



Striking a just balance: regulating alternative energy sellers in an evolving market

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Introduction

The Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is an independent, non-profit law and policy organisation that works for a fair, just and democratic society, empowering citizens, consumers and communities by taking strategic action on public interest issues.

PIAC identifies public interest issues and, where possible and appropriate, works co-operatively with other organisations to advocate for individuals and groups affected. PIAC seeks to:

- expose and redress unjust or unsafe practices, deficient laws or policies;
- promote accountable, transparent and responsive government;
- encourage, influence and inform public debate on issues affecting legal and democratic rights;
- 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 also receives funding from NSW Trade and Investment for its work on energy and water, and from Allens for its Indigenous Justice Program. PIAC also generates income from project and case grants, seminars, consultancy fees, donations and recovery of costs in legal actions.

Energy 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. 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 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;
- St Vincent de Paul Society;
- Physical Disability Council NSW; and
- Tenants Union.

Supporting innovation + ensuring adequate consumer protection

The Public Interest Advocacy Centre (PIAC) welcomes the opportunity to provide comment on the Australian Energy Regulator's (AER) revised *Draft Exempt Selling Guideline version 4* (the Guideline).¹ PIAC has previously made submissions to the AER's proposed revisions to the Guideline in which it has explained the principles on which it bases its views.

In brief, PIAC's priority is to ensure residential consumers are effectively and adequately protected. At the same time, PIAC believes it is important that regulation does not create barriers to innovative business models especially those that are likely to reduce energy use and, therefore, costs to consumers. In this vein, and particularly in the context of alternative energy sellers, it is important that compliance requirements do not present a barrier for new competitors to enter the market and, therefore, regulatory divergence is necessary to reflect the different circumstances of exempt sellers. Certain requirements under the Retail Law and Retail Rules may be more onerous or inappropriate for exempt sellers, for example, the price disclosure requirements for retailers' standing offer and market offer prices.² The regulatory costs for a small energy seller that lacks the economies of scale and scope of an authorised retailer can be substantial. An individual exemption is, therefore, preferable to an authorisation where these costs are likely to exceed the customer benefits, as long as the exempt customers receive protections similar to those that retail customers receive, as a condition of the exemption.

In PIAC's view, the retail NEM-related contract is the primary contract because it enables the National Energy Market (NEM) connection and, as such, the provision of an essential service and associated consumer protections. As the AER has also previously made clear, a key difference is the impact disconnection of energy services would have on a customer. It is appropriate that retailers have additional requirements, given their unique role in providing a connection to the NEM (and/or a sole supply of electricity). It follows that in cases where an alternative energy seller will be the consumer's only energy supply without the option of reconnecting to the NEM, it would be reasonable to require the alternative energy seller to obtain a retailer authorisation.

Full retailers are required to have a larger range of consumer protections in place because they are in a position where they have a great deal of control over the provision of an essential service. Exempt sellers selling innovative products and services usually increase consumer control over their energy supply and management as well as their consumption. If consumers are able to exercise more discretion in relation to their energy supply, which is usually the case with alternative energy selling arrangements, then it is less necessary that they and their providers are subject to obligations intended to protect them from the risk of oligopolistic behaviour, unfair practices and information asymmetry.

PIAC agrees with the AER that conditions for exemptions should take into account that a customer may not need the level of protection an authorisation would require a retailer to offer in relation to its customers and that there exists a risk of duplication if additional consumer protection requirements are placed on exempt sellers. It remains PIAC's view that the exempt

¹ DRAFT AER (Retail) Exempt Selling Guideline – Version 4 – September 2015, available: <https://www.aer.gov.au/retail-markets/retail-guidelines/review-of-retail-exempt-selling-guideline-2015>

² These requirements are set out in Division 11 of Part 2 of the Retail Law.

seller framework is adequate until such time as a significant number of consumers begin to leave the NEM.³

Notwithstanding these views, PIAC notes that it is possible that the exemptions framework could be used to circumvent the obligation to consumer protections that are required under a retail authorisation. Some energy retailers have set up subsidiary companies to provide solar and other energy management services, and have obtained exemptions for these companies. Alternative energy sellers whose energy sales are significant in terms of scale and/or scope should be subject to additional regulatory requirements that allow the AER to appropriately monitor their activities, gather data and have a stronger regulatory role to ensure that adequate consumer protections are afforded wherever possible.

PIAC continues to advocate for a transparent energy market and is wary of the potential for the development of a hidden market. PIAC contends that arrangements such as automatic deemed exemptions can lead to certain categories of suppliers being invisible in the NEM. This can limit the understanding of the significance of these suppliers in a national context. Similarly, scrutiny of their practices with regard to the supply of an essential service and the resulting outcomes for consumers would be impossible. PIAC urges the AER to keep such considerations in mind when undertaking its balancing exercise and determining appropriate exemption conditions.

As previously emphasised, PIAC recommends that every effort should be made to offer exempt customers protections that mirror, as closely as possible, the protections offered to the customers of retailers. PIAC supports the retention of the electricity tariff cap that exempt sellers may charge small customers, as well as new Condition clause 3(2) that provides for a minimum of two payment options. PIAC also supports the AER's proposed amendments that remove unnecessary ambiguity and vagueness from the drafting. PIAC also supports the removal of the term 'as soon as possible' in Condition 11 and replacing it with a defined timeframe. PIAC is of the view that it would be reasonable to adopt the same timeframe as provided for in the National Electricity Rules, where the wording is also similar to that of condition 11.⁴

PIAC reiterates that a current weakness of the exemptions framework in most NEM states is that customers of exempt sellers do not have access to the services of the jurisdictional energy ombudsman (or similar) for dispute resolution. PIAC is of the view that access to a free, independent and an impartial dispute resolution scheme is a basic consumer right. NSW is currently the only jurisdiction where the Energy Ombudsman has jurisdiction to investigate disputes between customers and an exempt seller. Under the National Energy Retail Law (NSW) customers have the right to apply to EWON for a review of a decision arising from any matter relating to the supply of electricity or gas by the exempt person to the customer. Currently EWON handles these disputes free of charge and does not require these exempt sellers to become members of EWON. In future it might be appropriate for jurisdictions to legislate that exempt sellers over a particular size be required to become members of an Ombudsman scheme.

In addition, while PIAC recognises that the creation of hardship programs can be a significant cost to an energy seller, it is important that hardship programs are available in situations where

³ PIAC submission to the AER issues paper, *Regulating innovative energy selling business models under the National Energy Retail Law*, 16 February 2015

⁴ See National Electricity Rules at [5.96]

energy sellers have a significant number of customers for whom they are the major energy supplier. PIAC suggests the AER monitor industry developments in this area and consider the cases where it might be necessary to require exempt sellers to develop hardship plans.

PIAC recommends that the AER continue to monitor industry developments with respect to the desirability of imposing conditions on exempt sellers requiring fee payment to the customer's authorised retailer to contribute towards the cost of providing hardship, life support and concession/rebate services for that customer; membership of Ombudsman scheme; and/or the development of hardship plans for businesses over a particular size.

PIAC also reiterates its recommendation that the AER write to the COAG Energy Council to initiate an overarching review of the National Electricity Law and Retail Law when customers begin to disconnect from the National Electricity Market in significant numbers.

Recommendations

Overall, PIAC makes the following recommendations:

- The electricity tariff cap that exempt sellers may charge small customers (i.e. relevant retailer standing offer) should be retained.*
- An exempt person should be required to offer an exempt customer at least two payment options for the nominated exemption classes so that customers, particularly small customers, are given greater choice in how they pay their energy bills.*
- The AER continue to monitor industry developments with respect to the desirability of imposing conditions on exempt sellers requiring fee payment to the customer's authorised retailer to contribute towards the cost of providing hardship, life support and concession/rebate services for that customer; membership of Ombudsman scheme; and/or the development of hardship plans for businesses over a particular size.*
- The AER write to the COAG Energy Council to initiate an overarching review of the National Electricity Law and Retail Law when customers begin to disconnect from the National Electricity Market in significant numbers.*