

22 June 2023

Sam Markham  
Project Leader  
Australian Energy Market Commission

*Submitted electronically*

Dear Ms Markham,

**PIAC Submission to the Review into the Arrangements for Failed Retailers' Electricity and Gas Contracts – Directions Paper**

The Public Interest Advocacy Centre (PIAC) welcomes the opportunity to respond to the Review into the Arrangements for Failed Retailers' Electricity and Gas Contracts (the Review) Directions Paper (the Paper).

**Consumer outcomes as key objective**

Consumer outcomes must be the key consideration when reviewing the Retailer of Last Resort (RoLR) scheme. The intent of the Paper is framed according to mitigating risks for the designated RoLR/s. While this is a key consideration and determinant of good consumer protection outcomes, we are concerned this results in a focus on processes rather than outcomes. While we appreciate that Section 5 of the Paper outlines how the assessment framework used in the Review correlates with consumer interests, consumer outcomes should be the overarching objective, with retailer risk mitigation a key contributing consideration.

We recommend that the objectives of the Review be realigned to focus on consumer outcomes, rather than more narrowly on retailer protections. Without this the Review risks implementing reforms that protect retail businesses and assuming retailer protections are a proxy for consumer protections. A more outcome focussed objective has scope to consider a wider range of (potentially more effective) measures to protect consumers in the event of retail failures.

**A government RoLR**

PIAC maintains that a government owned RoLR would be more appropriate and effective protection for consumers than the current arrangements. A government-owned RoLR would address several of the concerns outlined in the Paper including cascading failures, customer benefit-sharing and unreasonable competitive advantage.

In this context, we are pleased the AEMC recommends that Energy Ministers ‘explore government-owned retailer participation in the RoLR scheme to prevent cascading retailer failures’<sup>1</sup>. We welcome jurisdictional government consideration of this recommendation. PIAC would welcome an opportunity to further discuss the consumer benefits of a government-owned RoLR with jurisdictions considering this option.

### **RoLR Cost-Recovery Framework**

In setting the Default Market Offer (DMO), the AER considers wholesale costs, networks costs and costs to serve – including a considerable retail margin - as well as costs to acquire and retain customers (CARC). RoLR customers represent new customers acquired without acquisition costs. Given this, and the fact that the DMO (which effectively sets the benchmark for retail offers) includes allowance for CARC, the issue of recovery of RoLR costs would not seem to be a material one. PIAC considers that the DMO (and the market benchmark it represents) provides more than sufficient cover for costs incurred for the transfer of small customers to a designated RoLR. Scope for additional recovery of market costs in the event of a RoLR event represents unnecessary and unreasonable cross-subsidisation.

### **Billing failed retailers**

PIAC supports recovering the cost of failure from failed retailers. However, clear guidelines should be established to ensure any savings or benefits resulting from this cost recovery are passed onto consumers. This is particularly important where RoLR events result in customers losing benefits embedded in their original retail offer.

The AEMC should prioritise consumer outcomes when considering whether to recover costs from failed retailers. We disagree with the assumption that easy market entrance or expansion is necessarily in the consumer interest and weighted against stronger RoLR protections. Energy is an essential service with a guaranteed pool of customers. As an essential service, there must be parameters in place to ensure affordable, reliable supply of energy and broader consumer protections. If potential new market entrants are deterred by these protections, such as cost recovery from failed retailers, then they should not be regarded as meeting the bar required for the provision of an essential service. That is, provision for retail failure should be regarded as a fundamental ‘cost of business’.

PIAC seeks clarification on whether there are any risks or negative impacts from the AER being listed as a secured creditor on the PPSR. Subject to this assessment demonstrating there are no material risks, PIAC supports the AER registering on the PPSR to increase the likelihood of any relevant debts being paid.

### **Sharing benefits & costs with customers**

PIAC does not agree that benefits of a RoLR direction should only be shared with the transferred customers ‘in good faith and on a reasonable basis.’ Transferred customers often have contract terms or other benefits which are currently lost or compromised in the course of a RoLR event. The RoLR framework should not rely on ‘the good faith of retailers’ in sharing benefits with consumers in compensation for the loss of their previous retail contract terms and benefits, and other impacts flowing from the RoLR event. A more effective RoLR scheme

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<sup>1</sup> Directions Paper 3.

would embed cost recovery from failed retailers, with guaranteed mechanisms to ensure these funds are available to be shared with impacted customers.

### **Retailer behaviour and consumer harm**

The existing framework does not sufficiently mitigate consumer harms in volatile market conditions such as those witnessed in mid 2022. PIAC disagrees that the observed retailer behaviour in mid-2022 did not lead to consumer harm.

Section 4.3 of the Paper unreasonably places the onus on the consumer to mitigate harm, such as by assessing the value of the deal they are placed on and finding a better offer. This is out of step with the AER's current understanding of consumer vulnerability and assumes a certain level of engagement with the energy market which the AER recognises many consumers cannot meet. Making consumers protection from harm contingent on such engagement assumptions is not reasonable. Even for consumers who can engage with the energy market, there is consistent evidence that the assumed 'best outcomes' are often not received. Consumers impacted by RoLRs should be provided with the best available offer, or provided the protection of an efficient, effective default.

PIAC welcomes the opportunity to discuss these matters further with the AEMC and other stakeholders.

Yours sincerely

**Alana West**  
**Policy Officer, Energy and Water**

+61 2 8898 6519  
awest@piac.asn.au