



public interest
ADVOCACY CENTRE

**Submission to Issues Paper 2
Consumer protections in an evolving market:
traditional sale of energy – 2020 retail energy
competition review.**

13 February 2020

About the Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is an independent, non-profit legal centre based in Sydney.

Established in 1982, PIAC tackles barriers to justice and fairness experienced by people who are vulnerable or facing disadvantage. We ensure basic rights are enjoyed across the community through legal assistance and strategic litigation, public policy development, communication and training.

Energy and Water Consumers' Advocacy Program

The Energy and 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 program develops policy and advocates in the interests of low-income and other residential consumers in the NSW energy and water markets. PIAC receives input from a community-based reference group whose members include:

- NSW Council of Social Service;
- Combined Pensioners and Superannuants Association of NSW;
- Ethnic Communities Council NSW;
- Salvation Army;
- Physical Disability Council NSW;
- St Vincent de Paul NSW;
- Good Shepherd Microfinance;
- Affiliated Residential Park Residents Association NSW;
- Tenants Union;
- Solar Citizens; and
- The Sydney Alliance.

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Contents

- Introduction 1**
- Harm based assessment of consumer protection 1**
- Information provision 1**
 - QUESTION 1: Information provision in the content of bills 2
 - QUESTION 2: Forms of regulation (bills) 2
 - QUESTION 3: Notifications 3
 - QUESTION 4: Forms of regulation (innovation) 3
- Explicit informed consent 4**
 - QUESTION 5: Explicit informed consent in a digitalised market 4
 - QUESTION 6: temporary explicit informed consent waiver 5
 - QUESTION 7: Explicit informed consent, innovation and digitalisation 5
 - QUESTION 8: Explicit informed consent delegation to a third party 5
- Cooling-off periods 6**
 - QUESTION 9: Cooling off period under the NECF 6

Introduction

PIAC welcomes the Australian Energy Market Commission's (the Commission) review of the National Energy Consumer Framework (NECF) and examination of consumer protections amidst the transformation of the National Energy Market.

In PIAC's view, the two broad areas singled out for review do not cover some key aspects of the NECF which have significant impact on consumers. We consider that a comprehensive review of payment assistance, hardship, disconnection and retail assistance measures is needed. Discrete changes to elements of these frameworks over time, along with better understanding of the experience of consumers in the retail energy market, indicate that a comprehensive review is needed.

Throughout Issues Paper 2 (the Paper) there are implicit and explicit assumptions that PIAC considers incorrectly frame the issues. The Paper asserts that existing consumer protections are a potential barrier to innovation, citing a tension between regulatory prescription and innovation. While we understand this review is intended to examine the operation of a range of protections and their effectiveness, we consider this framing could bias the assessment that follows. The relationship between protection and regulation and the ability to develop innovative services and products, need not be a binary one framed in the negative. PIAC continues to argue that the restraints presented by regulations can be an incentive to innovate and improve efficiency.

Harm based assessment of consumer protection

PIAC supports a harm-based consumer protections frameworks, with a similar approach to determining where regulatory protections should be applied. This framework should be proportionate to the potential for consumer harm that may result in the retail energy market from its provision of an essential service. The nature and materiality of its impact on any number of consumers is a key consideration.

We consider harm to be particularly pertinent in the examination of the protection provisions examined in Issues Paper 2. Protections relating to the provision of information, Explicit Informed Consent (EIC) and cooling-off periods not only impact all consumers (wide scope), but have a significant impact upon the outcomes available to most consumers (material impact). Moreover, these protections are of particular importance to a large cohort of vulnerable consumers, for whom the retail energy market remains complex and problematic.

Where the Paper seeks to assess the ongoing value of these protections, PIAC considers it necessary to give sufficient weight to the potential for harm that would result in any reduction or erosion of them. It would be inappropriate to prioritise the potential for benefit to a particular cohort of consumers over the likely harm that would impact a significant proportion of consumers.

Information provision

For most consumers, information provided on bills is the only ongoing interaction they have with their retailer regarding their usage, energy prices, and how to access crucial services and

supports. Accordingly, requirements regarding on-bill information provision are crucial consumer protections that have a material impact for most consumers. The requirements for minimum information need not restrict innovation or retailers' capacity to provide additional information. PIAC does not consider current requirements to be 'restrictive' or to impede retailers' capacity for service innovation, and would be very concerned by any proposal to reduce these measures that protect consumers and help them understand and control their usage and costs.

PIAC agrees with the Consumer Action Law Centre (CALC), that it may be worthwhile to undertake consumer testing, as part of a process evaluating the ongoing appropriateness and impact of specific information elements.

PIAC also notes that many of the current information provision requirements link to key monitoring and evaluation activities undertaken by the Australian Energy Regulator (AER). Any reduction in information provision should consider the potential flow-on impacts on the effectiveness of the monitoring activities of the regulator, including the impact on identifying long term trends, and the independent dispute resolution functions of ombudsman schemes.

QUESTION 1: Information provision in the content of bills

Are the current requirements for the information and delivery of information that is required to be included on bills restricting innovation and digitalisation? If so, what changes would allow innovation to occur?

PIAC does not consider the current requirements act as a significant impediment or restriction to service or product innovation by retailers. Retailers are already able to offer a range of additional information options and innovative services beyond the existing minimum requirements. There is no evidence that the current regulatory requirements are having any detrimental impacts upon consumer options or outcomes.

The current provisions ensure consumers have key information required to understand their usage, costs and how to interact with their retailer. There may be value in undertaking consumer testing to assess the ongoing effectiveness and appropriateness of the individual elements of information currently required. PIAC would support further discussion regarding how this could be undertaken. However, we do not support any erosion of the minimum information requirements, and strongly recommend against any move to reduce the regulatory force of the requirements, such as through allowing self-regulation.

QUESTION 2: Forms of regulation (bills)

Does the current form of regulation of information provision restrict innovation and digitalisation? If so, what form of regulation – the mechanism employed – could be introduced? For example, could industry self-regulation or principle-based regulation better facilitate innovation and digitalisation?

The current form of regulation does not significantly restrict or inhibit innovation or the development and implementation of new technology-based services and products. It is a key consumer protection that facilitates consumer understanding, choice and more effective access to essential services that suit their needs. It would not be appropriate to allow industry self-regulation of minimum information provisions requirements.

We concur with the recommendation from CALC that principles-based regulation is appropriate in relation to any on bill information requirements that are additional to the existing minimums, and that may relate to new emerging technology products and services and their integration with traditional retail services.

QUESTION 3: Notifications

Do the current requirements on delivery of information of notifications to consumers restrict innovation and digitalisation? If so, what changes would allow these to occur?

PIAC supports requirements to ensure consumers are notified regarding important changes to their retail services that may influence their choices and bills. However, the current protections have been developed incrementally and it is timely to consider a more effective and simpler means of achieving the same intent.

While notifications are a valuable assistance in the context of current practices, they are not the most efficient option. PIAC strongly recommend that the AEMC consider introducing a different approach to consumer protection that ensures consumers are able to receive the services they have chosen without the need for additional notifications. Accordingly, PIAC supports the AEMC taking an approach similar to the Victorian Essential services Commission (ESC) in their proposed reforms relating to ‘fair and clear contracts’¹. Specifically, PIAC strongly supports reforms to require benefit periods to match the length and terms of the retail offer contract ensuring that consumers are clearly able to understand the terms of their contract and choose accordingly. This change would negate the need for benefit change notice periods.

QUESTION 4: Forms of regulation (innovation)

Does the current form of regulation of information provision restrict innovation and digitalisation? If so, what form of regulation – the mechanism employed – could be introduced? For example, are industry self-regulation or principles-based regulation appropriate methods of regulation?

PIAC does not support industry self-regulation of notification requirements for changes made to retail prices. However, we understand that areas exist where service offerings of potential benefit to the consumer may not be able to meet the current notification requirements.

PIAC notes a recent ESC draft decision proposing an exemption system for offers that would not meet the proposed requirements for fixed periods for retail pricing, but would result in benefits to the consumer. Such an approach, where exemptions are operated by the AER, could ensure consumer protections are maintained while allowing new products and services that may benefit specific consumer cohorts. The Commission could consider such an approach, subject to a number of safeguards recommended by CALC in their own submission to this process. Specifically:

- That there are stringent Explicit informed Consent (EIC) requirements for exempt contracts where retailers must also provide information regarding other, complying products.

¹ Essential Services Commission, 2019. ‘Ensuring energy contracts are clear and fair draft decisions’.

- That retailers publicly report regularly to the AER regarding the number of consumers on these contracts and the proportion of those consumers receiving payment assistance.
- That the AER operate an approval process for exempt retail products that requires retailers to demonstrate the benefits to consumers and define the characteristics of the consumers that the product is intended to benefit.
- That any customers on exempt contracts who receive payment support from the retailer or from a government scheme only continue to remain on that contract where it represents the best possible offer for them. This should also involve an entitlement for any such customers not on the best offer to review their contract.
- That there are clear mechanisms defining how the AER can intervene where the outcomes for consumers on exempt offers are not in their best interests.

Explicit informed consent

The National Energy Consumer Framework (NECF) operates to protect consumers and maximise their ability to choose the energy services that best suit their needs and protects their access to an essential service. Explicit Informed Consent (EIC) is a cornerstone consumer protection mechanism within the NECF.

PIAC rejects the Commission's assertion in the Paper that changes since the design of the NECF have left consumers more informed and capable, such that any regulatory provisions of the NECF may no longer be necessary. While it may be the case that some cohorts of consumers are able to access information and engage with the market to their own benefit, this is not true of the majority of consumers.

A stream of research, market monitoring and informed commentary over the last 5 years has demonstrated unequivocally that the retail market has left a majority of consumers poorly informed, unable to identify or choose offers that suit their interests, and paying well above what is necessary². In this context it is hard to see any reasonable argument in favour of reducing or eroding the protection currently provided by existing provisions for EIC. PIAC strongly recommends that the Commission retain, and explore strengthening, EIC protections.

QUESTION 5: Explicit informed consent in a digitalised market

Is the current method prescribed in the NECF for retailers to record EIC restricting innovation and digitalisation? If so, how could it be changed to allow these to occur?

The current methods prescribing the recording of EIC do not act as an impediment to innovation or digitalisation. EIC operates as an effective record of contract and needs to be recorded in a way that is easily retained and referenced by the retailer for the benefit of their ongoing service provision, and to fulfil the needs of the regulator and the relevant customer. The current protection offered through prescription of method in recording and retaining EIC should be retained without change.

² This is a broad comment referring to the consistent evidence that the market is not delivering outcomes for consumers, this includes, but is not limited to the ACCC Retail Electricity Pricing Inquiry in 2018, as well as monitoring reports by the AER and AEMC.

QUESTION 6: temporary explicit informed consent waiver

Should energy consumers be able to waive EIC for certain services for a given time period?

Answer provided in response to Question 8, below.

QUESTION 7: Explicit informed consent, innovation and digitalisation

Are the current provisions that require retailers to have a record of EIC restricting innovation and digitalisation? If so, how could these be changed to allow these to occur?

Requirements to obtain and retain records of EIC are vital for the monitoring and compliance activities undertaken by the Australian Energy Regulator (AER) and independent dispute resolution activities undertaken by Ombudsman schemes.

For services with lower levels of potential harm than the provision of energy, different, fit-for-purpose EIC arrangements may be appropriate. However, where retailers are engaging in contracts to provide an essential service for profit, there can be no reasonable argument against the retention of records regarding this contract. It would be unacceptable to remove or reduce the requirement to maintain records of EIC and PIAC strongly recommends against any such change.

QUESTION 8: Explicit informed consent delegation to a third party

Should energy consumers be able to provide EIC to a third party to interact with the retail market on their behalf? If so, what arrangements should be in place?

Third parties already operate a range of services relating to the comparison of available offers, switching offers, and assistance in engaging with retailers. While the implementation of the Consumer Data Right, and the progressive rollout of digital metering presents an increased opportunity for third parties to expand their service offers, PIAC is concerned these services could result in additional market complexity and cost.

PIAC recommends a cautious approach focussed on the potential for consumer harm when considering waivers or delegations for EIC. Should any ability to waive or delegate EIC be considered, PIAC recommends that it retain a structure that protects consumers and actively prioritises their benefit, specifically:

- That any waiver or delegation of EIC is temporary, and subject to regulated limitations on its conditions and duration.
- That any third party operating with a waived or delegated EIC be subject to compulsory regulation, and subject to dispute resolution by Ombudsman schemes.
- That any third party operating with waived or delegated EIC must be a government or not-for-profit entity, or otherwise acting only on behalf of the consumer (such as a community support worker, brokerage service or financial counsellor) and independent of any commercial conflict. In any case any third party should not collect fees or have any other commercial relationship with a retail operator.

Cooling-off periods

Existing provisions for cooling-off periods recognise the inherent information and power imbalance that exists between retail energy businesses and individual consumers and that marketing approaches are often misleading. We are concerned that the Paper does not accurately reflect this reality in asserting that consumers have a greater understanding of retail competition, and are better able to assess and realise the potential benefits of available offers.

The introduction of digital metering, and improvements to information and retail service provision may have aided the ability of some consumers to get outcomes that better suit their needs. However, it is incorrect to assert that this is the case for all, or even the majority.

PIAC disagrees with the Commission's assertion in the Paper that conditions are substantively different from those that pertained when the existing cooling-off provisions were implemented. Indeed, we contend that evidence regarding the operation of the retail energy market in recent years, and the experiences and outcomes for consumers, demonstrate that there is a need to augment existing provisions, rather than erode or dilute them.

In assessing changes to the existing protections framework, it is crucial to correctly assess the likelihood, materiality and scope of any potential benefits. This should then be weighed against the potential for harm and the extent of its likely impact on consumers. In this regard PIAC notes the potential benefits of relaxing or removing cooling off period provisions rely upon:

- consumers having a digital meter (the majority do not)
- consumers being able to correctly identify and get deals that offer the best value for them
- the consumer acting in a way that realises the potential benefits of the offer immediately
- the benefits of the better offer being material enough to be realised in the time 'saved' by a removal of cooling-off provisions
- equivalent (or indeed greater) benefits not being possible where cooling-off provisions are retained

Accordingly, in addition to only being relevant to a particular cohort of consumers, the potential benefits are heavily qualified and contingent, and may be immaterial even where they are realised. When this is weighed against the significant likelihood of ongoing consumer harm through sales decisions made without appropriate information, under duress, or without sufficient consideration, PIAC considers there to be no demonstrated case for removal or erosion of protections.

QUESTION 9: Cooling off period under the NECF

Are cooling-off period protections for solicited retail market contracts still beneficial? If so, why? If not, what improvements could be made?

The protections offered by cooling off periods continue to represent a crucial means of addressing the fundamental information and commercial power imbalance between retail businesses and individual consumers. This protection must be retained. However, PIAC considers that with the benefit of improved understanding regarding consumer behaviour and

their experience of the retail energy market, the Commission should give detailed consideration to an 'opt-in' period for purchase confirmation.

PIAC notes the findings of the 2017 report by the Consumer Action Law Centre (CALC)³ and recommends that the intent of cooling off protections be retained but that opt-in periods be considered, such that:

- The current 10 day 'opt-out' cooling off period is augmented or replaced with an 'opt-in' period, potentially of shorter duration
- The provision should apply to all business-initiated sales, with consideration of whether cooling-off periods or opt-in protections are more effective for consumer-initiated sales
- The seller would not be able to initiate contact with the consumer during the opt-in period
- The consumer would be required to independently contact the seller within the period to confirm the sale agreement via a means that meets EIC requirements

Ensuring that consumers are able to freely and intentionally exercise choice on the basis of the best available information is key to a retail market that operates in their interests. Contracts for an expensive essential service should not be predicated upon coercion, misleading or inadequate information, or be the default result of unintentional assent. Cooling-off periods, while a crucial protection, do not effectively achieve their intent as they require consumer action to cancel a sale. In this they allow sales to continue by default, where a consumer does not have the time, ability or inclination to enact a cancellation. Consumer behaviour shows that cooling off periods still allow a significant number of 'undesired' sales to continue. PIAC contends that opt-in provisions may not only allow a streamlining of the process to help realise switching efficiencies, but represent a truer exercise of active consumer choice.

³ Consumer Action Law Centre, Loddon Compaspe Community Legal Centre & WEstjustice, 2017. 'knock it off! Door to door slaes and consumer harm in Victoria'