Submission to COAG Energy Council Consumer Protections for Behind the Meter electricity supply consultation paper

October 2016

The Alternative Technology Association (ATA) welcomes the opportunity to respond to the COAG Energy Council's consultation paper on consumer protections for behind the meter electricity supply.

Founded 36 years ago, the ATA is a national, not-for-profit organisation whose 6,000 members are (mostly residential) energy consumers. About 2,500 of our members are Victorian.

Our extensive experience in energy policy and markets informs our advocacy and research which, amplified by our close collaboration with fellow members of the National Consumer Roundtable on Energy, makes the ATA an important voice for energy consumers Australia-wide.

ATA has a uniquely twofold perspective as a consumer advocate. With the continuing support of the Energy Consumers Australia (and formerly the Consumer Advocacy Panel) we represent all small energy consumers in advocacy that seeks to improve energy affordability and the structure and operation of the National Energy Market (NEM). Additionally, we speak with authority on behalf of the growing portion of the consumer base that has an interest in demand-side participation.

We thank the Energy Market Transformation Project Team for preparing a comprehensive and thoughtful consultation paper, and for your excellent participatory workshop that helped inform stakeholder submissions.

Overview

The energy market is becoming more complex for consumers as new products and services are emerge as a result of smart metering, energy storage, smart appliances and other technological advancements. These new products, services and innovative business models were not contemplated at the time when the National Energy Customer Framework (NECF)[1] was developed and implemented.

The NECF only provides the Australian Energy Regulator (AER) with jurisdiction to regulate for sale of energy (i.e. where there are metered energy flows), hence retail authorisation and exempt selling arrangements apply today only where there is a financial transaction relating to the volumes of energy.

[1] s39 National Energy Retail Law

This means that providers of many energy related services which are in other respects (including their impact on consumers) similar to those where energy is transacted, are not regulated beyond the Australian Consumer Law (ACL) with respect to consumer protections.

Until recently, this approach has been mostly suitable given the lack of novel energy services in the mass market and the nature of the services provided under the retail exemption arrangements, but now this needs to be brought up to date, as a lack of energy specific protections leaves energy consumers vulnerable to disadvantage, and at risk of impediment to the access of an essential service, without sufficient protections.

In ATA's view the requirement for either retail authorisations or exemptions (with relevant conditions) from retail authorisations, must be based on whether there is a provision of energy services, rather than simply a sale of energy.

In effect, this extends the exemptions framework to behind the meter products and services, and in the future may require a more flexible authorisations framework to encompass different types of energy service provision.

The below diagram illustrates 20 possible future relationships arising from potential new services in the energy market, more than a half of which involve consumers directly. All of the new services and relationships currently sit outside of current NECF arrangements and therefore outside energy specific consumer protections:

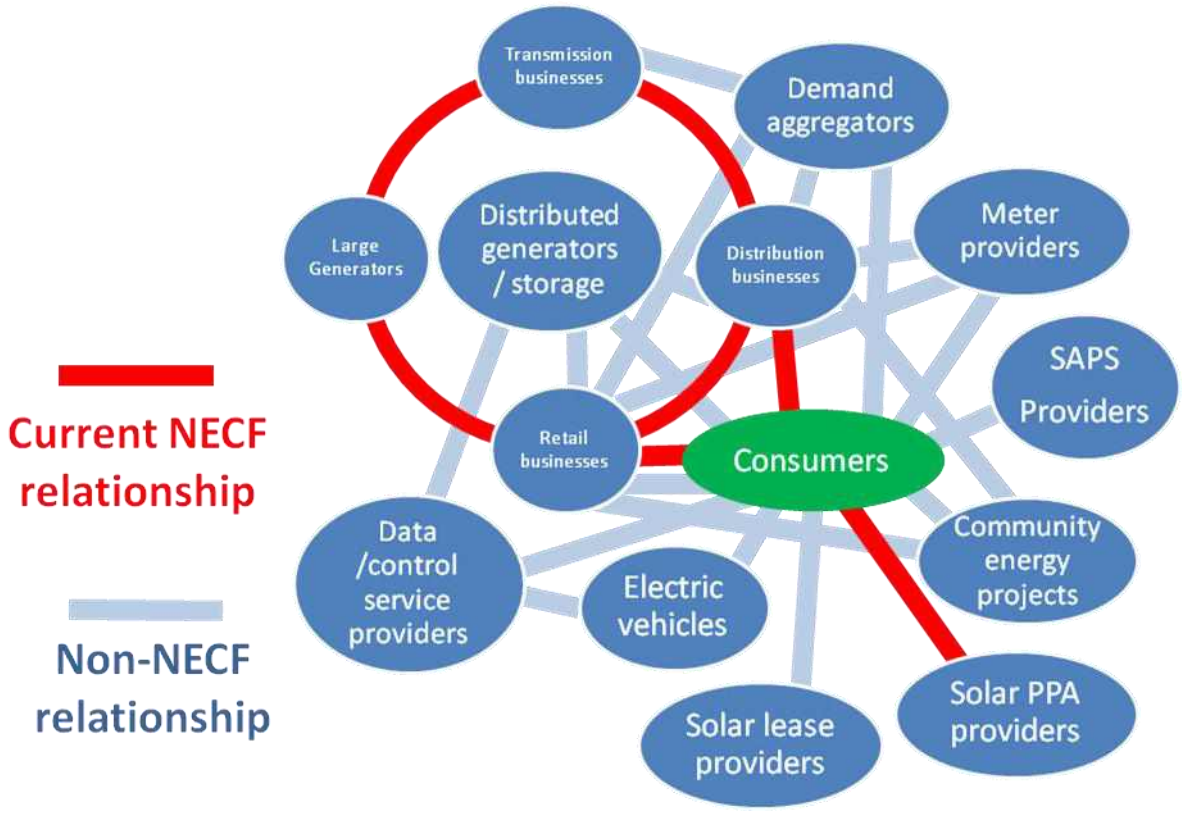

Figure 1 – The connecting bars represent current and potential future energy relationships. Those in red are covered by NECF today; those in blue are not.

ATA is of the view that the need for, and level of, regulatory intervention in the interest of providing consumer protection should be based not on the transaction of energy (i.e. on metered energy flows), but on:

- the extent to which the service or product in question is being relied on by the consumer to deliver the essential service of the continuous supply of electricity; and
- the impact on the consumer of experiencing payment difficulties and hardship

The absence of basic protections that aren't currently under NECF will lead to a perverse outcome where, for example, a consumer with a product or service provided by a retailer or DNSP has a higher standard of customer protection than one with the same product obtained from a third party.

Further, the current approach of limiting regulations only to where energy is metered and traded runs the risk of creating loopholes, whereby the provider of the product or service can avoid complying with some consumer protections and other requirements simply by not selling energy on a per kWh basis thus avoiding the need for an exemption.

This is not merely a theoretical risk: it is happening today. Noting Figure 1 above, solar lease providers are not subject to exemption requirements, yet solar PPA providers are. As a result, two different providers, of identical products and similar services, have different consumer protection obligations.

In ATA's view, NECF should be expanded to cover the provision of most current and future energy related services for households, if not all, energy services, and not only where there is a sale of energy.

These services may be provided by any of the entities noted in figure one, and may involve the operation, leasing and/or outright purchase of household-scale energy generation, consumption and management, such as:

- residential demand response;
- energy generation systems;
- energy storage systems;
- electric vehicles;
- operation of smart appliances;
- direct load control; and
- optimisation services across multiple loads and energy sources.

This is not to suggest that all energy services providers should be required to carry full retail authorisations – this would be excessive, inefficient, and create a compliance burden that would restrict offerings to consumers. The existing exemptions framework is probably the most appropriate vehicle for extending appropriate regulation to a range of behind the meter products and services. Specific categories could be added for the more prominent ones (such as has already been done for SPPAs – though the lack of conditions applying to SPPA exemptions needs to be remedied), with a 'catch-all' general registrable category for others. By being registrable, the AER will be able to recognise when growth in particular types of product or service warrants a dedicated category.

Ultimately – as the energy market continues to diversify – a small scale authorisations regime may become necessary to cover the most significant behind the meter products or services.

Objectives

As implied in the consultation paper, the scope of energy-specific regulation being limited to circumstances in which energy is literally being sold has led to a horizontal inequity whereby customer protections differ according to the business model employed. The clearest example is the different treatment of Solar Power Purchase Agreements (SPPAs) and solar leases. To the customer, these products seem very similar; but SPPAs fall under the scope of the National Energy Consumer Framework (NECF), while solar leases do not.[2]

The Energy Council's overarching objective of "*The promotion of the long term interests of consumers with regard to the price, quality and reliability of electricity and gas services*"[3] would better embrace the growing diversity and pace of innovation in the energy market if it were supplemented with more specific objectives to:

- promote horizontal equity with regard to consumer access to a sufficient supply of energy
- promote innovation and competition in provision of energy services
- promote consumer confidence in the energy market

Given the developing diversity in energy market business models, and the risk that business models may be developed to specifically avoid complying with energy-specific consumer protections, the scope of energy-specific regulation should be changed so it is based not on the transaction of energy (i.e. on metered energy flows), but on:

- the extent to which the service or product in question is being relied on by the consumer to deliver the essential service of the continuous supply of electricity; and
- the impact on the consumer of experiencing payment difficulties and hardship.

In particular, regarding the extent to which an energy service or product is being relied upon to deliver the essential service of the continuous supply of electricity as a spectrum rather than a binary is critical. Many households investing in new energy products and services are doing so on the basis that their upfront or ongoing costs will be offset by reduced reliance on the mainstream energy market: so while not necessarily providing the entirety of energy supply, they may nevertheless be providing a significant portion.

Overall, the rising significance of behind the meter electricity systems as a part of the energy market, along with growing numbers of other off-market services and products, raises the question as to whether a model of regulation based on the elements of the old monolithic system – retail rules, distribution rules, embedded network rules, and so on – is still appropriate. A principles-based customer-centric model framed around consumer outcomes and entitlements would be applicable to all energy supply scenarios, with some variation in methodology where necessary according to limitations, scope, or peculiarities of specific

[2] SPPAs fall under the NECF's exemptions framework, which stipulates that Australian Consumer Law applies rather than any energy-specific customer protections: so in effect, they are treated the same as solar leases. Nevertheless, there is more scope for specific consumer protections.

[3] Page 6 of the consultation paper

scenarios. (For example: adequate customer protection with regard to the impact of future financial hardship may comprise requiring clear information provision for solar PV systems purchased upfront, accredited financing for solar leasing, and hardship obligations on providers of SPPAs.)

Defining behind the meter electricity systems

In the context of this consultation, it seems appropriate that behind the meter electricity systems are defined as those used by single customers. The rationale for this is that:

- systems that supply multiple customers, such as in a high-rise building, are already covered under the regulatory framework for embedded networks[4]
- stand-alone systems supplying multiple customers (more accurately referred to as microgrids) are the subject of another consultation process.

The ownership model and role of systems are relevant to the extent and content of regulation, but not to the overall definition. Encompassing all single-customer behind the meter systems mitigates against arbitrary exclusions.

Considering again our proposed underlying principle that the scope of energy-specific customer protections be based on the extent to which the system is being relied upon to deliver the essential service of the continuous supply of electricity and the impact on the consumer of experiencing payment difficulties and hardship, it becomes clear that, for example:

- solar PV installations where the customer has an ongoing financial relationship with a provider that retains ownership of the system (leading to uncertainty if the customer were to fall into financial hardship), require more comprehensive energy-specific regulation than systems purchased upfront by the customer
- batteries with management systems controlled by a third party to buy and sell on the energy market according to dynamic price movements (potentially exposing the customer to significant financial losses if managed poorly), require more comprehensive energy-specific regulation than batteries controlled by the consumer to store unused solar generation.

Potential scenarios

Some regulatory challenges are unique to or more relevant for different behind the meter system scenarios.

Emergency backup

Where emergency backup is required for customers with life support systems that require an ongoing energy supply or with health conditions that require heavy usage of heating or air-conditioning to maintain room temperature within a narrow range, an assurance that the backup system will perform as required is critical. Systems installed as emergency backup for these customers should be include clear specifications for performance and maintenance

[4] Currently this is the exemptions framework, though it may be appropriate to regulate businesses that operate embedded networks across multiple sites under a small-scale authorisations framework.

requirements, and a performance guarantee, to enable consumers to make informed choices. Providers of behind the meter products and services that include emergency backup for these types of critical consumer needs should be required to ascertain the specifics of the customer's backup energy need and provide appropriate advice to the customer or – if they are providing the backup supply as part of their service – ensure that it is fit-for-purpose.

Co-optimised supply

The potential consumer harms of all behind the meter products and services are safety failures, and financial losses. Where a grid connection remains as the primary supply or a backup supply, the impact of reliability or capacity failures will be financial, as it will lead to an additional need to buy retail energy from the grid instead of the energy already paid for in advance (or offset) by purchase of or periodic payments on the behind the meter product or service.

Where there is no backup grid supply, the harm of reliability and capacity failures also exists.

Off-grid systems

Appropriate consumer protections should be in place for consumers who go 'off-grid'. Today, consumers are free to replace their mains grid energy supply with a Stand Alone Power Supply (SAPS) if they wish to do so, and the protections for consumers replacing a mains grid connection and retail contract should reflect the greater risks that are particular to their situation. In some respects, protections for consumers seeking to disconnect from the grid should be similar to those that exist today under retail and distribution frameworks.

Strong protections are required wherever:

- The provider of the product or service has the ability to entirely restrict a consumer's access to continuous energy supply for non-payment, or
- When the consequence of failure of the business, product, or service is that a consumer's access to the essential service of the continuous supply of energy is compromised, such that a consumer is unable to access energy from another cost effective and immediately available source.

Protections are equally important when a consumer is purchasing a SAPS outright with no intention of a continuing relationship with the provider. Providers of systems and services to take consumers permanently (or long-term) 'off-grid' need to be subject to stronger regulation than they are today. Specific protections that might apply include:

- Providing a performance guarantee with respect to frequency and duration of system outages;
- Educating customers about the difference between a grid connection and living with a SAPS;
- Clearly demonstrating that they have the explicit informed consent (EIC) of the consumer, with particular emphasis on the customer understanding the above matters;
- Contract terms that are clear and fair;
- A cooling off period;
- Full disclosure of detailed product information to allow for straight forward repairs and identification of correct replacement parts;
- Recording and reporting disputes to the AER; and

- A prudential fund or insurance against failure of the system and insolvency of the provider.

Currently, there is no requirement in the ACL, NECF, or the Clean Energy Council's voluntary SAPS installer accreditation for the any of above conditions to apply when a consumer goes off-grid. Due to the nature of electricity being an essential service and the fact that these customers are foregoing a reliable grid supply, it is appropriate for more robust regulation of SAPS providers in the interest of consumer protection.

Issues

Consumer protections in the energy market are premised on the understanding that energy is an essential service that is necessary for basic wellbeing. Energy is needed for lighting, space and water heating, cooking, refrigeration, health care, personal hygiene, communication, and entertainment. This is why residential consumers in the traditional energy market have protections, enshrined in industry regulation, to ensure as much as possible that they have a safe and reliable supply of sufficient energy to meet their needs, even if they live remotely or are in financial hardship. These protections have been retained as the energy market has transitioned from a government owned and operated monopoly to a fully privatised, disaggregated, and contestable marketplace.

Currently, new energy technologies and services – some provided by the same industry bodies that trade in the traditional market, others by third parties that do not – are being used by greater numbers of households, to the extent that they will probably be considered mainstream in the near future. When that happens, the choice between having household energy supplied by an energy retailer that routes it from a generator via a network, or by an energy services company that leases the household a solar panel array, domestic wind turbine, and backup generator, may be as everyday as choosing between a supermarket or a local shopping strip for household groceries. In both cases, there are pros and cons, different risks and opportunities for each choice; but an equal need for consistent basic consumer protections.

For the most part, customers of traditional energy retail businesses enjoy the same types of consumer protections wherever they are. Among other things, they can 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, and in some circumstances (for more novel supply arrangements) a limited right to exit a contract and revert to their previous contract
- The basis of all charges is clear and subject to regulatory oversight
- They have access to historical billing data
- They have access to discounts 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

- 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
- If their supplier ceases trading, their supply is uninterrupted

Application of these to various behind the meter products and services will vary according to the type of product or service. For example, those relating to billing or hardship support are only relevant where there is an ongoing financial relationship.

Competition

In the evolving energy market, behind the meter electricity products and services are becoming increasingly able to compete against the traditional market in certain circumstances. Home generation is capable of relegating traditional energy retailers and large-scale generators to being a backup supply for many households. Comprehensive generation and battery systems are increasingly capable (if not yet cost-effective) of displacing the grid altogether.

In this context, customer protections must walk a fine line between delivering the national objective of ensuring customers have a reliable and affordable energy supply, and allowing innovative business models to flourish without an overly burdensome regulatory burden. And this all must be balanced against the risk of predatory or incompetent businesses causing significant consumer harm, affecting consumer confidence which then hampers the very market evolution that spawned it.

In our view, competitive neutrality is best ensured when customer protections are premised on the necessary customer outcomes, and scaled to best reflect capacity of businesses to deliver while ensuring a sufficient level of customer protection can be provided.

As we have discussed above, the applicability of different types of protections to different products and services depends primarily on:

- the extent to which the service or product in question is being relied on by the consumer to deliver the essential service of the continuous supply of electricity; and
- the impact on the consumer of experiencing payment difficulties and hardship.

These factors will depend heavily on the ownership model, the business model, and the type of product or service in question; but it is these factors, and not those other qualities *per se*, that determine what is required.

General and specific provisions

Effective competition requires confident consumers, and consumers require good consumer protections to confidently participate in markets. When the market comprises a range of quite different products that can provide for customer needs in different combinations, consistent protections are necessary. Some customer protections should apply across the board; others will only be applicable to certain types of products or service, and certain situations. To implement these, appropriate accreditation, licensing obligations or exemption conditions must apply to all providers of energy products and services. This can be introduced with minimal disruption to current regulatory arrangements (and with minimal overhead to businesses) by extending the AER's retail exemption framework (and reflecting it in the Victorian exemptions framework), to encompass all energy service providers, with new classes for emerging products

and services added when required, and exemption conditions applying as appropriate for the specific services and situations. Over time it may be more efficient to adopt a different approach, such as a new accreditation scheme or a flexible small-scale authorisations framework, to specific types of businesses of service offerings.

We propose the following areas as generic provisions across all behind the meter energy products and services. Some of these are discussed more fully in subsequent sections of this submission.

Explicit informed consent

Explicit informed consent (EIC) ensures that customers are given sufficient information and understand their rights, obligations and the terms of their energy or energy management services contract, whenever they enter into an agreement with the energy business. Customers should be provided with accurate, standardised, suitably detailed, and easy to understand information about the product or service that is on offer – and the anticipated risks and benefits that may arise – before they sign up to the product or service.

Some innovative products and services for consumers inherently require a longer term contractual commitment, as material up-front investment is made in providing and installing equipment. In these cases, a service provider must be able to demonstrate EIC such that the consumer is made aware wherever:

- they may be foregoing access to competition for some or all of their energy needs for some period of time.
- they may be subject to some sort of additional change to recoup some of a provider's cost outlay if their circumstances change - for example, if they move house and equipment has to be removed or relocated.

Concessions and hardship grants

Ideally, these should be available for eligible customers for all costs that can be reasonably understood as a payment for energy supply. Significantly, some jurisdictions already give energy concession to customers of some forms of non-metered energy (for example, Victoria's Non-Mains Energy Concession). Naturally, extension of concessions to customers of behind the meter products and services is a matter for jurisdictions; we note that this is consistent with the intent to address hardship issues in the evolving energy market. The AER Retail Exempt Selling Guideline requires that providers do not hinder customers applying for a concession or rebate to which they are eligible, and apply on the customers' behalf if this is necessary: so if concession eligibility *is* extended to customers of new products and services, this same requirement should be placed on providers.

Marketing rules and restrictions

Common, accurate, and consistent language, presented in simple English, must be used in the marketing of novel services. Common language should be used where possible and necessary – for example, to describe the basic functions of Direct Load Control products and for information such as the nature, timing and frequency of control need to be clearly communicated to consumers. Without common definitions on the technical aspects of such a product, consumers are unlikely to be able to provide informed consent.

Marketing activities and material should also be required to contain clear and comprehensible information about pricing. This entails not only expressing prices and costs in ways that enable consumers to compare them with other providers; but also, where applicable, to understand prices and costs over time. Many behind the meter products and services comprise a large up-front cost that offsets future costs. Marketing that is based on cost savings over considerable time must be clear about estimated payback periods and based on defensible estimates of future energy prices.

Strong measures must be in place to ensure that certain consumers are not offered products and services that would potentially cause or exacerbate any detriment to their health, wellbeing, or safety. For example, those who are on life support, or have medical cooling and heating needs, should not be offered load control services that may restrict supply of energy for appliances required to sustain life and health.

Dispute resolution

Businesses providing energy products and services must have internal dispute resolution processes that meet a minimum standard. This can be scaled by business size, such that businesses with relatively low customer numbers meet a basic minimum standard, while larger ones have more comprehensive requirements for dispute resolution procedures and documenting (and reporting) of complaints and systemic issues.

Access to free, independent and an impartial external dispute resolution is a hallmark of the conventional energy market and is clearly much more effective than reliance on state-based consumer regulators.[5] Extending coverage of energy ombudsman schemes to cover providers of behind the meter products requires a number of changes – including developing new membership categories and fee structures within ombudsmen – but this is already being explored in a number of states and by a number of ombudsmen, so is a solvable problem.

Harmful products

Restrictions should be placed on products and services that are punitive and involuntary in nature: for example, the forced use of Supply Capacity Control as a credit management tool. In Victoria, energy retailers are prohibited from offering a Supply Capacity Control product to customers for any credit management purposes.

Asymmetric information

Around Australia, consumers lack confidence that they have sufficient information to make good decisions when engaging with the conventional energy market, and have low levels of trust in the information they do find.[6] That there is an undesirable level of information asymmetry in the conventional market suggests that it is likely to be even more of an issue for consumers making choices for novel energy products and services in the emerging market.

Consumer information is not a 'magic bullet' for good market outcomes. As the Consumer Action Law Centre's *Power Transformed* report notes:

> *As the number of choices or the amount of information increases, decision-making deteriorates. That is, people's decisions become less likely to be in their own interests. Heavy reliance on disclosure alone to underpin*

[5] Jo Benvenuti & Caitlin Whiteman, *Consumer access to external dispute resolution in a changing energy market*, EWOV/EWON/EWOSA, 2016.

[6] ECA, *Energy Consumer Sentiment Survey Findings: July 2016*, Energy Consumers Australia, 2016.

> *informed decision-making in a rapidly changing and diversifying market is therefore unlikely to support effective choice and effective competition*[7].

Nevertheless, consumers cannot reliably make good decisions without understanding what the product does and how it will meet their needs. Transparent product and service disclosure presented in a comprehensible way is a necessary element of this.

The NECF (and the Victorian Energy Retail Code) require **explicit informed consent** (EIC) for a number of customer decisions. Extending the requirement for EIC to contracts for behind the meter products and services would help ensure that customers are given sufficient information and understand their rights, obligations and the terms of their energy or energy management services contract, whenever they enter into an agreement with the energy business.

Customers should be provided with detailed, accurate, standardised and easy to understand information about the product or service that is on offer, and the anticipated risks and benefits that may arise from their use, before they sign up to the product/service. The NECF however does not address the need to disclose information in plain English and to ensure that consent is provided by someone who is competent to do so. This is a concern in view of the poor practices that are often employed in marketing to vulnerable consumers from non-English backgrounds and those with poor literacy.

In a recent judgement against retailer Energy Australia, Justice Gordon said EIC:

> *… goes to the very core of the stability and transparency of the energy markets, when considered from the perspective of consumer confidence. All participants in the industry must not only understand the central importance of the need to obtain the explicit informed consent of consumers but ensure that they have procedures in place which ensure that this is achieved."*[8]

In our view, this applies equally to emerging energy services.

It is not necessarily in a business' interest for consumers to fully understand exactly what products or services deliver or how they are priced, because businesses can benefit from the 'confusopoly' that leads to consumers making sub-optimal choices. Some of the new products and services have the potential to be more confusing than existing retail and energy service products due to added complexity.

It is therefore incumbent on government and regulators to ensure that, in addition to robust consumer protections, consumers have basic information tools to help them fully understand the new product and service. All contract terms and conditions and product information sheets must be easy to understand and accurate. In addition, full disclosure of information about product or service attributes and use is important.

We note that the Australian Energy Market Commission (AEMC) had, in the Power of Choice Review, recommended a comprehensive consumer awareness program prior to the implementation of pricing and metering reforms to assist consumers make informed choices about their electricity consumption and realise the benefits and opportunities of taking up demand side participation (DSP) products and services. We view the AEMC's recommendation on consumer awareness as relevant to the new products and services contemplated in this

[7] Consumer Action Law Centre, *Power transformed: Unlocking effective competition and trust in the transforming energy market*, Consumer Action Law Centre, 2016: p. 25.
[8] Federal Court of Australia, *Australian Competition and Consumer Commission v EnergyAustralia Pty Ltd* [2015] FCA 274

consultation paper. We note that a continuing education program is more appropriate than a once-off campaign, and government and industry may both have a role in such a program.

Different requirements for different business models

We are of the view that EIC should apply to all contracts, whether short or long term. The implications of the longer-term contracts with respect to EIC will be different to short term. For example, with traditional energy retail services, consumers should be able to readily change energy retailers to access better priced energy from the grid, or break a contract when their circumstances change, with little or no penalty. However, some innovative products and services for consumers inherently require a longer term contractual commitment, as material up-front investment is made in providing and installing equipment. In these cases, a consumer should not be restricted from accessing innovative products and services by protections that are intended to preserve access to competition in the retail market. However, a service provider must be able to demonstrate EIC such that the consumer is made aware that:

- They may be foregoing access to competition for some or all of their energy needs for some period of time. Cases exist today where consumers have been disadvantaged by a lack of awareness that they are foregoing competition when making long-term decisions to use LPG (bottled gas) appliances.
- They may be subject to some sort of additional change to recoup some of a provider's cost outlay if their circumstances change – for example, if they move house and equipment has to be removed or relocated.

Where the customer is disconnecting from the grid, even if the consumer is purchasing a Stand Alone Power Supply (SAPS) outright, the SAPS provider should be required to comply with EIC conditions that extend well beyond those required under the Australian Consumer Law (ACL). These should include:

- Providing a performance guarantee with respect to the frequency and duration of system outages
- Educating the customer about the difference between living with a grid connection and living with a SAPS
- Providing the customer with information about the likely costs and procedure necessary if they wish to reconnect to the grid in the future
- Demonstrating that they have the EIC of the consumer, with particular emphasis on the customer understanding the above matters.

Provision of behind the meter products and services without customer consent

In its *Power Transformed* report, the Consumer Action Law Centre documents a case in which a consumer was sold a solar PV system without their consent. The consumer had invited the salesperson in for a quote, the salesperson completed the contracts without the consumer's knowledge, and when the installers arrived the consumer felt like they had no choice but to allow it to go ahead.[9] Because their finance application – submitted by the salesperson without their knowledge – was rejected, this consumer is now in the midst of legal action (only possible due to securing *pro bono* legal representation) and is at risk of losing their house if they are

[9] See Consumer Action Law Centre 2016 *op. cit.* p. 22

unsuccessful. This is probably not a typical case, but it suggests that this type of consumer detriment is possible – and that its implications can go much further than problems with energy supply and affordability. If the rampant mis-selling that accompanied the early years of retail energy competition[10] – and continued for many years, especially in vulnerable communities[11] – is any guide, we can expect an increase in these types of cases as the market develops. Energy-specific regulation of marketing activities – and coverage by energy ombudsmen – has proven successful in reducing the incidence and managing the impact of misspelling in the retail energy market. In our view, the same will be necessary in the emerging market for behind the meter energy products and services.

Availability and reliability

Individual household stand-alone power systems (SAPS) are not common and are unlikely to be for quite some time. The cost of a system to provide 100 per cent of a household's needs are unlikely to compare favourably with a grid connection in all but the remotest locations; and the unpredictability of a household's energy needs makes decisions about the necessary capacity of a SAPS difficult to make with any certainty. In our view, households seeking more energy independence are far more likely to invest in hybrid systems that allow them to operate in isolation from the grid for the majority of the time, but retain a grid connection that can be used when required.

Disconnection from and reconnection to the grid

If households *do* disconnect from the grid, it must be recognised that at some point in the future there may be a need to reconnect – even if the customer is convinced there is not. Injury or ill-health may lead to a need for energy-intensive medical equipment; household composition or lifestyle might change; changing financial circumstances may render the household unable to repair or replace the system or parts of it when necessary; or the property might be sold and the new owner wish to reconnect to the grid. It seems appropriate that the household in question is liable for the reconnection costs; but it also seems clear that:

- vendors of SAPS should ensure their customers are well informed about the likely costs and procedure necessary if they need or wish to reconnect to the grid in the future
- when DNSPs disconnect SAPS customers from the grid, they should do so in such a way as to minimise future costs of reconnection

Availability, reliability, and redundancy in off-grid systems

Regulated standards for the level of supply availability and reliability in consumer off-grid systems are not feasible at an absolute level, because all consumers have different needs and different consumers will make different trade-offs of price versus capacity and quality. However it is critical that consumers purchasing such systems are fully informed about system capacity and performance so that they can base their decision on accurate information; and that system performance falls within that expectation. This requires:

- compliance of the system with applicable Australian Standards

[10] Footscray Community Legal Centre, *Submission to AEMC Review of the Effectiveness of Competition in Gas & Electricty Markets – Issues paper 1*, 28 June 2007

[11] Laura Berta, Gerard Brody & Cynthia Mackenzie, *Strangers Are Calling! The Experience of Door to Door Sales in Melbourne's Refugee Communities*, Footscray Community Legal Centre, 2013.

- assistance to the customer with regard to determining the capacity they need to meet their energy requirements
- accurate information about the capacity of the system
- provision of a performance guarantee with respect to the frequency and duration of system outages
- full disclosure of detailed product information to allow for straightforward repairs and identification of correct replacement parts
- a prudential fund or insurance against failure of the system and insolvency of the provider.

Compliance with this is part of the demonstration of explicit informed consent that vendors should be required to obtain from customers. This approach puts a limited regulatory burden on system providers in order to empower their customers to make their own decisions about a suitable level of reliability, availability, and redundancy in their energy supply.

Vulnerable consumers

There are two types of vulnerable customers: customers who are vulnerable now, and customers who become vulnerable in the future. Because anyone can become vulnerable at any point in their life, protections for vulnerable customers cannot be carved off and applied to some products and services and not others. The belief that hardship protections are not required in the emerging new energy market because 'vulnerable consumers' can't afford to buy, say, solar panels or off-grid systems is misguided: people who *can* afford to participate in these markets *now* may fall into financial hardship in the future due to accident, ill-health, relationship breakdown, job loss, and so on.

At the same time, there are some classes of consumer who can be identified as 'vulnerable' now and can be expected to remain vulnerable into the foreseeable future. These include:

- people reliant on life support systems that require a continuous supply of energy
- people with chronic health conditions that preclude regular employment, or lead to very high energy usage (such as conditions which cause thermoregulatory dysfunction, requiring constant use of heating or air-conditioning to maintain room temperature within a narrow range)
- people caring full time for someone with chronic health problems or a disability
- people on very low incomes with few prospects of improvement – in particular, people with low levels of education and employment skills

Some new energy products and services could be beneficial to consumers in ongoing financial hardship. For example, solar PV systems – whether owned outright or via SPPAs – can reduce households' energy costs enough to make unaffordable consumption affordable for many households. Direct load control or other energy management services used in conjunction with time-variant or demand tariffs could similarly reduce a vulnerable household's energy costs significantly. But there are also some risks. A household experiencing difficulties meeting repayments on a loan used to purchase an energy system could risk other assets, such as their home. A low-income household using an SPPA to lower their energy costs (and we note that some energy retailers are giving SPPAs to customers in ongoing hardship) could end up paying more rather than less if their system generates much more than they can use and they end up

reselling a significant portion of their generation at a feed-in-tariff (FiT) rate that is much lower than their purchase rate.

As there are efforts in some jurisdictions to facilitate access to emerging energy products and services for vulnerable consumers, it is imperative that energy-specific hardship protections are delivered based on:

- the extent to which the service or product in question is being relied on by the consumer to deliver the essential service of the continuous supply of electricity; and
- the impact on the consumer of experiencing payment difficulties and hardship

As a general guide:

- Products or services that require ongoing payment should have some requirement for giving some flexibility and support to customers with payment difficulties. This should be more extensive for products or services that provide the bulk of a customer's essential supply, especially where there are no readily available alternatives (for example, where a customer is off-grid).
- Products that are purchased via finance facilitated by the vendor should have a requirement that the type of finance used is subject to the National Credit Code (which contains hardship provisions)
- Providers of energy products and services that entail ongoing payments should not hinder customers applying for a concession or rebate to which they are eligible, and apply on the customers' behalf if this is necessary. (This will be necessary in any jurisdictions that extend eligibility for energy concessions to customers of behind the meter energy products or services.)
- For any behind the meter products of services that provide the bulk of a customer's essential supply, especially where there are no readily available alternatives (for example, where a customer is off-grid), should be required to ascertain whether customers require life support systems or energy-intensive temperature control and:
    - Ensure these customers are fully cognisant of their energy needs and the risk they may face if supply is not available
    - Provide information to assist these customers to secure an appropriate backup supply
    - Where and ongoing service relationship will exist, maintain a record of these customers to ensure prompt response to supply problems.
- Where a power purchase agreement is in place (such as an SPPA), it should be established and structured in such a way as to minimise the financial risk of excessive unused generation to vulnerable customers – for example, scaling system size to match household energy needs, and discounting the cost of unused generation to the FiT rate for concession-eligible customers (perhaps in conjunction with a minimum volume in the purchase agreement).
- There must be restrictions on products and services that are punitive and involuntary in nature; for example, the forced use of Supply Capacity Control as a credit management tool. In Victoria, energy retailers are prohibited from offering a Supply Capacity Control product to customers for any credit management purposes.

Dispute resolution

Businesses providing energy products and services should have internal dispute resolution processes that meet a minimum standard. This can be scaled by business size, such that businesses with relatively low customer numbers meet a basic minimum standard, while larger ones have more comprehensive requirements for dispute resolution procedures and documenting (and reporting) of complaints and systemic issues.

Access to free, independent and an impartial external dispute resolution is a hallmark of the conventional energy market and is demonstrably much more effective than reliance (under Australian Consumer Law) on state-based consumer regulators, which have limited (and varied) capacity to actually resolve disputes (focusing more on information provision and advice) and complaint processes that can be complex and, if complaints need to be taken to tribunals, costly.[12] Apart from in NSW, State-based Energy Ombudsmen's jurisdictions don't extend even to embedded networks, let alone behind the meter products and services. The Victorian Government is currently exploring the practicalities of extending the reach of the Energy and Water Ombudsman to exempt retailers and network operators in embedded networks;[13] and the Victorian, NSW, and South Australian Energy and Water Ombudsmen are currently exploring the feasibility of extending their membership to alternative energy providers.[14] Implementing this change would require, among other things, developing new fee structures and membership categories for Ombudsmen that are appropriate for smaller-scale businesses without needing unjustifiable cross-subsidies from other Ombudsman members. This is not simple, but it's a solvable problem; and it's already been done in other sectors (such as telecommunications). Once it's figured out, then extending membership and jurisdiction of Ombudsman schemes to providers of behind the meter services will be rudimentary. If customer protection in stand-alone systems is to be delivered similarly to the way it is in embedded networks (as we are suggesting), then including external dispute resolution in this way will be obvious.

It is important to recognise that external dispute resolution does more than actively resolve disputes. The existence of accessible ombudsman schemes and the financial cost to members of having ombudsman cases encourages them to seek to resolve disputes internally. Ombudsman resolutions also serve as soft precedents, indicating to other members how their obligations to customers should be delivered. In this way, the ombudsman is effectively part of the compliance framework.

Transaction costs

The availability of government-backed independent energy price comparators has improved the ability of consumers to make informed decisions when choosing an energy retailer. This has been necessary for two reasons:

- The complexity of energy tariffs (with the interplay between the fixed and variable components making cost calculations difficult); and
- The failure of commercial price comparators to actually compare all available products, and to actually show the user the best available price.

[12] Benvenuti & Whiteman, 2016 *op. cit.*.
[13] Department of Environment, Land, Water and Planning, *General Exemption Order: Draft Position Paper*, DELWP, 2016
[14] Benvenuti & Whiteman *op. cit.*

The costs (to government and to industry) of implementing an independent price comparator make it an 'if necessary' rather than 'by default' option. If price structures of specific products and services are complex and vendors do not present prices in such a way as to make them calculable and comparable, then some form of price comparator is necessary. If independent comparators for such products do not arise in the market, then one will be necessary. This could be provided by government funding to a suitable body (perhaps a not-for-profit) for an independent comparator, or direct provision of a regulated service.

If behind the meter products and services are subjected to an appropriate level of energy-specific regulation (as we are suggesting), requirements can be included to standardise information about prices, to enable customers to more readily make comparisons. An example of this kind of approach, albeit for conventional energy retail products, is the *Tariff Information Label*[15] used in the UK, which shows key information about tariff rates, other fees, and key contract conditions in a standardised format. It also uses a standardised *Tariff Comparison Rate*[16] to enable comparison of price outcomes across different offers. A similar approach tailored for specific types of behind the meter products or services that become relatively common would help minimise customer transaction costs and facilitate informed choice without requiring regulated comparison services.

Nevertheless, as already noted, if specific product types become established in the behind the meter market but pricing information continues to be obfuscated or overly complex, some form of regulated comparator may become necessary. Ongoing monitoring of the market will be required, and an appropriate regulatory framework necessary to enable action when necessary.

With behind the meter products and services being subject to appropriate regulation, contracts will need to comply with regulatory requirements. Standardised contract terms should be considered for products or services that become relatively established if this requirement proves insufficient to ensure that contracts deliver the intent of regulated provisions.

Conclusion

Thank you for the opportunity to respond to the consultation paper on consumer protections for behind the meter electricity supply. We also thank the Energy Market Transformation Project Team for the excellent participatory workshop that helped inform stakeholder submissions, and for allowing us to lodge a late submission.

If you wish to discuss anything raised in this submission further, please contact Dean Lombard. Senior Energy Analyst, at dean@ata.org.au or on (03) 9631 5418.

[15] See https://www.ukpower.co.uk/home_energy/tariff-information-labels
[16] See https://www.ukpower.co.uk/home_energy/tariff-comparison-rate