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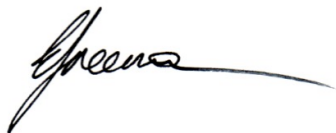
Dear Madam/Sir

Proposed Framework Schedule for Transfer of Distribution and Retail Functions

The Public Interest Advocacy Centre (PIAC) is an independent, non-profit legal centre based in Sydney. PIAC has established the Utility Consumers' Advocacy Program (UCAP) with funding from the NSW Government. The work of UCAP includes developing policy and advocating for the interests of residential consumers, particularly low-income consumers, in the NSW energy and water industries. Broad policy direction for UCAP comes from a community-based Reference Group.

The following comments are provided in response to the *Proposed Framework Schedule* published by the Ministerial Council on Energy (MCE). As is noted below, PIAC considers the more appropriate timeline for consultation on this round of proposals for energy to be that established for the consultant's paper released by the MCE. We look forward to providing the MCE with more detailed views by January 13, 2006.

Yours sincerely
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1. Introduction

PIAC is an independent, non-profit legal centre based in Sydney. PIAC has established the Utility Consumers' Advocacy Program (UCAP) with funding from the NSW Government. The work of UCAP includes developing policy and advocating for the interests of residential consumers, particularly low-income consumers, in the NSW energy and water industries. Broad policy direction for UCAP comes from a community-based Reference Group.

2. Proposed schedule for high level functions

On 30 June 2004 the Commonwealth, State and Territory Governments signed the Australian Energy Market Agreement (AEMA), which formalised previous commitments to establish a national energy market. Importantly, the AEMA enabled the introduction of the Australian energy market legislation and the energy market institutions. The Ministerial Council on Energy (MCE) is now seeking to amend the AEMA.

The *Energy Market Reform Bulletin Number 50* released on the 13 October is seeking submissions on an amendment to 'provide binding commitments to transfer specified distribution and retail functions to the national framework'. The proposed listing of binding 'high-level functions' to be transferred to the national framework is drawn from the NERA/Gilbert+Tobin paper titled *Public Consultation on a National Framework for Energy Distribution and Retail Regulation*, which was released simultaneously and is also currently the subject of public consultation.

This submission responds to the questions raised in the *Bulletin* and recommends that it is not appropriate to consider the listing of functions until the consultation around the NERA/Gilbert+Tobin paper has been finalised. We also argue that some of the amendments being sought are either unnecessary under the current terms of the AEMA or already have sufficient mechanisms in place to comprehensively address the issues raised. The submission also supports the need to have robust end user advocacy in the development of these policies.

3. Which functions should be transferred to the new arrangements

PIAC is concerned primarily with the long-term interests of consumers. This requires consideration of not only the allocation of regulatory responsibilities but also the appropriate content of consumer protection measures and an effective regime of enforcement of obligations on the regulated businesses. To achieve these outcomes will in some instances mean that the jurisdictions should retain their present responsibilities; in others it will be sufficient for the jurisdictions to assist the making of regulation through the proposed directives.

However, given that we understood the consultation around the Gilbert+Tobin paper was to explore these issues it is difficult for PIAC to make detailed comment on the proposed framework. Indeed, a concern for consumer advocates is that the proposed framework will serve to undercut debate of the many issues and proposals set out in the Gilbert+Tobin paper and to which responses are due on 13 January.

What PIAC can say at this point is that the framework document fails to capture the complexity of many of the issues it lists. These complexities can be demonstrated by reference to community service obligations (CSOs). In several jurisdictions government funded emergency assistance programs are in place to reduce the incidence of utility disconnections for households in short-term financial crisis. These programs operate alongside rules around disconnection. The wider context for these programs is not only community-wide hardship but also decisions made, at present, by jurisdictional regulators around prices and constraints on changes in prices charged to consumers.

The proposed allocation of high-level functions between national regulators and the jurisdictions describes a simplistic separation of these issues. It is proposed that the States and Territories will retain responsibility for CSOs while distribution pricing, for example, will be the province of the national regulator. Yet, the capacity of these programs to deliver important consumer protection outcomes will be effected directly by pricing decisions made by the national regulator and the way in which changes in prices are permitted to be passed through to consumers.

4. Whether functions should be uniform

Considerable consultation still is required on the exact nature of the powers to be allocated between the national regulators and the jurisdictions. As noted above, the timeframe given to respond to the framework document has not permitted us to develop a detailed response to the question of which functions should be treated uniformly and which should be made subject to derogations or jurisdictional directives. At this point we believe it remains for the MCE to make the case that the jurisdictions should be 'locked in' to such decisions rather than appropriate flexibility being given to the AEMC in developing the new rules.

PIAC supports the principle of some regulatory being undertaken at a national level and on the basis of there being a uniform outcome across all the jurisdictions. However, in a number of areas we have specific concerns that a transfer of functions may not be done in a manner which ensures the best outcomes for consumers. Specific comments are made below. The functions we have identified as giving cause for concern include:

- Price cap regulation and regulatory requirements for tariff setting;
- Network planning and expansion;
- Metering;
- Retail price setting;
- Retailer failure;
- Consumer protection;
- Customer churn;
- Other rules.

5. Whether functions should remain with jurisdictional regulators

The proposed listing of functions describes the retail price regulation function at 15 as relating ‘to the model to be developed by the Commonwealth’. Retail price regulation is specifically excluded in the Gilbert+Tobin paper and, therefore, no details have been provided about any proposed model by which the function could be transferred to the national level. The inclusion of the retail price regulation function in the listing of functions to be transferred to the National level is therefore inconsistent with the contents of the Gilbert +Tobin paper and contrary to the statement of the *Bulletin*.

PIAC endorses the current provision of the AEMA allowing the States and Territories to optionally retain the retail price regulation function. Until such time as all participating NEM jurisdictions have elected to transfer this function to the national energy regulator, the capacity to undertake economic regulation of retail prices must remain with jurisdictional regulators. The issue about when this transfer should and will occur is a question separate to the allocation of distribution regulation functions and non-price regulation of retail functions, which are currently the focus of consultation.

We therefore recommend that any binding amendment at this time to the AEMA place the retail price regulation function with the States/Territories, rather than at the national level.

6. Whether any functions would be redundant

The proposed listing suggests that Business Authorisation for licensing matters other than technical capability and safety will be redundant under the new national framework. Licences currently play an important role in creating a robust compliance environment. For example, In New South Wales, a licence is currently issued only after an energy business has demonstrated sufficient systems are in place to achieve compliance with regulations. Unless it can be established that a sufficient culture of regulatory compliance can be achieved in the absence of licences, PIAC is of the view that licences should not be abolished. PIAC will address this issue in the substantive response to the Gilbert+Tobin paper.

7. Timing of any transfers

The AEMA allows for functions relating to rule-making to be transferred to the Australian Energy Market Commission (AEMC) in compliance with policy directions issued by the MCE. It also allows for any other functions (outside of rule-making) to be transferred to the AER as agreed by MCE and conferred by legislation. Similarly, the AEMA allows for the MCE to transfer additional functions to the Australian Energy Regulator (AER) by agreement and conferred by legislation. The AEMA establishes a comprehensive set of regulatory functions that should be transferred to the AER.

The proposed listing of functions to be transferred will presumably be endorsed by the MCE (through the process outlined above). Beyond this process it is therefore unclear why a binding amendment to the AEMA would be necessary.

8. Functions identified for transfer

Price cap regulation for distribution

Currently the two largest jurisdictions in the NEM (NSW and Victoria having the highest load and numbers of customers) each use variants of a weighted average price cap (WAPC) to determine the price outcomes of revenue cap regulation. This may point the way to a single form of regulation being applied to all regulated distribution services. On the other hand, it should not be assumed that all stakeholders would support even a uniform approach to the WAPC form of regulation. For example, PIAC is concerned that this approach to pricing lacks transparency. Further, the Gilbert+Tobin paper recommends the use of ‘market based rates of return’ but is not forthcoming on how these should be determined.

Requirements for tariff setting

The Gilbert+Tobin paper proposes that tariff setting would be dealt with at the national level, taking into account explicit jurisdictional requirements. It is not clear whether this is intended to mean that the jurisdictional directives will be binding on the AER. Further consultation is needed also on the scope for jurisdictional requirements. While ‘equalisation of tariffs’ is mentioned PIAC believes other approaches such as the use of side constraints also need to be retained. The Gilbert+Tobin paper suggests tariff setting should be based on clear, economic criteria. This does not preclude the AER from determining ‘policy requirements’ in relation to distribution tariffs. However, the relationship between economic criteria and consumer benefit remains unclear.

Network planning and expansion

The framework document is unclear as to the relationship between the two functions of network planning and network expansion (functions 7 and 13). As a result it is difficult for PIAC to comment on the merit of this element of the proposed schedule. We note that the Gilbert+Tobin paper provides little information on the specific proposals. PIAC does not oppose in principle the making of nationally uniform rules on network expansion. However, important issues need to be aired such as whether it is envisaged that network expansion would be required to be undertaken on a least cost planning approach or how it is proposed to treat avoided CAPEX and demand management alternatives.

Metering

The outcomes of the Joint Jurisdictional Review of metrology should be considered by the MCE. Many of the elements of regulation of metering can readily be made uniform. However, as the Gilbert+Tobin paper indicates, metering involves far more issues than installing and reading of meters. For example, several jurisdictions each have accepted different economic cases for the net cost and benefit of the introduction of interval metering. Similarly, different approaches have been adopted in seeking to introduce competition in the area of metering services.

Retail price regulation

Consumers cannot comment on the ‘model to be developed’ until it has been published. Agreement between the jurisdictions should not be sought until full consultation has been undertaken. In particular, many of the elements distribution pricing which may be subject to the proposed jurisdictional directives should be considered in relation to any changes to retail price regulation. The claim that competition can provide consumer benefit in this context remains to be proven.

Retailer failure arrangements

In principle there are good reasons for establishing a single national approach to retailer failure or retailer of last resort (ROLR) provisions. Consumer advocates, however, have been at pains to argue that national consistency should not be achieved by a 'lowest common denominator' approach. The Gilbert+Tobin paper has not provided enough detail on the way in which some key issues might be resolved in relation to ROLR provisions.

Consumer protection

The proposals around the regulation of consumer contracts, marketing behaviour and trade practices issues (functions 18-20) highlight the concern of PIAC that the framework document will undercut the critical consultations on the Gilbert+Tobin paper. In particular, we note the consultants have failed to address the point raised previously by PIAC of the need for robust and effective compliance and enforcement measures in relation to obligations on the energy businesses. Consumer advocates believe the desire in some quarters to facilitate competition and lower costs for retailers does not provide an appropriate for consumer protection or 'consumer benefit' as required under the *NEL*. PIAC and other organisations oppose strongly any move toward an agreement between the jurisdictions and the Commonwealth on these issues before full and public consultation has taken place.

Customer churn

The framework document proposes agreement on customer transfer (function 22) and regulation of customer churn. The Gilbert+Tobin paper discusses the possibility of establishing greater consistency between electricity and gas in the rules covering customer transfer. It is not clear why the framework document uses the term 'customer churn'. While in principle PIAC does not oppose the idea of uniform national rules on settlements and transfers for all low-volume energy customers we point out that in the past there has been considerable consultation with consumer advocates on achieving a balance between consumer protection and the goal of building a competitive retail market.

Other rules not covered

PIAC is unclear on the scope of the proposed agreement on 'other rules'. It is not possible to support a proposal where no detail has been provided. Nor is it advisable for the jurisdictions to enter an agreement where the terms are unknown. There may be a number of areas where consumers have little material interest and where rule-making can proceed without our being consulted. On the other hand, we are concerned that decisions are not 'locked-in' at this point in a way which may preclude further consultation on issues of great concern to residential users of energy.