



public interest
ADVOCACY CENTRE LTD

**Submission to Retailer of Last Resort and
Operator of Last Resort arrangements under the
*Water Industry Competition Act 2006***

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Erin Halligan, Policy Officer

Energy + Water Consumer Advocacy Program

1. The Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is an independent, non-profit law and policy organisation. PIAC 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.

2. 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 (CPSA);
- Park and Village Service;
- Ethnic Communities Council NSW;
- Rural and remote consumers;
- Physical Disability Council of NSW; and the
- Retirement Villages and Residents Association.

3. Introduction

PIAC welcomes the opportunity to provide comment to the NSW Department of Finance and Services' discussion paper on *Retailer of Last Resort and Operator of Last Resort arrangements under the Water Industry Competition Act 2006* (the Discussion Paper).

PIAC understands that the current provisions for Retailer of Last Resort (RoLR) arrangements under the *Water Industry Competition Act 2006* (NSW) (WIC Act) serve as a broad framework. In particular they lack detail on the implementation issues involved in ensuring continuity of service in the event of a water retail supply failure.¹ There are currently no arrangements in place under the WIC Act to respond to a water network operator failure or appointment of an Operator of Last Resort (OoLR).²

PIAC provides comment to the Discussion Paper based on expertise gained from PIAC's involvement in the development of the RoLR and OoLR arrangements in the National Energy Customer Framework (NECF), as well as consumer experiences following the 2010 RoLR event triggered by the suspension of Jackgreen from the National Energy Market.

4. Regulation

4.1 Consumer responsibility

PIAC endorses the Discussion Paper's objective for RoLR and OoLR arrangements to form part of a broader framework that places responsibility for risk management and contingency planning in the hands of the licensee.³ PIAC is concerned, however, that the arrangements may also place equal responsibility on NSW account holders to assess risks associated with becoming a customer to a WIC Act licensee.⁴ The Discussion Paper states that:

RoLR arrangements should not discourage customers of their responsibility to be aware of potential issues associated with becoming a customer of a WIC Act licensee. For example, it is important that customers fully assess the risks associated with purchasing a property that is serviced by a stand-alone system operated by a WIC Act licensee.⁵

PIAC contends that placing this level of responsibility on the consumer is unfair. PIAC believes that, in a functioning competitive retail market, it is the responsibility of licensees to operate in a transparent manner, complying with required licence conditions and ensuring continuity of service to their customer base. PIAC believes it is the responsibility of IPART to monitor retailer and operator compliance and ensure licensees are meeting the terms and conditions of their licence to ensure consumers are protected from service failure risks.

PIAC believes it is unreasonable to place responsibility on consumers to make informed service

¹ Department of Finance and Services NSW, *Retailer of Last Resort and Operator of Last Resort arrangements*

² Ibid.

³ Department of Finance and Services NSW, above n 1, 7.

⁴ Ibid.

⁵ Ibid.

provision risk assessments when entering into contracts. Realistically, most consumers are drawn to cheap or more affordable offers,⁶ and the average consumer cannot be expected to have the expertise or information required to weigh up price offers against market risk. In PIAC's research report, *Choice? What Choice?*, the overwhelming majority of surveyed consumers identified their main reason for switching household electricity retailers was for cheaper prices, with very few switching for a better supply of service.⁷

PIAC argues that for a consumer to fully evaluate the risks of a retail or network supply failure, they must have a comprehensive understanding of all market operations. PIAC maintains that this is an unrealistic expectation to be placed on NSW consumers, particularly with new retailers emerging in a competitive water market.

PIAC believes that if the WIC Act adopts a framework that encourages consumer responsibility to assess the risks of dealing with a WIC Act licensee, the RoLR and OoLR arrangements must support customers to do so through transparent monitoring, evaluation and reporting of licence compliance by IPART, and set specific minimum standards for information provision in market contracts (as discussed in section 6.2 of this submission).

Recommendation

PIAC recommends the WIC Act amend the second draft principle 'Encourage good industry practice' as outlined in the Discussion Paper to remove customer responsibility to assess service supply risk in the RoLR and OoLR arrangements.

PIAC recommends that the WIC Act does not adopt any principles which assign customer responsibility for assessment of service supply risk in the RoLR and OoLR arrangements.

4.2 Licencing

The Discussion Paper asks whether RoLR arrangements should be permanent following a failure to supply, or whether the failed licensee should have opportunity to be reinstated into the market.

PIAC believes that the licence of a failed retailer must be revoked once a RoLR event is triggered. Where a former licensee wishes to re-enter the market, it should be compelled to reapply through standard application procedures, and be subject to a full reassessment that includes a review of the licence revocation. Current assessment practice under the WIC Act includes a full review of the applicant's technical, financial and organisational capacity to administer the activities authorised by the licence.⁸

PIAC believes that revoking the licence of a failed retailer has two important functions. Firstly, it serves as a disincentive for a retailer to withdraw or be suspended from the market. Secondly, it protects consumers from non-compliant and/or unreliable retailers re-entering the market.

Under the current WIC Act, the Minister issues licences for retailers and network operators.⁹ It is the role of IPART to consider and assess licence applicants before referring them to the Minister.

⁶ Consumer Action Law Centre, Submission to the Ministerial Council on Energy, Retailer of Last Resort - Development of a National RoLR Framework, 14 November 2008, 5.

⁷ Louis Schetzer, *Choice? What Choice?* Public Interest Advocacy Centre (2011) 19.

⁸ *Water Industry Competition Act 2006* (NSW) s 10(4).

⁹ *Ibid* s 10(1).

As part of this process, IPART is required to engage in public consultation regarding licence applicants.¹⁰ If a disqualified entity attempts to reapply for a licence through this process, there is opportunity for affected customers and other consumer stakeholders to provide input into the licence approval process. Based on these findings, IPART may then recommend the Minister not grant a licence to a previously disqualified body.¹¹

PIAC believes this process is consistent with the arrangements developed in the *National Energy Retail Law 2011 (SA)* (NERL). In the NERL, it is the responsibility of the Australian Energy Retailer (AER) to trigger a RoLR event. The NERL states:

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.¹²

Although this provision says the AER *may* revoke a retailer's authorisation effective from the RoLR transfer date, the AER contends that it is obliged to systematically revoke a retail authorisation following a RoLR event.¹³

During the consultation for the AER Retailer Authorisation Guideline, PIAC expressed concern that the provisions in the NERL allowed the AER a level of discretion in deciding to revoke a retailer authorisation.¹⁴ The AER responded to this concern by stating that:

The AER considers that the Retail Law requires the AER to revoke a retailer authorisation following a RoLR event. As such, no decision needs to be made.¹⁵

Consistent with the NERL, PIAC believes that the Minister should be obliged to cancel the licence of a failed WIC Act licensee at the same time a RoLR or OoLR is event triggered.

Recommendation

PIAC recommends that the RoLR and OoLR arrangements in the WIC Act include provisions for the licence of a failed retailer or network operator to be cancelled following a RoLR or OoLR event. The provisions must also state that if the failed retailer or network operator wishes to re-enter the market, it must apply for a new licence through the standard processes.

5. Cost Recovery

PIAC maintains that it is unfair for costs incurred from RoLR or OoLR events to be charged to consumers. PIAC believes that it is the responsibility of a licensed retailer or network operator to maintain supply continuity. As such, the failed retailer or network operator should meet the costs incurred from a failure to deliver water supply.

¹⁰ Ibid s 9 (1)(c).

¹¹ Ibid s 10(3).

¹² *National Energy Retail Law 2011 (SA)* s 142(1).

¹³ Australian Energy Regulator, *Notice of Draft Instrument - Retailer Authorisation Guideline* (2011) 14.

¹⁴ PIAC, Submission to AER, *Draft Retailer Authorisation Guideline*, 22 December 2010, 2.

¹⁵ Australian Energy Regulator, above n 12.

5.1 RoLR

The current provision for cost-recovery in the event of a RoLR is a RoLR supply fee,¹⁶ or RoLR tariff, which allows a RoLR to impose a charge onto a transferred customer.¹⁷ PIAC is opposed to this approach as it places an unfair burden on the customer to cover the costs incurred from the retailer failing to deliver a service.

PIAC recommends the WIC Act mandate the formation of an industry fund scheme as the most viable and equitable solution to recover costs in a RoLR event. Under the scheme, retailers would be required to pay an upfront fee into a collective fund upon being granted a licence.¹⁸ This fee could be determined by IPART based on the level of financial risk and/or the size of the retail customer base.¹⁹ The fund could collect interest, and would be held in escrow by the NSW Government to cover the costs of transferring customers in a RoLR event.²⁰ PIAC believes that this scheme would ensure that it is industry, not consumers, that covers the costs incurred from industry failure.

PIAC understands there may be some risk in adopting this approach, as the contribution levied to the licenced retailer may be passed through to the consumer. PIAC recommends that any RoLR fund costs be itemised in marketing information, customer bills and contract terms and conditions. PIAC believes that clearly delineating this information in marketing and contract material sends a clear signal to consumers on service costs that assist them in assessing the risks and full costs of entering into a market contract.

5.1.1 Provisions for implementation of a RoLR Tariff

Although PIAC would prefer complete industry accountability for costs incurred from RoLR transfers, PIAC understands that maintaining the status quo of the RoLR tariff is an option in the Discussion Paper.

Under the current Water Industry Competition (General) Regulation 2008 (WIC Regulation), the RoLR tariff is set by the Minister based upon recommendations from IPART,²¹ and is consistent with the provisions for an electricity RoLR or OoLR in the Electricity Supply (General) Regulation 2001 (NSW) (the Electricity Supply Regulation).²²

The WIC Regulation currently has no detail on the fixed amount for the RoLR fee. The Electricity Supply Regulation, however, sets the maximum amount a transferred customer of a failed retailer can be charged at \$50.²³ This fee can be used to cover costs associated with customer transfer, account establishment and notification requirements.²⁴ PIAC acknowledges that one of the

¹⁶ Water Industry Competition (General) Regulation 2008 (NSW) s 23.

¹⁷ Department of Finance and Services NSW, above n 1, 24.

¹⁸ PIAC, Submission to IPART, *Review of retailer of last resort supply fee for small retail customers: Electricity-Draft determination*, 29 November 2007, 3.

¹⁹ Department of Finance and Services NSW, above n 1, 41.

²⁰ PIAC above n 12, 3.

²¹ Water Industry Competition (General) Regulation 2008 (NSW) s 23.

²² Electricity Supply (General) Regulation 2001, (NSW) s 57(d).

²³ *Ibid*, s 62(5).

²⁴ Department of Finance and Services NSW, above n 1, 25.

benefits of the fixed tariff is that it prevents the pass through of excessive transfer costs to affected consumers and/or the RoLR customer base.²⁵

Until such time as a tariff is abolished, PIAC supports an IPART regulated tariff, approved by the Minister. PIAC believes the WIC Act should set a maximum amount for this tariff, and this should be set in line with the maximum RoLR charges in the Electricity Supply Act, currently set at \$50. PIAC recommends that if a RoLR tariff is maintained, that it is implemented in conjunction with an industry fund scheme.

5.2 OoLR

PIAC understands that, under the current WIC Act, there are no provisions for cost-recovery in an OoLR event. Consistent with the recommendations made for cost-recovery arrangements in a RoLR event, PIAC believes that it should be network operators that bear the costs of the failure of licensed network operation, not the affected consumers.

PIAC recommends the WIC Act develop an industry-wide fund as a principal cost-recovery mechanism, as proposed in the Discussion Paper.

Similar to the recommendations made for RoLR cost recovery, PIAC recommends that network operators pay a regulated upfront fee into a collective fund, which can be drawn on in case of an OoLR event. This amount would be imposed on operators at the time the licence is granted.²⁶

Recommendation

PIAC recommends the WIC Act mandate the development of an industry fund scheme as the most viable and equitable mechanism for the recovery of costs in a RoLR or an OoLR event.

PIAC recommends that if the existing RoLR tariff is maintained, it should be implemented in conjunction with an industry fund scheme. This tariff should be regulated by IPART and limited in scope to prevent excessive cost pass through.

PIAC also recommends that the RoLR tariff be itemised in customer bills and contract terms and conditions, as well as on all relevant marketing information.

6. Management of transfer

6.1 Customer Information

PIAC believes that it is essential for the RoLR arrangements to include provisions for managing and monitoring the transfer of customer information from the failed retailer to the RoLR. Along with the transfer of household account details and billing information, PIAC believes there must be an efficient transfer of other account details, including information regarding payment plans, rebates and any other customer assistance programs accessed by transferred customers.

After the RoLR event following the suspension of Jackgreen from the National Energy Market, the Energy and Water Ombudsman of NSW (EWON) reported many customer complaints regarding failed transfer of account information. In some cases, customers reported that accounts had not

²⁵ Ibid.

²⁶ Department of Finance and Services NSW, above n 1, 41.

been updated for a significant period of time, and customers were being charged late fees on bills they had previously settled.²⁷

PIAC also heard reports from customers accessing financial assistance who had experienced hardship as a result of their account details not being efficiently transferred. In a focus group conducted in partnership with the Physical Disability Council of NSW (PDCN), PIAC heard from one customer who had arranged a payment plan with Jackgreen. She was on a low, fixed income, received government rebates for her life support equipment, and had arranged the payment plan with Jackgreen to help manage her electricity costs. After the RoLR process was triggered, her payment plan information was not transferred, and the customer was faced with a large bill from the new retailer.

As there is currently no incentive for a RoLR to make contact with customers receiving payment support, it is the responsibility of the account holder to follow up on payment arrangements immediately after a RoLR event is triggered. This particular customer did not receive notification immediately after the RoLR process, and was unable to update her payment arrangements in sufficient time. She is now managing the remaining debt to the insolvent Jackgreen, as well as the new debt accrued with the RoLR, through payment plans, along with her regular monthly bills.

PIAC believes there must be provision in the RoLR arrangements to ensure the proper transfer of all customer account information to the RoLR, particularly for customers accessing financial assistance.

PIAC recommends that the RoLR arrangements should oblige the RoLR to proactively contact any customers accessing assistance to protect them from accruing unreasonable debt. PIAC contends that it is in the interests of the RoLR to make contact with these customers, as the failure to manage customer debt will inevitably increase the retailer's own operational costs.

Recommendation

PIAC recommends that the RoLR arrangements in the WIC Act include provisions for managing and monitoring the transfer of customer information from the failed retailer to the RoLR.

PIAC recommends there must also be particular obligations in the WIC Act for the RoLR to contact any customers accessing financial assistance, such as payment plans, to confirm these arrangements will continue.

6.2 Special circumstances contracts

PIAC understands that when a retail supply failure occurs, affected customers are entered into a special circumstances contract with the RoLR. Although there are provisions in the WIC Act for the RoLR to provide notice and a copy of the contract to the customer,²⁸ no minimum standards for this contract or notification of its implementation have been specified.

PIAC believes the Electricity Supply Regulation provides a good framework for setting the minimum conditions for notification of the special circumstances contract in a RoLR event. The Electricity Supply Regulation states:

²⁷ Energy and Water Ombudsman of NSW, *Jackgreen – the failure of an energy retailer* (2010) 28.

²⁸ Department of Finance and Services NSW, above n 1, 16.

A retailer of last resort must, as soon as practicable after the commencement of its obligation to provide last resort supply arrangements, give written notice to each customer who is subject to those arrangements of the following matters:

- (a) the commencement of last resort supply arrangements,
- (b) the terms and conditions on which electricity is to be supplied,
- (c) that the customer may arrange supply under a customer supply contract with the retailer of last resort or another supplier,
- (d) whether or not the customer is entitled to elect to take supply from a standard retail supplier under a standard form supply contract and, if the customer is so entitled and the supplier is not the relevant standard retail supplier, the name and contact details of that supplier,
- (e) the date on or after which the retailer of last resort may discontinue supply to the premises of the customer,
- (f) any charges that the customer may be liable to pay if the customer does not enter into a customer supply contract.²⁹

PIAC also notes that the Electricity Supply Regulation contains provision for access to information for consumers from culturally and linguistically diverse backgrounds. It states:

The notice is to contain, in community languages (including Arabic, Cantonese, Vietnamese, Italian, Greek and Spanish, and any other language approved by the supplier after consultation with any relevant customer consultative group), information about the availability of interpreter services for the languages concerned and telephone numbers for the services.³⁰

PIAC recommends that the WIC Act adopt these standards for notifying contract changes to transferred customers following RoLR and OoLR events triggered by WIC Act licencees. PIAC believes that following these minimum standards will ensure all consumers are supported in understanding the changes to their service arrangements as soon as possible, and are assisted in making educated decisions about their water usage and supply.

PIAC also believes it is important for the special circumstances contracts to be presented in a clear, consistent manner that assists consumers understand any supply changes as a result of the RoLR, and how it may compare to their previous arrangements. PIAC suggests that using a standardised template form to communicate contract information is a good way to ensure the RoLR expresses the conditions of the special circumstances contracts transparently and consistently to all transferred customers.

The AER has developed a Retail Pricing Information Guideline (the Guideline) that serves as a framework for the provision of contract information, assists customers understand and compare energy contracts, and specifies the standard for the manner and form in which contract information is to be presented.³¹

²⁹ Electricity Supply (General) Regulation 2001 (NSW) s 61(1).

³⁰ Electricity Supply (General) Regulation 2001 (NSW) s 61(1A).

³¹ Australian Energy Regulator, *Retail Pricing Information Guideline: Draft Instrument (2011) 2* <<http://www.aer.gov.au/content/index.phtml/itemId/734869>>.

The Guideline has developed a standardised table, known as an 'Energy Price Fact Sheet', for all energy contract information to be presented in. This approach ensures all contract information is clear and easy to read for consumers, and that retailers meet all minimum requirements.³² The minimum terms and conditions of a new contract that must be addressed in the 'Energy Price Fact Sheet' include:

- the unit prices for electricity and/or gas;³³
- any fixed or standing charges;³⁴
- any fees applicable to the contract, such as exit fees, disconnection fees, and late payment fees;³⁵ and
- any rebate and discount information available under the contract.³⁶

PIAC recommends the WIC Act develop a standardised template for the RoLR to communicate the terms and conditions of the special circumstances contract to transferred customers. Using a standard form will ensure all required information is provided to the customer, and that this information is communicated in a consistent, clear and easy to read manner.

Recommendation

PIAC recommends that the WIC Act adopt minimum standards for the notification of contract changes following the commencement of a water RoLR and OoLR, consistent with the RoLR OoLR arrangements in the Electricity Supply (General) Regulation 2001.

PIAC also recommends that this information be presented in a standardised template to ensure all information is communicated in a clear and consistent manner that is easy to read for consumers.

7. Conclusion

PIAC would like to thank the NSW Department of Finances and Services for the opportunity to contribute to this consultation process.

PIAC believes that the RoLR and OoLR arrangements in NSW must be guided by the necessity to protect and ensure continuity of essential service provision for NSW consumers. PIAC maintains that any costs incurred from failure to deliver this service must be the burden of the failed retailers or network operators, and not NSW households.

³² Ibid.

³³ Ibid 4.

³⁴ Ibid 6.

³⁵ Ibid.

³⁶ Ibid.