

# Retail Exempt Selling Guideline review 2021-22

6 April 2022

Public Interest Advocacy Centre  
**ABN** 77 002 773 524  
[www.piac.asn.au](http://www.piac.asn.au)

Gadigal Country  
Level 5, 175 Liverpool St  
Sydney NSW 2000  
**Phone** +61 2 8898 6500  
**Fax** +61 2 8898 6555

## About the Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is leading social justice law and policy centre. Established in 1982, we are an independent, non-profit organisation that works with people and communities who are marginalised and facing disadvantage.

PIAC builds a fairer, stronger society by helping to change laws, policies and practices that cause injustice and inequality. Our work combines:

- legal advice and representation, specialising in test cases and strategic casework;
- research, analysis and policy development; and
- advocacy for systems change and public interest outcomes.

## Energy and Water Consumers' Advocacy Program

The Energy and Water Consumers' Advocacy Program works for better regulatory and policy outcomes so people's needs are met by clean, resilient and efficient energy and water systems. We ensure consumer protections and assistance limit disadvantage, and people can make meaningful choices in effective markets without experiencing detriment if they cannot participate. PIAC receives input from a community-based reference group whose members include:

- Affiliated Residential Park Residents Association NSW;
- Anglicare;
- Combined Pensioners and Superannuants Association of NSW;
- Energy and Water Ombudsman NSW;
- Ethnic Communities Council NSW;
- Financial Counsellors Association of NSW;
- NSW Council of Social Service;
- Physical Disability Council of NSW;
- St Vincent de Paul Society of NSW;
- Salvation Army;
- Tenants Union NSW; and
- The Sydney Alliance.

## Contact

Thea Bray  
Public Interest Advocacy Centre  
Level 5, 175 Liverpool St  
Sydney NSW 2000

T: 02 8898 6550

E: [tbray@piac.asn.au](mailto:tbray@piac.asn.au)

Website: [www.piac.asn.au](http://www.piac.asn.au)



Public Interest Advocacy Centre



@PIACnews

The Public Interest Advocacy Centre office is located on the land of the Gadigal of the Eora Nation.

# Contents

- Contents ..... 3**
  
- 1. Summary of recommendations ..... 1**
  
- 2. Introduction ..... 3**
  
- 3. Chilled water and bulk hot water ..... 4**
  
- 4. Payment assistance ..... 5**
  - 4.1 Framing and use of the term 'hardship' ..... 5
  - 4.2 Proactive identification of payment difficulties ..... 5
  - 4.3 Flexible payment options ..... 6
  - 4.4 Hardship policy in accessible formats ..... 6
  - 4.5 Exempt seller hardship policy template ..... 7
    - Feedback on the exempt seller hardship policy template ..... 7
  
- 5. Provision of a factsheet on embedded networks ..... 7**
  - Feedback on draft factsheet ..... 8
  
- 6. Additional amendments ..... 8**
  - 6.1 Retrofit requirements – explicit informed consent ..... 8
  - 6.2 Exemption conditions and compliance ..... 9
  - 6.3 Access to ombudsman schemes ..... 9
  - 6.4 Exemption categories ..... 9
  - 6.5 Agent or service provider ..... 10
  
- 7. Continued engagement ..... 10**



# 1. Summary of recommendations

---

## **Recommendation 1**

*Extend regulation to embedded hot and chilled water services to improve consumer access to protections and pricing transparency and fairness.*

---

## **Recommendation 2**

*Remove the word 'hardship' from the exempt seller hardship policy.*

---

## **Recommendation 3**

*Develop simple measures for exempt sellers to follow so they can proactively identify people experiencing payment difficulties and require them to offer support to these consumers.*

---

## **Recommendation 4**

*The Guideline include simple and transparent steps for exempt sellers to follow to ensure fair and sustainable payment plans are offered. These should be reflected in the hardship policy template.*

---

## **Recommendation 5**

*Require hardship policies to be available in accessible formats.*

---

## **Recommendation 6**

*The hardship policy template should be amended to align better with equivalent NECF protections.*

---

## **Recommendation 7**

*The factsheet on embedded networks should be provided in hardcopy, as well as providing the link.*

---

## **Recommendation 8**

*The factsheet on embedded networks should be available in accessible formats.*

---

## **Recommendation 9**

*The factsheet on embedded networks should be amended to clarify the intent and ensure it provides balanced and accurate information.*

---

## **Recommendation 10**

*Information about retrofits must be provided in plain language, available in community languages and in accessible formats, and be provided in a way that is free from coercion.*

---

## **Recommendation 11**

*The AER's monitoring and compliance work should include collecting and maintaining details about how many people are covered by network and retail exemptions; the types of business structures that are used; and key indicators of consumer protection.*

**Recommendation 12**

---

*Escalating penalties should be used for entities that continuously take steps to avoid ombudsman scheme membership – or continuously ignore the requirement to join.*

**Recommendation 13**

---

*Residential energy consumers in deemed exemption categories (ie D1), must have access to the consumer protections other energy consumers have access to.*

**Recommendation 14**

---

*The AER should monitor the number of businesses adopting a structure allowing them to be classified as billing agents rather than specialist external providers. If businesses continue to do this despite the change made to the Guideline, this should be addressed in future reviews of the Guideline.*

## 2. Introduction

The Public Interest and Advocacy Centre (PIAC) welcomes the opportunity to respond to the Australian Energy Regulator's (AER) Retail Exempt Selling Guideline ('the Guideline') review 2021-22.

Providing consistent benefits and protections and improving outcomes for consumers must be central to the update of the Guideline. Embedded networks can provide the opportunity for better consumer outcomes, particularly where they enable access to renewable energy and storage. In these instances, the Guideline must ensure fit-for-purpose consumer protections without removing access to innovative consumer focussed arrangements. However, outside of these circumstances, outcomes for consumers in embedded networks are often inconsistent and, in many cases, they receive little benefit from the arrangement. Where there are potential consumer benefits these are often not sufficient to outweigh the potential harms and other impacts consumers experience as a result of being served through an embedded network.

Access to retail competition isn't a consumer benefit in itself. However, it is a mechanism for consumers to potentially access lower cost deals or service that better meets their needs, including accessing support in payment difficulty. Many consumers in embedded networks are not receiving the potential benefits of the arrangement, and do not have equivalent access to protections or competition to help improve their own outcomes.

PIAC supports reforms being proposed in Victoria 'to implement a ban on embedded networks in new residential apartment blocks, with appropriate exemptions for renewable energy microgrids that deliver low-cost renewable energy.'<sup>1</sup>

In this submission we highlight aspects of the Guideline we support and identify areas where further improvements are required, including in relation to:

- Regulation of hot and chilled water and the need for consumer protections, transparent and regulated pricing, and access to ombudsmen services.
- Payment difficulties and changes required to the Guideline and the exempt seller hardship policy template (the 'hardship policy template') to improve clarity and balance, align better with the National Energy Consumer Framework (NECF) and ensure they better reflect the changing understanding of payment difficulties and vulnerability.
- Improving the factsheet on embedded networks to make it clearer and more balanced between the potential difficulties of accessing competition and the potential detriment faced by staying with the exempt seller.
- The need to ensure residential consumers are not included in deemed exemption categories.

---

<sup>1</sup> Victorian Department of Environment, Land, Water and Planning, *Embedded Networks Review, Final Recommendations Report* (2022) 9.

### 3. Chilled water and bulk hot water

PIAC recommends the AER ensure the Guideline includes the sale of chilled and bulk hot water.

As we outlined in our submission to the Consultation Paper for this process, there are numerous consumer issues with the sale of chilled and hot water in embedded networks including clear billing information; access to retail competition to allow people to look for a cheaper deal and/or better customer service; access to payment plans or hardship assistance; disconnections protections; and access to ombudsman services.

Hot and chilled water are essential for health and wellbeing (chilled water being required to maintain healthy temperatures in buildings which lack cross ventilation or other means to cool). They are part of energy supply and are essential services. Loopholes should not prevent people's access to appropriate consumer protections including billing and access to ombudsman services.

There are a significant and growing number of people receiving hot water in embedded networks.<sup>2</sup> Although the figure is unknown, it is also likely that an increasing number of people are receiving chilled water in embedded networks as a result of the rapid growth in apartments utilising embedded networks arrangements. A solution needs to be found to ensure that these people have protections commensurate with people who have choices regarding hot water and cooling for their home. This solution should include:

- Consumer protections, including access to payment plans, hardship programs and protections against disconnection.
- Pricing that is transparent based on calculations that are easily understood.
- Tariffs and fees for connection/disconnection, late payment etc clearly listed and easy to access.
- Access to retail competition or regulation, including price caps for tariffs, fees for connection /disconnections and late payments.
- Access to ombudsmen services.
- Collection of data regarding how many people have embedded hot and/or chilled water and what their experiences are.
- Monitoring and enforcement of these as monopoly essential services.

#### ***Recommendation 1***

---

*Extend regulation to embedded hot and chilled water services to improve consumer access to protections and pricing transparency and fairness.*

---

<sup>2</sup> Energy and Water Ombudsman NSW, *Spotlight On: Hot water embedded networks*, <https://www.ewon.com.au/page/publications-and-submissions/spotlight-on/hot-water-embedded-networks>

## 4. Payment assistance

### 4.1 Framing and use of the term ‘hardship’

The use of the term ‘hardship’ in the Guideline is inappropriate, particularly where it may be adopted in consumer-facing material. Consumer protections in energy have focused on people who may be experiencing effects of ‘hardship’ impacting their ability to affordably maintain their connection to an essential service. This term is ill-defined and focuses narrowly on the person and their circumstances – such as disability, low income and unemployment, illness, or abuse – as the cause of issues with affordable access to energy. This framing does not acknowledge the role of energy systems and processes in causing payment difficulty. This is particularly relevant in embedded networks.

As part of the Draft Consumer Vulnerability Strategy (‘Vulnerability Strategy’), the AER has acknowledged the issues with the concept of ‘hardship’ and the inappropriateness of its use in communicating to consumers. Consumer vulnerability is a concept that refers to the relative state of all consumers in their access to an essential service such as energy. All consumers are more or less vulnerable, with any person’s relative level of vulnerability at a particular point in time (and its impact on them), dependent on their circumstances and the nature of the system and service they are interacting with.

In this Guideline and in the hardship policy template, the word ‘hardship’ should be removed, including from the name of the title. It’s necessary to align with the intent and impact of protections in the NECF in this document, but this does not require the use of identical language. In many cases the hardship policy template will be adopted verbatim as a ‘hardship policy’ and accessed by consumers. As the AER has recognised, the word ‘hardship’ should not be used in a consumer facing document. It should be replaced with language that is objective, not stigmatising and not focussed on the personal characteristics of the consumer. In the hardship policy template, we recommend replacing ‘hardship’ with words such as ‘payment difficulty’.

#### ***Recommendation 2***

---

*Remove the word ‘hardship’ from the exempt seller hardship policy.*

### 4.2 Proactive identification of payment difficulties

Early and proactive assistance is a key enabler of improved outcomes for consumers experiencing payment difficulty. It is vitally important and should not be excluded from the assistance exempt sellers are required to provide. Doing so is not aligned with Objective 1 of the Vulnerability Strategy ‘improve identification of vulnerability.’ As the Vulnerability Strategy recognises, there are many reasons people are not always able to recognise their own payment difficulties. They may also have concerns about raising these difficulties with a service provider. People who live in an embedded network often have additional concerns and may be afraid to ask for help for their energy bill knowing that the operator will then be aware that they may not be able to make their rent or other payments.

Failure to provide proactive and early assistance can lead to significant debt issues which can be disastrous for consumers, particularly when it’s not only their access to energy at stake, but also

their housing. People are increasingly turning to Buy Now Pay Later (BNPL) loans<sup>3</sup> and these loans are being used to cover everyday essentials including utility bills.<sup>4</sup> Many people often manage their energy bills in unhealthy ways such as energy rationing and/or going without other essentials such as food and medicine.

Proactive identification of consumers experiencing payment difficulties need not be difficult or onerous for exempt sellers and could be as simple as offering support options to consumers when they miss a payment by three or more days, have a certain debt amount (such as \$55), have been unable to maintain a payment plan and/or have requested a payment extension. Support options must be proactively offered if a consumer is at risk of disconnection.

Meeting basic obligations of assistance when people experience payment difficulty is a fundamental requirement and cost of business in selling an essential service. Exempt sellers unable to meet these obligations should not be providing them.

### ***Recommendation 3***

---

*Develop simple measures for exempt sellers to follow so they can proactively identify people experiencing payment difficulties and require them to offer support to these consumers.*

## **4.3 Flexible payment options**

The Guideline and the hardship policy template provide insufficient opportunity for consumers to decline or vary repayments according to their capacity to pay. This does not strike an appropriate balance in line with equivalent protections in the NECF. This is likely to lead to people entering unsustainable payment plans that they cannot manage or cannot manage without forgoing other essentials. It may also expose consumers to intimidating behaviour from exempt sellers who are in powerful positions, where the consumers cannot simply move to a new retailer, or residence.

We recommend the Guideline include simple and transparent steps an exempt seller must take to ensure a fair payment plan is developed and there are options available to consumers to decline or alter a payment plan. These must be included not only in the Guideline, but also in the hardship policy template.

### ***Recommendation 4***

---

*That the Guideline include simple and transparent steps for exempt sellers to follow to ensure fair and sustainable payment plans are offered. These should be reflected in the hardship policy template.*

## **4.4 Hardship policy in accessible formats**

Given the high numbers of people who experience disadvantage in embedded networks, in addition to being in plain English, hardship policies should also be available in accessible formats.

### ***Recommendation 5***

---

*Require hardship policies to be available in accessible formats.*

---

<sup>3</sup> Financial Counselling Australia, *It's credit, it's causing harm and it needs better safeguards* (2021) 5.

<sup>4</sup> Ibid 9.

## 4.5 Exempt seller hardship policy template

PIAC supports the development of a hardship policy template. Having a hardship policy template balances the potential capacity limitations of exempt sellers, with the need for consumers to have consistent, robust and enforceable protections.

The hardship policy template is an important first step but the requirements for exempt sellers to support people experiencing payment difficulty must keep pace with wider work, such as the Vulnerability Strategy and the Australian Energy Market Commission's (AEMC) *Protecting customers affected by family violence*.

### Feedback on the exempt seller hardship policy template

- As discussed above in 'Framing and use of the term 'hardship', the term 'hardship' should not be used in this document.
- Considering exempt sellers are required to offer hardship support, replace 'We can offer a range of support' with 'We are required to offer you a range of support'; and replace 'We will try to assist you if' with: 'We are required to offer you assistance if'. These are small ways to help empower consumers to seek the help they need, knowing that exempt sellers have to help them.
- As discussed above in 'Proactive identification of payment difficulties', if a person has a history of late payments, broken payment plans, requested payment extensions and/or received a disconnection warning notice the exempt seller should have already proactively offered hardship support. This should be reflected in the hardship policy template.
- Regarding urging consumers to contact the exempt seller, we recommend phrasing that is less intimidating. This could be achieved by deleting 'ask you a few questions about your circumstances' (which could feel daunting and invasive for some people) and changing 'work out what support we can offer you' to 'work with you to find ways to help you'.
- Regardless of whether the exempt seller is going to provide hardship support, they should inform the consumer of available government funded schemes they might be eligible for (as is required under the section 'Process to notify residential exempt customers experiencing hardship of appropriate government concession programs and appropriate financial counselling services'. Therefore, 'Tell you about government concessions, relief schemes or energy rebates you may be able to receive' should be deleted from under 'If we agree to provide you with hardship support, we will'.

### **Recommendation 6**

---

*The hardship policy template should be amended to align better with equivalent NECF protections.*

## 5. Provision of a factsheet on embedded networks

PIAC supports the provision of a factsheet to help consumers understand how to access a retailer of their choice. In recognition that there is uneven access to the internet and internet literacy, this factsheet should be given in hardcopy form as well as providing the link.

### ***Recommendation 7***

---

*The factsheet on embedded networks should be provided in hardcopy, as well as providing the link.*

We support the fact sheet being made available in multiple languages. The factsheet should also be available in accessible formats to ensure it can be accessed by people of all abilities.

### ***Recommendation 8***

---

*The factsheet on embedded networks should be available in accessible formats.*

#### **Feedback on draft factsheet**

- The heading should be clarified, so that it reads: 'How to access an energy retailer of your choice if you live in an embedded network'.
- The third paragraph only refers to the benefits of being in an embedded network and the difficulties of exiting one. This does not recognise that people in embedded networks experience problems as well. A more balanced reflection of the circumstances would be achieved by a change such as: 'Living in an embedded network can have benefits, such as lower fees or access to a more ecofriendly energy supply. There can also be issues with higher prices and lack of access to the same protections and choices as offered outside an embedded network. Some supply arrangements in embedded networks mean it can be challenging and costly to exit, but it can be possible to access offers from other energy retailers.'
- To make it clearer to avoid paying network charges twice, above of the second paragraph after 'Options for electricity supplier', there should be a sub-heading: 'Avoiding paying twice for network charges'.

### ***Recommendation 9***

---

*The factsheet on embedded networks should be amended to clarify the intent and ensure it provides balanced and accurate information.*

## **6. Additional amendments**

### **6.1 Retrofit requirements – explicit informed consent**

PIAC supports the inclusion that consent from each potential resident/tenant must be explicit informed consent for the retrofit itself (including where it's an expansion of an existing exemption) and the proposed energy agreement, and that evidence of this must be provided to the AER.

To ensure there is consideration for English literacy skills and/or people with disability, this information must be plain language, available in community languages and in accessible formats, and be provided in a way that is free from coercion.

### ***Recommendation 10***

---

*Information about retrofits must be provided in plain language, available in community languages and in accessible formats, and be provided in a way that is free from coercion.*

## 6.2 Exemption conditions and compliance

PIAC supports the proposed changes to the Guideline to strengthen penalties for breaches of conditions.

The AER's monitoring and compliance work should include collecting and maintaining details about how many people are covered by network and retail exemptions and the types of business structures that are used. The AER should also develop systems capable of monitoring key indicators for consumer protection, such as disconnection and the availability of basic retail protections, such as payment plans and access to government assistance.

### ***Recommendation 11***

---

*The AER's monitoring and compliance work should include collecting and maintaining details about how many people are covered by network and retail exemptions; the types of business structures that are used; and key indicators of consumer protection.*

## 6.3 Access to ombudsman schemes

PIAC supports the new requirement in the Guideline for exempt sellers to provide evidence 'confirming they have taken steps to obtain membership with the relevant ombudsman scheme.'<sup>5</sup>

The Energy and Water Ombudsman NSW (EWON) raised issues that '[s]ome embedded network operators have responded to the requirement to join an Ombudsman scheme by delaying their application indefinitely, disengaging from the discussion, or simply refusing to join.'<sup>6</sup>

The steps taken to obtain ombudsman membership should be confirmed with the ombudsman scheme in the jurisdiction they intend to sell in.

Escalating penalties should be used for entities that continuously take steps to avoid ombudsman scheme membership. These penalties should take into account the number of consumers the entity services across the jurisdiction, not just in the individual embedded network.

### ***Recommendation 12***

---

*Escalating penalties should be used for entities that continuously take steps to avoid ombudsman scheme membership – or continuously ignore the requirement to join.*

## 6.4 Exemption categories

PIAC continues to be concerned that embedded networks with fewer than 10 residential consumers, which are not retirement villages or residential parks, can still fall into the deemed exemption class. These residential consumers do not have access to a large range of supports including:

- assistance where there is payment difficulty, including a hardship policy and payment plans;
- protections for people requiring life support;

---

<sup>5</sup> Australian Energy Regulator, *Draft Exempt Selling Guideline (version 6)* 21.

<sup>6</sup> Energy and Water Ombudsman NSW, *Embedded networks – it's time for change*

<https://www.ewon.com.au/page/publications-and-submissions/reports/spotlight-on/embedded-networks>

- referral to government support schemes (where they are eligible); and
- access to independent dispute resolution through an ombudsman.

All residential energy consumers must have access to these protections.

### ***Recommendation 13***

---

*Residential energy consumers in deemed exemption categories (ie D1), must have access to the consumer protections other energy consumers have access to.*

## **6.5 Agent or service provider**

We are aware of EWON documenting examples of businesses adopting a structure allowing them to be classified as billing agents rather than specialist external providers.

In the Retail Exempt Selling Guideline Version 6, the proposed removal of the word ‘generally’ from ‘We do not generally consider class exemptions are appropriate for service providers...’<sup>7</sup> provides some re-enforcement that exemptions are only for situations where selling energy is not the core business activity of the service provider. However, this should be monitored by the AER and addressed in future reviews of the Guideline if required.

### ***Recommendation 14***

---

*The AER should monitor the number of businesses adopting a structure allowing them to be classified as billing agents rather than specialist external providers. If businesses continue to do this despite the change made to the Guideline, this should be addressed in future reviews of the Guideline.*

## **7. Continued engagement**

PIAC welcomes the opportunity to meet with the AER and other stakeholders to discuss these issues in more depth.

---

<sup>7</sup> Ibid 15.