Submission to the AEMC's Review into the arrangements for failed retailers' electricity and gas contracts Consultation Paper

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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.

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1. Introduction

PIAC welcomes the opportunity to respond to the Australian Energy Market Commission's (AEMC) *Review into the arrangements for failed retailers' electricity and gas contracts Consultation Paper*. This is an important process to ensure there are minimal disruptions or impacts for consumers in the event of failed energy retailers.

In this submission we discuss ways to reduce the impact for consumers who are switched to Retailers of Last Resort (RoLR), including the benefits of having a government owned RoLR. We also discuss the behaviour of retailers who have taken advantage of current circumstances (where there are high wholesale prices) and not acted in the best interests of their consumers.

2. Minimising risks for consumers affected by retailer failures

To date, retailers who have failed have had small customer bases. Shifting their consumers to other much larger retailers[1] has been an opportunity for large retailers to acquire consumers without the usual customer acquisition and retention costs. Given that consumers of these smaller retailers are likely to be mobile and have capacity to search for better retail offers, many are likely to soon switch to other retailers. However, larger retailers have 'stickier' consumers[2] with consistently low switching rates.[3] If a larger retailer was to fail, a majority of these consumers are more likely to stay with the RoLR they are moved to for an extended period of time.

Although consumers of failed retailers can be spread across several RoLRs, the possibility remains that should a larger retailer fail, it would involve customer numbers that are too large for RoLR/s to supply reliably.

Switching to the RoLR's standing offer

When consumers are moved on to the RoLR, they are put on the RoLR's standing offer which is, under usual market conditions, the retailers' most expensive offer. The Default Market Offer (DMO) was introduced to address the issue of the standing offer not acting as an effective or 'reasonable' safety net, being unjustifiably high and acting as a loyalty tax to consumers who were not switching their retailers or updating their offer.

As part of its design, the DMO has intentionally allowed for margins well beyond efficiency and profit, after generously accounting for costs. Defaulting to a RoLR DMO offer may provide some protection to consumers in current circumstances, but still results in consumers (unknowingly) paying more than an efficient price for their energy needs because of the RoLR event.

PIAC considers a more efficient, fairer DMO to be a crucial protection for consumers impacted by RoLR events. Rather than introduce complicated new provisions to protect impacted consumers, it is preferable to reform the DMO to ensure it is more efficient. Provisions regarding its application to RoLR events should be updated, to ensure that RoLR events do not unnecessarily

1 Since default retailers are likely to be 'Big 3' retailers Origin, AGL or Energy Australia, or a jurisdictional government owned retailer.
2 Essential Services Commission (ESC), 'Victorian Energy Market Report 2020-21' (2021) 12.
3 For example in NSW they are about 19% (Independent Pricing and Regulatory Tribunal (IPART) 'Monitoring NSW energy retail markets 2021-22 Draft Report' (2022)).

impact consumers. Consumers switched to a RoLR should be guaranteed a reasonable offer for a period of time that minimises disruption and allows them time to assess other offers. Consumers who are switched to a RoLR should retain choice about how they pay (since, for example, not all consumers can manage direct debit) and should not be subject to conditional discounts (many lower income households cannot meet the conditions and therefore end up paying more[4]).

A government RoLR

PIAC considers a government owned RoLR would be more appropriate and effective for consumers than the current market-based arrangements. A government RoLR would:

- help ensure minimal disruption to consumers;
- have minimal distorting impacts upon the retail market;
- reduce the risk of a cascade of retailer failure; and
- minimise the need for subsidies and cross-subsidised measures to support unviable businesses.

A government RoLR could be created from an existing retailer, such as a state government retailer, as already operate in some jurisdictions, the Australian Government owned Red/Lumo Energy, or a new government backed entity/ies created as part of other measures intended to improve stability of the energy market during the transition of the energy system. A government RoLR arrangement would enable more effective legal arrangements to assume the contracts of any failed retailer without impacting unreasonably on competitive tension between market retailers. Arrangements could focus on continuity of supply, without potentially conferring an unreasonable competitive advantage to another market retailer.

Consumers moved from failed retailers to a government RoLR should have an efficient, low-cost default deal to minimise consumer detriment as a result of business failure. They could be guaranteed this offer for a 6-12 month period, to provide breathing space for consumers while they assess the market and their circumstances, without requiring them to act or impacting them unreasonably.

Such an arrangement could still allow other retailers in the market the opportunity to bid to take on RoLR consumers, moving them on to their best offer, or other offers that suit the consumer's preferences.

The formation of a government RoLR would also provide an opportunity to address other significant issues impacting consumers. For instance, there is merit in considering the potential role of a government retailer in assuming consumers with entrenched accumulated debt or hardship (particularly those in social housing or on fixed incomes) and offering them a social energy tariff or otherwise low-cost offer. This may be more efficient than attempting to further subsidise these consumers through market retailers.

4 The AER found that 9% of people on offers with conditional discounts did not meet the conditions and so did not receive the discount. They also found that 14% of people in hardship programs and 12% of people in payment plans did not meet the discount conditions so were penalised with higher bills (AER, State of the Energy Market (2022) 210).

Recommendation 1

Government-owned Retailer of Last Resort/s (RoLR) should be created to provide last-resort support for all NEM energy consumers.

Special considerations

During this review process, the following should be priority considerations for the AEMC:

- There should be special provisions for when there is a failure of 'systemically important market participants', including decision making at a government level, as the AEMC recommended in 2015.[5]
- Many consumers, especially those on hardship programs or on payment plans are likely to be particularly price sensitive, sensitive to bill due dates (because they plan ahead for paying bills and may live hand to mouth) as well as having limitations to the way they can pay their energy bills.[6] Retention of conditions and support arrangements through RoLR events should be a priority focus.
- Requirements under the upcoming *Protections for customers affected by family violence* rule change will need to be maintained, particularly regarding account security for victim-survivors.
- There needs to be protections for people whose exempt seller fails. Many people in embedded networks, particularly residential parks, nursing and retirement homes and social housing developments, are likely to have lower incomes and be in vulnerable situations. The potential for harmful impacts is significantly higher for residents in embedded networks, both because of their personal circumstances and their limited access to supports and protections. A government RoLR would be particularly relevant in these circumstances.
- There is an increasing number of consumers accessing Distributed Energy Resources (DER) such as solar or batteries through their retailer and/or utilising special tariffs to take advantage of solar, batteries and/or electric vehicles and these consumers are likely to have additional needs. These consumers are likely to rely on their existing arrangements for ongoing energy affordability.

3. Recent conduct of retailers encouraging their consumers to change retailers

Despite claiming they were acting in their consumers' interests,[7] at least two retailers acted against their consumers' interests, by recommending they leave. These retailers then appear to have sold their contract hedges for significant profits.

This behaviour appeared to be intended to benefit from the circumstances through sale of hedge contracts and was not in the interests of consumers. It undermines trust and the fundamental legitimacy a retail market founded on competitive private provision of an essential service.

5 AEMC, 'NEM Financial Market Resilience, Final Report' (2015) 78.

6 For example, they may not be able to manage direct debit payments, online payments and/or may need paper billing to manage their household finances.

7 By making statements such as ""This was not an easy decision to make but as always, our customers are our priority" (Locality Planning Energy) and that their consumers were "better off with another electricity retailer" (ReAmped), as quoted in Vorrath, Sophie, 'Regulators investigate energy retailers who shed customers and sold hedges' (2022) *Renew Economy*.

These two retailers may not be the only retailers using the current circumstances to profit at the expense and inconvenience of consumers or in a way that undermines the effective operation of the retail energy market. The Australian Energy Regulator (AER) and Australian Competition and Consumer Commission (ACCC) should scrutinise retailer behaviour and contracting to ensure contracting and hedging behaviour is consistent with a retail market and in the interests of consumers. Where there is concern that a retailer may have acted to undermine the energy system, robust enforcement action should be taken including potential to revoke retail licences and/or impose fines.

This process should also consider other mechanisms to ensure retailers act in good faith in support of an efficient and effective retail market. This should include considering the introduction of a tax on retailer windfalls to reduce the incentive to profit from the liquidation of in-the-money hedge positions, as has been done by the United Kingdom Government.

Recommendation 2

Consider other measures to ensure retailers act in good faith in support of an efficient retail market, including the introduction of a tax on retailer windfalls to reduce the incentive to profit from the liquidation of in-the-money hedge positions.

4. Continued engagement

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