



Outcomes-based regulation: Proposing an overarching ‘consumer duty’ within the regulation of essential services

Preliminary Report Dec 2024

Jeannie Marie Paterson and Evgenia Bourova, Melbourne Law School

Table of Contents

1. Introduction	4
a. The Australian Energy Regulator's proposal for a consumer duty in the energy market	4
b. Purpose of this report	5
2. Understanding outcomes-based regulation	5
a. From responsible consumers to responsible providers	5
b. Features of outcomes-based regulation	7
c. The tiered approach to outcomes-based regulation	7
d. Reasons for adopting outcomes-based regulation	8
<i>Benefits of outcomes-based regulation</i>	8
<i>Concerns about outcomes-based regulation</i>	9
3. The AER's proposal for a consumer duty in the energy market	10
a. Gaps in the existing framework for energy regulation	10
b. The AER review of the NECF	10
<i>Perspectives in support of transitioning to a principles/outcomes-based model</i>	12
<i>AER Final Advice Report</i>	13
c. The AER's proposed duty	14
d. Proposals for an energy duty of care in the UK	14
4. Illustrations of outcomes-based duties in consumer protection in Australia and the UK	15
a. The best interests duty for providers of financial advice (Australia)	15
b. The Victorian Essential Services Commission's Payment Difficulty Framework	16
c. The duty of care on social media companies (UK and Australia)	16
d. The design and distribution obligations for financial products (Australia)	17
e. The efficient, honest and fair obligation on financial service providers (Australia)	17
f. The Consumer Duty in financial services (UK)	18
5. The UK Consumer Duty in Financial Services	18
a. Structure of the UK Consumer Duty	19
b. Performance of the Consumer Duty	20
6. Design features of a consumer duty of care in the context of essential services and energy markets	21
a. Themes and considerations	21
b. How the AER's proposed consumer duty addresses these design considerations	23
c. Further steps	26



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1. Introduction

a. The Australian Energy Regulator’s proposal for a consumer duty in the energy market

As Australia’s energy system transitions to a decarbonised, decentralised and digitalised future, it is becoming increasingly complex. Consumers have access to new energy services, including solar, batteries, EV chargers and smart appliances,¹ that give rise to new kinds of issues and risks involving misunderstanding, control of assets, hardship, unsuitable contracts or poorly performing services.² In this context, regulators are facing increasing pressure to balance economic efficiency—explicit in the National Energy Objectives—with broader goals, sometimes described as ‘energy justice’,³ including consumer protection, equity, inclusion, fairness and accountability.

The Australian Energy Regulator (AER), in its 2024 review of the current consumer protection framework governing the energy sector, acknowledged that ‘unless there is some regulatory reform to enhance consumer protections for new energy services, consumers may lack the confidence to support the energy transition’.⁴ Currently, energy service providers are subject to the Australian Consumer Law (ACL), the primary consumer protection law that applies nationally. In addition, the National Customer Energy Framework (NECF), as well as similar arrangements at state level (in Victoria, Western Australia and the Northern Territory), and the voluntary New Energy Tech Consumer Code (NETCC) apply to provide more specific protections to consumers that buy electricity or gas from energy retail companies.⁵

Retailers frequently bundle new energy services with traditional energy services. The complexity of these products raises new potential risks for consumers, including over-pricing, hardship and dispute resolution.⁶ The AER review has proposed a model for reforming the existing consumer protection framework that would provide effective protection in respect of both traditional and new energy services, while adapting to and encouraging market innovations. The AER’s proposed framework would incorporate ‘an overarching consumer duty complemented by the types of consumer outcomes that service providers should seek to achieve’.⁷ This duty would create expectations for providers to act in

¹ Australian Energy Regulator (AER), Review of Consumer Protections for Future Energy Services (Final Advice Report, November 2023) 9-10 (Final Advice Report).

² AER, Final Advice Report, 16-17.

³ Gabriel Chan and Alexandra B Klass, ‘Regulating for Energy Justice’ (2022) 97 New York University Law Review 142.

⁴ AER, Final Advice Report, 2.

⁵ Australian Energy Market Commission (AEMC), ‘How Energy Consumers are Protected Under the NECF and AC’ (Web Page) <<https://www.aemc.gov.au/regulation/energy-rules/NECF-ACL>>.

⁶ AER, Final Advice Report, 2.

⁷ AER, Final Advice Report, 3-4.

the interests of consumers and ensure good consumer outcomes.’⁸ The duty ‘would complement existing general consumer protections offered under the ACL.’⁹

Other industry examples of outcomes-based duties to protect consumer interests — considered in more detail in this report — include:

- the best interests duty for Australian financial advisors;
- The Victorian Essential Services Commission’s Payment Difficulty Framework;
- the duty of care on social media companies implemented in the UK and proposed for Australia.
- the design and distribution obligation in Australia’s financial services sector;
- the efficient, honest and fair obligation attaching to Australian financial license holders;
- the Consumer Duty for financial services implemented in the UK.

b. Purpose of this report

This preliminary report is a first step in building a comprehensive understanding of how a consumer duty, as implemented in other essential services sectors and international jurisdictions, could inform the development of similar obligations for Australia’s energy system. This project will ideally involve examining the available models for achieving good conduct outcomes, exploring their potential application in the context of Australia’s energy regulation framework, and considering the likely impacts of empowering energy regulators with new tools to enforce those obligations.

To better inform the project, this preliminary report seeks to set the scene as to the possible uses and scope of outcomes-based duties in essential services generally and energy specifically. It does this by providing an outline of:

Part 2: The key features of outcomes-based regulation;

Part 3: The duty proposed by the Australian Energy Regulator (AER);

Part 4: Other outcomes-based models of regulation in the consumer protection field in Australia and the UK;

Part 5: The features of the unique UK Consumer Duty

Part 6: the design features that should be considered in developing a outcomes-based regulation in the context of essential services and energy markets.

2. Understanding outcomes-based regulation

a. From responsible consumers to responsible providers

Consumer protection regimes in Australia and in other comparable jurisdictions have utilised different techniques to protect consumers. An overall trend is a move away from an emphasis on specific rules (for example, on pricing and billing) and the provision of information to consumers (for example, about energy supply). Instead there is a greater preparedness to impose responsibility on providers of goods

⁸ AER, Final Advice Report, 30.

⁹ AER, Final Advice Report, 3-4.

and services to promote good consumer outcomes. In the design of the regulatory regime, this trend has two noticeable elements, involving relying on:

- principles and standards rather than prescriptive rules, and
- outcome-based duties rather than conduct obligations.¹⁰

For example, in financial services, the regulatory regime has moved beyond merely relying on requirements for the disclosure of information to consumers to enable them to make better purchasing decisions towards positive obligations on suppliers to promote good outcomes and provide suitable products for consumers.¹¹ The AER has recommended similar style duties in energy services.¹²

This shift in regulatory approach recognises the complexity of modern consumer products, which imposes an almost insurmountable barrier to informed decision-making by consumers seeking to select a suitable product.¹³ This complexity is a defining feature of new energy markets. Changing markets and increased complexity have led to recognition of a need to shift greater responsibility to providers for ensuring that consumers obtain products suitable for their needs, and receive the ongoing support required to enjoy those products along with maintaining a basic level of energy security. Consumers do not have the skill to assess the risks associated with different energy choices or the time to make use of disclosure materials in informing their choice of products.¹⁴ Moreover, behavioural tendencies, such as optimism bias, often work against prudent decision-making by consumers.¹⁵ Yet the harms associated with poorly suited products can be significant.

The risks of harm arising from poor choices in complex consumer products are especially concerning for consumers experiencing vulnerability, but are relevant to all consumers dealing with new technologies in complex and rapidly changing markets. These concerns are amplified in markets such as energy for services that are essential; in a real sense, consumers simply cannot walk away from transacting with essential service providers, and even optional choices involve considerable sunk costs.¹⁶ In the face of significant asymmetries of information and bargaining power, providers rather than consumers are being increasingly made responsible for consumers obtaining products that meet their expectations and promote their best interests. In energy markets, this approach may additionally support innovation by building trust in the market and in new products and technologies.¹⁷

¹⁰ Julia Black, 'Regulatory Styles and Supervisory Strategies' in Niamh Moloney, Eilís Ferran and Jennifer Payne (eds), *The Oxford Handbook of Financial Regulation* (Oxford University Press, 2015) 217; Juan Carlos Izaguirre, 'Making Consumer Protection Regulation More Customer-Centric' (Working Paper, Consultative Group to Assist the Poor (US), June 2020) 14.

¹¹ See eg, Jeannie Marie Paterson, 'From Disclosure to Design: The Australian Regulatory Response to Mis-selling to Consumer Investors by Financial Services Providers' in Sandra Booyesen (ed), *Financial Advice and Investor Protection* (Elgar, 2021).

¹² AER, Final Advice Report, 3.

¹³ Izaguirre, 'Making Consumer Protection Regulation More Customer-Centric', 1.

¹⁴ AER, Final Advice Report, 11.

¹⁵ See Richard Whittle, 'The Consumer Duty: Behavioural Context and Practical Strategies to Support Informed Decision Making' (29 April 2024) SSRN <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4810846>.

¹⁶ Ron Ben-David, 'Response to the Australian Energy Regulator's Retailer Authorisation and Exemption Review: Energy Market Uncertainty, Consumer Protection, and a New Duty of Care' (Monash Business School, 27 May 2022) 22.

¹⁷ AER, Final Advice Report, 11.

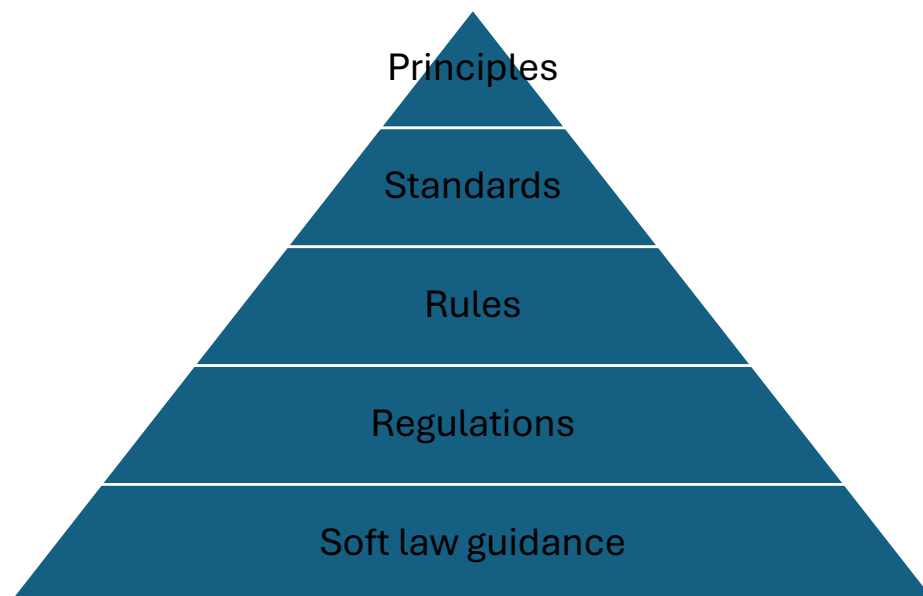
b. Features of outcomes-based regulation

Outcomes-based duties typically form part of an approach known as ‘principles-based regulation’.¹⁸ They express broad standards of expectation that providers are expected to meet rather than prescriptive rules.¹⁹ Outcomes-based regulation may include obligations to act in consumers’ best interests, take reasonable care or even ensure good consumer outcomes. The key feature of this design choice is that outcomes-based regulation leaves providers to determine how to meet the prescribed outcomes.

Outcomes-based duties are:

- focused on the conduct of the provider;
- impose positive obligations (as opposed to prohibitions on particular kinds of egregious conduct);
- require proactive steps for avoiding harm, providing useful advice and promoting beneficial outcomes.

c. The tiered approach to outcomes-based regulation



¹⁸ See generally, Jeannie Marie Paterson and Elise Bant, ‘Misrepresentation, Misleading Conduct and Statute Through the Lens of Form and Substance’, in Andrew Robertson and James Goudkamp, *Form and Substance in the Law of Obligations* (Hart Publishing, 2019) 403. See also, Julia Black, ‘Forms and Paradoxes of Principles Based Regulation’ (LSE Law, Society and Economy Working Paper 13/2008, London School of Economics and Political Science, 2008).

¹⁹ Julia Black, ‘Regulatory Styles and Supervisory Strategies’, 217, 230.

A broadly expressed outcome-based principle will usually be complemented by more prescriptive rules and soft law guidance as to the kind of outcomes or obligations that service providers are expected to achieve (for example, informed consumers, suitable products),²⁰ This guidance should be ‘tiered’, starting with the general duty, followed by general outcomes to be achieved, then followed by rules, regulations and guidance.²¹ Such a tiered approach would go some way to reducing uncertainty for product providers.²²

For this tiered approach to outcomes-based regulation to successfully build confidence in the regulatory framework, regulators need to be proactive with guidance and also strive for consistency, including in their approaches to soft law and enforcement techniques. Moreover, regulators and rule-makers need to remain committed to genuine principles-based regulation and the tenets of an outcomes-based approach.²³ Otherwise, the sector may become an impenetrable thicket of rules and requirements. Guidance on designing tiered principles-based regulation can be found in the Australian Law Reform Commission (ALRC)’s *Review of the Legislative Framework for Corporations and Financial Services Regulation*, which includes in its report a consideration of legislative design including the hierarchy of the Act with general principles, a scoping order and then more specific rules.²⁴ Importantly, consumers themselves — and potentially other stakeholders including environmental groups — should be involved in the regulatory design process, for example through civic society and consumer advocacy groups.²⁵

d. Reasons for adopting outcomes-based regulation

Benefits of outcomes-based regulation

Compared to prescriptive rules, outcomes-based regulation is more capable of adapting to changing market practices, rapid technological innovation and social expectations.²⁶ It may be more cost effective

²⁰ See also, Emma O’Neill, ‘Exploring Regulatory Approaches to Consumer Vulnerability’ (Report to the Australian Energy Regulator, Consumer Policy Research Centre, February 2020).

²¹ Julie Black, ‘Forms and Paradoxes of Principles-Based Regulation’, 429.

²² Elise Bant and Jeannie Paterson, ‘Statutory Interpretation and the Critical Role of Soft Law Guidelines in Developing a Coherent Law of Remedies in Australia’ in Ron Levy et al (eds), *New Directions for Law in Australia: Essays in Contemporary Law Reform* (ANU Press, 2017) 301.

²³ Decker, ‘Consumer Protection Frameworks for New Energy Products and Services and the Traditional Sale of Energy in Australia’, 47.

²⁴ Dr William Isdale and Christopher Ash, ‘Re-Designing our House of Law: Legislative Hierarchy and Design in Financial Services Law’, ALRC News (30 September 2022) <<https://www.alrc.gov.au/news/re-designing-our-house-of-law/>>.

²⁵ See David Havyatt, ‘Towards Consumer-Centric Energy Network Regulation: Australia’s Experience’ (2022) 78 *Utilities Policy* 101404, 2-3 <<https://www.sciencedirect.com/science/article/abs/pii/S0957178722000698>>.

²⁶ See Christopher Decker, ‘Consumer Protection Frameworks for New Energy Products and Services and the Traditional Sale of Energy in Australia’ (Final Report for the Australian Energy Market Commission, March 2020) 46. See also, Sharon Gilad, ‘It Runs in the Family: Meta-Regulation and Its Siblings’ (2010) 4 *Regulation & Governance* 485; Whittle, ‘The Consumer Duty: Behavioural Context and Practical Strategies to Support Informed Decision Making’.

and allows providers to draw on their own expertise to provide outcomes as opposed to being guiding by the inevitably slow process of regulatory reform.²⁷ It also reduces legislative complexity.²⁸

By contrast, rules governing products and performance provided tend to be prescriptive and inflexible in the face of changing energy markets. Thus, for example, the AER has suggested that the 'NECF's highly prescriptive obligations that were designed specifically for retail supply contracts could not easily be transferred and applied to new energy products and services'.²⁹ A principles-based approach has the advantage of allowing 'flexibility and adaptability because it does not focus on the type of service being sold, but rather the customer outcomes'.³⁰ Additionally, it is thought that rule-based obligations may more easily be 'gamed' by providers who may seek to provide their products and services in ways that reduce or avoid the prescriptive rules imposed (for example, through buy-now pay-later models).

Concerns about outcomes-based regulation

The concerns about principles-based regulation primarily relate to their potential for 'imprecision and vagueness',³¹ creating uncertainty as to what the principles require in terms of compliance. Outcomes-based duties do impose some cost and uncertainty on providers.³² It may also be more difficult for smaller service providers, particularly those for whom energy is not their core business, to implement an outcomes-based regulatory framework. Principles-based regulation prescribing a consumer best interests duty also 'gives the regulator greater discretion and arguably raises issues of regulatory accountability'.³³

However as observed by the AER, a consumer duty could also be a way of providing consumer protection in the face of an increasingly complex energy market and would 'provide a degree of flexibility for providers that takes into account the significant degree of uncertainty over how these innovative energy offerings will develop through the energy transition'.³⁴ Furthermore, 'a focus on customer outcomes may support development of trust and social licence in the sector'.³⁵ Certainly, research by Energy Consumers Australia reports that 'household and small business confidence that the energy market is working in their long-term interests' has been in decline, and despite a slight uptick in the last six months, it 'remains low for all households at 33%'.³⁶

²⁷ AER, Final Advice Report, 28-29.

²⁸ Australian Law Reform Commission (ALRC), Financial Services Legislation: Interim Report A (ALRC Report 137, 30 November 2021).

²⁹ AER, Final Advice Report, 27.

³⁰ AER, 'Review of Consumer Protections for Future Energy Services: Options for Reform of the National Energy Customer Framework' (Options Paper, October 2022) 23 (Options Paper).

³¹ Decker, 'Consumer Protection Frameworks for New Energy Products and Services and the Traditional Sale of Energy in Australia', 47.

³² AER, Final Advice Report, 4.

³³ AER, Options Paper, 24.

³⁴ AER, Final Advice Report, 3.

³⁵ AER, Options Paper, 23.

³⁶ Energy Consumers Australia, Energy Consumer Sentiment Survey (June 2024) 6.

3. The AER's proposal for a consumer duty in the energy market

As an example of the growing interest in principles or outcomes-based regulatory approaches, the AER has recently proposed to introduce a consumer duty of care in the Australian energy sector.³⁷

a. Gaps in the existing framework for energy regulation

There are currently three main sources of protection for consumers of energy in Australia:

- the ACL administered by the Australian Competition and Consumer Commission (ACCC), in conjunction with state- and territory-based fair-trading agencies;
- the National Energy Customer Framework (NECF), which is administered by the AER; and
- voluntary regulation initiatives, such as the New Energy Tech Consumer Code (NETCC).³⁸

In Australia, there has been a perceived need for reform to these frameworks due to two factors — 'government policies to encourage the transition to a low emissions future, and the advent of new technologies'³⁹ — and the associated increase in complexity affecting consumers' ability to make informed decisions in the energy market.⁴⁰

These intersecting frameworks for consumer protection contain several gaps identified in the literature. The NECF contains minimum requirements specific to the energy sector that retailers must comply with under each contract. However, the NECF 'does not provide any general principles for retailers to follow when designing contract terms. In contrast, the ACL does not specify specific terms applicable to the sale of goods and services but includes a set of principles that businesses must have in mind when designing and entering into consumer contracts, including energy contracts.'⁴¹ The ACL has been described as 'a principles-based approach to promote competition and fair trading, and for providing consumer protection'.⁴² However, while it covers consumer energy contracts, its provisions are not energy-specific.

b. The AER review of the NECF

In 2021, the Energy Security Board (ESB) tasked the AER with reviewing the current energy consumer protections framework to determine whether it was still fit for purpose.⁴³ In conducting the review, the

³⁷ AER, Final Advice Report. See also, Ron Ben-David, 'Response to the Australian Energy Regulator's Retailer Authorisation and Exemption Review'.

³⁸ The New Energy Tech Consumer Code 'is a voluntary code of conduct designed by industry and consumer representatives that sets minimum standards designed to protect consumers when purchasing new energy technologies, including solar generation systems, energy storage systems, electric vehicle charging and other emerging energy services': AER, Final Advice Report, 7.

³⁹ AER, Final Advice Report, 8.

⁴⁰ AER, Final Advice Report, 11.

⁴¹ Australian Energy Market Commission (AEMC), How Energy Consumers are Protected Under the NECF and ACL: 2019 Retail Energy Competition Review (Report, September 2019) 3.

⁴² AEMC, How Energy Consumers are Protected under the NECF and ACL, 8.

⁴³ AER, Final Advice Report, 12.

AER received submissions from stakeholders in response to an Issues Paper released in April 2022,⁴⁴ and an Options Paper released in October 2022.⁴⁵ In the Options Paper, the AER proposed three models for reforming the NECF:⁴⁶

- A tiered conditional authorisation framework alongside a reduced exemption framework (Model 1);
- An authorisation framework taking a principles-based approach to market regulation, including customer protection principles setting out, 'at a high level', the obligations and expectations for service providers (Model 2); and
- A principles/outcomes-based regulatory framework whereby legislation would set out 'regulatory objectives and parameters', with a focus on the 'primary' objective that 'a service provider must act in the best interests of the customer', and service providers would bear the onus of designing and distributing their products and services in a way that ensured this objective was met (Model 3).

Of all three options, Model 3 represented 'the most significant departure from the current framework.'⁴⁷ The AER described Model 3 as similar to the new 'consumer duty' that was recently implemented by the Financial Conduct Authority in the UK (see Part 4(f) of this report).⁴⁸ AER envisaged that the consumer duty might cover the following prescribed outcomes:

- contracts must meet consumer needs;
- consumers should get access to their energy supply when needed and providers should clearly explain the implications of controlling their assets;
- consumers have access to free, timely and fair dispute resolution;
- consumers are provided with key information so they understand the value and appropriateness of the service for their needs;
- the service performs in the intended way and meets consumers' expectations;
- consumers continue to receive energy services where they are experiencing hardship.⁴⁹

Policy arguments in favour of such a 'principles-based' approach were that:

- the energy retail market is in a process of transition and the effects of new energy products are unknown;
- prescriptive legislation is difficult to future proof; outcomes-based legislation will be more flexible and adaptable... and

⁴⁴ AER, 'Retailer Authorisation and Exemption Review' (Issues Paper, April 2022) (Issues Paper).

⁴⁵ See summary of stakeholder submissions to the Issues Paper in AER, Options Paper, 8-10.

⁴⁶ See AER, Options Paper, 12-24.

⁴⁷ AER, Options Paper, 21.

⁴⁸ AER, Options Paper, 22.

⁴⁹ AER, Options Paper, 30.

- the onus should be on the service and/or product provider, given they have chosen to participate in the energy market, to assist customers in navigating the new market and to ensure any outcome is beneficial to the customer.⁵⁰

Perspectives in support of transitioning to a principles/outcomes-based model

A joint submission by consumer groups was broadly in favour of an outcomes-based regulatory model, but cautioned that:

- ‘Such an approach would require very clear (and in some cases defined) parameters of what constitutes good experiences and outcomes for the customer.’⁵¹
- ‘Clear, plain language guidelines or statements will also be necessary for consumers to easily understand their rights and what their expectations for outcomes should be. They should not have to interpret outcomes or principles against their experience and it should be clear when intended outcomes have not been delivered.’⁵²
- There would also be a need for additional outcomes that would apply for certain groups, such as consumers who receive rebates, people on low incomes, those with life support needs, or those with language or access needs.⁵³
- The joint submission stated that ‘Some prescription will still be required for aspects such as disconnection, payment difficulty, family violence, life support, and notification of supply interruptions, including where failure to meet certain outcomes is a demonstration of non-compliance itself. Retaining some prescription is also likely to assist with clarity, consistency and enforcement.’⁵⁴
- ‘Even when a service provider acts in the best interest of a consumer, they are likely to only be doing so within the context of what products and services they offer. However, a principles and outcomes-based approach should involve a service provider indicating when their products or services are not suitable for a consumer or likely to deliver good outcomes for them.’⁵⁵

Submissions by Ron Ben-David of Monash Business School also drew upon the example of the UK Consumer Duty to argue in favour of a principles or outcomes-based regulatory approach over one focused on products and services.⁵⁶ Ben-David argued that such an approach ‘liberates the regulator from having to decide ex ante, and in all instances, which outcomes (or processes) are in a consumer’s best interests. The duty holds service providers responsible for good consumer outcomes. It denies service providers the refuge offered by frameworks which merely focus on compliance with

⁵⁰ AER, Options Paper, 23

⁵¹ Joint Submission to the AER’s Review of Consumer Protections for Future Energy Services, Options for Reform of the National Energy Customer Framework (15 February 2023) 24 <<https://cprc.org.au/submission/joint-submission-aer-review-of-consumer-protections-for-future-energy-services/>> (Joint Consumer Submission).

⁵² Joint Consumer Submission, 25.

⁵³ Joint Consumer Submission, 24.

⁵⁴ Joint Consumer Submission, 24.

⁵⁵ Joint Consumer Submission, 25.

⁵⁶ Ron Ben-David, ‘Response to the Australian Energy Regulator’s Retailer Authorisation and Exemption Review’.

prescriptive obligations.⁵⁷ Such a duty of care could look like a broad obligation requiring the service provider to act in the best interest of the customer.⁵⁸

AER Final Advice Report

In November 2023, the AER released its Final Advice Report, concluding that the current customer protection framework is 'not fit for purpose'.⁵⁹ As evidenced by data on complaints to energy ombudsman schemes,⁶⁰ the AER found that the emergence of new types of services in the rapidly changing energy market presented 'several areas of probable and material risks [of] consumer harm'.⁶¹ Such risks were not addressed by the current regulatory framework under the NECF 'because they involve services that do not involve the sale of energy to a person's premises'.⁶² As for the protections in the ACL, these are not specific to energy services, and do not go as far as the NECF in imposing positive obligations on energy service providers.⁶³

Instead, the AER proposed a new regulatory framework that would:

- expand the scope of the NECF to cover new energy services;⁶⁴ and
- support the prescriptive framework in the NECF with principles/outcomes-based regulation requiring regulated entities to promote good consumer outcomes (see Model 3 proposed in the Options Paper).⁶⁵

The AER hosted an online public forum on 22 January 2024 to brief stakeholders on the Final Advice.⁶⁶ In July 2024, a 'roadmap' was released identifying reform priorities in the energy sector, with particular focus areas including extending consumer protections to new service offerings and implementing further consumer protections, both of which are expected to take place between 2026 and 2028.⁶⁷

⁵⁷ Ron Ben-David, Submission to the Australian Energy Regulator, Review of Consumer Protections for Future Energy Services: Options for Reform of the National Energy Customer Framework (Monash Business School, 16 December 2022) 22 (Submission to the AER).

⁵⁸ Ron Ben-David, 'Response to the Australian Energy Regulator's Retailer Authorisation and Exemption Review', 23.

⁵⁹ AER, Final Advice Report, 18.

⁶⁰ See Energy and Water Ombudsman Victoria, Final Report of the VOICES Project (Victorian Energy and Water Ombudsman's Investigation of Consumer Experiences) (March 2021).

⁶¹ For a summary of such risks, see AER, Final Advice Report, 16-18.

⁶² AER, Final Advice Report, 19.

⁶³ AER, Final Advice Report, 19.

⁶⁴ AER, Final Advice Report, 25-27.

⁶⁵ AER, Final Advice Report, 27-31.

⁶⁶ See AER, 'Review of Consumer Protections for Future Energy Services' (Final Advice to Energy Ministers, 23 November 2023) <<https://www.aer.gov.au/industry/registers/resources/reviews/review-consumer-protections-future-energy-services/final-advice>>.

⁶⁷ Energy and Climate Change Ministerial Council, 'Energy Ministers Agree to the National Consumer Energy Resources (CER) Roadmap' (Department of Climate Change, Energy, the Environment and Water (Cth), 19 July 2024) <<https://www.energy.gov.au/energy-and-climate-change-ministerial-council/working-groups/consumer-energy-resources-working-group/national-cer-roadmap>>.

c. The AER's proposed duty

The duty proposed by the AER would be 'universal applied across all entities that fall within the scope of an expanded NECF definition (for example, retailers, distributors and providers of new energy services)'.⁶⁸

As outlined in the AER's Options Paper, the central objective of the consumer duty — ensuring 'good outcomes' for consumers⁶⁹ — would be underpinned by 'primary principles' requiring service providers to act proactively, conscientiously, reasonably and demonstrably.⁷⁰

The overarching duty 'could be complemented by clearly defined consumer outcomes that regulated entities would need to achieve.'⁷¹ These outcomes could include the following:

- 'contracts must meet consumer needs;
- consumers should get access to their energy supply when needed and providers should clearly explain the implications of controlling their assets;
- consumers have access to free, timely and fair dispute resolution;
- consumers are provided with key information so they understand the value and appropriateness of the service for their needs;
- the service performs in the intended way and meets consumers' expectations;
- consumers continue to receive energy services where they are experiencing hardship.'⁷²

Some elements of the overarching consumer duty would apply no matter the identity of the customer or the service being provided (base obligations), while others 'could be ramped up or down depending on a matrix of factors, including identity of the end customer, the product and/or service being provided, the characteristics of the service provider, and other factors' (flexible obligations).⁷³

Service providers would need to prepare a 'regulatory compliance plan' detailing how they would achieve these obligations at various stages of 'the customer journey'.⁷⁴

d. Proposals for an energy duty of care in the UK

While the UK has not yet legislated a consumer duty of care to energy customers, there are narrower duties that apply to specific groups of vulnerable customers — for example, Ofgem has a statutory duty to have regard to the interests of people who are disabled, chronically sick, of pensionable age, on low incomes or living in rural areas.⁷⁵ The UK also imposes enforceable obligations on energy suppliers in

⁶⁸ AER, Final Advice Report, 3-4.

⁶⁹ AER, Options Paper, 23. See also, AER, Final Advice Report, 30.

⁷⁰ AER, Options Paper, 21-22.

⁷¹ AER, Final Advice Report, 30.

⁷² AER, Final Advice Report, 30.

⁷³ AER, Options Paper, 22.

⁷⁴ AER, Options Paper, 22.

⁷⁵ Utilities Act 2000 (UK) ss 9, 13.

respect of vulnerable customers.⁷⁶ As part of their licence conditions, energy suppliers must identify and respond to the needs of customers in vulnerable situations and treat all domestic customers fairly.⁷⁷ As for the consumer duty that has been applied to UK financial services customers — discussed in more detail in Part 4(f) of this report — Ofgem is currently considering implementing a similar consumer duty for energy customers.⁷⁸

4. Illustrations of outcomes-based duties in consumer protection in Australia and the UK

As noted in the introduction, outcome- based regulation is being adopted in a number of sectors to complement more tradition information disclosure rules and general conduct prohibitions.

Best interests (Corporations and Credit Acts)	•Avoid conflicts of interest
Payment difficulty framework	•Act fairly once obligations triggered
Duty of care (Online Safety)	•Reasonable efforts to avoid foreseeable risk
Distribution and design (Corporations Act)	•Target market determinations and appropriate product design
Efficient, honest and fair (Corporations and Credit Acts)	•TBC
Consumer duty (UK)	•Promote good outcomes for consumers

a. The best interests duty for providers of financial advice (Australia)

In Australia, financial advisers are subject under the *Corporations Act 2001* (Cth) to a duty to act in the best interests of their clients in providing personal financial advice.⁷⁹ The duty is designed to ensure that ‘retail clients receive advice that meets their objectives, financial situation and needs.’⁸⁰ The duty is

⁷⁶ See generally, Jurgita Malinauskaite and Suzanne Rab, ‘Consumer Protection in the UK Energy Sector’, in Tina Soliman Hunter, Marcin Krasniewski, Jurgita Malinauskaite and Marzena Czarnecka (eds), *Routledge Handbook of Consumer Protection and Behaviour in Energy Markets* (Routledge: London, 2024).

⁷⁷ Ofgem, *Licence Guide: Standards of Conduct* (April 2024) 5.

⁷⁸ Ofgem, ‘Ofgem Sets Out Vision for Customer Service Culture Change to Make Energy Sector Best in Britain’ (Press Release, 10 September 2024) <<https://www.ofgem.gov.uk/press-release/ofgem-sets-out-vision-customer-service-culture-change-make-energy-sector-best-britain>>. See also, Ofgem, ‘Consumer Confidence: A Step Up in Standards’ (September 2024) 2 <<https://www.ofgem.gov.uk/sites/default/files/2024-09/OFG2266%20Consumers%20Confidence.pdf>>.

⁷⁹ See *Corporations Act 2001* (Cth) s 961B. Regarding the scope and application of the ‘best interests’ duty, see Australian Securities and Investments Commission (ASIC), *AFS Licensing: Financial Product Advisers – Conduct and Disclosure* (Regulatory Guide 175, November 2024) (Regulatory Guide 175); Stephen Corones and Thomas Galloway, ‘The Effectiveness of the Best Interests Duty – Enhancing Consumer Protection?’ (2013) 41(1) *Australian Business Law Review* 5.

⁸⁰ ASIC, *Regulatory Guide 175*, 6 [RG 175.6].

complemented by duties to provide appropriate advice,⁸¹ and to give priority to the interests of the client in case of a conflict of interest.⁸² The statutory provision outlines the features of good financial advice and provides a safe harbour for compliance with the duty, in that if an advice provider shows they have taken the steps in s 961B(2), they will be taken to have acted in the best interests of their client.

b. The Victorian Essential Services Commission's Payment Difficulty Framework

In Victoria, the Essential Services Commission (ESC) has developed a Payment Difficulty Framework embedded in Part 6 of the [Energy Retail Code of Practice](#) (version 3, 1 October 2024). It was developed in 2017 in response to the high numbers of residential customers being disconnected for non-payment.

The Consumer Policy Research Centre (CPRC) identifies the ESC as example of a regulator pursuing a principles/outcomes-based approach under its recently implemented payment difficulty framework,⁸³ which is underpinned by the principle that disconnection must be an option of last resort.⁸⁴ However, it appears to be more of a hybrid framework specifying a positive conduct standard (acting fairly) underpinned by prescriptive obligations.

Part 6 begins with the following objective in section 121(1):

‘The purpose of this Part is to set out the minimum standards of assistance to which residential customers anticipating or facing payment difficulties are entitled, so that disconnection of a residential customer for not paying a bill is a measure of last resort.’

Section 141(1)(b) contains a broad obligation on retailers, in any dealing with a residential customer, to ‘take into account all of the circumstances of the residential customer of which they are aware and, having regard to those circumstances, act fairly and reasonably.’

These broad obligations and statements of principle are followed by specific obligations, for example in relation to minimum forms of assistance that need to be offered to retail customers (Division 1 and 2).

c. The duty of care on social media companies (UK and Australia)

There is a current trend emerging in countries reconsidering their stance toward intermediary liability solutions for social media companies to impose a more active ‘duty of care’ to take reasonable steps to ensure the content hosted on their platforms does not cause foreseeable harm.⁸⁵ The UK *Online Safety Act* imposes on social media companies a series of duties of care to protect users from harmful content,

⁸¹ Corporations Act 2001 (Cth) s 961G.

⁸² Corporations Act 2001 (Cth) s 961J.

⁸³ O'Neill, ‘Exploring Regulatory Approaches to Consumer Vulnerability’, 54.

⁸⁴ Essential Services Commission, Payment Difficulty Framework: Final Decision (10 October 2017).

⁸⁵ For further consideration of a duty of care or best interests duty in respect of the consumer data collected, shared and used by businesses, see Chandi Gupta, ‘In Whose Interest? Why Businesses Need to Keep Consumers Safe and Treat their Data with Care’ (CPRC Working Paper, March 2023).

⁸⁶ with particular emphasis on fraudulent activity and protecting children,⁸⁷ along with some protection for democratic institutions.⁸⁸ Central to the duty is a requirement to undertake risk assessments. A similar duty of care to protect users of social media from foreseeable harm has been proposed in Australia.⁸⁹ This proposed Digital Duty of Care will place an onus on digital platforms to proactively keep Australian's safe and prevent online harm.⁹⁰

d. The design and distribution obligations for financial products (Australia)

Since 5 October 2021, Australian financial service providers have also been subject to product design and distribution obligations.⁹¹ These reforms require firms to design financial products to meet the needs of consumers and to distribute their products in a more targeted manner. The design and distribution regime focuses on the suitability of products, and is broadly analogous to the consumer guarantees or even product safety obligations.⁹²

The design and distribution regime is unique in requiring financial service providers to review their determinations for ongoing suitability of products to the target market. This is an important and novel element of the regime, as it requires the financial provider to engage in ongoing monitoring of its own performance in meeting the regulatory expectations placed on it.

e. The efficient, honest and fair obligation on financial service providers (Australia)

Australian financial services (AFS) licensees have a general obligation to 'do all things necessary to ensure that the financial services covered by the licence are provided efficiently, honestly and fairly'.⁹³ It is as yet unclear how far this duty extends.⁹⁴ It can cover failures to comply with obligations under the regulatory regime and also contractual breaches. It is unclear whether the duty requires proactive steps

⁸⁶ Caio C V Machado and Thaís Helena Aguiar, 'Emerging Regulations on Content Moderation and Misinformation Policies of Online Media Platforms: Accommodating the Duty of Care into Intermediary Liability Models' (2023) 8(2) Business and Human Rights Journal 244.

⁸⁷ See generally, Wolf Sauter, 'A Duty of Care to Prevent Online Exploitation of Consumers? Digital Dominance and Special Responsibility in EU Competition Law' (2020) 8(3) Journal of Antitrust Enforcement 649.

⁸⁸ It is unclear how Meta's move away from fact checkers sits with this duty of care.

⁸⁹ Gilbert and Tobin, 'Government Ramps Up Digital Platforms Online Safety Agenda by Proposing Duty of Care Obligations for Social Media Platforms' (Blog Post, 20 November 2024) <<https://www.gtlaw.com.au/insights/government-ramps-up-digital-platforms-online-safety-agenda-by-proposing-duty-of-care-obligations-for-social-media-platforms>>.

⁹⁰ The Hon Michelle Rowland MP, 'New Duty of Care Obligations on Platforms will Keep Australians Safer Online' (Media Release, Minister for Communications (Cth), 14 November 2024) <<https://minister.infrastructure.gov.au/rowland/media-release/new-duty-care-obligations-platforms-will-keep-australians-safer-online#:~:text=The%20Digital%20Duty%20of%20Care,by%20Ms%20Delia%20Rickard%20PSM>>.

⁹¹ See further, ASIC, Product Design and Distribution Obligations (Regulatory Guide 274, 10 September 2024) (Regulatory Guide 274).

⁹² See Paterson, 'From Disclosure to Design'.

⁹³ Corporations Act 2001 (Cth) s 912A(1).

⁹⁴ See eg, ASIC v Westpac Securities Administration Limited [2019] 272 FCAFC 187; ASIC v AGM Markets Pty Ltd (in liq) (No 3) [2020] FCA 208; ASIC v Commonwealth Securities Limited [2022] FCA 125; ASIC v National Australia Bank [2022] FCA 1324; ASIC v Commonwealth Bank of Australia [2022] FCA 1422.

to protect consumers' interests or whether it only has a negative element where a licensee fails to meet the required standard. Certainly, it does not demand perfection from licensees.⁹⁵

Section 912A became a penalty provision in 2019 under the *Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019* (Cth). Civil penalties operate to deter contraventions and ensure that breaking the law is not a mere cost of doing business for regulated companies.

f. The Consumer Duty in financial services (UK)

The Consumer Duty is a significant new approach to regulating financial services introduced by the UK Financial Conduct Authority (FCA).⁹⁶ It came into force on 31 July 2023. The Consumer Duty is an overarching duty requiring financial service providers to 'deliver good outcomes for retail customers',⁹⁷ and is underpinned by principles-based expected outcomes.⁹⁸

The Consumer Duty is a more encompassing obligation than a statutory duty of care, a best interests duty or the design and distribution obligations for financial services in Australia.⁹⁹ It includes the obligations demanded by these kinds of duties and more. It remains to be seen whether the licensing obligation to act 'efficiently, honestly and fairly' for Australian financial service providers develops in a similar direction. The UK Consumer Duty is closest to the reforms envisaged by the AER in its review of the NECF, discussed above.

5. The UK Consumer Duty in Financial Services

Because it is an innovative and broad model of outcomes-based duties, it is worth considering the consumer duty in more detail.

⁹⁵ ASIC v Commonwealth Bank of Australia [2022] FCA 1422.

⁹⁶ Financial Conduct Authority (FCA), A New Consumer Duty: Feedback to CP21/36 and Final Rules (Policy Statement PS22/9, July 2022) <<https://www.fca.org.uk/publications/policy-statements/ps22-9-new-consumer-duty>> (A New Consumer Duty). See also, Nicola Howell, Therese Wilson, Nina Reynolds, Andrew Schmulow, and Paul Mazzola, 'The Case for a 'Treating Customers Fairly' Regime in Australia: Evidence from Other Jurisdictions and a Consumer Survey' (2023) 30(2) Competition and Consumer Law Journal 183.

⁹⁷ FCA, Financial Conduct Authority (FCA) Handbook (2023) principle 2A.1.10 <<https://www.handbook.fca.org.uk/handbook/PRIN/2A/?view=chapter>> (FCA Handbook).

⁹⁸ See further, Iris H Y Chiu and Wai-Yee Wan, 'Constructing a Taxonomy of Financial Consumer Protection Policy and Assessing the New Consumer Duty in the United Kingdom's Financial Sector' (2024) 7 Cardozo International and Competition Law Review 465.

⁹⁹ See also, Iris H Y Chiu and Alan H Brener, 'Articulating the Gaps in Financial Consumer Protection and Policy Choices for the Financial Conduct Authority: Moving Beyond the Question of Imposing a Duty of Care' (2019) 14(2) Capital Markets Law Journal 217.

The Consumer Duty

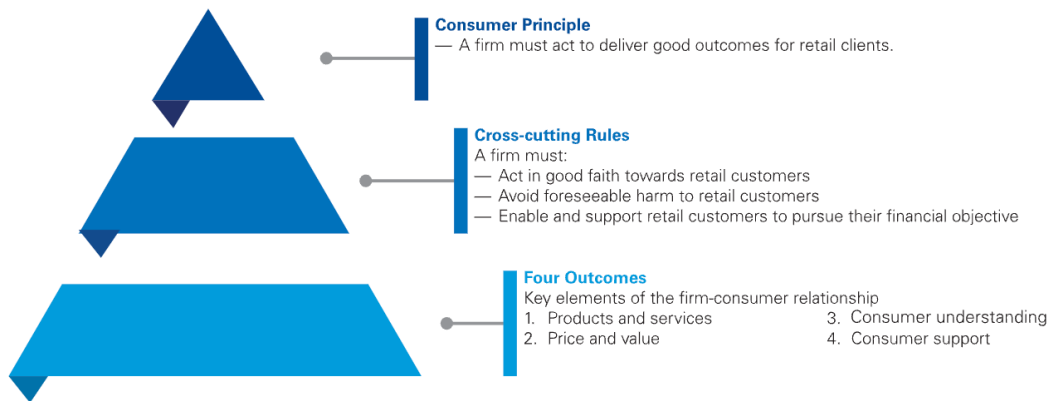


Diagram from KPMG International.¹⁰⁰

a. Structure of the UK Consumer Duty

The Consumer Duty requires firms to work to deliver ‘good outcomes’ to consumers.¹⁰¹ Firms must work towards this goal by acting in good faith, avoiding foreseeable harm, and enabling retail customers to pursue their financial objectives.¹⁰²

The rules and guidance for the new ‘Consumer Duty’ require firms to deliver 4 key customer outcomes that are, together with the overarching duty, now included as regulatory principles in the *FCA Handbook*, which outlines the legislative and other provisions with which regulated firms are required to comply:

- Products and services (‘We want all products and services for consumers to be fit for purpose. We want them to be designed to meet the needs, characteristics and objectives of a target group of customers and distributed appropriately.’);¹⁰³
- Price and value (‘We want all consumers to receive fair value. Value is about more than just price, and we want firms to assess their products and services in the round to ensure there is a reasonable relationship between the price paid for a product or service and the overall benefit a consumer receives from it.’);¹⁰⁴

¹⁰⁰ KPMG, ‘What are the New Consumer Duty Requirements?’ <<https://kpmg.com/xx/en/our-insights/regulatory-insights/what-are-the-new-consumer-duty-requirement.html>>.

¹⁰¹ See generally, Lucy McCormick, ‘How to Improve Call Compliance Ahead of the New Consumer Duty’, Infinity (Blog Post, 3 May 2023) <<https://www.infinity.co.uk/resources/news-and-views/how-to-improve-call-compliance-ahead-of-the-new-consumer-duty>>; Pinsent Masons, ‘Consumer Duty: “Most Significant Change” to UK Financial Services Regulation in a Decade Comes Into Force’ (Blog Post, 31 July 2023) <<https://www.pinsentmasons.com/out-law/news/consumer-duty-significant-change-uk-financial-services-regulation>>.

¹⁰² FCA, A New Consumer Duty, para 1.15.

¹⁰³ FCA, A New Consumer Duty, para 6.1. See also, FCA, FCA Handbook, principle 2A.3.

¹⁰⁴ FCA, A New Consumer Duty, para 7.1. See also, FCA, FCA Handbook, principle 2A.4.

- Consumer understanding ('We want firms' communications to support and enable consumers to make informed decisions about financial products and services. We want consumers to be given the information they need, at the right time, and presented in a way they can understand.');
- Consumer support ('We want firms to provide a level of support that meets consumers' needs throughout their relationship with the firm. This means firms' customer service should enable consumers to realise the benefits of the products and services they buy and ensure they are supported when they want to pursue their financial objectives').

In working towards these outcomes, firms need to understand the characteristics and objectives of their customers, including those experiencing vulnerability.¹⁰⁷ More granular expectations about these consumer outcomes have also been set out by the FCA.¹⁰⁸

This last expectation, customer support, is interesting as it goes to how firms respond to consumer needs and engage with customers throughout the duration of the contract, as opposed to being focused only on the transaction involving the acquisition of the product.

Under the Consumer Duty, firms are also required to show that they have mechanisms in place for monitoring outcomes and overseeing the work of their agents.¹⁰⁹ These obligations are scaled to the size and sophistication of firms. The FCA aims to provide regular guidance on the operation of the Consumer Duty along with examples of good and poor practice.¹¹⁰

b. Performance of the Consumer Duty

According to the FCA, the adoption of the duty was preferred over prescriptive regulatory obligations because it is more consistent with a regulatory environment that 'sets a higher, clearer standard by requiring firms to ensure their products and services are fit for purpose and offer fair value, and to help consumers make effective choices or act in their interests.'

Ben-David has stated that 'a central plank in the FCA's approach to implementing a consumer duty' is 'the avoidance of prescriptive regulatory obligations'¹¹² in favour of 'reasonable expectations' for firms.¹¹³

¹⁰⁵ FCA, A New Consumer Duty, para 8.1. See also, FCA, FCA Handbook, principle 2A.5.

¹⁰⁶ FCA, A New Consumer Duty, para 9.1. See also, FCA, FCA Handbook, principle 2A.6.

¹⁰⁷ See egs, FCA, FCA Handbook, principles 2A.3.4, 2A.3.7.

¹⁰⁸ See FCA, 'The FCA's Consumer Duty Will Lead to a Major Shift in Financial Services' (Media Release, 27 July 2022) <<https://www.fca.org.uk/news/press-releases/fca-consumer-duty-major-shift-financial-services>>.

¹⁰⁹ See FCA, FCA Handbook, principle 2A.9.

¹¹⁰ See eg, FCA, Price and Value Outcome: Good and Poor Practice Update (Web Page, 18 September 2024) <<https://www.fca.org.uk/publications/good-and-poor-practice/price-value-outcome-good-poor-practice-update>>.

¹¹¹ FCA, A New Consumer Duty, para 1.14.

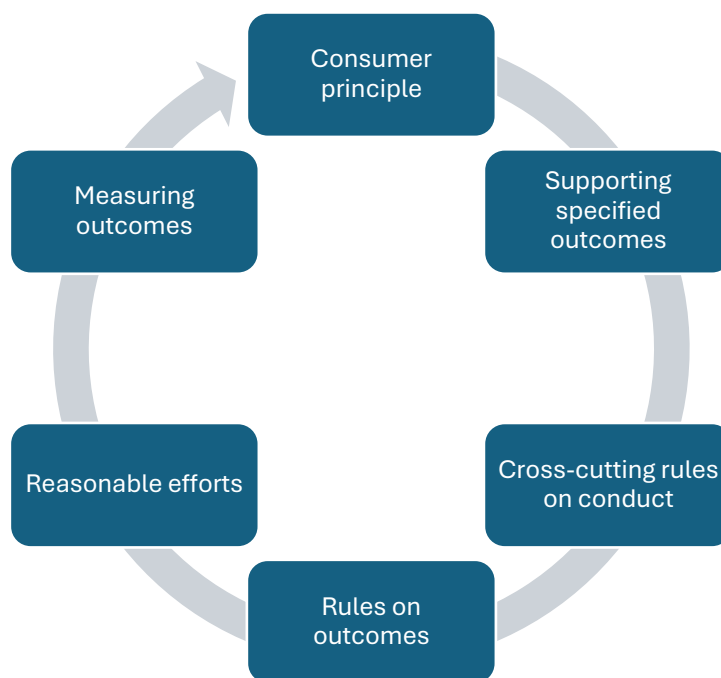
¹¹² Ben-David, Submission to the AER, 19.

¹¹³ Ibid 20.

Principles-based regulation such as the Consumer Duty ‘can potentially fill the gaps of rules-based regulation and allows the FCA to consider how to govern the financial services industry more holistically at any point in time. However, the Principles may not be civilly enforced in courts, as they do not give rise to an individual right of action.’¹¹⁴

It should be noted that the Consumer Duty has been developed in a different context to the regulatory regimes in Australia. In the UK, the FCA has the power to directly set rules and impose fines on the entities it regulates. In Australia, allowing federal regulators to impose fines is thought to offend the principle of separation of powers.¹¹⁵ As a matter of policy, regulators such as the Australian Securities and Investments Commission (ASIC) or the ACCC cannot set binding rules, but can only issue soft law guidance (although the AER does have some rule-making power).

6. Design features of a consumer duty of care in the context of essential services and energy markets



a. Themes and considerations

Outcomes-based duties require a proactive approach towards consumers’ best interests and welfare. The design of such duties is critical to delivering meaningful outcomes. Based on the examples discussed

¹¹⁴ Chiu and Wan, ‘Constructing a Taxonomy of Financial Consumer Protection Policy and Assessing the New Consumer Duty in the United Kingdom’s Financial Sector’, 520.

¹¹⁵ Andrew Eastwood and James Emmerig, ‘The BEAR Necessities: What Jurisdictional Considerations will Australia’s Version of the UK’s Senior Managers and Certification Regime Need to Accommodate?’ (2017) 28(3) *Journal of Business and Finance Law and Practice* 221, 225-6.

in this report, the following are some considerations for the design of a consumer duty of care for Australian essential services and energy markets:

- (i) Outcomes-based duties may be framed in different ways. For example, they can:
 - a. take the form of a best interests duty – which may mean not acting in conflicted situations or ensuring the suitability of the products or services provided;
 - b. include a target markets requirement obliging product issuers to identify the different customer cohorts for which the product is designed, and assess whether the product is consistent with their needs and objectives (for example, as under the design and distribution regime);
 - c. focus on avoiding foreseeable harm (for example, through a duty of care);
 - d. be designed to cover the consumer product life cycle – covering the suitability and pricing of products as well as customer service in the course of the contract– such as the UK’s Consumer Duty.
- (ii) Outcomes-based regulation may sit alongside existing consumer protection obligations – these may be seen as complementary, minimum standards or a safe harbour.
- (iii) If introduced in the energy market, a consumer duty would need to specify the key consumer outcomes. These outcomes should be designed to track the customer journey and address the specific needs of that market. The following set of outcomes was proposed by the AER:
 - consumers should be provided with key information so they understand the value and appropriateness of the service for their needs;
 - providers should clearly explain the implications of controlling their assets;
 - contracts should meet consumer needs;
 - consumers should get access to their energy supply when needed;
 - the service should perform in the intended way and meets consumers’ expectations;
 - consumers should continue to receive energy services where they are experiencing hardship;
 - consumers should have access to free, timely and fair dispute resolution.¹¹⁶

One example of framing for high-level values that should inform a consumer duty is found in the Energy Consumers Australia *Three Year Plan* for 2025-28. These values include:

- Equity;
- Value;
- Agency;
- Ownership;
- Control;
- Justice; and

¹¹⁶ AER, Options Paper, 30.

a. Representation.¹¹⁷

- (iv) A consumer duty works most effectively within a tiered structure encompassing clearly identified outcomes, principles for guiding conduct, focus outcome areas and rules or guidance on the key features of these outcomes.
- (v) A consumer duty should not be reduced to prescriptive rules which would take away from some of the strengths of the principles-based approach. The duty should articulate the desired outcomes and then leave scope to firms to determine how meet to meet those outcomes in the context of their business.
- (vi) Guidance on the consumer duty can be provided through a combination of hard and soft law. Rule-making powers would allow the regulator to be more responsive in this regard, noting that consistency is important to build compliance capacity in firms.
- (vii) A key feature of any outcomes-based duty is the requirement for firms to develop processes and procedures for complying with the duty and to monitor their own performance through realisable and meaningful metrics.
- (viii) Firms should be obliged to report on their performance, and any failings, to the regulator.
- (ix) Consumer advocates and civil society groups should be involved in the design process.

b. How the AER's proposed consumer duty addresses these design considerations

Design consideration	The AER's proposed consumer duty (see Part 3(c) of this report)
(i) Scope of duty:	
a. A best interests duty	The AER Options Paper suggests that its proposed duty has a 'primary focus' on the achievement of the objective that '[a] service provider must act in the best interests of the customer.' ¹¹⁸ Yet as articulated in the AER's Final Advice Report, the proposed duty falls short of a best interests duty; it merely requires retailers to 'consider the interests of consumers', ¹¹⁹ not to prioritise those interests over their own.
b. Suitability of the products	The proposed duty appears to contain a suitability component, through the definition of the consumer outcomes that 'contracts must meet consumer needs'

¹¹⁷ Energy Consumers Australia, 3 Year Plan (Web Page, 2025) < <https://energyconsumersaustralia.com.au/about-us/three-year-plan-25-28>>.

¹¹⁸ AER, Options Paper, 21.

¹¹⁹ AER, Final Advice Report, 30. This may be in response to concerns by some energy retailers and distributors that 'a requirement to achieve consumer "best interests" might introduce regulatory uncertainty and hinder innovation': at 94.

	and 'the service performs in the intended way and meets consumers' expectations.' ¹²⁰
c. Target markets determination	The proposed duty appears to acknowledge the importance of this. For example, the AER Options Paper took into account the argument that the focus of consumer protections should be 'on the type of customer (for example, residential and potentially vulnerable), not the volume of energy an entity sells.' ¹²¹
d. Avoiding foreseeable harm such as through a duty of care	The proposed duty is not currently accompanied by any specified outcomes for avoiding or mitigating consumer harm ¹²² (something that consumer groups have suggested should be the focus of consumer protections, over and above considerations of energy's 'essentiality' ¹²³).
e. Encompass the transaction life cycle	This appears to be envisaged in the proposed outcomes which cover meeting expectations, dispute resolution and hardship. ¹²⁴ The expectation of good service could be more strongly acknowledged.
(ii) Relationship with existing consumer protection obligations	The AER in its Final Advice Report suggests that its proposed framework will largely build upon and sit alongside the existing regulatory regime. It states that the framework encompasses 3 main elements: 'expanding the scope of the NECF to capture new energy services'; 'incorporating principles-based regulation including an overarching consumer duty and supported by clear consumer outcomes — this would operate alongside the current prescriptive elements for traditional energy retail services'; and 'adjustments to the existing authorisation process'. ¹²⁵

¹²⁰ AER, Final Advice Report, 30.

¹²¹ AER, Options Paper, 14.

¹²² Contrast with the UK Consumer Duty (outlined in Part 4(f) of this report), which comprises a 'cross-cutting obligation' to 'avoid causing foreseeable harm (by either act or omission)': FCA, FCA Handbook, principles 2A.2.8-2A.2.9. See also the New Zealand Electricity Authority's recently published Consumer Care Obligations, which state that their purpose is, among other things, to 'help minimise harm to residential consumers caused by insufficient access to electricity or by payment difficulties': see Electricity Authority (NZ), Electricity Industry Participation Code 2010 (2024) pt 11A cl 11A.1(c).

¹²³ AER, Final Advice Report, 92.

¹²⁴ AER, Final Advice Report, 30.

¹²⁵ AER, Final Advice Report, 25.

(iii) Specified key consumer outcomes	The AER stated that its proposed consumer duty 'could be complemented by clearly defined consumer outcomes that regulated entities would need to achieve.' For a list of such outcomes, see Part 3(c) of this report.
(iv) Tiered structure	The AER in its Final Advice Report did not expressly address the question of how the overarching consumer duty and accompanying outcomes would sit among other 'tiers' of regulation and guidance.
(v) Commitment to principles-based regulation	The AER in its Final Advice Report appeared to be fairly committed to incorporating elements of principles-based regulation into its proposed framework, noting that this would have the advantages of flexibility in the face of a rapidly changing energy market. ¹²⁶ However, the AER also acknowledged that as argued in industry stakeholder submissions, 'a principles-based regulatory approach may also create some potential costs, uncertainties and challenges for industry participants.' ¹²⁷ Note also that consumer groups have emphasised the need to retain 'certain prescriptive regulations to safeguard consumers' fundamental rights to a safe, reliable and secure electricity supply,' particularly in relation to issues affecting vulnerable consumers, such as family violence, payment difficulty and disconnection. ¹²⁸
(vi) Rule-making power	Still to be determined.
(vii) Requirements for governance and monitoring by firms	As stated in the AER Options Paper, the proposed duty 'would require energy service providers to prepare a regulatory compliance plan that demonstrates how they will achieve compliance. This plan would need to provide details on how the service provider would meet the objective, the primary principles, and the obligations that apply depending on the type of customer (small/large; residential/business) and the stage of the customer journey (for example, marketing, sales). This compliance plan would need to be approved

¹²⁶ AER, Final Advice Report, 28-9.

¹²⁷ AER, Final Advice Report, 4.

¹²⁸ AER, Final Advice Report, 96-7.

	by the AER. ¹²⁹ Industry stakeholders have expressed concern over the need for regulator approval for compliance plans, arguing that this may ‘slow and deter innovation.’ ¹³⁰
(viii) Reporting requirements	Still to be determined.

c. Further steps

If interest in adopting a consumer duty in the energy sector continues, then the next steps in terms of research would include investigating:

- The architecture of the potential regulatory regime, including the role of principles-based mandated outcomes, rules and soft law guidance;
- The scope of the consumer duty (for example, whether it would be as broad as the UK Consumer Duty) and its outcomes (for example, across the transaction life cycle);
- Who would be subject to the regime and how – noting the proposal encompasses traditional and new service providers;
- Additional protections for consumers experiencing vulnerability;
- Scope for the participation of consumer groups in the design process.

¹²⁹ AER, Options Paper, 22.

¹³⁰ AER, Final Advice Report, 97.