



Levelling out the playing field

PIAC response to the AER's Issues Paper: AER approach to retail exemptions

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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; and
- 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 the 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 EWCAP from a community-based reference group the members of which 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 review

Under the proposed National Energy Customer Framework (NECF) the Australian Energy Regulator (AER) is required to publish a guideline on retail exemptions. PIAC welcomes the opportunity to comment on the *Issues Paper: AER approach to retail exemptions*. In writing this submission PIAC has taken the approach of answering a selection of questions posed in the Issues Paper. The questions answered represent the best opportunity for PIAC to advocate for equitable outcomes for energy consumers as the framework for regulating exempt suppliers develops.

3. Questions and Answers

Question 1. Do stakeholders agree with the AER's interpretation of what constitutes the sale of energy?

PIAC does not agree with the AER's interpretation of what constitutes the sale of energy. The assumption outlined in the Issues Paper notes that:

The AER assumes that, where a charge for energy is absorbed into another charge, the energy portion of the charge would be covered under the applicable jurisdictional tenancy law and any other relevant legislation.¹

However, it is not always the case that jurisdictional tenancy law and other relevant legislation are positioned to protect the rights of consumers. In NSW for instance, lodgers and tenants of boarding houses are explicitly excluded from the *Residential Tenancies Act 2010*.² Unlike permanent residents of residential parks, there are no Customer Service Standards in place to oversee the supply of energy to residents of boarding houses and a tenant of a NSW boarding house cannot access the services of the NSW Consumer, Trader and Tenancy Tribunal to assist in solving a dispute with a landlord.

PIAC has three central concerns about negative outcomes for consumers that will stem from energy sales being invisible where they are blended into other activities. Firstly, there are no mechanisms in place to ensure tenants are charged at rates no higher than the standard tariff. Secondly, non-payment of these (unrestricted) charges can result not just in disconnection but eviction. Finally, a group of sellers who are involved in providing their customers' primary access to energy will be completely invisible to the AER and hence the supply of energy will not be subject to any conditions or obligations. PIAC is especially concerned where these consumers are otherwise vulnerable, as in the case of boarding house tenants. It is PIAC's recommendation that where a supplier provides a customer's primary supply of energy in permanent or semi permanent accommodation arrangements that this constitutes the sale of energy, regardless of billing itemisation.

¹ Australian Energy Regulator, *Issues paper: AER approach to retail exemptions* (2010) [8] <<http://www.aer.gov.au/content/index.phtml/itemId/737837>> at 19 July 2010.

² *Residential Tenancies Act 2010* (NSW) s 8 (1)(c).

Question 3. Are there other particulars and information relating to exempt sellers that should be included in the public register?

The AER has outlined that information regarding 'whether any premises have elected to purchase energy from a retailer of their choice'³ will be included on a 'public register of authorised retailers and exempt sellers'.⁴ To make an accurate assessment of customers' ability to exercise choice, PIAC believes the public register should also include information on whether the infrastructure at the site allows customers to purchase energy from other suppliers.

Question 4. Is the apparent growth in onselling problematic, and if so, why?

PIAC shares the AER's concerns that customers of onsellors will not have access to the same range of consumer protections that are available to customers of retailers. The growth of onselling is of concern to PIAC because the proposed framework for retail exemptions is not capable of producing equitable access to consumer protections, nor is it designed to facilitate a transparent energy market.

PIAC recommends that every effort should be made to offer exempt customers protections that mirror, as closely as possible, the protections offered to the customers of retailers⁵. It is problematic that exemptions as proposed will contribute to a multi-tiered energy market that includes customers of exempt sellers that are protected by certain conditions, customers of exempt sellers that are not protected by any conditions and customers of retailers who benefit from a full range of consumer protections.

The absence of a Retailer of Last Resort (RoLR) type of provision for customers of exempt sellers is an issue of concern. PIAC encourages the AER to investigate the development of a scheme that provides continuity of supply for customers of exempt sellers. PIAC is aware that the policy principles guiding the AER's regulatory role with regard to exempt sellers outline that, 'exempt customers should, as far as practicable, not be denied customer protections afforded to retail customers under this Law and the Rules'⁶. In determining the practicability of instigating RoLR-like provisions for customers of onsellors PIAC recommends that there is a significant need to give adequate weighting to the wellbeing of consumers.

For socially and economically disadvantaged consumers, the loss of electricity supply can start a chain of events that further ingrains disadvantage⁷. At the very least it prevents people from lighting their homes, cooking and storing food that requires refrigeration. Where an onseller is disconnected, their customers face all of the negative impacts of disconnection whether or not the customers' payments are up to date.

³ Australian Energy Regulator, *Issues paper: AER approach to retail exemptions* (2010) [12] <<http://www.aer.gov.au/content/index.phtml/itemId/737837>> at 19 July 2010.

⁴ Ibid 11.

⁵ As set out in the Second Exposure Draft of the National Energy Customer Framework, Ministerial Council on Energy, *National Energy Customer Framework: Second Exposure Draft* (2009) <<http://www.ret.gov.au/Documents/mce/emr/rpwg/default.html>> at 2 August 2010.

⁶ Ministerial Council on Energy, *National Energy Retail Law: Second Exposure Draft 2009* (Cth) s 528 (1)(c) <<http://www.ret.gov.au/Documents/mce/emr/rpwg/default.html>> at 2 August 2010.

⁷ Jessie Connell and Wesley Hill, 'Cut Off II: The Experience of Utility Disconnections', report prepared by Urbis for the Public Interest Advocacy Centre Ltd, Sydney NSW (2009) 29.

PIAC is also concerned about how continuity of supply would be managed for customers who are in need of life support systems or other medical equipment powered by electricity purchased from an onseller. The *Second Exposure Draft of the National Energy Retail Rules* protects retail consumers who are using life support equipment from 'de-energisation'⁸. PIAC urges the AER to consider how consumer protections for customers of onsellers can be strengthened with the inclusion of RoLR-like provisions and regulated protection from disconnection for those relying on life support and medical equipment.

Purchasing electricity from onsellers inhibits customers from accessing the full range of customer assistance programs in NSW. Access to the NSW Government's Energy Accounts Payment Assistance Scheme (EAPA) is contingent on a consumer being able to produce an 'original bill... issued by the retail supplier'⁹. The EAPA scheme is an important program that assists customers who are struggling to pay energy bills. In the current climate of rising energy prices it is vitally important that customers have equitable access to all assistance programs. PIAC acknowledges that the AER has no jurisdiction over the administrative rules of NSW Government assistance programs. We simply include this information to illustrate that onselling produces varied results for customers. As an advocate for low-income and other vulnerable consumers of energy, PIAC sees the development of an energy market that offers varying levels of customer assistance to be extremely problematic. Strategies to overcome these inconsistencies may include the development of an exempt seller billing system that is compatible with jurisdictional assistance programs and/or further consultation with State/Territory Governments to foster equitable access to jurisdictional assistance programs for customers of onsellers.

Finally, PIAC sees the growth of onselling as contributing to the development of a hidden energy market. PIAC advocates for a transparent energy market and contends that automatic deemed exemptions will lead to certain categories of suppliers being invisible in the National Energy Market. As such, there will be no way to gain an understanding of the significance of these suppliers in a national context. Similarly, scrutiny of their practices with regard to the supply of an essential service and the resulting outcomes for consumers will be impossible.

Question 7. How important is it for customers in onselling situations to have access to choice of retailer?

Within the context of the current National Energy Market, PIAC strongly supports a consumers' right to choose their energy supplier. Where infrastructure does not facilitate a consumer's ability to exercise that right, PIAC has concerns that onsellers wield an inordinate amount of power over access to an essential service. PIAC urges the AER to compel onsellers in non-competitive environments to gain registration. As has been outlined, regulation would allow the AER to provide 'more targeted regulatory oversight of their activities'¹⁰. PIAC believes this is an important step in encouraging exempt suppliers to act in accordance with their obligations. PIAC also urges the AER to investigate ways in which it can work with planning authorities to prevent the approval of redevelopments and new developments that have no infrastructure to facilitate individual metering.

⁸ Ministerial Council on Energy, *National Energy Retail Rules: Second Exposure Draft* (2009) s 702 (1)(d).

⁹ NSW Government, Department of Energy, Utilities and Sustainability, *Energy Accounts Payment Assistance: Guidelines for community welfare organisations* (2005) [7].

¹⁰ Australian Energy Regulator, *Issues paper: AER approach to retail exemptions* (2010) [34] <<http://www.aer.gov.au/content/index.phtml/itemId/737837>> at 19 July 2010.

Question 8. Once network configuration/metering issues are addressed, are there any other impediments to exempt customers having access to choice of retailer for electricity?

PIAC has concerns that onsellors who are also the landlord or the manager of the consumer's apartment building may only give the consumer information about energy supply that is in their interests— namely that purchase from the onseller at a particular site is presented as a *fait accompli*. PIAC therefore urges the AER to educate onsellors about their obligations not to hinder a customer's access to retail competition. PIAC similarly advocates for an environment in which customers' rights to access energy from a choice of supplier are widely promoted.

Question 10. What core customer protections should exempt sellers be required to provide for their small customers?

As outlined previously, PIAC advocates for a consistent approach to consumer protection, regardless of the category of the supplier. The AER has suggested that small-scale exempt sellers 'may not have the resources to provide customer protections such as hardship schemes'¹¹. PIAC urges the AER to commensurately consider that socially and economically disadvantaged customers may not have the resources to remain connected if they don't have access to a hardship program and/or payment plans.

Question 11. Are the core protections proposed in the draft categories of deemed and registrable exemptions attached to this paper appropriate?

Notwithstanding PIAC's view that every effort should be made to offer exempt customers protections that mirror, as closely as possible, the protections offered to the customers of retailers¹², we have some suggestions regarding the conditions listed below.

Re: Condition 6 - Undercharging and Overcharging

PIAC's policy position is that bills provided by retailers should be based on actual meter readings no less than once every six months. There is a legitimate concern that without established limits, customers will receive consecutive bills based on an underestimation of usage followed by a higher than anticipated bill, to offset the underestimations, once the meter has actually been read. In some cases, customers will experience difficulty paying these unexpectedly larger bills. PIAC calls upon the AER to reduce the timeframe for recovering undercharged amounts from twelve months to six months, thereby minimising the amount that can accrue as a result of undercharging. Therefore, part 1a of Condition 6 would be adjusted to read as follows:

¹¹ Ibid 19.

¹² As set out in the Second Exposure Draft of the National Energy Customer Framework, Ministerial Council on Energy, *National Energy Customer Framework: Second Exposure Draft* (2009) <<http://www.ret.gov.au/Documents/mce/emr/rpwg/default.html>> at 2 August 2010.

limit the amount to be recovered to the amount undercharged in the 6 months before the date the exempt customer is notified of the undercharging, unless the amount was undercharged as a result of the exempt customer's fault or unlawful act or omission; and

Re: Condition 8 - Payment difficulties and disconnection or cessation of supply

PIAC urges the AER to stipulate in Condition 8 that customers of exempt suppliers should be offered two payment plans. While payment plans are referred to in Condition 8 there is no stipulation that they are to be offered. The *Second Exposure Draft of the National Energy Retail Law* compels retailers to offer 'hardship customers' or 'customers experiencing financial payment difficulties' payment plans¹³. Similarly, the offer of two payment plans forms the basis of the framework protecting hardship customers from disconnection under the *Second Exposure Draft of the National Energy Retail Rules*¹⁴. PIAC believes it is reasonable to provide exempt customers the same level of consumer protection in regard to payment plans.

Re: Condition 10 Reconnection of Supply

There is a need for the regulation of reconnection charges to be clarified and added to Condition 10. Condition 10, part c. seems to be at odds with earlier assertions that the passing on of 'an administration or similar fee[s]' was not a concept that was supported by the AER¹⁵. PIAC urges the AER to regulate the exclusion of reconnection charges for customers of exempt sellers.

Question 12. Do stakeholders agree with the requirement for exempt sellers to notify the AER, and their customers, of the possibility of disconnection?

PIAC believes that a requirement for exempt sellers to notify the AER, and their customers, of the possibility of disconnection does not go far enough to protect consumer interests. In the event that no other protections are offered, PIAC supports notification as proposed. PIAC's preferred position is for the AER to work on developing a RoLR-like framework that provides continuous supply to exempt customers.

Question 13. Are there any conditions which the AER could impose which might help to mitigate the risk of an exempt seller failing and leaving its customers without supply?

As noted above, PIAC strongly advocates for a scheme that provides guaranteed continuous supply to customers in the event that the exempt seller fails. As an interim measure, PIAC proposes that exempt sellers be required to register with their retailer the existence of any customers in use of life support equipment at

¹³ Ministerial Council on Energy, *National Energy Retail Law: Second Exposure Draft 2009* (Cth) s 231 (1) <<http://www.ret.gov.au/Documents/mce/emr/rpwg/default.html>> at 2 August 2010.

¹⁴ Ministerial Council on Energy, *National Energy Retail Rules: Second Exposure Draft 2009* (Cth) s 605 (2) <<http://www.ret.gov.au/Documents/mce/emr/rpwg/default.html>> at 2 August 2010.

¹⁵ Australian Energy Regulator, *Issues paper: AER approach to retail exemptions* (2010) [26] <<http://www.aer.gov.au/content/index.phtml/itemId/737837>> at 19 July 2010.

properties supplied by the exempt seller. It should then be mandated that properties listed on this register be protected from disconnection.

Question 14. To what extent can the protections found in hardship policies be applied to customers of exempt sellers operating under deemed and registrable exemptions?

In NSW, the state government has developed a suite of consumer protections in recognition of energy as an essential service¹⁶. PIAC asserts that it is entirely warranted for all energy customers to be offered protections regardless of the whether an exempt supplier or a retailer is supplying them. It is therefore recommended that exempt sellers offer customer hardship policies that offer no less than the minimum requirements for a customer hardship policy as outlined in clause 226 of the Second Exposure Draft of the National Energy Retail Law¹⁷.

Question 16. Should exempt sellers operating under an individual exemption be required to base their dispute resolution processes on Australian Standards AS ISO 10002-2006, as amended and updated from time to time?

PIAC asserts that it is preferable that all exempt sellers are required to manage dispute resolution under a common set of respected standards.

Question 17. Should this requirement be extended to exempt sellers operating under a deemed or registrable class exemption, or to all exempt sellers selling more than a certain number of customers? Why or why not?

Please refer to answer for Question 16.

Question 18. What sort of tests should the AER use to determine whether the sale of energy is incidental to a business?

PIAC requests that consumer rights and protections be given significant weight when the AER makes any determination on exempt sellers. Consumer rights and protections are especially important where an exempt seller is providing the primary source of energy to a consumer's home and not simply to common areas within a site.

¹⁶ NSW Government, Industry and Investment, 'Measures to assist household energy customers' (Media Release, 22 April 2010). <http://www.industry.nsw.gov.au/_data/assets/pdf_file/0016/324340/measures-to-assist-household-energy-customers.pdf> at 30 July 2010.

¹⁷ Ministerial Council on Energy, *National Energy Retail Law: Second Exposure Draft 2009* (Cth) s 226 <<http://www.ret.gov.au/Documents/mce/emr/rpwg/default.html>> at 2 August 2010.

Question 21. How should the AER judge an exempt seller's profit intentions?

PIAC agrees with the AER's decision not to support exempt sellers passing on administration or similar fees¹⁸. PIAC also supports mechanisms that cap prices at the standard offer tariff. However, it is PIAC's view that any savings an exempt supplier gains through the bulk purchase of energy or discounted contract rates should be passed on to their customers. There are instances where customers of exempt suppliers cannot access a competitive energy market because the site does not allow for individual metering, or meters lack meter identification numbers. As these customers are unable to access a competitive market through any other means any cost benefits should be passed on.

Question 23. What additional information might the AER have regard to when considering the significance of the energy likely to be sold by an exempt seller?

PIAC takes the view that information that discloses whether a customer has any access to a choice of retailer and whether that customer is wholly reliant on an exempt seller for their energy needs is relevant in determining the significance of the energy sold by an exempt seller.

Question 27. Should the AER create a class of deemed exemption for persons engaged in the sale of unmetered energy where that is not prohibited by jurisdictional legislation? If yes, what conditions should be attached to that exemption? Should it be limited to existing dwellings and those that are currently in the planning stages?

PIAC would welcome the AER's creation of a class of deemed exemption for the sale of unmetered energy where that is not prohibited by jurisdictional legislation. As noted throughout this submission, PIAC advocates for conditions that would, as closely as possible, mirror the protections offered to the customers of retailers.

Question 28. Are there situations where it may be appropriate for the AER to grant an individual exemption to a new development that does not allow for individual electricity metering of dwellings?

PIAC would not support an individual exemption for a new development that does not allow for individual metering of dwellings and access to the National Energy Market.

Question 34: Are pricing protections necessary for off-grid customers? If so, what conditions could the AER impose on off-grid suppliers to limit energy prices?

¹⁸ Australian Energy Regulator, *Issues paper: AER approach to retail exemptions* (2010) [26] <<http://www.aer.gov.au/content/index.phtml/itemId/737837>> at 19 July 2010.

PIAC takes the view that off-grid pricing should be capped at levels that reflect the cost of supply. This would provide a level of protection for consumers who have no access to a supplier of choice, while at the same time not prohibiting access to basic energy services where these services are more expensive to provide.

Question 35. What other seller related factors might the AER consider in addition to those outlined in the Law?

PIAC believes that consumer protections would be enhanced if exempt suppliers whose business activities also involve providing semi-permanent and permanent accommodation were made into a registrable class of exemption. PIAC sees this process as adding value because the AER plays a stronger regulatory role with this class of exemption. The structure attached to registrable exemptions includes facilities for the AER to monitor exempt suppliers and educate them on their obligations. In addition, registration will 'allow the AER to increase its knowledge of certain exempt selling activities'¹⁹. PIAC asserts that a stronger regulatory role is appropriate where exempt suppliers have control over a person's energy and housing. Similarly, registration enhances the AER's ability to gather data on exempt sellers that could be useful in strengthening future national energy market regulation frameworks.

Question 38: Do stakeholders agree with the AER's registration threshold of 25 premises with a single site? Why or why not?

PIAC contends that energy customers deserve an equitable level of support and protection regardless of the size of the establishment providing the energy and accommodation.

Question 41. Do stakeholders support the AER providing a blanket exemption (the Class 2 deemed exemption) to cover situations where energy is passed through without a separate charge? Why or why not?

PIAC does not support a blanket exemption where energy costs are passed through without a separate charge. Where an exempt supplier is providing minimal amounts of energy, as in the case of an apartment building's common areas, a blanket exemption seems appropriate. The lack of conditions attached makes Class 2 deemed exemptions an inappropriate framework to deal with exempt suppliers are also providing permanent and semi permanent accommodation to their customers.

Question 42. Do stakeholders agree with the AER's proposal for this exemption to be issued without conditions?

Please refer to answer of question 41.

Question 48. Should individual exemptions be time-limited?

PIAC takes the position that where exempt sellers activities are likely to be influenced by changing technologies and economies that individual exemptions should be reviewed periodically.

4. Conclusion

The process of developing frameworks for regulating exempt suppliers has raised some interesting questions in what is likely to be a challenging process. The positions taken in the answers outlined above are firmly grounded by PIAC's goal to advocate for socially and economically disadvantaged consumers of energy. In this instance, PIAC seeks to minimise the effects of a multi-tiered energy market and promote frameworks capable of contributing to an energy market that is for consumers, more akin to a level playing field.