

public interest
ADVOCACY CENTRE

**Submission to the contestability of energy
services draft determination**

2 November 2017

Introduction

The Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is an independent, non-profit legal centre based in New South Wales. Established in 1982, PIAC tackles systemic issues that have a significant impact upon disadvantaged and marginalised people. We ensure basic rights are enjoyed across the community through litigation, public policy development, communication and training.

Our work addresses issues such as:

- homelessness;
- access for people with disability to basic services like public transport, education and online services;
- Indigenous disadvantage;
- discrimination against people with mental health conditions;
- access to energy and water for low-income and vulnerable consumers;
- the exercise of police power;
- the rights of people in detention, including the right to proper medical care; and
- government accountability, including freedom of information.

PIAC is funded from a variety of sources. Core funding is provided by the NSW Public Purpose Fund and the Commonwealth and State Community Legal Services Program. PIAC also receives funding from the NSW Government for its Energy and Water Consumers Advocacy Program and from private law firm Allens for its Indigenous Justice Program. PIAC also generates income from project and case grants, seminars, 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, developing policy and advocating in 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;
- Physical Disability Council NSW;
- Anglicare;
- Good Shepherd Microfinance;
- Financial Rights Legal Centre;
- Affiliated Residential Park Residents Association;
- Tenants Union; and
- Mission Australia.

Contestability of energy services

PIAC welcomes the opportunity to comment on the AEMC's draft rule determination for the contestability of energy services. PIAC sees much value in consumers being able to access Distributed Energy Resources (DER) as a way to enable consumers to better manage their energy consumption and energy bills. PIAC supports the intent of the draft rule to facilitate the uptake of DER and help promote an effective market for the provision of these assets and services.

However, PIAC has some concerns about the draft rule. Broadly, these concerns relate to the apparent conflation of ownership and control and the assumption that a contestable energy services market will inherently result in the best or most efficient outcomes for all consumers.

PIAC supports the reforms in this rule change designed to improve the process for classification of distribution services.

Ownership does not equal control

The AEMC appears to conflate the concepts of ownership and control in the draft rule. The AEMC notes that DNSPs may favour using behind the meter resources for network benefits over potentially more efficient benefits elsewhere in the system if they "are in *control* of such assets".¹ PIAC concurs that DNSPs would face this incentive and therefore considers this to be a reasonable concern.

However, the draft rule does not directly address this issue. Instead, the AEMC "considers it is important to limit DNSPs' ability to *own and operate* these assets".² In practice, the proposed clause S6.2.1 restricts DNSPs from including behind the meter resources in their regulatory asset base (RAB)³ and therefore prevents the regulated business from owning these resources.

Ownership and control of assets are conceptually and practically distinct. For example, during the privatisation of NSW's generators, NSW state-owned corporations maintained ownership of the assets while dispatch control was transferred to private firms.

Given that the harm identified by the AEMC relates to *control* of behind the meter resources, PIAC considers that it is inappropriate for the solution to also restrict *ownership*. The proposed solution unnecessarily restricts potential business models which may involve DNSP ownership, but not control, of behind the meter resources.

For instance, PIAC is aware of programs in California where the utility rolled out electric vehicle charging infrastructure as a regulated service.⁴ The Californian regulator approved programs which made use of the utilities' economies of scale and scope while retaining competition and customer choice in the provision of the charging stations and charging service business models. Doing so potentially brought forward the roll-out of this infrastructure for consumers – including

¹ AEMC, Contestability of energy services, Draft Rule Determination, August 2017, v.

² Ibid.

³ AEMC, Draft National Electricity Amendment (Contestability of energy services) Rule 2017, 17.

⁴ Jeff St. John, "Southern California Utilities to Deploy 5,000 EV Chargers in First-of-Their-Kind Pilots", *Greentech Media*, February 2016.

for consumers in less affluent urban areas as the programs required a portion of the stations must be installed in “disadvantaged areas.”

The idea that DNSPs may provide an efficient behind the meter solution is further explored below in relation to PIAC’s concerns about competition and access to DER for all consumers.

Recommendation 1

PIAC recommends that the AEMC consider the distinction between ownership and control of assets, and related business models, when making their final rule.

Contestability, competition and access

Broadly, PIAC supports the notion that effective markets for competitive energy services will lead to efficient investment in behind the meter resources. However, we are concerned that contestability may not have this result for all consumers. While competitive energy services will undoubtedly be made to some consumers, PIAC considers it unlikely that that access and benefits will be universal in a competitive market.

Regional access to behind the meter resources

PIAC is concerned that there may be regional discrepancies in the ability to access competitive energy services. While competitive markets tend to develop in areas with a higher concentration of potential customers, this is often not the case in smaller, regional communities. The low customer density in these communities means that potential providers are less willing to invest in finding customers and installing behind the meter resources on their premises.

This dynamic is already evident in the retail energy market. In PIAC’s experience, retailers are reluctant to offer favourable market contracts to small groups of consumers in regional areas. This occurs even when the underlying distribution and wholesale costs of serving these customers is the same as for customers in built up areas, and despite the fact that the retailer does not need to attend the customer’s premises in most cases.

Given that this is the case where firms do not have make the capital investment or site visits associated with behind the meter resources, PIAC considers it unlikely that many firms in a contestable energy services market would offer to make this investment in small or remote communities.

At best, this may mean regional consumers have to wait longer than necessary to receive the full benefits of emerging DER markets and services. At worst, they may miss out altogether, unless energy distributors are permitted to provide some contestable products and services under certain conditions.

Consumers cohorts and access to behind the meter resources

In addition to regional disparities, PIAC contends that not all types of consumers may be served by this market.

Until this decade, energy consumers could very broadly be categorised into ‘haves’ and ‘have nots’; they could either afford energy, and the tools to limit their usage if they so desired, or they could not.

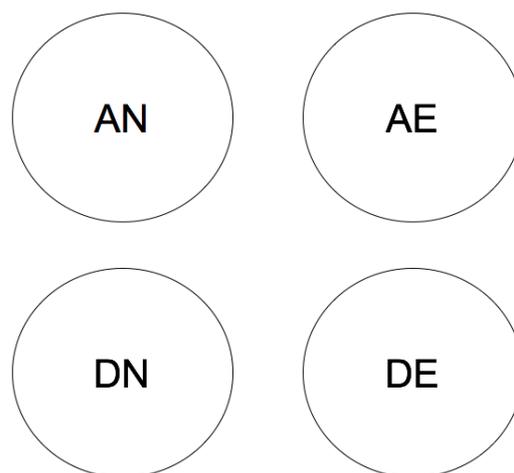
Since then, deregulation, the emergence of competition, innovation (particularly in relation to behind the meter energy technology), and the escalation of energy prices have created the need for consumers to be thought of differently to just these two cohorts. In addition to social advantage, a consumer’s level of engagement with the energy market now has a material impact on their energy outcomes.

An engaged consumer may be able to minimise their energy bills through a combination of retail churn, behind the meter technologies, and ongoing engagement in the form of paying their bills on time to access discounts. Conversely, a consumer that is not engaged, or is financially disadvantaged, is likely to consume more energy from the grid, purchased from a retailer to whom they pay a higher price by not accessing the cheapest deals.

Considering that the levels of engagement and advantage are not mutually inclusive, PIAC considers that consumers should be thought of in four cohorts, for the purposes of consumer protections and promoting competition that works for all consumers. Represented visually in Figure 1, these cohorts are:

- Advantaged, engaged (AE);
- Disadvantaged, engaged (DE);
- Advantaged, not engaged (AN); and
- Disadvantaged, not engaged (DN).

Figure 1 – Contemporary consumer cohorts



PIAC contends that the Advantaged, engaged cohort will be first served by emerging markets for DER and hence will be the only ones to fully benefit from contestable energy services markets that are entirely reliant on competition to deliver consumer outcomes. The combination of energy market engagement and relative social advantage means these consumers will both want to adopt behind the meter resources and be able to afford to do so.

For all other consumers, their lack of engagement, social disadvantage or combination of the two, will prevent them from benefitting fully from the competitive offerings of a contestable market. This is particularly true for the two disadvantaged cohorts. While Advantaged, not engaged consumers may become more engaged once they perceive the benefits to outweigh the costs, disadvantaged consumers will most likely remain financially unable to purchase behind the meter resources in a competitive market, irrespective of their desire to be engaged. PIAC contends that it is unlikely that a contestable energy services market would facilitate access to behind the meter resources for these consumers.

DNSPs and access to behind the meter resources

Where the contestable market fails to offer competitive energy service options to some consumers, PIAC contends that it is appropriate for DNSPs to do so. This would allow consumers that would otherwise not have access to the benefits of DER to do so. PIAC acknowledges this requires sound competitive neutrality arrangements to avoid unintended impacts on the competitive market, and in some instances ring-fencing to ensure separation of regulated and non-regulated services.

PIAC also notes that behind the meter and DER assets may offer a more cost-effective means for DNSPs to provide network services. This proposal is under consideration through the Alternatives to grid-supplied network services rule change, and PIAC refers to our submission to that process which is broadly supportive of the proposal.⁵

Recommendation 2

PIAC recommends that the AEMC not exclude DNSPs from owning behind the meter resources, subject to appropriate ring-fencing requirements, where the contestable market has failed to offer them to consumers and/or as a more efficient method of delivering network services.

Improvements to the process of classifying distribution services

PIAC supports the proposed improvements to the process of classifying distribution services. Currently, this process is neither responsive nor transparent. The NER currently prevent the AER from departing from previous service classifications unless it is “clearly more appropriate”.⁶ While this system was useful in providing continuity when responsibility for service classification transitioned from jurisdictional regulators to the AER, PIAC agrees with the AER that the requirement to demonstrate the clear appropriateness of a change in classification is unnecessarily restrictive.⁷

PIAC also concurs with the AEMC that the AER should be required to publish a service classification guideline. Currently, the AER classifies distribution services on a DNSP-by-DNSP basis and gives no formal guidance on how to approach these determinations. As the Clean

⁵ PIAC, *Submission to AEMC Alternatives to grid-supplied network services rule change consultation paper*, July 2017.

⁶ National Electricity Rules clauses 6.2.1(d) and 6.2.2(d).

⁷ AER, *Submission on contestability of energy services*, March 2017, pg. 3.

Energy Council noted in their submission to the initial consultation paper for this rule change, the current system has made “engagement in the review process unnecessarily complicated”.⁸

The current approach is also inconsistent with other arrangements, where the AER publishes guidelines which are used to facilitate transparent regulatory decision-making. These guidelines provide stakeholders with clarity and predictability about regulatory decisions, facilitating effective engagement with AER processes. To this end, PIAC is of the view that the AER should publish a similar guideline for distribution service classification.

Recommendation 3

PIAC recommends that the AEMC proceed with reforms to improve the process of classifying distribution services.

Further engagement

PIAC would welcome the opportunity to discuss the issues raised in more depth. For any queries please contact Energy Team Leader, Craig Memery at cmemery@piac.asn.au or on (02) 8898 6522.

⁸ Clean Energy Council, *Clean Energy Council submission to the Australian Energy Market Commission's Consultation Paper*, March 2017, pg. 2.