



**Water Industry Competition Act –
Regulations Consultation Paper
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Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) seeks to promote a just and democratic society by making strategic interventions on public interest issues.

PIAC is an independent, non-profit law and policy organisation that identifies public interest issues and works co-operatively with other organisations to advocate for individuals and groups affected.

In making strategic interventions on public interest issues PIAC seeks to:

- expose unjust or unsafe practices, deficient laws or policies;
- promote accountable, transparent and responsive government;
- encourage, influence and inform public debate;
- promote the development of law—both statutory and common—that reflects the public interest; and
- develop community organisations to pursue the interests of the communities they represent.

Established in July 1982 as an initiative of the 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 Centre Funding Program. PIAC generates approximately forty per cent of its income from project and case grants, seminars, consultancy fees, donations and recovery of costs in legal actions.

Utility Consumers' Advocacy Program

The Utility Consumers' Advocacy Program (UCAP) was established in 1998 by PIAC, with funding from the NSW Government, to develop policy and advocate in the interests of residential consumers, particularly low-income consumers, in the NSW energy and water industries. The project is based at PIAC and UCAP staff receive broad policy direction from a community based Reference Group, who's members include:

- Council of Social Service of NSW (NCOSS);
- Tenants Union;
- Combined Pensioners and Superannuants Association of NSW (CPSA);
- Park and Village Service;
- Western Sydney Community Forum;
- Rural and remote consumers; and
- Institute of Sustainable Futures, University of Technology.

Water Industry Competition Act

PIAC welcomes the opportunity to provide comment on the *Water Industry Competition Act 2006 (the Act)* and its proposed regulations ("*WICA Regulations*"). Where appropriate PIAC has answered the "Key Questions" as set out in the Regulations Consultation Paper. We have also provided comments on additional issues to assist the drafting of the regulations.

1. Framework for regulation in NSW

PIAC considers that the fundamental issue underpinning the formulation of *WICA Regulations* is whether the business of a licence holder under the Act is to provide potable water services to residential consumers, or rather, to provide non-potable water to private companies.

The two businesses require very different approaches to the licence framework and PIAC anticipates that accommodating these two licence groups under a single regulation will be very difficult.

PIAC recommends a licence or regulations framework that can issue different licences for businesses providing different water services. Distinctions between service providers could be made on the basis of potable versus non-potable, residential versus commercial, and distribution versus retail service delivery.

Licence obligations should vary in accordance with what level of influence a licence holder potentially has over public health or safety. The more serious the influence, the more onerous the licence obligations should be.

Key question:

As the private water industry matures, obligations that will apply uniformly to all licence holders of a particular class will be contained in the Regulations, or in instruments made under the Regulations, and obligations applicable to specific licence holders will be contained in their licences. It may take some experience of the new regulatory regime for all areas of common obligations to be identified. Are there any common obligations that need to be addressed in the initial Regulations before the Act can be commenced?

Despite the classification in the framework as set out above, PIAC agrees that common obligations can be identified, though they may be better described as fundamental obligations. PIAC recommends that the following fundamental obligations be addressed in the initial *WICA Regulations*:

- Public Health – eg. Water quality, safe infrastructure, maintenance, and continuity of supply.
- Equality – eg. Obligation to supply residential consumers or to ensure equitable service delivery to the community.
- Environment – eg. Obligation to prevent environmental degradation or to jeopardise water catchment.
- Accountability – eg. Reporting on water quality is to be publicly available, and Ministerial power to review and revoke licenses.

2. Water Quality and Public Health

Standards for potable and non-potable water quality must be incorporated into the *WICA Regulations* to set the minimum standard for all licence holders providing the specified services.

In regards to potable water, PIAC supports nothing less than the standards that exist under licence requirements for Sydney and Hunter Water and the Sydney Catchment Authority. PIAC endorses the Consultation Paper's comments that any new competitive regime should not derogate the current public health requirements as prescribed by the *Public Health Act 1991*.

PIAC does not support a case-by-case assessment of the risks applicable to individual licence holders. Instead, PIAC recommends that additional licence conditions should be imposed according to the particular class of licence that take account of issues specific to that class of licence holder.

3. Construction, Operation and Maintenance of Water Industry Infrastructure

Key Questions:

What initial asset management obligations should be imposed on licensed network operators in the Regulations? What services should the new regime aim to ensure can continue in the event of a physical disruption to water and sewerage services, and how should the new regime achieve this?

In 1997, Adelaide endured the “Big Pong”. It has been argued that this water industry catastrophe was caused by an infrastructure maintenance failure, which was a consequence of commercial decisions to maximise profit by minimising operating and maintenance costs.¹

The NSW Government cannot establish a legislative framework that jeopardises the provision of water services to the community. The aim of the *WICA Regulations* must be to ensure the continuous supply of potable water and other services to residential consumers, as even short term supply failures instigate long term problems and damage to the industry. The *WICA Regulations* must minimise the likelihood of any service disruption occurring that compromises the health of the community.

PIAC recommends the adoption of robust regulations that impose construction standards on water industry infrastructure, as well as ongoing monitoring of that infrastructure to prevent breakdowns and supply disruption.

4. Sustainability of Water Resources

Key Question:

The Act obliges retail suppliers to obtain sufficient quantities of water otherwise than from a public water utility. The Act also enables orders to be issued to require licence holders to make financial contributions to the Water Savings Fund and the Water Management Act 2000 aims to secure the sustainable allocation of water resources for entitlement holders and the environment. Are there any additional obligations that should be placed on licence holders to ensure the sustainability of the water resources that they use or acquire?

PIAC endorses the requirement that licence holders make contributions to the Water Savings Fund. Additional obligations on licence holders should include:

1. Public disclosure of the source of the water supply used by licensed retail suppliers, or at least information on the water quality should be publicly available.
2. An obligation that license holders supplying potable water be subject to the same obligations as Sydney Catchment Authority has under the *Sydney Water Catchment Management Act 1998*, such as:
 - to ensure that the catchment areas and the catchment infrastructure works are managed and protected so as to protect water quality, public health and safety, and the environment
 - to ensure that water supplied by it complies with appropriate standards of quality.
3. An obligation that licence holders comply with relevant environmental planning and protection legislation, with the threat of licence revocation if licence holders breach the legislation.

Further, if environmental planning and protection legislation need to be supplemented by *WICA Regulations*, consideration must be given to what the consequence of a breach of those regulations would be.

PIAC would also like to draw attention to possible complications resulting from the interplay of the Act and the *Fluoridation of Public Water Supplies Act 1957 (Fluoridation Act)*. In particular, PIAC seeks clarification as to whether the *Fluoridation Act* will apply to licensed retail suppliers under the Act. PIAC’s concern is that all retailers supplying potable water should be subject to the same process as prescribed in the *Fluoridation Act* so as to prevent water being marketed as “better quality” because it is “fluoride free” or “fluoride full”.

¹ Sheil, Christopher (2000) *Water’s Fall*. Pluto Press, p 57.

5. Consumer Protection

Key Question:

Should the minimum consumer protections provided through the licensing regime vary by nature or size of customer (e.g. procedures for the handling of complaints received from households) and should these minimum protections be prescribed in the Regulations or set out in Codes of Conduct, which could be developed by service providers?

PIAC recommends that minimum protections should be prescribed in the *WICA Regulations*. Setting minimum standards would not prevent innovative service providers from developing Codes of Conduct that go beyond the prescribed minimum standards, and marketing them as leading industry consumer protection policies.

PIAC observes that the Consultation Paper recommends the development of codes of practice on debt and disconnection. PIAC has provided comment on code development below, but notes that drafting the *WICA Regulations* may require amending relevant sections of the *Water Management (Water Supply Authorities) Regulation 2004* (in particular, Part 7 Division 4), to ensure that regulations pertaining to consumer policies are consistent across both monopoly providers and new market entrants.

5.1 Disconnection Policy

Water service providers presently have the right to disconnect or restrict customers from water if they have not paid their water bills. PIAC believes that the current reforms to the water industry, instigated by the Act, should include the removal of the right to disconnect residential household customers who have unpaid water charges.

There are strong reasons to remove water disconnection / restriction of residential households as a penalty for the inability to pay for the service. These include:

1. Water restrictions and disconnections are extremely stressful, severely limiting the ability of households to perform basic functions such as bathing and meal preparation.
2. There are strong public health reasons for ensuring a consistent supply of good quality drinking water to all residential households in NSW.
3. Disconnections from water are usually rare. For example, only 32 water disconnections occurred in 2004/05 as a result of non-payment to Hunter and Sydney Water.
4. Water restrictions / disconnections are relatively expensive for retailers in comparison to the revenue forgone in unpaid water usage charges. The immediate impact on water retailers of losing the capacity to disconnect / restrict supply is likely to be minimal.
5. A longstanding issue in NSW is that tenants may be disconnected / restricted if their landlord has neglected to pay water rates. A non-disconnection / restriction policy would safeguard against this.
6. If water retailers did not have disconnection / restriction as an option, then there would remain other means to pursue non payment of water bills, including the use of payment plans (where customers can arrange either to pay back a debt over a period of time or arrange water payments in smaller more regular amounts), or through legal action for debt recovery. Removing disconnection / restriction as an option may encourage retailers to work more closely with customers facing financial difficulty to resolve debt, with legal action being a last resort option.

5.2 Payment Plans

Failing the removal of the right to disconnect for non-payment of bills, PIAC strongly recommends the *WICA Regulations* include policies to prevent customers from being disconnected on the basis of their incapacity to pay alone.

PIAC considers this to be an essential customer protection and its adoption would make the *WICA Regulations* consistent with the *Electricity Supply (General) Regulations 2001 (Electricity Regulations)*. For example, section 13A of the *Electricity Regulations* makes it a condition for a licence holder to operate a payment plan, and cannot disconnect a customer unless the customer has failed to accept an offer of a payment plan or failed to comply with the terms of a payment plan.

PIAC strongly recommends that the *WICA Regulations* prescribe that payment plans are to be operated by all retail suppliers in NSW for customers and should:

1. include an offer for the customer to pay for their water consumption (in advance or arrears) by instalment payments;
2. be established having regard to the customer's capacity to pay, and the customer's expected consumption needs over the following twelve month period.
3. inform the customer of:
 - the period or periods of the plan;
 - the amount of each instalment and the frequency of instalments;
 - if the customer is in arrears, the number of instalments to pay the arrears;
 - if the customer is to pay in advance, the basis on which instalments are calculated; and
 - to provide fair and reasonable procedures for dealing with payment difficulties that the customer may experience under the plan.
4. include Centrepay as a payment plan option.²

5.3 Cooling Off Periods

PIAC anticipates that service providers in the water industry will market their business in the same manner as electricity retailers do in the energy market, that is, through direct sales (door to door and tele-marketing). With this manner of marketing, cooling off periods play an important part in ensuring effective competition in the market, and protecting customers from unfair contracting arrangements.

PIAC believes that robust regulation of marketing is required to ensure that the demand side is able to effectively participate in the market. The *WICA Regulations* should establish the following, as rights for consumers:

1. A written disclosure notice including key information about the contract, as well as a copy of the customer supply contract, must be provided to customers within 2 business days of contract formation unless the service provider has already provided these documents.
2. A customer may terminate a contract at any time within 10 days of receiving the disclosure notice and contract. Customers may exercise this right either in writing or verbally.
3. A service provider must keep a record of a customers' termination of a negotiated contract during the cooling-off period, appropriate to the manner in which notice was given to the service provider. For example, for verbally notified terminations, the service provider could keep a recording of the conversation or provide the customer with a unique identifier, similar to a receipt number, for the termination transaction.

² PIAC notes that Sydney Water recently adopted Centrepay as a payment plan option.

5.4 Billing

PIAC recommends that the *WICA Regulations* provide basic criteria that retailers must include on customer bills for water consumption, similar to that prescribed in Part 3, Division 4, of the *Electricity Regulations*. This would provide an industry consistent billing format, making it easier for customers to understand their bill.

Further, the information on the bill should be presented in a manner that is easily understood so that customers are more likely to absorb the information regarding their consumption habits. This assists in the development of a competitive market by properly informing customers, who can then exercise explicit informed consent.

5.5 Customer Transfers

PIAC supports robust regulations concerning the obtaining and recording of a customer's consent to transfer to another service provider. Customer transfers without consent is a major cause of complaint in the energy sector. Energywatch, the United Kingdom's energy watchdog, noted that with the liberalisation of the energy market, the instance of erroneous customer transfers increased.³ In NSW, the Energy and Water Ombudsman has also received an unacceptable number of complaints regarding customer transfers in the energy market.⁴

The *WICA Regulations* should ensure that a customer transfer can only result from a service provider obtaining, and being able to demonstrate, a customer's explicit informed consent to be transferred. Competition will not be aided by having regulations that promote an "ease of switching", if there is no confidence that the switching occurred with a customer's explicit informed consent.

PIAC recommends that a centralised collection point be established to track customer transfers, in order to assist the correction of erroneous transfers, or being "slammed". The Independent Pricing and Regulatory Tribunal (IPART) or the Department of Water and Energy (DWE) would be appropriate candidates for this task.

Key question:

Are existing safeguards in relation to the transfer of customer information to licence holders adequate? Are any additional safeguards required to protect the interests of customers, licence holders and incumbents?

PIAC supports the Consultation Paper's recommendation that a customer's information can only be viewed by those who have obtained the customer's authority. It is unreasonable, and likely to be a violation of privacy laws, for a service provider to consider that they have access to a customer's personal information without the customer's consent.

6. Retailer of Last Resort (RoLR)

Key Question:

What (if any) further matters need to be addressed in Retailer of Last Resort arrangements under the Regulations or are these matters better considered on a case-by-case basis?

In NSW, a recent RoLR event in the energy sector caused consumers and state-owned utilities to cover the costs incurred by a private retailer withdrawing from the market. It should be recognised that this RoLR event was not caused by retailer failure, but rather by the retailer making a business decision to withdraw from the market for the sake of financial expediency.

³ See Allan Asher's paper "Responsible Market's", delivered to PIAC on 4 May 2007, at page 1:

http://www.energywatch.org.uk/uploads/Public_Interest_Advocacy_Centre_4_May_2007.pdf

⁴ See the Energy and Water Ombudsman Annual Report, 2005-6, at page 18:

http://www.ewon.com.au/documents/annual_reports/EWON_AnnReport06_LR.pdf

There are considerable costs to consumers and RoLRs stemming from a market failure. Triggering a RoLR event, that is, halting the provision of an essential service, and contravening the fundamental obligation of ensuring the continuity of supply, should not be considered lightly.

PIAC urges the NSW Government to devise policies that dissuade companies from gaming the market. The *WICA Regulations* should outline what consequences a failed retailer must face once it has triggered a RoLR event, for instance, having its licence revoked.

PIAC also recommends that other initiatives be considered to reduce the impact of RoLR events on consumers and retailers. For example, the *WICA Regulations* could require service providers to provide a security fund to cover any expenses incurred by a service provider's decision to withdraw from the market.

7. Licensing Administration

PIAC acknowledges that compliance costs are a burden and may act as a barrier to new entrants to the market. However, compliance with regulations and licensing obligations are a necessary aspect of ensuring the NSW Government's goal, and responsibility, of providing for the safe, sustainable and equitable delivery of water services.

PIAC recommends that the administering of the licence regime should be transparent, accountable and well resourced.

8. Licensing Exemptions

Key Question:

Should there be certain categories of water industry infrastructure exempted from the requirement to hold a licence, for example, on the basis of its size, location or operation before the regime is implemented and, if so, what categories?

PIAC notes that the Act is already comprehensive in exempting bodies that already have appropriate regulatory obligations under other Acts. PIAC does not envisage that new entrant service providers will suffer a duplication of regulatory obligations. In any event, duplication can be avoided by attentive licence drafting rather than by removing all regulatory or licence obligations.

The service provision of water is the essential service to be managed by government. PIAC is eager to see the *WICA Regulations* ensure that all players in the water industry, public or private, are accountable to the NSW Government. Indeed, PIAC seeks clarification as to how licence exempt new entry service providers will be accountable to the public, particularly in the event of a service provider causing a market failure, resulting in the disruption of this essential service.

PIAC has recommended earlier in this submission that there should be differing classes of licences, with some licences subject to more onerous regulations than others. This flexible approach to licensing conditions minimises the need for certain service providers to be exempted from obtaining a licence.

PIAC recommends that should licence exemptions be insisted upon, any further licence exemption process should be vigorous, requiring the service provider to apply for licence exemption. Exemption would be dependant on factors such as the effect exemption has on the consumer, the service provider's impact on the environment, or the essentiality of the service provided.

PIAC calls on the NSW Government to closely consider the effect an exemption may have on a consumer, or body of consumers. Licence exemptions may, for instance, undermine other NSW Government policies aimed at promoting consumer welfare. By way of example, current licence exemptions prevent residential park tenants from accessing programs created under the Water Savings Fund.