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by email: AERInquiry@aer.gov.au

Dear Mr Leuner

Draft Retailer Authorisation Guideline

PIAC welcomes the opportunity to provide input to the public consultation process for the Australian Energy Regulator's (AER) draft *Retailer Authorisation Guideline* (the draft Guideline). PIAC will confine its comments to Part 3 of the draft guideline that deals with revocation, transfer and surrender.

Revocation of retailer authorisation

The National Energy Customer Framework (NECF) is comprised of the National Energy Retail Law (Retail Law) and the National Energy Retail Rules (Retail Rules). Under the NECF, the AER may decide to revoke a retailer authorisation if satisfied that there has been a material failure by the retailer to meet the obligations of a retailer under the energy laws, which creates a reasonable apprehension that the retailer will not be able to meet its obligations in the future.¹

The draft Guideline states that the AER may revoke a retailer authorisation if:

- a retailer materially failed to meet the retailer obligations of the Retail Law and Retail Rules or there applicable energy legislation; and there is a reasonable apprehension that they will not be able to meet these obligations in the future;
- for electricity, a retailer is not a registered participant for purchasing electricity as required by s.11(4) of the National Electricity Law;
- for gas, a retailer is not registered under the relevant gas market schemes;
- a retailer has triggered a RoLR event.²

The AER can also consider a revocation if a retailer fails to participate in or meet the obligations of any relevant energy ombudsman scheme.³

The AER will generally follow a specific process in considering whether to revoke an authorisation, unless the participant has triggered a Retailer of Last Resort (RoLR) event. The process will involve giving written notice of the intention to revoke the authorisation, with reasons, and requesting a response from the retailer by a specified date (not less than 10 days after giving notice). The response will be considered in determining whether or not to revoke the

¹ National Energy Retail Law Bill 2010 (South Australia) s 107(2)(b).

² Australian Energy Regulator, *Draft Retailer authorisation guideline* (2010) [21] <<http://www.aer.gov.au>> at 22 November 2010.

³ *Ibid*, 21.

authorisation.⁴

If authorisation is revoked, the notice of revocation will be published on the AER website, together with the reasons for the decision.⁵

Section 142 of the Retail Law states:

- (1) If a failed retailer has not already had its authorisation revoked under this Law, the AER may at the same time as it issues the RoLR notice for the retailer, and by endorsement on that notice, revoke the retailer authorisation with effect from the transfer date.⁶

In outlining the revocation process, the draft Guideline and the Retail Law refer to events that may lead to the AER revoking a retailer authorisation. In both cases, PIAC contends that the use of the word may suggests that the AER can exercise a level of discretion when considering revoking a retailer authorisation.

PIAC questions whether the provisions in the NECF and the draft Guideline sufficiently cover the situation where a RoLR event has been triggered, and the AER exercises its discretion not to revoke the retailer authorisation.

PIAC is specifically concerned that the process regarding the decision of whether or not a retailer authorisation is to be revoked needs to be appropriately transparent, with the reasons for such decisions being made public regardless of the outcome of the decision.

PIAC submits that where the AER decides not to revoke the authorisation, the AER should also publish its decision on its website together with the reasons for the decision. This should occur in situations where the AER is considering revoking a retailer authorisation following a RoLR event, and also where the AER decides not to revoke a retailer authorisation in any other situation. PIAC recommends that the draft Guideline be amended to this effect.

Transfer of retailer authorisation

Under section 102 of the Retail Law, a retailer may apply to the AER to transfer the retailer's authorisation.⁷ The AER must decide whether to grant or refuse the application. As the draft Guideline notes, the transfer application process mirrors the application process used for a new retailer authorisation—utilising the same entry criteria and consultation processes.⁸

Under the Retail Law, the entry criteria used to assess new applications and transfers are as follows:

- (a) the organisational and technical capacity criterion—the applicant must have the necessary organisational and technical capacity to meet the obligations of a retailer;
- (b) the financial resources criterion—the applicant must have resources or access to resources so that it will have the financial viability and financial capacity to meet the obligations of a retailer;
- (c) the suitability criterion—the applicant must be a suitable person to hold a retailer authorisation.⁹

⁴ Ibid.

⁵ Ibid.

⁶ Above n 1, s 142(1).

⁷ Ibid, s 102(1).

⁸ Australian Energy Regulator, above n 2, 23.

⁹ Above n 1, s 90(1)(a)(b)(c).

Before reaching a decision on an application for a transfer the AER must:

- (a) publish on the AER's website a notice
 - (i) setting out a copy of the application or giving details in relation to the application; and
 - (ii) stating that written submissions about the application may be made to the AER within a period of at least 20 business days that is specified in the notice; and
 - (iii) containing such other information as the AER considers appropriate; and
- (b) consider all written submissions received by it within that period before deciding whether to grant or refuse the application.¹⁰

PIAC submits that the draft Guideline does not clearly address the situation where an authorised retailer is acquired by another corporate entity. The concern is that the corporate entity acquiring the authorised retailer may thereby acquire the retailer authorisation, without any assessment as to whether the new entity satisfies the entry criteria regarding organisational and technical capacity, suitability and financial capacity.¹¹

Neither the NECF nor the draft guideline specifies a definition of 'transfer' of authorisation. Specifically, there is no provision that indicates that the acquisition of an energy retailer through a Deed of Arrangement would amount to a transfer of retail authorisation.

PIAC recommends that the draft Guideline be amended to include a requirement that wherever an authorised retailer is acquired by another corporate entity, whether through a Deed of Arrangement, takeover, or other means, the AER conduct a process through which it considers whether the acquiring entity has capacity to meet the obligations of an energy retailer under the National Energy Retail Law and the National Energy Retail Rules.

Thank you again for the opportunity to comment on the draft Guideline. Should any further information be required please contact Carolyn Hodge, Senior Policy Officer, via email chodge@piac.asn.au or telephone on (02) 8898 6520.

Yours sincerely



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¹⁰ Ibid, s 91(a)(b).

¹¹ Australian Energy Regulator, above n 2, 9.