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ADVOCACY CENTRE

**Submission to AEMC Draft Report
Updating the Regulatory Framework for
Embedded Networks**

27 March 2019

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 Society of NSW;
- Good Shepherd Microfinance;
- Affiliated Residential Park Residents Association NSW;
- Tenants Union;
- Solar Citizens; and
- The Sydney Alliance.

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AEMC Review of regulatory arrangements for embedded networks

PIAC welcomes the opportunity to comment on the AEMC's Draft Report for the Review of regulatory arrangements for embedded networks (the draft).¹

The growth in the number and size of embedded networks in Australia presents a variety of regulatory challenges. PIAC concurs with the AEMC and other stakeholders that the current two-tier embedded network regulatory framework is inconsistent, and has provided perverse incentives to embedded network operators, leading to poor outcomes for many consumers.

PIAC broadly supports the draft, and many of the AEMC's recommendations. We strongly support the Commission's view that consumer protections should be driven by the needs of customers and not the business model of suppliers.² PIAC considers that this should be the fundamental consideration for the Commission in determining how to approach implementation of the draft, and in particular determining the extent and mechanisms for transitioning legacy embedded network arrangements.

This submission focuses on several key considerations that PIAC contends should flow from adopting this approach, specifically:

- That transition of legacy embedded network arrangements into the new framework should be assumed as a starting point, with any exemptions having to demonstrate explicitly that the potential consumer detriment resulting from transition outweighs the benefit of the improved consumer protections.
- That choice of retailer should not be considered a consumer benefit in and of itself, except where it delivers, or is likely to deliver, demonstrated improvements to consumer outcomes. This is particularly important in consideration of issues where competition is assumed as a benefit to be weighed against known potential cost impacts for consumers (such as the cost of infrastructure upgrades resulting from transition into the updated framework).
- That arrangements for ENSPs to efficiently and transparently recover the costs related to embedded network infrastructure are a more appropriate means of ensuring that the intent of the draft is delivered, and the potential cost impacts upon consumers are minimised (more appropriate, for instance, than assuming that these costs will be recovered through other lease or tenancy arrangements). PIAC regards this as particularly important in facilitating the transition of some legacy embedded networks.
- That short term and long-term holiday accommodation (indeed all residential accommodation) should be treated consistently in the new framework, to minimise the potential for unintended consequences impacting consumers (particularly long-term residents of caravan or residential park accommodation). PIAC understands that it will be necessary to

¹ AEMC, *Draft Report, Updating the regulatory frameworks for embedded networks*, 31 January 2019.

² *Ibid*, i.

have a mechanism to assess networks where short-term accommodation makes up the bulk, or all of the consumers served, and adjust requirements accordingly.

- That the inter-related issues regarding embedded gas networks, and the treatment of bulk hot water, are sufficiently different to those relating to electricity to require specific examination, which should be undertaken as part of a separate AMEC process to update the framework for Gas embedded networks.

A transition to ensure better consumer protections for new and legacy embedded networks

All consumers should enjoy a basic level of protections in their access to electricity as an essential service, regardless of how those services are provided. In submissions to the Consultation Paper stage of the Review, PIAC and other stakeholders identified significant gaps in the consumer protections framework for embedded networks. Consumers in many embedded networks are currently treated as second class energy citizens, with far fewer important protections than others. This inequality is all the more significant when considering the large, though unquantified, number of consumers in embedded networks.

Accordingly, PIAC contends that transitioning legacy embedded networks into a new framework that provides better, and more consistent protections to all consumers in embedded networks, should be undertaken as a priority. Further, the AEMC should prioritise protections for exempt embedded network consumers (whether in new or legacy embedded networks) regardless of the progress of other regulatory reforms to provide vital consumer protections to currently under-protected consumers.

PIAC highlights the report produced by the Alternative Technology Association (ATA, Now Renew) assessing consumer protections in emerging energy markets.³ This report includes a list of fundamental protections, stating that all consumers should be confident that:

- They will be able to connect to an energy supply;
- Their energy supply will meet minimum reliability, quality, and safety standards and they will be compensated if it doesn't;
- Sufficient notice will be given for any planned interruptions to supply, and special consideration given to people reliant on life-support systems;
- They will be given clear information about the service they are purchasing, a cooling-off period for any contract they sign (for more novel supply arrangements), a limited right to exit a contract and revert to their previous contract;
- The basis of all energy supply charges is clear and subject to regulatory oversight;
- They have access to historical billing data;
- They have access to rebates on their energy costs if they are eligible for concessions;
- If they come into payment difficulties, they will be given support and flexibility and only disconnected as a last resort and according to a regulated process;

³ ATA, *Empowering the future – Appropriate regulation and consumer protections in emerging energy markets*, 2016, <http://www.ata.org.au/wp-content/uploads/2016/11/Empowering-the-future-appropriate-regulation-and-consumer-protections-in-emerging-energy-markets_ATA.pdf>.

- They have access to an external dispute resolution service if they are unable to resolve a dispute with their energy supplier;
- During billing disputes, they can stay on supply and not have to pay the disputed amount; and
- If their supplier ceases trading, their supply is uninterrupted.⁴

PIAC contends that these protections should always apply to both standard supply and embedded network consumers, with any exemptions being specifically identified and limited to those circumstances where consumer detriment is not a significant risk. Further, PIAC recommends that the AEMC regards access to these protections as the primary guiding principle in the implementation for the new framework covering embedded networks, particularly in relation to determining how and when to transition legacy arrangements to the new framework.

Specifically, PIAC recommends:

- That the starting premise for the AEMC should be the intention to transition all embedded networks into the new framework, and
- That consideration of any potential exemptions from transition of legacy networks must be informed by effective access to the listed protections, and explicitly identify how these protections will:
 - Be delivered by alternative arrangements (for example a community energy project), or
 - Be effectively reduced or outweighed by other consumer impacts (such as costs), should that legacy network be transitioned, or
 - Not be impacted, or not be relevant (such as in arrangements where the embedded network does not serve consumers).
 - Be monitored by the AER, with a view to revoking exemptions where consumers are not being effectively delivered the identified protections
- That transition be made a priority, with a specific sunset date identified, by which time there will be consistent application of the framework across new and legacy embedded networks,

At a minimum, reforms should provide all embedded network consumers with access to dispute resolution and concessions, while extending existing standing offer price cap (or a default market offer, where this is implemented) to off-market customers of authorised on-sellers and improving the ability of the AER to monitor and enforce compliance with its exemption guideline.

Addressing the distinction between the treatment of long and short-term holiday accommodation

In the draft, the AEMC signals an intent to treat short-term and long-term holiday accommodation (such as caravan and residential parks) differently, with short-term accommodation embedded networks able to continue to apply for exemptions, and long-term accommodation embedded networks required to be covered by registered network service providers and authorised retailers.

⁴ Ibid, 8.

PIAC has concerns that such a distinction is likely to exacerbate existing issues, and lead to a range of unintended impacts upon potentially vulnerable consumers for whom residential parks are the only affordable housing option.

As it stands, consumers provided electricity services under embedded networks in caravan and residential park arrangements are some of the most vulnerable consumers. There are entrenched power imbalances between residents and park operators, a lack of transparency in the composition of their accommodation and essential service charges, an un-regulated and often unsafe standard of service delivery, and a lack of consistent regulatory enforcement. This often sees consumers paying charges well in excess of the cost of energy services that they receive, without access to minimum safety and consumer protection provisions. Energy charges can often be combined with rental or other charges, without transparent usage, price or other information. Recourse to complaint or dispute resolution is complicated and even in rare cases where residents are able to successfully dispute energy related charges, they may end up evicted and without any alternative accommodation options.

PIAC supports the AEMC in seeking to address potential circumstances such as these by bringing long-term holiday accommodation into the updated framework, and subjecting them to improved monitoring and enforcement by the AER.

However, many caravan and residential parks have a (sometimes fluid) mix of short and long-stay tenants, making a distinction between the two (in a static framework) irrelevant at best, and unhelpful at worst. The reality of the often blurred lines between short and long-term accommodation mean that the updated framework cannot practically distinguish between them without creating perverse incentives that would potentially undermine the impact of reforms. Such incentives include:

- Where an operator currently offers long term accommodation or a mix of short and long-term accommodation, they would have an incentive to cease offering long-term accommodation in order to avoid the increased expense and time required to upgrade their network, and put in place the systems and arrangements required to be a network service provider or retailer, under the framework.
- Where an operator currently offers long term accommodation, they would have additional incentive simply to register as a short-term holiday accommodation operator, continuing to offer services to long-term residents yet without any recourse to basic protections or standards.

In both of these circumstances, the scope for long-term residents to complain or dispute is practically limited by their extreme vulnerability to a range of retaliatory actions by an operator. This vulnerability is exacerbated by the lack of regulatory oversight and enforcement responsibility (being neither clearly energy-based, nor clearly tenancy-based).

PIAC recommends that all holiday accommodation in embedded networks be required under the new framework to be a registered network service provider and retailer (either on-market or, authorised off-market retailer). We accept that this will require the creation of criteria so networks

that exclusively offer short-term accommodation (and have never offered long-term accommodation) can apply for an exemption from some elements of the new framework.

For instance, while elements of the framework aimed at ensuring standards of safety and security of supply should apply across the board⁵, it may not be necessary to universally apply or enforce all standards of billing, information or metering. PIAC recommends that implementation involve determining an appropriate framework to guide the AERs development of an application and monitoring system to identify and deal appropriately with networks that demonstrably deal wholly, or mostly with short term accommodation.

Improving access to competition in legacy embedded networks

PIAC is concerned that the AEMC's focus on access to competition seems to treat choice of retailer as a goal in itself, rather than as one potential mechanism for delivering better consumer outcomes. This is particularly important in consideration of the costs involved in facilitating access to retail competition, and the potential and likelihood of those costs being sufficiently mitigated by competition, where:

- retailers may have little or no interest in acquiring child-metered embedded network customers, especially those in smaller networks where they would have to contract with the embedded network operator;
- in some embedded networks, the cost of enabling access for contestable retail (including metering, metrology, and electrical works), may outweigh the benefits of having an embedded network in the first instance (depending upon the mechanism for recovery of costs involved in the transition, which we will address later in this submission);
- the draft assumes that on-market competition will provide ENSPs and off-market retailers with an incentive to control costs to 'win-back' any customers within the embedded network who may choose to go on market⁶. However, this likely over-estimates the incentive for ENSPs and off-market retailers, as it under-estimates the scope for them to continue to over-recover their costs either by directly charging their customers, or by indirectly doing so by raising other charges or fees (which are not regulated or transparent, and able to be charged whether consumers are on or off-market).

Broadly stated, the argument for increasing retail competition is that when a variety of retailers are competing for the business of consumers, they will provide more efficient and innovative services to gain a competitive advantage, driving down prices to result in better consumer outcomes.

Experience over many years in the deregulated retail energy market outside of embedded networks suggests that this has not been the case. Instead, the complexity of the retail energy market has consistently mitigated against informed choices by consumers and resulted in what

⁵ Which would seek to address, at a minimum, instance of any park residents being supplied via unsecured, and unsafe household extension leads

⁶ AEMC, *Draft Report, Updating the regulatory frameworks for embedded networks*, 31 January 2019, 83.

has been called a ‘confusopoly’. For many consumers, inability to effectively engage with the market means they default to very expensive energy contracts with high retail margins.

Where embedded networks consumers that are provided services by an authorised on-seller have access to the protections listed above, and access to any price regulation or protection that may be afforded through the implementation of a Default Market Offer, PIAC considers that access to retail competition may not be a practical consideration.

For this reason, PIAC contends that the AEMC should only require retail competition in embedded networks where it can be clearly demonstrated that it is likely to provide consumer benefits that outweigh the costs. This could include the requirement for retailers to express interest in providing energy at a lower rate than alternative providers in a given network as evidence that retailer offers will be available, rather than relying on assumptions that this will be the case.

Network charging and cost recovery

PIAC contends that consideration should be given to providing a mechanism for some ENSPs to recover their internal network costs through network charges, particularly in relation to potential costs related to the upgrade of infrastructure in legacy embedded networks.

In the current exemption framework, ENSPs are prohibited from recouping the costs associated with their own network infrastructure through energy bills.⁷ PIAC understands that this would continue to be the case under the new embedded network framework, as the network tariff that is paid by the consumer will effectively be a direct pass-through or shadow of the local DNSP’s network tariff. In both cases, this means that the ENSP’s means of recouping network costs is generally limited to leasing or other agreements with consumers.

PIAC considers that it may be appropriate to remove this prohibition in some circumstances, particularly in relation to transitioning legacy embedded networks, and the infrastructure upgrade costs that will result. In many residential parks, for example, internal embedded network infrastructure was not developed as an up-front capital project as it would be in shopping centre or apartment building embedded networks. Instead, network infrastructure has been built up over time, often decades, as parks have transitioned from exclusively holiday accommodation to places of permanent residence, increasing the demands on these embedded networks. As this evolution has occurred, there have also been changes to safety, metering and technical requirements that have potentially increased the gap between the infrastructure in these residential parks, and the minimum standards required for any other residences.

In consultations with park residents undertaken earlier in this process, PIAC found that embedded networks are often in poor repair, unreliable, do not comply with current wiring rules, and are potentially unsafe. It is not uncommon, for example, for electricity connections to involve household extension leads in place of hard wiring and fixed connections.

While these circumstances involve a level of service and safety for consumers that is unacceptable, the need to repair, maintain or upgrade infrastructure may result in considerable

⁷ Ibid, 64.

additional expenditure for operators, at short notice, that has not been factored into existing rent payments or other cost recovery arrangements. Many park residents are on fixed incomes and are unlikely to be able to afford increased rents or fit-out charges, that may already be problematic, poorly regulated or subject to the relative power imbalances between park operators and residents.

In these circumstances, it would be preferable to create a transparent mechanism for an ENSP to have the option to progressively collect network management costs through an extra ENSP network charge over a longer period of time.

In the past, this practice has been prohibited for two reasons. Firstly, it is impractical for ENSPs to go through an AER determination of network charges because of their small size. Therefore, there has not been a mechanism through which to regulate what individual ENSPs charge consumers to maintain the network. Secondly, lease agreements have been considered appropriate.

Clause 4.6.3 of the AER's network exemption guideline considers this appropriate because:

the AER considers the network development costs to have been met in the initial establishment of the facility. Such costs are capital in nature and are normally recoverable through fit-out charges or the like.

PIAC disagrees with this conclusion and recommends that the AEMC provide the AER and mechanism and direction to change this for several reasons.

Firstly, while a full revenue determination for each ENSP is clearly impractical, recovering the costs through lease payments provides significantly less regulatory protection than having them recovered transparently through energy bills. In previous reports, AEMC recommended giving the AER increased embedded network monitoring and enforcement responsibilities, meaning that there would be scope for a level of protection for consumers subject to the recovery of embedded network infrastructure charges, in the form of regulatory oversight of costs recovered through energy charges.

By contrast, the AER has no jurisdiction over private rental, lease or strata agreements and has no monitoring and enforcement powers over embedded network cost recovery through lease payments. With numerous jurisdictional regulations and frameworks governing such arrangements, there is evidence that consumers are burdened with excess payments that are not-transparent, and subject to significant power imbalances between residents and operators.

Therefore, PIAC contends that cost recovery through energy charges would result in better regulatory protection for embedded network consumers than recovery through lease payments.

Secondly, while the up-front costs of network development can be easily added to lease payments, this becomes more difficult when considering ongoing maintenance of an aging embedded network such as those in residential parks, with the potential for expensive works in these networks to create considerable consumer detriment through a sudden increase in other charges. Alternatively, the requirement to undertake these works without a transparent

mechanism to recover these costs could affect the solvency of operators, or limit their offering in ways that would negatively impact upon the affordable housing options available to such residents, for whom few other options exist.

Thirdly, it does not recognise that some residential park operators in NSW are currently already engaging in practices which amount to a de-facto network charge, by retaining the difference between the price they are paying, and the standard retail price that they are able to charge under obsolete provisions of section 77(3) of the *Residential (Land Lease) Communities Act 2013*, (NSW). Similar practices may currently be possible in other jurisdictions, and result in the non-transparent, unregulated and un-monitored collection of excess charges from embedded network customers (particularly those in caravan and residential parks).

Allowing recovery of internal network costs by the embedded network operator in some defined and monitored circumstances, would provide a consistent avenue for ensuring that such charges are more transparent, more likely to represent a reasonable cost, and subject to a consistent framework for dispute and oversight.

PIAC recommends that the rules give the AER discretion to allow registered ENSPs to recover networks costs through energy bills.

Given that it is not practical for each ENSP to have a full regulatory determination, this should be approved on an application basis, according to an enforceable guideline that the AER would be required to develop. An ENSP could make a simple application to the AER if they thought it was appropriate to charge in this manner and the AER could either approve the practice or not, based on a consumer benefit test. Through this process, the AER could provide broad direction that the funds collected be used only for network maintenance and upkeep, the type or extent of fees that may be collected within a period, and undertake or initiate enforcement if this is not followed.

Scope to exempt some innovative projects in embedded networks

PIAC understands that there are circumstances where exemption from some aspects of the updated frameworks may provide greater scope for desirable innovation, while still extending protections to consumers.

In PIAC's view, an important feature of effective markets and competition in the future energy system, will be that willing communities of consumers are able to establish innovative energy projects under a range of circumstances, with varying levels of interaction with and connection to the distribution and transmission networks. In relation to this process, where an innovative project is based around solar PV and/or battery installations, having an embedded network may be essential to realise the cost benefits.

Embedded networks may be of benefit to communities of consumers by:

- enabling more cost effective, scale-efficient shared energy generation and/or storage infrastructure;

- allocating the costs and benefits of onsite consumption of generated and/or stored energy that reduces import from the grid; and
- collective bargaining power for better prices for energy purchased from, or exported to, the grid.

Many of these networks would not benefit from access to contestable retail within the embedded network. As a result, despite their clear benefits, a potential inability to meet registration costs and the absence of a need for competitive retail, may mean these projects are not able to receive an exemption under the AEMC's proposed framework.

While PIAC supports the AEMC's intent to limit exemptions where possible, we contend that some innovative projects with a demonstrable consumer benefit should be able to be accommodated by a flexible approach to the consideration of exemptions.

Gas embedded networks

PIAC agrees with the Commissions position that there is potential benefit in harmonising the frameworks for Gas and Electricity. However, as the draft has identified, there are a number of differences between the current state of the National electricity framework, and the series of jurisdictional and national arrangements that exist for Gas. As a result, PIAC considers that a separate examination of the existing arrangements for gas is warranted, with a view to determining what an appropriate national framework for embedded gas networks may look like. Accordingly, PIAC makes the following recommendations:

- That the AEMC recommends initiating, as a matter of priority, a separate review dedicated to the national and jurisdictional frameworks and exemptions relating to gas embedded networks. It is important that this process is undertaken separately so as not to impede or complicate the current process relating to embedded electricity networks, where understanding of the issues and frameworks are more developed, and
- That this review should include consideration of related issues of gas-heated bulk hot-water, 'gas cook-top' and gas connection charges that often serve as an effective proxy for gas consumption and availability charges in embedded networks, particularly high-rise apartments, and
- That the AEMC engage with the AER and network providers, such as Jemena Gas Networks, in relation to current proposals to adopt connection practices that may effectively result in all large apartment blocks being embedded gas networks.

Further engagement

PIAC would welcome the opportunity to continue to engage in this process, and discuss the issues raised in this submission in more depth. For any queries please contact Douglas McCloskey at dmccloskey@piac.asn.au or (02) 8898 6534.