



**Water Industry Competition (General)
Regulation 2008: Draft Marketing Code of
Conduct and Draft Transfer Code of Conduct**

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**Erin Halligan, Policy Officer, Energy + Water
Consumers' Advocacy Program**

Introduction

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 receives funding from the NSW Department of Trade and Investment, Regional Infrastructure and Services 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.

Energy + Water Consumers' Advocacy Program (EWCAP)

EWCAP 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;
- Park and Village Service;
- Ethnic Communities Council NSW;
- Rural and remote consumers;
- Institute of Sustainable Futures, University of Technology;
- Western Sydney Community Forum; and
- National Seniors.

Water Industry Competition Act and the Draft Codes of Conduct

PIAC welcomes the opportunity to comment on the Draft Marketing Code of Conduct and the Draft Transfer Code of Conduct (collectively, the Draft Codes) for water retail suppliers, as drafted by the Minister for Water under clauses 26 and 27 of the Water Industry Competition (General) Regulation 2008.

The Energy + Water Consumers' Advocacy Programme (EWCAP) represents the rights and interests of low-income and other residential consumers in the NSW energy and water markets.

The development of the Draft Codes is an essential step in ensuring that a competitive water market is fair and efficient for both retailers and consumers.

Direct Marketing is growing rapidly in Australia, with increasing numbers of consumers choosing to purchase goods and services through marketing channels, and more businesses investing in this media to meet the increasing demand.¹

Effective competition relies on consumers being confident that they will be treated fairly by retailers. To achieve this, consumers must be provided with all the information they need to make informed choices about their retail supply contracts.²

In an effective competitive water market, these Draft Codes serve to set a benchmark for best practice standards

The *Marketing Code of Conduct* will set standards of conduct for marketers representing licensed retail suppliers and set a framework for the supply of comprehensive information to customers. The *Transfer Code of Conduct* will regulate the process for the transfer of customers from one licensed retail supplier to another.³

Experiences in the energy market have indicated the complexities of enforcing conduct standards in a competitive market, in part due to competing interests between business demands and consumer protection. The Australian Competition and Consumer Commission (ACCC) highlighted, in its determination on the Energy Assured Limited Scheme to self regulate door-to-door energy sales, that:

¹ Australian Direct Marketing Association *Code of Practice* (2006) 5.
< <http://www.adma.com.au/regulatory/code-of-practice/>>

² NSW Department of Trade and Investment, Regional Infrastructure and Services, *Energy Supplier Performance – Marketing Rules* (2 May 2011) NSW Government
<<http://www.industry.nsw.gov.au/energy/customers/supplier/marketing>>.

³ NSW Office of Water *Marketing Code of Conduct and Transfer Code of Conduct* (2 May 2011) NSW Government <<http://www.water.nsw.gov.au/Urban-water/Private-water-industry/Codes-of-conduct/default.aspx>>.

Sales agents have a conflict of interest between whether to provide clear and appropriate advice to potential consumers which may mean they do not entice a consumer to switch supplier, or use high pressure sales techniques so that they entice the consumer to switch and get paid commission. Retailers also face a conflict of interest between ensuring that their sales agents behave in an appropriate and compliant way which may mean fewer sales, rather than generating additional sales through promoting aggressive marketing strategies.⁴

It is for this reason that stringent regulatory frameworks must be established to ensure consumer protection in a competitive market. These frameworks must establish rules that allocate value for both consumers and suppliers in such a way as to maintain incentives for business to compete whilst promoting political legitimacy and confidence in the eyes of consumers.⁵

Framework for best practice

PIAC anticipates that water industry retail suppliers will market their business in the same manner as electricity retailers do in the energy market.⁶

Although the NSW water market is limited in terms of its competitiveness compared to the energy market, it is important to have strong policy frameworks that will be cornerstones in shaping the development of the water market in a way that protects consumers.

PIAC believes that the *Australian Consumer Law 2010 (Cth) (ACL)* and the *National Energy Retail Law 2011 (SA) (NERL)* should be cornerstone documents for the development of the Draft Codes.

The ACL was developed to give Australian consumers equal and consistent rights across all jurisdictions, simplifying national rules and regulations and creating a national standards and enforcement regimes for consumer protection.⁷ The objective of the NERL is to promote efficient investment, operation and utilisation of energy services in the interests of energy consumers.⁸

Both the ACL and NERL reflect best practice minimum standards for consumer protection. Extending policy consistency of these processes in the Draft Codes will ensure greater stringency and compliance in their implementation.

⁴ Australian Competition & Consumer Commission, *Energy Assured Ltd – Authorisation ACCC Decisions*, A91258 & A91259, 11 April 2011, 21.

⁵ Sandford Berg, *Developments in Best-Practice Regulation: Principles, Processes and Performance*, (Public Utility Research Centre, University of Florida, 2000) 8.

⁶ PIAC, Submission to NSW Office of Water, *Water Industry Competition Act – Regulations Consultation Paper*, 9 August 2007, 5.

⁷ Australian Consumer Law, *Why have a new law?* (5 May 2011) Commonwealth of Australia <http://www.consumerlaw.gov.au/content/Content.aspx?doc=the_acl/why_have_a_new_law.htm>.

⁸ Ministerial Council on Energy Standing Committee of Officials, Parliament of South Australia, *National Energy Customer Framework Second Exposure Draft: Explanatory Material* (2009) 7.

Consumer protection

Customer consent

Customer consent remains an important issue among customer complaints and dispute resolution processes. Minimum standards for information provision must be clearly defined in any codes or contracts to ensure customers are making informed decisions.

The Energy and Water Ombudsman of NSW (EWON) Annual Report for 2009/2010 indicated that marketers continue to supply misleading information when making a sale, and report instances where marketers take advantage of customer confusion over regulatory processes.⁹ Non-consensual contract transfers were also listed as a significant area of complaint by EWON.¹⁰

Customer Consent is addressed under clause 8.1 of the Draft Marketing Code of Conduct, and clause 7.1 of the Draft Transfer Code of Conduct. Both provisions are expressed in identical terms, namely:

For the purposes of this code, where customer consent is required, it must be express consent following the disclosure of all matters materially relevant to the giving of consent, including the purpose for which the consent will be used.

PIAC recommends that this definition be strengthened and made consistent with the definition of 'explicit informed consent' as defined in the NERL.¹¹

39 Nature of explicit informed consent

- (1) Explicit informed consent to a transaction is consent given by a small customer to a retailer where—
- (a) the retailer, or a person acting on behalf of the retailer, has clearly, fully and adequately disclosed all matters relevant to the consent of the customer, including each specific purpose or use of the consent; and
 - (b) the customer gives the consent to the transaction in accordance with subsection (2); and
 - (c) any requirements prescribed by the Rules for the purposes of this subsection have been complied with.
- (2) Explicit informed consent requires the consent to be given by the small customer—
- (a) in writing signed by the customer; or
 - (b) verbally, so long as the verbal consent is evidenced in such a way that it can be verified and made the subject of a record under section 40; or
 - (c) by electronic communication generated by the customer.

Clear definition and parameters for 'explicit informed consent' in these codes is important to ensure their total efficacy, as issues regarding consent extend to other provisions including privacy, information provision and erroneous transfers.

The inclusion of 'explicit informed consent' in the NERL was developed to bring the legislation in line with the best practice regimes of both South Australia and Victoria.

⁹ Energy and Water Ombudsman NSW, *Annual Report 2009/10* (2010) 25.

¹⁰ *Ibid* 23.

¹¹ *National Energy Retail Law 2011* (SA) pt 2 div 5 s 39.

In PIAC's joint submission to the National Energy Customer Framework,¹² it was highlighted that:

It is a fundamental principle in any transaction that a consumer provide their informed consent; however, informed consent is typically based upon supplier obligations of information without regard to a consumer's understanding of the information, in particular competency.

By using the NERL definition of 'explicit informed consent' in the Draft Codes, it guarantees NSW water consumers best practice standards that are consistent with standards set in the national energy market, as well as the standards reflected in South Australian and Victorian best practice regimes.

Recommendation

PIAC recommends that the definition and protocols for consent in both the Draft Marketing Code of Conduct and Draft Transfer Code of Conduct be brought into line with the National Energy Retail Law 2011 (SA) definition of 'explicit informed consent'.

Marketing at a customer's premises

Growing competition in the energy market resulted in a growth in retail marketing, with notable increased investment by retail suppliers in door-to-door sales.

The strong conflict of interest for marketers in meeting demanding sales targets whilst adhering to marketing codes of conduct has been difficult to manage. EWON reports some of the top complaints around consumer marketing are customers being misled by marketers and pressured into signing or agreeing to contracts.¹³

PIAC believes strong consumer protection guidelines are required so consumers are certain to be fully aware of a marketer's identity, intent and agenda from the very first point of contact. This will allow the consumer to take proactive steps and make informed decisions about any sales interactions in their homes from the very beginning, and will also support retailers avoiding erroneous sales and customer disputes.

Clause 11.2 of the Draft Marketing Code of Conduct addresses marketing at a customer's premises. The provision begins:

Where a marketer engages in marketing at a customer's premises, the marketing representative must immediately, upon entering the premises...

¹² PIAC Submission to the Ministerial Council on Energy, *First Exposure Draft Legislation of the National Energy Customer Framework*, 12 June 2007, 12.

¹³ Energy and Water Ombudsman NSW (EWON) above n 4, 23.

The definition of 'premises' in clause 3 of the Draft Marketing Code of Conduct is consistent with that in the Australian Consumer Law definition 'including both a Customer's residential premises and workplace premises'.¹⁴

PIAC contends it could be argued that 'upon entering a premises' is ambiguous, and it could be interpreted unfavourably for a consumer. For example, it is not clear whether 'upon entering a premises' means immediately after first contact is made, or once inside the front gate.

It could be interpreted that if a marketer must only disclose identity and intent 'upon entering a premises' they may not be bound to properly abide by the Code of Conduct until once inside a consumer's home. However, the critical point in time for these obligations to be triggered is before starting to negotiate with a consumer.

This is recognised in other relevant codes of conduct and legislation. For this reason, PIAC supports the provision in the NSW Energy Marketing Code of Conduct, which is consistent with the provisions outlined in Section 74 of the Australian Consumer Law (ACL), regarding marketing at a customer's premises. It begins:

A dealer who calls on a person for the purpose of negotiating an unsolicited consumer agreement, or for an incidental or related purpose, must, as soon as practicable and in any event before starting to negotiate...

PIAC believes that this approach not only provides greater clarity for effective consumer protection, but also extends consistency and enforceability by bringing the Code in line with the ACL.

Recommendation

PIAC recommends that clause 11.2 regarding marketing at a customer's premises in the Draft Marketing Code of Conduct be brought in line with the ACL provisions and therefore should apply before a marketer starts to negotiate with a customer.

Privacy

Both Draft Codes clearly identify the *Privacy Act 1988* (Cth) as key framework legislation.

PIAC would like to reiterate the importance of consumer privacy within both of these Codes, particularly as access to and storage of private customer account information is required in both marketing and transfer procedures.

Marketers and retailers are not only obliged to access and maintain private customer information for supply contract transactions, but are also required to retain a permanent record of customer details from people who request not to be contacted again, as outlined in clause 14 of the Draft Marketing Code of Conduct. They must also retain for a minimum period of two years any written

¹⁴ *Competition and Consumer Act 2010* (Cth) Sch 2, s 75.

or verbal consent from customers agreeing to transfer their contracts, as outlined in clause 9 of the Draft Transfer Code of Conduct.

PIAC agrees with both these provisions as they are essential to enforcing accountability in ethical marketing practices and the obtaining of explicit informed consent.

Compliance with privacy standards and assurance of customer information protection are not only fundamental to the Draft Codes, but are also crucial in building consumer confidence in the market.

Experience in energy retail marketing has indicated that maintaining stringent compliance standards has been difficult, with at times significant bureaucratic distance between the retail supplier and the individual marketers conducting door-to-door sales.¹⁵

PIAC submits that a customer's information must only be viewed by those who have obtained appropriate customer authority, and that such information is obtained by an accountable, authorised individual in line with the provisions of 'explicit informed consent'.

In ensuring such accountability, PIAC believes the Draft Codes should explicitly address the importance of compliance with privacy legislation when specifically addressing processes of obtaining and storing customer information.

Recommendation

PIAC recommends that the Draft Codes address privacy beyond reference to the Privacy Act 1988 (Cth), and include explicit provisions in managing account information and obtaining explicit informed consent in marketing and transfer processes.

Conclusion

PIAC commends the efforts of the NSW Office of Water Draft Marketing Code of Conduct and Draft Transfer Code of Conduct as a step toward ensuring consumer protection in the future.

These Draft Codes must set a precedent for best practice for consumer protection in the NSW water market by presenting robust minimum standards to guide retailers.

PIAC believes these Codes may be improved and enhanced by upholding consistency with existing relevant policy frameworks, such as the ACL and the NERL, particularly in the areas of explicit informed consent, marketing on a customer's premises, and ensuring customer privacy.

¹⁵ Australian Competition & Consumer Commission, above n 4, 33.