



Final Report

**Reviewing the National Energy Customer Framework
Draft Legislation**

12 June 2009

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PUBLIC INTEREST ADVOCACY CENTRE

FINAL REPORT

**REVIEWING THE NATIONAL ENERGY CUSTOMER FRAMEWORK DRAFT
LEGISLATION**

12 June 2009

1. This submission is made on behalf of the Public Interest Advocacy Centre (**PIAC**) in respect of the first exposure draft of the National Energy Customer Framework (**NECF**), comprising the draft National Energy Retail Law (**NERL**), the National Energy Retail Regulations (**NER Regulations**) and the National Energy Retail Rules (**NER Rules**).¹

2. The submission addresses certain salient consumer issues arising within the NECF proposal, specifically:
 - (a) the appropriate form and content of the NERL objective;

 - (b) hardship provisions within the NERL;

 - (c) de-energisation/disconnection;

 - (d) the circumstances in which a security deposit can be required and a credit check performed;

¹ Pursuant to Australian Energy Markets Agreement (**AEMA**), as amended, 2006, clause 14 and Annexure 2

(e) guaranteed service levels/community service obligations; and

(f) obligation to supply.

A NATIONAL ENERGY RETAIL LAW OBJECTIVE

(a) The existing proposal and legislative context

3. Part 1, Division 3, s 113 of the First Exposure Draft National Energy Retail Law (**NERL**), defines the NERL objective as follows:

The objective of this Law is to promote efficient investment in, and efficient operation and use of, energy services for the long term interests of consumers² of energy with respect to price, quality, safety, reliability and security of supply.

4. The NERL objective largely replicates the objectives specified within the National Electricity Law, a schedule to the *National Electricity (South Australia) Act 1996*, (**NEL**), and the National Gas Law, a schedule to the *National Gas (South Australia) Act 2008* (**NGL**).

5. Section 7 of the NEL and s 23 of the NGL prescribe the market objective for the electricity and gas industries respectively, being:

The objective of this Law is to promote efficient investment in, and efficient operation and use of, electricity services for the long term interests of consumers of electricity with respect to: (a) price, quality, safety, reliability and security of supply of electricity; and (b) the reliability, safety and security of the national electricity system.³

² Cf section 106 regarding the definition of customer and related terms

³ The national electricity market objective under the new NEL replaces the list of “Market objectives” and “code objectives” under the former Code. This change reflected the policy position agreed to by Commonwealth, State and Territory governments that reform should be made to promote the “long term interest of consumers”. A single objective that comprehends a number of specific components or elements has the advantage of conveying the message that the long term interests of consumers will be served through a composite of efficient investment in, and efficient use of, infrastructure and capabilities having regard to price, quality, reliability, safety and security of electricity services: *National Electricity Law and National Electricity Rules: Information Paper*, MCE December 2004, pp. 9-10.

The objective of this Law is to promote efficient investment in, and efficient operation and use of, natural gas services for the long term interests of consumers of natural gas with respect to price, quality, safety, reliability and security of supply of natural gas.

6. Section 7A(2) – (7) of the NEL prescribes revenue and pricing principles which the AER in certain circumstances must, and in others, may, take into account when exercising certain of its regulatory economic functions in accordance with ss 15 and 16(2)(a) and (b) of the NEL, as follows:

(2) A regulated network service provider should be provided with a reasonable opportunity to recover at least the efficient costs the operator incurs in:

- (a) providing direct control network services; and
- (b) complying with a regulatory obligation or requirement or making a regulatory payment.

(3) A regulated network service provider should be provided with effective incentives in order to promote economic efficiency with respect to direct control network services the operator provides. The economic efficiency that should be promoted includes:

- (a) efficient investment in a distribution system or transmission system with which the operator provides direct control network services; and
- (b) the efficient provision of electricity network services; and
- (c) the efficient use of the distribution system or transmission system with which the operator provides direct control network services.

(4) Regard should be had to the regulatory asset base with respect to a distribution system or transmission system adopted:

- (a) in any previous:
 - (i) as the case requires, distribution determination or transmission determination; or
 - (ii) determination or decision under the National Electricity Code or jurisdictional electricity legislation regulating the revenue earned, or prices

charged, by a person providing services by means of that distribution system or transmission system; or

(b) in the Rules.

(5) A price or charge for the provision of a direct control network service should allow for a return commensurate with the regulatory and commercial risks involved in providing the direct control network service to which that price or charge relates.

(6) Regard should be had to the economic costs and risks of the potential for under and over investment by a regulated network service provider in, as the case requires, a distribution system or transmission system with which the operator provides direct control network services.

(7) Regard should be had to the economic costs and risks of the potential for under and over utilisation of a distribution system or transmission system with which a regulated network service provider provides direct control network services.

7. Section 24 of the NGL contains mirror provisions.

(b) Analogous legislative provisions and proposals

8. Sections 7 NEL and 23 NGL (especially when read with s 7A NEL and s 24 NGL) adopt the semantics and structural form of ss 152AB(1) and (2) of the *Trade Practices Act 1974* (Cth) (**TPA**) in respect of the regulation of access to telecommunications carriage services: cf *Re Telstra Corporation Ltd* [2006] ACompT 4 at [63].

9. Section 152AT(1) and (2) of the TPA provide:

(1) The object of this Part is to promote the long-term interests of end-users of carriage services or of services provided by means of carriage services.

Promotion of the long-term interests of end-users

(2) For the purposes of this Part, in determining whether a particular thing promotes the long-term interests of end-users of either of the following services (the *listed services*):

- (a) carriage services;
- (b) services supplied by means of carriage services;

regard must be had to the extent to which the thing is likely to result in the achievement of the following objectives:

- (c) the objective of promoting competition in markets for listed services;
- (d) the objective of achieving any-to-any connectivity in relation to carriage services that involve communication between end-users;
- (e) the objective of encouraging the economically efficient use of, and the economically efficient investment in:
 - (i) the infrastructure by which listed services are supplied; and
 - (ii) any other infrastructure by which listed services are, or are likely to become, capable of being supplied.

10. Sections 152AB(4), (6), (7A), and (8) then further amplify the concepts within s 152AB(2).
11. That is, each of ss 7 and 7A NEL, 23 and 24 NGL and 152AB(1) and (2) TPA prescribe an overarching objective which is then amplified by certain secondary or operational objectives, which give greater content and concreteness to the primary objective without thereby limiting it.
12. The SCO notes in the Explanatory Material to the First Exposure Draft (at §3.1.2), that, where appropriate, terminology from existing national and jurisdictional legislation has been employed, although in many cases the fact that the NECF requires terminology which:
 - (a) has a particular “customer” focus or relevance; and

(b) is capable of applying equally in the electricity and gas contexts, has meant that terms and definitions from the existing NEL and NGL regimes have not necessarily been incorporated into the NERL and NER Regulations.

13. It is clear that the NECF generally, and the NERL objective specifically, must interact consistently and coherently with the overarching objectives of both the NEL and the NGL.

14. In addition to linguistic consistency, there is utility (where appropriate) in employing standards and language which have previously been employed in related legislative contexts or which have resulted from consultative processes undertaken by regulatory agencies. This can provide background jurisprudence and guidance as to how otherwise novel tests ought be applied.

15. Within this context, the Productivity Commission's *Review of Australia's Consumer Policy Framework* (Inquiry Report No. 45, 30 April 2008) rewards consideration.⁴

16. Within the Inquiry Report, the Productivity Commission proposed a new objective for Australia's consumer laws, being:

to improve consumer wellbeing by fostering effective competition and enabling the confident participation of consumers in markets in which both consumers and suppliers trade fairly and on good faith.

17. The Inquiry Report recommends that this overarching objective be buttressed by various operational objectives, as follows:

⁴ http://www.pc.gov.au/__data/assets/pdf_file/0006/79170/consumer1.pdf;
http://www.pc.gov.au/__data/assets/pdf_file/0008/79172/consumer2.pdf

- (a) ensure that consumers are sufficiently well-informed to benefit from, and stimulate, effective competition;
- (b) ensure that goods and services are safe and fit for the purposes for which they were sold;
- (c) prevent practices that are unfair or contrary to good faith;
- (d) meet the needs of those who, as consumers, are most vulnerable, or at greatest disadvantage;
- (e) provide accessible and timely redress where consumer detriment has occurred; and
- (f) promote proportionate, risk-based enforcement.

(c) PIAC Submission

18. In light of the above, PIAC submits that the current proposed s 113 objective be amended as follows:

113(1): The objective of this Law is to promote efficient investment in, and efficient operation and use of, energy services for the long term interests of consumers of energy with respect to price, quality, safety, reliability and security of supply.

113(2): For the purposes of this section, in determining whether a particular thing promotes the long term interests of consumers of energy with respect of price, quality, safety, reliability and security of supply, regard must be had to the extent to which the thing is likely to result in the achievement of the following objectives:

- (a) the objective that consumers can be confident about the price, affordability, safety and reliability of essential energy services;
- (b) the objective that energy services should be provided to all consumers equitably;

(c) the objective that all consumers be treated fairly in their purchase of energy services;

(d) the objective that energy should be affordable for all consumers;

(e) the objective that the needs of those who, as consumers, are most vulnerable, or at greatest disadvantage, be protected, and that energy not be denied to any customer on the basis of financial hardship or other circumstances of vulnerability;

(f) the objective of providing accessible and timely redress where customer detriment has occurred;

(g) the objective that consumers always be entitled to proportionate, risk-based responses from suppliers of energy;

(h) the objective that consumer interest is served by the supply of clean and sustainable energy.

19. PAIC notes that the above definition proceeds on the basis of current s 113 and hence uses the term “consumer”; but notes that the defined term with the current exposure draft (ss 103 and 106) is “customer”. Uniformity would be achieved (and ambiguity avoided) within the NERL by using the term “customer” throughout (including in the NERL objective).

B HARDSHIP PROVISIONS

(a) Customer hardship regime

20. Part 2, Division 9 of the NERL sets out the statutory provisions for a national customer hardship regime.

21. Section 103 defines a “hardship customer” as a residential customer who has been identified under a retailer’s Customer Hardship Policy as a customer who is experiencing payment difficulties due to hardship.

22. Section 232 of the NERL requires each retailer to develop, publish and implement a customer hardship policy in respect of residential customers of the retailer, the purpose of which is to assist hardship customers better to manage their energy bills on an ongoing basis.
23. Section 233 prescribes the minimum requirements for a customer hardship policy, which must:
- (a) include processes for the identification by retailers and self-identification by residential customers of those experiencing payment difficulties due to hardship for the early response by retailers, and early response thereto;
 - (b) flexible payment options (including payment plans; which are dealt with at section 235) for payment of energy bills by hardship customers in accordance with the Rules;
 - (c) processes for identifying government concession programs and financial counselling services to assist in hardship mitigation, and notifying hardship customers; and
 - (d) other programs designed to assist hardship customers.
24. Section 234 requires a retailer to inform a residential customer of its hardship policy where it appears to the retailer that non-payment of an energy bill is due to the customer experiencing payment difficulties due to hardship.
25. Section 235 requires a retailer to apply payment plans for hardship customers in accordance with the Rules. NER Regulation 222(1) requires a retailer to offer a payment plan to a hardship customer, unless the hardship customer has had 2 payment plans cancelled due to non-payment in the previous 12 months.

26. Part 10 Division 1 of the NERL governs AER compliance regimes, which may be referable to customer hardship policies; while Part 10, Division 2 governs AER performance regimes which may also be referable to customer hardship policies.
27. Under the currently proposed scheme, the AER will not have an approval function in relation to a retailer’s customer hardship policy. The requirement is for the retailer to publish their customer hardship policy. The AER will monitor and must carry out compliance audits (and thereby ensure compliance) as to whether a customer hardship policy published by a retailer complies with the requirements of the NERL and NER Regulation (see section 1004(2) of the NERL) and whether the retailer is implementing their customer hardship policy.
28. Section 1016 of the NERL, supplemented by Part 3 of the Rules, gives the AER new functions in relation to the customer hardship regime to develop ‘national hardship indicators’ and to monitor and report on retailer performance against those national hardship indicators.

(b) De-energisation of hardship customers

29. Section 236 provides that retailer must give effect to the general principle that de-energisation of premises of a hardship customer due to inability to pay should be a last resort option.
30. PIAC notes that, as currently drafted, s 236 imposes an obligation of uncertain content on retailers. It is unclear what is meant by “giving effect to” a principle. It is also unclear what is meant by the aspirational normative language of “should”. If the intention of the provision is to impose a mandatory and prohibitive standard in respect of the circumstances of de-energisation, a preferable means of framing s 236 would be: “A retailer must only de-

energise the premises of a hardship customer as an option of last resort, and prior to doing so, must exhaust the following steps [to be prescribed].”

31. Rule 605 also provides that supply to the premises of hardship customers should be de-energised only where a customer has not paid a bill and has not:

(a) agreed to a Payment Plan (the requirements for which are set out in the Rules) or other payment option to pay a bill offered by the retailer; or

(b) adhered to that customer’s obligations to make payments in accordance with an agreed Payment Plan or other payment option relating to the payment of bills.

32. Retailers will also often be requested to provide installment payment options to a wider group of customers than just hardship customers. The retailer may choose to provide such payment options via the same payment plan that applies to hardship customers, but also may choose to provide an alternative payment plan option. The NERL and NERR do not contain specific provisions in relation to the requirements of payment plans other than for hardship customers.

(c) PIAC Submission

33. PIAC submits that the NERL ought prescribe a legislative baseline for all customers, under which the statutory protections currently prescribed by s 233 of the NERL are extended universally to all energy customers who are on standard contracts. This extension would acknowledge that basal protections are required in respect of essential services such as electricity and gas. It would also acknowledge that hardship is a condition that can potentially transiently affect any customer of energy services; and is more likely to affect customers on standard contracts. Hardship customers (or preferably, “customers experiencing hardship”)

would then constitute a separate category of persons experiencing distinctive payment difficulties, which would be recognized and respected through a hardship regime adumbrated in the NERL and the Rules and given effect to through each retailer's customer hardship policy.

34. Specifically, PIAC recommends the following layered regulatory structure:

(a) at the level of the NERL:

- i. the matters currently protected within s 233 be extended to all energy customers on a standard contract; or equivalent instrument;
- ii. provision be made for each retailer to develop, publish details regarding, (on its website and on correspondence with customers, including bills) and implement a customer hardship policy which addresses matters beyond the legislative minimum. The current proposal would create competition *within* and between hardship programs. This would be beneficial not only for energy customers but also for competition within the energy market generally. The focal point of energy competition has often been upon the offerings comprehended by market contracts. This proposal would create real possibilities for competition within standard contracts for customers who would not typically attract market contracts;
- iii. s 232 be amended to read: "The purpose of a retailer's customer hardship policy is to assist customers in hardship to maintain an affordable and continuous supply of energy on an ongoing basis"

- (b) at the level of the Regulations or Rules, hardship programs developed by retailers would be approved by the AER. This is an important mechanism to prevent an absence of regulatory control. Under the current legislative proposal, a retailer develops a hardship program with which it must subsequently comply. The AER then monitors compliance only with internally defined standards. This structure removes any element of external or objective assessment of a retailer's hardship program. Various options are available, including the development of a model hardship program, which each retailer must minimally implement, but which it can vary to increase the protections or options available to customers; or a set of minimal principles developed by the AER under the Rules;
- (c) the AER would then monitor compliance with retailers' customer hardship policies in compliance with the Rules; and
- (d) the AER would independently assess and publish materials in respect of matters such as national hardship indicators (current s 1016).

C DE-ENERGISATION/DISCONNECTION

35. Within the current exposure draft:

- (a) the term "connection" is used in the context of establishing physical infrastructure for the purpose of supplying energy to a premises; while
- (b) the term "energisation" is used in the context of opening/enabling an existing connection such that energy may be supplied to a premises.

36. Accordingly, “de-energisation” refers to the “shutting off” of the supply of energy, while disconnection refers to the physical removal of assets relating to the supply point.
37. While we understand the technical and systems distinction between the concepts of disconnection and de-energisation, PIAC submits that the use of the language of de-energisation will confuse consumers, and inappropriately transposes the language of distribution networks into a retail context.
38. Technical accuracy notwithstanding, conventional usage designates the cessation of energy supply due to default and other reasons as “disconnection” and such usage ought be retained within a legislative structure designed, *inter alia*, to advance the interests and awareness of energy customers.

D SECURITY DEPOSITS AND CREDIT CHECKS

(a) The legislative proposal

39. Part 2, Division 5 (ss 225 – 231) of the NER Regulations regulates the requirement and use of security deposits in respect of customer retail contracts.
40. Section 226 provides that a retailer may require a small customer to provide a security deposit at the time the customer requests the sale and supply of energy under a customer contract where:
- (a) the customer owes money to that retailer in relation to the sale and supply of energy to other premises; or

- (b) the customer has fraudulently acquired or intentionally consumed energy otherwise than in accordance with the energy laws within the past 2 years; or
- (c) the customer has refused or failed to provide acceptable identification to the retailer;
or
- (d) the retailer reasonably considers that the customer has an unsatisfactory credit history; or
- (e) the customer has refused or failed to provide the retailer with the permission or other information requested under rule 225 (1) (a).

41. Section 225 provides that, for the purposes of deciding whether to require a small customer to provide a security deposit under s 226, a retailer may:

- (a) request the customer to provide the retailer with:
 - i. permission to obtain a credit check of the credit history of the customer;
and
 - ii. other information relating to the credit history of the customer; and
- (b) take into consideration:
 - i. any credit history obtained as a result of the credit check; and
 - ii. any credit history provided by the customer; and

- iii. any other available information that relates to the credit history of the customer,

that is reasonably required for the retailer to assess the ability of the customer to meet the customer's financial obligations under a customer retail contract.

- 42. The remaining provisions of Part 2, Division 5 govern the mechanics of obtaining, applying and returning a security deposit. Section 227 governs the payment of a security deposit; s 228 the amount of a security deposit; s 229 interest on a security deposit; s 230, use of a security deposit, and s 231 the obligation to return a security deposit.

(b) The PIAC proposal

- 43. PIAC makes two central submissions in respect of the request for and application of security deposits, as follows.

- 44. *First*, a circularity infects s 226(1)(d) and (e) which does not infect s 226(1)(a)-(c) and which recommends that subsections (d) and (e) ought be abandoned.

- 45. Sub-sections (1)(a) – (c) of s 226 prescribe factors which are likely indicia of a customer's possible inability to consistently meet its bills, sufficient to predicate a request for a security deposit. These factors are: existing debt to the retailer; historical fraudulent conduct; and a failure to provide adequate identification to the retailer. By contrast, sub-sections (d) and (e) of s 226 provide that a retailer may require the provision of a security deposit where the retailer reasonably considers that the customer has an unsatisfactory credit history or the customer has failed or refused to provide the retailer with permission or information under s 225.

46. Section 226(1)(d) sets a subjective and discretionary standard of assessment for a retailer: it must reasonably consider that the customer has an unsatisfactory credit history. There is no legislative guidance as to the grounds on which such a reasonable view may be reached; although these are necessarily grounds other than the factors prescribed at s 226(1)(a)-(c). The interaction of ss 225 and 226 suggests that one of the grounds upon which such a view may be reached is a request for information under s 225. So much is confirmed by s 226(1)(e). However, this results in a circularity in which a retailer may form a reasonable view that a customer has an unsatisfactory credit history as a result of an information request under s 225 (including a failure to respond to such a request), which request has no external justifying ground.
47. Accordingly, the factors prescribed at s 226(1) ought be external and reliable indicia of customer's possible inability to consistently meet its bills, sufficient to predicate a request for a security deposit; as opposed to subjective or circular criteria.
48. *Secondly*, any credit check undertaken for the purpose of ascertaining the ability of a customer to pay for energy services should be restricted in scope to an enquiry into payment of previous energy bills.
49. Such a limitation acknowledges:
- (a) that energy services are essential services and ought be distinguished – in respect of the attitude of a customer to their payment and discharge - from other debts, including other forms of direct deposit, telecommunications bills; indeed, most other payments, with the exception of rent. Given the essential role played by energy services, there is a category error in performing a credit check in respect of a customer's payment of other bills; and

- (b) the substantial disparity of bargaining power between residential customers of energy and retailers and distributors thereof.

E **GUARANTEED SERVICE LEVELS/COMMUNITY SERVICE OBLIGATIONS**

50. Under clause 14 and Annexure A of the AEMA, as amended in 2006, the States and Territories maintain responsibility for certain regulatory functions including: off-grid networks; community service obligations; measures to maintain distribution tariff equalisation schemes; land use, planning and environmental approvals or policies; and other items as listed in Annexure 2 of the AEMA.
51. PIAC submits that measures should be taken to ensure that NECF leaves unaffected the operation of CSO and GSL mechanisms at the State level; to ensure that guaranteed service levels continue to apply and community service obligations continue to be fulfilled.

Additional Comments provided in March 2010

52. In respect of the proposed PIAC comments on the enforcement section of the revised NECF package, I have no proposed amendments; I think it reads well. I note that it is very strange that the drafter has chosen a model of contract damages for section 1303. The tortious or statutory model of time running from crystallization of harm would have been more analogous. The model they have chosen in effect frames the legislation as a contract between the AER and a person who contravenes a provision.
53. In respect of the current framing of the objects provision at section 113, I consider that that the second exposure draft is an improvement on the first draft and that the suggestions below are not currently drafted in a way that could sensibly be given effect to. I am not clear on how energy costs could be applied equitably between and within different customer

classes (energy billing will always correlate to individual energy use and would be difficult to assess on an aggregated basis across classes of user). Similarly, I think detailed observations as to sustainability may better belong in environmental legislation, and as currently drafted below is too vague to be given any precise meaning.

54. The same objectives might be attained by proposing the following minor amendments:

Section 113*: The objective of this Law is to promote efficient and sustainable investment in, and efficient and sustainable operation and use of, energy services for the long term interests of all consumers of energy with respect to price, safety, reliability and security of supply of energy.

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