

public interest
ADVOCACY CENTRE

**Consumer resourcing for participation in
revenue determinations**

6 November 2017

1. Introduction

The Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is an independent, non-profit legal centre based in New South Wales. Established in 1982, PIAC tackles systemic issues that have a significant impact upon disadvantaged and marginalised people. We ensure basic rights are enjoyed across the community through litigation, public policy development, communication and training.

Our work addresses issues such as:

- access to affordable, sustainable energy and water services;
- homelessness;
- access for people with disability to basic services like public transport, education and online services;
- Indigenous disadvantage;
- discrimination against people with mental health conditions;
- the exercise of police power;
- the rights of people in detention, including the right to proper medical care; and
- government accountability, including freedom of information.

PIAC is funded from a variety of sources. Core funding is provided by the NSW Public Purpose Fund and the Commonwealth and State Community Legal Services Program. PIAC also receives funding from the NSW Government for its Energy and Water Consumers Advocacy Program and from private law firm Allens for its Indigenous Justice Program. PIAC also generates income from project and case grants, seminars, donations and recovery of costs in legal actions.

Energy and Water Consumers' Advocacy Program

The Energy + Water Consumers' Advocacy Program (EWCAP) represents the interests of low-income and other residential consumers of electricity, gas and water in New South Wales, developing policy and advocating in 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
- Physical Disability Council NSW
- Anglicare
- Good Shepherd Microfinance
- Financial Rights Legal Centre
- Affiliated Residential Park Residents Association
- Tenants Union, and
- Mission Australia.

2. PIAC's history as a consumer advocate

EWCAP has been funded by NSW Government consistently since 1998, and in 2015 was granted a 5-year contract with an increased budget to employ a team of four. This grant has been supplemented from other sources, such as grants from Energy Consumer Australia (ECA), to allow consumers across National Energy Market (NEM) jurisdictions to benefit from PIAC's expertise and legal capacity in relation to, for example, appeals of network pricing determinations.

This funding model has allowed PIAC to engage across numerous policy reform and regulatory processes, while retaining knowledge and experience within the organisation. The certainty afforded by a five-year contract has enabled PIAC to confidently implement long term direction to underpin the strategic, proactive and evidence-based advocacy that most effectively promotes the long-term interests of consumers.

As the primary energy consumer advocate for households in NSW, EWCAP's involvement with network regulation includes:

- Targeted engagement with networks on detailed and often technical matters, including bilateral meetings and participation in smaller, ad hoc working groups
- Formal stakeholder workshops
- Membership of customer councils
- Ongoing informal engagement with the Australian Energy Regulator (AER) and the Consumer Challenge Panel (CCP)
- Detailed responses to discussion papers, issues papers and proposals produced by the businesses
- Consulting with other consumer groups on issues, and capacity building
- Observing public forums and workshops hosted by network businesses
- Research and analysis of issues and matters relating to network proposals
- Reviewing and responding to media inquiries related to network matters
- Ongoing legal analysis
- Engagement with other specialists and academics
- Participation in development of AER guidelines
- Participation in network related rule changes, law changes and other reforms
- Engaging with the network peak body.

When these activities are combined with the preparation of submissions, participating in public forums and other activities at all stages of the AER's determination process, PIAC estimates that the resources required to represent the interests of NSW households in the regulation of NSW electricity and gas networks are approximately 1.5 FTE on an ongoing basis. This excludes the cost of external consultants and legal involvement in administrative reviews.

In addition to EWCAP staff, PIAC's litigation team has been actively involved in the AER's revenue determinations, including in challenges to these decisions through Limited Merits Review (LMR) and Judicial Review (JR). PIAC was the first consumer organisation to be a participant in LMR proceedings in the Australian Competition Tribunal, as an applicant and intervener in the Tribunal's NSW proceedings. In addition, PIAC acted as a consumer observer and legal advisor for other consumer organisations in LMR proceedings in South Australia and Victoria in 2016 and

2017. PIAC's involvement in these proceedings was made possible by additional funding and support from ECA.

3. Revenue determinations are one of many demands on consumer advocates

While the revenue determinations for electricity and gas network businesses form a substantial portion of the prices paid by consumers, it is by no means the only area in need of effective consumer engagement. The technological transition which is underway in the energy market, and in the Australian economy more generally, means the framework of the NEM is being substantially redesigned. There are many policy and regulatory reforms underway that relate to networks, including those which will help define many large, capital-intensive investments and which products and services are to be delivered as regulated services or through contestable markets.

Without effective and informed consumer engagement in these processes, consumers could be locked into less efficient regulation and markets resulting in unnecessarily high costs for energy services.

PIAC has identified six broad priority areas that affect the price and services experienced by consumers:

1. Wholesale markets and system operation – the effectiveness of wholesale generation and ancillary service markets as well as the regulations and procedures which govern the operation of the power system. There may be substantial costs incurred in pursuing continually greater levels of system security and reliability – especially considering the relatively high levels currently experienced in the NEM.
2. Networks – in addition to the revenue and access determinations made by the AER, there are also many other reforms and reviews which have material impact on consumers, such as rules and regulations around the provision of contestable services, process and requirements for new connections and more technical aspects of the revenue determination itself such as the rate of return guideline.
3. Retail – there must be effective competition in energy retail markets so all consumers, not just those who have the means, have access to real choice between a range of options for energy services. Particular focus should be given to how to best support vulnerable and disadvantaged consumers, while recognising and addressing the inherent limitations of markets to achieve this goal.
4. Behind the meter energy solutions and energy efficiency - disadvantaged and vulnerable consumers should be able to realise all the benefits of energy efficiency and demand side technology, with the same opportunities that others have for control over how they pay for, use, generate, and store energy, and not be limited by circumstance such as their income level or housing tenure.

5. Supporting frameworks - effective supporting frameworks are needed for disadvantaged and vulnerable consumers, that recognise that markets alone will not provide the support people need and that people should not have to be engaged just to be able to afford their energy bills.
6. Non-energy policies – these policies, while not directly related to energy, still impact the energy services and prices experienced by consumers. Areas are broad in range and include emissions, housing, privacy, digital technology, and transport electrification. Outcomes in these areas should support, or at least not inhibit, affordable, sustainable supply and efficient consumption of energy. With other sectors are increasingly interlinked with energy, governments, energy market institutions, businesses, consumers and community advocates and other stakeholders need to engage outside of the sector to ensure good outcomes for energy users.

While network outcomes are only one of these six priority areas, in PIAC's experience as the lead energy consumer advocate for NSW households, approximately one-third of our resources and advocacy outputs are applied to this area.

4. Current funding sources for consumer participation

Consumers remain underrepresented in national processes

Many of the substantive reforms being considered for the NEM are necessarily done at a national level. However, there remains a noticeable lack of consumer representation in these.

Energy Consumers Australia (ECA) was established with an expectation that they would provide strong, consistent consumer participation in national processes where consumers are otherwise underrepresented. ECA's recent participation in the AER's review of its regulatory treatment of expected inflation is a good example of where ECA has done this, by supporting building the capacity of the consumer contribution.

In addition, much of the participation by small consumer groups is enabled through ECA's grant program.

However, since ECA was envisaged, the demands on consumer advocates have grown well beyond the collective capacity of ECA and other advocates. This has been brought about by:

- an increased focus on engagement by energy market bodies and industry. While welcome, the increase in engagement places a many-fold increase in demands on consumer advocates and other stakeholders.
- A stepwise increase in the number of 'routine' reforms and other processes under the direction of existing market bodies, reflecting rapid transformation of the energy market.
- New reforms relating to energy security and reliability, along with actions by a number of governments to address these issues and energy affordability. None of these reforms were anticipated before October 2016, and most require the engagement of skilled and responsive

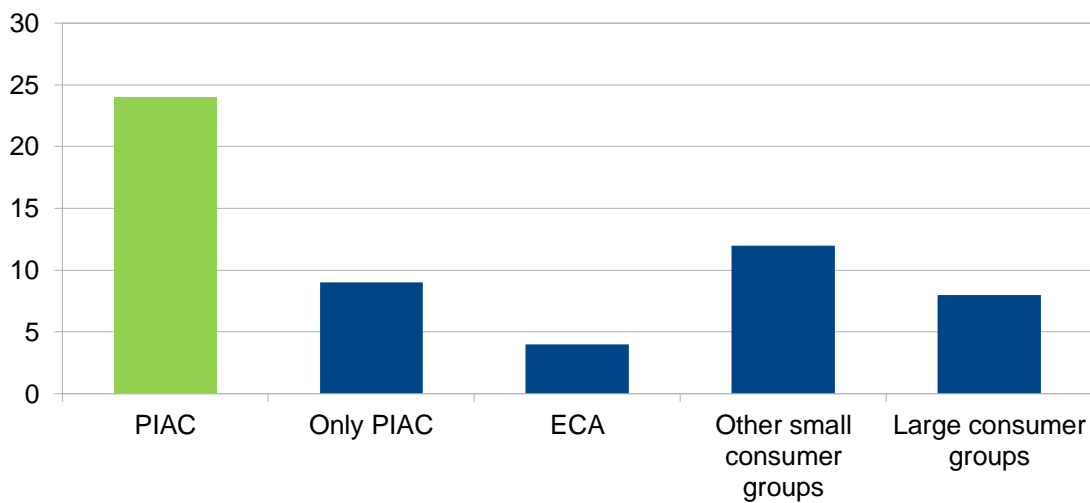
consumer advocates, with short timeframes for extensive analysis and engagement with little or no forewarning.

PIAC is very concerned that these factors are contributing to a dearth of nationally-resourced consumer representation in processes which impact the energy costs paid by all consumers. The impact of this is apparent by looking at the rule change and review processes that PIAC has been involved in over the last 6 months.

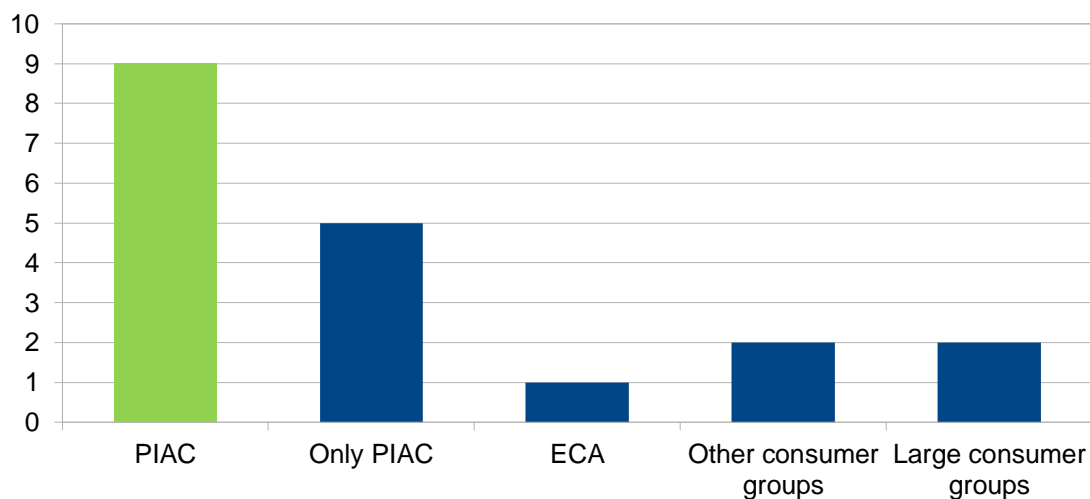
PIAC has made 46 submissions to policy and regulatory processes in the six months to the end of October. Approximately a third of these submissions relate to reforms to wholesale energy markets and system security and reliability arrangements, and a third relate to energy network regulation and reforms.

Below is a breakdown of the 24 AEMC processes and 9 AER processes to which PIAC has made submissions in this time. This includes most of the processes that may result in material outcomes for consumers undertaken by those institutions in that time.

Of 24 PIAC submissions to the AEMC, May to Oct 2017:
other consumer advocate submissions to same process



Of 9 PIAC submissions to the AER, May to Oct 2017:
other consumer advocate submissions to same process



Of the 46 submissions made by PIAC:

- Of 24 AEMC processes, which are rule changes and reviews that effect all NEM consumers:
 - 9 — more than a third — had no submissions from residential consumer groups aside from PIAC. This number is higher if submissions from large user groups are not counted.
 - ECA made 4 submissions in total.
 - Collectively, other groups representing residential and/or small business consumers made submissions to 12 processes — largely with the support of ECA grant funding — half the number to which PIAC has submitted.
- Of 9 AER reviews and other processes, most of which effect all consumers (1 or 2 were NSW specific):
 - 5 — more than half — had no submissions from other consumer groups
 - ECA made 1 submission (and may have made another that is yet to be loaded onto the AER website)
 - Collectively, other groups representing residential and/or small business consumers made submissions to 2 processes, presumably with the support of ECA grant funding.

Given the number of reactive and proactive ways that PIAC and other consumer advocates seek to engage and influence, counting submissions is a crude measure of capability and, at best, an incomplete measure of performance. Nonetheless, submissions that are supported by sound evidence and considered principles are important to grow to the collective body of knowledge shared by consumer advocates over the longer term, and more importantly, making submissions to processes is an essential, measurable advocacy contribution against which the collective capacity of the consumer sector can be considered.

Further, the number of consumer submissions does influence consumer outcomes, with fewer submissions often leading to consumer perspectives being given less weight in rule changes and other processes. While energy market institutions such as the AEMC are required to consider issues on merit, the fact remains that they often weigh the number of submissions supporting particular views, both in their assessment of the materiality of issues and the suitability of proposed solutions.

Considering this, and that the capacity of energy industry advocacy for a given reform tends to outweigh that of consumer groups by many orders of magnitude, the shortfall created by limited consumer participation suggests that increasing resourcing for consumer advocacy will have commensurate benefits for consumers, at least until the point where consumer groups can participate in processes to an equal extent to industry.

PIAC considers that the collective positive impact of existing energy consumer advocacy is in the order of a tenfold benefit, relative to the amount spent by energy users, taxpayers and industry on

consumer advocacy. In PIAC's view, a doubling of resourcing for consumer advocacy in energy policy and regulatory processes, while still insufficient to fully match the resources of energy industry, would have an effective impact.

One impact of the historical lack of long term resourcing in the consumer advocacy sector is that of the individuals in Australia whose primary role is to advocate for the interests of residential users of energy, only six have been doing so for more than five years.

Successful reforms often take at least five years from conception to implementation. Likewise, network regulatory processes, from early engagement with networks through to final determinations, span about three financial years, and longer when appeals are involved.

Long term funding certainty, and retention of knowledge and experience in the sector, is absolutely essential for consumer advocacy to make a lasting impact. Building capacity in the consumer sector over time needs to be a priority, and is essential that long term funding arrangements are in place.

PIAC's EWCAP program currently has a five-year funding contract for research and advocacy, which affords it the certainty needed to make longer term strategic plans, and in our view that is an appropriate model for other jurisdictions.

Regulated businesses funding consumer advocates

PIAC does not have a strong view on the merit of the proposal to introduce a 'purpose built' fund to which all regulated businesses would contribute funding to support consumer participation in the AER's determination and access arrangement process.

PIAC understands that, under such a proposal, consumers would ultimately pay for this as regulated business pass on this cost to its customers. PIAC does not see how this would necessarily lead to substantially different outcomes from the current arrangements for ECA which is funded by a levy on NEM participants and which is also ultimately borne by consumers on a 'per connection' basis, but acknowledges that this only serves as a rough proxy for a 'per network' basis for contribution.

5. Facilitating effective consumer outcomes

Without a specific increase in consumer funding for participation in network determination processes, it is likely that both the AER's determinations and any subsequent administrative reviews will continue to produce results that are heavily weighted towards network businesses, to the detriment of consumers.

Barriers to effective consumer engagement

The lack of resources to participate in processes, overcome complexity, provide sound evidence and balance the weight of material presented by network businesses remains the biggest barrier to consumer engagement.

The nature of policy and regulatory decision making in the NEM is extremely complex. Historically, small consumer organisations have lacked the internal technical expertise and

capacity to critique in detail the methods and approaches adopted by the network businesses and the AER in their regulatory proposals and draft decisions. Analysing these proposals, and understanding their likely impacts on consumers, may require (among other things) lawyers with expertise in the National Electricity and Gas Laws and Rules, economists with expertise in the regulation of electricity and gas markets, and engineers with expertise in energy-related infrastructure. Obtaining this advice externally (as it is rarely available in-house) over the course of a determination period is time-consuming and costly for consumer organisations.

Because of this, many of the submissions made by consumer groups to the AER in the past have been statements of principle, to the effect that the high levels of revenues proposed by the AER or DNSPs are unfair to and harmful for consumers. From the AER's perspective, it is most assisted by (and able to rely upon) evidence-based submissions that put forward alternative methodologies and considerations to guide their decision making across various aspects of their determination. Alternate perspectives on consumer and community preferences claimed by the network business, such as "willingness to pay" studies, may also be effective.

In respect of administrative review processes, the asymmetry of resources between networks and consumer groups was demonstrated clearly in the NSW LMR proceedings, where Networks NSW paid legal costs in the vicinity of \$90 million (representing approximately 8% of the networks' combined \$1.1 billion net profit in 2014-15),¹ compared with approximately \$500,000 spent by PIAC and ECA to fund their involvement.²

Building consumer advocate capacity

As noted earlier, it is essential that there is strong, knowledgeable and consistent consumer participation in the many regulatory and policy reforms underway in the NEM. It is also essential that consumers be adequately resourced compared to regulated businesses and other market participants, so that they can analyse the implications of proposals and participate in reform processes on an equal footing.

PIAC does not see the options of building complex technical knowledge within a consumer group and outsourcing expertise as being mutually exclusive. The regulatory reform processes are often lengthy processes and can be somewhat piecemeal. For instance, enacting a policy change determined by the AEMC through a rule change may also require additional guidelines and procedures to also be amended by AEMO and the AER. Therefore, it is essential that consumers are effectively represented throughout this process.

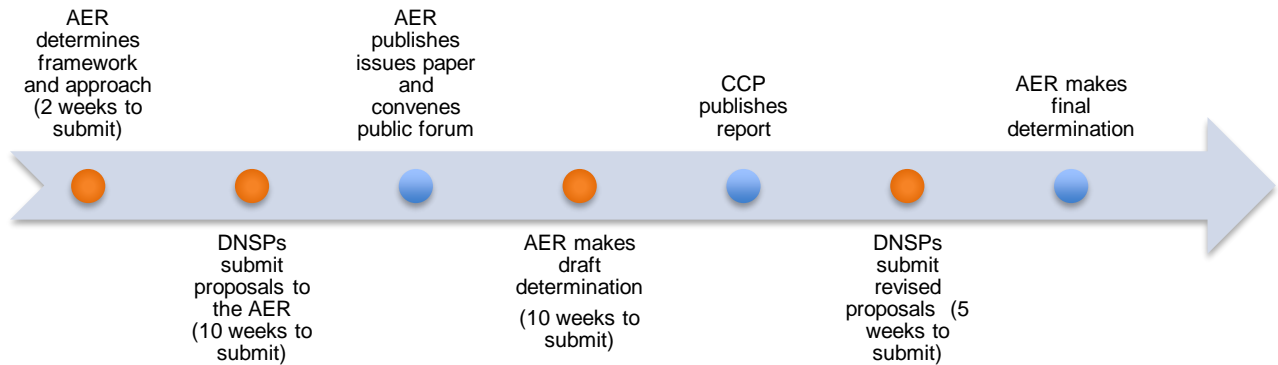
Building the capacity within a consumer organisation helps to provide continuity of knowledge and experience in understanding the reform proposal itself and, importantly, being able to critique alternative proposals which may be put forward. This can then be supplemented where needed with more specific expertise on an aspect of this issue.

¹ Sophie Li, "Public Interest Advocacy in the Australian Competition Tribunal" (2017) 87 *Australian Institute of Administrative Law Forum* 93, 101.

² It should be noted that this figure includes the costs of PIAC's intervention in judicial review proceedings before the Federal Court. The figure consists of approximately \$300,000 in direct costs, including fees for legal counsel, and \$200,000 in internal costs. To our knowledge, the costs of Networks NSW involvement in the judicial review proceedings are not included in the estimate of \$90 million.

6. Consumer engagement by the AER

Proactive engagement with consumer advocates by the AER has been a positive move. For instance, the formation of consumer reference groups for the AER's review of expected inflation and the rate of return guidelines are good approaches that should be used more broadly. However, the need for detailed knowledge in order to meaningfully engage in these reviews may still prove a barrier for many consumer advocates. To this end PIAC also supports the AER's proposed upskilling of consumer advocates for its rate of return guideline review.



As indicated in the diagram above, consumer organisations generally have at least four opportunities to submit to the determination process:

- When the AER publishes its framework and approach paper
- When the DNSPs submit proposals to the AER
- When the AER makes a draft determination; and
- When the DNSPs submit revised proposals to the AER.

While the time frame for providing a consumer submission varies between determinations, the above diagram also provides approximate time frames for consumer responses. It should be noted that processes, increasingly, vary from this formula. To use the example of NSW, following the LMR of the AER's regulatory determination, and JR of the ACT's finding, the AER is yet to make a final determination on the revenue for the current regulatory period that commenced in 2015. Following the remittal of the Full Federal Court in mid 2017, the AER is continuing this determination with additional processes that demand consumer advocacy participation.

It is unlikely that such protracted processes were anticipated in the allocation of existing consumer advocacy resources, but it is important that resources are made available for such contingencies.

7. Consumer engagement by network businesses

Informed and effective consumer engagement is a means to an end – not the end in itself. Consumer engagement done properly should lead to regulatory decisions and investments that are in the long-term interests of consumers.

However, experience has shown that some network businesses have treated consumer engagement as a tick-the-box exercise rather than the precursor to a collaborative process between the business and consumers. This has led to ineffective engagement with consumers and consumer advocates, and the feedback that was given back to the business has often not been reflected in the investment decisions and regulatory proposals.

Demonstrating engagement

Network businesses can demonstrate effective consumer engagement by lodging proposals which are generally supported by consumer advocates. These should detail where consumer and consumer advocate feedback has been sought and incorporated into the network business' decision-making process. Even if consumer preferences are not implemented, network businesses should be able to demonstrate they have understood consumer preferences, and document the reasons why these were not supported by the business.

PIAC is developing an assessment framework for the engagement by NSW network businesses around their revenue proposals. An overview of PIAC's criteria for assessing good engagement is provided below.

1. Genuine engagement, starting early

- Beginning early
- Creating two-way communication
- Providing accessible information (not broken links or unavailable publications)
- Being proactive
- Being open to sharing information and taking on feedback

2. Strategy-driven process

- Agree on some broad principles and work collaboratively towards them
- Do not fix on an outcome and try to justify it

3. Stakeholder identification

- Identification of a range of stakeholder groups (not just those that will agree with you)
- Engage with consumers as non-homogenous groups
- Provide fit-for-purpose information for each group of stakeholders

Incentives for network businesses

PIAC does not consider that additional incentives are warranted for regulated businesses to conduct meaningful and effective consumer engagement as part of the revenue determination processes. As noted above, good engagement is a means to an end — proposals that reflect consumer preferences — not the end in itself. Providing an incentive for an output such as 'good engagement' rather than an outcome, would be a step away from the nature of incentive-based regulation used in the NEM.

Effective consumer engagement should be considered as part of good business practice as a means to achieving regulatory decisions which are in the long-term interests of consumers. PIAC therefore supports the AER continuing to approve appropriate opex allowances for regulated businesses to conduct consumer engagement activities.

8. Further engagement

PIAC would welcome the opportunity to discuss the issues raised in more depth. For any queries please contact Energy Team Leader, Craig Memery at cmemery@piac.asn.au or on (02) 8898 6522.