumers begin to disconnect from the NEM (including through connections to mini-grids). Such circumstances would mean that the definition of electricity provision via the NEM as an essential service was under threat and should be reviewed. It would require an overarching review of electricity law and the electricity retail law.
**Recommendation 5**

PIAC recommends that the AER write to the COAG Energy Council to initiate an overarching review of the National Electricity Law and Retail Law when customers begin to disconnect from the National Electricity Market in significant numbers.

Once again, PIAC thanks the AER for the opportunity to provide comment on the Issues Paper. If you would like any further information, please do not hesitate to contact me, or Dr Gabrielle Kuiper, EWCAP’s Senior Policy Officer, on 02 8898 6520, or gkuiper@piac.asn.au.

Yours sincerely

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